Unlocking IP to stimulate Australian innovation: *An Issues Paper*

A submission to the Review of the National Innovation System

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Declaration of Interest: I am the lead Chief Investigator in an Australian Research Council Linkage Project, 'Unlocking IP' <http://www.cyberlawcentre.org/unlocking-ip/>, and am also one of the Co-Directors of the Australasian Legal Information Institute (AustLII) <http://www.austlii.edu.au>, which is mentioned in the submission.

ACKNOWLEDGMENTS – I have received a great deal of assistance in preparing this submission. It is submitted under my name, but is in many respects a collaborative work. Thanks to Catherine Bond who has contributed to many Parts, including her work on the history of Australia's public domain; to Ben Bildstein for his work on quantification of commons (Catherine and Ben are the APA(I) researchers on the 'Unlocking IP' project); to Abi Paramaguru and Sophia Christou for their valuable research assistance on the submission generally; for valuable comments and contributions to particular parts, thanks (in order of receipt) to Roger Clarke, David Vaile, Andrew Kenyon, Rachel Cobcroft, Jessica Coates, Brendan Scott, Andrew Tridgell, Anne Flahvin, Ross McLean, Kathy Bowrey, Matthew Rimmer, Brian Fitzgerald, Neale Hooper and Anne Fitzgerald; and to Jill Matthews for proofreading and editing. Responsibility for the text, its errors and omissions, remains with me.

Executive Summary

‘Public rights’ in intellectual goods (the broad usage of ‘the public domain’), are increasingly important as a driver of innovation in information economies. This submission examines ten areas where changes to strengthen or protect Australia’s copyright public domain may be desirable to encourage innovation. They are intended to be areas where change is possible within the constraints of our Constitution and international obligations, rather than impractical areas such as changes to the copyright term. The ten areas are: The scope for further exceptions to copyright; Legal deposit’s role in the public domain; Finding missing rights-holder (orphan works);; Enabling open content licensing to thrive; Maximising the value of free and open source software (FOSS); Moving toward open standards; Coexistence of open content and compulsory licences; Re-usable government works; Public rights in publicly-funded research; and Indigenous culture’s relationship to the public domain.

Some of the main issues and problems identified from consideration of these ten areas (from over 100 questions raised) are: Whether we should a adopt a more flexible ‘fair use’ copyright exception, very similar to that in the USA?; Whether steps should be taken to stop contractual provisions over-riding copyright exceptions?; Whether legal deposit schemes should be re-considered to maximise the contribution they can make to the public domain?; How can we stop technological protection measures (TPMs) subverting legal deposit schemes?; How can we best combine ‘active’ and ‘passive’ modes to ensure the best legal deposit scheme for audio-visual and digital materials?; What can we do to more effectively find missing rights-holders?; What rights to use ‘orphan works’ should be created, and should authors be compensated when found?; Whether amendments to the Copyright Act could be valuable to strengthen the enforceability open content licences?; Whether the Act should contain provisions enabling public domain dedications?; Whether the Act could also give more support to the enforceability of FOSS licences?; Whether Australian government practices are giving sufficient support to FOSS licensing or open standards?; Whether members of collecting societies need stronger rights to exempt their works from collecting society operations?; Are collecting societies charging for the public’s use of works in the public domain (including open content works)?; In what types of works should Crown copyright be abolished?; What licences, seals or other practices should Australian governments adopt to ensure greater re-use of government-created works?; Does the Copyright Act need to give greater protection to University republication of government-funded research?; Do current policies of Australian research funding bodies have strong enough requirements for public accessibility to publicly-funded research?; How can we best ensure that the special problems of the relationship between indigenous culture and the public domain receive an appropriate response in Australia?

Through the discussion of these areas, interlocking themes emerge, including the need to make ownership of works easier to ascertain, and to make use of works easier when owners cannot be found; how changes to copyright law might assist voluntary actions by authors to expand the public domain; how some Australian institutions may need more protection in their uses of works; and how governments could lead by example in relation to government-produced works, government-funded academic research, and government engagement with open source software and open standards.

The submission argues that these issues are so central to the question of innovation in Australia that the Innovation Review should recommend that the Australian Law Reform Commission should be given a reference to review the role of public rights in Australia’s copyright law (or preferably in all intellectual property laws). Such a review with the public domain as the focus of enquiry has never taken place in Australia, or perhaps anywhere in the world. Australia would benefit from a considered review that focuses on public rights, and on what balance between public rights and proprietary rights would maximise the national interest.

This submission is in the form of an 'Issues Paper': it presents over 100 questions which it would be valuable for such a law reform review to answer, and suggests why they are important to Australia's innovative capacity. It does not propose particular reforms. Researchers from the Unlocking IP Project intend to publish a further Discussion Paper in late 2008 which will discuss options for reform on all of these issues, followed by a Report in 2009 which will state our views on what reforms are desirable.

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1. Introduction: The value of Australia's public domain

1.1. Addressing the Review's concerns

The Review poses its key question in the negative as 'what assumptions underpinning current policy programmes are of diminishing importance and are being overtaken by changes in our operating environment?'. The assumption that proprietary rights in intellectual goods (ie their 'intellectual property' aspects) are the only rights in intellectual goods that help to drive innovation is an idea of diminishing importance. 'Public rights' in intellectual goods are increasingly recognised as a driver of innovations, and will be even more important in the future.

This can be briefly illustrated by considering the 'drivers for change' identified by the Call for Submissions:

- *the shift from in-house R&D laboratories to networks of 'open innovation'* – Open innovation[1] assumes inflows of knowledge to accelerate innovation, which is facilitated by that knowledge being available as open content, open source software and the like, as the costs of obtaining it are minimized; open innovation also assumes that outflows of knowledge must occur as part of this process, and public rights licences (including the General Public Licence (GPL), Creative Commons licences, and local initiativessuch as AEShareNet/TVET licences) have provided one of the most effective means of making your own knowledge available to others.
- *the rise of globally networked operations and 'cyber-infrastructure'* – Much of our 'cyber-infrastructure' is built on open source software and on open standards.
- *the rise of user-generated innovation and demand-driven searches for applicable knowledge and solutions* – 'User generated content' (UGC) is very commonly licenced under some form of public rights licence.
- *the dominance of service industries in advanced economies* – New business models using open content, software and standards are based around service industries rather than the ownership of intellectual property.
- *the internationalisation of more and more activity* – The global openness of information is one aspect of this internationalisation, the development of a global pool of available content and technologies.
- *a major lift in investment by many national and regional governments in education and research infrastructure* – The most effective and cost-effective forms of teaching infrastructure and research infrastructure that we can now build are very often those which involve either or both free access and open content.
- the shifting dynamics of global competition, especially with the surge of activity from countries like Brasil, Russia, India and China – Australia's population size means it can

[1] 'Open innovation is the use of purposive inflows and outflows of knowledge to accelerate internal innovation, and expand the markets for external use of innovation, respectively.' (Chesbrough, Vanhaverbeke and West, 2006)

never be a mega-producer of intellectual content, so our interests are less likely to lie with maximising intellectual property at any cost. We need to be more nimble.

- *the increased sense of urgency around finding solutions to global and national challenges like climate change, future energy sources, water supply, and a healthy population –* The solutions to these issues will involve international collaborations, which may well be based on 'open IP' rather than a purely proprietary approach.

These examples demonstrate the potential that various forms of public rights in intellectual goods have to contribute to the drivers for change identified by the review. This suggests that we should ask whether Australia has the best settings in its intellectual property laws, public policies and institutional structures to maximise the innovation potential of these public rights.

1.2. Examples of the value of Australia's public domain

Here is a selection of Australian intellectual goods illustrating the major role public rights of differing types play in Australian innovation and culture.

- Australians continue to make very substantial contributions to the development of **open source software** and thus to the Internet's global infrastructure. Contributions to the *Linux kernel* have included the port of Linux to the PowerPC architecture (largely done in Canberra), the work to put Linux on Cell processors, and contributions to the Sparc processor work. Australians hold senior positions in overall Linux development, and in subsystem maintenance. Australian work on Linux networking is the basis for many companies building firewall appliances, smart routers etc. The *Samba* re-implementation of the SMB/CIFS networking protocol[2], initially developed at the Australian National University, has been the basis on which various companies have built their businesses. The file transfer utility *rsync*[3] has similar antecedents. Other major contributions include the *pppd* dameon used by a significant proportion of ADSL home routers; the *radiud* authentication server used by many ISPs; the SSL library which is the cryptography engine used by much e-business (developed in Queensland); contributors to the Firefox browser; *gcc* use in the embedded computing market; and much development of the *Gnome* and KDE Linux desktop environments which are becoming increasingly important[4].

- The **AEShareNet** Licensing System[5], operated by TVET Australia, licences about 3,000 learning objects for free educational use[6], and in some cases with rights to modify, primarily for use in the technical and further education (TAFE) sector. In addition, about 600 pages on the web use its 'Free for Education' (FfE) licence[7]. The AEShareNet licence suite was one of the world's earliest developments of open content licensing. AEShareNet resources are searchable along with other Australian educational

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2 <http://us1.samba.org/samba/> – Samba is a free software re-implementation of the SMB/CIFS networking protocol, which allows for interoperability between Linux/Unix servers and Windows-based clients, originally developed by Australian Andrew Tridgell.

3 <http://samba.anu.edu.au/rsync/> - 'rsync is an open source utility that provides fast incremental file transfer'

4 Andrew Tridgell assisted in the compilation of this list.

5 <http://www.aesharenet.com.au/>

6 Of the over 23,000 items available via the TVET/AEShareNet site, about 3,000 are licensed under the FfE, P, S or U licences.

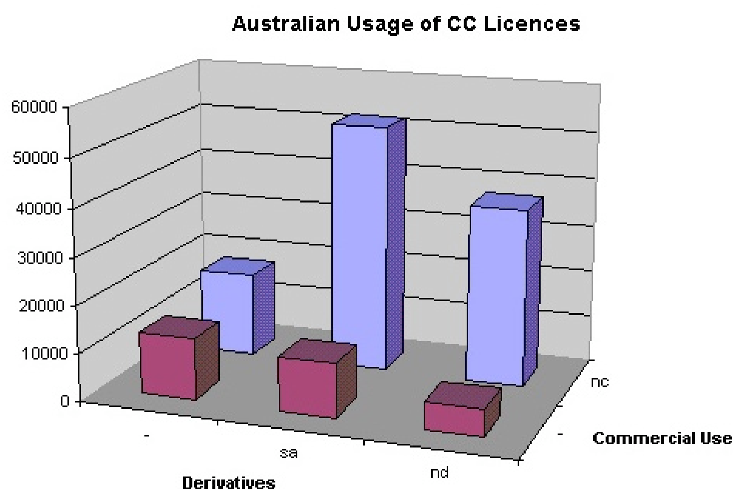
7 <link:http://www.aesharenet.com.au/FfE/>

resources from all sectors via Education Network Australia (**edna**)[8] , but it is not possible to limit searches there to items that are available for free educational use or modification.

- **PANDORA**[9], described as 'Australia's Web Archive' by the National Library, has developed since 1996 an expanding collection of selected Australian online publications, such as electronic journals, government publications, and web sites of research or cultural significance. Built in collaboration with nine other Australian libraries and cultural collecting organisations, PANDORA now has over 50M files (over 2 TB) comprising over 36,000 'archived instances'. It is growing at a rate of nearly 2% per month. PANDORA is archiving the history of Australia's 'online search commons'.

- Australia has played a significant role in the development of **e-learning platforms**. **LAMS** (Learning Activity Management System)[10] is open source software developed at Macquarie University which provides a visual tool for designing, managing and delivering online collaborative learning activities. It has been adopted in 2007 by the Northern Territory Department of Employment, Education and Training for roll-out in all of its schools[11]. **Moodle**[12] is an open source software e-learning platform, with particular strength in wiki development, and with a world-wide network of developers coordinated by the Moodle company based in Perth, Western Australia. It has a user base of 42,080 registered sites[13] with 16,927,590 users in 1,713,438 courses (Wikipedia, 2008: 'Moodle' entry).

