

The Department of the Attorney General

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

**Submission of the
Australian Broadcasting Corporation
July 2005**



ABC
Australian
Broadcasting
Corporation

EXECUTIVE SUMMARY

ABC's Perspective

The ABC is concerned to ensure copyright policy strikes a balance between the interests of copyright owners and copyright users. In the ABC's case, that balance is necessarily affected by the ABC's legislated mandate.

The ABC's submissions proceed from the perspective of the ABC as a net copyright user.

ABC's Response to Specific Issues Paper Questions

The ABC makes the following recommendations:

1. In principle, the Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC. However, the ABC supports an expansion of the fair dealing provisions rather than the model specifically proposed by the CLRC.
2. Instead of replacing the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law, the ABC supports a model which retains, improves and strengthens the current fair dealing exceptions and incorporates expanded exceptions.
3. There should be a specific exception to copyright infringement for the purpose of time-shifting for private and domestic use only.
4. There should be a specific exception to copyright infringement for format shifting both as a specific exception for private domestic use and as part of an *exception for public broadcasters*.
5. There should be an exception to copyright infringement for making back up copies of copyright material other than computer programs both as a specific exception for private domestic use and as part of an *exception for public broadcasters* discussed below.
6. The following specific exceptions or statutory licences should be introduced in addition to existing fair dealing provisions:
 - (a) fair dealing for the purpose of governmental and political discussion;
 - (b) fair dealing for the purpose of public interest discussion;
 - (c) fair dealing for the purpose of parody;
 - (d) fair dealing with orphaned works;
 - (e) exception to copyright infringement for public broadcasters including abolishing the ephemeral 12 month restriction, and permitting archiving, format shifting, back up copying and digitisation. The ABC proposes that a public broadcaster exception could be modelled on an extended version of the BBC exception under section 69 of the *Copyright, Designs and Patents Act 1988* (UK):

*Copyright is not infringed by the **making or use** by the Australian Broadcasting Corporation, for the purpose of maintaining supervision and*

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control over programmes broadcast or communicated to the public by them, of recordings or records of those programmes.

- (f) fair dealing for the purpose of conducting new technology trials; and
- (g) a residual open-ended fair use provision.

INTRODUCTION

Thank you for providing the Australian Broadcasting Corporation (the 'ABC') with the opportunity to make submissions with respect to the Issues Paper *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*.

The ABC welcomes this opportunity to make a submission to the Attorney General's Department on the fair dealing provisions in the *Copyright Act 1968* (Cth), (the 'Act'), and the exploration of fair use and other exceptions.

The ABC is a publicly funded broadcaster, authorised by Federal legislation, the *Australian Broadcasting Corporation Act 1983* (Cth) ("ABC Act"). The ABC's Charter is, in summary:

- (a) to provide Australia with innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system, including broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of the Australian community; and broadcasting programs of an educational nature;
- (b) to transmit to countries outside Australia broadcast programs of news, current affairs, entertainment and cultural enrichment; and
- (c) to encourage and promote the musical, dramatic and other performing arts in Australia.

Through its distinctive radio, television and new media services, the ABC is one of Australia's largest copyright creators, copyright owners, copyright users and copyright traders. The overriding concern of the ABC, as a national public broadcaster, is that it continues to fulfil its legislative mandate under the *ABC Act* and satisfy the changing expectations of the Australian community in the digital age.

Fair dealing plays a key role in the ABC meeting its Charter obligations. However, the pace of technological change has far exceeded the ability of copyright law to maintain a "balance" between the interests of both users and creators of copyright. With the focus now more prominently directed towards copyright piracy than creativity, the ABC has been restricted in its ability to access and deliver information, content and innovation to meet both its Charter obligations and public expectations.

With this in mind, the ABC proposes a number of changes to the Act in conjunction with further additions to the existing fair dealing provisions of the Act to enable the ABC to meet its key objectives.

A. ABC'S PERSPECTIVE

The ABC is concerned to ensure copyright policy strikes a balance between the interests of copyright owners and copyright users. In the ABC's case, that balance is necessarily affected by the ABC's legislated mandate. For the most part, the ABC's submissions proceed from the perspective of the ABC as a net copyright user. Through its divisions, specifically *ABC News and Current Affairs*, *ABC Television*, *ABC Radio*, *ABC New Media and Digital Services*, *ABC Asia Pacific*, *ABC Archives and Library Services* and *ABC Enterprises* the ABC is:

- (a) a producer of material that may rely on the fair dealing exceptions to copyright when producing content on diverse topics, including news, current affairs, drama, documentaries, comedy, factual and entertainment;
- (b) a broadcaster of material that may rely on the fair dealing exceptions to copyright when broadcasting content;
- (c) a communicator to the public of material that, when produced as online digital content, relies on the fair dealing exceptions to copyright infringement. In addition to website material, such may include digital content for platforms including datacasting, DVB-H (Digital Video Broadcasting Handhelds), digital radio trials and podcasting;
- (d) a distributor of material that may rely on the fair dealing exceptions to copyright in its distribution dealings;
- (e) a producer and distributor of ancillary commercial products embodying material that may rely on the fair dealing exceptions;
- (f) a licensee of material that may contain other material cleared under the fair dealing exceptions for commercial and non-commercial purposes; and
- (g) a holder of an archive and library of sound recordings and audio-visual material that may require reproduction of material as well as format and/or time shifting of material in carrying out its role as a repository of broadcast material.

