

Submission on
ALRC Discussion Paper 79

Copyright and the Digital Economy

Pirate Party Australia

Mozart Olbrycht-Palmer (mozart.palmer@pirateparty.org.au)

30 July 2013

Contents

Introduction	1
About Pirate Party Australia	1
General remarks	1
The Case for Fair Use in Australia	2
Proposals 4-1 & 4-2	2
Proposal 4-3	5
Proposal 4-4 & Question 4-1	6
Question 4-2	6
Interpreting fair use	8
Statutory Licenses	8
Summary	8
What is a statutory licence?	8
Australian statutory licenses	9
Fair remuneration for rights holders	9
Proposal 6-1	10
License it or lose it	10
Question 6-1	10
Fair Dealing	11
Proposal 7-1 & 7-2	11
Proposal 7-3 & 7-4	11
Non-consumptive use	12
Proposals 8-1, 8-2, & 8-3	12
Private and domestic use	12
Social norms	12
Complexity of existing provisions	13
A single, technology neutral provision	13
Business models and market harm	15
Piracy	15
Contracting out and TPMs	15
Proposals 9-1, 9-2, & 9-3	15
Social uses	16
Back-up and data recovery	16
Proposals 9-4 & 9-5	16
Transformative use	16
Proposals 10-1, 10-2 & 10-3	16
Libraries, Archives and Digitisation	17
Proposals 11-1, 11-2 & 11-3	17
Question 11-1	17
Proposal 11-4	17
Proposal 11-5	18
Proposal 11-6	18
Proposal 11-7	19
Orphan Works	19
Proposal 12-1	19
Proposal 12-2	19

Proposal 12-3	20
Educational Use & Government Use	21
Proposals 13-1, 13-2, 13-3, 14-1, 14-2 & 14-3	21
Retransmission of Free-to-air Broadcasts	21
Proposals 15-1, 15-2, 14-3 & Questions 15-1 & 15-2	21
Broadcasting	22
Proposal 16-1	22
Question 16-1	23
Proposal 16-2	24
Questions 16-2 & 16-3	24
Contracting Out	24
Proposal 17-1	24

Introduction

About Pirate Party Australia

Pirate Party Australia is a formally registered political party in Australia. The Party formed in 2008, and was registered in January of 2013. It is part of an international movement that includes registered political parties in nearly 30 countries.

The first Pirate Party, the Swedish *Piratpartiet*, formed in response to overbearing intellectual property laws. Subsequently, parties worldwide have formed around this same core, with an expand focus to digital and civil liberties, including intellectual property reform, increased privacy protections, greater governmental transparency and opposition to censorship. Pirate Parties are a reaction to legislative stagnation in regard to emerging technologies and social needs.

Since the formation of the Swedish Pirate Party in 2006, Pirate Parties have been successful in many elections, currently occupying seats at supranational, national, state and local levels, including two Members of the European Parliament for Sweden, three seats in the Icelandic Parliament, 45 state parliament seats across Germany, and a mayor in Switzerland, among others. Pirate Parties exist on every inhabited continent.

General remarks on the review

The Pirate Party thanks the Australian Law Reform Commission and the Attorney-General's Department for the opportunity to make a submission on such an important issue as copyright reform.

The Party does however have some misgivings about the scope of the review. There are of course needs to limit the scope and to avoid duplicating work that other bodies are working on, but in the interests of simplifying and consolidating copyright law in Australia, it is necessary to examine the totality. Copyright law should not advance in some areas and fail to progress in others. Copyright law a whole needs to fulfil contemporary requirements as well as future proof to an extent.

A lack of consistent approach to copyright reform in Australia will likely be a disadvantage, with different issues being examined in different ways. Pirate Party Australia is critical of the Attorney-General's Department's handling of copyright reform, particularly the handling that has caused the review of technological protection measures to fall outside the scope of this review, and the sustained closed-door piracy discussions between the Department and copyright industry representatives. Technological protections measures should naturally fall within the scope of a review that aims to and consolidate copyright law to operate effectively in the digital economy. Similarly, opaque discussions are antithetical to the need for copyright law to serve the community.

As a result, Pirate Party Australia urges that future reviews targeted at reforming the *Copyright Act 1968* be conducted without limitation of scope, in order to make recommendations that make a fully consistent, adequate and respectable copyright law in Australia. The Party recognises that copyright reform may necessitate the renegotiation of international agreements, and that in future international obligations should not be a limitation on how copyright can be reformed, but rather recommendations should encompass the renegotiation of any affected copyright and/or intellectual property provisions in international agreements such as the Berne Convention and TRIPS.

The Case for Fair Use in Australia

Proposals 4-1 & 4-2

Proposal 4-1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

Proposal 4-2 The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

Pirate Party Australia agrees with the proposal to introduce a broad, flexible exception for fair use as described, and offers some remarks on the Commission's discussion of fair use.

The adoption of illustrative purposes is important for the simplification of copyright law in Australia, and the use of 'fairness factors' qualify these purposes in such a way as to balance the interests of copyright holders against those of the general public (the latter for whom copyright law should ultimately serve). As noted by the Commission, fair use is not a radical exception, regardless of how broad it may be at first glance, and introducing it in Australia would incorporate some of the protections that the United States has for users of copyrighted material: this would alleviate the trend of merely importing the United States' more onerous copyright 'protections' via trade agreements that have ultimately made Australian copyright law unfairly and predominantly favour copyright holders.¹

It is important to note that Australia, despite the signing and ratification of various different treaties and trade agreements, is not as encumbered by the limitations of domestic law reform that the United Kingdom or the Republic of Ireland are, as implied from the discussion paper,² nor any other European Union members. In view of the Australia-United States Free Trade Agreement (AUSFTA) and ongoing Trans-Pacific Partnership (TPP) negotiations, it seems appropriate that Australia adopts a model of exceptions more closely resembling that of the United States than the European Union, as per the Commission's ultimate conclusion on the matter.

