AUSTRALIAN
DIGITAL ALLIANCE

Copyright Modernisation Consultation

submission by the

Australian Digital Alliance

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Introduction and Summary

The Australian Digital Alliance (ADA) is pleased to be consulted as part of the Copyright Modernisation Consultation. The Consultation proposes significant reforms to Australia's copyright system that have the potential to impact the rights of all Australians and significantly influence innovation and

The ADA is a non-profit coalition of public and private sector interests formed to provide an effective voice for a public interest perspective in copyright policy. It was founded by former Chief Justice of the High Court of Australia, Sir Anthony Mason in February 1999, to unite those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture. ADA members include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals.

We welcome the Government's recognition of the inadequacies in Australia's copyright system, as identified by the Productivity Commission (PC) and the Australian Law Review Committee (ALRC), and the need to address them to make Australian copyright law fit for the 21st century. We support the government's goal of modernising the Copyright Act to ensure it is effective, efficient and sufficiently adaptable to cope with changes in economic conditions, technology, markets and the costs of innovating.

The ADA strongly believes that the best and only way to do this is to introduce fair use exception into Australian law. An extended fair dealing scheme, as alternatively proposed by the consultation paper, will not meet the government's goal of "flexible exceptions, which need to adapt over time to provide access to copyright material in special cases as they emerge." The fair use exception should be open-ended and based on the best practice international standard provided by the current US fair use exception. It should cover all materials protected by copyright, and include the full list of illustrative purposes proposed by the consultation paper.

The introduction of a fair use exception would significantly broaden and simplify the *Copyright Act 1968*, permitting the repeal of s200AB, as well as some specific exceptions on a case by case basis. It would also provide the needed solution for the orphan works problem, although additional specific exceptions targeting key sectors affected by orphan works may also be appropriate.

Finally, to ensure the full effect of the important public policy decisions of the Australian Government, all exceptions in the Copyright Act should be explicitly protected from being overruled by contract.

A. Flexible Exceptions

Question 1
To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

The ADA supports fair use

The ADA strongly supports the introduction of a full open-ended fair use-style exception in Australia. This is the only reform option that will comprehensively future proof our laws and make them fit for the modern age, as per the Government's commitment and stated goal.

In its response to the PC's report on Australia's Intellectual Property Arrangements, the government committed to creating "a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes."[1] Similarly, the terms of reference for this consultation specifically state that its goal is "flexible exceptions, which need to adapt over time to provide access to copyright material in special cases as they emerge."

The key element in both statements is the requirement that the system be able to adapt over time to new technologies. It is well established that the fair use approach, with an open ended list of potential purposes, is the only model in operation internationally that provides this level of adaptability.

[1] Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements (August 2017) https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf, p.4

This conclusion is supported by numerous past government inquiries,[2] and ample evidence for it can be found in submissions to these inquiries[3] and in international studies.[4] The recent reports below further demonstrate the continued value of and need for fair use in Australia.

***Copyright in the digital age: Levelling the playing field* - Deloitte Access Economics**[5]

This report assesses the impact of shifting from the current fair dealing system to a more flexible approach to copyright law such as fair use in Australia, with reference to the experience of specific organisations working in Australia, including the University of Melbourne; Universities Australia; State Library of New South Wales; if:book Australia; Alexander Street Press; and the NSW Data Analytics Centre. It concludes 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."[6]

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[2] Copyright Law Review Committee report on Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners (1998) para 6.10; Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement, para 16.50; Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) p72; House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax (July 2013) at xiii; ALRC Report 122 Copyright and the Digital Economy (2014) para 4.73; Productivity Commission Inquiry into Intellectual Property Arrangement Draft Report (2016) recommendation 5.3.

[3] See for example submissions to the ALRC from: the ADA and ALCC; Communications Alliance; IP Australia; Pirate Party; Google; Telstra; Universities Australia; Choice - all available at https://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc. See also similar submissions to the PC, available at http://www.pc.gov.au/inquiries/completed/intellectual-property/submissions

[4] See, for example, Hargreaves, I. 2011, Digital Opportunity: A Review of Intellectual Property and Growth, May, London, UK. https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth

[5] Deloitte Access Economics,Copyright in the digital age: Levelling the playing field (February 2018) https://www2.deloitte.com/au/en/pages/economics/articles/copyright-digital-age-google.htm

[6] Deloitte, op cit, p.5

***The User Rights Database: Measuring the Impact of Copyright Balance* - Sean Flynn and Michael Palmedo**[7]

This research, which was presented to the World Intellectual Property Organization Standing Committee on Copyright and Related Rights, uses empirical data to test the impact of copyright reform in individual countries. It finds that copyright reforms that increase the openness of a country's copyright regime are associated with higher revenues in high technology industries and greater output in scholarly publication, without harming the revenue of copyright intensive industries like publishing and entertainment.

