



AUSTRALIAN DIGITAL ALLIANCE

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***Fair Use and Other Copyright Exceptions: An
examination of fair use, fair dealing and other
exceptions in the Digital Age***

**SUBMISSION OF THE AUSTRALIAN DIGITAL
ALLIANCE**

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Executive Summary

The ADA recognises and congratulates the Government's efforts thus far to update our copyright laws to deal with rapid technological developments in ways that are consistent with the public policy objectives underlying those laws. The *Copyright Amendment (Digital Agenda) Act 2000* for example recognised that "as far as possible, the exceptions [in the Bill] replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment".¹ The ADA also notes and supports the Government's accession to the WIPO Copyright Treaty which specifically provides for Australia to "...devise new exceptions and limitations that are appropriate in the digital network environment".² In accordance with Australia's stated intentions in both national and international forums, the ADA recommends implementation of exceptions as stated in this submission.

The current limited and prescriptive fair dealing provisions do not effectively fulfil their purpose. They do not provide an effective legislative mechanism by which the interests of users are 'balanced' with those of owners of copyright materials. They are technical, complex, inflexible and not well suited to the rapidly changing technological environment in which we all live and work.

This submission will explain how Australia's public interest is not well served by the current approach to fair dealing and specific, narrow exceptions. For example, there is no general right to back-up copyright material to ensure that users are able to get the value they paid for when that material is corrupted or lost. Similarly, exceptions dealing with the preservation of cultural material are technologically dated and do not allow many rare and valuable material to be copied until it is too late. As a result, the current fair dealing provisions in effect act as a disincentive to further technological and cultural development. The ADA supports legislative change in order to facilitate copying for such purposes, consistent with technological and cultural policies of the Government.³

The ADA submits that the appropriate model to adopt is one that builds on the Australian approach to certainty but also provides required flexibility. Certainty assists administrative implementation, especially in our large educational and cultural institutions, and reduces the potential for litigation. Flexibility allows the law to respond to the technological developments that continuously change the ways in which copyrighted works are delivered and accessed. Such a model should:

1. Retain the existing fair dealing exceptions;
2. Introduce at least the following new exceptions:
 - (a) orphaned works

¹ Revised Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 2000 (Cth) at 2.

² WIPO Copyright Treaty, Article 10. This treaty can be viewed at: <http://www.wipo.int/treaties/en/ip/wct/index.html>

³ For example, the coalitions 2004 election policies "Strengthening the Australian Arts", and "Information technology".

- (b) format shifting
 - (c) caching
 - (d) preservation copying
 - (e) back-up copying
 - (f) transformative uses
3. Clarify that in the application of exceptions, the relevant purpose is that of the end user;
4. Amend the Act to achieve technological neutrality by:
- (a) Introducing a technologically neutral flexible provision which allows for the development of new exceptions in accordance with principles of fairness;
 - (b) Ensuring that the exceptions to infringement apply equally in the digital environment by outlawing mechanisms that attempt to oust them, namely contract and technological protection measures.

1. Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA), a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material. As per the ADA's Statement of Principles, all members:

- Support balanced copyright and related laws that advance the interests of society as a whole;
- Believe copyright laws must balance effective protection of the interests of rights holders against the wider public interest in the advancement of learning, innovation, research and knowledge;
- Believe that fair dealing and other exceptions and limitations must be preserved and carried forward into the digital environment;
- Support appropriate and flexible compulsory licences that ensure guaranteed access for fair payment;
- Support the fundamental principle that copyright protection extends to expressions and not to facts, ideas, procedures, methods of operation or mathematical concepts as such;
- Support clear limitations of liability for copyright infringement in circumstances where compliance cannot practically or reasonably be enforced;
- Oppose laws that would give rights holders power to use technological or contractual measures to distort the balance of rights set out in the Copyright Act.

The ADA welcomes this timely review and the opportunity to comment on the exceptions to copyright infringement and how they operate in various contexts including within libraries, educational and cultural institutions, and more broadly.

In responding to the Government's issues paper, this submission comments on:

1. Purposes that should be included as exceptions to infringement;
2. How such purposes should be incorporated in the *Copyright Act 1968*;
3. The need for inclusion of flexibility in the application of copyright exceptions via a technologically neutral provision;
4. Consistency of such a technologically neutral provision with Australia's international obligations;
5. The relationship between the exceptions to copyright infringement and Part 5 Division 2A of the Act;
6. The relationship between the exceptions to infringement and contract law

7. The specific issues raised by the issues paper (and summarised at page 36 of that paper)

2. Limitations of the Current Fair Dealing Provisions

The current limited and prescriptive fair dealing exceptions are out of date and inconsistent not only with common practices of private citizens and consumers but also with the inherent functions of educational and cultural institutions which exist to serve the public.

Amendments to the current law are necessary in order to provide for the following new purposes:

2.1 Time Shifting

Time shifting should be included as a non-remunerable exception to copyright infringement.

Such an exception should not exclude uses falling outside of the realm of ‘private copying’. Any such restriction would unnecessarily exclude public institutions and other consumers from accessing information at convenient times and with no detriment to rights holders.

Time shifting is integral to public institutions for purposes including public seminars, classes, and presentations. The practice of copying broadcasts for such purposes has been fundamental to educational and cultural discourse. It is envisaged that time-shifting of web-casts delivered via the internet will also become increasingly relevant in the communication of information. For example, this form of technology will be able to be utilised by public institutions for purposes such as distributing recordings of speakers at its conferences to remote or ‘virtual’ attendees.

Time-shifting enables a broad range of consumers to access information at alternative times, as a result of use of devices purchased specifically for this purpose. Time-shifting does not interfere with copyright owners’ markets as it necessarily excludes ‘librarying’. Placement of any restrictions on the use of such devices for time-shifting purposes would act as a disincentive to further technological advancement which supports the dissemination of information. This has been recognised in the US, where a recent Supreme Court decision held that “...copyright laws are not intended to discourage or to control the emergence of new technologies, including those that help disseminate information and ideas more broadly or more efficiently.”⁴

Time shifting enables institutions and consumers to access and disseminate information for research, and educational and cultural purposes, in dynamic and

⁴ Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd. Et al., 454 U.S.C. (2005) per Breyer J in relation to the Betamax decision.

responsive ways. Time-shifting does not conflict with any ability of rights-holders' to commercially exploit their works. Indeed, the increased exposure of works as a result of time-shifting can enhance rights-holders' profiles thereby *facilitating* their ability to further exploit their works.

2.2 Format Shifting

Format shifting should be included as a non-remunerable exception to copyright infringement. Such an exception should not be restricted to private use alone.

Purchasers of legitimate copyright material should not be deprived of enjoying their purchases simply because formats are becoming obsolete at a quicker rate with the increased pace of technological change. There are sound public policy grounds which support format shifting in such circumstances. To prevent purchasers from format shifting would in essence act as an incentive to embody works in low quality formats, thus requiring the purchaser to buy more copies. This would in turn impact upon the overall accessibility of these works within the community.

