

Chapter Three

The Exceptions

The copyright balance

*'Recognising the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.'*²

3.01 The Preamble to the World Intellectual Property Organisation (WIPO) Copyright Treaty 1996 (WCT) provides a convenient introduction to the issues that the Copyright Law Review Committee is looking at in this reference. The WCT and the WIPO Performances and Phonograms Treaty (WPPT) were adopted by WIPO at a diplomatic conference in 1996.³ Together they are known as the Internet Treaties as they are directed at resolving some of the challenges for copyright and neighbouring rights brought about by the Internet.

3.02 Copyright has always been based on a notion of balance. That is, balance between encouraging competition and providing incentives in the areas of innovation and creativity on the one hand, and ensuring access to information on the other. In setting out the parameters of the Committee's inquiry, the terms of reference state that '[t]he Government regards it as important that Australian copyright law maintain an appropriate balance between the rights of copyright owners and the rights of copyright users'. However, the development of digital technology has seen a vigorous debate as to what an appropriate balance is under these new conditions. On the one hand, the risk of unauthorised, high quality reproductions increases exponentially. On the other hand, access to digital material can be denied by technological means without any assessment of the purpose for which that material is being accessed.

² Preamble, WIPO Copyright Treaty (WCT) 1996. The Preamble to the WIPO Performances and Phonograms Treaty 1996 (WPPT) contains a similar statement in relation to performances and phonograms: 'Recognising the need to maintain a balance between the rights of performers and the producers of phonograms and the larger public interest, particularly education, research and access to information'.

³ Following the 30th accession, the WPPT will enter into force on 20 May, 2002. The WCT entered into force on 6 March, 2002. Australia has yet to consider accession to the Internet Treaties.

3.03 Traditionally, one way in which the copyright balance has been achieved is by granting copyright for a limited term only, following which the material enters the public domain.⁴ Another way the balance is struck is through the idea/expression dichotomy, that is, the notion that copyright does not protect ideas, but the expression of those ideas.⁵ Recent cases have emphasised that determination of copyright infringement is a question of fact and degree, and that a blanket application of the idea/expression dichotomy can be misleading.⁶ In addition, the grant of exclusive rights to copyright owners under the *Copyright Act 1968* (Cth) (the Act) does not include the right to control certain uses of their works. These exceptions to the exclusive rights of copyright owners are a crucial part of the copyright balance and provide the focus for this reference.

3.04 Commentators dealing with this subject refer variously to limitations and exceptions.⁷ Spoor argues that out of the various phrases used, the term *exceptions* is

⁴ See ss. 33 and 34 of the Act in relation to works and ss. 93-96 in relation to subject matter other than works. While the term of protection is generally longer than in relation to registered forms of intellectual property, the term is finite and may not be renewed.

⁵ Commentators argue that the idea/expression dichotomy is one of the most quoted, yet most misleading statements. It is argued that this notion is likely to lead to confusion, particularly as it is sometimes applied to both the questions of subsistence of copyright (ie, to a determination of whether there is a work, and if so, to what extent it is original) and the issue of infringement (ie, the question of whether a substantial part has been taken: see, Lahore J. Copyright and Designs. 3rd rev. edn. Sydney: Butterworths, 1996, para. 34,105.

⁶ *Pacific Gaming v Aristocrat Leisure Industries Pty Limited* [2001] FCA 1636 26 November 2001. Sackville, Finn and Kenny JJ held that copyright in the appellant's written specifications for electronic gaming machines was infringed by the respondent competitor's specification, although the form of expression of the specifications differed. The judgment referred to a similar fact situation in *Ainsworth Nominees Pty Ltd v Andclar Pty Ltd* (1998) 12 IPR 551, where Sheppard J held that the respondent's use of a score table on its machines amounted to a reproduction of a substantial part of the specifications (even though the copying related to only one of the four sections). The court also made specific reference to further case law pointing to the misleading nature of the idea/expression dichotomy: 'The true position is that where an 'idea' is sufficiently general, then even if an original work embodies it, the mere taking of the idea will not infringe. But if the 'idea' is detailed, then there may be an infringement. It is a question of degree. The same applies whether the work is functional or not, and whether visual or literary...' (at 33, quoting Jacobs J in *Ibcos Computers v Barclay's Mercantile Highland Finance Ltd* [1994] FSR 275 at 291-2).

⁷ It has been argued that there is an overlap between the notions of 'exceptions' and 'limitations' in the introductory words of Art. 13 of the TRIPS Agreement 'in the sense that an "exception" refers to a derogation from an exclusive right provided under national legislation in some respect, while a "limitation" refers to a reduction of such a right to a certain extent': see, *United States-Section 110(5) of the US Copyright Act, Report of the Panel* (the Homestyle Case) WT/DS160/R, 15 June 2000 at 33. Ricketson also argues that a 'limitation' is a mechanism which reduces the exclusive character of an exclusive right (such as a licence which enables third party access to copyright material upon payment of a fee); while 'exceptions' to liability for copyright infringement are 'free-use' provisions: Ricketson S. International conventions and treaties. In ALAI study days—the boundaries of copyright: its proper limitations and exceptions, University of Cambridge, 14-17 September 1998. Sydney: Australian Copyright Council, 1999;3-26, 4-5.

probably more widely accepted as encompassing the various terminologies.⁸ However, Guibault contends that despite the use of ‘exceptions’ in international instruments, such as the Berne Convention, the term ‘limitations’ is a more neutral term as it is to be understood as permitting certain acts that will not constitute an infringement of copyright.⁹

3.05 A theoretical analysis of the policy basis of the exceptions in the later part of this Chapter indicates that some of the exceptions, such as those for fair dealing, are fundamental to defining the boundaries of copyright owners’ exclusive rights; others, such as the statutory licence schemes, reinforce copyright owners’ rights by providing a means of licensing copyright and securing the payment of equitable remuneration to the copyright owner. In the Committee’s view, these statutory licences are not true exceptions to the exclusive rights of copyright owners and might more appropriately be referred to as limitations. Having identified the theoretical distinction between the two concepts, when referring to exceptions in this Report the Committee includes both ‘exceptions’ and ‘limitations’.

3.06 Spoor has stressed the importance of the copyright exceptions in achieving balance, particularly noting that as copyright has developed into a bundle of strong, exclusive rights over time:

‘Far from being just a minor appendix to the copyright rule, let alone a mere blot on the copyright landscape, exceptions to copyright are an indispensable complement to the exclusive right. Together, they form an important balance between the author’s rights and the interests of the community.’¹⁰

The Committee observes that this comment supports the notion that the exclusive rights of copyright are partly defined by the exceptions, in that the rights only exist to

⁸ Spoor provides an example of the following UK report as an example of an attempt to distinguish between the various terminologies and as evidence of the wide acceptance of the term ‘exceptions’: ‘The exceptions are described in the 1988 Act as “permissions”. It should be noted that these are not exceptions to copyright, but a number of permitted acts which will not constitute an infringement of that copyright’: Spoor J. General aspects of exceptions and limitations to copyright: general report. In ALAI study days—the boundaries of copyright: Its proper limitations and exceptions, University of Cambridge, 14–17 September 1998. Sydney: Australian Copyright Council, 1999;27–41, 29.

⁹ Guibault notes the term ‘limitations’ is broad-based and encompasses all possible types of restrictions on the rights holder’s copyright, ranging from exemptions to the mandatory collective administration of rights: Guibault L. Copyright limitations and contract: an analysis of the contractual overridability of limitations on copyright. The Hague: Kluwer Law International, 2002, 16.

¹⁰ Spoor, *op. cit.*, p. 27.

the extent that they are not qualified by the exceptions.

3.07 The Government's concern to maintain an appropriate copyright balance is not new. For example, the Copyright Law Committee on Reprographic Reproduction (the Franki Committee) considered the notion of the copyright balance in its report in 1976.¹¹ The Franki Committee focused on the need to address the tension which developments in reprographic technology (increasing the speed, quality and cost-effectiveness of copying) had created between the expectations of copyright owners (to benefit financially from the greater dissemination of their works) and the needs of the community for ready access to information and knowledge. In stating its concerns, the Committee referred to the report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth (the Spicer Committee)¹² and its acknowledgment of the notion of the 'copyright balance':

'The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.'¹³

The 3-Step Test

3.08 While this Chapter will examine the nature and scope of these exceptions, it is important at this stage to note the role of Australia's international obligations in framing the exceptions in the Act and creating the current copyright balance. The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);¹⁴ the Agreement on Trade-Related Aspects of Intellectual Property

¹¹ Copyright Law Committee on Reprographic Reproduction 1976, *Report of the Copyright Law Committee on Reprographic Reproduction*, AGPS, Canberra—referred to here as the Franki Report.

¹² Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth 1959, *Report*, AGPS, Canberra—referred to here as the Spicer Report.

¹³ See, Franki Report, op. cit., para. 1.05 referring to the Spicer Report, op. cit., para. 13.

¹⁴ (1971) as amended on 28 September 1979.

Rights (the TRIPS Agreement),¹⁵ and the WIPO Copyright Treaty (WCT) form the overall framework for multilateral protection of copyright works. Article 13 of the TRIPS Agreement sets out a 3-step test for exceptions to the exclusive rights of copyright owners:

‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’

3.09 Although Art. 13 of the TRIPS Agreement has its origins in Art. 9(2) of the Berne Convention, it is a wider provision, applying not only to the reproduction right but also to all exclusive rights of owners of copyright in works.¹⁶ Article 10 of the WCT similarly deals with the application of the exceptions and limitations in the digital environment, namely, to the new right of communication to the public.¹⁷ The following Agreed Statement adopted by the Diplomatic Conference at Geneva in December 1996 at the same time the WCT itself was adopted is important in providing guidance on interpreting Art. 10:

‘It is understood that 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.

It is also understood that Article 10(2) neither reduces nor extends the scope of the applicability of the limitations and exceptions permitted by the Berne Convention.’

¹⁵ (1994).

¹⁶ Art. 9(2) of the Berne Convention requires three distinct and cumulative conditions to be satisfied before an exception to protection of reproduction rights can be justified under national laws: ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

¹⁷Article 10 states:

‘(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.’

3.10 The Committee notes that the obligations of Arts. 1-21 of the Berne Convention have been incorporated into both the TRIPS Agreement and the WCT.¹⁸ While the tests under Art. 13 of TRIPS and Art. 10 of the WCT are expressed slightly differently, Art. 9(2) is still part of those agreements and provides a convenient basis for analysis. The following discussion considers each stage of the test in turn.

First step: certain special cases

3.11 The condition that the use under Art. 9(2) of the Berne Convention is only allowed in ‘certain special cases’ has been interpreted by Professor Ricketson to mean that the use be for a specific and designated purpose.¹⁹ Similarly, the WTO Panel in the *Homestyle* case²⁰ interpreted the requirement that limitations and exceptions under Art. 13 of the TRIPS Agreement be confined to ‘certain special cases’ to also mean that the use be for a specific and designated purpose, in the sense that the exception should be clearly defined and narrow in its scope and reach.²¹ It is also suggested that the use is considered ‘special’ if it is also justified by some clear reason of public policy or other exceptional circumstance.²² In analysing the 3-step test under Art. 13 of TRIPS, the WTO Panel challenged the applicability of this second test. While the Panel declined to undertake the evaluation of local public policy and rejected interpretative tests based on the subjective aims of the legislation, it acknowledged that public policy purposes may be referred to so as to ascertain the scope of an exception and the original legislative intent.²³

¹⁸ Article 9(1) of the TRIPS Agreement obliges WTO Members to comply with Arts. 1-21 of the Berne Convention (with the exception of Art. *bis* on moral rights and the rights derived therefrom). Similarly, Art. 1(4) of the WCT requires Contracting Parties to comply with Arts. 1-21 of the Berne Convention.

¹⁹ Ricketson, 1999, *op. cit.*, p. 10.

²⁰ *Homestyle* case, *op. cit.* This case involved a dispute resolution Panel of the World Trade Organisation invalidating a US exemption applying to the public performance of radio or television transmissions of non-dramatic musical works on the basis that it contravened all three steps under Art. 13 of the TRIPS Agreement.

²¹ The Panel discussed the scope of the first arm of Art. 13 of the TRIPS Agreement (which is in similar terms to Art. 9(2) of Berne): ‘In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13’s first condition does not imply passing a judgement on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition’ (*ibid.*, at 33–4).

²² Ricketson, 1999, *op. cit.* p. 10.

²³ *Homestyle* case, *op. cit.*, at 33–4.

Second step: normal exploitation

3.12 ‘A normal exploitation of the work’ under Art. 9(2) of the Berne Convention refers to the ways an author might reasonably be expected to exploit their work in the normal course of events.²⁴ For example, photocopying a large number of copies without remuneration of the author may conflict with an author’s normal use of their work.²⁵ In the *Homestyle* case, the WTO Panel noted that while this interpretation of the second step provides an empirical test for determining the ‘normal exploitation of a work’, the phrase ‘normal’ can also be considered to have normative connotations.²⁶ It was also held that the phrase ‘exploit’ connotes ‘making use of’ or ‘utilising for one’s own ends’.²⁷ Thus, in determining what is the ‘normal exploitation’ of a copyright work regard must be had to not only existing, but also the potential uses of a work the copyright owner should be able to control.²⁸ However, the use will only be in conflict with the normal exploitation of the work if it enters into economic competition with the copyright owner, rather than because the use is one which could also be of commercial benefit to the copyright owner.²⁹

Third step: not unreasonably prejudicial

3.13 The third criterion under Art. 9(2) of the Berne Convention is that ‘the reproduction of such works...does not unreasonably prejudice the legitimate interests of the author’.³⁰ In 1967 the Stockholm Revision Conference was held to clarify and refine the substantive provisions of the Berne Convention, and considered, amongst

²⁴ Ricketson, 1999, *op. cit.*, p. 10.

²⁵ the *Homestyle* case referred to the Report on the work of the Main Committee I in the Records of the Intellectual Property Conference of Stockholm, 11 June – 14 July 1967, as providing this particular example of a conflicting use: *Homestyle* case, *op. cit.*, at 44–5.

²⁶ In terms of the Panel’s analysis of Art. 13 of the TRIPS Agreement.

²⁷ *ibid.*, at 44.

²⁸ *ibid.*, at 48–50.

²⁹ *ibid.*, at 48–49. Potential non-economic uses of a work, such as the market for criticism, review and research can also be considered as part of a normative analysis.

³⁰ A similar provision exists under Art. 10 of the WCT, which requires that ‘limitations of or exceptions to the rights granted to authors of literary and artistic works...do not unreasonably prejudice the legitimate interests of the author’.

other things, the issue of expressly protecting the right of reproduction.³¹ Initially, the fundamental assumption of the delegates at the Stockholm Conference was that any exception to the reproduction right would inevitably prejudice the author's rights; therefore, the word 'unreasonable' was introduced to qualify 'prejudice'.³² However, in terms of assessing the term 'legitimate' under Art. 13 of the TRIPS Agreement, the WTO Panel held in the *Homestyle* case that the term refers to the lawfulness of the author's use and the normative aspect of protecting interests that are justifiable in light of the objectives that underlie the protection of exclusive rights.³³ Thus, legitimate interests may cover both the economic and personal value of the rights to the copyright owner.³⁴ In terms of assessing the copyright owner's economic interests under Art. 13 of the TRIPS Agreement, the WTO Panel also held that:

'prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.'³⁵

3.14 In applying the 3-step test as a means of assessing the applicability of the exceptions to the rights of copyright owners in the digital environment, strong arguments have been made that 'digital is different' and the balance that existed in

³¹ Following this Conference, Art. 9 was introduced to expressly recognise the right of reproduction and Art. 9(2) was included to provide further exceptions to the reproduction right beyond those provided for by individual member countries: see, Ricketson S. *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. London: Kluwer, 1987; 117.

³² The recommendations of the Delegates at the Stockholm Conference to revise the initial 1886 Act were incorporated into Arts 1-20 and 22-26 of the Paris Act, 1971 (which informs the current Berne Convention) (*ibid.*, pp. 483-4).

³³ the *Homestyle* case, *op. cit.*, pp. 57-8.

³⁴ The WTO Panel held that the 'legitimate interests' of the right holder are not necessarily limited to economic rights (*ibid.*, p. 58). Ricketson also suggests that 'legitimate interests' extend to the non-pecuniary, as well as pecuniary interests of authors, in light of the obligation to protect moral rights under Art. 6*bis* of the Berne Convention. The personal or moral interests of authors would cover matters such as the need for proper acknowledgment of authorship and accuracy of reproduction: see, Ricketson, 1999, *op. cit.*, p. 11.

³⁵ *Homestyle* case, *op. cit.*, at 59.

the hard copy world should not be applied to the online world.³⁶ Such arguments point to the differences in publication, marketing and distribution of digital material as compared with print material, noting that what is ‘normal exploitation’ (to adopt the formulation used in the 3-step test) in the print sphere does not apply to the digital world.³⁷ Proponents of this argument have warned that failure to allow the digital marketplace to evolve before legislating for exceptions will put Australia in peril of failing ‘its international obligations, and, more importantly...Australian creators and industries’.³⁸

The copyright balance and the Digital Agenda amendments

3.15 Australia participated in the 1996 Diplomatic Conference and, while it has not yet ratified the Internet Treaties, the *Copyright Amendment (Digital Agenda) Act 2000* (the Digital Agenda Act), which came into operation on 4 March 2001, brings Australian law largely into compliance with these international instruments.³⁹ Commentators argue that the acknowledgment in the Agreed Statement of the

³⁶ Hugenholtz raises a concern with the extension of the print-based library exceptions to the digital environment, stating: ‘The physical content of a library...serves as a natural limit to the library privilege. By contrast a digital (or virtual) library is (at least potentially) *ubiquitous*, and open day or night to an unlimited global user group. The digital library has the potential of totally usurping the roles of publishers, vendors and other *primary* exploiters of copyright works’: Hugenholtz PB. Rights and limitations and exceptions: striking a proper balance, paper presented to IFLA/IMPRIMATUR Conference, Amsterdam, October 1997;1–14, 11–12. Lucie Guibault also argues that digital technology has changed the nature of production patterns and consumer habits to the extent that ‘[n]ot only can users easily reproduce works in countless perfect copies and communicate them to thousands of other users, but they can also manipulate works to create entirely new products’. Guibault also attributes the European Commission’s move to extend the reproduction right to cover the use of protected material and to prohibit the introduction of any private use exception, as an attempt to protect the economic interests of the computer program and database industries in light of the risks of massive reproduction in the digital environment: see, Guibault L. Limitations found outside copyright law. In ALAI study days—the boundaries of copyright: its proper limitations and exceptions, University of Cambridge, 14–17 September 1998. Sydney: Australian Copyright Council, 1999;42–54, 42.

³⁷ Commentators note that the question of what is a ‘normal exploitation’ of a work in the digital context is problematic, particularly as digital networks have increased the variety in the content and potential uses of a work: see, Ricketson, 1999, op. cit., p. 21.

³⁸ For an excellent exposition of this view see, McDonald I. Copyright in the new communications environment: balancing protection and access. Sydney: Centre for Copyright Studies, 1999;1–16, 16.