Pirate Party Australia supports the recommendations of the Copyright Law Review Committee (CLRC) in 1998, which have in essence been again proposed by the ALRC in this discussion paper, and agrees that the model is 'sufficiently flexible to accommodate new uses that may emerge with future technological developments.' This last point the Pirate Party considers especially important, as copyright law in Australia has typically failed to move with technological advances, requiring a change of law each time a 'disruptive technology' challenges the limits of copyright law. This is evidenced by the number of amendments that have been made to the *Copyright Act 1968* in order to accommodate such technologies.³ A single exception

¹Matthew Rimmer, 'Robbery Under Arms: Copyright law and the Australia-United States Free Trade Agreement' (2006) 11(3) *First Monday* <http://firstmonday.org/ojs/index.php/fm/article/view/1316/1236>

²Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) [4.14-15]

³See, eg, *Copyright Act 1968* (Cth) ss 10AA, 10AB, 10AC, 44E, 44F, 47AA, 47AB-47H, 116AK-116D, 132APA-132APT, 135T-135Y, 135ZZK-135ZZS.

that would not require the passing of amending legislation to bring the Act in line with contemporary technologies and practices would make copyright law in Australia far more responsive and be geared more towards allowing activities rather than restricting them by default. Given the rapid rate of technological change that has occurred and continues to occur, it is far better to permit a broad range of activities than to prohibit all but a narrow number of exceptions. That is, leaving the door open to an extent, and closing it where necessary.

With regard to the report by the Intellectual Property and Competition Review Committee (the 'Ergas Committee'), the Pirate Party considers that short-term economic costs associated with amending the *Copyright Act 1968* should be of secondary concern to the long-term economic advantage of allowing greater unlicensed use of copyrighted material and the overall social benefits. Copyright law began generally as a mechanism to encourage creativity by providing a statutory monopoly. The *Statute of Anne* illustrates this, being an Act to:

[Prevent] Printers, Booksellers, and other Persons [from taking] the Liberty of Printing, Reprinting, and Publishing ...Books, and other Writings, without the Consent of the Authors or Proprietors ...and for the Encouragement of Learned Men to Compose and Write useful Books ...⁴

(Emphasis added)

This sentiment is further expressed in the United States' Constitution:

The Congress shall have Power ...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁵

Regardless of whether Australia continues to follow the Commonwealth approach to copyright law by retaining fair dealing or instead reforms the *Copyright Act* to bring copyright law more in line with that of our third-largest trading partner,⁶ reforms should keep in mind this ultimate purpose that inspired the development of copyright law. Copyright must not serve copyright holders to the detriment of the public benefit. Copyright reform requires equal, if not greater, consideration of social aspects as economic ones: copyright is not a natural right — it is a right conferred by those who represent the interests of the electorate as a whole. The long-term benefits of copyright reform given the rapid rate of technological advancement far outweigh any short-term transaction costs.

The Joint Standing Committee on Treaties' recommendation of replacing fair dealing with something resembling the US' fair use doctrine 'to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting'⁷ illustrates Pirate Party Australia's argument well: time- and format-shifting *are* anomalies, and the law has consistently failed to keep pace with such anomalies. The *Copyright Act* makes reference to increasingly obsolete technologies. It also illustrates another argument that the Pirate Party has made that Australia has imported many of the stricter provisions of the United States' copyright regime (in this case the frequent extensions of copyright terms) from trade agreements like AUSFTA, without importing protections under such agreements.⁸

With regard to the Australian Government's possible concern about compliance with

⁴*Statute of Anne 1710*, 8 Anne, c 19.

⁵*United States Constitution* art I §8.

⁶Department of Foreign Affairs and Trade, *Australia's trade with the world graph* (2012) Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/tradematters/aus-graph.html>>

⁷Joint Standing Committee on Treaties, Parliament of Australia, *Report 61: The Australia-United States Free Trade Agreement* (2004) Rec 17.

⁸Matthew Rimmer, 'Robbery Under Arms: Copyright law and the Australia-United States Free Trade Agreement' (2006) 11(3) *First Monday* <http://firstmonday.org/ojs/index.php/fm/article/view/1316/1236>

the three-step test in international copyright law,⁹ Pirate Party Australia sees this as baseless as almost all nations worldwide have ratified the Berne Convention from which the Test derives, including the United States, where Fair Use and the Three-Step Test have been operating alongside each other for more than 30 years. As a submission notes: ‘the US fair use regime has never been challenged on the grounds of non-compliance with the three-step test.’¹⁰

Pirate Party Australia agrees entirely with the findings of the Commission regarding ‘the changed environment’ in paragraphs 4.28–4.33.

Pirate Party Australia agrees entirely with the findings of the Commission regarding ‘arguments in favour of fair use for Australia’ in paragraphs 4.34–4.56.

Pirate Party Australia disagrees with the statements made under ‘fair use is unnecessary and no case is made out for it’ (paragraphs 4.58–4.69) and refers to the number of submissions that supported the argument for fair use as evidence that a case has been made out for it — particularly Google’s submission which claims:

Fair use is an integral part of the US copyright system, and has led to an explosion in internet-based creativity and innovation, and encouraged investment in internet infrastructure. New online services like Google, YouTube, Facebook, Twitter, Flickr could not have emerged had US copyright law not been sufficiently flexible to accommodate uses that could not have been predicted in advance by even the wisest policy makers.¹¹

The submission then goes on to list several uses that may have been prohibited under the *Copyright Act 1968*. The argument that ‘existing exceptions are adequate and appropriate’¹² doesn’t stand up to the test in this case, nor has the common law addressed ‘the needs of promoting innovation’¹³ as demonstrated by a recent decision of the Federal Court¹⁴ which effectively outlawed an extension of the video recorder to meet the needs of contemporary Australian consumers.

Paragraph 4.62 paraphrases the Interactive Games and Entertainment Association Ltd’s claim that consumers are already receiving many of the benefits that might flow from a fair use exception. If, *prima facie*, this is true, it still does not rectify the fact that fair use cannot be relied upon — the benefits are given at the discretion of the industry — and does not compensate for the fact that the benefits given to copyright industries under international agreements, and which may change yet again under the Anti-Counterfeiting Trade Agreement (ACTA) and Trans-Pacific Partnership (TPP) if they are ratified, tilt the balance too far in favour of the copyright industries. Regardless of existing protections these industries claim are given to consumers, the reality is that limited legal protection is given to consumers, while enormous legal benefit has been given to copyright holders, such as an extension of the copyright term to life plus seventy years without an adjustment of exceptions to compensate for this.