Additionally, public institutions should be able to format shift on behalf of their patrons for a number of purposes:

Public seminar purposes

Format shifting would provide a logical extension to any time shifting exception. Public institutions must be able to transfer information between formats, for example, transfer of a broadcast onto VHS, and then onto a computer file in order to communicate the relevant piece of information to a class or at a public presentation. This example commonly occurs within schools who employ 'electronic reticulation systems'.

Storage and access purposes

Format shifting is essential to the storage and access functions of public institutions. For example:

- Storage is a perpetual problem for public institutions, particularly for those holding large volumes of material or large objects. Format shifting enables the transfer of works to materials which occupy less physical space. Digital files particularly occupy much less space than traditional forms of 'hard copy' storage.
- Related to the storage problem, public access to collection material is also an increasing problem for institutions. It is increasingly difficult for institutions to facilitate access to their collections which due to lack of space may not be maintained on site. Format shifting enables public institutions to transfer collection material to networked disks to facilitate public access to that material.
- One common method which has been utilised in other jurisdictions such as the US to resolve the storage/access dilemma, and which some institutions utilise in Australia, is the use of 'thumbnail images'. Format shifting would enable thumbnail images of works in an institutions collection to facilitate public access to an increased number of works in that collection. Non-commercially viable copies such as thumbnail images are discussed further below.

- Similarly, format shifting would enable institutions to facilitate access to audio materials by allowing conversion to compressed formats (RealAudio, QuickTime, mp3).

Preservation purposes

In addition to more efficient storage of and access to works, format shifting is integral to the preservation functions of public institutions, discussed below.

2.3 Preservation Copying

Copying of works undertaken for the purpose of preservation should be exempted from copyright infringement. This is particularly relevant in the context of public institutions that are mandated to undertake this function. Such institutions should not be restricted in their preservation functions. The law must allow copying in order to *prevent* deterioration or loss of a work at any given point in time. No distinction should be made between different types of work for this purpose.

The current situation where preservation copying is allowed only for original artistic works and works held in manuscript form⁵ whereas other works must first be damaged, deteriorated, lost or stolen, fails to take into account the variety of works which different institutions hold, and draws an artificial distinction between different kinds of works for preservation purposes which is not warranted. It is particularly detrimental to the public interest in relation to rare or out of print works that may be in reasonable condition but cannot be replaced in the event that the item is lost, stolen or damaged. The current provisions provide a disincentive to loaning or making such materials available for public access.

The following are problems not addressed by the current preservation provisions.

- Materials such as cellulose (paper) and cellulose nitrate (negatives and film), are subject to deterioration to varying degrees depending on factors such as storage conditions, frequency of handling and particular composition⁶. Under the current preservation provisions, institutions may have knowledge to the effect that certain material will deteriorate within a certain time-frame, however such knowledge is useless because the Act does not allow preservation until deterioration has begun.
- Audio and video materials require regular migration due to (a) deterioration and (b) technologies becoming obsolete. For example, pneumatic video tape is no longer being produced. Pneumatic tape is known to deteriorate rapidly and thus preservation arrangements for material embodied in pneumatic tape must be made as a matter of urgency even if currently the tape is in its early stages of deterioration.
- In relation to works contained within newer technologies, a risk exists that certain media will degrade or become obsolete thus making access to the work contained therein problematic or impossible. In order to retain works contained within new media, institutions need to be able to transfer them to

⁵ Copyright Act 1968; Sections 51A(a) & 110B

⁶ "Caring for Photographs & Paper Workshop"; www.maq.org.au/profdev/cal2000/carepa_print.htm

other sustainable formats in order to preserve them. Several transfers may be required, depending on the rate at which particular technologies become obsolete.

- Libraries and cultural institutions hold travelling exhibitions. The Act does not allow for preservation copies to be made to alleviate the risks involved in holding such exhibitions.
- In the future it is anticipated that materials currently deposited on DVD, will need to be transferred to newer formats.
- Reverse engineering of digital materials is not provided for.
- Circumvention of copy protection mechanisms for preservation purposes is not provided for.

Placing restrictions on copying for preservation purposes undermines a primary function of public institutions.

2.4 Back-up Copying

Institutions and consumers should be able to make back-up copies of all purchased material whether it is contained on hardware, software, network systems, CD or DVD.

Back-up copying enables existence of a 'spare', to be accessed in response to unforeseen events which disable access to the original copy. This is a particular need that has developed in the digital environment, where system malfunctions can lead to loss of material.

The importance of back-up copying is recognised by s.47C of the Act⁷. This section however does not account for the range of formats within which digital material can be embodied. Institutions and consumers need to be able to protect against loss of material embodied in a range of formats. The Act must be amended to account for the extent that 47C does not cover this. It is important to note that a back-up copy is necessarily distinct from a preservation copy. Back-up copies are kept in anticipation of failure of the preservation copy.

The Act should allow back-up copies to be made where there is a risk that if a back-up copy is not made, material may be lost. To the extent that the current Act puts institutions and consumers at risk of breaching copyright laws simply by taking precautions against loss of purchased or acquired material maintained in digital form, it is inconsistent with technological advancements which enable more efficient means of storing works and should be amended.

2.5 Sample Copies

The making of sample copies, either to facilitate access or preview material prior to purchase, should be included as a non-remunerable exception to copyright infringement. An example prevalent in many cultural institutions is the production of low resolution thumbnail copies of images. Such copies, while having no value in any commercial market for the work, greatly enhance access to works for preview or sampling purposes.

⁷ Copyright Act 1968; s.47C

The ADA envisages that this may be relevant in various contexts, and recognises a particular need exists in relation to the provision of access to the collections of public institutions. Samples provide an efficient and limited form of access to a much broader range of an institutions collection than would otherwise be possible. The growing amount of cultural information that institutions collect over time make copies such as thumbnails a logical option to resolve issues of storage and access, while at the same time, not interfering with any market for the commercial exploitation of the work⁸.

Any exception for sample copies such as low resolution thumbnail images should be non-remunerable. Current institutional practice when acquiring works is to obtain non-remunerable licenses to digitise those works.⁹ The current problem however is that such licenses have not been obtained for many of the works within the collections of institutions. This problem is particularly detrimental to the public in circumstances where rights holders can not easily be contacted or found.

The public benefit of an exception for sample copies far outweighs any detriment to rights holders. Such an exception would also assist rights holders: Previewing of works encourages purchases of commercial copies.

2.6 Orphaned Works

The copying of orphaned works should be exempted from copyright infringement provided that appropriate steps have been taken to locate the owner of the work, as described below.

The current situation where there is no provision in the Act for dealings with orphaned works, results in perpetual copyright by default. This provides a disincentive to researchers wishing to utilise a broad range of works in their endeavours, impairing or obstructing research accordingly.

It also places a great administrative burden on institutions, which either place a significant amount of resources into locating owners beyond what should reasonably be expected, or alternatively, refrain from using such material altogether, to the detriment of the public. This burden has been enhanced as a result of the term extension provided for pursuant to the Australia – US Free Trade Agreement¹⁰, and is unwarranted, particularly given that preliminary data collected from commonwealth cultural institutions indicates that only one institution has recorded only one complaint in relation to use of an orphaned work¹¹. That particular institution estimated that of the 300 shelf kilometres of its collection, only 5-10% was published

⁸ It is important to note here that thumbnails are deliberately provided in a low resolution format by institutions so that any attempt to copy these results in very bad quality images being produced.