³⁹ The only outstanding matters are the term of protection of photographs and performers’ rights in sound recordings. The Government has sought submissions on both these issues in recent years. In its *Arts for All* policy in the November 2001 Federal Election the Coalition pledged to extend the duration of copyright in photographs to enable protection to be in line with that enjoyed by other creators. The Coalition Arts Policy also contained a commitment to work with the performing arts community to develop workable performers’ rights legislation which recognises the value attached to the recording and communicating of performances. Both reforms would bring Australian law into compliance with the Internet Treaties (see footnote 1 in relation to Australia’s ratification of the Internet treaties).

Diplomatic Conference that existing exceptions can be carried forward and ‘appropriately’ extended into the digital environment indicates that Contracting States cannot adapt existing exceptions and limitations that apply in relation to rights already protected by the Berne Convention to the new rights under the WCT in an automatic, unthinking fashion.⁴⁰

3.16 In approaching the Digital Agenda amendments, the Australian Government took the view that the balance in the print world should, as far as possible, be translated into the digital world. The specific exceptions created by the Digital Agenda amendments are discussed in detail in the second part of this Chapter. The Government has committed itself to a three-year review of the Digital Agenda Act. This review will look at the operation of the amendments in practice. The policy behind the legislation has, however, already been scrutinised by the Intellectual Property and Competition Review Committee (IPCRC – also known as the Ergas Committee) during the course of its review of intellectual property legislation under the Competition Principles Agreement.

3.17 On the issue of what the balance should be in the digital environment, the Ergas Committee noted that ‘[a]lthough technological change alters the protection needed, it does not undermine the vital nature of [copyright] limits. Rather, the limits must be maintained, within the changes imposed by technological development. The Committee consequently notes and welcomes the Government’s commitment to maintaining the balance between users and creators through the provisions set out in the Digital Agenda Act’.⁴¹ It further noted that fair dealing and other copyright exceptions are a key part of the copyright balance and that new technology does not change the importance of that balance and is not a reason for winding back the scope of fair dealing.⁴²

3.18 The Ergas Committee concluded that the Digital Agenda Act struck a reasonable balance between the interests of copyright owners and users. It stressed

⁴⁰ Ricketson, 1999, op. cit., p. 20.

⁴¹ Intellectual Property and Competition Review Committee September 2000, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, Commonwealth of Australia, Canberra, p. 34—referred to here as the Ergas Report.

⁴² *ibid.*, p. 92.

the importance to the Australian community of ensuring that libraries can discharge their functions as disseminators of information in an online world and stated that it did not believe that the libraries and archives provisions of the Act would detrimentally affect the capacity for development of online markets. It did, however, recommend that examination of the effects of the library and archives provisions on markets be part of the three-year review of the operation of the Digital Agenda Act. Further, the Ergas Committee stated that it was broadly satisfied with the Government's approach to the issues associated with technological protection measures. It also stated that it would be concerned if the use of technological locks, perhaps accompanied by a greater reliance on contract, were to displace or in any way limit the effectiveness of fair dealing provisions. The Ergas Committee therefore urged that the review of those provisions encompass a careful consideration of the evolving role of technological measures in the copyright system. The Ergas Committee also supported the amendments introduced to allow the decompilation of computer software for purposes of interoperability.⁴³ The Government has since adopted these recommendations.⁴⁴

3.19 It is not the purpose of this reference to pre-empt the 3-year review of the Digital Agenda Act. The purpose of this review is to examine the extent to which contract is being used as a mechanism to exclude or modify the exceptions set out in the Act and whether this should be permissible. Therefore the balance that this Committee is concerned with in carrying out its inquiry is the balance that currently exists in the Act and the issue of whether that balance should be enforceable as against agreements excluding or modifying exceptions to the exclusive rights of copyright owners.

The Exceptions

3.20 This Part analyses the nature, scope and policy basis of the principal exceptions to the exclusive rights of copyright owners in the Copyright Act. This will form the theoretical basis for assessing the extent to which contracts should be able to exclude or modify the exceptions later in the Report. It is important to note that

⁴³ *ibid.*, pp. 13–14.

⁴⁴ See, Government Response to Intellectual Property and Competition Review Recommendations, 28 August 2001.

while crucial to defining the copyright interest, the exceptions operate as defences to copyright infringement and are not positive rights in and of themselves. For the purpose of this analysis the exceptions are categorised into five main groups: fair dealing; libraries and archive exceptions; other technology based exceptions; statutory licences and miscellaneous exceptions.⁴⁵

3.21 The *Copyright Act 1911* (UK) was enacted in Australia by the *Copyright Act 1912*. Despite being repealed in the UK in 1956, the Australian enactment of this statute continued in force in Australia until the 1968 Act was enacted. The scope of the exceptions to the 1968 Act has been expanded according to significant amendments to the Act (including, in 1980,⁴⁶ 1986,⁴⁷ 1989,⁴⁸ 1993,⁴⁹ 1999⁵⁰ and 2000⁵¹). This has meant that the policy rationale for each exception is contingent on particular historical and political circumstances:

‘Each exception or defence has a particular history within Anglo-Australian copyright jurisprudence. Each embodies certain values, and reflects certain priorities about the scope of the copyright owner’s rights in relation to the general public interest.’⁵²

3.22 This Chapter outlines the close relationship between the fair dealing exceptions and the libraries and archives exceptions. They were both introduced to ensure access to information and to achieve the public interest in education, the free flow of information and freedom of expression. While the Franki Committee was largely concerned with overcoming difficulties arising from Australia’s geography, which may no longer be relevant in the digital environment, the Committee notes

⁴⁵ However, there is considerable overlap between the different categories. For example, fair dealing for research and study overlaps with the provisions allowing libraries to copy material for research and study.

⁴⁶ *Copyright Amendment Act 1980* (Cth).

⁴⁷ *Copyright Amendment Act 1986* (Cth).

⁴⁸ *Copyright Amendment Act 1989* (Cth).

⁴⁹ *Copyright Amendment (Re-enactment) Act 1993* (Cth) repealed and re-enacted the *Copyright Amendment Act 1989* (Cth) due to the need, as seen by the Government, to avoid any question of invalidity following the decision of the High Court of Australia in *Australian Tape Manufacturers Ltd v Commonwealth of Australia* (1993) 176 CLR 480 (which held that the blank tape levy in Part VC of the Act was unconstitutional and therefore invalid).

⁵⁰ *Copyright Amendment (Computer Programs) Act 1999* (Cth) (Computer Programs Act). This amendment followed the recommendations of the Copyright Law Review Committee in Chapter 10 of its report on *Computer Software Protection*: see, Copyright Law Review Committee 1995, *Computer Software Protection*, Commonwealth of Australia, Canberra.

⁵¹ *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (Digital Agenda Act) and the *Copyright Amendment (Moral Rights) Act 2000* (Cth) (Moral Rights Act).

⁵² McDonald 1999, op. cit., p. 3.

that the Franki Committee also recommended introducing the fair dealing exceptions as a *matter of principle*:

‘we are satisfied that as a matter of principle a measure of photocopying should be permitted without remuneration, for purposes such as private study, to an extent which at least falls within the present limits of “fair dealing”.’⁵³

3.23 In contrast to overseas jurisdictions, in Australia there has been a distinct policy decision to include the library and archives provisions as royalty-free exceptions, rather than leave this type of copying to voluntary licensing or subject it to statutory licensing schemes.⁵⁴ Furthermore, the discussion on statutory licences indicates that while the justification for each licence differs, statutory licences have been introduced, on the whole, to reduce the transaction costs involved in multiple copying, to address monopolistic practices by copyright owners, and to promote efficiency in the distribution of remuneration to right holders. Many of the statutory licences exist as a historical consequence of industry-specific arrangements (such as in the case of the statutory licences for ephemeral broadcasting),⁵⁵ and have been introduced without any clearly stated policy justification.

Fair dealing

3.24 In the following section, the Committee examines how the concept of fair dealing has evolved as an integral part of copyright as understood in the common law tradition. Australian copyright legislation in relation to fair dealing and the legislation of other former British colonies for the most part follow the Imperial British model developed in 1911. However, the Committee observes that fair dealing in the 1911 Act largely reflected developments in this area of the common law during the preceding period. English courts started developing the notions of ‘fair abridgement’ as early as

⁵³ Franki Report, *op. cit.*, para. 2.18.

⁵⁴ As compared to overseas jurisdictions (such as Canada): see, McDonald I. A comparative study of library provisions from photocopying to digital communication. Sydney: Centre for Copyright Studies, 2001, pp. 45–7.

⁵⁵ *ss.* 47, 70 and 107.

1740, particularly as the Statute of Anne 1709⁵⁶ did not provide for any exceptions.⁵⁷ The case of *Gyles v. Wilcox*⁵⁸ found that ‘a real and fair abridgement’ would not infringe copyright.⁵⁹ Later cases reaffirmed this principle and extended it by bringing quotation and criticism within the scope of the exception.⁶⁰

3.25 By 1900 the fair abridgement exception had been reduced in scope and replaced by a ‘fair use’ defence applying to reviews and limited quotations. Burrell notes that some commentators attribute this narrowing of the scope of the exception to an increasing awareness of the effect of reviews and abridgements on the market for the original work and the possibility that romantic conceptions of authorship influenced judicial interpretations of the exception.⁶¹ Despite a narrowing of its scope, Burrell notes that the common law fair use exception had a major impact on the fair dealing provision introduced into the *Copyright Act 1911* (UK), particularly as the fair dealing provision merely codified the existing common law rather than marked the start of a more restrictive approach to the copyright exceptions.⁶² Furthermore, there were no clearly stated aims to the Bill (for the 1911 Act) in the House of Lords, other than to ‘declare that for the future the principle on fair dealing which the courts have established is the law of the code...All that is done here is to make a plain declaration of what the law is and to put all copyright works under the same wording.’⁶³ Following the introduction of s. 2(1)(i) into the 1911 Act, case law continued to provide assistance in statutory interpretation of this provision and provisions of later Imperial enactments, including the Australian *Copyright Act 1968* (Cth).⁶⁴

⁵⁶ (the Act of 1709). This was the first copyright statute.

⁵⁷ Burrell R. Reining in copyright law: Is fair use the answer? I.P.Q. 2001;4:361–388, 366. However, as the Statute of Anne specifically sought to promote learning, describing itself as ‘[a]n Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned’, it is considered to be more consistent with the attempt to balance competing interests than to confer exclusive rights: Lloyd I. Intellectual property in the information age. E.I.P.R. 2001;6:290–5, 291.

⁵⁸ (1741) 2 Atk 141.

⁵⁹ The abridgement consisted of reproducing 35 sheets of the 275 sheets of Sir Matthew Hale’s *Historia Placitorum Coronae* into a book entitled *New Crown Law* (Burrell, op. cit., p. 366).

⁶⁰ *Wilkins v. Aitkin* (1810) 17 Vesey, 422; *Whittington v. Wooler* (1817) 2 Swan 428; *Mawman v. Tegg* (1826) 2 Russ. 385; and *Bell v. Whitehead* (1839) L.J. Ch. 141 (ibid.).

⁶¹ *ibid.*, pp. 366–7.

⁶² *ibid.*, p. 368.

⁶³ *ibid.*

⁶⁴ For example, the common law provides particular assistance in interpreting statutory provisions relating to fair dealing for the purpose of criticism and review, as the terms ‘criticism’ and ‘review’ are not defined (see paras 3.48–51 of this Report).

3.26 Following the Imperial model, Australia and other former colonies define the limits of copyright protection by way of an exhaustive list of specifically defined exceptions, rather than by way of a small number of generally worded exceptions.⁶⁵ A fair dealing with both works and subject-matter other than works can be found if the activity is undertaken for one of the following four purposes:

- research or study – ss. 40 and 103C;
- criticism or review – ss. 41 and 103A;
- reporting news – ss. 42 and 103B; and
- giving professional advice – ss. 43(2).⁶⁶

3.27 The purpose of an activity must fall within one of the four categories, the four fair dealings are exhaustive, and the overriding criterion of ‘fairness’ applies. There is no precise definition of the term ‘fairness’. Judicial determinations have held that fairness is ‘a matter of impression’ and a ‘question of degree’.⁶⁷ Burrell argues that in contrast to the commonly accepted history of judicial interpretation, namely, creating a series of exceptions out of thin air in order to rein in an overly broad right created by Parliament, later judicial interpretations of the original fair dealing provision subsequently narrowed the scope of the fair dealing provisions to the detriment of copyright users.⁶⁸

3.28 The *Copyright Act 1911* (UK) introduced the original fair dealing provisions.⁶⁹ Burrell notes that s. 2(1)(i) was relatively flexible as it allowed fair dealing with any category of work; and provided that copyright would not be infringed by:

⁶⁵ Burrell, op. cit., pp. 361–2.

⁶⁶ This provision is restricted to advice given by a legal practitioner, patent attorney or trade mark attorney.

⁶⁷ The ‘matter of impression’ test propounded by Lord Denning MR in the English case of *Hubbard v Vosper* [1972] 2 QB 84 at 94 has been adopted by the Federal Court of Australia in the case of *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 at 109–110 (De Garis): see, Copyright Law Review Committee 1998, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, Attorney-General’s Department, Canberra, para. 5.28—referred to here as the Simplification Report: Part 1. See also the dictum of Ungood-Thomas J in *Beloff v Pressdram Ltd* [1973] All ER 1 241 at 263 – ‘fair dealing is a question of fact and impression’ (as quoted in *TCN Channel Nine & Ors v Network Ten* 108 FCR 235 at 277.

⁶⁸ Burrell, op. cit., p. 367.

⁶⁹ s. 2(1)(i).

‘Any fair dealing with *any* work for the purpose of private study, research, criticism, review or newspaper summary’ (emphasis added).⁷⁰

Burrell argues that, influenced by judicial interpretations of s. 2(1)(i), the dominant view by the 1950’s was that the fair dealing exceptions were confined to the list of approved purposes in s. 2(1)(i) and that these purposes were exhaustive.⁷¹ However, during this period it was also acknowledged that there was a need for the legislature to expand the scope of many of the provisions. For example, while the Gregory Committee recommended that the ‘substantial part’ test should be considered separately from the fair dealing provision and that the list of approved purposes should be treated as exhaustive, the Committee also acknowledged that the provision was unintentionally restrictive and recommended an amendment to make it clear that it applied equally whether the criticism and review was of the work from which the extract was taken or another work.⁷² Burrell notes that this recommendation was made despite the fact that the 1911 Act provided that *any* fair dealing with *any* work for the purpose of criticism and review would not infringe copyright.⁷³

3.29 The *Copyright Act 1956* (UK) changed s. 2(1)(i) of the *Copyright Act 1911* (UK), which it replaced. The new fair dealing provisions in s. 6(1)-(3) of the 1956 Act restricted the category of works to which the exception applied to literary, dramatic and musical works only, rather than to *any* work. The purposes were also restricted to research or private study, criticism or review (whether of that work or another work), and reporting current events (in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film). In Australia, the Spicer Committee recommended provisions along the lines of s. 6(1)-(3) of the *Copyright Act 1956* (UK) be enacted into the 1968 Act.⁷⁴

3.30 The Franki Committee was also keen to expand the scope of the fair dealing exceptions (particularly in relation to copying for research and study). Following its

⁷⁰ Burrell, *op. cit.*, p. 368.

⁷¹ *ibid.*, p. 370.

⁷² Copyright Committee of the British Board of Trade 1952, *Report*, Cmd. 8662, HMSO, London, paras 39–40 — now referred to here as the Gregory Report.

⁷³ Burrell, *op. cit.*, p. 370.

⁷⁴ Spicer Report, *op. cit.*, para. 106.

recommendations, the scope of the fair dealing exceptions in Australia was expanded to include anything done in the course of the provision of professional advice by a legal practitioner or patent attorney as to the legal rights or obligations of a person.⁷⁵ More recently, the CLRC in its Simplification Report: Part 1 recommended that the existing fair dealing provisions be consolidated into a single provision and that the proviso be expanded to an open-ended model that specifically refers to, but is not limited to, the current set of exclusive purposes.⁷⁶

Fair dealing for research or study – ss. 40 and 103C

3.31 A fair dealing with a literary, dramatic or musical work (or with an adaptation of such a work), or a fair dealing with an artistic work, is not an infringement of copyright if the fair dealing is for the purpose of research or study.⁷⁷ Important amendments were introduced by the *Copyright Amendment Act 1980* (in response to the Franki Report) so as to provide assistance in determining the notion of ‘fairness’ and to clarify and extend instances of permitted copying, including:⁷⁸

- introducing guidelines on what constitutes a fair dealing (s. 40(2));
- deeming that copying within specified limits constitutes such a dealing (s. 40(3));⁷⁹ and
- removing the word ‘private’ from s. 40, thereby removing the constraint that research or study should be limited to only ‘private’ study.⁸⁰

⁷⁵ This extended the then s. 43 exception for copyright infringement for anything done for a judicial proceeding or report of a judicial proceeding: Franki Report, op. cit., paras 7.15–6.

⁷⁶ Copyright Law Review Committee, 1998, op. cit., p. 51.

⁷⁷ s. 40(1).

⁷⁸ See, Second Reading Speech, Copyright Amendment Bill (No. 2) 1979, *Parliamentary Debates*, Senate, 4 June 1979, per Senator Chaney, pp. 2533–4.

⁷⁹ Copyright Law Review Committee, 1998, op. cit., paras 4.06–10.

⁸⁰ The word ‘private’ similarly qualified the then provisions relating to copying by library and archives (s. 49) and copying of unpublished works in libraries or archives (s. 51): see, Franki Report, op. cit., para. 3.21 and paras 5.14–5. There was also no specification on the use for which an inter-library copying could be made under s. 50, with a person being able to be supplied with a copy regardless of whether it was for research or private study (ibid., para. 4.13). Following the recommendations of the Franki Committee, the Copyright Amendment Bill (No. 2) 1979 deleted the word ‘private’ from ss. 49 and 51 to ensure that the provisions were brought into line with the Committee’s recommendations regarding fair dealing for the purpose of research and study: Copyright Amendment Bill (No. 2) 1979, Explanatory Memorandum, paras 16 and 20. Amendments to s. 50 clarified that users are able to rely on s. 50 inter-library copying provisions in situations where the user is entitled to request a copy under s. 49, or where the requesting library requires a copy for its own collection (ibid., para. 17).

3.32 The Franki Report referred to the fact that the rights of the copyright owner have never been absolute and that there has been a historical concern in copyright law to manage competing interests:

‘The rights of the copyright owner have never been absolute, in the sense that no dealing with his work could ever take place without his consent. This is the position under the international conventions relating to copyright and the domestic laws of the countries where copyright is protected. The most universal exception is the right to copy minor or insubstantial parts of works. There is also widespread exclusion from the rights given to authors of various rights of copying of a fair dealing or public benefit nature by libraries, educational bodies, research establishments and individuals. In other words, it has always been the policy of the law that the monopoly granted to the author is of a limited nature. Historically therefore the author is not in a position to maintain his claim with regard to copying of published works from a position of absolute right.’⁸¹

3.33 In relation to fair dealing for research and study, the Franki Committee’s recommendations were informed by an underlying policy concern to ensure that the ‘public interest in ensuring a free flow of information in education and research’ was balanced against concerns for the potential economic impact which fair dealing uses may have on the copyright owner:⁸²

‘Even in cases where copying is carried out in the pursuit of a socially desirable objective, it by no means follows that it should take place to the unreasonable prejudice of the economic or other legitimate interests of the author.’⁸³

3.34 The *Copyright Amendment Act 1989* (Cth)⁸⁴ introduced a similar fair dealing defence under s. 103C to apply to audio-visual items. Section 100A defines ‘audio-visual item’ to include a sound recording, a cinematograph film, a sound broadcast or a television broadcast.

