

**Fair use, fair dealing: The Copyright Exceptions Review and the  
Future of Copyright Exceptions in Australia**

**Background Paper to Oral Presentation**  
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## 1 Introduction

On Thursday, May 5 2005 the Commonwealth Government released an Issues Paper called *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*.<sup>1</sup> That paper is the subject of the afternoon session of SNAPSHOT 3.

This session is important, because getting the balance right in terms of copyright exceptions is vitally important to artists and creators, and all the other parties involved in the creative industries. The session is also very timely. Submissions to the government on this Issues Paper are due by **1 July 2005**.

The decision to initiate a review of the Australian copyright exceptions appears to be motivated largely by two factors:

1. The Free Trade Agreement with the US, and the adoption in Australia of some US-style copyright protection has caused people to consider – and Parliamentary Committees to recommend – the adoption of US-style defences which appear, in some respects, to be more generous to users;<sup>2</sup>
2. The associated realization, as a result of digital technologies and digital media like iPods, that vast numbers of Australians are infringing copyright all the time, by the most ordinary acts (like copying music to an iPod or taping a TV program to watch later).

The Issues Paper however ranges far more broadly than that, and essentially seeks information on any and all issues that are arising under the current exceptions in the *Copyright Act 1968*.

This background paper is not an argument for or against proposed changes to Australian law. Instead, I will lay out the issues so that readers and session attendees can make up their own minds. Specifically, I will:

1. Talk a little about the ‘bigger picture’ – the differences between fair use and fair dealing
2. Introduce, in broad terms, the way the law in Australia on copyright exceptions currently works
3. Consider some of the areas which are ‘live’ in this review – areas where Australian law has been criticized, or where changes that might be considered;

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<sup>1</sup> The Issues Paper is available at <http://www.ag.gov.au/agd/WWW/agdhome.nsf/0/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>

<sup>2</sup> A perception that is in some cases accurate, and in others based on misconceptions of US law, which is, itself, under pressure and constantly changing through court decisions.

4. Outline the process of the review, and the role that individual artists and arts managers might want to take in that process.

## 2 The ‘bigger picture’: Australia’s system vs a ‘fair use’ system

The ‘big question’ in the review – one that is attracting a lot of attention – is whether Australia should move from its current system of copyright exceptions, to a ‘fair use’ system. So from your perspective, it is important to think a little about what that means.

### 2.1 *Why have exceptions to copyright at all?*

Copyright law works by granting to authors (and copyright owners) certain exclusive rights in the works that they have created. Broadly, copyright owners are given exclusive rights to reproduce, communicate, perform, put online, broadcast, and adapt their works. Anyone wanting to do any of these things in relation to copyright material – or a substantial part of copyright material – must seek the permission of the copyright owner.

The law has a number of aims: to reward and recognise creators, and to provide incentives for creation and investment of copyright material. Copyright law also aims to fulfil certain broader social aims: importantly, to increase public access to a broader range of creative material.

However, it is universally recognised that if some rights in copyright material are a good thing, more are not necessarily better. Granting absolute rights to copyright owners to control every single use of copyright works would have significant costs. We therefore have various **exceptions and limitations** on those rights. We have these exceptions for a variety of reasons:

- **To allow creation of new material:** giving rights in copyright material has costs: it does increase the price of copyright material, and it can lead to significant costs in terms of obtaining permissions to use existing works. This can limit the ability of ‘new generation’ creators to build on what has gone before. If no one could ever quote an existing work, or if libraries and archives couldn’t do some basic things to make material available and preserve it, we would see less creation and less access. The **fair dealing** exceptions promote this value;
- **To promote the public interest in access to copyright material:** there is considerable social benefit in access to copyright material. We therefore have some exceptions for institutions that provide access – libraries, archives, cultural institutions, and educational institutions;
- **To recognise that in some circumstances, full rights are impossible or too costly:** In some cases, if permission had to be granted by every individual rights-holder, it would be too costly and those uses just wouldn’t happen.

The need to balance public interests in access with the rights of copyright owners has led to the creation of various **exceptions and limitations** to the copyright owners' exclusive rights.<sup>3</sup>

It is important to recognise that the context in which copyright operates is constantly changing and, in particular, in the last few years has changed as a result of digital technologies. Digital technologies change the cost of obtaining permissions, and the costs of enforcement, and hence may change the need for exceptions. The policy of the government thus far has been to extend the existing exceptions into the digital environment – although copyright owners have generally opposed this approach.<sup>4</sup>

## 2.2 *Different types of exceptions*

It is very important to recognise that there are different kinds of exceptions and limitations in Australian law. Exceptions or limitations may be:

- **Free or remunerated:** Some exceptions allow use without any payment at all to copyright owners (the 'free use' exceptions). In other cases, copyright owners' permission to use material is not required, but they must be paid (statutory licenses);
- **Specific or general:** exceptions to copyright law may be highly particularized, setting out in exact terms the situations in which they apply. This is the current model in Australia. Or, they can be drafted in an 'open-ended' way, so that exceptions apply to uses which are 'fair' according to the courts' opinion, applying certain listed criteria: the current model in the US.

## 2.3 *Current Australian law of copyright exceptions*

Before we think about whether there is a *problem* with exceptions in Australian copyright law, it is important to understand what the *current law* says. Australia currently has a mix of free and remunerated exceptions, but importantly, no open-ended exception. In other words, if your conduct does not fit in one of these defences, and it involves exercise of a copyright owners' rights, it is an infringement.

### 2.3.1 *The Free Use Exceptions*

The free exceptions under Australian law at the moment (situations where copyright owners do not get paid) are of many different kinds. There are many, many small and specific free exceptions – outlining all of them would require a much longer paper. The most important, however, are the fair dealing exceptions, and the libraries and archives exceptions.

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<sup>3</sup> eg, Fair dealing, provisions for educational institutions, systems for persons with disabilities, systems for use by governments, and the library and archive provisions.