⁹ For example, the NLA ensures that contracts it enters in relation to the acquisition of works enable their digitisation.

¹⁰ The Australia- US Free Trade Agreement came into force on 1 January 2005 and can be accessed at: <http://www.dfat.gov.au/trade/negotiations/us.html>

¹¹ The Copyright in Cultural Institutions group (CICI), a working group of copyright and intellectual property managers representing cultural institutions located primarily in the Australian Capital Territory, undertook a formal survey of copyright practices of member institutions for the purposes of this review. The results of this survey are attached as an Appendix to the CICI submission.

material¹². This is not to say that all institutions will be affected to the same degree, however it is a pertinent example of the extent to which inflexible copyright laws will adversely affect institutions depending on the constitution of their collections.

Inability to copy orphaned works is particularly illogical when they are of limited or no commercial value. Letters, Australian and foreign Government reports, and reports from private organisations are examples of works that contain cultural value but are not commercially viable¹³. Public institutions are prevented from activities such as publishing these works by making them available on the internet, or from promoting such documents via non-commercial leaflets associated with exhibitions. Decreased ability of these institutions to promote cultural material necessarily results in decreased transfer of such knowledge to the public.

The ADA supports an exception to infringement to cover situations where the author of a work is unknown and the user has made ‘reasonable efforts’ to locate and notify the copyright owner. After consideration the ADA has concluded that the balance of interests dictates that such an exception should be a non-remunerable free-use exception. This is particularly so given the vast number and variety of orphaned works that exist, and given that the standard of originality in Australia means that ‘works’ are defined extremely broadly, for example, receipts may constitute copyrighted works¹⁴. Any system attempting to administer trust monies for all orphaned works will necessarily be complex, time consuming, and unreasonably burdensome.

Furthermore, the ADA would not support any scheme which deems unidentifiable rights holders to be members of collecting societies. If the Government does find on balance that royalties in relation to orphaned works should be held on trust for a particular period of time, such monies should be returned to institutions at the end of that period. Royalties owed to a specific rights but never identified rights holder should not be redirected to collecting societies thus providing its members with remuneration beyond any reasonable entitlement, to the detriment of public institutions. Such a scheme would again risk orphaned works not being utilised due to budgetary constraints.

The ADA recognises that any orphaned works exception must be balanced against the interests of copyright owners. Thus such an exception should:

- Impose upon the user a requirement to first make ‘reasonable efforts’ to locate the owner
- Require the user to include a ‘prescribed notice’ in any use of the work.

‘reasonable efforts’

Industry practice currently includes web searching, searching the white pages, searching old institutional records and curator’s records, consulting with other

¹² Ibid, Data from the National Archives of Australia.

¹³ Ibid.

¹⁴ In *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* 25 May 2001, the Court found the law which applies in Australia involves a low threshold of originality - effort in gathering and listing of data is sufficient for copyright protection.

institutions, and probate searches¹⁵. Industry practice should form the basis of any ‘reasonable efforts’ test.

‘prescribed notice’

Industry practice currently is for institutions to provide notice on or in close proximity to any copy of the work made, inviting the rights holder to contact the institution. If a rights holder comes forward, they are then able to seek any payment of royalties or the removal of any material. As such copies are used for non-commercial purposes only within institutions; no material loss to the rights holder is incurred. As mentioned above, data provided by Commonwealth Cultural Institutions suggests that use of orphaned works is currently occurring without any loss being caused to the rights holders. Many orphaned works are not commercially viable. Thus, the ADA believes that this form of prescribed notice should also form the basis of any legislative ‘prescribed notice’ requirement.

The ADA does not recommend:

- Any prescribed notice period prior to the intended publication: A prescribed time-frame of notice would be unduly restrictive and inconsistent with institutional practices which require clearances within very limited time-frames for purposes such as exhibitions.
- Any requirement such as exists with unpublished works pursuant to section 51A currently, that copying is permitted only after 50 years post death of the author. Where a work is not being commercially exploited, any such limitation does not assist rights-holders, but merely operates to hinder public institutions. See further the discussion relating to unpublished works below.
- Introduction of a Canadian style model. The ADA refers to the CLRC Simplification Report Part 2¹⁶ which found that the introduction of a similar scheme in Australia would require a high level of administrative resources and that the costs were likely to outweigh the benefits.
- Introduction of a Scandinavian style model which deems collecting societies to represent all rights holders for the purpose of a licensing scheme, with the onus being on the unidentifiable rights holder to notify the collecting society if they do not want to be so represented. Such a scheme would not be workable given the low standard of originality that exists in Australia, as discussed above.

2.7 Abandonware¹⁷

Copyrighted material which was commercially viable for a limited period but is not any longer should be able to pass into the public domain.

The ADA would support the adoption of a process similar to that provided for pursuant to the US *Public Domain Enhancement Act*¹⁸ which requires rights holders

¹⁵ CICI, Op. Cit.

¹⁶ CLRC, Simplification of the Copyright Act 1968 Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues, February 1999

¹⁷ This concept is further explored by Kim Weatherall in her paper entitled “*Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia*”, IPRIA Occ. Paper No. 3/05 May 2005 at 13.

to pay a fee of \$1 to indicate ongoing interest in their copyright after a period of time, for example, after the first 20 years of the term of copyright. Such a requirement would facilitate the passing of non-commercially viable works into the public domain.

2.8 Unpublished Works

Consistent with the above recommendations in relation to orphaned works, the ADA supports amendment to the application of sections 33, 51, and 110A relating to unpublished works to ensure that copyright is not perpetual by default, to the detriment of those seeking access to unpublished works.

Unpublished works which fall under section 33(3) risk being subject to perpetual copyright in cases where a work is never published or publicly performed or offered. The ADA supports an exception to infringement in cases where the rights holder cannot be located. Such works should be regarded as ‘orphaned’ and treated accordingly.

The current exceptions for unpublished works contained in s.51 and 110A¹⁹ are unduly protective of copyright and require review. They provide that to be exempted from infringement, libraries or archives wishing to copy unpublished works for research or study purposes, or with a view to publication, must wait until 50 years after the death of the author²⁰. Thus a library cannot copy such material to facilitate access to it, even if reasonable steps have been taken to locate any current rights holder without success. Furthermore, individuals and organisations other than libraries are not able to utilise even these narrow provisions.

The ADA recommends amendment of these provisions for consistency with any orphaned works provision that is introduced. Furthermore, these provisions should be broadened in application beyond libraries and archives only, for purposes beyond research and study or with a view to publication only. Unpublished works may exist in the collections of a variety of institutions²¹, and may be required for various purposes, including for example, criticism and review.

Any exemption for orphaned works must encompass unpublished works where the author is known but has died. In such circumstances copying should be allowed regardless of when the author died. The 50 year period should only apply to works where the rights in those works have been transferred to an identifiable third party. To balance the interests of rights holders, persons wishing to copy such materials should be required to take reasonable steps to identify who the rights holder is, as described above in the discussion relating to orphaned works.