⁸¹ Franki Report, op. cit., para. 1.09.

⁸² *ibid.*, para. 1.02. For example, following the recommendations of the Franki Committee, the addition of s. 40(2)(e) in 1980 and its requirement to consider ‘the effect of the dealing upon the potential market for or value of the work’ ensured that economic reward for copyright owners was maintained (*ibid.*, paras 1.02 and 2.60).

⁸³ *ibid.*, para. 1.10.

⁸⁴ See footnote 49.

(a) Definition of 'research' and 'study'

3.35 The Act contains no definition of the term 'research or study'. In *De Garis v Neville Jeffress Pidler Pty Ltd (De Garis)* Beaumont J considered the meanings of the terms under s. 40, holding that dictionary definitions applied.⁸⁵ Beaumont J held that it is the purpose of the person making the dealing rather than the ultimate use to which the dealing is put that is relevant to any assessment of fair dealing for the purpose of research or study.⁸⁶

3.36 Prior to the *Copyright Amendment Act 1980* (Cth), the word 'study' was qualified by the adjective 'private', but 'private' was deleted following the recommendations of the Franki Committee (see previous discussion, para. 3.31). Although the Franki Committee considered that the limitation was intended to distinguish the use of material for private study from its use for classroom instruction, it found the distinction artificial and difficult to maintain:

'It is clear that the photocopying of material is of considerable assistance in enabling teachers and students to prepare material for classroom use, and that it is difficult to maintain a distinction between private study and other educational purposes. So long as the photocopying for educational use is qualified, for the purposes of section 40, by the requirement of fair dealing, we think that the removal of the limitation to private study will not prejudice owners of copyright.'⁸⁷

(b) Legislative guidance on determining 'fairness' – ss. 40(2) and 103(2)

3.37 As stated above, the concept of fair dealing was initially introduced by the *Copyright Act 1911* (UK) and the elements of this exception essentially involved a codification of existing caselaw.⁸⁸ While the fair dealing provision under s. 40(2) essentially codified the case law, the Franki Committee warned against determining

⁸⁵ (1990) 37 FCR 99 at 106. The court also adopted the Macquarie dictionary definition of 'research' and 'study': 'research' was defined as 'diligent and systematic inquiry or investigation into a subject in order to discover facts or principles'. 'Study' included the following: '1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection; 2. the cultivation of a particular branch of learning, science, or art...; 3. a particular course of effort to acquire knowledge...; 5. a thorough examination and analysis of a particular subject...'

⁸⁶ *ibid.* See also, *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545; *Longman Group Ltd v Carrington Technical Institute Board of Governors* (1990) 20 IPR 264.

⁸⁷ Franki Report, op. cit., para. 2.64.

⁸⁸ See paras 3.24–30, above.

the concept of fair dealing by references to notions of abstract justice and principles of copyright alone, and recommended practical considerations also be taken into account.⁸⁹ Under the fair dealing exception, in s. 40(2)(a)-(e) the factors to be considered in determining if a dealing is fair include:

- the purpose and character of the dealing;
- the nature of the work or adaptation;
- the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- the amount and substantiality of the part copied in relation to the whole work or adaptation.⁹⁰

3.38 A similar list of factors under s. 103C(2) provides guidance in determining a fair dealing of an audio-visual item for the purpose of research and study.⁹¹ This defence under Part IV was introduced by the *Copyright Amendment Act 1989*.⁹²

3.39 The Simplification Report: Part 1 recommended that the factors currently listed under s. 40(2) (for determining fair dealing for research or study purposes) be applied generally to all fair dealings. The report argued that as the factors currently listed under s. 40(2) are derived from case law, they have been previously applied to all fair dealings.⁹³ The Simplification Report: Part 1 is currently being considered by the Government. The Committee notes, however, that as the recommendation of the

⁸⁹ Franki Report, op. cit., para. 1.19.

⁹⁰ This applies only where part of the work or adaptation is reproduced.

⁹¹ s. 103C(2) lists the matters to be taken into account when determining if a dealing with an audio-visual item constitutes a fair-dealing for the purpose of research and study:

- the purpose and character of the dealing;
- the nature of the audio-visual item;
- the possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price;
- the effect of the dealing upon the potential market for, or value of, the audio-visual item; and
- in a case where part only of the audio-visual item is copied the amount and substantiality of the part copied taken in relation to the whole item.

⁹² As repealed and re-enacted by the *Copyright Amendment (Re-enactment) Act 1993*: see footnote 49.

⁹³ Copyright Law Review Committee, 1998, op. cit., paras 6.35–6.

Franki Committee was based substantially upon principles developed from case law, it is generally considered that the factors listed under s. 40(2) apply, where relevant, to all fair dealings.⁹⁴

(c) The quantitative test – s. 40(3)

3.40 The determination of what is a fair dealing in relation to the copying of a work for the purpose of research or study is assisted by a quantitative test provided under s. 40(3) of the Copyright Act. This test provides that, subject to certain qualifications, the copying of the whole or part of an article in a periodical publication or the copying of not more than a ‘reasonable portion’ of a work or adaptation is deemed to be a fair dealing, notwithstanding the factors to be taken into account in determining fairness under s. 40(2).⁹⁵ This test applies to all literary, dramatic and musical works contained in published editions of the works, with the exception of computer programs. There is no equivalent quantitative test applying to audio-visual items.⁹⁶

3.41 Under the test, the whole or part of an article from a periodical publication may be reproduced (s. 40(3)(a)), while a reasonable portion may be reproduced in any other case (such as a dealing with a work or adaptation for the purpose of research and study) (s. 40(3)(b)).

3.42 Section 10(2) provides a non-exhaustive definition of the term ‘reasonable portion’ as it applies to s. 40(3)(b). The following amounts of a published edition (being an edition of not less than ten pages) of a literary, dramatic or musical work can be copied:

- up to 10% of the number of pages; and
- if the work is divided into chapters and a chapter exceeds ten percent of the number of pages, the whole or part of a single chapter may be copied.
- In the case of published literary and dramatic works in electronic form, up to 10% of the number of the words (rather than pages) can be copied (s. 10(2A)(c)). If the

⁹⁴ *ibid.*, paras 4.09 and 6.36–44.

⁹⁵ *ibid.*, para. 4.11.

⁹⁶ *ibid.*, para. 4.13.

work is divided into chapters, up to one chapter can be copied (s. 10(2A)(d)).⁹⁷

- If works are available in both electronic and print formats, then it is only necessary to meet the ‘reasonable portion’ requirement of either format (s. 10(2B)).
- A person may not make from the same work more than one reproduction which contains only a ‘reasonable portion’ of the work s. 10(2C).

3.43 The CLRC’s Simplification Report: Part 1 indicated that by specifying the amount of copying deemed to be a fair dealing, the scope of the quantitative test is narrow and less flexible than the test under s. 40(2)(e), which requires the user (and the court, if necessary) to assess the quantity but also the quality of the material copied.⁹⁸ The report noted that the United States ‘fair use’ test⁹⁹ contains provisions similar to s. 40(2) but provides more flexibility in determining the applicability of the exceptions as provisions are open-ended and not confined to a specified range of purposes.¹⁰⁰ The CLRC also referred to s. 107 of the *Copyright Act 1976* (US) in its recommendations to expand the fair dealing exception under s. 40 to an open-ended model, which would refer to the current set of exclusive purposes (such as research or study, criticism or review, reporting news and professional advice) but not be confined to those purposes.¹⁰¹ The Committee notes that the Franki Report also relied on the open-ended provisions in the Copyright Bill then before the United States Congress (which became s. 107) to justify removing the artificial distinction in s. 40 between private study and classroom instruction.¹⁰²

⁹⁷ The Simplification Report: Part 1 (released prior to the Digital Agenda Act) acknowledged the desirability and clear public benefit of applying this test to works in digital form; however, it also stressed that differences in presenting and organising information in the digital environment create barriers to the effective operation of this test. It was argued that the ‘reasonable portion’ test is best suited to the analogue environment as there are discernible and quantifiable units of measurement (such as pages and words) which assist in pin-pointing the material form of ideas and in quantifying copyright material for the purposes of fair dealing; Copyright Law Review Committee, 1998, op. cit., para. 6.55.

⁹⁸ *ibid.*, para. 6.51.

⁹⁹ The Simplification Report: Part 1 referred to the legislative history of the *Copyright Act 1976* (US) (US Senate Report No. 94-473) as suggesting that a key, although not necessarily determinative, factor in ‘fair use’ is whether the work is available (*ibid.*, para. 5.05).

¹⁰⁰ The Simplification Report: Part 1 noted that while s. 107 of the *Copyright Act 1976* (US) virtually parallels s. 40(2), the main difference is that the US provision does not directly require considerations of the availability of the work in determining the fairness of a dealing for research or study purposes (as compared to s. 40(2)(c) of the Act) (*ibid.*, paras 5.05–6).

¹⁰¹ *ibid.*, paras 2.03 and 6.35.

¹⁰² Franki Report, op. cit., para. 2.64.

(d) The application of the fair dealing exceptions to the digital environment

3.44 The central aim of the Digital Agenda reforms was to ‘ensure that copyright law continues to promote creative endeavour while allowing reasonable access to copyright material on the Internet and through new communications technologies’.¹⁰³ The Digital Agenda Act applied the then ‘fair dealing’ exception to the new right of communication to the public. This new right includes the right to make copyright material available online (such as uploading material onto a server connected to the Internet) or to electronically transmit material. The right to communicate to the public subsists as an exclusive right in literary, dramatic, musical and artistic works, and in sound recordings, films and broadcasts.¹⁰⁴ The only subject matter of copyright which does not receive this new right is the published edition.

3.45 Although the new right to communicate to the public provides copyright owners with greater protection for their material in the digital environment, the Digital Agenda reforms ensure that ‘[a]s far as possible, the exceptions replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment’.¹⁰⁵ Thus, the fair dealing defence, as it existed before the Digital Agenda amendments, applies to copyright material in digital form and in relation to all exclusive rights, including the new right of communication to the public.

3.46 The Digital Agenda Act extends the ‘reasonable portion test’ to published literary and dramatic works in electronic form with the exception of musical works, computer programs and electronic compilations such as databases.¹⁰⁶ For a discussion of the ‘reasonable portion test’ as it applies to electronic material see para. 3.42, above.

¹⁰³ Copyright Amendment (Digital Agenda) Bill 2000 (Digital Agenda Bill 2000), Revised Explanatory Memorandum, p. 1.

¹⁰⁴ s. 31(1)(a)(iv) as amended by the Digital Agenda Act, schedule 1 item 35.

¹⁰⁵ Digital Agenda Bill 2000, Revised Explanatory Memorandum, p. 2.

¹⁰⁶ Digital Agenda Act, schedule 1 item 20 amends s. 10 to insert new ss. 10(2A), 10(2B) and 10(2C), which define ‘reasonable portion’ in relation to a published literary or dramatic work in electronic form.

Fair dealing for criticism or review – ss. 41 and 103A

3.47 Section 41 allows a fair dealing with a work or adaptation for the purpose of criticism or review provided that sufficient acknowledgment of the work is made.¹⁰⁷ This exception also applies to such a dealing with an audio-visual item as well as to the underlying copyright material in the audio-visual item under s. 103A.¹⁰⁸

Definition of criticism and review

3.48 Like ‘research or study’ in s. 40, there are no legislative guidelines on the meaning of ‘criticism or review’ and case law has played a major role in defining these terms. As with fair dealing for research and study (s. 40), the origins of s. 41 go back long before the *Copyright Act 1911* (UK) and are to be found in an early judicial recognition in *Chatterton and Cave* (1878).¹⁰⁹ In that case Lord Hatherley stated that:

‘Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like – and if the quantity taken be neither substantial nor material, if...‘a fair use’ only be made of the publication, no wrong is done and no action can be brought.’¹¹⁰

The Federal Court of Australia in the *De Garis* case followed this decision in interpreting the scope of s. 41.¹¹¹

3.49 In *Commonwealth of Australia v John Fairfax and Sons Ltd* it was held that the work must be used for genuine criticism or review and cannot be published under the pretence of quotation.¹¹² In another case, it was found that so long as there is a substantial measure of criticism or review, this need not be the sole purpose of the dealing.¹¹³ In the *De Garis* case, Beaumont J considered the precise meanings of

¹⁰⁷ ‘Sufficient acknowledgment’ is discussed in paras 3.55–6 of this Report in relation to fair dealing for the purpose of reporting news.

¹⁰⁸ The *Copyright Amendment Act 1986* inserted this provision.

¹⁰⁹ 3 App Cas 483.

¹¹⁰ *ibid*, at 492.

¹¹¹ *De Garis*, at 106–7.

¹¹² *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 56.

¹¹³ *Sillitoe v McGraw-Hill Book Co* (UK) Ltd [1983] FSR 545.

‘criticism’ and ‘review’.¹¹⁴ He held that the *Macquarie Dictionary* definitions applied, noting that cognitive evaluation was essential to criticism and review. In *TCN Channel Nine & Ors v Network Ten*, Conti J upheld the *De Garis* definitions, stressing that the terms are of broad meaning.¹¹⁵ He also noted that comments need not be balanced to be classified as ‘criticism’ or ‘review’, and a ‘hidden motive’ may lead to a presumption that the dealing was not fair.¹¹⁶ This case is currently on appeal to the Full Federal Court.

3.50 The underlying question in determining whether use for criticism or review amounts to a fair dealing with a portion of a work will always be whether the use was fair for the relevant purpose. Thus, what amounts to a fair dealing is a matter to be determined by the facts of each case. Conti J noted that the substantiality of the material used, and the motives for use, will influence the determination of ‘fairness’.¹¹⁷ Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd* also indicated that the absence of either express or implied consent so as to justify a use of a work for criticism or review is an important factor in deciding whether there has been a fair dealing under s. 41.¹¹⁸ As indicated previously, the factors listed under s. 40(2) which assist in determining the fairness of dealings for research and study purposes also assist in determining ‘fairness’ for criticism and review.¹¹⁹

3.51 The Explanatory Memorandum to the Copyright Amendment Bill 1986 (which extended the fair dealing exception to cover audio-visual items) noted that while the existing s. 41, and the then proposed s. 103A, have their basis in the common law, the underlying policy rationale is to provide information and comment for possible consumers and audiences. Furthermore, the Explanatory Memorandum stated that copyright owners ordinarily expect their works, or parts of them, to be used to carry

¹¹⁴ (1992) 37 FCR 99 at 105.

¹¹⁵ (2001) 108 FCR 235 at 275.

¹¹⁶ *ibid.*, at para. 51.

¹¹⁷ *ibid.*, at paras 49–53, and para. 66.

¹¹⁸ (1980) 147 CLR 39.

¹¹⁹ See, *TCN Channel Nine v Network Ten* (2001) 108 FCR 235 at 276; *De Garis* at 108; and *Hubbard v Vosper* (1972) 2 QB 84 at 94 per Lord Denning MR.

out criticism or review.¹²⁰ This policy rationale reiterates the original justification of the ‘fair use’ defence, as stated above by Lord Hatherley in *Chatterton v Cave*.¹²¹

Fair dealing for reporting news – ss. 42 and 103B

3.52 A fair dealing with a literary, dramatic, musical or artistic work, or with the adaptation of such a work other than an artistic work, does not constitute an infringement of the copyright in the work if done for the purpose of, or associated with, reporting news (s. 42(1)). The Act also allows the news reporting exception to be invoked in reporting via various media, including:

- newspaper, magazine or similar periodical, where sufficient acknowledgment of the work is made;¹²²
- communication;¹²³ or
- cinematograph film.¹²⁴

3.53 The playing of a musical work during news reporting by means of a communication or in a cinematograph film will only constitute a fair dealing if it forms part of the news being reported (s. 42(2)). The courts have found that the term ‘news’ is not restricted to current events. It can relate to long-term reviews or commentary.¹²⁵ Section 103B applies a corresponding exception to any fair dealing with an audio-visual item or with any other work or audio-visual item included in the material.¹²⁶

3.54 In the *De Garis* case, Beaumont J again accepted the Macquarie Dictionary definition of ‘news’, finding that ‘news’ included a report of any recent event or

¹²⁰ Copyright Amendment Bill 1986, Explanatory Memorandum, para. 26.

¹²¹ See para. 3.48.

¹²² s. 42(1)(a). See paras 3.55–6 for an explanation of the phrase ‘sufficient acknowledgment’.

¹²³ ‘Communicate’ is defined in s. 10(1) as ‘make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter’. Section 42(1)(b) states that copyright will not be infringed if the dealing with the work is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

¹²⁴ See definition in s. 10(1).

¹²⁵ *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 per Mason J.

¹²⁶ An audio-visual item means a sound recording, a cinematograph film, a sound broadcast or a television broadcast (s. 100A).

situation; the reports of events published in a newspaper or journal, or on radio, television or any other medium; information and events considered suitable for reporting; and information not previously known.¹²⁷ In *TCN Channel Nine & Ors v Channel Ten*, Conti J observed that it can be difficult to distinguish between news and entertainment, as news may involve entertainment and the use of humour.¹²⁸

3.55 Sections 42(1)(a) and 103B(1)(a) require sufficient acknowledgment to be made of the work or audio-visual item if the reporting occurs via a newspaper, magazine or similar periodical.¹²⁹ Sufficient acknowledgment in relation to a work includes:

‘an acknowledgment identifying the work by its title or other description and, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgment of his or her name is not to be made, also identifying the author.’¹³⁰

3.56 The requirement to sufficiently acknowledge a work in instances of a fair dealing of a work or other subject matter for news reporting or criticism and review is separate to, and does not diminish, the moral rights requiring the attribution of the author of a work when undertaking specific acts in relation to their work.¹³¹ Moral rights are distinct from the exclusive rights of copyright in works and other subject matter in Parts III and IV of the Copyright Act.¹³² Unlike copyright, which is an economic right, moral rights are personal rights.¹³³ As such, they are inalienable and

¹²⁷ *De Garis* at 109. See, Copyright Law Review Committee, 1998, *op. cit.*, para. 4.27.

¹²⁸ *TCN Channel Nine & Ors v Network Ten* (2001) 108 FCR 235 at 281 and 285.

¹²⁹ Although under s. 103B a fair dealing can be made with an audio-visual item or with any other work or audio-visual item included in the item, sufficient acknowledgment is only required of the first-mentioned audio-visual item. Sufficient acknowledgment is also a requirement of a fair dealing of a work for the purpose of criticism and review (s. 41). See para. 3.47, above.

¹³⁰ s. 10(1).

¹³¹ Section 193 requires that the author be attributed whenever any ‘attributable’ act is performed. Section 194 indicates what are attributable acts in relation to different types of works and cinematograph films which will require an attribution of authorship (such as reproducing, publishing, performing, communicating or adapting a literary, dramatic or musical work). Section 195AC also provides an author with a right to take action against false attribution.

¹³² The two principal rights forming the basis of moral rights include: the right to be identified as the author of a work (the right of ‘attribution’) and the right of integrity (the right to object to distortion, mutilation or other modification of, or derogatory action in relation to, the work which is prejudicial to the author’s honour or reputation).