<sup>4</sup> The policy of the government was reflected in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

### Fair dealing

Fair dealing allows people to deal with copyright works (copy, communicate, broadcast etc) for certain specific purposes, without the permission of the copyright owner. The permitted purposes are:

- Research or study
- Criticism or review
- News reporting
- Giving professional legal advice

Use must be for one of these purposes, it must comply with any conditions in the legislation,<sup>5</sup> and must also be 'fair'. 'Fairness' depends on a variety of factors, including:

- The nature and character of the dealing;
- The proportion of the work taken;
- The effect of the dealing on the market for the copyright work; and
- The possibility of obtaining the work within a reasonable time at a ordinary commercial price.<sup>6</sup>

The fair dealing exceptions reflect the importance to society of certain activities – research, criticism, news reporting. They also promote the **creation of new works**, by ensuring that creators do not have to seek licenses in situations where it would be too expensive, or a license might not be forthcoming ('I want to take a bit of your work to criticize you, is that ok?').

### The Libraries and Archives Provisions

A second set of free exceptions under current Australian copyright law relates to certain activities by libraries and archives (broadly defined to include museums and public galleries). These exceptions are designed to promote public interests in access to material, and allow cultural institutions, libraries, and archives to make some limited uses of material without paying or seeking permission. They cover such activities as making preservation copies; making copies for library users or for delivery to other libraries.<sup>7</sup> In 2000, the library and archives provisions were extended to the digital environment, to allow institutions to make preservation and other copies electronically.<sup>8</sup>

### Other free exceptions

There are a range of other miscellaneous free exceptions in Australian law. They include:

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<sup>5</sup> For example, in some cases (such as the reporting of news), attribution is required.

<sup>6</sup> Strictly speaking, these factors are only applicable to the fair dealing exception for research and study under s 40 of the *Copyright Act 1968* (Cth). However, since all defences involve the concept of 'fairness', to some extent these factors are generally applicable.

<sup>7</sup> See generally Andrew Kenyon and Emily Hudson, 'Copyright, Digitisation and Cultural Institutions', Intellectual Property Research Institute of Australia Occasional Paper No. 3/04, at 7-8.

<sup>8</sup> *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

- Certain temporary copies made in the course of technical processes, such as during lawful communications online, or as part of a technical process of using a lawful copy of a work (eg, playing a lawfully purchased DVD);<sup>9</sup>
- Certain uses of computer programs, including making back up copies, making interoperable products, correcting errors etc;<sup>10</sup>
- Certain uses of broadcasts, such as playing where people sleep;<sup>11</sup>
- Various uses of artistic works, including taking photos, incidental filming.<sup>12</sup>

Some of these exceptions recognise important public or social interests (eg, the right to use copyright works to make interoperable computer programs reflects society's interest in free competition in software and the creation of interoperable programs). Others were created to accommodate industry practices (eg, the exception for lawful communications) or where the costs of copyright would outweigh the benefits (the visual arts exceptions<sup>13</sup>).

### 2.3.2 *The remunerated 'exceptions' to copyright rights*

The other kind of 'exception' or limitation that Australia has is remunerated exceptions. These are partial limitations to copyright owners' rights: you do not need the permission of the copyright owner, but you do need to pay - either at a rate agreed with the copyright owner, or at a rate set by the Copyright Tribunal.

Statutory licenses currently apply to a small set of situations:

- Educational copying: both analogue and digital copying by both schools and universities;<sup>14</sup>
- Broadcasting sound recordings;<sup>15</sup>
- Copying to assist persons with a disability;<sup>16</sup>
- Retransmission of works included in free-to-air broadcasts;<sup>17</sup>
- Recording cover versions of musical works.<sup>18</sup>

## 2.4 *The 'fair use' argument*

As this outline makes clear, the current situation in Australia is that we have a specific list of things people are allowed to do with copyright works. A 'headline issue' in the current

<sup>9</sup> Eg *Copyright Act 1968* (Cth) ss 43A, 43B

<sup>10</sup> *Copyright Act*, Part III Div 4A

<sup>11</sup> *Copyright Act*, Part III Div 4

<sup>12</sup> *Copyright Act* Part III Div 7

<sup>13</sup> But see the Myer Report (*Report of the Contemporary Visual Arts and Craft Inquiry* (2003), which recommended that the 'anomaly' whereby people can commercially exploit the copyright in **sculptures on public display** without reference or payment to the artist be repealed.

<sup>14</sup> *Copyright Act* Part VA and VB

<sup>15</sup> *Copyright Act* ss 108 - 109

<sup>16</sup> *Copyright Act* s 47A and Part VB

<sup>17</sup> *Copyright Act* Part VC

<sup>18</sup> *Copyright Act* Part III Div 6

debate is this: should Australia adopt a different, general, open-ended US-style ‘fair use’ regime? It is important to think about what that would mean.

In the United States, under §107 of their copyright law, a user may make ‘fair use’ of a copyright work without infringing. The law lists certain types of uses which may be fair (such as news, criticism, teaching, scholarship or research), but this list is open-ended: it does not preclude other uses being considered ‘fair’.

In determining whether a use is fair, the court is required to consider 4 factors:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.<sup>19</sup>

There are four key advantages in introducing a fair use defence or open-ended defence:

1. **Flexibility:** this is the main advantage. We do not have to foresee every possible use that we might want to encourage, but can leave it to the courts to apply the defence at some later stage;
2. **Legislative Simplicity:** one thing that happens when you try to create specific exceptions to copyright is that they become highly complex, as a result of interest group lobbying and the process of ‘negotiating’ legislation. An open-ended exception can remove that complexity from the Act;
3. **Less frequent review:** the government does not have to review the legislation every time a new issue comes up;
4. **Covering problem areas without fighting with the US:** a fair use exception is probably the only kind of exception we could introduce without US opposition. The FTA gives the US considerable ability to complain about any changes to our copyright law. This is one they couldn’t complain about, because it is something they have themselves.