- Usage of **Creative Commons licences** in relation to Australian content had resulted in at least 2,000 websites containing over 100,000 pages of CC licensed content as of early 2007 (Bildstein, 2007), though this may be something of an under-estimate[14]. This includes both the use of the Australian CC licences, and the use of the 'generic' CC licences over Australian materials, as shown in the graph at right (from Bildstein, 2007: 4.2.4). The most popular licence attributes are 'Non-commercial' and 'Share-alike'. A few of the best known sites using CC licences are noted in some of the examples below.



8 <http://www.edna.edu.au/>

9 <http://pandora.nla.gov.au/about.html>

10 <http://www.lamsinternational.com/resource/>

11 <http://www.lamsinternational.com/news/index.html#12>

12 <http://moodle.org/>

13 <http://moodle.org/stats/>

14 Bildstein (2007:5.4.1)) notes that his figures omit two types of content, for the purpose of the comparison he wished to make. The estimate of 2,000 websites comes from his estimate that the average number of pages licensed coming from the same website was approximately 50, and division of the total number of web pages with licences by 50 (personal communication).

- Despite Australia's Crown Copyright in cases and legislation, **Australian law** has been the site of world-leading initiatives in free access to law. The NSW government gazetted a general licence to the public allowing reproduction of legislation and case law as far back as the 1990s. The Australian Council of Chief Justices' 'Court designated citations' standard, adopted in 1998, has enabled cases to be authoritatively cited from the moment they are handed down, and has been adopted in the United Kingdom, southern Africa, the Pacific Islands and elsewhere across the common law world. Since 1995 the *Australasian Legal Information Institute* (AustLII), a community service and research infrastructure initiative of two university law schools, has created the world's largest free access online law resources[15], including such features as free Point-in-Time legislation, and the world's only comprehensive national treaties collection. Over 200 public institutions, including courts, tribunals, government agencies and universities, have collaborated with AustLII to produce these free access repositories. AustLII's open source Sino search engine is used by the majority of free access 'legal information institutes' around the world.

- **Screenrights**, the collecting society for educational use of audio-visual materials, takes an innovative approach to educator's public rights to use a-v materials, regarding this as a business opportunity for its members: 'With Screenrights now collecting more than $23 million a year from educational copying, filmmakers are becoming increasingly aware of the benefits of marketing their work effectively to this sector'[16]**.** As part of this business model, it contributes back a large quantity of free-access educational resources such as study guides, about programs which are being screened on TV , through its *Enhance TV* service[17]: 'Educational programs to be broadcast on television are highlighted on the site, and in an email newsletter circulated to over 20,000 Australian educators every week. This gives teachers the advance notice they need to copy, and provides exposure for filmmakers'.

- Free access **repositories of Australian academic research** are becoming more common. **Institution-based repositories** are being established at various Australian Universities, including those repositories from members of the ARROW[18] consortium (Australian Research Repositories Online to the World), which between them currently provide about 12,000 academic papers for free access (but usually with no licences providing other rights)[19]. Swinburne University of Technology has the largest repository (Swinburne Research Bank[20]) with 7003 papers, followed by Monash University ARROW Repository[21] (2516 papers), and the University of the Sunshine Coast 'Coast Research Database'[22] (1933 papers). Of the ARROW databases, only the smallest, the University of New South Wales UNSWorks[23] (348 papers) requires depositing authors to use a Creative Commons licence (Attribution-Noncommercial-NoDerivatives). There are significant institutional repositories outside ARROW[24], such as Bond

15 <http://www.austlii.edu.au> – Declaration of interest: I am one of AustLII's Co-Directors.

16 <http://www.screenrights.org/rightsholders/innovative-services.php#EnhanceTV>

17 <http://www.enhancetv.com.au/>

18 <http://www.arrow.edu.au/repositories> – 8 of the 16 ARROW members have established ARROW repositories

19 Research by Catherine Bond on Australian academic repositories, as at 24 April 2008. Some repositories could not be accessed.

20 <http://researchbank.swinburne.edu.au/vital/access/manager/Index>

21 <http://arrow.monash.edu.au/vital/access/manager/Index >

22 < http://research.usc.edu.au/vital/access/manager/>

23 <http://unsworks.unsw.edu.au/vital/access/manager/Index>

24 Details given are from OAIster < http://www.oaister.org/viewcolls.html>, as at 24 April 2008.

University's *e-publications@bond*[25] (1856 papers), QUT ePrints[26], University of Wollongong's Research Online (2064 papers)[27], Flinders Academic Commons[28] (1525 papers). In addition, **national discipline-based repositories** are starting to develop. AustLII provides free access to over 50 Australasian law journals (6576 papers)[29], and has received ARC funding to expand this into a national Legal Scholarship Library[30].

- The National Library of Australia's **Picture Australia**[31] aims to be the definitive pictorial service for and about Australians and Australia, providing one search over collections in 45 major Australian public institutions. Pictures, (photos, sketches, cartoons etc) are often only available for private research and study, but some are available for other uses[32]. Picture Australia's 'Click and Flick' is an initiative to open Picture Australia to contributions from the Australian public, through uploads to Flickr using Creative Commons licences[33]. Picture Australia now includes over 1.1 million images from the collections of 45 organisations and, now, individuals via Flickr. Its federated combination of public domain images, Crown copyright images made available for free access, and images contributed by the public under voluntary public rights licences (Creative Commons) is indicative of what creative collaboration among public institutions can do.

- Other major cultural institutions are starting similar initiatives. The **Powerhouse Museum**, Sydney is one of the first cultural institutions in the world to release their public domain images on Flickr[34] (April 2008), following the example of the US Library of Congress (launched January 2008). The Powerhouse is releasing its Tyrrell Collection, 7903 glass plate negatives recording life in Australia around the turn of the 20th Century, of which 300 have initially been included on Flickr [35], with a statement on each that they have 'No known restrictions on

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25 <http://epublications.bond.edu.au/>

26 <http://eprints.qut.edu.au/>

27 <http://ro.uow.edu.au/>

28 <http://dspace.flinders.edu.au/>

29 <http://www.austlii.edu.au/au/journals/>

30 <http://www.austlii.edu.au/austlii/research/2008/lief/>

31 <http://www.pictureaustralia.gov.au>

32 Though it is impossible to search for 'public domain' to find out which ones!

33 <http://www.pictureaustralia.gov.au/contribute/individual.html> and <http://www.pictureaustralia.gov.au/contribute/participants/Flickr.html> - However, the link from these pages does not offer the use of the Creative Commons Australian licences. See further in Part 6.4.

34 <http://flickr.com/commons>

35 <http://www.flickr.com/photos/powerhouse_museum/>

publication'. The example here shows Pyrmont Bridge, Sydney, at the turn of the century[36].

- **Sites supporting creativity** that use open content licences are increasing. Multimedia site *60Sox*[37], provides a focal point for emergent creativity in Australia and New Zealand, and uses Creative Commons Australia licences. *Australian Creative Resources Online* (ACRO)[38] hosts a repository for audio, video, and still images that can be used freely and legally for creating digital art, education, or other uses. ACRO uses both Creative Commons Australia licences and AEshareNet Free for Education licenses. The *Brisbane Media Map* is a database of hundreds of creative industry organisations in the Brisbane area, linked to Google maps locations, and with its content, database and software all licensed under Creative Commons Australian licences (CC-BY-NC-ND 2.1)[39]

- Finding **Australian works in which copyright has expired** (the narrow meaning of 'public domain') is harder than one might expect, because there is often no way to search major catalogs (such as at the National Library) to specify only works that are in the public domain. Nor do overseas collections such as Google Books which include Australian public domain materials allow searches by that characteristic. Only a few specific 'out of copyright' Australian collections exists. The University of Adelaide Library's *eBooks@Adelaide*[40] (969 records) includes more than 500 classic works of literature, philosophy, science and history (not necessarily Australian) in the public domain. **Project Gutenberg Australia**[41] is a private initiative which includes numerous Australian works (and other works) in the public domain, and can be searched using Google's search engine, but it is very difficult to gain any clear idea of its coverage.

- **Australian scientists** are making use of public rights licensing, often through publication in Australian or international repositories, and sometimes with re-use rights. A Murdoch University research team published their simple diagnostic test for African Sleeping Sickness[42] on the with Public Library of Science under an Australian Creative Commons licence (CC BY 2.5).

- **Politics and public affairs websites** make use of Creative Commons licences. *YouDecide2007*[43], a citizen journalism initiative between SBS, On Line Opinion, the Brisbane Institute, and QUT Creative Industries covered the 2007 Australian federal election, using the CC BY-NC-ND 2.5 AU licence. *On Line Opinion*[44] uses the CC BY-NC-ND 2.0 licence. *EngageMedia*, a video-sharing website, focuses on social justice and environment issues in Australia, South East Asia and the Pacific [45].

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36 Attribution: 'Pyrmont Bridge', Kerry and Co., Sydney, New South Wales, Australia, c. 1902-1917; Format: Glass plate negative; Rights Info: No known restrictions on publication; Repository: Tyrrell Photographic Collection, Powerhouse Museum <www.powerhousemuseum.com/collection/database/collection=The_Tyrrell_Photographic>; 30/04/08; Creative Commons Attribution-Noncommercial-No Derivative Works 2.1 license.

37 <http://60sox.org.au/>

38 <http://www.acro.edu.au/>

39 <http://wiki.creativecommons.org/Brisbane_Media_Map>

40 <http://etext.library.adelaide.edu.au/>

41 <http://gutenberg.net.au/>

42 <http://creativecommons.org/weblog/entry/8112>

43 <http://www.youdecide2007.org/>

44 <http://www.onlineopinion.com.au/>

45 <http://creativecommons.org.au/asiaandthecommons/engagemedia>

- **Civil society organisations** are also making increasing use of open content tools. The Association for Progressive Communications Australia[46] has released 10 years of documentation on the use of ITC for community development, under a Creative Commons licence (CC BY-NC-ND 2.5 AU) on a publicly-available wiki for Document Freedom Day 2008[47].

These public resources are only the tip of the iceberg, both of what Australia's public domain already comprises and (more importantly) of what our public domain could be in future.

1.3. Recognition that our copyright public domain is valuable

The importance of the public domain to Australia, and to our innovative capacity, has often been recognised, and sometimes ignored, but has not had sustained examination.

Australia's Copyright Law Review Committee recognised 'that the exclusive rights of copyright are partly defined by the exceptions, in that the rights only exist to the extent that they are not qualified by the exceptions" and considers that "the principal exceptions, such as those for fair dealing, are fundamental to defining the copyright interest' (CLRC, 2002: 201). As we will see, the Committee has proposed protections of the copyright public domain against encroachments by contract law based on this approach.

Cutler (2007) criticises 'the lack of explicit recognition of the role of, particularly, public cultural institutions in the innovations system':

> … the role for public cultural institutions, in particular, as open content repositories. We have seen the initiatives like the BBC Archive in the UK, but the role of the ABC, museums, galleries, places like The Centre for Moving Image, open content repositories, in a country like Australia is crucially important because in a small country economy like Australia it is only in the public sector that you find the scale that potentially can make a difference. Here public cultural institutions can play a disproportionate role in creating critical mass around open content repositories …

The National Library of Australia said in a submission to one public enquiry

> The public domain is an integral part of the creative process and allows the public access to the fruits of an artist's labours after the expiry of the copyright term. This is particularly true for creators of works such as reference books, CD-ROMs, multimedia material, and documentary and educational films, all of which draw heavily on public domain material. Because the copyright regime exists to serve everyone, not just specialist interest groups, the National Library would regard any extension of the copyright term, and the consequent reduced access to a large portion of our common heritage, as detrimental to creativity and against the public benefit. (National Library of Australia, 1996: section 12)

Concerning government information, a State agency says

> Although attention has been given to improving access to public sector information since the 1980s, efforts to facilitate access and re-use have strengthened in recent years. As well as advances in computing technology, an important contributing factor has been the body of economic research over the past decade which points to the advantages to be gained. This trend is in recognition of the potential social and economic value of public sector datasets, databases and other informational products, articulated by key authors in this area… (Qld Spatial Information Office, 2006:9).