¹³³ In the sense that only individuals have moral rights (s. 190).

remain with the author after the economic rights in the relevant work or film have been assigned or otherwise disposed of to another person (s. 195AN(3)).¹³⁴

Judicial proceedings and professional advice – ss. 43 and 104

3.57 The Act distinguishes between using copyright material for judicial proceedings and the use of copyright material in the course of the giving of professional advice. The fair dealing limitation is only applied under s. 43(2), which provides an exception for a fair dealing with a literary, dramatic, musical or artistic work if it is for the purpose of the giving of professional advice by a legal practitioner, patent attorney or trademarks attorney.¹³⁵ The Franki Committee recommended a provision similar to the current s. 43(2) to assist people to gain a greater awareness of their legal rights and obligations.¹³⁶

3.58 In contrast, s. 43(1) provides a complete exemption from infringement of copyright in a literary, dramatic, musical or artistic work as a result of anything done for the purpose of a judicial proceeding or a report of a judicial proceeding. This is a blanket exception which is not qualified by any requirement of fair dealing. The Simplification Report: Part 1 acknowledged that the main purpose of the provision is to facilitate access to the legal system rather than to provide legal practitioners or patent attorneys with benefits beyond those enjoyed by other professional groups.¹³⁷

3.59 It is important to note that there is no fair dealing counterpart in relation to audio-visual items. There is a general exemption from infringement of copyright in sound recordings, films, broadcasts and published editions which cover anything done for the purpose of:

¹³⁴ Subject to an exception allowing the legal representatives or person administering an author's affairs to enforce the author's moral rights upon their death (s. 195AN(1) and (2)). An exception also exists in the case of co-authorship agreements, where an author has waived his or her right to exercise the right of integrity of authorship in respect of a cinematograph film or a literary, dramatic, musical or artistic work included in the film except jointly with the other author or authors (s. 195AN(4)).

¹³⁵ A patent attorney is a person registered under the *Patents Act 1990* (Cth) and a trade marks attorney is a person registered under the *Trade Marks Act 1995* (Cth) as such attorney.

¹³⁶ Franki Report, op. cit., paras 7.15–6.

¹³⁷ Copyright Law Review Committee, 1998, op. cit., para. 6.136.

- a judicial proceeding or report of a judicial proceeding (s. 104(a)); and
- seeking professional advice from a legal practitioner; patent attorney or trade marks attorney; or for the purpose of, or in the course of the giving of this professional advice (s. 104 (b)-(c)).

Thus, s. 104(a)-(c) effectively conflate s. 43(1) and (2) by removing the fair dealing requirement for the giving of professional advice in relation to audio-visual items. As this section is not a fair dealing exemption, it permits unlimited copying (or any other act within the copyright) for the specific purposes to which it refers.

Library and archives exceptions

3.60 Provisions allowing libraries to copy works were introduced into Australian law by the 1968 Act. Many of these provisions reflected the recommendations of the Spicer Committee, and were based largely on the provisions of the *Copyright Act 1956* (UK). The main rationale of the UK provisions is found in the Gregory Report's focus on the need to alleviate the potential for librarians to infringe copyright when using new copying technology (contact photography and micro photography) so as to facilitate research.¹³⁸ The recommendations were adopted almost without change in the 1956 Act.¹³⁹ The *Copyright Amendment Act 1980*¹⁴⁰ introduced the majority of the current library copying exceptions following the recommendations of the Franki

¹³⁸ Gregory Report, op. cit., para. 43.

¹³⁹ The Gregory Report made particular recommendations in relation to the copying of periodical publications, books and manuscripts. The Committee recommended that copying of periodicals be limited to non-profit-making bodies and be for genuine research or private study (with an undertaking that the extract will not be used for any other declared purposes). It was also recommended that only one article of an issue be copied and that a person only receive one copy, and that excerpts be supplied at not less than cost price (ibid., para. 47). In relation to the copying of works it was seen that a 'substantial part' could be copied, if permission had been granted from the copyright owner. Copying could occur also in circumstances where the owner could not be traced, provided that it was '...an extract which does not represent an unreasonably large part of the whole work and is kept strictly to the minimum needs of the reader for the purpose of particular study' (ibid., para. 52). It was also recommended that the copying of manuscripts be limited to copying for private purposes only, and that copying could only occur if the manuscript was at least 50 years old, or if 50 years had passed since the death of the writer (ibid., para. 53).

¹⁴⁰ As amended by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1984*.

Committee.¹⁴¹ Further amendments by the *Copyright Amendment Act 1986* introduced provisions for the copying of sound recordings and cinematograph films by libraries and archives and the Digital Agenda Act also extended the operation of the library and archive copying provisions to the digital environment.¹⁴²

3.61 Provisions under Part III Division 5 of the Act provide an exception to infringement of copyright for the reproduction of literary, dramatic, musical and artistic works held by libraries and archives. Under Part IV Division 6 of the Copyright Act, there are exemptions for copying a sound recording or cinematograph film for preservation purposes (s. 110B), or for the purpose of research and study or with a view to publication (s. 110A). Although the Act does not contain a definition of the word ‘library’, in applying the statutory exceptions the Act differentiates between different types of libraries. The exceptions for intra-library copying for research or study (s. 49) and for inter-library copying (s. 50) are restricted to non-profit libraries; while copying unpublished copyright material and copying for preservation under ss. 51, 51A, 110A and 110B applies to all libraries and archives.¹⁴³ Provisions relating to copying by archives are also limited to those archives and bodies which are not operated for the purposes of deriving a profit (s. 10(4)(b)).¹⁴⁴

3.62 In differentiating between non-profit libraries and libraries established or conducted for profit, s. 18 states that ‘a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit’. Thus, it does not follow that a research library owned by a commercial organisation will automatically be excluded from the statutory scheme under ss. 49 and 50. Other factors, such as whether or not the library is conducted as

¹⁴¹ Most of the recommendations of the Franki Committee concerning the library provisions were reflected in the 1980 amendments to the Act. For example, a non-exhaustive definition of ‘reasonable portion’ was introduced into the Act, deeming 10% of the number of pages of a published literary, dramatic or musical work to be a ‘reasonable portion’; in the event that copies were not commercially available the copying of entire works was permitted in a number of circumstances; and a number of procedural or administrative steps accompanying copying were introduced: see, McDonald, 2001, op. cit., p. 13 and also see para. 3.42.

¹⁴² These amendments are discussed further at paras 3.67–8.

¹⁴³ Copyright Law Review Committee, 1998, op. cit., para. 7.22. But note that ‘archives’ is exhaustively defined in s. 10(1).

¹⁴⁴ Section 10(1) of the Act lists specified institutions holding archival material, such as the Australian Archives, and Public Record Offices. This list is merely illustrative and a catch-all provision under s. 10(4) (amended by the Digital Agenda Act) clarifies that museums and galleries may rely upon the library provisions as they are examples of bodies which hold material of historical significance or of public interest.

a profit centre within the organisation, must also be considered. Libraries in educational institutions and in government may rely upon the library provisions. However, the purpose for which a copy is made may mean that copying by the library should be done under the educational or government copying provisions.¹⁴⁵

3.63 The Committee notes that the Simplification Report: Part 1 recommended repealing s. 18 to allow all provisions permitting royalty-free copying by libraries to apply to all libraries, whether or not they are conducted for profit.¹⁴⁶ As previously noted, the Government is currently considering the recommendations of the Simplification Report: Part 1.

Historical development of the library copying provisions

3.64 The Franki Committee was set up to examine the question of reprographic reproduction of copyright works in Australia, and to recommend any alterations to the copyright law and any other measures considered necessary to effect a proper balance between the interests of owners and users of copyright materials in respect of reprographic reproduction.¹⁴⁷ In reporting in 1976, the Franki Committee noted the considerable changes in the methods of reprographic reproduction and in the reduction in cost and wide availability of reprographic equipment.

3.65 Internationally, the response to the emergence of the photocopier varied.¹⁴⁸ In Australia, improvements in copying technology assisted in overcoming the problems with accessing material arising from Australia's 'tyranny of distance'. The Franki Committee noted that at that time, many texts were unavailable in Australia and that delivery was often unreliable.¹⁴⁹ Overseas, it was considered that access to copyright material would be increased simply by improving the traditional role of libraries as

¹⁴⁵ The educational copying provisions are mostly set out in Part VB of the Act; and ss. 183 and 183A deal with copying by government 'for the services of' government: see, McDonald, 2001, op. cit., p. 18.

¹⁴⁶ A similar recommendation was made relating to archives. The Simplification Report: Part 1 recommended that all provisions in the Act permitting royalty-free copying by archives apply to all archives, whether or not they derive a profit: Copyright Law Review Committee, 1998, op. cit., paras 7.28 and 7.38.

¹⁴⁷ Franki Report, op. cit., para. 1.01.

¹⁴⁸ For an excellent comparative analysis of the library copying provisions: see, McDonald, 2001, op. cit., pp. 29–81.

¹⁴⁹ Franki Report, op. cit., para. 1.51.

repositories of copies of research material. It was not seen as necessary for libraries to actively disseminate material. In contrast, the Franki Committee's recommendations were influenced by the fact that:

'Australia is geographically isolated from the major centres of scientific and industrial research and that the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts.'¹⁵⁰

3.66 The Committee is aware that there is often a requirement in other jurisdictions to remunerate owners for the copying of their material in libraries.¹⁵¹ In those countries, payment via licensed copying is seen as a means of maximising the benefits of reprographic reproduction, including by increasing competition amongst producers of specialist copyright research material.¹⁵² The Australian library copying exceptions, in contrast, do not require royalty payments.¹⁵³ The Franki Committee specifically rejected proposals for payment on a per page basis.¹⁵⁴ It was seen that there were 'practical difficulties in the way of a feasible scheme for the payment of such remuneration' and that a reasonable amount of unremunerated copying by a person, at least for research or study, should be allowed.¹⁵⁵

3.67 The *Copyright Amendment Act 1986* later introduced provisions allowing the copying of sound recordings and cinematograph films by libraries and archives. Amendments under the Digital Agenda Act have also partly extended the library provisions to the digital environment. The print-based library copying exceptions that previously existed now apply to the reproduction and communication of copyright material in electronic form, so that libraries and archives can make and communicate digital reproductions of articles or published works in response to requests from users.

¹⁵⁰ *ibid.*, para. 1.37.

¹⁵¹ McDonald, 2001, *op. cit.*, p. 83; and Guibault, 2002, *op. cit.*, pp. 22–6.

¹⁵² Economic Council of Canada 1971, *Report on Intellectual & Industrial Property*, Information Canada, Ottawa (as quoted in McDonald, 2001, *op. cit.*, p. 45).

¹⁵³ The library copying provisions are seen to be distinct from the statutory licence schemes under Part VA and VB of the Act allowing educational and other institutions to engage in multiple copying of copyright works.

¹⁵⁴ Franki Report, *op. cit.*, para. 3.06.

¹⁵⁵ See, Second Reading Speech, Copyright Amendment Bill (No. 2) 1979, *Parliamentary Debates*, Senate, 4 June 1979, per Senator Chaney, p. 2533.

3.68 In introducing the amendments the Government expressed the view that they were in accord with the Internet Treaties and the underlying principle of extending the copyright balance to the digital environment.¹⁵⁶ The Revised Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 2000 (Digital Agenda Bill 2000) indicates that amendments in relation to the library and archives copying provisions were made to reflect the Government's aim:

‘that libraries and archives should be able to use new technologies to provide access to copyright material for the general community, as long as the economic rights of owners of copyright material are not unreasonably prejudiced.’¹⁵⁷

Thus, the ‘commercial availability’ test for inter-library copying was tightened for electronic material. This is one example of an amendment made to minimise any prejudicial impact on the economic rights of copyright owners.¹⁵⁸

Theoretical relationship between fair dealing and library copying provisions

3.69 The Committee notes that the Franki Committee's policy justification for recommending amendments to the library and archives provisions closely reflected their justification for expanding the scope of the fair dealing provisions, namely to ensure ‘a free flow of information in education and research’.¹⁵⁹ As well as considerations of the geographical constraints in meeting increased demand for copyright material,¹⁶⁰ the library copying exceptions were also seen by government to benefit the public by facilitating education and scientific research.¹⁶¹ It was noted that there was a great need for copies of material to be easily available,¹⁶² particularly as most photocopying is of an educational, scientific or technical nature rather than literary, artistic or recreational.¹⁶³

¹⁵⁶ Digital Agenda Bill 2000, Revised Explanatory Memorandum, pp. 1–2.

¹⁵⁷ *ibid.*, para. 94.

¹⁵⁸ Digital Agenda Act, schedule 1 item 64, repealed the then s. 50(7A) and substituted a new s. 50(7A), (7) and (7C): see, Digital Agenda Bill 2000, Revised Explanatory Memorandum, paras 117–25.

¹⁵⁹ Franki Report, *op. cit.*, para. 1.02.

¹⁶⁰ *ibid.*, para. 3.04.

¹⁶¹ This rationale was particularly relevant to the exceptions for inter-library loans: see, 2nd Reading Speech, Copyright Amendment Bill (No.2) 1979, *Parliamentary Debates*, Senate, 4 June 1979, per Senator Chaney, p. 2534.

¹⁶² Franki Report, *op. cit.*, para. 3.13.

¹⁶³ *ibid.*, para. 1.16.

3.70 The Committee notes the reference in the Report of the Franki Committee to the historical practice of international copyright regimes to recognise the right to make copies in the course of fair dealing; and the right of libraries, educational bodies, research establishments and individuals to engage in copying of a public benefit nature.¹⁶⁴ The Franki Committee's reference to the fact that '[l]ibraries...are properly regarded as information resource centres'¹⁶⁵ also implicitly recognises the close theoretical relationship between the fair dealing and library copying provisions and the role of libraries and archives as repositories of information for public access and for education and research.

3.71 The Committee observes that the Franki Committee's reference to Australia's 'very considerable public interest in ensuring a free flow of information in education and research' and the need to balance the interests of individual copyright owners against this element of the public interest is similar to the policy concern outlined in the Preamble to the WCT.¹⁶⁶

3.72 Although the fair dealing and library and archives exceptions have a similar policy basis, the Committee observes that the latter are far narrower than the former. Although the Gregory, Spicer, and Franki Committees recommended expanding the library copying exceptions to facilitate education, they also proposed substantial limitations on these exceptions. Limitations were introduced as much to protect the market for copyright works as to safeguard librarians. For example, the recommendations of the Gregory Committee (which influenced the scope of the limitations introduced under the *Copyright Act 1956* (UK)) were influenced by the arrangements that had previously existed between publishers of scientific materials and libraries to protect copyright material.¹⁶⁷

¹⁶⁴ *ibid.*, para. 1.09 (see full quotation in para. 3.32 in the fair dealing section of this Report).

¹⁶⁵ *ibid.*, para. 3.04.

¹⁶⁶ *ibid.*, op. cit., para. 1.02. See para. 3.01 of this Chapter for a discussion of the Preamble to the WCT.

¹⁶⁷ The Royal Society, individual scientific societies and many publishers of scientific periodicals allowed single copies of extracts from scientific books and periodicals to assist research: Gregory Report, op. cit., paras 45–6. Only one article from a periodical could be copied and only a single copy could be supplied to a client in response to a written request (*ibid.*, para. 47). A client could also only use the material copied for their private study, research or review. The Gregory Committee recommended that these copying provisions could be applied broadly to research other than scientific research without prejudicing the income which publishers or authors could derive from periodical publications (*ibid.*, paras 45–7).

3.73 The current Copyright Act in Australia limits the proportions of material that can be copied by libraries and the use of these copies. The Act also requires declarations to be made to assist in limiting the purposes for which copies can be made, and the quantity of material that can be copied. Prescribed documentation and records must also be kept. Nor do the library provisions allow a library to deal with copyright material on behalf of a client in every way in which clients themselves may deal with the material under the ‘fair dealing’ provisions.¹⁶⁸ The Digital Agenda amendments particularly restrict the scope of the exceptions as they apply to the digital environment. A more detailed analysis of the limitations on reproducing and communicating print-based and digital material is included in the following discussion of each library and archive provision.

(a) Reproducing and communicating works by libraries and archives for users for research or study – s. 49

3.74 Section 49 allows a non-profit making library or archives to reproduce and communicate published works for a client who has requested this for his or her research or study for free without infringing copyright.¹⁶⁹ The purposes for which a library is able to deal with copyright material for a client is limited to this one research or study purpose, and does not extend to other purposes covered by fair dealing.¹⁷⁰ There are no similar provisions permitting libraries to copy subject matter other than works, such as audio-visual material including films, recorded music and talking books.¹⁷¹

3.75 The amounts of published literary, dramatic or musical works that can be copied under s. 49 differ according to the type of work copied and whether the material is in hard copy or electronic form.¹⁷² In relation to periodical publications,

¹⁶⁸ McDonald, 2001, *op. cit.*, p. 19.

¹⁶⁹ Sections 49(6) and (7) exempt a library or archive from infringing the copyright in a periodical publication or published work by supplying a reproduction of the material to an individual, providing the request and declaration provisions under ss. 49(2) and (2C) have been satisfied. A new s. 49(7B) also provides a similar exception to an infringement of copyright in an article or published work where the material is communicated in electronic format: Digital Agenda Act, schedule 1 item 56.

¹⁷⁰ As outlined in the previous section, the fair dealing provisions (ss. 40-3 and 103A-C) cover dealings with copyright material for the purpose of research or study; criticism or review; reporting news; and giving professional legal advice (for works only).

¹⁷¹ McDonald, 2001, *op. cit.*, p. 20.

¹⁷² See para. 3.83, below.

the following amount may be copied:

- the whole or part of an article from an issue of a periodical publication;¹⁷³ and
- the whole or parts of two or more articles from the same issue of a periodical publication unless they relate to the same subject matter.¹⁷⁴

3.76 For works other than periodical publications, the amount of allowable copying includes:

- a ‘reasonable portion’ of most types of works;¹⁷⁵ and
- the whole or more than a ‘reasonable portion’ of such a work if a copy of the reproduction is not available within a reasonable time at an ordinary commercial price.¹⁷⁶

3.77 The ‘reasonable portion’ test under s. 10(2)–(2C) is the same test that applies to fair dealing and library copying, as outlined at paras 3.40–3. As indicated in these paragraphs, the test differs according to whether the work is in hard copy or electronic form.¹⁷⁷

3.78 Specific documentation is required before the library can supply reproductions of material to an individual and there are limitations on the amount of material that can be copied under the ‘reasonable portion’ test. The documentation requirements are discussed in detail in paras 3.84–8.

3.79 The Digital Agenda Act amendments also extend the operation of the provisions under s. 49 to electronic material. Library and archives can now supply electronic reproductions of works or parts of works in response to user requests for the purpose of research or study without infringing copyright, subject to certain

¹⁷³ s. 49(1)(a).

¹⁷⁴ s. 49(4).

¹⁷⁵ This test only applies to a published literary, dramatic, or musical work (other than an article in a periodical publication or a computer program) (s. 49(5)). See paras 3.40–3 for a discussion of the ‘reasonable portion’ test.

¹⁷⁶ *ibid.*

¹⁷⁷ Computer programs are excluded from the reasonable portion test as it applies to literary works (s. 10(2)). Thus, a ‘reasonable portion’ of a computer program is a matter entirely for judicial interpretation.

conditions.¹⁷⁸ Works can only be supplied to a user on dumb terminals which prevent making further reproductions or communications of the work.