However, fair use would also have **disadvantages:**

1. **Uncertainty:** until a court has adjudicated, you do not know whether you have a right to use the material;
2. **Overclaiming and Overcaution:** uncertainty may lead to overcaution – people seeking permission even where they almost certainly do not need it;<sup>20</sup>

<sup>19</sup> 17 U.S.C. §107, available at <[http://www4.law.cornell.edu/uscode/html/uscode17/usc\\_sec\\_17\\_00000107----000-.html](http://www4.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000107----000-.html)>

<sup>20</sup> In a recent paper in the US, US Circuit Court Judge and University of Chicago Scholar Richard Posner and copyright scholar William Patry found that ‘copyright overclaiming’ was not an uncommon occurrence in the real world. Copyright owners, they found, routinely advise would-be copiers that they are infringers even when a proposed copy would be a fair use. For example, the Copyright Society of the USA advises on its website that the copying even of just a few seconds of a movie or television program is not fair use. A

3. **Would our courts react well?** US courts are, in general, far more inclined to get into ‘policy debates’ than Australian courts ever are. So we cannot be sure how courts in Australia would react to a fair use doctrine until case-law develops. Under current law, fair dealing cases have come up only very rarely – it seems likely that the same would be true under a fair use defence.
4. **Would it fix the problem?** It is not clear that fair use would, in fact, cover all the problems that we could currently identify with the Australian law of copyright exceptions. Because fair use is a court-determined and court-developed doctrine in the US, it is often unclear whether particular uses would be allowed *even in the US* – let alone in Australia *if* we introduced a fair use defence.

Copyright owners have argued that introduction of an open-ended defence would lead to ‘a vast expansion of the exceptions to copyright owners’ rights’.<sup>21</sup> It is not clear whether this is accurate: the fact is that we do not know, until the situations where fair use applies are determined, either by legislation, legislative history, or the courts.

### 3 Identifying current problems

#### 3.1 *A framework for thinking about the issues*

Given the uncertainty surrounding the idea of a ‘fair use’ defence, the most important thing in the current review, in my opinion, is to identify where, if anywhere, there are problems in Australian law. It is unhelpful to get into a detailed debate about what US law currently allows. The best way to think about it is in two stages:

1. What specific problems exist, if any, with the current set of copyright exceptions?  
For example:
  - a. Are there uses of copyright works which should be allowed without permission and/or without payment to copyright owners, which are not allowed under our current law?
  - b. Are there uses of copyright works which are allowed under current law without permission and/or payment, but shouldn’t be?
2. Should these uses require payment to copyright owners or not?
3. What is the best way, consistent with Australia’s international obligations, to fix any specific issues identified – is it best to:
  - a. Adopt a general, open-ended copyright exception like fair use?

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documentary maker was told he had to pay US\$25,000 for 3 seconds of a television program playing in the background of a scene in a documentary. See William Patry and Richard Posner, ‘Fair Use and Statutory Reform in the Wake of *Eldred*’ (2004) 92 *Cal L Rev* 1639, 1654-1659.

<sup>21</sup> Australian Copyright Council, *Response by Australian Copyright Council to CLRC report “Simplification of the Copyright Act 1968: Exceptions to the Exclusive Rights of Copyright Owners”*, 1999, available at <<http://www.copyright.org.au/pdf/acc/Submissions/X9902CLRC.pdf>>

- b. Introduce new specific exceptions, and/or amend existing exceptions?

Artists, and arts managers, and the people of the Arts Law Centre, are I think well-placed to think particularly about this first question, because they are the ones on the ground, dealing with these issues day to day.

In this spirit, what I will do now is to outline a few, specific areas where the law is arguably unhelpful, that have been raised in discussion, and so might be worth thinking about.

### 3.2 *Private copying: time shifting, format shifting and other private copies*

#### 3.2.1 *The issue*

The ‘headline issue’ in the current review is private copying. It was various Senators’ shock at learning that they were ‘serial copyright infringers’ because they tape programs from the TV to watch later in part that caused them to think seriously that it might be a good idea to adopt a US-style fair use defence in Australian law.

There are various kinds of private copying:

- **Time-shifting:** making a copy of a (transitory) copyright work in order to enjoy it later: in particular, taping a broadcast (radio or television) to listen to or watch at a more convenient time
- **Format-shifting:** copying material from one format to another: eg copying a CD onto an iPod or other digital music player, or on to the laptop, so it can be more easily transported.
- **Back-up copying:** where a consumer makes a copy of purchased copyright material in case the purchased original is lost or damaged.

Under current Australian law, all of these copies involve infringement of copyright material.<sup>22</sup> One reason why the personal copying issue has been a particular focus recently is because it is an area where the American copyright system is (slightly) more user-friendly than the Australian one. So in the US:

- There is case-law holding that taping a television program to watch later (ie, time-shifting) is a ‘fair use’ and so not a copyright infringement under US law;<sup>23</sup> and
- The official position of the Record Industry Association of America (RIAA) is that it if you want to ‘take your own CDs and make copies for yourself on your computer or

<sup>22</sup> There is a limited exception under s 111 of the *Copyright Act 1968* (Cth) which allows individuals to copy broadcasts for private/domestic use. However, that exception applies only to the broadcast – not to the underlying works (eg the movies or television programs shown). In relation to back up copies, there is an exception to allow back up copies of computer programs, but not of any other form of copyright work (s 47C *Copyright Act 1968* (Cth)).

<sup>23</sup> *Sony Corp of America v Universal Studios, Inc* 464 US 417 (1984). Whether the same holding would apply today has been questioned by some.

portable music player, that's great. It's your music and we want you to enjoy it at home, at work, in the car and on the jogging trail.'<sup>24</sup> By contrast, in Australia, ARIA's position is that 'As a consumer, the purchase of a CD only gives you the right to own the physical disc, to play it privately, and to pass on the same physical disc to another person. You have not bought the right to make ... copies... This means that copying the music on the CD, without the permission of all relevant copyright owners, is an infringement of copyright.'<sup>25</sup>

It is worth noting that it is not only in comparison to the US that the Australian position looks anomalous. There are many countries where private copying is allowed. In Canada and in many European countries, for example, there is a levy on recording media (like blank CDs). The proceeds of the levy are distributed amongst copyright owners. Consumers under such systems are allowed to make personal copies without infringing.

### 3.2.2 Options for reform

The *problem* in relation to private copying is very easy to identify. The *solution* is nowhere near as simple. There are a number of options for dealing with the problem of private copying.

We could **leave the status quo**, hoping that copyright owners would, in the near future, introduce sufficient reasonable 'legal' alternatives that consumers would no longer need to engage in copyright infringement to enjoy their works. In other words, we could leave it to the market to work out what consumers wanted and provide that.