***Imagination foregone: A qualitative study of the reuse practices of Australian creators* - Dr Kylie Pappalardo, Professor Patricia Aufderheide, Jessica Stevens and Associate Professor Nicolas Suzor**[8]

This study interviews 29 Australian creators working in a variety of artforms and with a range of expertise, about the extent to which their creative choices are influenced by copyright law. It aims to understand how copyright restrictions affect creative practice, and to what degree copyright inhibits the creation of new cultural goods that build on existing materials. It finds that Australia's unwieldy copyright system presents a significant barrier to creative practice, causing creators to break the law, alter or abandon projects, or avoid whole genres of creation entirely. It further finds that creators are more comfortable operating within "the spirit" of fairness and respect, rather than trying to interpret and understand "the minefield" of specific exceptions, and generally prefer a simple fairness test for determining appropriate reuse (ie "is that use fair?"), rather than the dual fairness and purpose test of Australia's fair dealing law (eg "is this use fair and for the purpose of parody and satire?").

***Fair Use Is Good for Creativity and Innovation* - Bill Patry**[9]

The author of the paper draws on the history of copyright, his own experience working with fair use over 35 year as a creator and lawyer, and actual cases of fair use in the US, to describe and set out the benefits and limits of the doctrine. He then goes on to dispel some of the myths perpetuated about fair use, such as: that it reduces creator's rights; that it leads to a lot of litigation; that it is too fact-specific or unpredictable; and that it can only work in the context of the American legal system.

Extended fair dealing does not meet the government's goals

The proposal of an extended fair dealing model will not introduce a system that adapts to new technologies, and the Act will once again need revision in only a few years.

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[7] Sean Flynn and Michael Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance* (2017) http://infojustice.org/wp-content/uploads/2017/11/Flynn-and-Palmedo-v1.pdf - see description at http://infojustice.org/archives/39079

[8] Pappalardo, Kylie, Aufderheide, Patricia, Stevens, Jessica, & Suzor, Nicolas (2017) *Imagination foregone: A qualitative study of the reuse practices of Australian creators.* QUT, Brisbane, QLD, p.3 available at https://eprints.qut.edu.au/115940/

[9] Bill Patry, *Fair Use Is Good for Creativity and Innovation* (2017) http://digitalcommons.wcl.american.edu/research/46/

Extended fair dealing can be used to fill some of the "gaps" in our copyright law by targeting known uses that are currently illegal (such as those listed below). But it will never be able to "fill the jar" of uses that should be permitted, and will never provide the flexibility to support new uses and technology that the government prioritises in its response to the PC report.

It is the "open" aspect of fair use – the aspect that fair dealing lacks – that has allowed search engines, cloud services and other emergent technologies to thrive in the US, despite remaining illegal in Australia. As Deloitte Access Economics concludes, all available evidence shows that "innovative digital activities are more likely to develop in countries with fair use exemptions… they are more likely to occur, or operate with greater certainty under a more supportive legal framework."[10]

In contrast, a fair dealing system essentially requires rights holders and/or the government to "approve" new technologies and behaviours as they emerge. The Australian experience clearly demonstrates that this does not work, that it is simply impossible for the legislature to keep up with the growth of beneficial technologies, leaving common and important emergent uses illegal. Although they have been well documented in past reviews, it seems pertinent to once again list some of the problems the current approach has caused for Australian businesses and consumers:

- The use of domestic video cassette recorders (VCRs) remaining illegal in Australia until 2006 despite being widely available on the market in the 1980s[11] and losing market share to newer release formats in the mid-2000s[12];
- The shutdown of cloud-based computing services due to legal uncertainties following the Optus TV Now case;[13]
- Parody remaining illegal in Australia[14] until 20 years after it was recognised as fair use in the US.[15]

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[10] Deloitte, op cit, p.6

[11] For example, Screen Australia reports that 26% of Australian households in metropolitan areas had at least one VCR in 1984 and by 2002 at least 89% of households had at least one VCR. See Proportion of Australian Metropolitan Market Households with Video Cassette Recorders and DVD Players, 1984–2004, https://www.screenaustralia.gov.au/fact-finders/video-and-online/audiences/in-the-archive/vcr-and-dvd-player-penetration..

[12] For example, Screen Australia no longer reports on VHS sales in Australia "due to very low demand for the format (less than 1 per cent of total units sold in 2007)". See DVD, VHS and Blu-Ray, 2000–2017, Screen Australia, https://www.screenaustralia.gov.au/fact-finders/video-and-online/industry-trends/video-releases.

[13] Giblin, 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.

[14] See the decision in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146; (2002) 118 FCR 417

[15] Leval, Pierre N. (1994). "*Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use". *Cardozo Arts & Entertainment Law Journal*. 13

Fair dealing provides no benefits over fair use

Fair dealing provides no benefits in comparison to fair use. Various claims made over the years of the supposed benefits of fair dealing over fair use have been clearly disproved by numerous sources. These include the myths that:

- Fair dealing is more certain – The ALRC examined this claim in great detail, and concluded that fair use is no less certain than Australia's current copyright exceptions.[16] Statistics show that 80 percent of US fair use cases are confirmed at appeal - hardly evidence of an uncertain and unpredictable doctrine.[17] Even the Motion Picture Association of American has strenuously defended the certainty of fair use, saying: "An uncertain doctrine would not be relied on by major U.S. media companies every day."[18] Furthermore, evidence from the US shows that industry guides and handbooks can assist greatly with the application of the doctrine, and are even relied upon by insurance companies in assessing project risk.[19] There is no reason similar guides could not be developed in Australia.