Policy justification of s. 49

3.80 The Spicer Committee recommended supplementing the then equivalent of s. 40 with a provision similar to the current s. 49. The Committee considered it logical to extend a student's permission to make a copy of a work under the fair dealing provision to that of a librarian copying on behalf of a student. It was argued that 'subject to certain safeguards, students should be entitled to the benefit of modern means of copying that science has made available.'¹⁷⁹ This recommendation was also formulated, in general, on the provisions of s. 7 of the *Copyright Act 1911* (UK) and the Gregory Report's policy of ensuring research and education are not unduly hampered:¹⁸⁰

'We take the same view as the Gregory Committee that, subject to certain safeguards, students should be entitled to the benefit of the modern means that science has made available.'¹⁸¹

It was considered that if a student were to be permitted to make a copy of a work under fair dealing, a librarian acting on the student's behalf should also be permitted to do so.¹⁸²

3.81 The Spicer Committee's recommendation also addressed the previous limitation the case law placed on the extent to which a library could make copies for clients. In terms of the fair dealing exceptions, the *De Garis* case held that the relevant purpose in determining the fairness of a dealing was that of the person actually undertaking the dealing.¹⁸³ The implication of this case for library copying was that

¹⁷⁸ ss. 49(7A) and (7B). The conditions applying to this section and the Digital Agenda amendments to the library copying provisions are discussed in detail in paras 3.89–95.

¹⁷⁹ Spicer Report, op. cit., para. 135.

¹⁸⁰ Section 7 of the *Copyright Act 1956* (UK) was primarily based on the recommendations of the Gregory Committee. Section 7 provided that any action done by a student that would come within the description of 'fair dealing' should be regarded as if done by a librarian acting on the student's behalf (subject to certain conditions).

¹⁸¹ Spicer Report, op. cit., para. 135.

¹⁸² Gregory Report, op. cit., para. 43.

¹⁸³ *De Garis* at 105.

an assessment of the fairness of the library's act of copying was required, rather than the end use by the library client.¹⁸⁴ The CLRC in its Simplification Report: Part 1 has recommended removing the current restrictions on the use for which libraries can copy material.¹⁸⁵ It has been recommended that libraries should be able to copy material for end-users for all fair dealing purposes rather than only research and study.¹⁸⁶ In light of the recommendations of the Simplification Report: Part 1, it should be noted that jurisdictions such as Canada currently allow a library to copy material for criticism and review as well as a client's research and study.¹⁸⁷

3.82 In justifying the library copying exceptions, the Franki Committee also highlighted the following obstacles libraries commonly face in fulfilling their functions as information resource centres:¹⁸⁸

- libraries often find lending physical items such as journals inconvenient and impractical;
- copies of material are often unavailable; and
- the purchasing of several copies of one item does not always satisfy the needs of clients who often want their own copies; and it is difficult for libraries to estimate the number of copies needed to be purchased.

Proportion of a work that may be copied – s. 49

3.83 As indicated in para. 3.76, s. 49(5) allows libraries and archives to reproduce the whole or a reasonable portion of a work (other than an article contained in a periodical publication) in their collection without infringing copyright, provided that the work cannot be obtained within a reasonable time at an ordinary commercial price.¹⁸⁹

¹⁸⁴ Copyright Law Review Committee, 1998, *op. cit.*, para. 7.61.

¹⁸⁵ *ibid.*, paras 7.52–60.

¹⁸⁶ The CLRC also recommended in its Simplification Report: Part 1 that the 'fairness' criteria under s. 40(2) should also be used to assess the conduct of libraries and archives (*ibid.*, para. 7.55).

¹⁸⁷ McDonald, 2001, *op. cit.*, p. 47.

¹⁸⁸ *ibid.*, p. 19.

¹⁸⁹ And an officer of the library has made a declaration to this effect.

Documentation requirements – s. 49

3.84 The *Copyright Amendment Act 1980* introduced many of the procedural requirements relating to library copying, following the Franki Report. The Franki Committee recommended the inclusion of the declaration system, to the extent that it required library clients to declare that a copy of the work is required for research and study purposes only, rather than require librarians to be satisfied as to the purpose for which the copy is required.¹⁹⁰ It was also recommended that in relation to the copying of an entire work or more than a reasonable portion, a librarian be required to make a declaration indicating that on the basis of a reasonable investigation an unused copy could not be obtained within a reasonable time at an ordinary commercial price.¹⁹¹

3.85 An individual who wants the library or archives to make a reproduction of the whole or part of an article or the whole or part of the published work, must furnish a written request to the officer identifying the material to be copied.¹⁹² An individual must also sign a declaration indicating:

- the applicant requires the reproduction for research and study;
- the reproduction will not be used for any other purpose; and
- that the applicant has not previously been supplied with a reproduction of the material by an authorised officer of the library or archives.¹⁹³

3.86 The standard form of a copying request can be varied for remote clients. If due to a person's remote circumstances they are unable to provide a request or declaration, then the declaration can be made by a means other than in writing.¹⁹⁴ In addition to making a standard declaration, the user must also declare that by reason of their remoteness they cannot conveniently provide a request and declaration in writing in enough time to enable the reproduction to be supplied in the time required by the user.¹⁹⁵

¹⁹⁰ Franki Report, op. cit., para. 3.26.

¹⁹¹ *ibid.*, para. 3.19.

¹⁹² s. 49(1)(a). Verbal requests may also be made by remote users s. 49(2A) and (2B): see discussion in para. 3.86.

¹⁹³ s. 49(1)(b).

¹⁹⁴ s. 49(2B).

¹⁹⁵ s. 49(2A)(b).

3.87 If a client also requests the copying of more than a reasonable portion the librarian must also make a written declaration relating to the availability of the material.¹⁹⁶

3.88 Librarians are also required to notate all material copied with the date of copying and the name of the library.¹⁹⁷ Declarations must be kept in the records of the library or archives for four years.¹⁹⁸ The inclusion of the declaration system in general in the Act was intended to act as a check against excessive copying by libraries and archives of copyright materials. The system also assists by reminding libraries and users of their copyright obligations and enables copyright owners to monitor compliance with the copying requirements.¹⁹⁹

User requests and the ‘digital agenda’

3.89 The Digital Agenda Act introduced exceptions to the new right of communication to the public, and created new exceptions in relation to existing rights. The exception that permits libraries and archives to make a copy of a work for the purpose of research or study has been extended to include the supply of electronic copies of works or parts of works in response to user requests for the purpose of research and study.²⁰⁰ The Government’s stated aim in introducing these amendments is to ensure that libraries and archives are able to use new technologies to provide access to copyright material for the general community, as long as the economic rights of copyright owners are not unreasonably prejudiced.²⁰¹ These amendments also reflect the underlying policy of the Digital Agenda Act of ensuring that ‘[a]s far as possible, the exceptions replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment’.²⁰²

¹⁹⁶ s. 49(5).

¹⁹⁷ ss. 203(H)(1), (5)(a), (5)(b) and (5)(c).

¹⁹⁸ s. 203A(1) requires records to be retained by the library or archives for the prescribed retention period. Under the Copyright Regulations 1969 (Cth) the prescribed retention period is four years (r. 25A).

¹⁹⁹ Copyright Law Review Committee, 1998, *op. cit.*, para. 7.43.

²⁰⁰ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 94.

²⁰¹ *ibid.* See also para. 3.68.

²⁰² *ibid.*, p. 2.

3.90 Under the new s. 49(5A), permission is not required from the copyright owner to exercise the new right of communication to the public and to make the material available online to users onsite.²⁰³ However, restrictions are placed on what users can do with any material that is communicated:

- Published articles and other works acquired as part of a library's digital collection can only be viewed from a dumb terminal which prevents the user from making a digital reproduction or communication of the work.²⁰⁴ However, a user can make a fair dealing hard copy of the work made available online, such as via printing, just as he or she can make a fair dealing photocopy of a hardcopy work in a library.

3.91 The restrictions on responding to user requests for the copying of electronic material are tighter than for print-based material. For example, in order to claim an exemption from copyright infringement under ss. 49(6) or 49(7), s. 49(7A) requires that a notice must accompany the supply of an electronic reproduction in response to a user request to communicate the reproduction.²⁰⁵ The notice must alert the user to:

- the fact that the reproduction is made under s. 49;
- the fact that the article or work might be subject to copyright protection; and
- any such matters as are prescribed (in the regulations).

The exemption from infringement under ss. 49(6) or 49(7) only applies if the library's reproduction is destroyed as soon as practicable after it is communicated to the user (s. 49(7A)(d)). This restriction was recommended to prevent libraries and archives from building up electronic collections of parts or the whole of articles or works as a result of communicating such works in response to user requests under ss. 49(2) and (2C).²⁰⁶

3.92 The Digital Agenda reforms also included amendments to ensure that the technical processes underlying new technologies, such as the Internet, are not

²⁰³ *ibid.*, para. 101.

²⁰⁴ s. 49(5A). There is also a requirement that copyright notices be given to users before supplying them with copies (s. 49(7A)(c)); and reproductions must be destroyed as soon as practicable after communicating them to the user (s. 49(7A)(d)).

²⁰⁵ s. 49(7A)(c)(i) and (ii).

²⁰⁶ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 106.

jeopardised.²⁰⁷ Under ss. 43A and 111A temporary reproductions of a work or audio-visual item are permitted as part of the technical process of making or receiving a communication.²⁰⁸ As these exceptions are intended to allow browsing (or simply viewing) of copyright material (including copyright material that involves the production of sound), copies made by the process of certain forms of caching will not infringe the existing right to copy.²⁰⁹

3.93 To combat the unauthorised use of copyright material online, the Digital Agenda Act introduced provisions providing copyright owners and their licensees with remedies against the abuse of technological copyright protection measures, such as the use of circumvention devices and services.²¹⁰ A 'technological protection measure' (TPM) means a device or product, or a component incorporated into a process, designed to prevent or inhibit copyright infringement through the use of access codes, access processes or copying control mechanisms (s. 10(1)). These measures can be rendered ineffective by the use of circumvention devices and circumvention services, defined in the Act as those devices or services that have only a limited commercially significant purpose other than the circumvention of an effective technological protection measure (s. 10(1)). TPMs will be discussed further in Chapter 4.

3.94 Commercial dealings with circumvention devices and services are generally prohibited under the Copyright Act, even if the purpose of circumvention is to access material for a fair dealing purpose, and even if such material is otherwise unavailable.²¹¹ However, under s. 116A dealings in circumvention devices and services are allowed for certain 'permitted purposes'. These exceptions were introduced alongside the anti-circumvention enforcement measures to 'strike a fair balance between the rights of copyright owners and the rights of copyright users'.²¹²

²⁰⁷ *ibid.*, paras 69 and 175.

²⁰⁸ ss. 43A and 111A.

²⁰⁹ In general terms, 'caching' is the process whereby digital works are copied as part of the process of electronically transmitting those works to an end-user. See, Digital Agenda Bill 2000, Revised Explanatory Memorandum, paras 69 and 175.

²¹⁰ See paras 3.127–9 for a discussion of provisions relating to circumvention devices.

²¹¹ Section 116A provides civil remedies and criminal sanctions against the manufacture, commercial dealing, importation, making available online, advertising, marketing and supply of a device or service used to circumvent technological protection measures.

²¹² Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 182.

3.95 Under ss. 116A(3) and (4), the permitted purposes are deemed to include those acts which are not infringements of copyright under specific provisions. These include the following provisions relating to copying by libraries and archives:

- copying by parliamentary libraries (s. 48A);
- reproducing and communicating works by other libraries and by archives for users (s. 49);
- reproducing and communicating works by libraries and archives for other libraries or archives (s. 50); and
- reproducing or communicating works for preservation (s. 51A).

These provisions and the other permitted purposes will be discussed in paras 3.127–9 of this Chapter in relation to other technology-based exceptions (including the Digital Agenda reforms).

(b) Reproducing and communicating works for other libraries or archives

3.96 Amendments to s. 50 were introduced by the *Copyright Amendment Act 1980*, following the recommendations of the Franki Committee.²¹³ Inter-library copying provisions were initially limited under the 1968 Act to the supply of one copy of an article in a periodical publication and a ‘reasonable portion’ of literary, dramatic and musical works to another library not established or conducted for profit.²¹⁴ More than a reasonable portion could be copied only if ‘the name and address of any person entitled to authorise the making of a copy was not known’.²¹⁵ The Spicer Committee in its 1959 report recommended against permitting entire works to be copied, so as to protect the legitimate interests of the copyright owner:

²¹³ Section 50 was also amended by the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1984* to the extent that references to literary works covered computer software. The Digital Agenda Act also amended references to ‘copy’ under s. 50 to include references to ‘reproduction’.

²¹⁴ Not more than one copy could be supplied unless the library was satisfied that the previous copy had been lost, destroyed or damaged: see, Franki Report, *op. cit.*, paras 4.11 and 4.12.

²¹⁵ s. 50(2) prior to the amendment in 1980.

‘The mere fact that a work is “out of print” is not, in our view, sufficient justification for the copying of the work as it may prevent the building up of a demand for the work sufficient to justify commercially the bringing out of a new edition.’²¹⁶

The Franki Committee later recommended the ‘commercial availability’ test replace this proviso, as difficulties were encountered in communicating with the person entitled to authorise the making of a copy.²¹⁷

3.97 The Franki Committee regarded Australia’s geography as justification for inter-library copying provisions.²¹⁸ It was argued that Australia’s geographical constraints made the lending of books and periodicals to remote users impractical, on both efficiency and cost grounds:

‘Photocopying for the purpose of “inter-library loan” is to replace in appropriate cases the loan of a book or periodical which, particularly in a country of large area, becomes impractical for many reasons, including the time taken to transmit the work itself to the place where it is required and the cost of postage or airfreight...Australia could not afford to store multiple copies of little-used or unused journals on library shelves around the country.’²¹⁹

3.98 The Franki Committee was particularly concerned to facilitate inter-library loans of scientific and technical material. There was a concern to ensure that the development of Australian expertise in these areas, and Australia’s international competitiveness and progress generally was not hampered:

‘It is quite clear to us if information is not readily available in Australia, the progress of the country will be seriously impeded and this must ultimately react on the general standard of living in the community.’²²⁰

3.99 As mentioned in the previous discussion on the historical development of the library copying provisions, the library and archives exceptions are narrower than the fair dealing exceptions. Despite their similar policy base, the documentation and administrative requirements for document supply, to both individuals and for inter-

²¹⁶ Spicer Report, op. cit., para. 146.

²¹⁷ Franki Report, op. cit., para. 4.20. The ‘commercial availability’ test is discussed further in paras 3.102–4, and para. 3.106.

²¹⁸ McDonald 2001, op. cit., p. 24.

²¹⁹ Franki Report, op. cit., paras 4.02–6.

²²⁰ *ibid.*, para. 4.06.

library copying, restricts the extent to which works can be copied for research and study purposes as compared to an individual's right to make a fair dealing copy. While the Digital Agenda amendments sought to replicate the balance struck between the rights of owners and users that applied in the print environment, the previous discussion of the limitations applying to viewing and reproducing digital material in response to user-requests indicates the very narrow scope of this exception. The Digital Agenda amendments have also further limited the scope of the current inter-library copying provisions and are discussed below.

Current inter-library copying provisions – s. 50

3.100 In response to a request from another library or archives, s. 50 allows a non-profit library to make and supply reproductions²²¹ of published works, articles or parts thereof, held in the collection of a library without infringement of copyright or payment to the copyright owner.²²² However, inter-library copying is restricted to copying and document supply for the following purposes:

- to include the reproduction in another library's collection;²²³
- for research or study of a client of another library ;²²⁴ and
- to provide library services to a Member of Parliament, to assist in the performance of their duties.²²⁵

3.101 Where the reproduction has been previously supplied to the requesting library for inclusion in its collection, further reproductions may only be supplied if the material has been lost, stolen or damaged, and an authorised officer of the library makes a declaration to this effect.²²⁶

²²¹ ie, copies and communication of copies.

²²² Illustrations can also be copied where relevant.

²²³ s. 50(1)(a).

²²⁴ s. 50(1)(b).

²²⁵ s. 50(1)(aa).

²²⁶ s. 50(7)(d).

Proportion of a work that may be copied – s. 50

3.102 The amount of material that can be reproduced and supplied to another library varies according to the nature of the material. In terms of hard-copy works, the following amounts may be supplied:

- the whole or part of an article contained in an issue of a periodical publication (s. 50(1));
- the whole or part of more than one article from the same issue of a periodical publication if the articles relate to the same subject matter (s.50(8));
- a ‘reasonable portion’ of a work;²²⁷ and
- the whole or more than a reasonable portion of a hard-copy work (other than an article), if the work is not available within a reasonable time at an ordinary commercial price (ie, the commercial availability test (s. 50(7A)(e)).²²⁸

3.103 The commercial availability test is tighter for the copying of electronic material than it is for print-based material. The test applies to all electronic reproductions, including works, parts of works and periodical articles, whether or not the part contains more than a reasonable portion of the work.²²⁹ However, the nature of the test differs according to the amount and type of electronic material copied and is set out in s. 50(7B)(ii)-(iv) as follows:²³⁰

- if the reproduction is of the whole, or of more than a reasonable portion, of a work (other than an article) in electronic form, the authorised officer must be satisfied that the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price (s. 50(7B)(e)(ii));²³¹

²²⁷ A ‘reasonable portion’ may be supplied between libraries to either include material in the recipient library’s collection or to fulfil another library client’s s. 49 user request. See paras 3.40–2 and 3.77 for an explanation of the definition of reasonable portion under ss. 10(2)-10(2C).

²²⁸ s. 50(7A). The authorised officer of the library or archives is required to provide declarations to this effect (s. 50(7A)(e)). These restrictions do not apply to reproductions made for parliamentary libraries (s. 50(7A)(d)).

²²⁹ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 119.

²³⁰ These restrictions do not apply to electronic reproductions made for parliamentary libraries (s. 50(7B)(d)).

²³¹ The Act does not define ‘reasonable time’ or ‘ordinary commercial price’. The definition of ‘reasonable portion’ under s. 10(2)-(2C) is discussed further in paras 3.40–2 and 3.77.

- if the reproduction is of a reasonable portion (or less) of a work in electronic form other than an article, the authorised officer must be satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price (s. 50(7B)(e)(iii)); and
- if the reproduction is of the whole or part of an article the authorised officer must be satisfied that the article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price (s. 50(7B)(e)(iv)).

3.104 In contrast, the ‘commercial availability’ test only applies to print-based material if there has been a request for the copying of more than a reasonable portion of a work (s. 50(7A)). The test does not apply in respect of articles reproduced from a hardcopy work (s. 50(7A)(a)).

3.105 Similar declaration requirements apply to requests for inter-library copying as for user-requests under s. 49. Thus, where a reproduction is made and supplied of the whole or part of a work held in electronic form or of more than a reasonable portion of a hardcopy work (other than an article) an authorised officer of the library requesting the reproduction must make a declaration setting out the particulars of the request, including the purpose for which the reproduction was requested.²³² Further reproductions can only be supplied where the authorised officer makes a declaration indicating that the previous reproduction has been lost, destroyed or damaged.²³³

3.106 It is also a specific requirement of the ‘commercial availability’ test that a declaration be made by the requesting library indicating that an electronic article is

²³² s. 50(7A)(e)(i) (hard-copy works) and s. 50(7B)(e)(i) (works in electronic form). All declarations made under ss. 49, 50, 51A and 110B are required to be retained by the library for the prescribed retention period (four years)(s. 203A) and arranged in chronological order according to the date of the declaration (s. 203D). See paragraphs 3.84–8 for an outline of the declaration requirements as they relate to user requests.