B. ABC RESPONSE TO SPECIFIC ISSUES PAPER QUESTIONS

1. THE GOVERNMENT SEEKS YOUR VIEW ON THE OPERATION OF THE EXCEPTIONS IN THE COPYRIGHT ACT (PARTICULARLY THE FAIR DEALING EXCEPTIONS IN SS40-43(2) AND SS103A-103C) IN PROVIDING A BALANCE BETWEEN THE INTERESTS OF COPYRIGHT OWNERS AND COPYRIGHT USERS.

The ABC supports retaining, improving and strengthening the existing copyright exceptions and adding further specific exceptions to copyright infringement.

(a) Balance

The ABC is both a copyright creator and copyright user. The ABC has an extensive mandate under the *ABC Act* that requires it to perform a diverse range of activities.

We reiterate, in part, the position articulated by the ABC in its 1997 submission on *Simplifications of the Fair Dealing Provisions of the Copyright Act 1968*. As a public broadcaster the ABC has a key role to play in disseminating information and encouraging public discussion. The fair dealing provisions, in particular the exceptions for the reporting of news and criticism and review, enable the ABC to better perform its Charter function:

to encourage and promote the musical, dramatic and other performing arts in Australia (ABC Act, section 6(1)(c))

and its obligation to:

broadcast daily from each broadcasting service regular sessions of news and information relating to current events within and outside Australia (ABC Act, section 27(2)).

The ABC negotiates with copyright owners and pays for copyright material on a daily basis. However, the magnitude and nature of the ABC's activities mean it regularly relies on the exceptions in the Act to meet its Charter obligations, in particular:

- (i) sections 41 or 103A - Fair Dealing for the Purpose of Criticism or Review;
- (ii) sections 42 and 103B – Fair Dealing for the Purpose of Reporting News;
- (iii) section 45 - Reading or Recitation in public or for a Broadcast;
- (iv) section 47 - Reproduction for Purpose of Broadcasting;
- (v) section 67 - Incidental filming or televising of artistic works;
- (vi) section 70 – Reproduction for Purpose of Including Work in Television Broadcast; and
- (vii) section 107 – Making a Copy of the Sound Recording for Purpose of Broadcasting.

B. ABC RESPONSE TO SPECIFIC ISSUES PAPER QUESTIONS

When considering the balance between copyright owners, users and the ABC's legislated mandate, it is important to acknowledge that copyright law must strike a balance between the copyright owner's right to a return on the intellectual investment and free speech. The fair dealing exceptions provide a means by which this is achieved, and by which the ABC can achieve its mandated functions.

Recent reforms as a result of the Australian US Free Trade Agreement have consolidated a period of significant strengthening of copyright owners' rights, such as performers' rights and an extended copyright duration. The growth of encryption and technological protection measures have also strengthened the rights of copyright owners and so the rights of copyright users provided for under fundamental exceptions need to be protected.

The imbalance in favour of copyright owners needs to be addressed to ensure that copyright users may legitimately use copyright material which is justified by concepts and public policy such as free speech, public benefit and access, without destroying the copyright owners' ability to derive returns on their intellectual investment.

It should also be acknowledged that the ABC, as a broadcaster and participant in the digital environment, is able to add value to a copyright owner's work by providing that work with editorial integrity and exposure on one of the ABC's many services. This should not be forgotten when balancing the economic interests of the copyright owner with the exceptions to copyright infringement.

In addition, there are increasingly a number of shortcomings in the existing fair dealing regime as it applies to public broadcasters.

(b) Review of Existing Fair Dealing Provisions

The ABC notes the following difficulties with the existing regime:

(i) What is 'news' and 'criticism or review'?

Rather than providing a clear interpretation of these fair dealing purposes, courts have interpreted what constitutes 'news' and 'criticism or review' narrowly. As a result, many justifiable uses of copyright material in the broadcasting sector have been restricted. The lack of clear judicial guidance on the meaning of existing fair dealing provisions gives rise to the prospect of copyright users becoming increasingly risk averse, such that these important exceptions, which purport to strike a balance between copyright owners and free speech, are underutilised and, therefore, undermined. This jeopardizes the ABC's ability to program content in an optimum way to satisfy its Charter.

B. ABC RESPONSE TO SPECIFIC ISSUES PAPER QUESTIONS

Following *The Panel* decisions,¹ uncertainty has arisen in the broadcasting sector as to what constitutes news and criticism or review. The determinations of the judges, with respect, did not lay down clear consistent majority principle. This is one of the reasons the ABC seeks to extend the fair dealing exceptions for example, by seeking political and governmental discussion and public interest discussion exceptions – see point 8 below.

(ii) Criteria for Assessing Fairness

The criteria such as that provided in section 40 (2) (for example, the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price) should not be applicable to public institutions like the ABC, carrying out their legislated mandate. Such criteria are inconsistent with mandated legislative function as they:

- (A) restrict the ABC's ability to present news and information in an appropriate and timely fashion;
- (B) do not take into account the exigencies and pressures of 'on air' time frames; and
- (C) fail to acknowledge the limited in public funds available to public broadcasters to clear material.

(iii) Sufficient Acknowledgment

It is difficult to see how the existing requirement for sufficient acknowledgement can be applied to material communicated by mobile phones and podcasting. Sufficient acknowledgment within the context of fair dealing and moral rights should be a requirement only where it accords with industry practice and is reasonable in the circumstances.

The ABC seeks clarity on this issue within the Act.

(iv) TPM's Preventing Fair Dealing

Amendments should be made to allow the use of decryption devices on technological protection measures (TPMs) for the purpose of fair dealing. The use of TPMs has impeded the ABC's ability to fair deal as they restrict use of copyright material on different platforms. For example, some radio play list equipment cannot read certain copies of CDs and some DVDs cannot be unscrambled for the purpose of fair use.