2.9 Caching

¹⁸ HR 2408 2005, The Public Domain Enhancement Act can be viewed at <http://www.copyright.gov/legislation/>

¹⁹ Copyright Act 1968

²⁰ Copyright Act 1968, Sections 51 & 110A

²¹ The Copyright in Cultural Institutions group (CICI), a working group of copyright and intellectual property managers representing cultural institutions located primarily in the Australian Capital Territory, undertook a formal survey of copyright practices of member institutions for the purposes of this review. The results of this survey are attached as an Appendix to the CICI submission.

Caching has been defined as “an activity, performed by machine or human being, with the goal of reducing communication and data processing costs, adapting to limited bandwidth, or providing a safe or otherwise regulated online environment”²².

The ADA supports the introduction of a free exception to copyright infringement for caching within public institutions on the following grounds:

Efficiency

The principal purposes of caching are to (a) provide faster access to online items and (b) reduce the transmission costs of downloading online items. Thus it exists to create efficient access to the online environment within large networks. Caching does not replace the purchase of educational materials. To provide an example of universities, proxy servers cache all downloads and retain material in the cache for a period of time which is determined by software rules. At Swinburne University, it has been estimated that roughly 40% of download requests are met from the cache; an indication that its purpose of efficiency is substantially met²³.

Responsible internet use for students

As mentioned above, caching operates according to software rules, and systems administrators can change these rules to govern what is cached and for how long. It is noteworthy that copyright owners can also configure their sites so that they cannot be cached either partly or entirely. Systems administrators can also configure proxy servers so that illegal or inappropriate material is filtered from what is cached. Access to certain material is disabled. Such configuration of proxy servers also enables very large files and spam to be detected and access barred²⁴.

Caching for purposes of browsing and searching

Caching facilitates efficient access and browsing of online materials. It does not extend the rights of users to print hard copies of copyrighted works beyond what they are able pursuant to the fair dealing provisions.

Technological developments have changed student behaviours. In the past, students accessed most information in hard copy. Now it is much more common for students to search for and browse materials online via search engines such as Google. The exclusive rights contained in copyright have never included reading or browsing²⁵. Such extensive additional rights should not be provided in the digital environment. Searching and browsing does not impact upon a copyright owner’s rights, although it has been said that many academic and research authors might experience significant benefits through the increased exposure of their works²⁶.

Essentially a form of temporary copying

²² Whitehead, D. Draft: “Caching: An Issues Paper” 2005. This paper was presented at the Australian Digital Alliance Forum “ADA fair dealing review strategy forum” held at the National Library of Australia on 26 May 2005.

²³ Ibid.

²⁴ Ibid.

²⁵ Section 31, Copyright Act 1986

²⁶ Hudson, E. & Kenyon, A. “*Copyright, Digitisation and Cultural Institutions*”, The University of Melbourne Faculty of Law, Legal Studies Research Paper No. 101, 2004.

‘Passive caching’ is conducted mechanically in order to maximise system efficiency. The relevant material is cached on an institution’s server, or on a desktop hard drive, merely in response to or as part of the process of satisfying a user request. It may include the use of automatic filters, but does not involve active human selection or intervention²⁷.

There is a common view²⁸ that passive caching falls within the temporary copying exceptions found in s.43A & 43B of the Act. The ADA concurs with this view.

‘Active caching’ however has been the topic of some confusion. Active caching may have the additional purpose of ‘quality assurance’ for public institutions, particularly schools. Although human intervention is involved, there is little qualitative difference between the two²⁹. The difference between active and passive caching is one of degree not substance. ‘Active’ caching is a misnomer in the sense that the cache simply does not retain certain material because it has not been successfully downloaded.

Not an appropriate licensable activity

The Philips Fox Digital Agenda Review Report³⁰ proposed that active caching be incorporated into the Part VB statutory license³¹. Further to the above discussions, this is problematic for various reasons:

- It would be inconsistent with the temporary copying provisions contained in s.43A and 43B and create an artificial dichotomy between temporary copies classed as ‘caches’ and other temporary copies which are currently non-remunerable exceptions.
- It would raise questions of whether temporary copies made in RAM or on your VCR, PVR or ipod are also remunerable.
- It would create too large an administrative burden and would require the introduction of some kind of internet monitoring scheme. Given the extent and pace of development of new technologies, the ADA submits that such a scheme would be unworkable.

The ADA would not be in favour of including active or passive caching in the educational statutory license contained in Part VB of the Act.

The ADA supports the inclusion of an exception to copyright infringement to clarify that the technical processes involved in both ‘active’ and ‘passive’ caching do not constitute infringements of copyright.

2.10 Transformative Uses

²⁷ Whitehead, D., Op. Cit.

²⁸ See for example, *Digital Agenda Review Report and Recommendations*, Attorney-General’s Department, January 2004; Submission of the Copyright Advisory Group to the Schools Resourcing Taskforce of MCEETYA to this review.

²⁹ Ibid.

³⁰ Attorney-General’s Department, “Digital Agenda Review Report and Recommendations” January 2004.

³¹ Ibid, Recommendation 16 at 9.

The ADA supports the inclusion of an exception to infringement for transformative uses such as parody.

The Panel case³² illustrates that whilst we have an exception for copying for the purposes of ‘criticism and review’³³, the current law has been applied so as to effectively require the part copied not to be a ‘substantial part’ of the original, prior to any application of this exception³⁴. This is so even if the new work is clearly not competing in any market for the original. Taking a ‘substantial part’ of a work enables effective criticism and review. Thus the ‘substantial part’ test is excessive and defeats the purpose of the exception.

Lack of any effective legal mechanism allowing for transformative uses of works discourages further innovation and creation. It stifles advancement of the arts and sciences. Transformative uses of works should be exempted from copyright infringement.

3. Public/Private Use Dichotomy: Not Warranted

The existing problems with the current fair dealing exceptions have been outlined above. These problems do not concern private citizens alone, but extend to the core functions of public institutions that effectively act as ‘agents’ for private citizens in conserving and facilitating access to the nation’s cultural heritage and learning resources. Such functions are not merely philosophical, but are in fact mandated via statute³⁵.

Institutions must be permitted to perform copying for users in all instances where users would be permitted to make the copy for themselves under fair dealing. The user’s purpose should be considered the relevant purpose in assessing fairness. This approach is consistent with the CLRC’s recommendations contained in the Simplification Report Part 1, that ‘the user’s purpose is the relevant purpose in applying exceptions’³⁶, in response to the case of *De Garis v Neville Jeffress Pidler Pty Ltd*³⁷, where Beaumont J held that it is the purpose of the person making the dealing, rather than the ultimate use to which the material is put, that is relevant when assessing whether the dealing can be regarded as a fair dealing for the purpose of research or study. The ADA supports such an approach. It is consistent with the approach taken in other jurisdictions where copies made on behalf of third parties can be fair³⁸.