We could create a **full, free exception** to copyright for private copying, under which all personal copying of any kind of copyright material would no longer be a copyright infringement. This would ensure that Australian consumers were no longer 'serial infringers' – but it would not provide any remuneration to the creators of copyright works, and might lead to less production of copyright works. It may also be contrary to our international obligations.

We could create **specific exceptions for certain kinds of personal copying**. For example, we might say that making back up copies, or taping television programs to watch later is not copyright infringement, but wholesale copying of your CD collection to your iPod is copyright infringement. This might ensure the market can still operate in some areas (like digital music), but also allows consumers to do certain things which seem more justifiable. It would remove the current hideous anomaly in Australian law without necessitating a whole new system.<sup>26</sup>

Or, we could create a **statutory license** – in other words, a levy system. Under this kind of system, a levy would be imposed on certain media (CD-Rs, DVD-Rs, perhaps digital music

<sup>24</sup> RIAA FAQs, available at <<http://www.riaa.com/issues/ask/default.asp#stand>>

<sup>25</sup> <<http://www.aria.com.au/pages/faq.htm#Q4>> The contrast is pointed out in a post on my weblog: <[http://weatherall.blogspot.com/2005\\_04\\_01\\_weatherall\\_archive.html#111291552929109710](http://weatherall.blogspot.com/2005_04_01_weatherall_archive.html#111291552929109710)>

<sup>26</sup> New Zealand has proposed something along these lines.

players and memory devices). The proceeds of the levy would be distributed by the collecting societies, like APRA. In return, consumers would have the right to make private/personal copies.<sup>27</sup>

There are two key issues that need to be dealt with in any consideration of the private copying problem:

1. **Should users pay** for the privilege of making private copies (whether back up copies, time shifting, or format shifting copies)? That is, should there be a remunerated exception here, where some pot of money is created so that copyright owners are compensated for these uses that may interfere with their markets? In the US, some of these uses are free; others are not. In Canada and some European countries, private copying is allowed under a levy system, where levies are paid on digital media.
2. **If users are going to pay**, how should this be administered? What devices are going to be subject to a levy? Which copyright owners should benefit?

Historically, the copyright collecting societies like Screenrights have been quite in favour of a levy scheme; ARIA have been opposed. The Australian Consumers Association have indicated that they could live with a levy but only if consumers did not end up paying a levy for private copying rights that were taken away by technological protection measures like copy prevention technologies.<sup>28</sup> Paying a levy, without being able to copy, is the least desirable of all possible worlds. It is an incredibly complex issue.

The Issues Paper is not enthusiastic about the idea of a levy, pointing to ‘encouraging signs’ that licensing, technology are providing a kind of market solution. If I had to predict an outcome now, I would say that we will get a narrow defence covering some private copying (eg, time shifting) in cases where copyright material is not protected by technological measures. This would mean the law would not look *quite* so out of step with the US and the rest of the world, but without going to the full extent of a levy.

### 3.3 *The orphan works and ‘abandonware’ issue*

#### 3.3.1 *The issue*

Another issue being raised in the context of the current review is the so-called ‘orphan works’ issue. Both JSCOT and the Senate Select Committee make reference to the issue of orphan works in their recommendations about copyright exceptions.<sup>29</sup>

<sup>27</sup> This option is canvassed in some detail in the 2002 proposal of the Copyright Collecting Societies, available as an annex to the Screenrights Submission to the Senate Select Committee: available at <[http://www.aph.gov.au/Senate/committee/fretrade\\_ctte/submissions/sub535.pdf](http://www.aph.gov.au/Senate/committee/fretrade_ctte/submissions/sub535.pdf)>

<sup>28</sup> In a recent case in France, a court held that technological measures adopted by the copyright owner unlawfully interfered with the ‘right’ to make private copies.

<sup>29</sup> See Joint Standing Committee on Treaties, *Final Report on the Free Trade Agreement between Australia and the United States of America* (May 2004), Recommendation 17; see also Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report, Recommendations of the Labour Senators*, Recommendation 10 (the Liberal Party senators adopted the JSCOT Recommendations).

The ‘orphan works’ issue refers to the problem of old copyright works. In fact, we need to differentiate between two different situations:

- **Orphan works:** works for which it is difficult, or impossible to locate a copyright owner. This may be because the owner is dead, or the company which owned copyright has ceased to exist, or has changed its name.
- **‘Abandonware’ and other ‘abandoned’ works:** copyright material which is no longer being exploited or is no longer in print/available, but which is still within the copyright term. ‘Abandonware’ is a term used in relation to software which has been ‘abandoned’ – is no longer available or no longer being supported. But of course there are many copyright works of other kinds which fit the same description.

The orphan works problem has been around for a very long time: one of the costs of copyright is that it protects the worthless as well as the valuable. More recently, however, three factors exacerbate the problem of orphan works and ‘abandonware’:

- **No registration system:** copyright exists regardless of any formalities – in other words, registration is not required. This has two effects: (1) even the most worthless material is still protected by copyright, and (2) owners are more difficult to find than the owner of, say, a trade mark or a patent (where you can look them up on the register). As a member of the Berne Convention Australia is not able to introduce registration.
- **Copyright term extension:** with the conclusion of the FTA with the United States, Australia has had to extend its copyright term from “life plus 50 years” to “life plus 70 years”. This simply exacerbates a problem that already existed – the older the works that are still within copyright, the more likely it is that many will become ‘orphans’;
- **Computer programs and rapid obsolescence:** Some works – in particular software – are only likely to have a very limited ‘shelf-life’. But some software remains of interest to a niche market long after it is not interesting to the mainstream. A good example here is the old ‘Arcade-style’ computer games. Go online and you can find any number of sites devoted to old Atari or Commodore 64 games.

The problem with orphan works and abandonware is quite simple:

- They are worthless to the copyright owner: either because the copyright owner no longer exists (the company went out of business), or the work has been ‘abandoned’ (in the sense of no longer exploited). That means that the copyright owner will not be making the work available and will not seek to be making money out of the work; **but**
- Others who may have sufficient interest, or incentive, to make the works available (for example, by setting up an abandonware website) face the near-impossible task of obtaining permission from the copyright owners (who, in the case of orphan works at least, may not even exist) before they can do anything with the work.