The later parts of this submission include arguments and statements supporting the importance of particular aspects of Australia's public domain.

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46 <http://wiki.apc.org.au/index.php?title=Documents> – see <http://www.apc.org/en/news/access/asiapacific/apc-au-celebrates-document-freedom-day>

47 <http://www.apc.org>

Business and other sustainability models and the public domain (1.3)

The examples of value and creativity that can be found in Australia's public domain are encouraging, but need to be supplemented by Australian examples and details of the 'business models' and other models of sustainability that can be shown to be successful in the Australian context in producing a continuing stream of innovation based on information goods containing public rights. At present, a body of case studies of such business models is lacking.

Clarke and Dempsey (2004) argue that a substantial and healthy public domain is needed to encourage investigators of innovations; enhancers of innovations; extenders of innovations; and developers of competing innovations. Clarke (2007) attempts to answer the question 'what business models enable content-developers to make their materials available in a content commons by means of open content licences, rather than seeking monopoly rents from the works by means of copyright licensing fees?'. Clarke uses the questions 'Who Pays? (Consumers Pay; Producers Pay; Third Parties Pay); For What?; Why?; To Whom?' to categorise a wide array of open content business models, but they are not particularly Australian-oriented.

1.4. The purpose of this Submission

The main purpose of this submission is to argue that one reason we do not yet maximise the innovation potential of these public rights is that our intellectual property laws have never been reviewed with a focus on public rights and what they can contribute to innovation. Perhaps, until the turn of this century, such an investigation would have been premature, because some of the ways in which public rights can be used to stimulate innovation were not obvious until recently. What is clear is that we do need such an investigation now. This submission will not try to suggest any final answers to how we should change our laws, policies and practices, but will canvass a wide range of examples of problems that need to be addressed, and the types of solutions that need to be considered.

I argue that these issues are so central to the question of the innovation in Australia that the Innovation Review should recommend that the Australian Law Reform Commission should be given a reference to review the role of public rights in Australia's copyright law (or preferably in all intellectual property laws). Such a review with the public domain as the focus of enquiry has never taken place in Australia, or perhaps anywhere in the world. Australia would benefit from a considered review that focuses on public rights, and on what balance between them and proprietary rights would maximise the national interest. I will refer to it as the 'Public Domain Review'.

This submission will, from this point onward, be limited to Australian copyright law. Patent law, obviously just as important to innovation, would require a quite separate line of argument.

1.5. 'Public rights' and the public domain

I have been using the terms 'public rights' and 'public domain' almost interchangeably. I will explain shortly more precisely what I mean by 'public rights'. 'Public domain' is an ambiguous term. In its narrowest use it means those works in which copyright has expired due to the expiry of the copyright term. A slightly broader usage includes works which don't ever attract copyright protection, and those over which the author has renounced all claims of copyright. However, it has a more modern and expansive usage which encompasses all types of 'public rights', including in addition to the two uses already mentioned, other aspects of copyright law which give rights to the public, such as fair dealing exceptions and uses allowed under compulsory licences (and other examples given in the next section). 'Public domain' in this broad sense can be used in relation to copyright (see Greenleaf, 2003) and in relation to other forms of intellectual property rights. Samuelson, (2006) provides seven different maps indicating how different scholars see this broader notion of the public domain. For this submission, I will use 'public domain' as a synonym for the

broadest usage of 'public rights' in relation to copyright. To avoid confusion, I will also avoid using the word 'commons', though much of the discussion could also take place using that term.

Avoiding a misleading dichotomy

If the term 'public domain' is used in its narrow sense, there is a dichotomy of works: some works are in the public domain but only if they are old enough, and all other works are not. The approach taken in this submission is very different, and recognises that almost all works contain both public and proprietary components, and fall somewhere on a continuum between the extremes of works which are subject to 'private rights only' and those which are subject to 'public rights only'. At the public rights extreme it is easy enough to envisage public domain works such as the plays of Shakespeare[48]. But for practical purposes all proprietary works are at least subject to some minimal 'fair use' exceptions in copyright law, and so are subject to some public rights. The proprietary extreme of the continuum is empty[49].

The normal nature of works is to be a composite of public and proprietary rights, with each work situated at some point along a continuum between the two extremes. There is therefore normally a dichotomy between public and private rights, but it is one which exists within each work, rather than between works. The Creative Commons slogan "some rights reserved" recognises this inherent duality in works and builds on it.

'Effective' public rights – a useful refinement

For the purposes of this paper, I mean by "public rights"[50] all those aspects of copyright law and practice that are important in determining the ability of the public (or a significant class of the public) to use works without obtaining a licence on terms set (and changeable) by the copyright owner. In other words, public rights are 'The effective extent to which I can use your works without seeking your permission.' Including things that determine the effective exercise of otherwise formal rights reduces the precision of the notion of public rights, but does allow us to give a richer and more useful description of a country's public domain.

The corollary of this definition of 'public rights' is that private/proprietary rights are the effective ability of the owners of copyright in works to refuse to allow other people to use those works, except on terms set (and changeable) by them.

1.6. The magic puddin' and his "treacherous 'abits"

> "There's nothing this Puddin' enjoys more than offering slices of himself to strangers."

The public domain as a source from which successive creators can draw nourishment without it being diminished has a quirky parallel in Australian culture. Norman Lindsay's *The Magic Pudding* (1918) – described by Philip Pullman as 'the funniest children's book ever written' ('The Magic Pudding', Wikipedia entry) – is based around Albert, the 'cut-an'-come-again Puddin''. His magical property is that

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[48] As examples of works in which copyright has expired by effluxion of time (or by some effective 'gifting' to the public), and in which the only copy is *not* effectively locked in a TPM.

[49] For a work to exist at the purely private end of the spectrum, it would have to be effectively locked within a technological protection measure (TPM) so as to effectively nullify any fair use rights which might otherwise apply (so any (public rights would be merely formal but ineffective). The jurisdiction concerned would also have to have no legislative exceptions under which TPMs could be overridden (for example by public archives), otherwise we would have to say that some minimal public rights still exist.

[50] I use the expression 'public rights' without intending that too much be read into 'rights' as distinct from 'liberties'. Such distinctions are worth making but not essential to this argument.

> "The more you eats the more you gets. Cut-an'-come-again is his name, an' cut, an' come again, is his nature. Me an' Sam has been eatin' away at this Puddin' for years, and there's not a mark on him." (Lindsay, 1918)

As with all similar stories in popular cultures, there 'is always a catch, a hidden trap, or a built in punishment for being too greedy. The magical gift is not to be abused.' (McGuinness, 2004). This is also true of public rights in copyright. If they were to be allocated too generously, there is a risk that the incentive to innovate will be stifled, but if they are too limited, both socially valuable uses by consumers, and incentive to follow-on innovators, may equally be stifled.' As the author of the recent UK review of innovation and IP observed 'The ideal IP system creates incentives for innovation, without unduly limiting access for consumers and follow-on innovators. It must strike the right balance in a rapidly changing world so that innovators can see further by standing on the shoulders of giants.' (Gowers, 2006).

In Albert's case, the catch was that he was always trying to escape in search of other owners, which is also always a risk for public rights.

> `My word', said Bill when the Puddin' was brought back. `You have to be as smart as paint to keep this Puddin' in order. He's that artful, lawyers couldn't manage him.' (Lindsay, 1918).

We have tasted a few slices from the magic puddin' back in Part 1.2. But this is meagre fare compared with what could be. Can the law learn to manage Australia's public domain so that it best serves Australia's interests? That's the nub of this submission: how do we best manage our magic puddin'?

Our pictured pudding is inviting, but does not look quite as magical as Norman Lindsay's wonderful drawings of Albert. However, it is licenced under an Attribution-Noncommercial-Share Alike 2.0 Generic licence[51] so I can reproduce it here**.**

Although Lindsay died in 1969, his drawings – and the book – will remain in copyright for another 31 years to 2039. However, if you would like to see what Albert looks like, there are some splendid images of him and his friends in the National Library's 'National Treasures' online[52], and a search of Google images will reveal many more images and memorabilia.

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[51] Attribution:'Christmas Summer Pudding 2005', uploaded on Flickr on 25 December, 2005 by Helen K, at <http://flickr.com/photos/helenk/77328980/sizes/l>; Creative Commons: Attribution-Noncommercial-Share Alike 2.0 Generic**.**

[52] <http://nationaltreasures.nla.gov.au/%3E/Treasures/item/nla.int-ex6-s17>

2. Australia's copyright public domain

2.1. The 'global public domain' and Australia

There are elements which are common to the public domains of the vast majority of jurisdictions around the world, principally because of two factors: (i) the near-universal adoption of the Berne Convention (1886) (and some effects of the TRIPS Agreement) and (ii) some effects of the Internet are global, particularly those associated with search engines and with viral licences. To some extent it makes sense to talk about a global public domain, but what is relevant here is the effect of these factors on the shape of Australia's national public domain.

International agreements and their limitations on Australia's public domain

The main effect of international agreements has been to restrict what can be included in a national public domain according to international law. The Berne Convention (1886)[53] and its subsequent amendments[54] can be seen as the main factor responsible for determining the size of national public domains, and many of their features[55]. Five specific negative elements constrain public domains.

First, the most significant determinant is that in accordance with Berne, registration of works is not required for copyright (Article18 and elsewhere). This creates a shrunken public domain, as it reverses the default condition of a work from 'public' to 'proprietary'. If registration is required, then it can be expected that most works will not be registered, and the public domain will be correspondingly large. When from 1978-89 the USA abandoned a compulsory registration system for copyright[56] and publication and notice requirements and belatedly joined the Berne Convention (1989), this may have been the largest contraction (since Berne itself) of the scope of the world's public domain. The absence of any requirement for registration is a major contributor to problems such as 'orphan works', where it is impossible to locate a copyright owner of a book that is out of print, but the work is still protected by copyright and therefore cannot be reproduced by others. When the US had a registration system, only about 10% of all works registered were re-registered at the end of the 28-year term (Landes and Posner, cited in Google (2005)), so the other 90% of those works would then have entered the public domain in the pre-Berne US environment.

The second restrictive element of Berne is the requirement of a minimum copyright term of life of author plus fifty years (A7(1))[57]. Without this requirement, the minimum term of protection of some types of works, such as computer programs, may have been less, and they would have become part of the public domain (in the narrow sense) earlier. Third, moral rights (including integrity) may be

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53 *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*.

54 *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*, completed in PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24 , 1971, and amended on September 28, 1979. For a broader discussion on the provisions of the Berne Convention, see Ricketson and Ginsburg (2006).

55 This is not an historical observation: some countries' laws included features mentioned here before they were included in the Berne Convention.

56 The US Library of Congress maintains a voluntary registration system for most types of works. 'Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin' (US Copyright Office (2007) 'Copyright Registration' and 'Copyright Office Basics'.

57 This term was introduced in the 1908 Berlin revision of the Convention, and has thus been applicable to members of the Union for exactly one hundred years.

perpetual according to the interpretation of some state parties such as France[58]. This limits the potential re-use of such works. Fourth, the fair use '3 step test'[59] is seen by some as limiting the extent to which countries can expand the scope of fair use and compulsory licences, although this interpretation is highly contested (as discussed later). The TRIPS Agreement[60] is mainly relevant to determining the nature of the public domain because it adds another version of the fair use 'three step test'. Fifth, it is a minimum rights treaty (A20) and it is therefore possible for a consensus of national developments to further reduce most public rights.

There are also aspects of the Berne Convention that support the existence of public rights, or are at least neutral. These include that there shall not be protection of 'news of the day' or 'miscellaneous facts' (A2(8)). Berne leaves open for national decision (and is therefore neutral) the vital areas of (a) compulsory licensing; (b) fair dealing and (c) protection of legal materials[61]. Perhaps the most important positive aspect of Berne is something that it does not mention, and therefore leaves outside the scope of copyright, namely that the rights to control who can read, listen to or view a work are not in themselves part of the exclusive rights of copyright owners (although these 'user rights' have been made less secure by the recent laws concerning technological protection measures).