- Fair use promotes litigation – Independent analysis of the experience in Israel indicates that there has been no significant increase in litigation resulting from their recent adoption of the doctrine.[20] Furthermore, as Deloitte Access Economics point out in their report, there is no evidence that fair use litigation is rampant in the US, with there only being seven fair use trials in the seven year period between 2009 to 2016.[21]

- Fair dealing provides higher creator incomes – this argument is predicated on the assumption that uses that are licensed under fair dealing will be made free under fair use. However, the requirement to consider market impact in the fairness factors weighs strongly against this, and previous reviews – including the ALRC, the PC, Deloitte, and even the government's own analysis of the costs and benefits of a fair use exception, commissioned from Ernst & Young[22] – have all considered and rejected this claim. As Deloitte puts it:

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[16] ALRC, op cit, https://www.alrc.gov.au/publications/4-case-fair-use/fair-use-sufficiently

[17] Thomson/Reuters, Westlaw legal database, Cases, U.S. Court of Appeals, 2009- 2016. As Bill Patry puts it "If you give a client an 80% chance of prevailing on appeal in any case, copyright or not, that's pretty darn good." See http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1048&context=research, p.29

[18] Sheffner, B, 'MPAA and Fair Use: A Quick History', available from: http://www.mpaa.org/mpaa-and-fair-use-a-quick-history/ .

[19] See Patricia Aufderheide, Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact, International Documentary Association, https://www.documentary.org/online-feature/fair-use-put-good-use-documentary-filmmakers-statement-makes-decisive-impact

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

[21] file:///J:/Copyright/1%20ADA/ADA%202018/deloitte-au-economics-copyright-digital-age-google-160418.pdf p.10, quoting Lex Machina, Copyright Litigation Report 2016: Figure 18, p.13

[22] See Department of Communications and the Arts, Cost benefit analysis of changes to the Copyright Act 1968 (2016) available at https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968

> 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…. 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.[23]

The ongoing proponents of this argument rely primarily on the example of the supposedly-negative impact of use under Canada's fair dealing provisions on educational publishers. This claim was rejected by both the Productivity Commission and Ernst & Young, and has been further debunked by both domestic[24] and international[25] commentators. Furthermore, as many have pointed out, by far the most successful creative industries sector in the world – that of the US – operates under a fair use doctrine and "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."[26]

Comments on Fair Use Implementation

Fair use must cover all copyright materials

It is essential that a fair use exception cover all materials protected by copyright equally and without discrimination. A fair use exception is not a fair use exception unless it covers all material.

Applying different exceptions to different material would be a substantial step backwards in Australian copyright law, a move from the technological neutrality that has been central to our copyright ecosystem since the Digital Agenda amendments almost 20 years ago. It would add unnecessary complexity, and push copyright further from the expectations of ordinary citizens. The application of different rules to different materials is inappropriate in a modern age where public discussion and art occurs across all mediums, from newspaper columns to podcasts to videoblogs. There is no justification, for example, for allowing a snippet of text from a book as a quotation, but not a snippet of a film, other than certain sectors seeking preferential treatment.

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[23] Deloitte, op cit, p.8

[24] Productivity Commission Intellectual Property Arrangements Inquiry (2015), p.178-181, available at http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf ; http://www.smartcopying.edu.au/copyright-law-reform/current/myth-fair-use-decimated-educational-publishing-in-canada; see further detail in the submission to the Consultation provided by Universities Australia

[25] Michael Geist, Less Than 1%: Canadian Publisher Data Points to Tiny Impact of Access Copyright Royalty Decline (1 May 2018) http://www.michaelgeist.ca/2018/05/accesscopyrightroyalty/; ARiel Katz The Loss of Access Copyright Royalties and the Effect on Publishers: Sifting Fact from Fiction (June 2014) https://arielkatz.org/loss-access-copyright-royalties-effect-publishers-sifting-facts-fiction/

[26] Deloitte, op cit, p.8

The central goals of simplifying the Australian Copyright Act and increasing its efficiency, effectiveness and fitness for purpose also weigh against the outdated approach of applying exceptions only to certain materials.

Different industry practices and norms, such as common behaviours or the availability of licences, will rightly affect the circumstances in which individual uses are fair. But these will vary not only based on the format of the material (eg text v film) but also on many other aspects of the material, such as the purpose of the source work and the impact on the market for the work, and are therefore more appropriately considered as part of a holistic consideration of the use - ie an overall fairness test.

We support the illustrative purposes proposed

The ADA supports the inclusion of illustrative purposes in a fair use exception, and supports the list of proposed purposes put forward in the consultation paper. These purposes represent categories of reasonable activities that today are illegal in Australia and for which licensing is impractical or impossible. Introducing a fair use exception that includes these purposes will fix many of the gaps in Australian copyright law identified by the PC. All are fundamental user activities central to free speech and access to knowledge that should be legal when undertaken in a fair manner.

We note that the exact drafting of the legislation and Explanatory Memorandum statements will affect the utility of these purposes. We therefore submit that the release of an exposure draft of any proposed legislation is essential to ensure that the language is appropriate to meet the needs of all stakeholders and to avoid any unintended consequences.

With respect to the application of a fairness exception to educational uses, the ADA supports the comments of National Copyright Unit of the Council of Australian Government Education Council (CAG) and Universities Australia (UA).