³² TCN Channel Nine Pty Limited v. Network Ten Pty Ltd (No 2) [2005] FCAFC 53

³³ Section 41 Copyright Act 1968

³⁴ Network Ten Pty Ltd v. TCN Channel Nine Pty Ltd & Ors [2003] HCATrans 338 (5 September 2003); Network Ten Pty Ltd v. TCN Channel Nine Pty Ltd & Ors S213/2002 (11 April 2003)

³⁵ For example: Section 5 of the Australian National University Act 1991, Section 5 of the Archives Act 1983, Section 6 of the National Museum of Australia Act 1980, Section 5 of the Australian National Maritime Museum Act 1990, Section 6&7 of the National Library of Australia Act.

³⁶ CLRC Simplification of the Copyright Act 1968 Part 1, Exceptions to the Exclusive Rights of Copyright Owners, September 1998 at 13.

³⁷ (1990) 95 ALR 625

³⁸ For instance, Canada: CCH Canadian Ltd. V. Law Society of Upper Canada [2004] 1 SCR 339

The ADA submits that the limited exceptions for libraries and archives to copy on behalf of their patrons under Division 5 of the Act are inadequate and do not address uses which should be free in *all* educational and cultural institutions. The principle of looking at the user's purpose to determine fairness must be extended to cover (a) public institutions other than libraries and archives which engage in copying on behalf of their patrons (b) any new exceptions to copyright infringement that are introduced.

4. How These Issues Should be Addressed by the Copyright Act 1968

In determining how such exceptions to infringement should be incorporated into the *Copyright Act 1968* the following relevant matters should be taken into account:

4.1 Independent Parliamentary Inquiries Examining the Issues

The issue of exceptions to copyright infringement has been addressed extensively by 3 independent Government Committees. The CLRC in its Simplification Report³⁹ produced a detailed analysis of the fair dealing exceptions with recommendations in relation to their simplification and expansion into the digital environment. The Joint Standing Committee on Treaties and the Senate Select Committee on the Australia-US Free Trade Agreement, addressed the inadequacy of the current exceptions to copyright infringement specifically in the context of the free trade agreement with the US⁴⁰.

CLRC Simplification report

The exceptions to copyright infringement were the subject of a full volume of the CLRC's Simplification Report.

The CLRC opined that an approach that seeks to deal with each specific case of fair dealing is undesirable for two main reasons. Firstly, it cannot be comprehensive because it is not possible to predict new uses to which the technological developments may give rise, and secondly, each new circumstance that needs to be dealt with simply adds to the complexity of the legislation. The committee recommended a flexible approach which was not limited to an exclusive set of purposes and which would therefore be able to 'move fair dealing into the digital environment' consistent with international obligations provided for pursuant to TRIPS⁴¹ and particularly also with the WCT⁴². The committee considered that such a flexible provision would:

- strike a balance between the competing interests of owners and users of copyright material⁴³;

³⁹ Attorney-General's Department, Op. Cit.

⁴⁰ The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties, *Report 61 The Australia-United States Free Trade Agreement*; The Senate Select Committee Report "Select Committee on the Free Trade Agreement between Australia and the United States of America" 2004.

⁴¹ The Agreement on Trade Related Aspects of Intellectual Property Rights can be viewed at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

⁴² The WIPO Copyright Treaty can be viewed at: <http://www.wipo.int/treaties/en/ip/wct/index.html>

⁴³ CLRC Simplification of the Copyright Act 1968 Part 1, Exceptions to the Exclusive Rights of Copyright Owners, September 1998 at 6.12.

- be consistent with Australia’s international obligations, and with the spirit of the WCT and WPPT⁴⁴ and
- provide greater certainty in the determination of ‘fairness’ through the general application of the non-exclusive set of considerations (such as under s.40(2)) to all fair dealings⁴⁵
- build on existing Australian jurisprudence surrounding fair dealing⁴⁶.

Report 61 of the Joint Standing Committee on Treaties

The Committee recognised that whilst Australian negotiators defended the (lesser) term of copyright protection vehemently, the final outcome was necessary to secure the overall package⁴⁷. It made three recommendations which it saw necessary to ensure the balance of interests between users and owners is maintained through copyright legislation:

- that Government enshrine the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes;
- that the Australian fair dealing doctrine be amended to resemble the US flexible fair-use defence to counter the effects of copyright term extension, and to correct the anomalies of time and space (format) shifting;
- that the standard of originality be reviewed and a higher standard such as is applied in the US be adopted⁴⁸.

Senate Select Committee Report on the Free Trade Agreement between Australia and the USA

The Committee noted that as a result of the CLRC Simplification Report recommendations not yet having been adopted by Australian law, the AUSFTA would result in Australian users of information ‘having more restricted access to copyright material than users in the US due to the higher standards of copyright protection overall and the lesser usage rights available’⁴⁹. It opined that ‘the application of a broad, open-ended ‘fair-use’ doctrine, similar to that in the US, may resolve this long-standing legal anomaly in Australian copyright law and assist in legitimising several commonplace actions undertaken regularly by Australians perhaps unaware that they are infringing copyright’⁵⁰.

The ADA supports the introduction of a flexible provision into the *Copyright Act 1968*, consistent with the findings of these independent Parliamentary reviews.

4.2 Complexity

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid at 6.13

⁴⁷ The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties, *Report 61 The Australia-United States Free Trade Agreement* at 237

⁴⁸ Ibid at 238.

⁴⁹ The Senate Select Committee Report “*Select Committee on the Free Trade Agreement between Australia and the United States of America*” 2004

⁵⁰ Ibid

The addition of many exceptions would necessarily add to the complexity of the Act. Continuing to introduce specific exceptions as they arise will complicate procedures and clearance processes within public institutions and make the Act generally more ‘user unfriendly’. With developments in technology, users will need to make judgement calls in relation to technical processes and whether new practices fall within existing exceptions. A general fairness provision would enable them to do this. Without such flexibility, users will again be in a situation where they may not be able to access new technologies, or will have to do so illegally, until such time as another legislative review leads to amendment.

4.3 Certainty

The ADA recognises the Government’s work towards attaining certainty in copyright law, for example by extending the reasonable portion test to the digital environment.⁵¹ The ADA also recognises however that the certainty that is provided by the fair dealing provisions is limited and indeed *limiting*. The four broad purposes which currently define fair dealing do not define what is or is not fair pursuant to those provisions. Whether something is a fair dealing is a question of fact and degree and depends on the circumstances surrounding a particular case. This is ultimately a matter for determination by a court.

The current exceptions are being underutilised because of the uncertainty surrounding their scope. This can perhaps best be illustrated by the Panel case⁵², where the current s.103A ‘criticism and review’ defence⁵³ proved ineffective to deal with the transformative uses of certain television segments. This decision has resulted in the revision of industry practice for documentary film-makers: licences are obtained as a matter of course even if only a few seconds of footage are being copied.

Thus, while the current fair dealing provisions provide some certainty in relation to uses which are permitted, they also provide a great deal of certainty in relation to many uses which are not. Members of the ADA do not wish to retain this form of certainty in the Act⁵⁴: On the whole, it hinders rather than assists their functions, as illustrated.

The introduction of a flexible fairness based provision into the *Copyright Act 1968* would not detract from the certainty that currently exists. It would provide an additional workable mechanism to assist users in ascertaining the fairness of uses which are currently not permitted.