¹ TCN Channel Nine Pty Limited v Network Ten Pty Ltd [2002] FCAFC 146 (2002); 55 IPR 112. TCN Channel Nine Pty Ltd v Network Ten Pty Ltd [2001] FCA 841; (2001) 50 IPR 335.

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The UK has sought to address this issue further to the European Copyright Directive 2001/29/EC under the *Copyright and Related Rights Regulations 2003* (UK) which introduced section 296ZE “Remedy where effective technological measures prevent permitted acts” and the British Broadcasting Corporation is able to avail itself of this remedy. There should be clarity on this issue in the Act.

(c) Other Exceptions to Copyright Infringement

Inconsistency in application to works, other subject matter and performances

The ABC submits that a number of other exceptions in the Act are incomplete and inconsistent. This means gaps appear in relation to certain uses of copyright works. For example:

(i) Section 45 – Reading or Recitation in Public or for a Broadcast

Section 45, in relation to extracts of reasonable length, is broadcast specific and does not allow the ABC to stream radio content (simultaneously with broadcast or otherwise) when relying on this provision.

The ABC relies on section 45 of the Act in many areas of its production for television and radio programs, especially Radio National. However, this provision is specific to sound broadcast and television broadcast and does not cover new media such as online communication, SMS and other new technologies without risk of copyright infringement. The amendment of this provision to include other formats would afford the ABC greater flexibility in using material across all its platforms. For new media and SMS communication, sufficient acknowledgement may be difficult or impractical. Previous comments in relation to sufficient acknowledgment equally apply.

(ii) Section 67 – Incidental Filming or Televising of Artistic Works

Section 67, in relation to incidental use, is specific to a television broadcast of an artistic work. It cannot be relied on to justify exercises of other copyright rights nor the broadcast of other incidental works, subject matter other than works or performances. Currently, section 67 applies only to the use of artistic works in film and broadcasting. The expansion of this section of the Act to include other works and subject matter other than works and to cover more than television broadcasts would afford the ABC greater flexibility in accessing material for use and using material across all its platforms.

Many other jurisdictions have much broader provisions allowing the incidental inclusion of “works” in artistic works, sound recordings, film, broadcasts or cable programs. For example: New Zealand’s Copyright Act (1994) section 41; the European Union’s Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 Article 5, United Kingdom’s Copyright Design and Patents Act (1988) section 31, Hong Kong’s Copyright Ordinance, section 40 and Canada’s Copyright Act (1985) section 30.7.

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- (iii) Section 70 – Reproduction for Purpose of Including [Artistic] Work in Television Broadcast and Section 107 – Making of a Copy of the Sound Recording for Purpose of Broadcasting

The broadcaster's statutory licences in sections 70 and 107 are subject matter specific – here artistic works and sound recordings - and do not consistently extend to other subject matter other than works such as film or broadcast. The existing exception should be extended to all subject matter incorporated in the broadcast.

- (iv) Section 111 – Filming or Recording Broadcasts for Private and Domestic Use

Arguably the current exception in section 111 only applies to the broadcast signal and not the underlying copyright material contained in a broadcast.² The existing exception should be extended to all uses of underlying works or subject matter incorporated in the broadcast.

- (d) Clarification of Substantial Part in Section 14 – Acts Done In Relation to Substantial Part of Work or Other Subject-Matter Deemed to be done in relation to the Whole**

For there to be clarity and consistency in the application of the fair dealing principles, it will be necessary to clarify the notion of substantial part. With respect, *The Panel* decisions have not clarified with certainty what is a substantial part of a copyright work and when a use is "insubstantial". Arguably, those decisions have **narrowed** the concept of what is "insubstantial". This uncertainty does not assist the ABC in its day-to-day broadcasting and communication decisions.

In many of the ABC's radio, television and new media productions, the ABC has encountered difficulties in applying the law since *The Panel* decisions.

One recent example related to a video art submission supplied by the author to the ABC for the possible broadcast on the ABC's multi-channel. The author had used small extracts from various films and had not cleared such use. The extracts were used to comment artistically on various themes. This video work was unable to be communicated to the public as a result of uncertainty about whether the footage used would be insubstantial. And yet, its use was unlikely to destroy the copyright owner's ability to make income from such works. In this instance, but for the *Panel* decisions, the ABC would have said such quoting from films and sound recordings should not be considered use of a substantial part.

The ABC submits, with respect to broadcasting and communication to the public, the use by broadcasters of third party copyright material in relation to cinematograph

² The ABC noted this view was not held by Phillip Argy at the IPRIA and CMCL conference on fair use on 15 June 2005.

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films, sound recordings and broadcasts, can only be dealt with practically on a quantitative basis and not in the way set out in the most recent *Panel* decision of the Full Federal Court.³ The ABC has found as a matter of day-to-day practice, it is simply not practical to assess substantiality in any other way. The qualitative test propounded by the Full Federal Court is subjective and cannot be applied consistently by lawyers and copyright users with any degree of certainty as each have differing views on what constitutes an important part of the film, recording or broadcast. As the ABC would submit that quoting from literary material, in the manner of speaking freely, should not be a copyright infringement, use of short excerpts of cinematograph films, sound recordings and broadcasts should also be permitted. In these circumstances the free speech imperative outweighs any potential economic loss to the copyright owner.

The balance is currently in favour of the copyright owner of films, sound recordings and broadcasts, and undermines the ability of copyright users to deal fairly with this material.

(e) Interaction between Copyright and Contract

The ABC submits the Government should legislate to ensure that parties cannot contract out of exceptions to copyright infringement.