²³³ s. 50(7).

not commercially available.²³⁴ This requirement also applies in the case of requests for the copying of the whole, or more than a reasonable portion, of an electronic work.²³⁵ Both the test and the declaration requirement do not apply to reproductions made for parliamentary libraries.²³⁶ All reproductions in electronic form made for the purpose of supply must also be destroyed by the supplying library or archives.²³⁷ This is consistent with s. 49(7A), which was also introduced to prevent libraries and archives from building up electronic collections of copyright material.²³⁸

3.107 The supplying library can ‘communicate’ the requested material to the requesting library, including via email, by making available online and faxing (s. 50(4)). This differs from s. 49(5A), which restricts making digital material available online to a dumb terminal located within the premises of the library and preventing the further communication of that material.

Reproducing and communicating unpublished works in libraries or archives – s. 51 & s. 52

3.108 Section 51 allows unpublished literary, dramatic and musical works, engravings and photographs kept in public libraries and archives to be reproduced for clients, as follows:

- Old unpublished material may be copied for a user for research or study or with a view to publication if it forms part of the library’s collection; is available for public inspection; and at least 50 years have past since the author died.²³⁹

²³⁴ For requests for the copying of the whole or part of an article, the declaration must set out the particulars of the request, including the purpose for which the copy was requested. It also needs to state that, after reasonable investigation, the authorised officer is satisfied that an article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price (see s. 50(7B)(e)(iii)). For requests to copy reasonable portions of works, the declaration must set out the particulars of the request, including the purpose for which the copy was requested. It must also state that after reasonable investigation, the authorised officer is satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of material, within a reasonable time at an ordinary commercial price (see s. 50(7B)(e)(iv)).

²³⁵ s. 50(7B)(e)(ii).

²³⁶ s. 50(7B)(d).

²³⁷ s. 50(7C).

²³⁸ Digital Agenda Bill 2000, Revised Explanatory Memorandum, paras 106 and 125.

²³⁹ s. 51(1).

- Unpublished theses and similar works kept in a library of a university (or of a similar institution) or in an archives may also be copied for a client's research or study.²⁴⁰

The policy rationale of these provisions is outlined in the Franki Committee's acknowledgment of the potential historical significance of unpublished documents (which are often written on paper that will easily deteriorate) and the reasonableness of allowing the copying of such works to facilitate scholarship and research.²⁴¹

3.109 Section 52 of the Act also allows unpublished literary, dramatic or musical works, engravings or photographs kept in libraries or archives to be published without infringing copyright. For the exception to apply, the old work cannot be published on its own, but must be incorporated in a new literary, dramatic or musical work.²⁴² The Act also allows limited copying and communication of unpublished material by a library for a client's research or study purposes (s. 51A(1)(a)). This is discussed further in para. 3.111 in relation to adding to, preserving and replacing material in a library or archives collection.

(c) Adding to, preserving and replacing material in a library or archives collection – ss. 51A and 110B

3.110 Section 51A allows a reproduction of a literary, dramatic, musical or artistic work forming part of the collection of a library or archives to be made for various internal purposes, including:

- preservation;
- research;
- replacement of damaged material or material which has deteriorated, or has been lost or stolen; and
- administrative purposes.

A sound recording or cinematograph film can be copied for similar purposes (s. 110B).

²⁴⁰ s. 51(2).

²⁴¹ Franki Report, *op. cit.*, paras 5.03 and 5.05.

²⁴² Other conditions apply, such as unidentifiability of the copyright owner.

Preservation – ss. 51A(1), 110B(1), and 110B(2)

3.111 Instances where a library or archives may make a royalty-free reproduction of a work in its collection for the purpose of preservation are listed in s. 51A(1) of the Copyright Act. Reproduction of a work is permitted:

- whenever the work is in manuscript form or is an original artistic work and requires preservation against loss or deterioration, or reproduction is for the purpose of research (s. 51A(1)(a)); and
- if a work held in the collection in a published form has been damaged or deteriorated (s. 51A(1)(b)), or has been lost or stolen (s. 51A(1)(c)).

3.112 In relation to sound recordings and cinematograph films a copy of the following material may be made for the purpose of preserving it against loss or deterioration, and for research:

- the first copy of a sound recording (eg, a master tape or matrix) (s. 110B(1)(a)-(c)); and
- the first copy of a cinematograph film (eg, the first negative or videotape) (s. 110B(2)(a)-(c)).

Whether or not that material is the matrix or original negative, a copy may also be made to replace damaged, deteriorated, lost or stolen material.

3.113 The exceptions to the copying of any published material for preservation, research or replacement purposes only apply once the commercial availability test is satisfied and the required declaration has been made.

3.114 The Franki Committee recommended the introduction of provisions along the lines of s. 51A to allow the copying of unpublished works for the purpose of preservation, security or research and the copying of published works for the purpose of replacing damaged, deteriorating, lost or stolen material held in the collection of a library or archives.²⁴³ The Committee focused on the difficulties often experienced by libraries in locating the copyright owners as demonstrating a need for library provisions allowing the copying of published or unpublished works for preservation

²⁴³ Franki Report, *op. cit.*, para. 5.11.

and certain other purposes.²⁴⁴ The Committee highlighted how this problem is often exacerbated when public figures deposit papers in major institutions that contain much third party material.²⁴⁵ There was also a concern to protect archival material of valuable historical interest written on paper that will easily deteriorate.²⁴⁶

3.115 Section 51A(2) enables libraries and archives to digitise the copyright material in their collections for ‘administrative purposes’, and this digitised material can be communicated (by making it available online) within the premises to officers of the library or archives only (s. 51A(3)).²⁴⁷ Similarly, s. 110B(2A) also enables libraries and archives to communicate digitised copies of sound recordings and cinematograph films to officers of the library or archives.²⁴⁸ In contrast, s. 51A(3A) allows a preservation copy of an original artistic work to be ‘communicated’ to the public in instances where the original has been lost, deteriorated or is considered to be at risk of significant deterioration.²⁴⁹ This exception is limited to making the material available online only within the premises of the library or archives on a computer terminal that cannot be used to make an electronic or hardcopy reproduction, or to communicate the reproduction.²⁵⁰

Research at a library or archives

3.116 Reproductions of works and sound recordings or cinematograph films forming part of a library’s collection can be made for the purpose of carrying out research at either the library or archives where the material is held or another library.²⁵¹ Sound recordings and films can also be communicated to other libraries and archives for the purpose of research and study; and the material can be accessed from a computer

²⁴⁴ *ibid.*, para. 5.02.

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*, para. 5.03.

²⁴⁷ The phrase ‘administrative purposes’ is undefined and Ricketson suggests that it could be interpreted to include purposes other than relieving storage pressures, (which was the implied purpose of microform copies): Ricketson S and Creswell C. *The law of intellectual property: copyright designs and confidential information*. 2nd edn. Sydney: Law Book Co., 2001, para. 11.323.

²⁴⁸ s. 110B(2A).

²⁴⁹ s. 51A(3B) lists the circumstances where the preservation copy of the original artistic work can be made available online.

²⁵⁰ s. 51A(3A) and Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 139.

²⁵¹ s. 51A(1)(a) (original artistic works or works held in manuscript form); s. 110B(1)(a) (sound recordings held in the form of a first record); and s. 110B(2)(a) (cinematograph films held in the form of a first copy).

installed within the premises of the other library or archive (s. 110B(2B)). This exception does not extend to communication to the general public. The commercial availability test and the declaration requirements under ss. 51A(4) and 110B(3) must also be satisfied.²⁵²

Reproducing and communicating works in Australian archives – s. 51AA

3.117 Section 51AA provides special provisions for the Australian Archives, allowing it to make, on request, a single working, reference and replacement copy of works kept in the Archives' collection without infringing copyright. A single working copy can be made and retained by the Australian Archives or a regional office of the Archives to make further reference and replacement copies of the work.²⁵³ A reference copy includes a copy made for supply to the central or regional offices of the Archives for use by the office in providing access to the work to members of the public.²⁵⁴ Where the officer in charge of the central or regional office of the Australian Archives is satisfied that a reference copy has been lost, damaged or destroyed, a single replacement copy can be made from a working copy.²⁵⁵

Other technology-based exceptions (including Digital Agenda reforms)

Reproducing computer programs

3.118 The *Copyright Amendment (Computer Programs) Act 1999* (Computer Programs Act) introduced exceptions to the Act to facilitate the growth and competitiveness of the computer software industry, which was seen as fundamental

²⁵² The authorised officer of the library or archives must, after reasonable investigation, make a declaration stating that he or she is satisfied that a new copy (not a second-hand copy) of the work, sound recording or film cannot be obtained within a reasonable time at an ordinary commercial price.

²⁵³ s. 51AA(1)(a) and s. 51AA(2).

²⁵⁴ s. 51AA(1)(b) and (c), and s. 51AA(2).

²⁵⁵ s. 51AA(1)(d) and (e), and s. 51AA(2).

to the development of the information economy in Australia.²⁵⁶ Provisions included in Part III Division 4A allow the doing of certain acts in relation to computer programs that would otherwise infringe copyright. Exceptions to exclusive rights are designed to make allowance for the reproduction that occurs incidentally through normal computer usage (such as running software on a hard drive); to allow for legitimate activities (such as error correction and security testing); and to promote the development of new interoperable technology. The making of reproductions (and in certain circumstances adaptations) of computer programs is allowed for the following purposes:

- normal use or study of the program (s. 47B);
- making a back-up copy (s. 47C);
- making interoperable products (s. 47D);
- error correction in programs (s. 47E); and
- security testing of a program or of a computer system or network of which it forms a part (s. 47F).

3.119 Section 47H of the Act expressly provides that an agreement, or provision of an agreement, which seeks to exclude or limit some of the exceptions has no effect.²⁵⁷ The Committee notes that s. 47H does not apply to s. 47B(2). Section 47B(2)(b) allows an express direction or licence to override the exception in s. 47B(1) which allows the making of an incidental and automatic reproduction of a computer program in the course of running a computer program for the purposes for which the program is designed. The Committee also notes that these provisions are largely based on similar provisions contained in the Council of the European Communities *Directive on the Legal Protection of Computer Programs*.²⁵⁸ The Directive also acknowledges the practical necessity of allowing the incidental reproduction of a computer program so

²⁵⁶ Computer Programs Bill 1999, Second Reading Speech, *Parliamentary Debates*, House of Representatives, 11 August 1999, the Hon Daryl Williams AM QC MP, p. 8479. See also, Computer Programs Bill 1999, Explanatory Memorandum, p. 4.

²⁵⁷ s. 47B(3) and ss. 47C-47F.

²⁵⁸ 14 May 1991 (91/250/EEC). See, Copyright Law Review Committee, 1995, op. cit., Appendix G.

as to be able to 'use the computer program...in accordance with its intended purpose'.²⁵⁹ The scope of s. 47H is discussed in further detail in Chapter 5.

3.120 The exception for decompilation (reverse engineering) of computer programs (s. 47(D)) was introduced for both practical reasons and to maintain Australia's international competitiveness. The Government acknowledged the competitive nature of the computer industry internationally. Reference was made in the Second Reading Speech to developments in the US and Europe that allowed for the decompilation of programs to assist in discovering the interface information of existing programs and to achieve interoperability.²⁶⁰ In introducing this provision the Government was concerned to remove any obstacle to the ability of software developers to compete with their overseas counterparts. The exception for error correction (s. 47E) was justified on the basis of a particular concern at the time in relation to the year 2000 date / Y2K bug problem as a result of which error-free copies of computer programs might not have been available.²⁶¹

3.121 Debate in the House Of Representatives on the Copyright Amendment (Computer Programs Bill) 1999 (Computer Programs Bill) focused on efficiency as an issue of concern to the computer industry. It was considered that many computer program developers would not choose decompilation as a first course of action as decompilation is considered to be an expensive and time-consuming process.²⁶² It was seen that the exception would be of greatest assistance in instances where decompilation was the only means of making new software and hardware products that interoperate with existing programs:

²⁵⁹ Article 5(1) of the Directive states: 'In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.'

²⁶⁰ Computer Programs Bill 1999, Second Reading Speech, op. cit., p. 8480. See also, Computer Programs Bill 1999, Explanatory Memorandum, p. 12. Article 6 of the European Commission *Computer Programs Directive* (1991) permits decompilation of computer programs for interoperability (for full text, see EU website: <http://www.europa.eu.int/eur-lex/en/lif/dat/1991/en_391L0250.html>). In the United States the reproduction and adaptation of computer programs as part of reverse engineering is an infringement unless such acts come within the 'fair use' exception under the US *Copyright Act 1976*. The sanctioning of reverse engineering as a 'fair use' exception has been endorsed by the US Court of Appeals (9th Circuit) in the decision of *Sega Enterprises Ltd v Accolade Inc* 977 F.2d 1510 (9th Cir. 1992). It was held that reverse engineering, including the decompilation of a computer program to determine its unprotected ideas and functional concepts, was permissible 'fair use' under s. 107 of the US *Copyright Act 1976*: see, Copyright Law Review Committee, 1995, op. cit., paras 10.28–101.

²⁶¹ Computer Programs Bill 1999, Explanatory Memorandum, p. 3.

²⁶² Computer Programs Bill 1999, Second Reading Speech, op. cit., p. 8493.

'If Australian industry is to be allowed to compete on level terms with producers of similar products in the USA and Europe, Australian software copyright law must be brought more into line with the law in those countries. Accordingly, as an exception to the copyright reproduction right, where interface information about other programs is not readily available to a software producer, the producer will now be able to decompile another program to the extent necessary to get the required interface information for making an interoperable product.'²⁶³

3.122 Thus, the exception for interoperability is limited to programs for which the interface specifications are not readily available to a software producer; and decompilation is only allowed to the extent necessary to obtain interface information required for the purpose of making an interoperable product.

3.123 The Second Reading Speech indicated that limitations were placed on the scope of the exceptions to acknowledge the research efforts of program developers and the heavy investment involved. Unauthorised copying was of less concern as it was considered that the types of processes involved in reproducing a computer program under the exceptions differed to making pirated copies:

'[t]o make such a pirate product, one would not decompile the original, but would simply copy it straight onto a disc.'²⁶⁴

Extending the definition of 'computer program'

3.124 Since 1984, computer programs have been explicitly protected under the Act as literary works, whether in human-readable language called 'source code', or in machine-readable language referred to as 'object code'. In *Data Access Corporation v Powerflex Services Pty Ltd & Ors*²⁶⁵ the High Court found that a compression table in a computer program was a literary work. The practical result of this was that any table or compilation associated with or incorporated in computer programs may not have been able to be reproduced without infringing the literary work copyright, with the possibility that the computer program itself could not be reproduced. Following this decision, s. 47AB was inserted into the Act and clarified that the definition of

²⁶³ *ibid.*, p. 8480.

²⁶⁴ *ibid.*, p. 8481.

²⁶⁵ *Data Access Corporation v Powerflex Services Pty Ltd & Ors* (1999) 202 CLR 1.

computer program in Part III Division 4A of the Act included any literary work that is incorporated in, or associated with, a computer program; and is essential to the effective operation of a function of that computer program. The stated intention of the amendment was to:

‘ensure that, whenever a person is permitted to reproduce a computer program for the purposes of normal use or study, making a back-up copy, making interoperable products, error correction or security testing, that person is also permitted to reproduce any literary work that is incorporated in, or associated with a computer program, which is essential to the effective operation of a function of that program.’²⁶⁶

3.125 Considerations of the public interest in permitting interoperability and promoting the efficient operation of technology also influenced the insertion of s. 47AB in the Copyright Act. The revised Explanatory Memorandum to the Digital Agenda Bill 2000 indicates that it was necessary to extend the exceptions to computer programs to associated literary works to provide consistency with the legislative changes to the definition of ‘computer program’ in s. 10(1) of the Copyright Act. The amendment was also considered necessary where the compression or ‘look-up’ table is vital to the effective performance of the functions of that program.²⁶⁷

Reproduction for the purpose of simulcasting (ss. 47AA and 110C)

3.126 Where a literary, dramatic or musical work, or adaptation of such a work, may be broadcast without infringement of copyright, a film or sound recording of the work or adaptation may also be made without infringement of copyright provided that it is made for the sole purpose of simulcasting the work or its adaptation in digital form (s. 47AA). This technology-based provision was inserted by the Digital Agenda Act to promote compliance with the *Broadcasting Services Act 1992* (Broadcasting Services Act) and the introduction of digital television in Australia. The Broadcasting Services Act contains provisions requiring broadcasters to simulcast in both analog and digital form for a period of time to facilitate the phasing in of digital television in Australia. Section 110C contains a similar provision allowing for

²⁶⁶ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 85.

²⁶⁷ *ibid.*, paras 83–5.

the copying of sound recordings and cinematograph films for the purpose of simulcasting in digital form, provided that the broadcasting of these items would not be an infringement of copyright.

Circumvention devices

3.127 As discussed above in the context of library copying (paras 3.93–5) the Digital Agenda Act introduced prohibitions under s. 116A to address the problem of circumvention of TPMs. Section 116A(3) prohibits the making, importing, selling, distribution (including online) and promotion of circumvention devices and services. The actual use of such devices and services is not proscribed *per se*. Section 116A(3) also provides an exception to this provision for a range of permitted purposes. A ‘permitted purpose’ includes something done under the following provisions:

- reproducing computer programs to make interoperable products (s. 47D);
- reproducing computer programs to correct errors (s. 47E);
- reproducing computer programs for security testing (s. 47F);
- copying by parliamentary libraries (s. 48A);
- reproducing and communicating works by other libraries and by archives for users (s. 49);
- reproducing and communicating works for other libraries or archives (s. 50);
- reproducing or communicating works for preservation (s. 51A);
- use of copyright material for the services of the Crown (s. 183); and
- reproduction and communication by educational institutions and institutions assisting persons with a print or intellectual disability under Pt VB.

3.128 The permitted purpose provisions provide an important means of maintaining the copyright balance in the digital environment. In an effort to balance the need to protect owners against the interests of legitimate users, limitations are placed on the scope of the ‘permitted purpose’ exceptions. For example, s. 116A(3) requires the person supplied with a device be a ‘qualified person’, essentially defined as the authorised officer of the institution or other person properly authorised in

writing.²⁶⁸ A declaration must also be given to the supplier and must specify the matters listed under s. 116A(b)(i)-(iv), including: the person's name and address; the basis on which they are a qualified person; the name and address of the supplier; a statement indicating that the device or service is to be used for a permitted purpose and identifying the permitted purpose by reference to a specific section of the Copyright Act; and a statement indicating that the work or other subject-matter in relation to which the device or service is required is not readily available in a form not protected by a TPM.²⁶⁹

3.129 The Committee also notes that s. 116A (unlike US legislation) does not prohibit use of a circumvention device by an individual.²⁷⁰ Unless the individual's use is protected by a licence or a statutory defence (such as a fair dealing defence), or the use does not amount to an exercise of a copyright right, the use may, however, give rise to an infringement of copyright. Citing concerns about the use of bans on circumvention to restrict lawful activity, the Attorney-General's Department and the Department of Communications, Information Technology and the Arts have explained the Government's approach as follows:

'The government believes that the most significant threat to copyright owners' rights lies in preparatory acts for circumvention, such as manufacture, importation, making available online and sale of devices, rather than individual acts of circumvention.'²⁷¹

Statutory Licences

3.130 The Act establishes a number of statutory licences to allow for the use of copyright material without the owner's permission, provided equitable remuneration

²⁶⁸ s. 116A(3) and (4); and ss. 132 (5G), (5H) and (5J).