The ‘orphan works’ problem, therefore, is a classic situation where the copyright balance fails. In general, copyright increases public access to works by giving authors incentives to create and incentives to make works available. But protecting orphan works gives no incentive for more creation or exploitation of the work. By definition, these works are not valuable to the copyright owner. But copyright stands in the way of the copyright goal of increasing public access to copyright works, because the necessary permissions for use cannot be obtained at a reasonable cost.

The orphan works issue is the real cost of copyright term extension. The number of works which are still generating royalties or remuneration 65 years after the death of the author is very limited, as CAL studies done in the context of the FTA have shown. But the number of works ‘needlessly’ covered by copyright is significant. All this at a time, of course, when technology makes it increasingly possible to give very broad access to copyright material – eg by putting material online.

How serious is the problem? It is far from clear. However, to get some idea: according to a recent paper by Patry and Posner, 3.35 million works are maintained in copyright, to protect 77,000 on which copyright might be renewed if such was still required.<sup>30</sup> The Copyright Office over in the US is currently undertaking a review of the orphan works issue,<sup>31</sup> and in the context of that review, many people have made submissions pointing out how orphan works affect their interests. Many examples of orphan works problems seem to come from the area of film, it seems: perhaps because there is a strong interest in using old films in new documentaries and for enthusiasts, but it is not uncommon that the owner is unidentifiable.

### 3.3.2 *Options for Reform*

There are a number of reforms that could be made to deal with the orphan works issue. The issues to deal with here are

- You want potential users of potential ‘orphan works’ to have to make some effort to find the owner of a copyright works. In other words, you don’t want there to be, for example, some kind of presumption that a work is orphan just because it is old;
- But you don’t want to set the requirement so high that the costs will prevent use of these old and (to the copyright owner) worthless works;
- You need to work out what to do about cases where a work is ‘revived’, and the copyright owner wants to come back for a ‘cut’ of the new market;
- You need to take into account the fact that Australia is operating here in an international context: if you create a complex system here, this could in some cases be well-nigh useless unless orphan works and/or abandonware can be used overseas.

Options for reform include:

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<sup>30</sup> William Patry and Richard Posner, ‘Fair Use and Statutory Reform in the Wake of *Eldred*’ (2004) 92 *Cal L Rev* 1639, 1641-42.

<sup>31</sup> See <http://www.copyright.gov/orphan/>

- Adopt a fair use defence in the style of the US, in the expectation that at least some orphan works and abandonware situations will be covered by such a defence (and, perhaps, enumerating ‘orphan works’ as an example of a possible fair use);
- The creation of a form of ‘statutory license’ – where people desiring to use orphan or unavailable works may do so, subject to making a payment into some fund which can be claimed by copyright owners who turn up later;
- The creation of a kind of ‘fair dealing’ defence, as proposed by Patry and Posner, whereby someone desiring to use an old work has a duty of ‘reasonable inquiry’, requiring would-be copiers to make reasonable efforts to seek an owner and obtain a license before use;<sup>32</sup>
- An Act along the lines of the *Public Domain Enhancement Bill* proposed in the US by Lawrence Lessig, which would require registration of copyright works and the payment of a token fee (\$1) after the Berne term of protection (ie, after 50 years after the author’s death).

In choosing what to do, consideration must be given to:

- What the US does as a result of its current inquiry; and
- Whether any system will apply to unpublished/unexploited works, as well as truly ‘orphan’ works.

### 3.4 *Fair dealing and the creation of new/transformational works*

#### 3.4.1 *Are the fair dealing provisions too narrow?*

A third issue regarding copyright exceptions which is particularly relevant for creative artists and the creative industries is whether the fair dealing provisions strike the right balance in protecting existing creators while allowing new creations that make use of existing works.

The most important recent case interpreting the fair dealing provisions in Australia is *The Panel* decision.<sup>33</sup> The case concerns the television show *The Panel*, and its use of a series of excerpts from Channel 9 television shows. The court had to consider whether the showing of short excerpts counted as ‘criticism or review’ or the ‘reporting of news’. The court drew on a tradition in Australian courts of using dictionary meanings of ‘criticism’ and ‘review’ – arguably quite narrow definitions.<sup>34</sup> The result in the case was that some uses *were* fair dealing (where judges thought that there was sufficient ‘passing of judgment’ or clear

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<sup>32</sup> William Patry and Richard Posner, ‘Fair Use and Statutory Reform in the Wake of *Eldred*’ (2004) 92 *Cal L Rev* 1639

<sup>33</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417, [2004] FCAFC 146.

<sup>34</sup> See Michael Handler and David Rolph, ‘A Real Pea Souper: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *MULR* 381. The ‘tradition’ of using dictionary definitions comes from the approach adopted by Justice Beaumont in *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625

criticism/review involved), and some were not.<sup>35</sup> The case is currently back in front of the Full Federal Court after the interpretation of some other provisions was overturned by the High Court. A judgment is expected soon.

This interpretation of fair dealing has particular impacts on creators who want to incorporate existing works into their creations. It is not clear whether fair dealing will allow a series of ‘transformative’ or creative uses of existing works such as:

- Satire and/or parody;<sup>36</sup>
- ‘humorous’ reporting of news and humorous criticism;<sup>37</sup>
- appropriation art (artistic works that ‘appropriate’ existing works and re-interpret them);<sup>38</sup>
- documentaries that incorporate existing material.

The result may be that, in cases of doubt, creators are required to obtain clearances from everybody – a process which can be very expensive.

Of course, the real question is **whether there are any problems here**. It may be that there is no real problem at all – that the practice of obtaining clearances is not a significant issue for the overwhelming number of creators; that it is simply an ordinary cost of the artistic ‘business’; that it is a requirement for any form of international distribution and so no reform of Australian law is required. While there are overseas studies which have found that the process of permission-seeking is a serious barrier to the creation of some kinds of works,<sup>39</sup> only creators and people who deal with this on a regular basis know whether there are significant issues here.