The Pirate Party contests that section 200AB of the *Copyright Act* is a sufficiently broad exception (as in paragraph 4.63) or that fears of litigation would deter uses of copyrighted material any more than it does already.

⁹Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) [4.27]

¹⁰Combined Newspapers and Magazines Copyright Committee, Submission No 238 to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper 42*, 2013.

¹¹Google, Submission No 217 to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper 42*, 2013.

¹²BSA (The Software Alliance), Submission No 248 to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper 42*, 2013.

¹³*Ibid.*

¹⁴*National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 29.

APRA/AMCOS' concern that 'an open-ended exception would result in the balance between the interests of copyright owners and the interests of copyright users being too heavily in favour of users' is almost laughable as, compared to the United States, Australia has a fraction of the exceptions with almost all of the copyright protections (as per discussion above relating to copyright extensions); copyright in Australia is currently too far tilted in favour of the copyright *holders*.

Uncertainty is a byproduct of any major legislative change in common law countries.¹⁵ There will always be a requirement for precedent to be formed when new legislation comes into force. Copyright reform should not be considered any different to other major reforms: the introduction of copyright law with the *Statute of Anne* certainly would have curbed business models that relied on the absence of such a right. Nonetheless, that major change has created the very regime that those copyright industry bodies submitting the uncertainty and expense argument rely upon. Should we change no laws simply because it is inconvenient?

This argument also relies on the notion that there is no precedent for fair use. To the extent that there is limited precedent in Australia, this notion is accurate, however it is not uncommon for Australian courts to examine foreign case law to form their arguments. Despite agreement that there will be some uncertainty if transitioning to fair use, Pirate Party Australia disagrees that courts will be unguided, given the 170 years of case law that the United States can provide.

It is Pirate Party Australia's opinion that it would be better for fair use to be introduced, challenged for non-compliance with the Berne Convention, and then reformed to the point that it does comply, rather than not reform the *Copyright Act* at all.

With this in mind, Pirate Party Australia agrees with the ALRC's proposals for reform as described in paragraphs 4.92–4.149.

Proposal 4-3

Proposal 4-3 The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used — the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

Pirate Party Australia considers the approach described in paragraph 4.150–4.156 appropriate to determining whether a use is 'fair.' The Party also submits that attribution should certainly be a factor considered in this process, as the moral rights of creators are valuable for maintaining and improving reputations of creators which have flow on economic and social benefits.¹⁶

¹⁵See, eg, Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006).

¹⁶See, eg, Roger Van Den Bergh, 'The role and social justification of copyright: a "law and economics" approach' [1998] (1) *Intellectual Property Quarterly* 17.

Proposal 4-4 & Question 4-1

Proposal 4-4 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

Question 4-1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

Pirate Party Australia considers the rationale in paragraphs 4.157–4.165 to be accurate, and the non-exhaustive list of illustrative purposes acceptable, especially supporting the statement by Universities Australia that a general exception ‘should be sufficiently flexible to allow courts to determine that uses that are unanticipated at the time that the exception is introduced come within the scope of the exception if found to be fair.’¹⁷

To ensure flexibility, the Party submits that it may be appropriate to consider the inclusion of an item that makes reference to additional illustrative purposes that are the subject of a schedule to the *Copyright Act* which can be expanded as necessary by the responsible minister. This would provide the judiciary with greater guidance, make the law more responsive, and quash concerns submitted by copyright industry bodies that fair use would give rise to greater uncertainty and litigation. This notion is briefly mentioned in paragraph 4.169 in relation to the Israeli implementation of fair use.

Question 4-2

Question 4-2 If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

Pirate Party Australia takes the view that in order to achieve a balance between the protection of the public interest and the commercial interests of copyright holders it is best to err on the side of caution when *reducing* the number of exceptions available.

The position taken by the Arts Law Centre of Australia outlined in paragraph 4.173 is entirely unacceptable. The Arts Law Centre of Australia submitted that ss 65–68, which provide exceptions for the use of public art and artistic works should be

¹⁷Universities Australia, Submission No 246 to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper 42*, 2013.

repealed “at the least insofar as they permit commercial uses of any reproductions made under them”.¹⁸ The Party reasons that insofar as a work is in a public area, the use of that public area for further artistic purposes should not be hindered by the exhibition of works in that area, regardless of the commercial nature of those further artistic purposes. The enormous economic value of the public domain¹⁹ indicates the worth of more freely permitting the use of copyrighted material in commercial practice, and indeed as copyright terms have continued to increase, the ability to use those works commercially (within certain limits) has not kept up with the reality that copyright can exceed five generations compared to the half-generation it initially lasted for. Exceptions to copyright that include commercial uses are necessary to promote the notion that copyright encourages creativity for the benefit of society. Noted intellectual property expert, Lawrence Lessig, describes the effects of restricting use of copyrighted works:

In 1990 [Jon] Else was working on a documentary about Wagner’s Ring Cycle. The focus was stagehands at the San Francisco Opera ...During a show, [stagehands] hang out below the stage in the grips’ lounge and in the lighting loft.

During one of the performances, Else was shooting some stagehands playing checkers. In one corner of the room was a television set. Playing on the television set, while the stagehands played checkers and the opera company played Wagner, was *The Simpsons*. As Else judged it, this touch of cartoon helped capture the flavour of what special about the scene.

Years later, when he finally got funding to complete the film, Else attempted to clear the rights for those few seconds of *The Simpsons*. For of course, those few seconds are copyrighted; and of course, to use copyrighted material you need the permission of the copyright owner, unless “fair use” or some other privilege applies ...

Then, as Else told me ...Fox “wanted ten thousand dollars as a licensing fee for us to use this four-point-five seconds of ...entirely unsolicited *Simpsons* which was in the corner of the shot.”

Else ...worked his way up to someone he thought was a vice president for licensing ...He explained to her, “There must be some mistake here ...We’re asking for your educational rate on this.” That was the educational rate ...

Else didn’t have the money to buy the rights to replay what was playing on the television backstage at the San Francisco Opera. To reproduce this reality was beyond the documentary filmmaker’s budget.²⁰

It is therefore preferable that it be made clear (as indicated by the Commission in paragraph 4.174) that *all* existing exceptions be explicitly protected by fair use if it were introduced, including any and all commercial exceptions that may be available to users of copyrighted material. This is why Pirate Party Australia in its initial submission on the Commission’s issues paper (IP 42) argued in favour of a fair use exception operating alongside current protections. Given the nature of copyright as a near-complete monopoly, it is better to increase the range of defences available to those accused of copyright infringement than to limit those defences given that copyright is an almost exclusive right. Expanding the social and economic utility of copyright law in Australia would be more appropriate than reducing the scope of exceptions to only permit a very narrow range of exceptional uses.