In relation to Australia, the Australia-US Free Trade Agreement is a bilateral agreement which has required Australia to restrict its public domain. The Agreement, formally passed in 2004, included requirements for the extension of the duration of protection beyond the Berne-minimum of life of the author plus fifty years, to a seventy-year posthumous period of protection, and stronger provisions for acts of circumvention involving technological protection measures attached to a digital work by the owner of the copyright (Bond, Paramaguru and Greenleaf, 2007).

It is unlikely that these international agreements will be amended in the short term; indeed, the Berne Convention has not been amended since 1979, long before the rise of digital technologies. It remains one of the most significant treaties in intellectual property regulation, particularly when viewed from a public domain perspective. The obligations in these treaties that restrict the scope of Australia's public domain are constraints on any Australian law reform. Some of these provisions may be undesirable but they are likely to be permanent. They are the settled context of our public domain. The challenge for those who wish to encourage innovation and the public interest through a broader public domain is to identify practical changes to the law which are consistent with these constraints, or reforms to policy and practices which do not require changes to the law.

The expanding informal global commons

In contrast to international agreements, global practices related to the Internet have effectively expanded public rights globally, and have therefore expanded Australia's public domain.

The Internet's world-wide-web from the early 1990s created a global commons for *browsing* and private use (including reproduction) of works that authors made accessible on the Internet. From 1996 search engines have created a global *de facto* commons for the *searching* of such works.

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[58] Article 6*bis*(2) of the Berne Convention only requires that the moral rights subsist for at least as long as the economic rights granted in the work. On that basis, so long as the rights extend for the same period as the economic rights, that nation will not be in breach of the Berne Convention. The moral rights amendments introduced in 2000 were in part aimed at quelling fears that the provisions of the *Copyright Act 1968* covering moral rights did not actually meet the requirements of Article 6*bis*. See Crawford (1989); Ricketson (1989).

[59] As contained in Article 9(2) of the existing Convention.

[60] Acceded to by over 75% of countries by 2005, nearly 150 countries (Wikipedia, 2007). It does not seem that the WIPO Copyright Treaty (WCT) is so likely to be adopted universally: as of May 2007 only 64 countries had ratified the WCT (IIPA, 2007), and it closes in December 2007.

[61] See Article 2(4) of the existing Convention.

Creation of the searchable commons has required the acquiescence of copyright owners in practices by search engine providers (particularly creation of concordances/indexes and retained caches) which may breach copyright laws on a massive scale, though this varies between countries. This is probably the largest expansion of the effective public domain to occur, at least since the development of public libraries turned the right to read works into an effective public domain. It has been described as an example of creation of a commons by 'friendly appropriation and acquiescence' (Greenleaf, 2006). An unresolved question at this stage is whether Google Books and other book search facilities will succeed in creating another extension, a global searchable commons for literature which copyright owners have *not* made freely accessible via the Internet.

Viral licences are voluntary licences of works offered by the author of the work which allow the software or document to which they apply to be modified or combined with other software or texts, but only on the basis that the resulting software or text is available to the public under the same licence conditions. As a result, where they are adopted in preference to non-viral licences, the quantity of software or texts available to the public under the licence expands. The most effective viral licences create an intellectually very significant and rapidly expanding global public domain in certain types of information. The most obvious and important example is open source software created by the viral GNU General Public Licence (GPL) and some other Free and Open Source (FOSS) licences, There are many millions of instances of such licences being used identifiable globally, as detailed in Part 7. The most important examples in relation to textual works are Wikipedia and other collaborative reference works created under the viral GNU Free Documentation License or similar viral licences**.**

There has also been widespread adoption across the world of other open content licences which are not 'viral', such as those Creative Commons licences which do not include the 'share-alike' attribute. Such licences expand the public domain by allowing either any licencees, or defined classes of licencees, to use the content without payment, according to terms of the (non-viral) licence. Some of these licences have national origins, are tailored to national laws, and are mainly used within a particular country (for example, the TVET/AESN licences in Australia)[62]. However, the greatest proliferation of content licensed under (non-viral) open content licences is of a 'global' rather than national nature. The Creative Commons 'movement' and its suite of licences originated in the USA and were tailored to US law, but have been 'ported' to comply with the legal environments of different countries. These suites of 'CC' licences have a very high degree of similarity to the 'generic' Creative Commons licences, and to those of other countries.

From the perspective of encouraging innovation through public rights, the issues raised by these developments are (i) 'are there changes to Australian law needed to ensure that the *de facto* commons created by search engines is not at risk in Australia?'; (ii) 'what changes if any to Australian law are needed to ensure that voluntary licences (viral and non-viral) creating public rights are effective, irrespective of which licences are used to create these rights?'.

2.2. Australia's public domain - A very brief history[63]

To understand how Australia's public domain can contribute to innovation, it is necessary to appreciate all of the different types of public rights that comprise this public domain. We also need to note those elements found in other countries' public domains but which are lacking in Australia. Given that some of the shape of Australia's public domain has been determined by its own history, and its interaction with international influences, we need to start with an overview of that history.

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62 AEShareNet/TVET Australia – Licensing overview at <http://www.aesharenet.com.au/coreBusiness/> and Short Licence Comparison Table at http://www.aesharenet.com.au/coreBusiness/whatWeDo/027comparison.asp.

63 This section is primarily by Catherine Bond, and draws on her unpublished PhD research.

We then move to an analysis of the components of Australia's public domain, in the expanded sense previously discussed.

In some form or another, the public domain has always existed in Australia. Its shape and boundaries have changed over time, but it has always been a feature of Australian copyright law. While Atkinson (2007) has noted that the rhetoric of a balancing of rights or strong public interests considerations have never been at the core of our national copyright legislation, they have undeniably played a role in the development of these laws. Such concerns have been reflected in the decision-making of both the legislature and judiciary.

Since the construction of the first colonial copyright legislation, in Victoria in 1869[64], the public domain has been recognised as an issue. It is clear, from this earliest statute, that governments recognised copyright was a limited right that would expire, and that once copyright had expired, these previously-proprietary materials would be free for any member of the Australian public to use (Bond, 2008). This has not changed with the extension of the term of copyright in Australia. Under the original colonial laws, copyright reflected the English duration of life of the author plus seven years, or forty two years, for books; this period was repeated in the first national law, the *Copyright Act 1905* (Cth), although members of the Parliament butted heads over the appropriate period of protection (Bond, 2008). The period was extended to the Berne-mandated life plus fifty years when Australia adopted the *Copyright Act 1911*(Imp) as part of the *Copyright Act 1912* (Cth). This period remained in place until the Australia-United States Free Trade Agreement mandated a longer term of protection.

Australia also inherited from the United Kingdom the notion of legal deposit. This was included in the 1842 United Kingdom *Copyright Act* and incorporated into the first colonial copyright statute in Victoria. By this time, registration was not tied to protection in Australia: for example, pursuant to section 14 of the 1869 Victorian statute, copyright subsisted in "every book which shall, before or after the passing of this Act, have been or be first published in the colony of the Victoria in the lifetime of its author". However, a registry of copyright works was kept (including books, paintings, photographs *etc*) and registration was a precondition to a cause of action for infringement. In addition, these early statutes required that a copy of, for example, a book that was first published in Victoria and thus received copyright protection under its individual law, had to be deposited at the Public Library of Melbourne within two months of publication (s16). This continued under the *Copyright Act 1905*, where registration was still required for infringement actions; however, rather than a copy of the book being deposited to a public library, two copies of the book had to be deposited with the Registrar, upon registration (s75). Under the *Copyright Act 1912*, registration was optional (s26), although needed for an owner to avail themselves to certain remedies provided in that Act. Today, as discussed in greater detail below, we have no registration system, but legal deposit is still a requirement under our national law.

Thus the Australian public domain, as with many other national public domains, has been subject to international influences. This is not surprising given the position of Australia in the global landscape, particularly in light of our membership of the Commonwealth. This influence has been stronger at some points and weaker at others over the last one hundred and fifty years. Similarly, while there have been many instances of judicial recognition that databases and compilations of information and facts are capable of attracting copyright protection, this has been matched by a consistent recognition of facts and information being part of the public domain. While the rhetoric and meaning of the Australian public domain may not be as strong as in other jurisdictions, for example, as in the United States, once you start looking it is difficult to ignore its presence.

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[64] 33 Vic. no. 350.

In light of this brief historical analysis, we can turn to the elements of what now constitutes our national public domain.

2.3. Components and characteristics of our national public domain

What developments particular to Australia have influenced the shape of our public domain and the existence, scope and effectiveness of public rights under Australian copyright law? The elements of law, policy[65] and practice that are significant in determining the nature and scope of public rights to works in Australia can be divided into six categories:

- Limits to copyright subsistence
- Exceptions to copyright
- Extinguishment of rights
- Voluntary public licences (take-up and limits)
- *De facto* public rights
- Effectiveness supports and constraints

The first three categories are mainly to do with formal copyright law, whereas the last three have more to do with practice and institutions. The elements and categories identified have similarities to those found in other countries' public domains, but are not identical to those found in any other country. They are a unique combination that makes up Australia's public domain. Similarly, the measures needed to maximise the benefit of this public domain to Australia – law reform, and changes to policy and practices – will be unique.

The main characteristics of each of these six categories is reviewed briefly below, emphasising to what extent the elements in that category may be distinctive of Australia's public domain (though rarely unique). Statutory references are to the Australian *Copyright Act 1968* unless stated.

Limits on copyright subsistence

Australia's public domain gets off to a very unpromising start, if we first consider its constitutional position. Court interpretations of the federal Constitution's intellectual property clause (s51(xviii))[66] have not yet placed many or clearly significant limitations on what is capable of being protected by copyright law[67].It is unlikely that section 51(xviii) could be invoked in a defensive sense, to limit extensions to the term of copyright, and it is equally unlikely to place any limitations on copyright in the name of freedom of speech. However, none of these matters are beyond dispute (Bond, 2007).

No registration of works is necessary for protection: for example, pursuant to section 32 of the Act, copyright subsists in any unpublished literary, dramatic, musical or artistic work where the author is

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[65] Practices are sometimes accidental and readily reversible with a change of administration; policies require more effort to reverse, and their reversal is more visible. For example, in NSW and the Northern Territory, the non-enforcement of Crown copyright in legislative materials is a matter of policy (embodied in a public declaration), not merely a practice.

[66] Section 51(xviii) of the Australian Constitution reads:

> (51) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to…
>
> (xviii) Copyrights, patents of inventions and designs, and trade marks.

[67] Under some circumstances the intellectual property power may have significant limitations because it cannot 'monopolize words in the English language' (*Davis v Commonwealth* [1988] HCA 63), or constrain the implied freedom of political communication (discussed by Kirby J in *Stevens v Sony* [2005] HCA 58). A levy on blank tapes was held to be outside the constitutional power: *Australian Tape Manufacturers Association Ltd v Commonwealth of Australi*a [1993] HCA 10. (see also *Nintendo Co. Ltd. v Centronics Systems Pty Ltd* [1994] HCA 27).

a qualified person, or in published works that are first published in Australia. Therefore the default position is that any works created are primarily subject to private rights, with public rights playing only a minor role. As Berne allows, Australia does have material form requirements;[68] however, broad definitions of what constitutes such form means these are not significant barriers against copyright protection.

There are no significant legislative restrictions on what types of works can obtain copyright protection. Works of a 'legislative, administrative and legal nature' have both Crown copyright and prerogative rights.[69] Australia has implemented rental rights of various types, and moral rights. There are, of course, some limitations on those works in which copyright will be refused because they lack the minimal requirements of originality, or on public policy grounds, but they are rarely of significance. The *prima facie* scope of copyright's private rights in Australia is very broad: works starting life with no copyright protection are almost non-existent.