4.4 Flexibility Required for Technological Competitiveness

Failure to introduce a flexible provision would be limiting and inconsistent with evolving technologies. The addition of specific exceptions without any amendment to incorporate a flexible provision, would necessarily act as a deterrent for further

⁵¹ Copyright Amendment (Digital Agenda) Act 2000

⁵² TCN Channel Nine Pty Limited v. Network Ten Pty Ltd (No 2) [2005] FCAFC 53

⁵³ Copyright Act 1968, Section 103A

⁵⁴ This was confirmed in discussions at the Australian Digital Alliance Forum “ADA fair dealing review strategy forum” held at the National Library of Australia on 26 May 2005.

developments in technology. It would by default outlaw uses not specifically mentioned. Thus uses which may supersede current practices would be excluded, even if they do not negatively impact upon rights holders, but in fact assist them through conserving or promoting their works, as is often the case in the context of public institutions.

Furthermore, by automatically outlawing new uses, the Act provides a disincentive for technological development in Australia. The impact that a flexible provision can have on technological advancement can perhaps best be seen in the context of the US.

4.5 Evidence from the US

The flexibility provided by s.107 of the US Copyright Act⁵⁵ has enabled the US to remain at the forefront of technological innovation. The case of *Sony Corporation v. Universal City Studios, Inc* (the Betamax case)⁵⁶ in 1984 enabled US copyright law to adapt to VCR technologies by holding that device manufacturers are not liable for copyright infringement if there are substantial non-infringing uses. In contrast: Australia is reviewing the legality of this now ‘old’ technology in 2005.

Section 107 of the US Act⁵⁷ has proven itself to be a flexible but fair provision. The Betamax case was reaffirmed in the case of *Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd. Et al.*⁵⁸, which was handed down on 27 June 2005. In fairness to rights holders the US Supreme Court in that case held that although mere knowledge of infringing potential is not enough to demonstrate legal liability, a company can be held liable if it distributes a device with the object of promoting its use to infringe copyright⁵⁹. The Court thus ‘balanced’ the interests of rights holders by adapting the fair use principle to the particular case before it.

In summary, extending the current prescriptive model of fair dealing would not enable development of the law with technology. It would in fact act as a disincentive to further developments; it would make the Act more complex and less user-friendly, and it would retain the uncertainty which exists in relation to the current provisions. Furthermore, retaining this model would fail to take into account various Parliamentary inquiries which have addressed the issue and recommended the adoption of a more flexible model.

5. Introduction of a Flexible Provision

The ADA is amenable to amending the Act to incorporate all of the above exceptions to infringement specifically. However, it is the submission of the ADA that the scenarios mentioned above, illustrate a clear need for the incorporation of flexibility into the *Copyright Act 1968*.

⁵⁵ 17 U.S.C. Section 107 (2005)

⁵⁶ 464 U.S. 417 (1984)

⁵⁷ 17 U.S.C. Section 107 (2005)

⁵⁸ 454 U.S. (2005)

⁵⁹ Ibid

For example, thumbnail images and caching were unheard of prior to the advent of the world wide web in a mass market from 1995. History dictates that it would be extremely limiting to amend the Act to include further narrow exceptions only. On this basis the ADA would **not** support the introduction of specific exceptions *instead of* a flexible provision.

5.1 Consistent with Balance

Introduction of a flexible provision would allow owner and user rights to be balanced on a case by case basis. The process of ‘balancing’ would generally require an analysis of:

- (a) the purpose and character of the dealing
- (b) the nature of the work or adaptation
- (c) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (d) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied in relation to the whole work or adaptation⁶⁰.

5.2 Increased Access Consistent with Increased Certainty

Incorporation of these tests in a flexible more generalised ‘fairness’ provision may encourage proper risk assessments rather than risk aversion which has become part of current industry practices⁶¹. It may also encourage the development of industry codes of practice which properly assess the limits of these tests in relation to common practices⁶².

5.3 Minimisation of Further Complexity

A flexible provision may effectively legalise uses such as:

- format shifting
- time shifting
- use of thumbnail images
- uses of orphaned works

Furthermore, it would allow for future uses to be incorporated into copyright jurisprudence without necessarily requiring further legislative amendment.

5.4 Hybrid Model: Retain some Certainty with Added Flexibility

Members of the ADA do not seek to *replace* the existing fair dealing provisions with ‘fair use’ as it exists at s.107 of the *Copyright Act*⁶³. Rather this submission supports the addition of flexibility to the current fair dealing provisions. The ADA also supports the addition of specific exceptions to update Australian law in areas where it clearly lags behind other jurisdictions and where there is a clear and immediate need

⁶⁰ These ‘tests’ are derived from The Copyright Act 1968 Section 40(2) however exclude 40(2)(c) on the basis that the ADA is of the view that this test is superfluous in light of the other 40(2) tests.

⁶¹ Jaszi, P. “Public Interest Exceptions In Copyright: A Comparative and International Perspective”, Washington College of Law, 2005

⁶² Ibid.

⁶³ 17 U.S.C. Section 107 (2005)

for public institutions and citizens to be able to make a free use copy without first waiting for a court decision.

Support for a hybrid model such as proposed by the ADA can be found in international academic literature. For example, Peter Jaszi in his paper “Public Interest Exceptions in Copyright: a Comparative and International Perspective” stated that:

“if one could imagine an optimal, hybrid approach, it might well be one that combined a flexible core doctrine such as ‘fair use’, rooted in a recognition of information access as a human right; an adequate list of specific use exemptions; a sceptical attitude toward far-reaching ‘moral rights’ claims, and a relatively conservative approach to penalties for copyright infringement, which emphasized compensation over deterrence⁶⁴.”

The issues paper raises the question of how a fair use style provision could be implemented. Due to the limited time frame of this review, and in response to advice from the Attorney-General’s department, the ADA does not provide herein a draft legislative model. Comments in relation to the options provided by the issues paper for implementing reform are provided below. However, the ADA would wish to provide further comments in relation to any specific model that is proposed. Alternatively, the ADA would like the opportunity to provide further comments as required by the Attorney-General’s Department in drafting any model.

6. Consistency with International Obligations

Exceptions and limitations to the rights of copyright owners must comply with Australia’s international treaty obligations. The relevant treaty obligations include Article 9(2) of the Berne Convention⁶⁵, Article 13 of the TRIPS Agreement⁶⁶, Article 10 of the WCT⁶⁷, Article 16 of the WPPT⁶⁸ and Article 17.4.10(a) of the AUSFTA⁶⁹. These provisions provide for:

- The ‘3 step-test’ for permitted exceptions:

‘Members shall confine limitations or exceptions to exclusive rights to *certain special cases* which do not conflict with a *normal exploitation*

⁶⁴ Jaszi, P. “Public Interest Exceptions in Copyright: a Comparative and International Perspective”, Washington College of Law, 2005 at 12.