With respect to library and archive uses, the ADA the comments of the Australian Libraries Copyright Committee (ALCC).

In general, the ADA supports the inclusion of government use as part of an open ended fair use model.

With respect to the remaining specific purposes proposed by the consultation paper, the ADA provides the following comments.

Quotation

The introduction of a quotation right is the bare minimum change needed to align our copyright laws with the reasonable expectations and behaviour of the general population.[27] Being able to reference and make use of content, including in audiovisual and digital formats, in an illustrative manner is essential to allow public discussion, the sharing of knowledge and free speech. Yet Australia's current law does not leave room for ordinary daily activities. Artists, authors, academics and consumers all make use of small portions of copyright material in their practice - sometimes in ignorance of the law, but at others simply because the law doesn't make sense.[28] Where permissions for short quotes are sought, they can be extremely costly, time consuming and often not forthcoming at all.[29] The government's own cost benefit analysis of the introduction of a fair use exception, commissioned from Ernst & Young, found that permitting quotation would have a positive net benefit for the Australian economy due to the corresponding reduction in transaction costs.[30]

Uses that are currently illegal that we expect would be covered by this purpose include:

- retweeting tweets and forwarding emails
- online publication of theses that include short quotes
- inclusion of charts and tables in conference presentations
- uploading logos of companies to their entries on Wikipedia
- incidental capture of short excerpts of background music in documentaries as they are being filmed

Private non-commercial use

Australia's current private copying exceptions are a patchwork of narrow, inflexible and confusing exceptions, resulting in a system which allows ordinary and reasonable consumer behaviours only in limited and inconsistent circumstances. For example, while transferring a videotape to another device is legal, transfering a DVD or 8 millimetre film is not – even if both the use and the film in question are non-commercial. Similarly, while it is probably legal to read a poem aloud or sing a song at a wedding or funeral, without the copyright owner's permission it is illegal to include a copy of the same material in the program for the event, project it on a screen for audience participation, or inscribe it on a gravestone. A fairness-based exception that applies to private non-commercial uses would provide the flexibility needed to cover reasonable consumer behaviours such as these without permitting uses such as peer-to-peer file sharing that are harmful to the market.

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[27] See, for example, the results of the 2013 survey by Choice (https://www.choice.com.au/about-us/media-releases/2013/august/choice-says-it-is-time-to-fast-forward-copyright-past-the-vhs-era). See also Pappalardo et al, op cit.

[28] Pappalardo et al, op cit, p.25

[29] Pappalardo et al, op cit, p.22

[30] See Department of Communications and the Arts, Cost benefit analysis of changes to the Copyright Act 1968 (2016) p.72 available at https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968

Uses that are currently illegal that we expect would be covered by this purpose include:

- transferring a legitimately purchased DVD or 8 millimetre film to a computer to watch at your convenience
- reproducing a poem in the program of a wedding, or projecting the words of a song on a screen for audience participation
- photographing a billboard or mural for a holiday album
- creating a Snugglepot costume for Bookweek
- reproducing and displaying old photographs of family members

Incidental and technical use

The legalisation of incidental and technical uses is essential if Australia wishes to have a functional technology sector. It would permit activities that are fundamental to all online businesses such as caching and running a search engine, and which are currently illegal in Australia. It would also accommodate new behaviours arising from the daily use of technology by ordinary Australians as technology changes.

The possibility of a general right to make technical and incidental use of materials is often objected to in principle without reference to specific examples of inappropriate uses that it may permit, or evidence of potential harm it may cause. This contrasts sharply with the clear and specific evidence that has repeatedly been provided of uses undertaken everyday by Australia's technology sector that are beneficial to society and yet are currently illegal. This evidence is supported by the ALRC report, which concluded:

> There is not specific exception in the Copyright Act that permits the copying or reproduction of copyright material for the purposes of caching or indexing… [because] the [s43A and 111A] exceptions only cover copies made 'in the technical process of making or receiving a communication' whereas caching and indexing facilitates communication to other users. Nor do these provisions account for the fact that materials may be cached for longer that 'temporary periods'.[31]

Similarly, cloud computer has been found to be illegal by the Australian High Court where it is being provided as a commercial service and used to store third party material, even if that material is legitimately accessed.[32] Other services that require the copying of material as part of automated processes, such as the auto-translation of text online and the conversion of material for viewing on different devices (eg from 3D to 2D and vice versa), are equally unsupported by the Australian Copyright Act.

We would be particularly concerned if the fundamental activities of an entire sector were left illegal in response to vaguely voiced fears. If there are particular activities that opponents are

[31] ALRC, Ibid, paras 52-54
https://www.alrc.gov.au/publications/issues-paper/caching-indexing-and-other-internet-functions

[32] See discussion in Marita Shelly, Optus and TV Now: will copyright law catch up to the cloud? (The Conversation, 10 September 2012)
https://theconversation.com/optus-and-tv-now-will-copyright-law-catch-up-to-the-cloud-9422

concerned would be inappropriately covered by this exception, these should be listed so that they can be addressed directly.