Other factors are also relevant to the public domain's scope. Australia's copyright law protects compilations[70] to an extent that is in many respects at least equivalent to the protections provided by the EU's database Directive[71], and possibly stronger in light of recent EU case law (Waelde, 2007). Both Australian and EU protections are in contrast to the much more narrow approach taken by the *Feist case* in the USA[72]. The breadth or restrictive nature of the principles determining the scope of implied licences to use works is another factor. It is uncertain in Australian law at present and before the High Court[73].

Exceptions to rights

Assuming copyright does subsist in a work, what uses may the public (or specified sections of the public) make of that work without infringing?

Little can be copied without infringement: 'substantial part' can mean something close to 'insubstantial'[74], and this provides little scope for public rights. Similarly, Australia does not have any broad 'fair use' defence,[75] but only a narrow range of 'fair dealing' defences of relatively fixed scope: (i) reporting news[76]; (ii) criticism and review;[77] (iii) research or study;[78] (iv) and legal advice.[79] These have been augmented recently by a further defence of uses 'for the purpose of parody or satire'[80]. Limited though these exceptions may be, they do provide public rights of value. The *Copyright Act* also contains a number of additional sections that provide exceptions to infringement of owner rights: for example, the format-shifting and time-shifting provisions that will

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[68] 'Material form' is defined in section 10 of the *Copyright Act 1968* as "in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)."

[69] See Part VII, Division 1, *Copyright Act 1968*; section 35(6), *Copyright Act 1968*; section 8A, *Copyright Act 1968* and *Attorney-General for New South Wales v Butterworth & Co.* (1938) 38 NSWSR 195.

[70] *Desktop Marketing System Pty Ltd s v Telstra Corporation Ltd* [2002] FCAFC 112

[71] *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.*

[72] *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991)

[73] *Copyright Agency Limited v State of New South Wales* [2008] HCATrans 174 (22 April 2008) at <http://www.austlii.edu.au/au/other/HCATrans/2008/174.html>

[74] See *Network Ten v TCN Channel Nine* (2004) 218 CLR 273.

[75] In this sense I refer to 'fair use' as codified in United States law: see 17 U.S.C. § 107.

[76] Section 42 (for literary, dramatic, musical or artistic works); section 103B (for audio-visual items).

[77] Section 41 (for literary, dramatic, musical or artistic works); section 103A (for audio-visual items).

[78] Section 40 (for literary, dramatic, musical or artistic works); section 103C (for audio-visual items).

[79] Section 43 (for literary, dramatic, musical or artistic works); section 104 (for audio-visual items).

[80] Section 41A (for literary, dramatic, musical or artistic works); section 103AA (for audio-visual items).

be discussed in greater detail below. Though these provisions add to 'public rights', their limited application to private purposes means that they do not add to the public domain in any significant sense.

In contrast to these narrowly-drafted 'fair dealing' provisions, Australia's public rights created by compulsory licences are more extensive than those in many jurisdictions. Australia has compulsory licences for the benefit of entertainment industries similar to many other countries. It has been argued that these compulsory licences are the principal reason for the financial success of the recorded music, radio and cable TV industries of the USA (Lessig, 2004: Ch 4). Australia also has compulsory licences for educational purposes, both for reproductions of print works, and for reproductions and in-class uses of audio-visual works, which are much more extensive than are found in some other countries. These compulsory licences, particularly those in the education sector, are a distinctive part of Australian public rights, creating a closed commons (Drahos, 2006) for benefit of certain classes of users.

Lessig (2006) notes that the 'permission free' resources he discusses could cost something, so long as the user had the right to buy access. In my view this is essential for a full understanding of public rights. On that basis, compulsory licences may be the largest and most important limitation on the right of copyright owners to unilaterally determine the conditions of use of works. If so, then it is of particular importance that these licences are administered in a manner which maximises their benefit to the Australian public

Extinguishment of rights

Due to the *Australia-US Free Trade Agreement* [2005] ATS 1 (Part 17 Intellectual Property Rights) and implementing legislation[81], Australia has extended the copyright term in much the same way as the USA[82] to the life of the author plus seventy years. This is also in line with the position in the European Union.[83] Had an extended term for protection not been included in the 2004 Free Trade Agreement, the period of copyright would have remained at life of the author plus fifty years, given the Howard- Government's earlier pledge in light of the findings of the Intellectual Property and Competition Review Committee[84]. Works will therefore now enter the Australian public domain (in the narrow sense) at a slower rate than was previously the case, though no study has yet attempted to quantify this or estimate its likely effect on Australian cultural development.

It is important to note that the extension of the term of copyright applied prospectively rather than retrospectively; therefore, where a work had already entered the public domain, copyright in that work was not 'revived' pursuant to the AUSFTA. Rimmer notes that 'As part of the free trade agreement with the United States, the Australian Federal Government has agreed to a prospective extension of the copyright term from life of the author plus fifty years to life of the author plus seventy years. Understandably, the Government was nervous about implementing a retrospective extension of the copyright term. Therefore, there was no restoration of copyright, for material which had already fallen into the public domain'(Rimmer, 2004). This position is in contrast to the United States and the European Union, where the term was extended *retrospectively*.[85] Thus, under

81 Copyright Legislation Amendment Act 2004 (Cth); US Free Trade Implementation Act 2004 (Cth); Copyright Amendment Act 2006 (Cth)

82 Due to the *Copyright Term Extension Act of 1998*; see also *Eldred v Ashcroft* 537 U.S. 186 (2003)

83 *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.*

84 See 'Government Response to Intellectual Property and Competition Review Recommendations'.

85 Joint Standing Committee on Treaties, *Report 61:Australia-United States Free Trade Agreement,* Chapter 16: Intellectual Property Rights and Electronic Commerce, p. 231, footnote 28.

Australian law, an additional period of protection was added to existing works protected under copyright: those works where the copyright had expired did not gain protection again.

A feature of the Australian situation that contributes positively to its public rights is that, although Australia has introduced moral rights, their duration is co-extensive with the economic rights of copyright.[86] This is particularly important with the right of integrity, given that if this right was of longer duration than the term of the economic rights. Anyone modifying a work after it had entered the public domain (narrow sense) would still have to consider whether they might infringe the right of integrity.

The other way to 'extinguish' copyright in a work is to somehow put that work into the public domain (in the narrow sense) before the copyright term has expired. As discussed later (in Part 3.5), it is questionable how this may be done under Australian law. Whether moral rights can be so extinguished is also questionable.

Voluntary public licences (take-up and limits)

The existence of various licences creating public rights, for voluntary use by authors within a jurisdiction, has no effect on the public domain until those licences are used, and is proportional to the extent of their uptake and the significance of the works in relation to which they are used.

Estimating the extent of use made by Australian authors, or in relation to content related to Australia, is complex (Bildstein, 2007). By mid-2006 Bildstein identified over 100,000 web pages linked to particular Creative Commons licences (Bildstein, 2007: 4.2.3). However, he concluded that "even though Australian versions of the licences are available, the tendency for people to use the American licences is still significant." At the least we can conclude that works under public rights licences do now constitute a significant, if modest, part of Australia's public domain.

De facto *public rights*

These have been mentioned above in relation to the global dimension of commons. The Australian position has its own special factors in both cases, while remaining consistent with the overall global developments. There is more likelihood of search engine caching practices being held to be in breach of copyright law in Australia[87] than in the USA with its broader fair use provisions, but there have been no actions in Australia to disturb the *de facto* searchable commons. Despite Crown Copyright applying to most primary legal materials, this has had little impact on their availability

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[86] See section 195AM, *Copyright Act*.

[87] "For example, there is as yet little judicial interpretation of the Australian exception for a 'a temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication' (s43A *Copyright Act 1968*), and it is unlikely or at least uncertain that this would provide any protection for the caching practices of search engines, though it may well be sufficient to protect the creation of the concordance necessary for a search engine to operate. The current 'fair dealing' provisions in the Australian legislation would seem unlikely to provide any assistance to search engines. There is also little prospect that the concept of implied licences will be interpreted broadly enough, at least in jurisdictions like Australia (*Trumpet Software v Ozemail* (1996)), to give the operators of search engines the breadth of licence they would need. Nor would the mere fact that these practices have persisted for the best part of a decade, in itself, do so.": Greenleaf, 2007**.** However, it could be argued that a court may find that a search engine has an implied licence to search and cache the Internet, comparable to a licence implied to a user to download a website onto the computer in order to view that website's content. Given that, today, a significant amount of content on the Internet is found through a search engine mechanism, such an argument may succeed. In recent times both the High Court and Federal Court have been more permissive with implied licences, lending credence to such an example: see *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80. The latter decision has been granted special leave to the High Court on the issue of the implied licence: see *Copyright Agency Limited v State of New South Wales* [2007] HCATrans 700.

for free access[88]. On the negative side, some de facto protections of privacy in the 'private use' of copyright works are being eroded by the surveillance capacities of some categories of digital works[89].

Effectiveness supports and constraints

Lessig (2006) has said that his aim was to 'map a strategy for [the public domain's] defense'. He talks about 'crafting an "effective" public domain – meaning a free space that functions as a public domain, even though the resources that constitute it are not properly within the public domain'. He could have been talking about this sixth category of elements that I have listed as contributing to Australia's public rights in copyright. I use the same term: 'effective'.

The elements in this category are related laws, or policies or practices that help or hinder the operation of elements in the first three categories (formal legal rules operating to the advantage of the public domain), or are impediments to the operation of voluntary licences of public rights. They are vital to the effective operation of public rights.

Examples of such supporting or constraining factors are that although Australia has 'legal deposit' requirement for print works published in Australia, we have as yet no equivalent for digital or audio-visual works; and we have no effective registers to locate authors, or to determine whether authors have died. Another is the increasing practice of Australian academic funding bodies to require that the outputs of publicly-funded research are made available through free-access repositories. These 'effectiveness' elements are discussed at many points throughout the rest of this submission.

2.4. A decade of net gains for proprietary rights

For over a decade, reforms to Australian copyright law have repeatedly strengthened the rights of authors and other proprietary rights-holders.[90] These reforms have included the introduction of rental rights and performers' rights (1994)[91], a new right of communication to the public and new anti-circumvention (TPM) provisions (2000)[92], the introduction of moral rights (2000)[93], the USFTA parcel of protections including strengthening of the reproduction right, new performers' rights in sound recordings, more protection for encoded broadcasts and electronic rights management information (2004)[94], major extension of copyright terms and introduction of

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[88] Australia's Crown copyright applies to legislation and case law, and this has been used in the past to enforce monopoly provision of electronic publication of both (the CLIRS system in the 1980s). However, Australia also became the first country to have free Internet access to all of its legislation and case law, nationally from 1996, and from all nine jurisdictions by 1999. Bond has argued against the recommendation of the Copyright Law Review Committee, in its 2005 *Crown Copyright* report, that copyright in legislation and case law be abolished on the basis that these materials are already widely available and removing copyright would not enhance delivery of these services: see Bond, 2007. The contrary view is that access is only one aspect of open content, and does not deal with reproduction.

[89] The limits of surveillance capacity that copyright owners could exercise over the uses made of works, particularly where those uses took place in private premises, created something like a 'private use commons' (Greenleaf 2003). This is being eroded by the surveillance capacities of some categories of digital works. The interaction between privacy laws and copyright law then becomes important in determining how much the 'private use commons' is diminished.

[90] The expansion of owner rights under copyright law has not been limited to Australia, but occurred globally, particularly since the advent of the Internet and other digital technologies.

[91] Copyright (World Trade Organization Amendments) Act 1994 (Cth) giving effect to TRIPS obligations.

[92] Copyright Amendment (Digital Agenda) Act 2000 (Cth) giving effect to 1996 WIPO Copyright Treaty.

[93] Copyright Amendment (Moral Rights) Act 2000 (Cth).