⁶⁵ the Berne Convention for the Protection of Literary and Artistic Works can be viewed at: <http://www.wipo.int/treaties/en/ip/berne/>

⁶⁶ The Agreement on Trade Related Aspects of Intellectual Property Rights can be viewed at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

⁶⁷ WIPO Copyright Treaty can be viewed at: <http://www.wipo.int/treaties/en/ip/wct/index.html>

⁶⁸ The WIPO Performances and Phonograms Treaty can be viewed at: <http://www.wipo.int/treaties/en/ip/wppt/>

⁶⁹ The Australia- US Free Trade Agreement came into force on 1 January 2005 and can be accessed at: <http://www.dfat.gov.au/trade/negotiations/us.html>

of the work and do *not unreasonably prejudice* the legitimate interests of rights holders.’⁷⁰

- A mandate to extend copyright exceptions into the digital environment:

‘the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.’⁷¹

This mandate was agreed to at the time of adoption of the WIPO Copyright Treaty. It confirmed not only that exceptions currently provided for under existing laws, including US style fair use, were consistent with the 3 step test, but also that such exceptions should be appropriately extended into the digital environment.

It has been argued that introduction of a ‘flexible’ provision, such as was recommended by the CLRC in its Simplification Report, and such operates in US law would breach the first step of the 3 step test which requires exceptions to be limited to ‘certain special cases’⁷². However, the ADA submits that by limiting any flexible provision by tests such as proposed by the CLRC (and such as contained in s.107 or s.40(2)), the outcome is such that any use which complies must necessarily meet the definition of a ‘certain special case’.

Proponents arguing that the ‘flexible’ approach does not comply state that an exception does not fall within the definition of ‘a certain special case’ just because it ‘is fair’⁷³. Such proponents point to the EC Information Society Directive as an example of legislation that clearly does comply⁷⁴. The ADA is of the view that the compliance of EC countries via prescriptive legislation which has its roots in the civil law rights based tradition, does not have any bearing on the compliance of the US approach or on any potential Australian approach. Australia already provides for a general ‘fairness’ test in its legislation: s.40(2)⁷⁵. Introduction of a broader ‘fairness’ provision as outlined would therefore be consistent with the drafting style of the Australian legislation. Furthermore, a flexible provision would be consistent with the interpretation of other common law jurisdictions of their obligations pursuant to the abovementioned treaties. The US and NZ also contain similar ‘fairness’ tests in their legislation⁷⁶.

⁷⁰ Ibid, Article 9(2) of the Berne Convention; Article 13 of the TRIPS Agreement

⁷¹ Ibid, Article 10 of the WIPO Copyright Treaty

⁷² Ricketson, S. “The three-step test, deemed quantities, libraries and closed exceptions”, The Centre for Copyright Studies, 2002 at 147-154. This can be viewed at:

<http://www.copyright.org.au/pdf/ccs/CCS0202.pdf>

⁷³ Ibid at 150

⁷⁴ Ibid at 151

⁷⁵ Copyright Act 1968

⁷⁶ CLRC Simplification of the Copyright Act 1968 Part 1, Exceptions to the Exclusive Rights of Copyright Owners, September 1998 at 3.04.

The ‘Homestyle’ case⁷⁷ is often cited in relation to interpreting the 3 step test. Any discussions in relation to this case however should note that the provision which was found TRIPS non-compliant concerned a *specific exception* which exempted approximately 70% of all US restaurants and bars and 45% of US retail stores from paying royalties for the use of television and radio broadcasts of music to entertain their customers⁷⁸. The exception clearly interfered with the ability of rights holders to commercially exploit their works. Arguably, it was specifically inserted into the Act because it would not have passed the Section 107 (US fair use) tests. S.107 itself however has not been challenged in an international context⁷⁹.

The issues paper raises the question of whether a fair use style exception would be compliant with Art 17.4.10 of the AUSFTA⁸⁰. In the absence of any credible argument that US fair use fails the 3 step test and that the US is moving to abolish its flexible fair use exception, this is best regarded as a non-issue for the purposes of this review.

The ADA therefore submits that for Australia to adopt a flexible fair use style defence is entirely consistent with its obligations pursuant to applicable international treaties.

7. Other Matters for Consideration

7.1 Digital Agenda Review Report and Recommendations

Public institutions need to be able to quickly decipher what the law is in order to efficiently follow it in their day to day practices. The Digital Agenda Review Report recommended adoption of codes of practice to clarify issues concerning exceptions to copyright infringement⁸¹. Adoption of such codes could assist institutions in the interpretation of any flexible style provision that is introduced. It would supplement the Act for institutional purposes to provide greater certainty than currently exists. A ‘plain English’ guide to exceptions for institutional use would enable and encourage proper assessments to be made on a case by case basis as to whether a particular use is ‘fair’. It would also enable the provision of ‘certainty’ without restricting the Act to a 2005 technological context.

7.2 Technological Protection Measures (TPMs)

TPMs are dealt with distinctly in Part V Division 2A of the Copyright Act. The relationship between this part of the Act with Part 3 Division 3, the exceptions to infringement, is unclear.

⁷⁷ United States-Section 110(5) of the US Copyright Act, Report of the Panel WT/DS160/R, 15 June 2000.

⁷⁸ Attorney-General’s Department Copyright e-Newsletter, Issue 14, June 2000

⁷⁹ Ibid

⁸⁰ The Australia- US Free Trade Agreement came into force on 1 January 2005 and can be accessed at: <http://www.dfat.gov.au/trade/negotiations/us.html>

⁸¹ Attorney-General’s Department, “Digital Agenda Review Report and Recommendations” January 2004 at 3 and 5.

Section 116A(3) provides that supply of a circumvention device to a person in a very narrow set of circumstances is not illegal⁸². These circumstances however do not allow for supply to a person in order for them to utilise the exceptions to infringement contained in sections 40-43 (the fair dealing exceptions). Thus if a circumvention device prevents access to a work: Any access rights users may have under the fair dealing provisions are effectively extinguished. The rapid pace of technological developments increasingly enables rights holders to utilise technology to block not only the ability of a work to be copied, but the ability of that work to be accessed for purposes such as browsing or reading. This frustrates public policies which support access to information, innovation, learning and research.

Public institutions must be allowed to circumvent TPMs for a users fair dealing purposes. Restricting institutions' ability to do this will increasingly frustrate their functions in an environment where technologies are becoming more sophisticated and enabling rights holders to more easily 'lock up' their works. With reference to the first issue for consideration contained in the issues paper, the fair dealing exceptions contained in ss40-43(2) and ss103A-103C are at risk of becoming redundant in their function of providing a balance between the interests of copyright owners and copyright users if they have no application to Part 5 Div 2A of the Act. The fair dealing exceptions should not be restricted to applying in the print environment. They should not enable rights holders to 'opt out' of fair dealing. 'Access' is not among the exclusive rights provided for by the Act. The legislature should ensure that TPMs do not in effect confer such a right. Consistent with the objectives of the Digital Agenda Reforms⁸³ the exceptions to infringement must equally apply to the digital environment. Otherwise any concept of 'balance' will be lost.