¹⁸Arts Law Centre of Australia, Submission No 171 to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper 42*, 2013.

¹⁹See, eg, Rufus Pollock, *The Value of the Public Domain* (Paper, Institute for Public Policy Research, 2006).

²⁰Lawrence Lessig, *Free Culture* (The Penguin Press, 2004) 97–98.

Interpreting fair use

Pirate Party Australia believes that concerns regarding interpretation of fair use are well summarised by the Commission in paragraph 4.182:

In the ALRC's view, an express statement about the extent to which US or other countries' jurisprudence should be taken into account by Australian courts is unnecessary. It is well-established that foreign case law may be used by Australian courts, to the extent that the reasoning of such decisions is persuasive. If fair use is enacted, the ALRC would expect that Australian courts may look to US case law, in particular, as one source of interpretative guidance, but would not be bound by such decisions.²¹

Statutory Licenses

The Pirate Party believes that statutory licenses should be abolished and replaced with a free use *exemption* for educational institutions, public administration, and similar public interest and/or benefit organisations.

Summary

Pirate Party Australia agrees with the premise of the paragraphs, being that:

- The digital environment calls for a new way for licenses to be negotiated and settled.
- A replacement scheme needs to be:
 - Less prescriptive,
 - More efficient, and
 - Better suited to a digital age.
- Reform should help Australian educational institutions and governments take better advantage of digital technologies and services.

What is a statutory licence?

The Pirate Party considers Professor Jane Ginsburg's finding that the 'imposition of a compulsory license reflects a legislative judgement that certain classes or exploitations of works should be more available to third parties than others'²² to be an accurate summation of the argument for statutory licenses. Reflecting back on the purpose of copyright, remuneration of the copyright holder works in tandem with the encouragement of creation and the furthering of culture, knowledge and education as a result,²³ it is vital to consider that the refusal of access to that material is somewhat antithetical to the latter of these goals. This is not to say that reasonable remuneration must be, by necessity, excluded, but rather that the purpose of providing a statutory right with limited exceptions must be considered.

Copyright is granted by the public, in the public interest, one element of which is the furthering of education. It would be therefore in opposition to the public interest for licenses to educational institutions to be withheld. The same argument could be extended to the Crown.

²¹Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) [4.182]

²²Professor Jane Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865, 1926.

²³*Statute of Anne 1710*, 8 Anne, c 19; *United States Constitution* art I §8.

The Party believes that the ALRC's statement in paragraph 6.9 in regard to repeal of statutory licenses is accurate, but stresses that any replacement scheme must not prevent access to copyrighted materials for use by educational institutions.

Australian statutory licenses

The call from educational institutions to repeal statutory licenses should not be considered surprising, given that over the last three decades the nature of interactions with copyrighted material has changed enormously. Technological advancements have led to the utilisation of copyrighted resources in ways that had previously not been envisaged — we continue to transition from a largely passive, consumptive society (a 'read-only society') to a more active, productive society (a 'read-write society'). As a result, much of intellectual property law, in particular copyright law, has failed to keep pace with the different kinds of interactions currently employed in educational fields. The reality is that a single use of copyrighted material might ultimately employ many different acts of copying and transformation.

The Pirate Party agrees strongly with Dr Matthew Rimmer's remarks in paragraph 6.23. Pirate Party Australia submits that there should be a general exception for format shifting for those with disabilities, regardless of the commercial nature of the enterprise. The rationale behind this is that the delay in licensing and production of works in an accessible format is too great, and if it can be done by a third party before a copyright holder does, then the copyright holder is needlessly failing to fulfil their social duty that copyright by its nature imposes. Current levels of accessibility for copyrighted material by the disabled are appalling, and licensing requirements should be repealed entirely in this area. The Party proposes the abolition of licenses and the introduction of a complete copyright *exemption* for institutions assisting persons with disabilities.

The Party believes that such an exemption should be expanded to include education and governmental institutions, with a shift towards an 'open education' model of delivering content required for education. This would allow educational institutions to use material without requiring any navigation of a licensing system while at the same time encouraging a shift away from commercially produced materials towards materials created by educators for use in educational contexts.

Fair remuneration for rights holders

Some submissions from governments, collecting societies and others supported the existence of the statutory licence for government, on the basis that it would be impractical to seek permission of copyright owners before using the material and that government use is for the public benefit, rather than private or commercial ends.²⁴

This seems to suggest, in Pirate Party Australia's view, that there should be a general *exemption* for public benefit use of copyrighted material. Because 'it would be impractical to seek permission of copyright owners' and 'government use is for the public benefit,' Pirate Party Australia submits that licensing requirements for government use be abolished, and that this should extend to educational uses as they are neither 'private or commercial.'

The justification that statutory licenses are important for business²⁵ is fairly weak and

²⁴Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) [6.29]

²⁵Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) [6.30]

the Pirate Party believes that this sort of rent-seeking behaviour from the copyright industries should not be encouraged. If Screenrights' survey is to be believed (though the Pirate Party is always skeptical of industry studies), half their members rely upon the education sector for the 'ongoing viability of their business, and close to 20 per cent said this money was essential,' then this indicates that these businesses depend on the state-sanctioned extortion that is statutory licensing. It seems very narrow-sighted to maintain statutory licenses in order to perpetuate businesses that are unwilling to adapt to changed social and legal environments.

Again, the public interest that underpins copyright law must be at the forefront. It is not in the public interest for educational institutions to maintain statutory licenses that do not reflect changes in technology, nor for them to be beholden to the copyright industry's whim by negotiating licenses. The simplest solution seems to be to end the commercial reliance on educational uses of copyrighted material, and provide a total free use exemption for educational institutions.

The comment of the Australian Copyright Council that 'the Part VB statutory license is generally well understood and operates efficiently'²⁶ is a direct contradiction of the submissions made by the educational organisations that use them, as demonstrated by paragraph 6.35 — 'few stakeholders explicitly argued the benefits of statutory licensing over voluntary licensing.'