[94] US Free Trade Agreement Implementation Act 2004 (Cth) giving effect to Article 17.7 of AUSFTA.

performers' rights in sound recordings (2004)[95], and further strengthening of TPM provisions (2006)[96]. Throughout these reforms, new enforcement measures have regularly been introduced,[97] and penalties steadily increased.[98]

During this period there have also been reforms which have strengthened some aspects of non-proprietary rights to access and use some works. These have included liberalization of parallel import restrictions, copying for people with disabilities, and compulsory licences for educational institutions (1998)[99], exceptions to infringement of copyright in computer programs (1999)[100], updating and extending fair dealing, computer software and other exceptions, and introducing statutory license scheme for retransmission of free to air broadcasts (2000)[101], and most recently new fair dealing and other private use rights (covering parody and satire, format time and space shifting and a new 'flexible dealing' exception for libraries, archives, collecting institutions, and educational institutions)[102].

The general trend over the previous decade has been the creation of whole new areas of proprietary rights and the carving out of parts of what had previously been in the public domain, coupled with either concurrent or subsequent 'handing back' of some parts of the public domain by way of very limited and technically defined exceptions. Public rights have certainly been on the losing side in the last decade, despite the attempts made to mitigate some of the most unfair aspects of these losses.

It is not my purpose here to criticise any of these reforms, but only to point out that there has been a steady expansion of proprietary rights, often in order to comply with multilateral or bilateral obligations. If broader and stronger proprietary rights strengthens innovation, then Australia has given this impetus to innovation plenty of opportunity for over a decade. In my view it is time to give more concentrated attention to the impetus for innovation that public rights can provide.

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95 Copyright Legislation Amendment Act 2004 (Cth) giving further effect to USFTA obligations.

96 Copyright Amendment Act 2006 (Cth) again reflecting some AUSFTA obligations.

97 Copyright Amendment Act 2006 (Cth), Schedule 1, 'Criminal laws; see also Attorney-General's Department (2007); Paramaguru, Vaile, Bond, and Maurushat (2007).

98 Copyright Amendment Act 2006 (Cth), Schedule 1, 'Criminal laws'; see also Bond (2006); Moses (2006a); Moses (2006b).

99 Copyright Amendment Act (No. 1) 1998 (Cth)

100 Copyright Amendment (Computer Programs) Act 1999 (Cth)

101 Copyright Amendment (Digital Agenda) Act 2000 (Cth)

102 Copyright Amendment Act 2006 (Cth)

3. Scope for more balance by exceptions to copyright

As we have seen, the Copyright Law Review Committee recognised 'that the exclusive rights of copyright are partly defined by the exceptions, in that the rights only exist to the extent that they are not qualified by the exceptions' and considers that 'the principal exceptions, such as those for fair dealing, are fundamental to defining the copyright interest' (CLRC, 2002: 201). The potential scope of this fundamental aspect of the public domain depends on the '3 step test' for exceptions initially established by the Berne Convention. This is a very formal 'black letter' place to start a consideration of the public domain, but so many aspects of expanding the public domain hinge on whether they are achievable in light of the (immovable) 3-step test established by the Berne Convention and TRIPS agreement, that it seems better to deal with it at the outset, and then to consider what scope there is for expanding the current exceptions and thus the public domain.

3.1. The 3-step test Down Under – restricting or not?

Article 9(2) of the Berne Convention states:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

This Article was included as part of the Berne Convention following the 1967 Stockholm Conference and, in the words of Ricketson and Ginsburg, "it has become the centerpiece of the exceptions regimes that have been incorporated into the TRIPs Agreement and the WCT." (Ricketson and Ginsburg, 2006, [13.03]) Despite this significance, confusion still surrounds the interpretation of this Article (Ricketson and Ginsburg, 2006).

In addition to the appearance of this test in the Berne Convention and TRIPs, it was also included as part of Article 17.10 of the *Australia-US Free Trade Agreement*:

> (a) each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder[.]

Any exception to the rights of the copyright owner introduced into Australian copyright law must therefore be in accordance with this provision, or Australia may be in breach of its obligations under Berne, TRIPS and the *Australia-US Free Trade Agreement*. But whether this is any significant limitation is highly contested.

The new s200AB[103] sets parameters within which the 3-step test is being interpreted and applied in Australia. When it was first included in the Copyright Amendment Bill 2006, section 200AB

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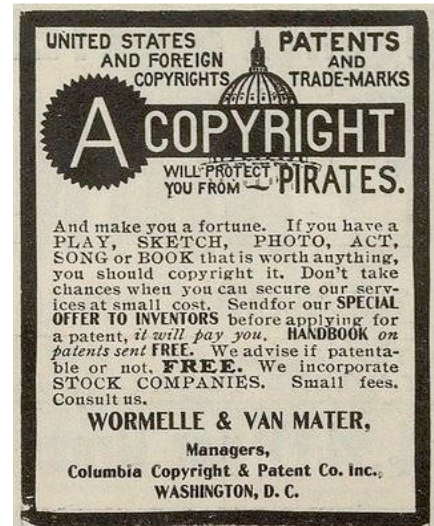
[103] '(1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist: (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case; (b) the use is covered by subsection (2), (3) or (4); (c) the use does not conflict with a normal exploitation of the work or other subject-matter; (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.' Subscction (2 deals with 'Use by body administering library or archives'; Subsection (3) with 'Use by body administering educational institution'; and Subsection (4) with 'Use by or for person with a disability'. Subsection (6) provides that 'Subsection (1) does not apply if, because of another provision of this Act: (a) the use is not an infringement of copyright; or (b) the use

included an exception for parody or satire. Rimmer (2006), in the lead-up to the *Copyright Amendment Act 2006*, described section 200AB as “a strange, catch-all provision” that was fundamentally “unworkable”. He concluded that section 200AB, and the additional exceptions, as “a poor substitute to the open-ended, flexible defence of fair use” (Rimmer, 2006).

[104]Kenyon[105] argues that s200AB has a limited role. He notes that s200AB merely relates to particular areas that could be subject to exceptions consistently with the 3-step test. While other exceptions should meet the 3-step test, there is no reason that the uses must fall within s 200AB, nor that the exceptions should take a legislative form similar to s200AB (involving transposing wording from an international agreement into domestic legislation). Section 200AB will be important in Australia because it is likely to shape (and might misshape) perceptions about the options, and it may be subject to judicial interpretation which could have important implications for the statutory approach to other possible exceptions.



In relation to whether exceptions comply with the 3-step test, there are major areas that require exploration about the scope of ‘public interest’, and room for public policy choices within the 3-step test. A crucial point to appreciate is that existing decisions of relevant World Trade Organization Panels which have considered the 3-step test do *not* set definitive limits to the scope and role of public interest within the 3-step test (Wright, Christie and Kenyon, 2008). The WTO Panel decisions are often mis-characterised as preventing recourse to public interest arguments and as setting out an interpretive approach that will simply be followed by Australian courts.

It is probably more accurate to state that WTO Panels have noted ways in which ‘public interest’ could be relevant under the 3-step test, while saying that the particular arguments did not arise on the facts in question in those disputes. This means that analyses of s200AB that attempt to formulate a set of rules (drawn, for example, from WTO Panel decisions) to apply in deciding whether a particular use falls within the section are often misleading and may well be counter-productive to the development of cultural sector practices that support Australia's interests in innovation while also respecting the 3-step test. Thus, the issue of exceptions and the 3-step test has not in any manner been ‘exhausted’ by the introduction of s200AB. However, whether Courts interpreting the section will take this approach is uncertain, and the issue deserves further consideration, ideally within a broad law reform setting.

Considerable recent scholarship, including Seftleben (2004), Tawfik (2005), Hugenholtz and Okedeji (2008) questions whether the three step test should be seen as a significant limitation on the capacity of countries to created exceptions, and instead interprets it as (in Setfleben’s words) a ‘high level abstraction’ intended to reconcile the many different types of exceptions that already

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would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.’

[104] Attribution: Advertisement for Columbia Copyright & Patent Company*, The New York Clipper*, November 3, 1906; held in Library of Congress General Collections; <http://www.loc.gov/exhibits/bobhope/images/vc36.jpg>

[105] The following discussion of s200AB draws largely on argument suggested by Andrew Kenyon (personal communication, 2008) , on Wright, Christie and Kenyon (2008), and on references suggested by Matthew Rimmer (personal communications, 2008)

existed when it was introduced. Patry's interpretation is that 'National governments are free to craft laws that serve their own needs and policies, including liberal limitations and exceptions'[106].

The questions that a Public Domain Review needs to consider therefore include:

1. *Do the 3-step test and s200AB of the Copyright Act limit the extent to which Australia can create further exceptions/defences to copyright, or compulsory licences?*
2. *Which feasible legislative expansions, within the requirements of our international obligations, are most needed to support Australian innovation?*

Some of these are discussed in later parts of this submission, re compulsory licences for orphan works, or for government works, and limits on the operation of collecting societies. All of these would need to satisfy the 3-step test. The most likely other exceptions requiring discussion here are further exceptions needed for cultural institutions (eg archiving) or end-users.

3.2. Fair's fair – Would 'fair use' give more balance?

A common objection to the *Australia-US Free Trade Agreement* was that it was unbalanced: it imported the restrictive elements of US copyright law without any of its countervailing features which give some protection to public interests and public rights in copyright. As Cutler (2007) says

> One of the things we often neglect with the direct importing of legal regimes and trade agreements and international treaties, is that we do not look at what we are not importing in terms of the offsetting regimes that accompany some of these legal frameworks.
>
> If we look at intellectual property law and copyright, while we have holus bolus with a stroke of the pen adopted the US regime under the Free Trade Agreement, what we have not imported are some of the offsetting protections.

During the passage of the Free Trade Agreement and the subsequent implementing legislation, numerous calls were made for Australia to implement a fair-use provision. Australian Democrats Senator Ridgeway unsuccessfully proposed a 'fair-use-style' section as part of the US Free Trade Implementation Bill 2004[107]. Although the proposed section listed many of the existing exceptions

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[106] William Patry, 'Fair Use, the Three-Step Test, and the Counter-Reformation' in *The Patry Copyright Blog,* 2 April 2008 at <http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html>

[107] Commonwealth of Australia, *Senate Official Hansard*, No. 10 2004, Thursday 12 August 2004, at p. 26411; the proposed section was:

42A Defence of fair use

(1) A fair use of a copyrighted work or other subject matter does not constitute an infringement of copyright.

(2) A fair use includes purposes such as:

(a) research or study;
(b) criticism or review;
(c) reporting the news;
(d) judicial proceedings or professional advice;
(e) parody or transformative use;
(f) time-shifting, space-shifting, or device shifting; (g) reverse engineering or making interoperable products.

(3) In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(a) the purpose and character of the use;
(b) the nature of the copyrighted work or other subject matter;
(c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
(d) the effect of the use upon the potential market for or value of the copyrighted work.

(4) The defence of fair use cannot be excluded or modified by agreement or contract law.

of the *Copyright Act* – for example, the use of copyright works for the purpose of research or study – and it included newer exceptions (parody or transformative use) the use of the non-exhaustive term ‘such as’ makes it much broader than the specific examples given, and there would have been considerable scope for its interpretation.