²⁶⁹ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 190.

²⁷⁰ The *Digital Millennium Copyright Act 1998* (US)(DMCA) inserted into the *Copyright Act 1976* (US) provisions dealing with circumvention devices: s. 1201(a)(1) prohibits the circumvention of technical measures that control access to all works; s. 1201(b)(2) prohibits trafficking in technology that may be used to circumvent technological protections against unauthorised access to works; and s. 1201(b) prohibits trafficking in devices that circumvent copy control measures. It does not, however, prohibit the act of circumventing copy control measures. This anomaly stems from a concern that prohibiting such conduct could inhibit non-infringing conduct such as fair use. See paras 6.63–88 for a discussion of the DMCA.

²⁷¹ Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs 1999, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, December 1999, paras 4.36–43.

is paid. The word 'equitable' is intended to mean fair, just and reasonable, and this qualification ensures that copyright owners are fairly remunerated.²⁷²

3.131 As the previous discussion on the exceptions indicates, many of the statutory licences exist as a consequence of industry-specific arrangements (such as in the case of the statutory licences for ephemeral broadcasting)²⁷³ and to alleviate high transaction costs involved in accessing copyright material at the time. Apart from administrative efficiency, many statutory licence schemes have been introduced without any clearly stated policy justification. Many of the particular uses of copyright material now subject to statutory licences developed before the law clearly recognised the right of copyright owners to control them. Guibault also argues that some statutory licences were created to alleviate the symptoms of market failure raised by constant technological developments, which make effective control of exclusive rights practically impossible.²⁷⁴ Statutory licences are therefore a practical means of remunerating owners, particularly where it is impossible to monitor usage in situations where technology (such as reprography) has made the reproduction of copyright material easier, cheaper and of better quality.²⁷⁵

3.132 Rather than alleviating market failure, the statutory licence in Part III Division 6 was also introduced to minimise the potential for music copyright owners to engage in monopolistic practices which would affect the recording industry which had established itself around the use of copyright material. The Spicer Committee noted in 1959 that the compulsory licence to manufacture records could be justified on the grounds of the 'history of the matter' and the damage that might be occasioned to a well-established industry if the licence was abolished.²⁷⁶ The Committee notes that in terms of the historical basis to the mechanical reproduction right, the British Parliament established a compulsory recording licence under s. 19(2) of the *Copyright Act 1911* (UK) in response to lobbying by record companies against Parliament's

²⁷² *University of Newcastle v Audio-Visual Copyright Society Ltd* (1999) 43 IPR 5050 at 519 (Copyright Tribunal, Burchett P). See also, Copyright Law Review Committee 2000, *Jurisdiction and Procedures of the Copyright Tribunal*, Commonwealth of Australia, Canberra, 114–15.

²⁷³ ss. 47, 70 and 107.

²⁷⁴ Guibault, 2002, op. cit., pp. 22–3.

²⁷⁵ *ibid.*

²⁷⁶ Spicer Report, op. cit., paras 167–71.

intention at the time to provide authors of musical works with the exclusive right to authorise the mechanical reproduction of their musical works.²⁷⁷ Record manufacturers argued that allowing authors' exclusive control over such reproductions would produce a monopoly which would affect the market for manufactured records. Thus, the rationale for the mechanical licence provision under Part III Division 6 of the Australian Act was not convenience, but rather as a means of moderating the feared high royalty demands of music copyright owners for their consent to the recording of their works.

3.133 The Committee notes that the circumstances surrounding large scale copying by institutional users contrasts dramatically with the situation involving copying by individual copyright users under fair dealing. Some statutory licence schemes operate where the licensee is an institution (or government body), such as the schemes which apply to the copying and communication of broadcasts, and the reproduction and communication of works, by educational and other institutions.²⁷⁸ Institutions often possess sufficient power to negotiate with copyright owners, and for this reason the Act provides for voluntary licensing.²⁷⁹ In this way, the statutory licence schemes operate as default provisions. Their role is to provide for the efficient remuneration of copyright owners for multiple copying rather than the defence of an individual use of copyright material. Hence, in the Committee's view, they are not properly regarded as exceptions to the exclusive rights of copyright owners, but rather as exceptions to the right to refuse a licence.

3.134 There is a range of statutory licenses, including those for:

- 'ephemeral' reproduction of a literary, dramatic, musical or artistic work or a sound recording for the purposes of broadcasting (ss. 47, 70, 107);

²⁷⁷ The United Kingdom was able to introduce a compulsory licence provision as the definition of 'reproduction in a material form' under s. 1(1)(d) of the *Copyright Act 1911* (UK) was wide enough to include both sound recordings and films. Section 1(1)(d) was introduced following Britain's accession to the Berlin Revision of the Berne Convention in 1908 (the 'Berlin Act'), and its adoption of Art. 13(1) and (2) of that Act, which was introduced to deal with the problem of the increased ability to copy music brought about by rapid technological changes. Art. 13 provided authors of musical works with the exclusive rights of authorising '(1) the adaptation of these works to instruments which can produce them mechanically; (2) the public performance of the said works by means of these instruments'.

²⁷⁸ Parts VA and VB.

²⁷⁹ The statutory licensing schemes under Parts VA and VB of the Act for copying, reproduction and communication by educational institutions or institutions assisting persons with a print disability or an intellectual disability do not preclude voluntary licensing (s. 135Z (Part VA) and s. 135ZZF (Part VB)).

- the making of sound broadcasts of literary and dramatic works by holders of a print disability radio licence (s. 47A);²⁸⁰
- recording of musical and literary works (Part III Division 6);²⁸¹
- ‘off air’ copying and communication of broadcasts by educational institutions and institutions assisting people with an intellectual disability (Part VA);
- reproducing and communicating works and published editions etc. by educational institutions and institutions assisting people with a print or intellectual disability (Part VB);
- retransmissions of free-to-air broadcasts (Part VC);
- public performance and broadcast of sound recordings (s. 108(1)(a)), and s. 109(1)); and
- use of copyright material by the Crown (Part VII Division 2).

3.135 The statutory licence scheme now in Part VB was originally introduced by the *Copyright Amendment Act 1980*, following the recommendations of the Franki Committee. As there was no international consensus at the time on measures to regulate reprographic reproduction of copyright works, the introduction of this scheme was considered a progressive legal development.²⁸² Substantial amendments to the initial statutory licence copying provisions were later made and new schemes added in 1989,²⁸³ 1998²⁸⁴ and 2000.²⁸⁵ These include a widening of the subject matter covered by the licence scheme and addition of new schemes (1989); a substantial simplification of the administration of many of the schemes (1998) and, recently, the application of some of the digital agenda reforms and the addition of another new scheme (2000).

²⁸⁰ However, there is no longer a ‘print disability radio licence’ under the Broadcasting Services Act, and this drafting anomaly is to be corrected.

²⁸¹ ss. 55-64 permit the making, for a royalty payment, of recordings of musical and literary works.

²⁸² At the time of the Franki Report in 1976 a resolution had been adopted in December 1975 by a joint meeting of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee of the Universal Copyright Convention indicating the unlikelihood of reaching international consensus on measures needed to regulate reprographic reproduction of copyright works. At the time of the report, schemes were operating in the Federal Republic of Germany, Sweden and the Netherlands where payments were made in respect of photocopying to authors’ societies as it was accepted that it was not possible to distribute remuneration to authors personally. However, these schemes were not as developed as the statutory licence scheme proposed by the Franki Committee: see, Franki Report, op. cit., paras 1.34–6.

²⁸³ via the *Copyright Amendment Act 1989* (Cth) as repealed by the *Copyright Amendment (Re-enactment) Act 1993* Cth (see footnote 49).

²⁸⁴ via the *Copyright Amendment Act (No 1) 1998* (Cth).

²⁸⁵ *Copyright Amendment (Digital Agenda) Act 2000* (Digital Agenda Act).

Statutory licence schemes for copying by educational institutions and institutions assisting persons with an intellectual or print disability – Parts VA & VB

3.136 Following the recommendations of the Franki Committee, the *Copyright Amendment Act 1980* introduced two separate statutory licence schemes covering multiple copying by educational institutions (the then s. 53B) and multiple copying by institutions assisting persons referred to as ‘handicapped readers’ (the then s. 53D). The recommendations relating to statutory licence schemes were considered amongst the most significant of all the exceptions advanced by that Committee.²⁸⁶

3.137 The Franki Committee justified its recommendations in relation to statutory licences on the basis of facilitating equitable access to information. It argued that to the extent that there was demand for the making of multiple copies for use by non-profit educational establishments, then copyright law should accommodate this demand.²⁸⁷ In a recent decision of the Copyright Tribunal, Finkelstein DP similarly emphasised that the public interest in facilitating education is an important policy to be considered in determining the rate of equitable remuneration under a Part VB licence:

‘While acknowledging the force of the view...that authors should not be required to subsidise educational institutions, it nevertheless remains true that Parliament thought it appropriate to limit the monopoly conferred upon authors, so that the monopoly would not inhibit the proper education of Australian students...The public benefit of the statutory licence should not be underestimated. Setting a rate which would inhibit its use, will be positively detrimental to the public welfare.’²⁸⁸

The statutory licences have also been justified as a practical solution to the inefficiencies and high transaction costs that educational institutions would encounter in having to seek permission from the copyright owner, particularly in light of Australia’s geographical constraints.²⁸⁹

²⁸⁶ Copyright Amendment Bill (No 2) 1979, Second Reading Speech, op. cit., p. 2535.

²⁸⁷ Franki Report, op. cit., paras 1.52 and 6.26.

²⁸⁸ *Copyright Agency Limited v Queensland Department of Education* [2002] ACopyT 1 (8 February 2002) at para. [85].

²⁸⁹ Franki Report, op. cit., para. 6.29.

3.138 The 1980 amendments introduced a statutory licence scheme to allow the making of copies of published copyright material in braille or sound recordings for people with disabilities.²⁹⁰ The Government had received representations, as did the Franki Committee (although they were outside its terms of reference), regarding difficulties experienced by institutions in obtaining the permission of copyright owners to reproduce published works in braille form and the extent to which this detrimentally affected the ability of intellectually disabled students to complete course requirements.²⁹¹

The Copyright Tribunal

3.139 In recommending the introduction of statutory licensing schemes, the Franki Committee was divided over the precise means of fixing remuneration. However, it did recommend that in the event of failure by educational institutions and copyright owners to come to a satisfactory agreement, the Copyright Tribunal could arbitrate.²⁹² The *Copyright Amendment Act 1980* subsequently introduced provisions to enable parties to negotiate levels of remuneration and required records to be kept as the basis of the copyright owner's claim to payment. Provisions also ensured that the Tribunal had power to make determinations in relation to statutory licences.

3.140 The Government is currently considering the Copyright Law Review Committee's recommendations to extend the Tribunal's jurisdiction to cover all (non-statutory) licence schemes, including all transactional (individual user-specific) licences administered by a collecting society.²⁹³

Introduction of Parts VA and VB

3.141 The *Copyright Amendment Act 1989* repealed the old schemes in Part III Divisions 5A and 5B of the 1968 Act, and introduced provisions to streamline and

²⁹⁰ This scheme was later incorporated in s. 53D following amendments under the 1980 Act.

²⁹¹ Copyright Amendment Bill (No 2) 1979, Second Reading Speech, op. cit., p. 2536.

²⁹² Franki Report, op. cit., para. 6.47.

²⁹³ Copyright Law Review Committee, 2000, op. cit., Chapter 11.

facilitate educational photocopying and to allow off-air copying for the first time.²⁹⁴ The new provisions were justified as providing an efficient and practical system to assist in furthering education:

‘The proposed statutory licences for copying by educational institutions contained in the Bill recognise the need for educators to have easy access to copyright material for teaching purposes. They also recognise the need for copyright owners to be remunerated for the use of that material. While copyright owners should not be called upon to subsidise the educational needs of the public, there should be as few obstacles as possible to access to educational materials.’²⁹⁵

3.142 New Parts VA and VB were added to enable educational institutions and institutions assisting people with disabilities to copy television and radio programs off-air and print copyright works, in return for payment to declared collecting societies for distribution to copyright owners. The provisions were considered flexible in allowing educational institutions to make off-air copies of all television programs for educational purposes, irrespective of the original purpose of the program. They also overcame the practical difficulties in having to contact individually all owners of the various copyrights in the broadcast.²⁹⁶

3.143 Further amendments in 1998 extended the Part VA licence to cover pay-television transmissions. These allowed institutions under the Part VA educational statutory licence to copy not only free-to-air broadcasts but also other broadcast transmissions such as subscription broadcasts and cable television transmissions; while Part VB continued to provide educational institutions and institutions assisting persons with a disability with a statutory licence to make copies of works subject to the payment of equitable remuneration.

Current Parts VA and VB statutory licence schemes

3.144 The statutory licence scheme under Part VA allows the copying and communication of broadcasts by educational institutions and institutions assisting

²⁹⁴ As amended by the *Copyright Amendment (Re-Enactment Act) 1993* (Cth) (see footnote 49).

²⁹⁵ Copyright Amendment Bill 1988, Second Reading Speech, Senate, 28 November 1988, p. 3010.

²⁹⁶ *ibid.*, p. 3011.

persons with an intellectual disability, subject to payment of equitable remuneration for the owners of copyright in the underlying material included in the broadcast.²⁹⁷ This follows the Digital Agenda Act's substitution of a new, broader definition of 'broadcast' and the extension of Part VA to the communication as well as copying of broadcasts.²⁹⁸

3.145 Part VB establishes a statutory licence scheme to permit reproduction and communication of certain copyright material by educational institutions, institutions assisting persons with a print disability and institutions assisting persons with an intellectual disability. The Digital Agenda reforms also extended Part VB licences to all reproductions (both hard copy and electronic), and to communication of copyright materials.²⁹⁹ This broadened the means of access by students to copyright material under the scheme. However, the statutory licence scheme under Part VB does not apply to computer programs (s. 135ZE).

3.146 The main rationale of the Digital Agenda amendments to Parts VA and VB was to ensure that the schemes were broad-based, flexible, and capable of adapting to future technological developments.³⁰⁰ The amendments also removed the technologically-specific nature of provisions under the earlier schemes so as to facilitate electronic use of copyright material.³⁰¹

Administration of the current statutory licence schemes

3.147 The 1989 Act streamlined the statutory licence schemes in respect of the system used to collect equitable remuneration for copyright owners.³⁰² The copying permitted under the new Parts VA and VB statutory licence schemes was essentially the same as the copying permitted under the old licences. The new element lay in the mechanism for the collection and payment by a single collecting society of

²⁹⁷ Equitable remuneration is paid to the declared collecting society.

²⁹⁸ Digital Agenda Bill 2000, Revised Explanatory Memorandum, paras 276–7.

²⁹⁹ Digital Agenda Act, Schedule 1 items 152 and 166 (*ibid.*, paras 388 and 402).

³⁰⁰ Digital Agenda Bill 2000, Revised Explanatory Memorandum, paras 279, 337, and 338.

³⁰¹ *ibid.*, paras 276 and 340.

³⁰² The system involved the issuing of records notices, as required under ss. 135ZV; 135ZX; and 135ZY.

remuneration to the copyright owner, calculated on the basis of either full record-keeping and payment per copy or sampling and payment of an annual amount per student. This amendment was as important as, if not more important than, the introduction of sampling. Payment to a single collecting society not only assisted copyright owners to obtain payments but also greatly increased convenience for users.³⁰³ The amendments in relation to Parts VA and VB are discussed below as they relate to each statutory licence scheme separately.

3.148 The sampling system was introduced under both Part VA and VB as an optional alternative to full record-keeping. Under this system remuneration is assessed on a per student per annum basis, rather than an amount per copy (as under the records system).³⁰⁴ It was considered necessary to provide the option of the sampling system to overcome the perceived shortcomings of the then existing statutory licensing schemes, in particular, the cumbersome and costly mandatory full record-keeping requirements of those provisions (ie, the then ss. 53B and 53D).³⁰⁵ The system was considered to be 'far more flexible, less costly to operate and less administratively burdensome on all parties, including teachers than the records system.'³⁰⁶

3.149 The streamlining of the administration of the Part VB statutory scheme and the introduction of the Part VA licence also facilitated the particular educational needs of correspondence students. Amendments to the record-keeping system and the new alternative sampling system allowed different rates of remuneration to be agreed or determined in relation to different institutions; different classes of students within an institution; and different classes of works, sound recordings or films included in a TV broadcast.³⁰⁷ A lower rate could be paid for copying on behalf of these students so as to acknowledge their greater reliance on print and broadcast material.

³⁰³ Copyright Amendment Bill 1988, Explanatory Memorandum, para. 73.

³⁰⁴ Where a sampling notice is given, the amount of equitable remuneration is such 'annual amount' as is determined by agreement or by the Copyright Tribunal (s. 135ZW(1)).

³⁰⁵ Copyright Amendment Bill 1988, Explanatory Memorandum, para. 53. See also, Finkelstein DP in *Copyright Agency Limited v Queensland Department of Education* [2002] ACopyT 1 (8 February 2002) at paras [25]-[27] for a discussion of the difficulties experienced in administering the statutory licence scheme established by s. 53B.

³⁰⁶ Copyright Amendment Bill 1988, Explanatory Memorandum, para. 54.

³⁰⁷ *ibid.*, para. 48.

3.150 The Digital Agenda Act also updated the administrative provisions for determining equitable remuneration under both the Parts VA and VB statutory licence schemes, to assist in establishing flexible arrangements and to accommodate future technological developments.³⁰⁸ Amendments to Part VA extended the statutory licence scheme to allow for an agreed system, which enables collecting societies and institutions to agree on the manner of sampling for calculating remuneration payable.³⁰⁹ Part VB was also amended by establishing a third, new system for the payment of equitable remuneration for digital copying by educational institutions (see paras 3.151–3, below).

3.151 The Digital Agenda amendments to Part VB establish two separate schemes for the payment of equitable remuneration for reproduction by educational institutions. The first licensing scheme under Part VB applies to copyright material in hard copy or analogue form, and is the current scheme under Part VB, Division 2 of the Copyright Act. A new licensing scheme was introduced under Part VB, Division 2A to accommodate the copying of works in electronic form and communication of works by educational institutions.³¹⁰ Part VB now requires use of a new electronic use system (EUS) to determine the equitable remuneration payable to the copyright owner for the reproduction in electronic form and communication of copyright material.³¹¹ The system was specifically introduced 'to avoid the technology-specific requirements of the current records system and sampling system. The system is broad enough to encompass electronic copyright management systems or whatever system the relevant parties agree to use'.³¹² Differentiation between the systems is determined by the form of the reproduction.³¹³

3.152 In the instance of hard copy reproductions of material originally in hardcopy form, Part VB, Division 2 applies and institutions must use either the records or

³⁰⁸ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 309.