It is important, the Pirate Party feels, to note that those organisations espousing the benefits of statutory licensing are those that benefit from the scheme or represent the interests of those who benefit from statutory licenses.

Proposal 6-1

Proposal 6-1 The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

While Pirate Party Australia acknowledges the arguments in favour of a voluntary licensing scheme as convincing, the Party does not feel that the proposal adequately addresses the needs of the education community with regard to the use of copyrighted material, despite being an improvement on the current system, and maintains that a free use exemption should be introduced for uses that are in the public interest or for the public benefit.

License it or lose it

Pirate Party Australia agrees that there is concern that rights may be withheld or extortionate license fees be demanded in the absence of a statutory licensing scheme. Again, this could be remedied by a free use exemption for certain bodies.

Question 6-1

²⁶Australian Copyright Council, Submission No 219 to the Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper 42*, 2013.

Question 6-1 If the statutory licenses are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and education institutions that only operate where the use cannot be licensed, and if so, how?

With the above discussion in mind, Pirate Party Australia submits that if statutory licenses are repealed, the *Copyright Act* should be amended to provide for a free use *exemption* for governments and educational institutions that operates regardless of whether a license can be obtained. This might be considered a 'public interest' or 'public benefit' exemption to cover a range of uses.

Fair Dealing

Proposal 7-1 & 7-2

Proposal 7-1 The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. 'Research or study', 'criticism or review', 'parody or satire', and 'reporting news' should be illustrative purposes in the fair use exception.

Proposal 7-2 The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1) — fair dealing for research or study;
- (b) ss 41, 103A — fair dealing for criticism or review;
- (c) ss 41A, 103AA — fair dealing for parody or satire;
- (d) ss 42, 103B — fair dealing for reporting news;
- (e) s 43(2) — fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c) — professional advice exceptions.

Pirate Party Australia agrees with both proposals, but emphasises the need to ensure that it is clear the repeal of the current fair dealing exceptions does not undermine reliance upon them under the fair use provisions intended to replace them.

Proposal 7-3 & 7-4

Proposal 7-3 If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions 'for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney' for both works and subject-matter other than works.

Proposal 7-4 If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should

all provide that the fairness factors must be considered in determining whether copyright is infringed.

In the unfortunate event that fair use is not enacted, Pirate Party Australia finds both acceptable, particularly the expansion of fair dealing exceptions and the application of fairness factors to those exceptions.

Non-consumptive use

Proposals 8-1, 8-2, & 8-3

Proposal 8-1 The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. 'Non-consumptive use' should be an illustrative purpose in the fair use exception.

Proposal 8-2 If fair use is enacted, the following exceptions in the Copyright Act should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

Proposal 8-3 If fair use is not enacted, the Copyright Act should be amended to provide a new fair dealing exception for 'non-consumptive' use. This should also require the fairness factors to be considered. The Copyright Act should define a 'non-consumptive' use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

Pirate Party Australia agrees with the intention of all three proposals, but adding that it is vital to ensure such a provision is open-ended with regard to technology. A majority of current copyright law problems in Australia can be put down to an inflexibility regarding technological change, and it would be very shortsighted to replicate the mistakes made previously by failing to take into account that technology will continue to change well into the future. The intention is not to create a floodgates situation where every use is claimed under fair use, but rather to account for further development in a more effective way that has been previously.

Private and domestic use

Social norms

Pirate Party Australia agrees with the NSW Young Lawyers' submission cited in paragraph 9.21, and Commercial Radio Australia in paragraph 9.22, that 'users expect

to be able to store content on a variety of devices ...and in a variety of locations ...Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices available,' as well as the ADA, ALCC and Ericsson in paragraphs 9.23–24.

The type of 'digital rights management' or 'technological protection measure' and consumer restrictions described by Professors Bowrey and Samuelson in paragraphs 9.25–26 certainly lower respect for copyright law. In order to respect copyright law, we must have respectable copyright law. Copyright does not work solely for the copyright holders: as has been emphasised numerous times in this submission, copyright is not a natural right. Copyright right is a right granted on the premise that an entity will have an incentive to create works. It is a right granted to benefit the public just as much as the copyright holder.

The arguments presented in paragraphs 9.30–31 may be valid to an extent, however there should be an accommodation of practices that can be considered 'reasonable.' In Pirate Party Australia's view, when copyrighted material is paid for it is the license to access that content that is being purchased, not the format. As a result, regardless of where and how the content is accessed, that access should be legitimate. It is unreasonable to impose illegality on practises that allow this. It is odd, in the Party's opinion, to prohibit practices that are (1) reasonable consumer expectations, (2) widespread and appear to have a negligible effect on the market, (3) 'non-market' practices (i.e. are not commercial activities), and (4) effectively unenforceable.

Complexity of existing provisions

Pirate Party Australia agrees with the conclusions of paragraphs 9.33–34.

A single, technology neutral provision

Pirate Party Australia agrees that a single, technology-neutral provision is the most appropriate way forward when dealing with private and domestic uses, and that the application of fair use factors could make the provision operate successfully across various forms of content. To that end, Pirate Party Australia agrees with paragraphs 9.35–9.40.

The Party does not agree with paragraphs 9.41–44, in that, as the ALRC itself concludes in paragraph 9.45, 'fair use and fair dealing exceptions with fairness factors considered, are likely to be able to better account for the differences in markets and technologies between types of copyrighted material and types of uses.' What should be stressed here is that traditionally copyright law in Australia has been restrictive and prohibitive — the default position has been to restrict and prohibit uses and provide narrow exceptions where considered reasonable. Pirate Party Australia submits that as the digital paradigm has largely changed the way society interacts with copyrighted material, this default stance should be reversed. The *Copyright Act* should by default be permissive and the restrictions should be provided where considered reasonable. This isn't to say that copyright law in Australia should be a free-for-all, but rather that it would be better to encourage a broad range of uses and practices that are novel and/or unaccounted for, thus heightening innovation. The strength of fair use, according to the ALRC in paragraph 9.46, is that 'uses with some technologies may be found to be fair, while others are not.' This means that, ultimately, a wide range of uses is permitted by default, which will become more definite and restricted over time. This flexibility is far more favourable than the current law.