The ABC supports the extension of section 47H of the Act – *Agreements Excluding Operation of Certain Provisions* – to other parts of the Act. This is consistent with other legislation which cannot be contracted out of, for example, *Trade Practices Act 1974*, section 68, *Corporations Act 2001*, section 199C, *Occupational Health and Safety (Commonwealth Employment) Act 1991* section 80.

The ABC maintains its submissions to the CLRC dated 28 February 1997 in relation to simplification of the fair dealing provisions, where the ABC endorsed the adoption of a provision on the same terms as section 137 of the *Broadcasting Act 1996* (UK).

The ABC understands that the *Broadcasting Act 1996* (UK) section 137 amends the *Copyright, Designs and Patents Act 1988* (UK) to render void any contractual provision which attempts to prohibit or restrict a broadcast or cable program where otherwise the defence of fair dealing to report current events would apply. In relation to section 10 of the Issues Paper, the ABC recommends the government have regard to the UK provisions with a view to the inclusion of a similar provision in the Australian Act.

The ABC supports the CLRC recommendation in 2002 that the Act be amended to preserve the integrity of certain exceptions that are fundamental to the balance between copyright owners and users, at paragraph 7.49:

³ TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2) [2005] FCAFC 53 (26 May 2005)

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“The Copyright Act be amended to provide that an agreement...that excludes or modifies...the operation of [various sections, including fair dealing] of the Act has no effect”.

As a net user of copyright material the ABC relies extensively on the fair dealing provisions in the Act to carry out many of its Charter activities. The ABC’s everyday activities are affected by the uncertainty in the relationship between contract restrictions and its right to fair deal under the Act.

(f) Maintenance of Current Dealings Deemed to be Fair

The ABC is concerned that any new provisions should not narrow the range of dealings currently deemed to be fair. The supported test is one which refers to the purpose and character of the dealing.

2. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO CONSOLIDATE THE FAIR DEALING EXCEPTIONS ON THE MODEL RECOMMENDED BY THE CLRC.

The ABC submits that the Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC in principle. However, the ABC supports an expanded model of the fair dealing provisions rather than the model specifically proposed by the CLRC. Please see points 8 and 9 below.

3. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO REPLACE THE PRESENT FAIR DEALING EXCEPTIONS WITH A MODEL THAT RESEMBLES THE OPEN-ENDED FAIR USE EXCEPTION IN UNITED STATES COPYRIGHT LAW

The ABC does not support replacing the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States Copyright Law. Instead, the ABC supports a model which retains, improves and strengthens the current fair dealing exceptions and incorporates expanded exceptions as set out in points 8 and 9.

The ABC acknowledges the flexibility that an open-ended fair use model provides to copyright users. This is particularly significant in the current technological climate where the application of fair use to new media situations is not always clear. However, the ABC is concerned about the views of US commentators such as Lessig and Posner who argue that the US open-ended fair use exception to copyright has led to over claiming and a copyright “chilling effect”. They suggest that a categorical approach, that is, specific exceptions is a more practical solution. Wheeler⁴ points out from his analysis of the US provisions that it is a much litigated, but still vague doctrine, not always susceptible to clear answers. If part of the

⁴ “What’s Fair? Copyright Exceptions and Limitations”, Fox Entertainment Group (USA) Future of Fair Use Seminar, Korea, 21 April, 2005.

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rationale for change of the Australian provisions is clarity, arguably the US model will not provide the panacea to this ill.

The ABC is also concerned that US courts have held that news organisations that replicate clips of “hot news” events – specifically the rebroadcast of clips of LA News Service’s footage of beating of Reginald Denny, which LANS licensed without permission to other stations for a fee - is not fair use.⁵ For this reason, the ABC would advocate preserving, strengthening and improving the current fair dealing provision for reporting news.

The ABC submits that certainty is a key requirement of a fair use regime and the ABC is not sure how Australian courts would react to a US fair-use open-ended doctrine. Furthermore, it is not clear that the US open-ended model would cover all uses. Given *The Panel’s* less than clear legacy, the case-by-case scenario currently being played out in the US may lead to more uncertainty in Australia.

While it is noted in the Issues Paper that the US open-ended fair use model provides an endless variety of situations and combinations of circumstances that can arise in particular cases, it precludes the formulation of exact rules in the statute. And while the US fair use model is broad and flexible with the capacity to adapt to technological change it, arguably, has restricted copyright users because of its uncertainty. Uncertainty tends to favour a risk adverse attitude.

Thus the ABC submits that the revised fair dealing regime in Australian should be based on a model which retains, improves and strengthens the current fair dealing exceptions and incorporates expanded exceptions for certainty and includes a residual open-ended fair use provision to ensure flexibility and adaptability in new media environments.

4. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO INCLUDE A SPECIFIC EXCEPTION FOR TIME-SHIFTING TELEVISION AND RADIO BROADCASTS – INCLUDING UNDERLYING WORKS, FILMS, SOUND RECORDINGS AND LIVE PERFORMANCES – AND IF SO, UNDER WHAT CONDITIONS.

The ABC supports access to programming. In terms of time-shifting by private individuals, the ABC supports a specific exception to copyright infringement for the purpose of time-shifting for private and domestic use only. This as an extension of the existing principles set out in the private copying exception for live broadcasts in section 111 of the Act. The ABC proposes that the conditions set out in section 111(3) would be the appropriate conditions.

The ABC considers time-shifting essential and in the interests of its audience. The ABC’s objective as the national free-to-air broadcaster is to provide the widest access to the material broadcast and communicated by the ABC for the audience’s own personal and public benefit. The model of such an exception should be confined to private, domestic use to ensure the interest of copyright owners are protected.