³⁰⁹ Subject to the jurisdiction of the Copyright Tribunal (*ibid.*, paras 309–10).

³¹⁰ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 337.

³¹¹ See s. 135ZU(2A).

³¹² Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 340.

³¹³ See s. 135ZU(2A).

sampling system.³¹⁴ For hard-copy reproductions of material in electronic form, Part VB, Division 2A applies and the records or sampling system must be used.

3.153 Part VB, Division 2 applies to the making of electronic copies of original hardcopy works and requires the EUS to be used. Under Part VB, Division 2A, the EUS is also required to be used for determining equitable remuneration for the making of electronic copies of material originally in electronic form.

3.154 The concept of 'deemed' copies and communications also applies to determinations of equitable remuneration under Parts VA and VB. The Digital Agenda Act also ensured that where a broadcast or a copy that is communicated remains online for more than the prescribed period (12 months, or otherwise as agreed between the parties), then the broadcast or copy is deemed to be recopied and communicated again at the end of the period and is the subject of further payment.

Relationship between fair dealing for the purposes of research and study and Part VB statutory licences

3.155 There is a possible overlap between fair dealing under s. 40 and the statutory licence for multiple copying by educational institutions and institutions assisting persons with a disability (current Part VB statutory licence). In *Haines v Copyright Agency Ltd* (1982)³¹⁵ the Federal Court considered whether a memorandum, issued to schools by the Director General of Education in NSW, stating that s. 40 allowed for virtually the same amount and type of copying as ss. 53B and 53D, was inaccurate and misleading.³¹⁶ It was held in a unanimous judgment that the memorandum as a whole should be withdrawn. The court affirmed the decision of McLelland J at first instance, that the essential ingredient of s. 40 was that the fair dealing with a work must be for the purpose of research and study, and that determinations of a fair dealing must take into account the existence and effect of statutory licences providing

³¹⁴ Digital Agenda Bill 2000, Revised Explanatory Memorandum, paras 343–4 explain when to apply the current system and when to apply the new system.

³¹⁵ 64 FLR 184.

³¹⁶ Section 53B was repealed by the *Copyright Amendment Act 1989* (Cth) and replaced by the new system in Pt VB of the Act.

equitable remuneration to the copyright owner.³¹⁷ However, the Court did not express a view as to whether a particular act of copying may be protected under both sections, and the issue of an overlap remains uncertain.

Part VC statutory licence scheme

3.156 The Digital Agenda Act also introduced a statutory licence scheme under Part VC for the payment of equitable remuneration to holders of rights in underlying works used in the retransmission of free-to-air broadcasts (s.135ZZK).³¹⁸ Prior to this amendment, retransmitters, such as cable pay-television operators, were able to retransmit free-to-air broadcasts without permission or payment of remuneration to either the owner of copyright in the broadcast or the owner(s) of copyright in the underlying works, such as any music, written material or film. The Revised Explanatory Memorandum to the Digital Agenda Bill 2000 indicates that this amendment was specifically made to implement the Government's decision that, in relation to underlying rights holders in free-to-air broadcasts, retransmitters should have a statutory licence to retransmit those broadcasts.³¹⁹

Crown copying – s. 183(1)

3.157 Section 183(1) allows the Commonwealth or a State (or a person authorised by these bodies) to do acts comprised in the copyright in a work or other subject matter, with the exception of computer programs, without infringing copyright provided that the acts are done for the services of the Commonwealth or the State.

³¹⁷ McLelland J at first instance noted that the quantity of allowable copying differs between the two provisions: not more than a reasonable portion of the work can be copied for the purpose of research and study under s. 40 unless the copying otherwise constitutes a fair dealing; whereas more than a reasonable portion can be copied in return for equitable remuneration under ss. 53B and 53D (currently the Part VB statutory licence scheme). Furthermore, McClelland J noted that the fact that equitable remuneration is paid to copyright owners could affect the value of the work (as assessed by s. 40(2)(d)) and that this must necessarily influence the amount and type of copying undertaken by a school which could properly be regarded as a 'fair dealing' under s. 40 (*Haines v Copyright Agency Ltd* (1982) 40 ALR 264 at 271 (SC(NSW))).

³¹⁸ The new scheme does not apply to a broadcast that has been retransmitted and a licence to retransmit the broadcast itself must be negotiated separately with the owner of the copyright in the broadcast. Retransmissions of free-to-air broadcasts over the Internet are also excluded from the operation of this scheme.

³¹⁹ Subject to the payment of equitable remuneration to the underlying rights holders in the broadcasts: see, Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 447.

The phrase ‘for the services of the Commonwealth or the State’ is not defined, and a leading commentator suggests that it should be given a wide interpretation so as to cover any activity related to the purpose of government.³²⁰ Note however that copying done by or for government schools is deemed not to be done for the services of the Commonwealth or a State (s. 183(11)). Equitable remuneration for use of the copyright material must also be paid to the relevant collecting society. When an act has been done under this exception, the copyright owner must be given a notice in the form prescribed by r. 25 of the Copyright Regulations 1969 which informs the copyright owner of the doing of the act comprised in a copyright and provides any such other information as required from time to time (s. 183(4)).

Miscellaneous Exceptions

3.158 In addition to the fair dealing, libraries and archives and other technology based exceptions and the statutory licences, there are other miscellaneous exceptions under the Copyright Act. However, these exceptions are not organised in a consistent way throughout the Copyright Act. Each exception allows for a specific act to be done in relation to a specific subject matter of copyright, thus there is no single underlying rationale for the miscellaneous exceptions. While these exceptions no doubt were introduced into the Act for sound policy reasons, in the Committee’s view, it is difficult to see them as essential to defining the nature of copyright. This is particularly so, as many of these exceptions have little practical significance today in light of changes in technology and industry practice. In this regard, it is worthwhile noting that none of the submissions the Committee received touched on these exceptions.

³²⁰ Ricketson and Creswell, 2001, *op. cit.*, para. 12.275.

Reproduction and related uses

Reproduction of writing on approved label for containers for chemical product (ss. 44B and 112B)

3.159 The courts have held that copyright exists in labels for, and other material included in, the packaging of chemical products.³²¹ Section 44B of the Act provides that the reproduction on a label on a container for a chemical product of any writing appearing on an approved label is not an infringement of any literary copyright that may subsist in relation to that writing. Section 112B provides for the same exception in relation to any published-edition copyright that may subsist in relation to the writing. These provisions were introduced in 1994³²² as part of Government policy on the marketing of generic agricultural and veterinary chemical products in Australia.³²³ The practical effect of this provision is that it prevents holders of expired patents covering products from stopping distribution of competing generic versions of those products by asserting copyright in the directions and other product information that is required to be included on the containers of the products.

Certain reproductions and publication of artistic works (ss. 65, 66, 67, and 68)

3.160 These provisions cover the making of a painting, drawing, engraving or photograph of sculptures and works of artistic craftsmanship situated, otherwise than temporarily, in public places or including them in a cinematograph film or television broadcast (s. 65); the making of a painting, drawing, engraving or photograph of buildings and models of buildings or the inclusion of them in a film or broadcast (s. 66); the incidental filming or televising of artistic works (s. 67); and the publication of a painting, drawing, engraving, photograph or cinematograph film which is exempted, by virtue of ss. 65, 66 or 67, from copyright infringement (s. 68). The Spicer Committee

³²¹ Affirmed by the English Court of Appeal in *Elanco Products Ltd v Mundops (Agrochemical Specialists)* [1980] R.P.C. 213 and by the Full Court of the Federal Court of Australia in *Skybase Nominees Pty Ltd v Fortuity Ltd* (1996) 36 IPR 529.

³²² *Agricultural and Veterinary Chemicals Act (Consequential Amendments Act) 1994* (Cth).

³²³ Copyright Law Review Committee, 1998, op. cit., para. 8.25.

recommended inclusion of the provisions in the Act on the basis that copying works situated permanently in the public, such as parks and streets, was reasonable.³²⁴

Reproduction of part of artistic work in later work (s. 72)

3.161 This exception provides that the copyright in an artistic work is not infringed by the author of that work if the author makes a later work without repeating or imitating the main design of the earlier work (s. 72(1)). Section 72(2) states that s. 72(1) has effect notwithstanding that part of the earlier work is reproduced in the later work and that, in reproducing the later work, the author used a mould, cast, sketch, plan, model or study made for the purpose of the earlier work. This exception extends beyond employment settings, and can encompass the situation where freelance artists want to reuse part of a work in which the copyright has passed to another.

Reconstruction of buildings (ss. 73(1) and 73(2))

3.162 Section 73(1) provides that where copyright subsists in a building the copyright is not infringed by a reconstruction of that building. Similarly, s. 73(2) provides that where a building has been constructed in accordance with architectural drawings or plans in which copyright subsists and has been constructed by, or with the licence of, the owner of that copyright, that copyright is not infringed by a later reconstruction of the building by reference to those drawings and plans. The practical justification of these exceptions is self-evident.

Filming or recording of a television or sound broadcast for private and domestic use (s. 111)³²⁵

3.163 This provision allows the making of sound and audio-visual recordings of radio and television broadcasts for the private and domestic use of the person by

³²⁴ Spicer Report, *op. cit.*, paras 218–9.

³²⁵ As the European Union has a private copying scheme this provision will be discussed in detail in Chapter 6 in the comparative law section on the European Union.

whom they are made (ie, home copying). However, the exception does not allow home copying of any underlying works included in the broadcast, as it relates to copyright in a television broadcast ‘in so far as it consists of visual images’ (s. 111(1)); and to the copyright in a sound broadcast, or in a television broadcast ‘in so far as it consist of sounds’ (s. 111(2)). The expression ‘private and domestic’ is not defined in the Copyright Act; however, s. 111(3) specifically states that the provision does not cover activities that may involve selling, distributing, exhibiting by way of trade, broadcasting or causing the film to be seen or heard in public. The practical effect of the exception is that only live, extempore broadcasts such as of sporting events could be home copied free of infringement.

Reproductions of editions of works (s. 112)

3.164 This provision ensures that there will be no incidental infringement of published edition copyright where use of the work(s) contained in the edition is allowed under other provisions of the Copyright Act. The dealings referred to are those relating to fair dealing (ss. 40-43); copying by libraries and archives (ss. 49, 50 and 51A); the uses of copyright works pursuant to the statutory licensing schemes under Part VB; and the copying of statutory instruments and judgments (s. 182A). As the drafting of many of the above exceptions does not apply to published editions, this provision was introduced to provide consistency within the Copyright Act.

Reproduction of statutory instruments and judgments (s. 182A)

3.165 Section 182A allows the making of a single copy of the whole or part of a prescribed work for ‘a particular purpose’. Section 182A(3) provides a list of statutory and judicial material deemed to be a ‘prescribed work’. This exception was introduced by the Copyright Amendment Act 1980 following the recommendation of the Franki Committee.³²⁶

³²⁶ Franki Report, *op. cit.*, para. 8.07.

Performances, transmissions and broadcasts

3.166 Prior to the Digital Agenda Act, transmission rights were technologically- and rightholder-specific. For example, the right to broadcast only extended to ‘wireless broadcasts’ and the cable diffusion right was couched in complex and obscure terms and, in any case, did not extend to sound recordings or broadcasts. The new right to communicate to the public was introduced to replace and extend these technologically specific rights.³²⁷ However, the phrase ‘broadcast’ still has specific meaning in the Copyright Act. Section 10(1) defines broadcast as a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992 which covers transmissions over the air, by cable or satellite or a combination of these means. The miscellaneous exceptions referring to the term ‘broadcast’ therefore refer to this broader range of transmissions.

Performances of published literary or dramatic works (s. 45)

3.167 This provision allows for the reading or public recitation (or the inclusion in a sound broadcast or television broadcast of a reading or recitation) of an extract of reasonable length from a published literary or dramatic work (or adaptation of such a work). However, sufficient acknowledgment of the work must be made for the exception to apply.

Performances of works at places where people reside or sleep or in respect of a club or other non-profit organisation (s. 46)

3.168 Section 46 exempts the public performance of a literary, dramatic or musical work, or an adaptation of such a work, by the operation of reception equipment or by the use of a record at premises where people reside or sleep if this forms part of the amenities provided exclusively for the residents, inmates and their guests. This provision was justified by the Spicer Committee on the following basis:

³²⁷ Digital Agenda Bill 2000, Revised Explanatory Memorandum, para. 50.

'In our opinion, a performance in a guest house or hotel to residents or their guests should not be treated as a public performance where there is a similarity between the type of performance given in such an establishment and the performance that a person might receive in their own home.'³²⁸

3.169 The exception is limited by the requirement that the performance is made by operation of reception equipment or by use of a record which form part of the amenities provided exclusively for residents or inmates of those premises or their guests. Thus, the exception would not apply where works were performed on a television or radio set in a public bar of a hotel, but would cover the situation where the apparatus was situated in a room which was open only to hotel residents and their guests.³²⁹

Causing sound recording to be heard at a guest house or club (s. 106)

3.170 This provision provides a similar exception to s. 46 for sound recordings heard in public as part of the amenities provided at premises where persons reside or sleep (s. 106(1)(a)). A further exception to copyright infringement is provided for a club, society or other organisation which causes the sound recording to be heard in public as part of the activities of, or for the benefit of, the organisation (s. 106(1)(b)). However, s. 106(1)(b) limits the exception to non-profit organisations whose principal objects are charitable or are concerned with the advancement of religion, education or social welfare. The exception does not apply if these organisations charge admission and the proceeds are applied otherwise than for the principal purposes of the organisation (ss. 106(2) and (3)).

Performance of works or other subject-matter in the course of educational instruction (s. 28)

3.171 Section 28 provides that it is not an infringing act to perform a literary, dramatic or musical work, or to play or show a sound recording or film, in class, or otherwise in the presence of an audience. However, the exception only applies provided that the performance is conducted by a teacher or student in the course of giving or

³²⁸ Spicer Report, *op. cit.*, para. 69.

³²⁹ See also s. 199(1) at para. 3.172, below.

receiving educational instruction not being given for profit, and the audience is limited to persons who are taking part in the instruction or are directly connected with the instruction. This is a very narrow exception, which is limited almost entirely to the classroom situation and does not extend to such performances as school concerts or school plays where parents may be present (s. 28(3)).

Public performance of certain works, sound recordings and films by the reception of broadcasts (ss. 199(1), (2) and (3))

3.172 It is not an infringement of the public performance right in a published literary or dramatic work, or in a sound recording or film, to cause a reading or recitation from such work to be performed in public, or the recording or film to be seen or heard in public, by the reception of a broadcast in which the work, recording or film is thus included.³³⁰ This exemption does not apply to musical works included in broadcasts. Thus, only owners of copyright in musical works used in a broadcast can exercise their public performance right against persons who play music in public by the reception of broadcasts.

Public performance of recordings that originate overseas (s. 105)

3.173 This provision states that the copyright subsisting in a sound recording by virtue only of the fact that first publication took place in Australia under s. 89(3) is not infringed by causing the recording to be heard in public or by broadcasting the recording. The purpose of this provision, together with the operation of the Copyright (International Protection) Regulations 1969, is to ensure that performing and broadcasting rights in foreign sound recordings are only recognised under Australian copyright law on the basis of reciprocity, that is, where those rights are also recognised by the relevant foreign country.³³¹

³³⁰ Note that 'reception' has a technical meaning (s. 25).

³³¹ These countries are specified in Sch 3 to the Copyright (International Protection) Regulations 1969. First publication of the recording in one of these countries is not a sufficient connecting factor for this purpose.

Public performance of old news film (s. 110(1))

3.174 This provision permits old news films to be exhibited in public 50 years after the principal events depicted in the film occurred without infringing copyright in the film.³³²

Public performance of works contained in old films (s. 110(2))

3.175 This provision covers the situation where copyright in a cinematograph film expires before the copyright in underlying works (script, music, and artwork). This can occur as film copyright lasts 50 years from first publication (s. 94) while copyright in works generally lasts 50 years from the end of the year in which the author dies (s. 33(2)). In order to meet this anomaly, the Act provides that exhibiting an out-of-copyright film does not infringe copyright in any underlying work in the film.

Other Uses

Inclusion of works in collections for use by places of education (s. 44(1))

3.176 This provision allows short extracts from a published literary, dramatic, musical or artistic work or from an adaptation of such a work to be included in a book, sound recording or film which comprises a collection of works intended for use by places of education without infringing copyright in the work so included. The right is heavily circumscribed, including a requirement that the collection consist principally of non-copyright material (s. 44(1)(c)).³³³ A limit is also placed on the number of extracts from the works of one author which may be included in collections by the same publisher over a five-year period (s. 44(2)). The Simplification Report: Part 1 recommended that the section be repealed. The Report noted that the provision is seldom, if ever, used and that it is largely superseded by s. 135ZG which allows

³³² The exception only applies to copyright in the film not, for example, to any music incorporated in it. For films made before 1 May 1969, see ss. 221 and 222.

³³³ The conditions applying to the exception are contained in s. 44(1)(a)-(e).

institutions under the Part VB statutory licence to make copies of works to include in materials to be distributed to students.³³⁴

Use of record embodying film soundtracks (s. 110(3))

3.177 This provision allows a sound recording containing the same material as is in the soundtrack of a cinematograph film (other than a record derived directly or indirectly from that soundtrack) to be used without infringing copyright in the film.

Use of works and broadcasts for educational purposes (ss. 200(1), (2) and (2A))

3.178 Section 200 permits the use of works and broadcasts for educational purposes in certain limited circumstances. Section 200(1)(a) allows the reproduction or adaptation of a literary, dramatic, musical or artistic work by a teacher or student in the course of educational instruction 'otherwise than by the use of an appliance adapted for the production of multiple copies or an appliance capable of producing a copy or copies by a process of reprographic reproduction'. Thus, the scope of the exception is limited to the reproduction of copyright material on a blackboard and the making by hand and use of an overhead projection of a work. Section 200(1)(b) also permits educational institutions to reproduce or to adapt a work as part of the questions to be answered in an examination or in an answer to examination questions.

3.179 Educational institutions are also permitted under s. 200(2) to make a record of a sound broadcast without infringing copyright in a work or sound recording included in a sound broadcast. However, the exception only applies to sound broadcasts intended to be used for educational purposes; the record must be made by, or on behalf of, the person or authority in charge of a non-profit place of education and the record must be used only in the course of instruction at that institution. Section 200(2A) also permits a record of a sound broadcast to be made without infringing copyright in the broadcast. While s. 200(2A) is not restricted to broadcasts intended to be used for educational purposes, the exception is subject to the condition that 'the record is made by, or on behalf of, the body administering an educational institution

³³⁴ Simplification Report: Part 1, op. cit., paras 9.21–2.

and is not used except for the educational purposes of that institution or another educational institution'. The exception is also considered to be of limited effect since it relates only to making a record of a sound broadcast and does not extend to works or sound recordings included in the broadcast.³³⁵

Conclusion

3.180 The discussion in this Chapter highlights how an analysis of the policy basis of each exception is a crucial part of assessing the extent to which contracts should be able to set aside or modify the exceptions, if at all. Having looked at the exceptions in this Chapter and how they contribute to the copyright balance, the following Chapters will examine the way they are being dealt with by transactional arrangements and what, in the Committee's view, should be done about it, if anything.

³³⁵ *ibid.*, para. 9.30.