Paragraph 9.47 discusses the reality that there is an increasing reliance on outsourcing digital storage. Pirate Party Australia agrees with the statements made by the ALRC, particularly that there is a need to account for and permit non-local access of copyrighted material stored in 'the cloud.'

Pirate Party Australia cites the example of TV Now, a service that was provided by Optus that recorded free-to-air television at the subscriber's explicit request and allowed this content to be relayed to them at a more convenient time. While it has been long accepted that this practice is legal in regard to video cassette recorders (VCRs), and appears to extend to similar recording devices, the move towards cloud-based recording has been met with legal opposition. The Federal Court ruled that Optus' service did not fall within the boundaries of the *Copyright Act*²⁷ and as a result the law seems to confine time-shifting to only devices within the home or devices solely under the control of the user. This shows a lack of understanding, either on the part of the Federal Court, or on the part of the legislature, about the nature of modern technologies and the intention of permitting time-shifting. Time-shifting is impractical if limited to technologies that are obsolete or becoming obsolete. The reality of modern life is that people are become less reliant on devices owned directly and are looking more at free and paid services that are provided remotely and accessed from the home. Even the home-access notion is becoming outdated as the prevalence of portable devices — laptop computers, tablet computers, smartphones, and so on — means that people are accessing content wherever they find it most convenient.

An analogy of this sort of behaviour that is relevant to the technologies described in the *Copyright Act* is as follows:

Supposing a person records a television programme at their home using a VCR, planning to watch it later. They take the video cassette to a friend's residence and watch it there, or they take the cassette to work to watch it in their lunchbreak. Should these activities be, or are these activities, legal? Supposing the person records it using a DVD recorder instead and watches it on the train on a portable DVD recorder. Is this legal? What if they request a friend to record it for them and purchase and supply a blank medium for that purpose? What if a device is hired commercially and used to record the content?

At which point does it become unreasonable, and at which point does is it prejudiced against the interests of the copyright holder? How far is *too far*? The Pirate Party believes that this should be a question of intention or purpose, and not a matter of medium. To outsource the responsibility of recording and making available for access a video recording on request should be legal as an extension of the time-shifting exceptions.

With regard to concerns that the minimal delay between recording and playback is prejudicial towards those who have purchased the broadcast rights, this argument cannot stand up. Why should someone watch a broadcast only a single device? If someone chooses to transmit television channels from a single aerial connection to multiple televisions in their home, this makes no difference. If someone chooses to digitise that feed and transmit it via the Internet for sole personal use so they can access it from computers in their home rather than televisions (it is not uncommon for a home to have more computers than televisions), this makes no difference either. They are still watching the same broadcast, they are just watching it somewhere else. Again, if someone chooses to transmit the feed so they can access it on a portable device, what difference does it make?

Consider pointing a video camera at a television and watching the result on a display. How far away does the display need to be before it becomes an infringing broadcast?

²⁷*National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 29.

Is it ever an infringing act to simply watch television from a distance?

Pirate Party Australia submits that (1) time-shifting and format-shifting must be technologically neutral, (2) it is sufficient for a user to merely initiate a recording for it to be made by them, and does not rely on any control of or proximity to the device, and (3) there should be no limit on retransmitting content for personal use.

Business models and market harm

Pirate Party Australia finds the copyright industry statements in paragraphs 9.51–57 to be laughable and absurd. Essentially the arguments being made seem to be that the sale of bulk or blanket licenses to consumers and business models that make content widely available obviate the need for a private copying exception. Pirate Party Australia finds it unacceptable to encourage a situation in which consumers become reliant on the whims of industry to protect reasonable behaviour that should be protected under copyright law.

It is Pirate Party Australia's view that a license should provide a consumer with the total freedom to interact with the content however they choose and at no additional cost. The license is for the content, not the medium it is being accessed in, on, or through.

Piracy

Pirate Party Australia agrees with the ALRC in paragraph 9.61.

While the Pirate Party favours a complete exception for non-commercial use (including sharing) of copyrighted content, it notes that this would be better dealt with by a separate exception rather than under fair use, given the blanket nature of such an exception. The Party also notes that file-sharing is outside the scope of this inquiry.

Contracting out and TPMs

Pirate Party Australia finds the situation created by TPMs as described in paragraph 9.76 unacceptable, but agrees that this exceeds the scope of the inquiry.

Proposals 9-1, 9-2, & 9-3

Proposal 9-1 The fair use exception should be applied when determining whether a private and domestic use infringes copyright. 'Private and domestic use' should be an illustrative purpose in the fair use exception.

Proposal 9-2 If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

Proposal 9-3 The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed.

Pirate Party Australia agrees with all three proposals.

Social uses

Pirate Party Australia agrees with paragraphs 9.92–9.93 insofar as fair use provisions would enable uses to be examined on a case-by-case basis, and that it ‘is doubtful that attempting to prescribe types of social uses that should not infringe copyright would be beneficial.’

Back-up and data recovery

External hard drives and automatic back-up software allow users to back-up all content stored on their devices, while cloud services allow the off-site backing-up of data. This sort of copying is blanket: it does not discriminate between licensed copyrighted material and other material, and many Australians do this (as described in paragraph 9.94).

Pirate Party Australia agrees with the ALRC in paragraph 9.95–97, the submissions that argued in favour of protecting consumers’ rights and meeting reasonable consumer protections (paragraph 9.98), and the Internet Industry Association’s argument that ‘backing up should not require further permission of the copyright holder’ (paragraph 9.99).

The Party stresses the need for an exception that would easily adapt to changing technological environments, concurring with Dr Giblin in paragraph 9.100.

The industry concerns expressed in paragraphs 9.101–9.103 are unacceptable. As the Pirate Party has expressed earlier: it is unreasonable for consumers to rely on the copyright industry to permit them to perform practices that are reasonable. Is it unreasonable for a user to keep a complete, restorable, clone of their hard drive so that they can quickly restore their computer or files they may have inadvertently deleted? It is the Pirate Party’s view that regardless of any industry solutions available, a consumer should be able to back-up copyrighted material in a manner they choose. In paragraph 9.103, there is the claim that ‘users can often redownload a game “multiple times.”’ The key word is ‘often’ and not ‘always.’ It is unreasonable for consumers to rely on the grace of the copyright industry to provide them with reasonable rights.