⁵ *LA News Services v KACL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997)

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Historic precedent suggests that when new technologies are allowed to flourish in the marketplace, existing markets adapt in the long term and sustainable markets eventually evolve. The obvious example here is the evolution of the video recorder that did not ultimately destroy the market for cinema or home video. It is possible that the digital market too will settle over time into a commercially sustainable market without the need to over-regulate and prevent new technologies from developing when there are legitimate, licensed purposes for which they may be used.

The ABC also recognises that appropriate time limitations may be one way of achieving a balance. This is because the ABC recognises that financial modelling with respect to new digital forms of delivery are still emerging.

5. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO INCLUDE A SPECIFIC EXCEPTION FOR FORMAT SHIFTING AND IF SO, FOR WHAT MATERIALS AND UNDER WHAT CONDITIONS.

The ABC supports a specific exception to copyright infringement for format shifting both as a specific exception for private individuals and as part of an *exception for public broadcasters*.

(a) Private Individuals

The ABC supports a format-shifting exception for the ABC's audience as a necessary extension of the time-shifting exception for the same reasons set out at point 4 above. The exception should be limited to private and domestic use only.

(b) Exception for Public Broadcasters

The ABC supports an exception under the Act enabling public broadcasters to format-shift. Please see below at 8.

The ABC is conducting digital multimedia trials and is creating content for new technology platforms to conform with the Government's expressed agenda to encourage take up of new technologies. An exception which allows conversion to digital formats ensures that the public funds invested in driving new technology take up will be cost effectiveness and efficiencies. See point 8(f) for further information.

6. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO INCLUDE A SPECIFIC EXCEPTION FOR MAKING BACK-UP COPIES OF COPYRIGHT MATERIAL OTHER THAN COMPUTER PROGRAMS, AND IF SO, FOR WHAT MATERIALS AND UNDER WHAT CONDITIONS

The ABC supports an exception for making back up copies of copyright material other than computer programs both as a specific exception and as part of the *exception for public broadcasters* discussed below.

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(a) Private Individuals

The ABC supports the right of the ABC's audience to make back up copies of copyright material. As above, the exception should be limited to private and domestic use only.

(b) Exception for Public Broadcasters

The ABC supports an exception under the Act enabling public broadcasters to make back up copies of copyright material in order to carry out its broadcasting activities and other communication and archival activities.

Please see below at 8.

The narrow restriction granted by section 47C to computer programs is out of touch with everyday broadcast practices.

Further, in order to secure the public asset contained in the ABC's library and archives, it is necessary for the ABC to be able to make back-up copies of all broadcast and other material. This involves format shifting and back up copying for both maintaining its library and archives services and allowing the public access to its repository of back catalogue material. Without these rights a national asset may be lost or locked away.

7. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO INCLUDE A STATUTORY LICENCE FOR PRIVATE COPYING, AND IF SO, FOR WHAT MATERIALS AND UNDER WHAT CIRCUMSTANCES.

The ABC wishes to strike the right balance and does not object to a statutory licence scheme. As stated above the ABC recognises that financial models with respect to new digital forms of delivery are still emerging and the correct balance between commercial and private interests needs to be explored. However, the introduction of a statutory licence for such a purpose would need to be examined in further detail and with further consultation.

8. THE GOVERNMENT SEEKS YOUR VIEW ON WHETHER THE COPYRIGHT ACT SHOULD BE AMENDED TO INCLUDE OTHER SPECIFIC EXCEPTIONS OR STATUTORY LICENCES, AND IF SO, UNDER WHAT CONDITIONS?

The ABC supports the introduction of the following specific exceptions or statutory licences in addition to the current fair dealing provisions:

- (a) fair dealing for the purpose of governmental and political discussion;
- (b) fair dealing for the purpose of public interest discussion;
- (c) fair dealing for the purpose of parody;
- (d) fair dealing with orphaned works;

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- (e) exception to copyright infringement for public broadcasters including abolishing the ephemeral 12 month restriction, and permitting archiving, format shifting, back up copying and digitisation;
- (f) fair dealing for the purpose of conducting new technology trials; and
- (g) a residual open-ended fair use provision.

(a) Fair Dealing for the Purpose of Governmental and Political Discussion

The ABC submits that the Act should make express reference to the implied constitutional right of political and governmental discussion with the defence of fair dealing.

The ABC advocates the necessity for free speech and the role of the media in being able to access and disseminate information in the public interest in a timely manner and in an appropriate format.

The ABC supports the addition of a *free speech exception* to copyright to balance the importance of free speech against the rights of copyright owners. The ABC advocates the introduction of a specific fair dealing defence for the purpose of political and governmental discussion, in line with the Australian constitutional implied right of freedom of political and governmental discussion.⁶ Such a principle was supported in obiter by Mason J in *Commonwealth v Fairfax*.⁷

(b) Fair Dealing for the Purpose of Public Interest Discussion

The ABC advocates the introduction of a specific fair dealing defence for the purpose of discussing matters of public interest, as an adjunct to the fair dealing defence for reporting news and fair dealing for the purpose of political and governmental discussion.

This is to ensure that the fair dealing defences cover the field of discussion that is within the public interest. The addition of this defence will help to bring certainty to the concept of “news” which the ABC submits is currently uncertain. As was suggested in *Commonwealth v Fairfax* provision of information in the public interest may not be significantly covered by the existing fair dealing defences if there is in fact a distinction between “newsworthiness” and the “public interest”.

⁶ See for example: *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 1 *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* [2004] HCA 39 (1 September 2004)

⁷ (1980) 147 CLR 39.