Arguments put forward during the government roundtable that this purpose somehow undermines or contradicts the government's recent policy decisions regarding intermediary safe harbours do not stand up to basic scrutiny. Safe harbours set standards on how infringing activities by users should be dealt with by intermediaries; an incidental and technical use purpose acknowledges that certain baseline uses should, by their very nature, be recognised as legal, as their benefit to the community far outweighs the marginal impact (if any) they might have on the market. It would be very difficult, for example, to prove any quantifiable market harm arising directly from the incidental caching of copyright material.

Uses that are currently illegal that we expect would be covered by this purpose include:
- caching outside an educational context;
- running a search engine;
- providing a commercial cloud service;
- auto-translation tools and services.

Text and data mining
Permitting text and data mining (TDM) is essential if Australia wishes to have a competitive research and development sector, particularly in the burgeoning field of Artificial Intelligence (AI).

The government lists AI research as one of the top emerging technologies which provide opportunities for Australian growth.[33] The Australian Centre for Robotic Vision, an Australian Research Council-funded Centre of Excellence, recently launched A Robotics Roadmap for Australia 2018[34] which states that, "We believe Australia has a unique opportunity to take a leading role in the development of robotic technologies and in the tech sector more generally."[35] The Roadmap adds that, "The Australian robotics industry is diverse, with more than 1,100 companies. We conservatively estimate that these companies benefit the Australian economy by employing almost 50,000 people and generating revenue of $12 billion."[36]

"The boost to Australia's national income from robot-driven productivity gains through to 2030 are $AU1 trillion from accelerating the rate of automation and $AU1.2 trillion - from transitioning our workforce to higher skilled occupations"

[33] The Digital Economy: Opening Up the Conversation, https://www.industry.gov.au/innovation/Digital-Economy/Documents/Digital-Economy-Strategy-Consultation-Paper.pdf, p.14
[34] A Robotics Roadmap for Australia 2018, Australian Centre for Robotic Vision, https://www.roboticvision.org/robotics-roadmap/ .
[35] A Robotics Roadmap for Australia 2018, Australian Centre for Robotic Vision, https://www.roboticvision.org/robotics-roadmap , p4.
[36] A Robotics Roadmap for Australia 2018 – Summary, Australian Centre for Robotic Vision, https://www.roboticvision.org/robotics-roadmap, p2.

"The Australian robotics industry has an opportunity to exploit these strengths by developing Australia as a test bed for new technologies and by further supporting the niche talent and technologies that currently exist."[37]

Yet Australian law leaves the TDM necessary to conduct research in the AI field illegal.

If Australia wishes to have a functional text and data research sector, it is important that it provide clear rights for researchers to conduct TDM. In order to avoid doubt, TDM should be separately included as an illustrative purpose under the fair use exception. It is also important that TDM uses be judged on their overall fairness, and not limited to non-commercial activities. A non-commercial limitation entirely undermines the point of a TDM exemption, which is to permit Australia's businesses and economy to benefit from this burgeoning field. As far back as 2011 McKinsey & Co estimated the value of TDM as nearly $700 billion[38] – money that will not be available to Australian companies if commercial use of the products of TDM is not permitted. It would place Australia far behind the copyright systems of Japan, the United States or other fair use countries, which allow TDM in any circumstances that are fair. We also note that the new Copyright Directive recently approved by the Legal Affairs Committee of the European Parliament includes both mandatory and optional TDM exceptions, neither of which are limited to non-commercial uses.[39] Essentially, the result would be a research and innovation gap between Australia and the rest of the world.

It is generally impossible for TDM research to be conducted in a non-commercial silo and then licensed before commercialisation, both because the extremely large data sets required mean that it is impractical to contact all copyright owners, and because non-commercial silos rarely exist in today's era of university industry collaboration. Where licensing of a data set is possible and appropriate, the fairness test will be sufficient to ensure it is required. As Bill Patry, Senior Copyright Counsel at Google, explained at the ADA Forum in 2017, this is the approach taken by Google with regards to its current AI research under the US fair use system – to license what data sets they can, and to only rely on fair use where licensing becomes impossible.[40]

Uses that are currently illegal that would be covered by this purpose include:

- artificial intelligence research and development
- visualisation of national collections
- plagiarism discovery tools

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[37] A Robotics Roadmap for Australia 2018, Australian Centre for Robotic Vision, https://www.roboticvision.org/robotics-roadmap/, p13.
[38] McKinsey & Company. (2011). Big data: the next frontier for innovation, competition and productivity.
[39] See discussed at International Federation of Library Associations, *Sunshine and Clouds: The European Parliament Takes Position on the Copyright Directive*, (21 June 2018) https://www.ifla.org/node/59306
[40] See comments of Bill Patry on the Diffusing Fair Use Panel at the ADA Forum 2017, available at https://www.youtube.com/watch?v=I8_yabkiOyQ&t=877s at approximately 17 min

- indepth computer analysis of large quantities of published research results to summarise knowledge in a field

The US fair use factors should be used as the international standard

As recognised by the ALRC and the PC, the four factors used by the US, Israel, South Korea and the Philippines are the international standard and provide the best option for a robust fair use exception.[41] Australia should follow international best practice and limit the fairness factors in its new fair use exception to these ie:

- the purpose and character of the dealing;
- the nature of the copyright material;
- the effect of the dealing upon the potential market for, or value of, the material;
- the amount and substantiality of the part dealt with, taken in relation to the whole material.