Other problems that have been discussed in relation to the fair dealing provisions in Australia are:

1. It appears, at least on current law, that the provisions do not clearly allow organizations or institutions to make copies on behalf of third parties, even though the third party will be using material for a permitted purpose (eg, a library cannot make a copy for a student under the fair dealing provision) – although this is not

<sup>35</sup> See the discussion in Michael Handler and David Rolph, ‘A Real Pea Souper: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 MULR 381

<sup>36</sup> Note that these two are treated separately under US law – ‘parody’, which comments on the work copied, may be fair use (eg, *Suntrust Bank v Houghton Mifflin* 268 F.3d 1257 (11<sup>th</sup> Cir 2001) (parodic novel treatment of ‘Gone with the Wind’ called ‘The Wind Done Gone’), whereas ‘satire’, where a work is copied to comment more generally on society, is not.

<sup>37</sup> In *The Panel*, while the court did not totally discount that news or criticism may be ‘humorous’, it did appear to conclude that in many cases, material was reshown ‘for its entertainment value’, disqualifying it from being fair dealing.

<sup>38</sup> For example, the situation in *Rogers v Koons* 960 F.2d 301 (2<sup>nd</sup> Cir 1992). In that case, sculptor Jeff Koons recreated a photograph by Art Rogers called ‘Puppies’ in a large, blue sculpture. US Courts held that Koons’ use was not, in fact, fair use, as it was not so much parody, but rather, satire – a comment on society at large, and not the particular work which had been copied.

<sup>39</sup> US Professor Peter Jaszi has recently done a study of film making in the US. The study found that copyright law did pose a significant barrier to the creation of some works.

entirely clear.<sup>40</sup> By contrast, the Canadian Supreme Court recently held that copies made on behalf of third parties can be fair.<sup>41</sup>

2. It is not clear whether ‘commercial’ research would be considered to fall within the concept of ‘research or study’;<sup>42</sup>
3. The provisions are insufficiently flexible in the case of exploitations and uses occurring in a digital environment,<sup>43</sup> or possibly, that they cannot be applied at all to the digital environment, where all uses can be individually licensed.<sup>44</sup>
4. They do not (unlike the US) cover activities like time-shifting and format-shifting (see above).

### 3.4.2 Options for reform

To the extent that there *is* any problem here, the question then arises – how should it be dealt with? There are in essence two options: (1) introduce a broad ‘fair use’ provision, in the style of the US, in the hope that uses like parodies might be covered, or (2) amend the current provisions to ameliorate any perceived negative effects, such as the arguably narrow interpretation of ‘criticism’ in the *Panel* case.

#### US-style fair use?

One way to deal with this issue would be via a fair use defence, as outlined in Part 2.4 above. This option would have all the advantages and disadvantages considered already.

#### Specific exceptions?

Another option would be to overturn, by amendment to legislation, the relatively narrow view adopted by Australian courts of the fair dealing defences. There are various actions that could be taken:

- We could include parody and/or ‘transformative uses’ as fair dealings;
- We could add parody to the fair dealing defences for criticism or review.

<sup>40</sup> *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625. The existing Australian case law is limited, and it is not entirely clear to what extent one person can copy on behalf of another under fair dealing: see CLRC, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) at 73-75.

<sup>41</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339

<sup>42</sup> The Australian Law Reform Commission (ALRC) has recommended that the Commonwealth should amend the *Copyright Act 1968* (Cth) (*Copyright Act*) to provide that research with a commercial purpose or objective is ‘research’ in the context of fair dealing for the purpose of research or study. It also recommended that in relation to databases protected by copyright, the operation of the provisions relating to fair dealing for the purpose of research or study cannot be excluded or modified by contract: Recommendations 28-1 and 28-2, ALRC, Report No. 99, *Genes and Ingenuity: Gene Patenting and Human Health* (2004).

<sup>43</sup> CLRC, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) at 49-51

<sup>44</sup> David Lindsay, *The Future of the Fair Dealing Defence to Copyright Infringement*, CMCL Research Paper No. 12 (November 2000); see also the proposal of CAL discussed in the CLRC *Simplification Report* at 6.20 – 6.22 (pp55-56). See also comments of the Intellectual Property and Competition Review Committee, in their Final Report, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, at 85.

- We could create specific exceptions to allow use of existing works in the context of valued new products such as documentaries.

No doubt there are other actions that could be taken. The viability of any such specific exceptions depends entirely on whether an existing problem is identified by creators in the current review.

#### 4 The process of the review and making submissions

As I noted at the outset, the Issues Paper was released at the beginning of May, and submissions are due by the beginning of July. A few points to note:

- Anyone may make a submission. You do not need a lawyer; it does not have to be 20 pages long. If you have encountered actual problems in real life with any of the existing defences, consider letting the government know.
- Your representative bodies are likely to make submissions: the Arts Law Centre, the Screen Directors' Association, the Screen Producers' Association, the Media Entertainment and Arts Alliance, the Copyright Council, the Writers Guild – all are on the list of bodies consulted by the government on the issues in this review. You can make inquiries, therefore, from your representative bodies about what they are doing on the review;

You may find out more about the review by:

- Looking at the Issues Paper, which is available free online from the Attorney-General's Website;
- Going to my website where I have made quite a few comments about the issues at hand;<sup>45</sup>
- Attending the seminar that CMCL/IPRIA are running in mid June; flyers have been placed in the 'showbags' and you can find more about the seminar on the CMCL or IPRIA websites;
- Looking at the Appendix to this paper where I outline past developments in this area. The current review is not taking place in a vacuum – the questions raised have been kicking around law reform bodies for some time now.

The issues in this review affect what you can do in your creative activities; they also affect what other people can do with your creative output. You might want to have a say.