7.3 Copyright and Contract

In accordance with the recommendations of the CLRC's Copyright and Contract Report⁸⁴, the *Copyright Act 1968* must make it clear that contractual provisions purporting to exclude or modify any of the exceptions to infringement provided for in the Act are unenforceable. Unequal bargaining power between 'owners' and 'users' necessitates codification of this recommendation. Failure to clarify this issue by way of legislative reform frustrates the very policy justifications for including exceptions to infringement in the Act. 'Balance' between owners and users cannot be achieved through fair dealing if fair dealing can be easily excluded.

The ADA also supports the CLRC's recommendation that Government work actively to promote an international solution to deal with situations where private international law principles limit the application of Australian legal remedies⁸⁵.

8. Issues for Consideration in Submissions: Response to Issues Paper

⁸² Copyright Act 1968, Section 116A (3)

⁸³ Copyright Amendment (Digital Agenda) Act 2000

⁸⁴ Copyright Law Review Committee, *Copyright and Contract*, 2002

⁸⁵ This issue is discussed in detail in the Report at 184-199

1. The operation of the fair dealing exceptions in ss 40-43(2) and ss103A-103C are essential in working towards a balance between the interests of copyright owners and copyright users. The ‘copyright balance’ is necessarily interpreted by the ADA as a position which balances the protection of copyright with the ability to access copyrighted material so as to facilitate a maximum level of creative output to the benefit of society. The ADA submits that those sections currently do not achieve this goal. In order for the fair dealing exceptions to achieve such a balance, the following amendments at least are required:

- additional specific exceptions should be prescribed, as discussed above;
- A ‘flexible’ technologically neutral provision should be introduced to allow for the development of new exceptions in accordance with the principles of fairness;
- The legislation must ensure that the exceptions to infringement apply equally in the digital environment by outlawing mechanisms that attempt to oust them, namely contract and technological protection measures.
- The legislation must clarify that in the application of exceptions, the relevant purpose is that of the end user;
- ss103A-C should be amended to bring the current exceptions in relation to AV materials in line with other works (ss40-43).

2. The ADA supports the introduction of an amendment to consolidate the fair dealing exceptions such as proposed by the CLRC in the Simplification Report with the qualification that the application of the section 40(2) purposes must not be expanded to cover fair dealings that are not currently so constrained. The ADA believes it is not appropriate that the current exceptions relating to criticism and review and reporting the news, be narrowed by the s.40 (2) tests.

Additionally, any model that is introduced must remedy the problems with the current exceptions to infringement which can be summarised very briefly as (a) inflexibility and (b) inconsistency with the practises of private citizens, consumers, libraries, educational institutions, and cultural institutions. The ADA is of the view that the CLRC proposal addresses problem (a) and opens the door for problem (b) to be addressed via confirmation by the courts. However, in order to address problem (b) efficiently, the ADA is of the view that certain common uses of copyright materials which are integral to the functions of educational and cultural institutions should be additionally prescribed in the Act.

3. The ADA supports the addition of a fair use style provision, as proposed by the CLRC, and by the ADA in its previous position statement⁸⁶. The ADA would not however support the replacement of the current fair dealing exceptions with a provision which resembles the US fair use provision on the basis that any model adopted must take into account the operation of the current exceptions within

⁸⁶ This position statement can be viewed at:
<http://www.digital.org.au/submission/FairDealingProposal.rtf>

educational and cultural institutions in Australia. The ADA notes however that there is a fine line between adopting the US law, and implementing the CLRC recommendation. The ADA submits that in essence the difference lies in the drafting of any such provision, and that such a provision should be drafted in accordance with the style of the Australian Act and legislative history.

4. The ADA supports the introduction of a specific exception for time-shifting television and radio broadcasts. Any such provision should not exclude purposes which do not fall under the realm of ‘private copying’. To so limit such a provision would unnecessarily limit access to and dissemination of information. Furthermore it would hinder the functions of public institutions by effectively outlawing time-shifting by institutions on behalf of their patrons.

5. The ADA supports the introduction of a specific exception for format-shifting. Such an exception should not be unnecessarily limited to private use. Sound public policy grounds support format shifting by consumers, institutions, and private citizens, as discussed above. Additionally, format shifting is integral to the preservation functions of institutions which many are mandated to undertake pursuant to statute. The ambiguity that currently exists in relation to whether much preservation copying is in fact legal is inconsistent with a primary function of many institutions.

6. The ADA submits that the Act should be amended to include a specific exception allowing back-up copies to be made of all digital material acquired or purchased by consumers and educational and cultural institutions. This is a necessary extension of the Act into the digital environment where failure of digital systems can result in loss or damage of material.

7. The ADA opposes any amendment of the Act to include a statutory licence for private copying. The High Court has already stated that it would be unconstitutional for the Government to place a tax on blank media.⁸⁷ Consumers purchase blank media for a range of purposes other than copying copyrighted material. Such legitimate activities should not be the subject of rent-seeking or taxation by rights holders. Furthermore, implementation of such a complex administrative scheme would create more problems than it could fix. The ADA refers to SISA’s analysis of some such problems:

“Which media would be taxed? All storage media? All devices capable of storing copyright material? All devices with hard drives? Based on what? Size of the storage capacity? What about people who always use storage devices for their own lawfully acquired content? Are they exempt?”⁸⁸

8. The ADA supports the introduction of the following additional specific exceptions being introduced:

⁸⁷ Australian Tape Manufacturers Association Ltd and Others v. The Commonwealth of Australia (1993) 176 CLR 480 FC 93/004

⁸⁸ Submission of the Supporters of Interoperable Software in response to this review.

USES	CONDITIONS
Orphaned works exception	Provided reasonable efforts have been made to locate the rights holder.
Preservation copying	Preservation purposes only
Back-up copying	All legitimately acquired digital material
Caching/temporary copying	No conditions
Sample copies/ Thumbnail images	For sampling purposes only
Transformative uses	Any uses

9. Options of reform and costs and benefits of such options are outlined above. To summarise in brief, costs of not updating our law and not extending our Act into the digital environment include:

- Stifling of technology: The Betamax case⁸⁹ legalised time-shifting in the US over 20 years ago.
- Risk of policy processes frustrating legal change required with rapid technological advances: Debate over the reverse engineering exception (section 47D) took 10 years to debate in Australia;⁹⁰
- The administrative burden of impractical provisions: For example, section 49 (7A)(d) requires librarians to destroy electronic copies of works even if they know they will have to digitise that same work again the following week for another request.
- Restricting functions of educational and cultural institutions restricts the ability of the Australian public to access information. It risks deterioration of cultural material for future generations, and results in Australia not being able to effectively compete with other jurisdictions in a rapidly globalising environment.

The benefits of maintaining a closed and restricted set of exceptions:

- Users are certain about what they cannot copy;
- Rights holders are certain about what users cannot copy.

The benefits of introducing more statutory licenses:

- An increased revenue stream for rights holders.

10. Other matters have been addressed above.

Summary and Conclusion

For the reasons outlined, the ADA would support the expansion of the current fair dealing exceptions according to the ‘hybrid’ model described.

⁸⁹ Sony Corporation v. Universal City Studios Inc, 464 U.S. 417 (1984)

⁹⁰ Jonathan Band, *Software Reverse Engineering Amendments in Singapore and Australia*, J. Internet L., Jan. 2000, at 17, 18.