Following the introduction of the *Australia-US Free Trade Agreement*, the Federal Government, in mid-2005, undertook a review into whether Australia should scrap its individual fair dealing provisions and introduce a broad US-style ‘fair use’ provision. An Issues Paper was released in May 2005. This review was in part based upon a recommendation of the Copyright Law Review Committee, in its report into *Simplification of the Copyright Act 1968* (CLRC*,* 1998)[108]:

> 6.10 The Committee’s recommendations in this chapter provide a means for the current fair dealing provisions to be simplified and extended into the digital environment. The Committee proposes the following changes:
>
> - consolidation of the current fair dealing provisions—ss. 40, 103C, 41, 103A, 42, 103B and 43(2)—in a single provision;
> - expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes— research or study (ss. 40 and 103C), criticism or review (ss. 41 and 103A), reporting news (ss. 42 and 103B) and professional advice (s. 43(2))—but is not confined to those purposes;
> - general application of the non-exclusive set of factors provided for in s. 40(2) to all fair dealings.
>
> The result of these three changes is to introduce a provision akin to but more precise than the open-ended US ‘fair use’ provision (s. 107 of the US Copyright Act).[109]

It is important to note that this was in light of considerations such as international treaty obligations, with the three-step test, as contained in the Berne Convention, referenced early on in the report. Indeed, in justifying its reasons for this proposal, the CLRC noted that it was “consistent with Australia’s current international obligations”.[110] This provision would not have been as broad as a ‘fair use’ equivalent, but it would have been a step in this direction. This discussion was revived again in 2005. In May 2005 the Attorney-General’s Department released an Issues Paper outlining possible changes to our national copyright legislation that would bring our law into line with the ongoing digital revolution (Attorney-General’s Department, 2005). One of the main aims of the review was to construct a way for legalising time-shifting and format-shifting, both of which were not permitted under Australian law, despite technologies openly available for undertaking such practices in relation to copyrighted content. Australia’s international obligations were noted in the course of the Issues Paper, including issues with the three-step test. The position in the United States was also the subject of significant attention, with the Attorney-General’s Department raising this question for consideration: ‘Should the Copyright Act 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? (Attorney-General’s Department, 2005: 21). The Issues Paper further outlined the options for reform, listing four possibilities:

> 'Option 1 – consolidate the fair dealing exceptions in a single open-ended provision;[111]

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(5) The defence of fair use cannot be excluded or modified by technological protection measures, and electronic rights management information

108 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968 – Part One: Exceptions of Exclusive Rights of Copyright Owners* (September 1998) at<http://www.clrc.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightLawReviewCommittee_CLRCReports_SimplificationoftheCopyrightAct1968>

109 Ibid, at [6.10].

110 Ibid, at [6.12].

111 Attorney-General’s Department, 2005: 33

> Option 2 – retain the current fair dealing provisions and add an open-ended fair use exception;[112]
> Option 3 – retain current fair dealing exceptions and add further specific exceptions;[113]
> Option 4 – retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material.[114]'

From a public domain perspective, the adoption of Options 1 or 2 would have been preferable. However, it was Option 3 that the Howard Government ultimately adopted, enacting a range of specific exceptions as part of the *Copyright Amendment Act 2006*. These included the numerous time-shifting and format-shifting provisions enumerated above, in addition to the inclusion of section 200AB. Although these specific exceptions created some additional public rights, it seems that the Howard Government could have gone further in protecting the interests of the public.

Weatherall (2007:34) points out that, contrary to the views of Australia's Copyright Law Review Committee and the assumptions of the authors of the Issues Paper, some academic opinion cautions other countries against following the example of the USA:

> There is a respectable, although by no means universally held, opinion that the open-ended fair use exception contravenes the three-step test even in the US: Ruth Okediji, 'Toward an International Fair Use Doctrine' (2000) 39 *Columbia Journal of Transnational Law* 75. There is an equally respectable view that the fair use exception in the US may not contravene the three-step test, because the case law provides sufficient _certainty' and specificity, but that the attempt to introduce a similar exception now in another country, without its elaboration in case law, would contravene the three-step test: see Burrell and Coleman, above n 131, 249–74. [Robert Burrell and Alison Coleman, Copyright Exceptions: The Digital Impact (2005]

However, there is a strong contrary stream of academic option mentioned above. Patry refers to

> U.S. adherence to the Berne Convention, adherence where fair use was so obviously compatible with the letter, spirit, and history of the three-test step that not a single WIPO official or foreign copyright expert ever mentioned it in the four years U.S. adherence was being debated and eagerly sought.

Given that the United States, as a member of the Berne Convention, has a more flexible way of providing exceptions to copyright through its 'fair use' exception, it is still worth re-considering Options 1 or 2, the 'fair dealing options' to expand Australia's more specific and inflexible exceptions, despite the academic cautions noted by Weatherall. The United States has never been held in breach of its obligations under Berne on the basis of its fair use exception, and it seems unlikely that it would be in future. If the wording of an Australian provision was the same in essential respects as is used by the USA[115] then perhaps it would be more difficult to argue that this was not in compliance with the three step test. This is perhaps the most far-reaching question

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112 Ibid, at p. 34

113 Ibid, at p. 34

114 Ibid, at p. 34.

115 '§ 107. Limitations on exclusive rights: Fair use 'Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'

suggested in this submission, so it is best to pose it at the outset. Any Public Domain Review should consider this option again.

3. *Would it be beneficial for Australia to adopt a flexible 'fair use' exception to copyright, based closely on that in force in the USA?*
4. *Is there any practical likelihood of Australia being found to be in breach of its international obligations if it took this approach?*

3.3. Cultural institutions and the public domain

According to a major study of the impact of copyright on the digital collections of Australian cultural institutions prior to the new s200AB, inadequate public rights were impeding innovation in Australian culture: 'Copyright has had a significant impact on digitisation practices to date, including in the selection of material to digitise and the circumstances in which it is made publicly available. This has resulted in notable differences between analogue and digital collections – what could be called a "digital skew" – and has driven the content of online exhibitions, galleries and databases.' (Hudson and Kenyon, 2007:199-200).

Among the problems they identified were the following (Hudson and Kenyon, 2007):

> 'Institutions commonly report focusing digitisation efforts on works for which copyright is easy to deal with, such as items in the public domain and those for which licensing is straightforward' (2007: 203).
>
> 'Copyright has great relevance to cultural institutions because they generally do not own copyright in collection items, but routinely perform acts within the exclusive rights of the copyright owner, placing them at risk of infringing copyright.' (2007:203).
>
> 'The research with cultural institutions revealed four main approaches to dealing with the risks of digitising collection materials. First, institutions often rely on statutory exceptions. However, the devil is in the detail; many exceptions only permit activity in limited circumstances, and typically not where digitised material is to be made available to the public. Second, institutions report dealing with copyright through negotiating for licences and assignments. Two main difficulties arise, related to the costs of individual negotiation and the impact of orphan works. Where exception and negotiation-based approaches fail, two main options remain: avoid copyright issues through the selection of works, such as materials in the public domain; or proceed with infringing conduct under a risk management strategy' (2007:204).
>
> 'Our research shows that the lack of relevant copyright exceptions, difficulties in the licensing process to date, and institutions' generally conservative and underdeveloped risk management have resulted in copyright significantly influencing the selection of materials to digitise and their availability to the public.' (2007:204).
>
> 'Fieldwork suggested that while the libraries and archives provisions accommodate some internal uses well (as exemplified by the administrative purposes provision), they contain anomalies and restrictions that do not seem justified by any compelling policy reasons.' (206)
>
> 'Importantly for this research, the libraries and archives provisions are generally not applicable for public activities, such as reproducing material for exhibitions, allowing patrons to browse collection items onsite on copydisabled terminals, or the creation of online databases.' (2007: 206) .
>
> 'Interviewees from across the sector discussed this, noting the resources that can be spent identifying and locating copyright owners, negotiating and recording licence information, renegotiating licences, and so forth. These costs can be prohibitive on large projects, where hundreds of individual licences may be required.' (2007: 207)

Hudson and Kenyon (2007) conclude that the result is a stultification of Australian cultural practices. 'Many cultural institutions appear resigned to withholding digital content from public access when managing copyright becomes too difficult' (208). 'Limited exceptions, challenges to licensing in terms of costs and orphan works, and a cautious approach to copyright infringement,

mean the selection of works for public digitisation is often driven, in whole or in part, by the ease of copyright compliance.' (208) 'It has an indirect effect through the increasing resources being dedicated to copyright compliance: time and money spent on administrative tasks in identifying, locating and contacting copyright owners, rather than acquiring new copyright works, digitising works, paying licence fees to copyright owners, or other activities to develop online collections. Importantly, these restrictions on the digital availability of cultural collections do not necessarily advance the economic and non-economic interests of copyright owners.' (209) 'The challenge is to develop copyright law, policy and management practices that reflect variations in the interests of copyright owners, creators and users.' (210)

Will the new flexible exception for cultural institutions and other specified users in s200AB, and s51B provision allowing preservation copying of significant collections by key cultural institutions[116], significantly reduce these problems? Hudson and Kenyon (2007) consider it is too early to tell. 'The reception of s 200AB by Australian cultural institutions and copyright owners will be important for broader debates about statutory drafting and the desirability of flexible, fair use-style exceptions in copyright law. On its face, s 200AB appears to have the potential to allow greater preservation activities by institutions, and permit some public activities for which licensing is not possible. However, it is an exception for which users' level of knowledge is likely to be a major influence on its practical application (as appears to be the case for fair use).' (212) 'But the Australian reforms' broader exception should benefit preservation and may also facilitate some types of digital access, particularly to orphaned material. Under the new provision, institutions need not report to their public funders, for example, that they decided to ignore the requirements of Australia's copyright legislation in pursuing a particular digital collection strategy; instead, institutions could develop policies that clarify which material and which uses they believe are covered by the new flexible exception.' (213) Section 51B will allow cultural institutions to make preservation copies of orphan works, but will do little more than that.

A review of public rights in Australian copyright will need to review whether s200AB is working well enough to resolve the problems identified by Hudson and Kenyon, or whether it needs to be strengthened.

5. *Are the new s200AB and s51B working well enough to resolve the problems identified in relation to cultural institutions, or do they need to be strengthened?*

Hudson and Kenyon also identify orphan works as a major problem for cultural institution (2007: 207-08), and problems faced by cultural institutions in relation to indigenous collections (2007: 202-03). These issues are discussed in following sections.

3.4. Contracts over-riding exceptions

In 2002 the Copyright Law Review Committee in its *Copyright and Contracts* Report (CLRC, 2002) found from its own investigations and academic commentary that agreements were being used to exclude or modify the copyright exceptions and that existing remedies are not adequate, the Committee has concluded that there is a displacement of the copyright balance. Even if the enforceability of some of these agreements was questionable under Australian law (or other laws), they found there was a strong incentive for copyright owners to seek to enforce them, and disincentives to users to defend their rights.

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[116] Where a copy of a work is already held by certain libraries or archives, and is a work is of historical or cultural significance to Australia, they will be able to make up to three copies for preservationpurposes if a copy cannot be obtained within a reasonable time at an ordinary commercial price.

> … that the Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A of the Act, has no effect.
>
> … that the integrity of the 'permitted purposes' in s. 116A(3) (4) and (7) of the Copyright Act be retained by preventing a copyright owner from making it a condition of access to his or her work or other subject matter that users will not avail themselves of a circumvention device or service for the 'permitted purpose' of doing an act that is not an infringement of copyright under ss. 47D, 47E, 47F, 48A, 49, 50, 51A, 183 and Part VB.

The Committee's recommendations were not taken up by the government since 2002, so a Public Domain Review should ask:

6. *Should purported contractual exclusions or modifications of exceptions to copyright be made to have no effect, as recommended by the Copyright Law Review Committee in 2002?*
7. *Do the 2002 recommendations need to be supplemented in light of changes to the Copyright Act, or changes to practices, since then?*

3.5. What is the work?

The exceptions to copyright operate with respect to a particular work or subject matter. For example, in determining whether a particular use is in respect of a "substantial part" of a work, or would amount to a "fair dealing" with respect to a work, the first question that needs to be asked is: what is the work? There is no statutory definition of "work". Until fairly recently, this was not a problem. A textbook, for example, was clearly a "work", and an exception which permitted up to 10 per cent of that work to be reproduced for the purpose of research or study was one which delivered certainty to users. But what if the publisher has determined that individual chapters (or even a few pages) of the "book" are to be made available electronically? Is each chapter (or bundle of pages) now a "work"? If so, how do the exceptions to copyright apply to such a "work"?