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The concept of public interest discussion is not foreign to Australian jurisprudence. It is applied in defamation laws across Australia, for example, section 15(2)(b) of the *Defamation Act 1974 (NSW)*.

(c) Fair Dealing for the Purpose of Parody or Satire

The ABC advocates the introduction of a specific fair dealing defence for the purpose of parody or satire to clarify and strengthen the fair dealing defence for the purpose of criticism or review.

Australian copyright law has difficulties accommodating creative critiques or reviews through parody or satire and does not generally recognise such as falling within the fair dealing defence for the purpose of criticism or review. The difficulties faced by Channel 10 in using extracts from Channel 9's broadcasts in *The Panel* provide a clear example of this. The law to date has taken a literal, conservative approach to this defence,⁸ notwithstanding that contemporary and popular forms of criticism or review are often couched in figurative, satirical, metaphorical language and symbols. Such creative and popular forms of critical expression are recognised within the post-modernist and contemporary approaches to communication.

Parody and satire are popular forms of expression across many genres of ABC programming such as *The Glass House*, *Frontline*, *D-Gen*, *Aunty Jack*, *Norman Gunston*, *Tug Dumbly*, and various *Triple J* programming. This material is considered high risk. Clearing these forms of content is always problematic, cumbersome, and often without success. This process is costly and has a high level of uncertainty regarding the level of copyright clearance required.

(d) Fair Dealing with Orphaned Works

The ABC advocates the introduction of a specific defence of fair dealing with orphaned works.

The ABC regularly faces the difficulty of trying to locate the copyright owner of underlying copyright material. "Orphaned works" cannot currently be used legally outside of the fair dealing exceptions or statutory licences under the Act. The cost and time involved in locating the creators of orphaned works, finding substitutes for them, bearing the risk of possibly not being able to continue with the production as a result, all create considerable financial, administration and labour costs to the ABC.

For example, the ABC's recent filming of an aboriginal artwork in a program could not be cleared as a result of not being able to locate the artist who had disappeared in the Northern Territory. The entire segment could not proceed. Some other recent examples of the ABC being unable to clear material despite the ABC's reasonable efforts to trace the copyright owner include use of an artistic work by Montien Boonma, with no response from the Montien Boonma Estate in Thailand; a literary

⁸ See *The Panel* decisions, footnote 1.

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work “Choosing Shoes” by Frida Wolfe where the rights have reverted to the author who has been untraceable since 2001; and artistic work by Gumaidj Mungarawoi who is untraceable.

Furthermore, the ABC has a substantial back catalogue of programs which contain both culturally and historically significant material. Many of these programs cannot be cleared for broadcast or for new technology formats because of an inability to locate the copyright owner. For example, difficulties have arisen with such programs as *Poetica*, *Rewind*, and *Play School*.

There are existing provisions in the Act that could act as a precedent for amending the Act in relation to other copyright material. These include section 51 which relates to unpublished works in libraries or archives, and section 113C which relates to performers’ rights – especially use of published sound recording when an owner can’t be found.

(e) **Exception to Copyright Infringement for Public Broadcasters including Abolishing the Ephemeral 12 Month Restriction, and permitting Archiving, Format Shifting including Digitisation, and Back up Copying**

The ABC recognises the public interest functions fulfilled by cultural and heritage institutions such as the National Archives of Australia, Screensound, the National Gallery of Australia, the National Museum, the National Library of Australia, Film Australia, the Australian Film Television and Radio School, and the other public broadcaster, Special Broadcasting Service. The ABC observes it is increasingly difficult for such public cultural institutions to achieve their mandates and comply with the technical impositions of copyright law, particularly in preserving and maintaining archival material.

The ABC proposes that a public broadcaster exception could be modelled on an extended version of the BBC exception under section 69 of the *Copyright, Designs and Patents Act 1988* (UK):

*Copyright is not infringed by the **making or use** by the Australian Broadcasting Corporation, for the purpose of maintaining supervision and control over programmes broadcast or communicated to the public by them, of recordings or records of those programmes.*

Historically, the position of broadcasters relative to copyright has been catered for by the implementation of specific statutory provisions that recognise and accommodate the policy objectives of both the broadcasters and of copyright law. Examples of such statutory provisions are found in section 107 of the *Copyright Act – Making a copy of the sound recording for the purpose of broadcasting*, and associated provisions in section 152(11) – *Applications to Tribunal for determination of amounts payable for broadcasting published sound recordings*. These statutory licences are consistent with the international standard for copyright exceptions and limitations, the “three-step test”. However, the ABC submits that the form and policy underlying current statutory licences are derived from the technological environment of the 1960s and as such the licences are now out of date.

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Statutory licences have the advantages of minimising transactional clearance and administration costs for the ABC, providing certainty to the ABC by ensuring that the ABC does not infringe copyright, and ensuring that public information and cultural material – the ABC’s intellectual property assets – are not made redundant through restriction but instead are available to the public through the ABC’s broadcasting activities.

While these provisions have assisted all broadcasters, the ABC is in a unique position by virtue of its role as a national broadcaster. The ABC submits that the public interest objectives of the ABC set out in the *ABC Act* and the ABC’s *Editorial Policies* on the one hand, and the public interest objectives set out in the *Berne Convention* on the other, are consistent. Therefore any amending legislation introduced should support the activities carried out by the ABC under the *ABC Act* and operate to ensure the policy objectives of both the *ABC Act* and the *Copyright Act* can be met. The ABC asks Government to consider how the ABC can best deliver its mandated services in the interests of the ABC as a copyright producer, user and owner. This may be accomplished through specific statutory provisions relating to public broadcasters which the ABC believes could operate to meet the policy objectives of both the *ABC Act* and the *Copyright Act*.