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<sup>45</sup> My website, *Weatherall's Law*, is a weblog at <<http://weatherall.blogspot.com>>. I have put links on the lefthand sidebar to my website to the posts that concern the issues raised in the review. Three posts in particular concern this issue:

- 'The Fair Use Issues Paper – some initial thoughts' (6 May 2005) (summarising the Issues Paper) <[http://weatherall.blogspot.com/2005\\_05\\_01\\_weatherall\\_archive.html#111534990637909223](http://weatherall.blogspot.com/2005_05_01_weatherall_archive.html#111534990637909223)>
- 'A compendium of my posts in the last 12 months on copyright exceptions issues' (6 May 2005) <[http://weatherall.blogspot.com/2005\\_05\\_01\\_weatherall\\_archive.html#111534949411968236](http://weatherall.blogspot.com/2005_05_01_weatherall_archive.html#111534949411968236)>
- 'Some thoughts on submissions to make on copyright and fair use' (13 May 2005) <[http://weatherall.blogspot.com/2005\\_05\\_01\\_weatherall\\_archive.html#111593943799749478](http://weatherall.blogspot.com/2005_05_01_weatherall_archive.html#111593943799749478)>
- 'Links to other peoples' thoughts on copyright exceptions' (15 May 2005) <[http://weatherall.blogspot.com/2005\\_05\\_01\\_weatherall\\_archive.html#111613917123771238](http://weatherall.blogspot.com/2005_05_01_weatherall_archive.html#111613917123771238)>

## **Appendix 1: A brief history and some more resources on copyright exceptions**

The Issues Paper does not come out of nowhere, and should not be viewed in complete isolation. In fact, Australia has been having the debate about the appropriate scope of copyright exceptions, generally and in a digital environment, for quite some time now. This Annex to my background paper outlines some of the past developments, and debates, for people who wish to pursue the question further.

### ***The immediate impetus for this review: the Free Trade Agreement***

The immediate impetus for this review now came from the Free Trade Agreement between Australia and the United States of America.<sup>46</sup> That Agreement contained a very detailed chapter on IP law,<sup>47</sup> and resulted in some quite significant changes to Australia's copyright law.<sup>48</sup> All of the changes to copyright law were in the direction of *strengthening* copyright owners' rights, and, as a result, questions were raised about whether those rights had become 'too strong', and 'upset the balance' in Australian copyright law. In particular, in the proceedings before the two Parliamentary Committees to consider the FTA, many persons making submissions pointed out that while Australia was adopting many of the aspects of US law which strengthen copyright owner rights, we were not adopting the US exceptions which, in some key respects, are more generous to users than Australian law.

As a result, the Final Reports of the two Parliamentary Committees which reviewed the FTA *both* raised concerns about the issue of balance. The Joint Standing Committee on Treaties (JSCOT) made three relevant recommendations:<sup>49</sup>

#### **Recommendation 16**

The Committee recommends that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes.

#### **Recommendation 17**

The Committee recommends that the changes being made in respect of the *Copyright Act 1968* replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair-use, to counter the effects of the

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<sup>46</sup> Australia-United States Free Trade Agreement (Washington, 18 May 2004) [2004] ATS 1, entered into force 1 January 2005.

<sup>47</sup> Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (hereafter, 'Senate Select Committee'), *Final Report*, August 2004, 45 [3.1].

<sup>48</sup> The *USFTA Act* consisted of 9 Schedules, containing the necessary provisions to amend Australian legislation to fulfil Australia's obligations under the AUSFTA: see Explanatory Memorandum, US Free Trade Agreement Implementation Bill 2004 (Cth) 3. Three of those schedules deal with IP rights directly: Schedules 3 (Geographical indications for wine), 8 (patents) and 9 (copyright). Of the 167 pages of the Bill, 100 (or 67 per cent) deal with IP; of those, 98 pages deal with changes to IP legislation.

<sup>49</sup> Joint Standing Committee on Treaties, *Final Report on the Free Trade Agreement between Australia and the United States of America* (May 2004)

extension of copyright protection and to correct the legal anomaly of time shifting and space shifting that is currently absent.

### **Recommendation 19**

The Committee recommends that the Attorney General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition.

The Senate Select Committee on the Free Trade Agreement between Australia and the United States of America ('Senate Select Committee') could not reach agreement on any specific recommendations, although the Labour Senators made recommendations not dissimilar to the JSCOT recommendations:

### **Recommendation 7**

Labor Senators recommend that the Commonwealth Government enshrine in the *Copyright Act 1968* the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic, research and related purposes. Labor Senators further recommend that the issue of such use of copyright material should be referred to the Senate Select Committee on Intellectual Property to investigate whether universities, libraries, educational and research institutions should be exempt from paying royalties after 50 years.

### **Recommendation 8**

Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate options for possible amendments to the *Copyright Act 1968* to expand the fair dealing exceptions to more closely reflect the 'fair use' doctrine that exists in the United States and to address the anomalies of 'time shifting' and 'space shifting' in Australia.

### **Recommendation 10**

Labor Senators recommend that the Senate Select Committee on Intellectual Property should investigate the possibility of establishing in Australia a similar regime to that set out in the *Public Domain Enhancement Bill 2004 (US)*, with a view to addressing some of the impacts of the extension of the term of copyright, in particular the problems relating to 'orphaned' works.

The Coalition went to the election in October of last year with an Arts policy, *Strengthening Australian Arts*, that included an undertaking to examine the issue of whether the *Copyright Act 1968* should include a general exception which would facilitate the public's access to copyright material in the digital environment. And then in February 2005, when the Attorney-General Philip Ruddock opened the ACIPA Copyright Conference in Brisbane, he announced that there would be a review of copyright exceptions this year, with an Issues

Paper to be produced by the Attorney-Generals' Department.<sup>50</sup> This promise was fulfilled when the Issues Paper was made available in May 2005.

The issues raised in the Issues Paper are, however, of much longer gestation than that, however. Various of the issues raised in this review have been bubbling away for quite some time now.