This also aligns with the approach taken in Australia's most recent fair dealing provision, disability access.

The inclusion of the additional 5th commercial availability factor used in research and study and proposed by the consultation paper – ie the possibility of obtaining the material within a reasonable time at an ordinary commercial price – would be a departure from international norms and create confusion and unnecessary complication.

This additional factor is unnecessary not because the issues it encompasses should not be taken into account, but rather because they are appropriately covered by the existing 3rd factor, the effect upon the potential market. Including two separate factors that both deal with the market impact of the activity essentially requires commercial factors to be considered twice, inflating their importance above the other fairness factors. Due to the principle that legislatures do not include redundant language in legislation, this "double dipping" risks leading to arguments that if a licence is available a use can never be fair. Indeed, we note that some submissions to the ALRC argued for the inclusion of such a factor for exactly this purpose – to exclude any use for which a licence may be available (no matter the terms or fairness).[42] The ALRC ultimately rejected the inclusion of the factor as unnecessary, confusing and inappropriate for many fair uses such as 'criticism and review' and 'parody and satire'.

The ADA does not support granting the minister power to alter extended fair dealing laws

We acknowledge the laudable goal of the proposal included in the consultation paper to grant the Minister power to add and remove fair dealings – ie to provide a mechanism to add more flexibility and encourage more timely updates to our copyright regime. We understand that this

[41] See http://infojustice.org/wp-content/uploads/2017/07/Master-List-Version-06192017.pdf
[42] ALRC, Copyright and the Digital Economy (2014) 5.95-100

proposal is influenced by the Israeli fair use provision which allows the Minister to prescribe conditions under which a use shall be deemed fair.[43]

However, importantly, this power in Israel is under an open ended fair use exception, not an extended fair dealing exception, as has been proposed in the consultation paper. This changes the impact of the proposal significantly. Under a fair use provision, the courts still retain the power to make decisions on a case-by-case basis, taking the full circumstances into account. Thus the Ministerial power does not alter the breadth of the exception, but merely provides a mechanism to codify uses that are, or become, non-controversial.

In contrast, creating the ability for the Minister to alter a closed fair dealing scheme would leave Australia's copyright law extremely vulnerable to lobbying power, with those with the loudest voice potentially having the ability to alter the fundamental rights of all Australians. It is likely that any regular review attached to such a power would quickly take on the problems apparent in the review process for exemptions under the technological protection measures (TPM) provisions. In Australia this review has repeatedly failed to eventuate on its three-yearly schedule, with only one review (in 2012) having been conducted since the TPM laws were introduced in 2005, the recommendations of which were only introduced this year. In the US, the review process has arguably become a debacle where stakeholders are required to regularly "justify" existing exceptions.[44] This is extremely time consuming, creates great uncertainty for those wishing to take advantage of the exception, and means that the same arguments that have previously been resolved are rehashed without any obvious purpose.

Most importantly, allowing exceptions to be removed without legislative oversight implies that they are somehow less than other elements of copyright law. Fairness exceptions embody user rights that are fundamental to the copyright ecosystem, and should no more be disallowable than an author's right to reproduction. Any amendments to Australia's copyright exceptions will shift the careful balance that underlies all of copyright law, and should only happen after a full legislative review process.

[43] See explanation in Zohar Efron, Israel's Fair Use (Centre for Information and Society, 2008) at http://cyberlaw.stanford.edu/blog/2008/01/israel%E2%80%99s-fair-use

[44] See Parker Higgins, Who's Driving This Thing? Anti-DRM Victories and Milestones: 2015 in Review (Electronic Frontiers Foundation, 2015) https://www.eff.org/deeplinks/2015/12/whos-driving-thing-anti-drm-victories-and-milestones-2015-review

Question 2
What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

The ADA supports the comments of the ALCC with respect to changes to be made to existing exceptions in the Act for galleries, libraries, archives and museums. In addition, the ADA provides the general comments below.

At more than 700 pages the Australian Copyright Act is one of the longest in the world. It includes more than 90 different exceptions. One of the benefits of introducing a fair use exception would be that it would allow the rationalisation of these exceptions. However, the ADA does not believe that all exceptions should be repealed in favour of fair use.

Section 200AB should be repealed
Section 200AB and the existing fair dealing exceptions should be repealed as essentially being subsumed by fair use. Section 200AB in particular has been problematic since its introduction in 2006, and continues to be under-used as a result of its restrictive and confusing drafting.[45] The flexibility it provides will be better supplied by a fair use provision, particularly if the activities to which it currently applies – uses by educational institutions and libraries and archives – are included in the non-exhaustive list of illustrative purposes included in the fair use system.

Problematic or narrow specific exceptions could be repealed in favour of fair use
In the interest of simplification, it will also be appropriate for some specific exceptions to be repealed in favour of the new fair use exception. This will be the case, for example:

- where a particular exception is narrow and clearly falls within one of the example illustrative purposes provided in the new provision eg ss43A and 43B (covered by incidental and technical) or s72 (covered by quotation).
- for exceptions which are problematic or not functioning as intended, where the uses to which they apply are covered by one of the illustrative purposes in the fair use exception. For example, Australia's current private copying exceptions (ss……109A, 110AA, 111) are in general extremely long and restrictive, with a large number of situation specific caveats that make them so narrow and complex as to have little practical effect. They certainly do not accord with ordinary use. A fair use provision which included private non-commercial use as an illustrative purpose would be clearer and more effective at allowing such uses where they are clearly reasonable, but excluding those that are unfair or harmful to copyright owners.