(i) Abolishing the 12 Month Ephemeral Restriction

The ABC submits that the statutory licences made available to it under sections 47, 70 and 107 (created in 1968) need to be updated to take into account the practices of public broadcasters within digital environments. Technological developments in methods of broadcasting and online communication have changed the way in which the ABC now communicates its content to its audiences such that the ephemeral period of 12 months is no longer meaningful.

The ABC submits that it is the act of broadcast or communication to the public which is of value and compensable to the copyright owner; but there should be a specific exception to copyright infringement for reproduction where such reproduction takes place to fulfil the ABC’s internal functions, which include making copies for broadcasting and communication to the public, format shifting, making back up copies, making copies for preservation and making copies for archiving.

As set out below, the ABC has become a repository for valuable cultural materials. It is not in the public interest to destroy such materials within a 12-month period. Complying with the 12-month restriction creates further cost for the ABC and risks destroying valuable cultural materials.

(ii) Archiving

The ABC’s archives and library hold one of the largest collections of non-literary works, comprising, naturally, sound recordings and cinematograph films.

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The ABC is a significant public institution in Australia. Like other cultural institutions such as the Australian Film Commission, the National Gallery and Library of Australia, the Australian Museum, Screensound, and the Special Broadcasting Service, the ABC performs public and cultural functions for the benefit of Australians. The ABC proposes that archiving by such public institutions should fall within a specific exception to copyright infringement.

The ABC provides an important role in preserving and providing access to culturally and historically significant material and fulfilling the public expectation that important broadcast content be preserved for access by the public and industry in a manner not able to be carried out by other organisations. The value of the intellectual property that the ABC creates is characterised in section 5.6.1 of the ABC's *Editorial Policies* which state:

'ABC program material (complete programs, segments, footage, stills, audio and text) is a valuable historical, cultural and commercial asset.'

The ABC's ability to preserve and maintain its material should be recognised and facilitated by the Act through an explicit exception to allow the ABC to exercise copyright for the purpose of preserving and archiving material.

The nature of public broadcasting has changed significantly since the introduction of the ephemeral reproduction rights set out in sections 47 and 107. These provisions should be replaced with an exception which is neutral in its application to copyright works and subject matter and neutral in respect of the acts of copyright necessary to preserve and archive significant Australian cultural material such as *Aunty Jack*, the *Norman Gunston* programs, *Certain Women*, *The Burning Piano*, *Hindsight* and *Long Way to the Top*.

The ABC requires the right to **make and use copyright material** including archiving, copying, and format-shifting, in order to use its vast repository of material to discharge its role as a public broadcaster.

The ABC has incurred costs using public funds for acquiring and maintaining appropriate equipment and skilled personnel to make sure the ABC's archive is maintained appropriately. The ABC continues to incur significant costs in relation to maintenance of its archive, which include the cost of the maintenance and management and preservation of the ABC's library and archive holdings (including current digitising).

Both the public and the media/entertainment industry have significant access expectations of the ABC, whether prescribed or not, in meeting their diverse needs. An example is accessing important educational, historical, culturally significant and newsworthy material both in the public interest and for personal interest (eg, pertaining to family members). Access is sought for research and study purposes (for example, allowing copying, format and/or time shifting and viewing of material) and production related purposes (for

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example, creating new material across a range of formats for communication to the public).

By archiving material, the ABC was able to provide the BBC with the entire 4 episodes of the *Doctor Who* series, *Tomb of the Cyberman*, which had been made by the BBC in 1966 but destroyed in 1979. As a result of the ABC's archiving practice, the BBC was able to digitally remaster this for the next generation of *Doctor Who* devotees. Similarly, the ABC held and was able to supply the BBC with early *Doctor Who* clips that had been deleted due to censorship restrictions imposed years before.

(iii) Format Shifting including Digitisation

The ABC submits it should not have to clear the digitisation of the ABC's archive for preservation and storage purposes, when this activity seeks to preserve a national asset.

In respect of the ABC's activities, the ABC would argue that the value for copyright owners is in the broadcast and communication to the public of the copyright material and not in the archiving or preservation which has an inherently public benefit. Preservation of copyright material will ultimately benefit copyright owners. The value of the ABC's archive has been demonstrated over time as other broadcasters such as the BBC have sought copies of their own programs they no longer hold.

Inability to archive, preserve and digitise reduces the value of the ABC's archive. The Australian public deserves the benefits of a return on the investment of public funds into programs.

(f) **Fair Dealing for the Purpose of Conducting New Technology Trials**

The ABC supports the introduction of a new specific fair dealing provision for public broadcasters for the purpose of conducting new technology trials.

The ABC has traditionally interpreted its Charter obligation to provide innovative broadcasting services as including services which are technologically innovative. In many cases, the testing and development of such services requires live trials that may include the transmission of copyrighted materials to small audiences. For example, the ABC will soon be participating in trials of DVB-H (digital video broadcasting—handheld) services in Sydney. This entails transmitting the ABC2 television service to small audiences who have been provided with specialist receiver equipment for the trial. It would be prohibitive to develop a specific broadcast schedule simply for the purposes of such a trial and the ABC has as a result been required to negotiate with the rights collector before participating. A fair dealing exemption that applied for a set period of time when a new technology is being trialled or established would remove a possible impediment to new technologies becoming available to the Australian public.