### ***Relevant Government and Law Reform Reports***

As noted already, debates about copyright exceptions have been kicking around for some time in Australia. Here, I list the relevant government and law reform reports that have addressed the issue:

- The Copyright Law Review Committee Report on the Simplification of the Copyright Act (Part 1: Exceptions) (1998) recommending the creation of an open-ended US-style 'fair use' exception (consolidation of the existing fair dealing exceptions). While published in 1998, it is still under review by the Australian government;<sup>51</sup>
- The Intellectual Property and Competition Review Committee Report (2000): recommends, in essence, ongoing monitoring of fair dealing issues;<sup>52</sup>
- The CLRC report on Copyright and Contract (2002): recommending that provisions be inserted such that contractual provisions that seek to make ineffective certain defences to copyright infringement (like fair dealing) be made ineffective/invalid/void. This report is still under review by the Australian government<sup>53</sup>
- The Digital Agenda Review (2004) (pdf): This report has a series of recommendations on the library, archive and educational copying provisions. It is still under review by the Australian Government;<sup>54</sup>
- The ALRC Report on Gene Patenting (2004): recommended that the Commonwealth should amend the Copyright Act 1968 (Cth) (Copyright Act) to provide that research with a commercial purpose or objective is 'research' in the context of fair dealing for the purpose of research or study. It also recommended that in relation to databases protected by copyright, the operation of the provisions relating to fair dealing for the purpose of research or study cannot be excluded or modified by contract;<sup>55</sup>

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<sup>50</sup> A transcript of the Attorney-General's speech is available at  
<<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/speeches>

<sup>51</sup> <http://www.ag.gov.au/agd/www/clrhome.nsf/AllDocs/6CF73AAA96DF123DCA256D270002DE38?OpenDocument>

<sup>52</sup> <http://www.ipcr.gov.au>

<sup>53</sup> <http://www.ag.gov.au/agd/www/clrhome.nsf/AllDocs/RWP092E76FE8AF2501CCA256C44001FFC28?OpenDocument>

<sup>54</sup> [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/\\$FILE/FOX+Final+reportpassword.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/$FILE/FOX+Final+reportpassword.pdf)

<sup>55</sup> <http://www.austlii.edu.au/au/other/alrc/publications/reports/99/>

- Final Report of the Joint Standing Committee on Treaties (2004): made three relevant recommendations (as noted above),<sup>56</sup>
- Final Report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (2004): (noted above).<sup>57</sup>

### ***The debate about the open-ended fair use exception***

Should Australia have an open-ended fair use exception? The debate on this point has been going on for some time here in Australia.

Back in September 1998, the Copyright Law Review Committee (CLRC) issued its first report on the *Simplification of the Copyright Act*. This first report was focused on the exceptions to copyright. The view of the CLRC was that an open-ended exception would be preferable to the current set of more specific exceptions because it would provide greater flexibility:

‘The Committee’s model is not limited to an exclusive set of purposes such as govern the extent of fair dealing as it currently applies. The Committee considers that the removal of such a limitation will provide greater flexibility by allowing courts to determine the existence of additional purposes that are regarded as falling within fair dealing. Only this approach will enable fair dealing to be adapted to changing technology and, in particular, will move fair dealing into the digital environment. The Committee’s recommended model simplifies the existing plethora of fair dealing provisions and addresses the real limitations of the current provisions, which are that they are inflexibly linked to specific purposes and are difficult to apply to new technologies.’<sup>58</sup>

The proposal of the CLRC was one similar to the model that applies in the US. In other words, there would be an open-ended exception, which would refer to certain purposes as ‘examples’ of what would constitute fair dealing, without precluding other purposes as being fair. There would be a list of factors to be taken into account in determining what is ‘fair’, just as there is under s 107 of the US Act.

### ***The debate about private copying***

Should Australia have an exception that would allow for private copying of copyright material? This issue too has a long history:

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<sup>56</sup> <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm>

<sup>57</sup> [http://www.aph.gov.au/Senate/committee/fretrade\\_cte/report/final/index.htm](http://www.aph.gov.au/Senate/committee/fretrade_cte/report/final/index.htm)

<sup>58</sup> Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) at 51.

- A 1986 Commonwealth Inquiry into the Arts recommended a private copying scheme in the context of home audio copying;<sup>59</sup>
- A blank tape levy was introduced, but was ruled unconstitutional by the High Court of Australia in 1993. The unconstitutionality of the levy was owing to the drafting of the Act. Most experts considered that a levy could be introduced which would avoid this problem, however, the Commonwealth did not move to re-introduce any kind of levy scheme;<sup>60</sup>
- In 2002, a group of Copyright Collecting Societies and copyright owners' associations<sup>61</sup> got together to propose a levy and further the debate on the issue.<sup>62</sup> They drafted a detailed submission and a proposal for legislation which was sent to the Attorney-General and the Minister for Communications, Information Technology and the Arts. The submission requested a review by the Copyright Law Review Committee on the issue of Private Copying. Neither Department responded to that submission.
- The issue arose again last year, when Phil Tripp, a Music Business Analyst and Commentator made a new submission for a levy on recordable media and digital players, with the money to go to copyright owners, and a right to make personal copies given to individuals.<sup>63</sup> ARIA opposed the proposal.

Comments about the operation of Australia's existing copyright exceptions also came up in the context of the 'Digital Agenda Review' – a review that occurred in 2003 of Australia's digital copyright laws which were introduced in 2000.<sup>64</sup>

So the Issues Paper does not come 'out of nowhere'. The issues here have been kicked around for quite some time. If there is a surprise, it is that the government has chosen to take this particular discussion 'in house', by having it run by the Attorney-General's Department, with no outside expert body to conduct the review.

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<sup>59</sup> *Patronage, Power and the Muse: Inquiry into Commonwealth Assistance to the Arts*, House of Representatives Standing Committee on Expenditure, September 1986 (Recommendation 24).

<sup>60</sup> *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480. Part VC was repealed by Act 107 of 1993, section 13.

<sup>61</sup> The Collecting Societies were: the Australian Performing Right Association (APRA) and Screenrights. The representative groups were the Australasian Music Publishers Association, the Screen Producers Association of Australia, the Australian Screen Directors Association and the Australian Writers' Guild.

<sup>62</sup> The Submission is available as an annex to the Screenrights Submission to the Senate Select Committee on the FTA, which is available (as a pdf) here:

<[http://www.apf.gov.au/Senate/committee/freetrade\\_ctte/submissions/sub535.pdf](http://www.apf.gov.au/Senate/committee/freetrade_ctte/submissions/sub535.pdf)>. That submission also contains a valuable history to the issue in Australia.

<sup>63</sup> See 'Free AU consumers to copy music for personal use: Proposal', Story in ZDNet Australia, available at <<http://www.zdnet.com.au/news/business/0,39023166,39150538,00.htm>>

<sup>64</sup> *Digital Agenda Review, Report and Recommendations* (Phillips Fox, January 2004) (reviewing the *Copyright Amendment (Digital Agenda) Act 2000* (Cth))