[45] See 'Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?', by Policy Australia October 2012 available at http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf

- for “micro” exceptions which apply to uses that are small-scale, non-controversial and incidental, and which do not correspond to a public policy purpose that is central to the copyright ecosystem. An example of such exceptions are ss44B, 44BA, and 44BB, which all relate to use of material as part of Australia’s healthcare services. These exceptions have essentially been included to avoid a conflict between copyright and other legal obligations ie to ensure that those seeking to comply with Australia’s health and public safety laws do not incidentally infringe copyright. Such activities are clearly more appropriately classified as generally “fair” uses rather than included in their own exception – exceptions which will become outdated rapidly and need updating as laws and systems change. The very existence of such exceptions provides a powerful argument in favour of the introduction of fair use – a functional copyright system should not prohibit such activities or require new exceptions to be introduced every time a change is made to an unrelated area of law.

We propose that the Department of Communication and the Art’s copyright team conduct an assessment of all existing exceptions in the Act to determine if they fall within one of the above categories and therefore should be repealed.

Core specific exceptions should be maintained

However, many “core” specific exceptions included in the Act do serve a unique purpose separate and in addition to a fair use exception and should not be repealed or replaced. The specific exceptions provided for libraries and archives, educational institutions and institutions assisting those with a disability provide a good example of this type.

These exceptions deal with activities which are common, non-controversial and have a clear public policy purpose such as sharing of information, free speech or equitable access. They are undertaken on a daily basis by non-experts who should not be required to make fairness judgement calls as part of their ordinary work practices. Furthermore, they are undertaken within institutions which are recognised as having a special societal role in sharing of knowledge and therefore have been granted a privileged position under the Act.

Such activities have essentially been deemed fair by Parliament and the decision codified through the introduction of their own exceptions, with appropriate limits and checks to replace the fairness determination. This contrasts with uses where the specific circumstances may alter their “fairness”, meaning they should be judged on a case-by-case basis and so are more appropriately covered by fair use. The repeal of these exceptions in favour of fair use would have an inevitable chilling effect, with individuals and even whole institutions defaulting to a no-use approach for activities that have previously been well established.

B. Contracting Out

Question 3
Which current and proposed copyright exceptions should be protected against contracting out?

Question 4
To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

All current and future exceptions should be protected

The ADA strongly supports the protection of all exceptions in the Copyright Act against contractual override, including both the existing fair dealing exceptions, and the proposed fair use exception if introduced, as set out Option 2 in the consultation paper.

As has already been discussed, all exceptions in the Copyright Act, including the flexible exceptions, represent important user rights. Exceptions are included in the Act as a matter of public policy, generally a after long period of public comment and debate, because they protect essential free speech and access to information activities that are unlikely to be able to be licensed whether for practical reasons (disability access, incidental and technical copying) or because the use may not be palatable to copyright owners (eg criticism and review, parody and satire). Allowing them to be overridden by a simple contractual provision would undermine the parliamentary process and lead to highly undesirable outcomes. This is why the standard rules of statutory interpretation state that legislation takes precedence over private agreement. It is only due to a quirk of drafting, judicial decisions and industry practice that doubt has been cast on this in the copyright context.[46]

But rather than being less important for copyright, we would argue that this protection is doubly important in the "closed garden" world of modern content systems, where licensing abounds and there is often little to no chance for negotiation or meeting of minds.[47] This was the conclusion of the Copyright Law Review Committee's Copyright and Contract Report all the way back in 2002, which found that "should such agreements be enforceable, there would be a displacement of the copyright balance in important respects."[48] Imagine, for example, if creators began including "no negative review" clauses on the click through licences applied when

[46] Copyright Law Review Committee, *Copyright and Contract* (2002) Chapter 5
[47] References:
https://www.communia-association.org/2015/07/30/on-the-need-to-protect-copyright-exceptions-from-contractual-interference/;
[48] Copyright Law Review Committee, *Copyright and Contract* (2002) p.8

consumers access their materials online. Blanket “no further use” provisions in standard e-resource licences offered to libraries already risk the rights of individuals with a disability to convert works into accessible formats, and the rights of remote researchers to appropriately access our national collections.

As the CLRC identified,[49] it is particularly important to protect:

- the fair dealing exceptions as fundamental to the working of a balanced and functional copyright system.
- The specific exceptions granted to key user groups, including the library and archives, educational and disability sectors. The PC identified e-resources and content licensed by these groups are the most common example of contractual override of exceptions.
- Consumer protection exceptions such as format and time shifting – these rights are particularly prone to exclusion by EULAs and clickwrap licences, where there is no meeting of the minds, an imbalance in bargaining power or no opportunity to negotiate.

However, even exceptions of lesser consequence are clear public policy statements, the result of careful thought and essential to the copyright balance, and so should be protected against being overridden. Picture a circumstance, for example, in which a sign on the entrance to a public park could countermand ss.65 and 66 of the Act and remove the right to photograph the buildings and sculptures within it. Taking a piecemeal approach to protecting exceptions, protecting only some and not others, will inevitably lead to unintended consequences.