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Currently, the ABC is running a trial with Broadcast Australia. This is a 3 year, free-to-air TV datacasting trial in the Sydney metropolitan area in November 2003. The first phase of the launch includes 8 non-interactive services, including ABC's news, sport and weather service on digital channel 41. Broadcast Australia has now begun work on phase two of the trial, an interactive version of several of the existing services, including channel 41 which it hopes to start broadcasting later this month. Interactive capable set top boxes for the free to air market are not expected until late 2005/early 2006, but there are enough imported boxes in the country to arouse interest amongst manufacturers, retailers and other broadcasters. The ABC has also been involved in podcasting and digital radio trials.

(g) Residual Open-ended Fair Use.

The ABC submits that in addition to the above exceptions, there should be a residual 'catch-all' provision which provides for open-ended fair use.

Such a provision might provide for instances when 5 out of 6 copyright holders in underlying works embodied in multimedia material have agreed to clear their copyright for broadcast but one is steadfastly refusing. A residual fair dealing exception may allow such a valuable public asset to be used.

In addition to the current and new provisions specified above, an open ended fair use provision would ensure flexibility in addressing new circumstances of fair dealing which might arise. It would assist to re-address the imbalance of copyright which in the ABC's view currently resides in favour of the copyright owner.

9. ANY OTHER OPTIONS FOR IMPLEMENTING REFORM, AND THE COSTS AND BENEFITS OF THOSE OPTIONS.

The ABC has set out its other options above.

10. ANY OTHER MATTERS ARISING OUT OF THE ISSUES PAPER

Non-Commercial Activities of the ABC - Broadcast and Other Communication to the Public

The ABC wishes to flag with the Government a number of copyright issues that impact on the ABC but may fall outside the scope of this review and may be appropriate to develop for the Government's further review into the digital agenda later this year.

(a) Copyright Administration

It has been the ABC's experience that the administration of contemporary copyright in the production and communication sectors has become increasingly difficult, complicated and costly. The system of copyright and contract has created a complex network of legal responsibility in relation to clearance of copyright such that the increasing cost of rights compliance and administration makes it more likely that the material remains redundant.

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Increased time, effort, resources and licence fees are required to obtain these clearances. Clearance is often made particularly difficult if the contact details of a copyright owner are no longer available as discussed above with respect to orphaned works, or if the copyright owner chooses to ignore the request, says no, or is not able to satisfy the strict time deadlines that are the day-to-day reality of broadcasting.

This limits the public access to the ABC archive and the ABC's capacity to use this content. For example, the ABC has been unable to re-clear programs such as *The Burning Piano* for re-broadcast. The ABC asks that consideration of the ABC's position be made to ensure the appropriate balance is struck between the interests of copyright owners and the public, who fund the ABC. Consider the following issues which the ABC currently faces:

(i) Clearance of Existing Assets for New Technologies

The ABC has encountered difficulties in attempting to clear material for online communication and podcasting where one piece of content has numerous underlying rights owners.

Currently, online communication rights cannot be licensed by most of the collecting societies.

A ten second piece of audio visual content used as part of an online composition could have five or more underlying rights owners – the copyright owner of the literary works, the copyright owner of the musical works, the copyright owner of the sound recordings, the copyright owner of any underlying films and any performances contained in the content. This requires a clearance officer to undertake research and possibly five separate correspondences, with or without success of contacting or ascertaining the correct copyright owner. If the correct copyright owner is located, it requires the clearance officer to negotiate and manage the expectations of those copyright owners, often requiring the clearance officer to deal with unreasonable fee expectations. And often the clearance officer has to deal with the concerns that copyright owners have about new technologies. One owner may say no, making the piece of content redundant and costs undertaking by the ABC wasted.

Often, distributors of third party content simply do not have the rights to grant the ABC for new technologies. These distributors, who are often multi-national companies may not have the resources or the inclination to go back to the authors and clear the work. And so, the material remains too expensive and complicated to clear. Complex contractual arrangements have made it difficult for the ABC to clear content for online communication.

The ABC is committed to investigating new technologies and digital take up in Australia. The ABC has experienced difficulties in clearing material to support the digital trials and multi-channelling of the national broadcasters. The ABC has set out its involvement in new technology trials and digital

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broadcasting above. The ABC experiences difficulty in clearing material for these new platforms.

(ii) High Number of Transactions

The ABC is required to clear vast amount of material so that content can be communicated across all of its services. Unlike other organisations which might need to clear a copyright item on an unusual basis, the ABC is increasingly being required to clear content for new services. Currently, the ABC is unable to clear a large amount of content for use on its services due to various difficulties: problems locating the copyright owner, not having permission under existing agreements for use in new technology formats, difficulties in determining whether the use would fall within the fair dealing provisions. These difficulties can mean prohibitive costs involved in clearing such copyright material for inclusion in ABC programming. It is imperative that the ABC have cost effective access to copyright material to fulfil its duties which will only be met by expanded copyright provisions.

(iii) Contractual Restrictions

Sometimes, contractual arrangements made with copyright holders were concluded so long ago that such rights holders are often reluctant to grant the ABC new technology rights in older repertoire because of the uncertainty legally whether they themselves have in fact obtained those rights to grant.

(iv) Exigencies of On Air Deadlines

Given the short deadlines that operate in the 'on air' environment it is sometimes simply unrealistic for the ABC to undertake the rights research where a piece of content is to be used for the ABC's non-commercial activities of broadcasting and other communication to the public. This reduces the ABC's ability to produce innovative, high quality content. Notwithstanding that, the ABC would allocate such time and resources to research and clearance if the ABC contemplated using the recording for a commercial purpose.

(b) **Public Broadcaster Time-Shifting**

A new and natural extension of the traditional broadcast model is the provision of program material on a time-shifted basis, available on demand for a period of time, via the ABC's multichannels or the ABC's online service.