Proposals 9-4 & 9-5

Proposal 9-4 The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

Proposal 9-5 The exception for backing-up computer programs in s 47J of the *Copyright Act* should be repealed.

Pirate Party Australia agrees with both proposals.

Transformative use

Proposals 10-1, 10-2 & 10-3

Pirate Party Australia agrees that fair use is an appropriate course of action to accommodate transformative uses and quotation. If fair use is not enacted, a fair

dealing exception for quotation would remedy much of the immediate concerns.

The Party would, however, like to see greater emphasis placed on the non-commercial use of copyrighted material as falling within the scope of fair use. Cover versions of songs, for example, should be permitted where no commercial benefit is being derived.

Libraries, Archives and Digitisation

Proposals 11-1, 11-2 & 11-3

Proposal 11-1 If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

Proposal 11-2 The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

Proposal 11-3 If fair use is not enacted, the *Copyright Act* should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

Pirate Party Australia agrees that this is an appropriate course of action, unless its recommendation under **Question 11-1** is adopted.

Question 11-1

Question 11-1 Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the *Copyright Act* be amended to facilitate voluntary extended collective licensing?

In accordance with the recommendations of the Pirate Party under statutory licenses, Pirate Party Australia believes that, with regard to mass digitisation and archival purposes, institutions such as libraries, museums and archives should be exempt from any licensing requirements.

The Party submits that as this is in the public interest, and the public benefit must be a consideration under copyright law, and that as there purpose is not a commercial one, there should be no requirement for additional licenses to be purchased. Pirate Party Australia does not object to licenses being purchased, however it does not feel that any additional payment should be made. The question the Party puts is: is it more valuable to 'compensate' a copyright holder for the copying of their work, or to properly archive works for future generations? Realistically speaking, archiving should be exempt from any further licensing.

Proposal 11-4

Proposal 11-4 The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether

published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

Conforming to the response to **Question 11-1**, Pirate Party Australia agrees with this proposal.

Proposal 11-5

If the new preservation copying exception is enacted, the following sections of the *Copyright Act* should be repealed:

- (a) s 51A — reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions' collections;
- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions' collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions' collections.

In the interests of simplifying the *Copyright Act*, Pirate Party Australia agrees with this proposal.

Proposal 11-6

Proposal 11-6 Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

Pirate Party Australia finds this restriction to be irrelevant and considers it may actually be damaging in the long-term.

There are two reasons for this:

1. preservation is not a normal or consumptive use of a copyright work, and
2. preservation is intended to ensure a work remains available even after it is no longer commercially available.

Preservation is largely about preventing or restricting access to a particular copy of a work — it is to prevent the degradation of content in order that it can be accessed in the future when copies become scarce or impossible to attain. With that reasoning, preservation is not a normal or consumptive use of a copyright work. Preserved content is not used in the same way as, for example, a book available for public access in a library. If a library wants more copies of content, they purchase more hardcopies, or a license to make available more electronic copies. It seems irrelevant to restrict preservation to prevent commercial disadvantage when there is no market value in preserved content. Preservation copies do not prejudice the

ability of the copyright holder to derive profit from commercial sales: it is only when content becomes unavailable that preserved copies become relevant.

Secondly, it makes little sense to only archive or preserve works that is no longer reasonably available. Preservation is intended to ensure that content never becomes unavailable. Archiving something after it is no longer available assumes that there is at least one copy of it remaining to copy and/or preserve. This may actually lead to a loss of availability of works if libraries and archives must wait until something is no longer available to preserve it.

Therefore the Pirate Party concludes that there is little merit in this proposal.

Proposal 11-7

Proposal 11-7 Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

This proposal seems aimed at targeting the 'problem' of piracy, a problem that does not need to be solved. While provisions (a) and (b) are 'supported' with submissions from industry bodies, (c) does not appear to be supported by any evidence. However, the Pirate Party wishes to draw attention to the fact that anti-piracy and technological protection measures are outside the scope of this inquiry, and that as a result **Proposal 11-7** is also.

Orphan Works

Proposal 12-1

Proposal 12-1 The fair use exception should be applied when determining whether a use of an 'orphan work' infringes copyright.

Pirate Party Australia supports the application of the fair use exception when determining whether a use of an 'orphan work' infringes copyright.

Proposal 12-2

Proposal 12-2 The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a 'reasonably diligent search' for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

Pirate Party Australia objects to the use of orphan works being referred to as 'infringement.' Rights have limited effect unless enforced, and in regard to copyright, it is a right that must be enforced by the copyright holder. As a result, if a copyright holder neglects to adequately enforce their rights — which requires identifying themselves as the copyright holder — it can hardly be considered infringement. Realistically speaking, if an orphan work is used, the user is ultimately assisting the copyright holder in becoming aware of their obligations. It should be considered an obligation to reasonably identify yourself as a copyright holder, as copyright is a two-way street. The public has a responsibility to respect the rights of the copyright holder as far as appropriate when using copyrighted material, and the copyright holder has a responsibility to make it reasonably possible for their works to be used.

A more appropriate term for 'infringement' would be 'use.'

Pirate Party Australia agrees that there should be a limitation on remedies available where an orphan work has been used if the two criteria of a 'reasonably diligent search' and attribution are met. Although the Pirate Party is not entirely sure how best to approach this, it offers the following guidelines for consideration:

- the copyright holder should not be entitled to any payment from income derived by the copyright user prior to their being identified as the copyright holder,
- the copyright holder should relinquish their right to prevent continued use of copyrighted material by the copyright user,
- the copyright holder should not be entitled to force the removal from sale or publication of the copyrighted material,
- the copyright holder should have a statutory right to future royalties from the use of the copyrighted material, however this should be limited to a reasonable percentage (perhaps a maximum of 10%), and
- the parties should attempt to negotiate a license agreement as to how those royalties are to be paid between themselves once the copyright holder is able to reasonably establish themselves as such.

Additional steps may be available or required. The Pirate Party believes that it is unfair for a copyright holder to attempt to claim royalties from use of their work where they have failed to assert their ownership of the copyright. It also seems unfair to prevent future sales or recall already issued material, including orders to take down online content.