This protection should not be conditional

Any amendment that protected exceptions only in some circumstances – eg where a contract is “unfair” – has an high likelihood of effectively reducing the level of protection given to exceptions in our copyright system. In the absence of clear court findings to the contrary, contracts will be assumed to have legal (in this example, to be “fair”), creating a default position whereby it is presumed that contracts do overrule exceptions – exactly the opposite effect to that being sought. This especially risks being the case where the judgement call is being made by individual consumers or non-experts, who have little or no resources to bring judicial actions on their own.

Standard rules of contract and limitations in the exceptions themselves should be sufficient to preserve freedom of contract and prevent unintended consequences. For example, doctrines such as estoppel may provide rights where two equal players have agreed to terms in a true meeting of the minds. Contractual agreements may also be taken into account in fairness decision eg where an unpublished work was provided to critics subject to an embargo period, it would not be “fair” for elements of the work to be published in a critical piece prior to the embargo date.

[49] See Copyright Law Review Committee, *Copyright and Contract* (2002) p.8 Recommendations 7.49-7.52

C. Orphan works

Question 5
To what extent do you support each option and why?
- statutory exception
- limitation of remedies
- a combination of the above.

Our preference is for a statutory exception for all use of orphan works
The ADA has a strong preference for use of orphan works to be covered by an exception in the Copyright Act. At a minimum, this should allow the use of orphan works:
- for non-commercial purposes by cultural and educational institutions; and
- in other circumstances, including for commercial purposes and by other users, after a diligent search.

This would be best achieved via the introduction of a fair use exception which lists use of orphan works as an illustrative purpose. If an owner of the material emerged, the use would generally stop being "fair" if it was continued, and a reasonable licensing agreement would need to be entered into.

To complement the fair use exception, it may also be appropriate to provide a specific exception to allow the use of orphan works without a fairness test for high traffic users such as cultural and educational institutions.

Orphan works must be usable by all users, and in commercial circumstances
It is particularly important that the new provisions allow full use of orphan works by the whole Australian population, not just by cultural institutions and not just for non-commercial purposes. If Australia wishes to gain the full economic and cultural value of its orphan works, commercial players must be allowed to make use of orphan materials in appropriate circumstances. For example:
- the results of old theses published online should be reusable by current researchers;
- authors should be able to take extracts from historical documents and build new works upon them;
- family historians should be able to publish evidence supporting their conclusions; and
- documentarians should be able to make use of old film and audio footage to tell Australian stories.

All of these activities provide significant benefits for the Australian public, and should not be prevent purely because the provenance of a work is unknown or the appropriate copyright owner cannot be located.

This right to use orphan works need not be absolute – it may, for example, be subject to a diligent search or requirement to pay a reasonable licence fee if a copyright owner comes forward. It is also important that any system dealing with orphan works fully legalise such uses ie do not just lower the risk associated with them. As the Department has heard at round tables associated with the review, use of orphan works is problematic not just because they carry a potential financial risk, but because they can exclude users from systems such as industry insurance schemes.

We note that both the Canadian and UK systems, while they have their disadvantages, do at least have the foresight to allow commercial use of materials.[50]

Question 6
In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

A limitation on liability will not be sufficient

A limitation on liability is not an appropriate solution either for user groups or copyright owners. A system which provides an exception for use of orphan works by general users, but guarantees rights holders the ability to prevent use or obtain a reasonable licence fee if they came forward would be more effective in meeting the needs of all stakeholders.

A limitation on liability does not meet the needs of user groups because their use of orphan works would still be illegal without a licence provision. Educational institutions would still be required to pay for use of orphan works under the statutory licence; documentarians would still not be able to obtain insurance where they have used orphan works; libraries and archives would still be forced to reject access requests for activities that are reasonable but technically illegal.

It does not meet the need of rights holders as they would still be required to go to court to obtain injunctions, compensation or damages. A requirement to provide reasonable compensation should a copyright owner come forward, at a rate agreed by the parties, would be a far better method of encouraging parties to seek to reach mutual agreement before judicial action is commenced.

[50] For a critique of the UK and Canada statutory licensing system, see our submission to the Productivity Commission Intellectual Property Arrangements Inquiry (2015) p.12-14, available at http://www.pc.gov.au/__data/assets/pdf_file/0006/195009/sub108-intellectual-property.pdf

Question 7
Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

We support a separate approach for both cultural and educational institutions to lower barriers to access

The ADA supports ensuring that there are the fewest barriers possible for use of orphan works by cultural and educational institutions. As such, in additional to a fair use exception, we also support the inclusion of a specific exception to permit use of orphan works in appropriate circumstances without a requirement for compensation. However, this special exception should at minimum apply to both cultural and educational institutions.

This should be complimented by, but separate from, the right to use orphan works in other circumstances under a flexible use exception, similar to the model currently used for the new disability access provisions of the Act.

If the Australian government wants to liberate orphan works from our national collections, they must ensure that those works do not just stop on the institution's website – they must be reusable including in commercial circumstances, to ensure the full value of these works is obtained culturally and economically