That said, for commercial uses, it is not unreasonable for a copyright holder to obtain future royalties from the continued use of copyrighted material, but it should not require expensive litigation or legal threats to establish this. Hence it would be much better to fix the maximum percentage they may obtain and to encourage license agreements to be formed without reliance upon judicial orders.

Proposal 12-3

Proposal 12-3 The *Copyright Act* should provide that, in determining whether a 'reasonably diligent search' was conducted, regard may be had to, among other things:

- (a) how and by whom the search was conducted;
- (b) the search technologies, databases and registers available at the time; and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.

Pirate Party Australia agrees that these are appropriate guidelines for determining whether a 'reasonably diligent search' was conducted.

Educational Use & Government Use

Proposals 13-1, 13-2, 13-3, 14-1, 14-2 & 14-3

Proposal 13-1 The fair use exception should be applied when determining whether an educational use infringes copyright. 'Education' should be an illustrative purpose in the fair use exception.

Proposal 13-2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

Proposal 13-3 The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

Proposal 14-1 The fair use exception should be applied when determining whether a government use infringes copyright. 'Public administration' should be an illustrative purpose in the fair use exception.

Proposal 14-2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

Proposal 14-3 The following exceptions in the *Copyright Act* should be repealed:

- (a) ss 43(1), 104 — judicial proceedings; and
- (b) ss 48A, 104A — copying for members of Parliament.

As Pirate Party Australia submitted under the section **Statutory Licenses**, the Party believes that the introduction of an exemption for 'public interest' uses would be the best approach. In contrast to fair use and other arguments the Party has made for exceptions, this should be a very narrow exemption that allows, for example, government agencies, educational institutions, and disability assistance institutions to use copyrighted material with a total free use exemption.

This maximises the public benefit that copyright aims to bring, while still allowing copyright holders to maintain a near-complete commercial monopoly on copyrighted materials.

Retransmission of Free-to-air Broadcasts

Proposals 15-1, 15-2, 14-3 & Questions 15-1 & 15-2

Proposal 15-1

Option 1: The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively

leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Option 2: The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

Proposal 15-2 If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission ‘over the internet’ should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

Question 15-1 If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

Proposal 15-3 If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

Question 15-2 How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

Pirate Party does not have any strong leanings in regard to this issue, believing that retransmission is primarily an issue to be worked out in consultation with broadcasters and rebroadcasters. It may be best to make this the subject of roundtable consultations rather than an inquiry.

However, the Party does believe that in order to modernise copyright law, the Internet and similar technologies should be included as transmission mediums. The Party again stresses the need to ensure that subsequent developments in technology are not prohibited if suitable as transmission mediums.

Broadcasting

Proposal 16-1

Proposal 16-1 The *Copyright Act* should be amended to ensure that the following exceptions (the ‘broadcast exceptions’), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:

- (a) s 45 — broadcast of extracts of works;
- (b) ss 47, 70 and 107 — reproduction for broadcasting;
- (c) s 47A — sound broadcasting by holders of a print disability radio licence;
- (d) s 67 — incidental broadcast of artistic works;
- (e) s 109 — broadcasting of sound recordings;
- (f) s 135ZT — broadcasts for persons with an intellectual disability;
- (g) s 199 — reception of broadcasts;

- (h) s 200 — use of broadcasts for educational purposes; and
- (i) pt VA — copying of broadcasts by educational institutions.

Pirate Party Australia agrees that, in the interests of modernising copyright law, **Proposal 16-1** is appropriate. It has become evident that the Internet is well established as a broadcast medium, which differs from television in much the same way as television differs from radio, and should therefore be permitted to operate with at least the same provisions as other established mediums.

Question 16-1

Question 16-1 How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:

- (a) the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?
- (b) 'on demand' programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?
- (c) the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

Pirate Party Australia is of the opinion that the Internet is changing perceptions of the producer-consumer relationship and the ways in which passive consumers are becoming active participants in cultural exchanges and dialogues. The television took the principle of radio — the transmission of sound to an audience — and combined it with a visual aspect. However, it still remained a one-way communication. Our notions of broadcasting typically are that of a producer and a passive consumer, a 'one-to-many' relationship.

The Internet, however, is atypical of broadcast mediums in that it is capable of being a two-way communication. This is arguably the medium's greatest strength.

As such, it is inadequate to try to extend broadcast exceptions to 'only the internet [*sic*] equivalent of television and radio programs' as it is not immediately clear what the 'Internet equivalent' actually is. Would it simply be the transmission of one-way communications over the Internet? Or would it encompass other types of communications that the Internet allows?

Pirate Party Australia sees no need to continue to exclude 'on demand' programs from the broadcast exceptions. It seems odd to permit broadcast exceptions where the time of broadcast is fixed and yet prohibit them when the time of broadcast is flexible.

As with the changing nature communications the Internet allows, Pirate Party Australia questions what a 'free-to-air' broadcaster is in relation to the Internet — would it include broadcasters whose sole broadcast medium is the Internet? Would it extend to YouTube channels and podcasters? It seems pedantic and backward to attempt to limit exceptions to only traditional forms of media in light of emerging trends.

The question that needs to be addressed is whether copyright law in Australia should fully embrace the opportunities of digital technology and relax the restrictions around who can produce and distribute content, or whether it is better to maintain the same

restrictions that exist currently and simply introduce the regulations of so-called 'old media' onto more advanced communications mediums.

The former approach would encourage much greater cultural participation and production, while the latter would simply replicate the monopolistic restrictions that currently exist as a product of inflexible copyright law that has not kept pace with either technological change or the social changes that technology has facilitated.

Proposal 16-2

Proposal 16-2 If fair use is enacted, the broadcast exceptions in ss 45 and 67 of the Copyright Act should be repealed.

Pirate Party Australia agrees, provided it is explicit that the fair use provisions may be relied upon.

Questions 16-2 & 16-3

Question 16-2 Section 152 of the Copyright Act provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the Copyright Act be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

Question 16-3 Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the Copyright Act be repealed and licences negotiated voluntarily?

Pirate Party does not have any strong leanings in regard to this issue, believing that compulsory licensing is primarily an issue to be worked out in consultation with interested stakeholders. It may be best to make this the subject of roundtable consultations rather than an inquiry.

Contracting Out

Proposal 17-1

Proposal 17-1 The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

Pirate Party Australia finds this an appropriate amendment to the *Copyright Act*.