8. *Is there a need for a statutory definition of 'work', or statutory clarification of the factors to be taken into account when determining what is a work?*

3.6. Other issues concerning limits and exceptions

Implied licences

The breadth or restrictive nature of the principles determining the scope of implied licences to use works is uncertain in Australian law at present and is before the High Court in *CAL v NSW*[117]. Examples can illustrate where implied licences may be important to the public domain. Where a two dimensional artistic work is contained in a standard, and in order to implement the standard it may be necessary to make a three dimensional reproduction of it, the question arises whether the party promulgating the standard (assuming it is the copyright owner of the two dimensional artistic work) impliedly licences those who are following the standard to reproduce the work. It may be significant whether copies of the standard have been purchased from the standards body. Free access, 'open content' standards may present more difficulties in this respect than standards of which copies are sold.

Depending on the outcome of *CAL v NSW*, it may be essential that any public domain review should consider whether the Copyright Act requires amendment to ensure that the law concerning implied licences does not unnecessarily impede innovation and other public interests.

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[117] *Copyright Agency Limited v State of New South Wales* [2008] HCATrans 174 (22 April 2008) at <http://www.austlii.edu.au/au/other/HCATrans/2008/174.html>

9. *Does the law concerning implied licences unnecessarily impede innovation and other public interests?*

Authorisation

Fitzgerald et al (2007: 213-14) raise the issue of the relationship between authorisation and the public domain:

> Since the question as to whether authorisation has occurred in any given case is one of fact and the statutory criteria in ss36(1A) and 101(1A) are not exhaustive, it seems inevitable that in future cases the assessment of authorisation must take into account the need the need for ubiquity, and value of, user driven distributed information – sharing technologies in social discourse, creative innovation and the knowledge economy. The notion of authorisation is an important regulatory point within any copyright regime. What falls within its boundaries in essence extends the reach of copyright ownership and what falls outside it allows a greater number of that of other copyright fundamentals such as idea, expression, substantial part and fair dealing is critical to the free flow of ideas innovation and democracy and determines what activity falls within or outside the public domain or copyright.

10. *Is there potential for the concept of authorisation to unduly restrict legitimate efforts to provide public greater access to information?*

Technological protection measures

The revision of the Copyright Act's provisions concerning technological protection measures (TPMs) following the Australia-US Free Trade Agreement (AUSFTA) resulted in many submissions advocating various exemptions from, and relaxations of the TPM provisions, which their advocates argued were within what was allowed by the AUSFTA. Only some of these proposed exemptions were enacted.

For example, my colleagues and I made 19 submission (Greenleaf, Maurushat, Vaile, Bond and Paramaguru, 2007), and the substance of few if any are reflected in the legislation. Among the more substantial submissions were:

- **Submission 15:** There should be added an additional exception to s116AK, "Subsection (1) does not apply if the person using the access control technological protection measure uses it in a way which breaches the *Privacy Act 1988*."
- **Submission 16:** Section 116AK should include a clause explicitly stating that a Parliamentary review of the exceptions to circumvention of a technological protection measures must occur at least every four years, as allowed under the terms of the AUSFTA.
- **Submission 17:** There should be added an additional exception to s116AK, "Subsection (1) does not apply if the person using the access control technological protection measure uses it for a purpose which is in breach of Australian law."

A full review of Australia's public domain would reconsider these and other proposals made in 2006, and any issues which have arisen in the operation of those provisions since enactment. The expansion of legal deposit requirement raises further need for exemptions from the TPM requirements.

11. *Is there a need for further exemptions from the Copyright Act provisions concerning technological protection measures (TPMs), taking into account the submissions made in 2006 and subsequent developments?*

4. Expanding legal deposit's role in the public domain

4.1. Importance of legal deposit to the public domain

One requirement for the effective operation of the public domain at the expiry of copyright in a work is that there is at least one copy of the work available to the public for subsequent reproduction by anyone. In Australia this requirement is satisfied for print works by 'legal deposit' requirements in federal law and that of various States[118], but they do not apply to audio-visual works (now very often digital) or texts published in digital form. So there is no guarantee that a copy of a published digital work will be in a publicly accessible repository when its copyright expires. Menell sums up the danger:

> The newly developed ability to preserve knowledge electronically has an important temporal dimension. Like endangered species, many forms of human knowledge are vulnerable to extinction. Therefore, societies run the risk of losing aspects of their cultural heritage by forestalling the process of digital archiving.(Menell, 2007, p. 27)

In addition, if these digital works are increasingly only accessible through access control systems or distributed with technological protection measures, it is also possible that copyright in such works may expire with no copy *which can be accessed technically* being available.

The Australian federal government has published a *Discussion Paper* for an enquiry into the extension of legal deposit to audio visual and digital text works (Legal Deposit DP, 2007). The *Discussion Paper* does not specifically mention the importance of legal deposit schemes to the maintenance of a healthy public domain in Australia, stressing instead that the purpose of such schemes around the world is to 'preserve national heritage, and to provide the public with access to that material for research or study' (2007: para 110). It refers to reports by the Copyright Law Review Committee (CLRC) in 1959, which stressed that the purpose of legal deposit was 'to build up a complete collection of Australian literature', but made no mention of the use to which such a collection should be put, and again in 1999, when it stressed accessibility to the public for research or study purposes.

This approach does not adequately recognise the other objective function of legal deposit schemes, to provide copies of works which may be republished, or re-used in other ways, once the work is no longer subject to copyright protection because of expiry of copyright. However, even when a work is still within the term of copyright protection, if the only publicly accessible copy of it is one which is provided by a legal deposit institution, then legal deposit is essential before even the uses which are allowed under fair dealing or compulsory licence provisions may be enjoyed. These are both 'public domain functions' of legal deposit, in both the narrow and the broad usage of the term. Having a copy available so that it can be used to create new, transformative, works, is what is needed to encourage innovation.

The *Discussion Paper* is therefore somewhat lacking in that it does not explicitly address these public domain aspects of legal deposit schemes in the questions it asks. The main questions about a legal deposit scheme which need to be asked from the public domain perspective include:

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[118] For links to a number of state government legal deposit schemes, see t <www.nla.gov.au/services/ldeposit.html> (National Library of Australia).

12. Will the scheme guarantee that when the copyright term expires a copy is available for anyone to reproduce, so that they can obtain a copy to further transform?

The US Library of Congress indicates that less than 20% of U.S. features films from the 1920s remain wholly intact in American archives (Menell, 2007: 28). This supports not only the case for archiving, but also digital archiving. This is a question posed in the enquiry into extension of legal deposit (Legal Deposit DP, 2007, Issue 7). Electronic versions (free from digital locks) will be easier to preserve, reproduce and distribute. This will be especially useful when the work falls in the public domain.

Investment should also be made in appropriate search technology to locate archived material, digital or otherwise, decades later. Searches that can look for information about a digital work (often the case with libraries now) as well as within the content of a digital works are far more desirable, especially for research purposes. Images and videos may prove to be difficult to tackle as search possibilities are more limited in such cases.

13. After a copy is deposited what steps should be taken to ensure that the item can be found?

The Discussion Paper outlines the circumstances in which the NLA, NFSA and the Pandora Project allow access to materials while they are within the copyright term, and how this may be extended to digital and audio-visual materials (2007: Part 2), but the emphasis is on collection practices and access. It does not address whether, and with what guarantees, users can exercise their rights under fair dealing, compulsory licensing and other existing public rights. A Public Domain Review therefore needs to ask:

14. Does a scheme provide for users to both access materials held under legal deposit during the term of copyright in a work, and to exercise any fair dealing or other public rights which exist?

Care needs to be taken that the interests of authors are not unnecessarily prejudiced in furthering this aspect of the public domain uses of legal deposit works.

15. Should the existing legal deposit schemes be re-examined from this perspective in relation to non-digital textual works as well? Should the resulting policies be included in copyright legislation?

Another public domain aspect is that such deposit requirements, because they require identification of publishers of works, can also assist in identifying copyright holders of both orphan works (during the term of copyright) and the author whose death may need to be ascertained (for works out of copyright). But this would require a better searchable register of publishers and authors that legal deposit schemes provide at present.

16. Can legal deposit schemes also be used to assist in the resolution of the problem of orphan works and unlocatable authors?

The European Digital Library Project (funded by the European Commission), completed in February 2008 integrated bibliographic catalogs and digital collections of various European National Libraries to create 'The European Library'.[119] Consolidation of digital collections is an extremely useful exercise helping to reduce duplication of archival work (and associated expense) as well as increasing the pool of resources available and accessible. Such a scheme may also *help* to

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[119] See http://www.edlproject.eu/ (accessed April 2008). The European Library can be found at http://www.theeuropeanlibrary.org/portal/index.html (accessed April 2008).

resolve the problem of orphan works and locating authors. It may be useful to consider such a digital library project for the Asia-Pacific region.

17. *What changes to the law (if any) would ensure that Australia was best place to participate in any consolidation of digital libraries in the Asia-Pacific region?*

4.2. Technological protection measures (TPMs) and legal deposit

In relation to this question concerning TPMs, Fitzgerald, Coates and Kiel-Chisholm (2008) have submitted to the legal deposit review that:

> If the national collection is to be maintained adequate preservation practices must be able to be undertaken by libraries. This is particularly important for electronic and audiovisual material, which must be migrated regularly as hardware and software formats become outdated. Furthermore, as time passes and technological protection measures attached to current storage formats become obsolete, it will become difficult or even impossible to disable the measures to allow adequate preservation or access, even with the original publisher's cooperation.
>
> Libraries should therefore be granted an exception under s116AN(9) (prescribed acts) to allow them to circumvent technological protection measures where necessary to allow preservation of material in the library's collection, including legal deposit material, under ss51A, 51B, 110B and 110BA.
>
> If possible, libraries should also be granted exceptions to ss116A0 and 116AP, to allow them to effectively obtain and create devices to implement the above exception. However, is seems likely that the limitations imposed by Article 17.4.7 of the US Free Trade Agreement will prohibit this.
>
> The limitations imposed by the US Free Trade Agreement in relation to exceptions to Australia's anti-circumvention laws will act to severely hamper the practical effectiveness of any exception introduced to allow libraries to circumvent technological protection measures.
>
> Therefore, to enable deposit institutions to effectively preserve and provide access to the legal deposit materials in their collections, publishers should be required to provide the materials free of technological protection measures. Publishers of online material should be required to provide an effective means to disable or circumvent any technological protection measures (eg by providing a key) necessary to access the material on request.

A Public Domain Review therefore needs to ask:

18. *Will the scheme guarantee that, when the copyright term expires, there will be be no impediment to access or reproduction because of the use of TPMs in relation to the work?*

19. *Does Article 17.4.7 of the Australia-US Free Trade Agreement prohibit exceptions to ss116A0 and 116AP to allow depository institutions to effectively obtain and create devices to ensure that materials lodged under legal deposit schemes may be accessed?*

20. *Alternatively, should deposit be required of copies which are not protected by technological protection measures?*

4.3. Expansion of legal deposit to audio-visual works

My colleagues and I have made a detailed submission entitled 'Legal deposit's role in the public domain' to the Attorney-General's Department / DCITA review (Greenleaf, Paramaguru, Bond and Christou, 2008). It includes 28 recommendations, in response to that enquiry's questions.

Some of the main recommendations we make are (in summary):

- We submit there should be two criteria for inclusion of audio-visual and electronic materials in legal deposit:
  (i) For any materials (except free access materials on the Internet), if they are sold, or

distributed for free, deposit by the publisher should be required under the same conditions as would make a person a 'publisher' in relation to print materials. This would apply to all materials sold on CD, DVD or other medium, or delivered via the Internet by any means other than the World-wide-web).
(ii) All materials available for free access on the Internet should be included, and provision by that means should be considered to be publication. Depository institutions should be entitled to make copies of such materials for the purposes of legal deposit, without the publisher being required to provide a copy. They should be authorised by law to ignore robot exclusion protocols for this purpose. However, if the publisher uses any technical means to prevent the depository institution collecting a copy of the materials, a depository institution may require deposit of copies as with (i).

- We submit that publishers of any materials (except free access materials on the Internet) should be required to required to submit material in the best quality format in which it is provided to those to whom it is published. However, if the depository is unable to display the materials in the same way that these recipients can display or use the materials, it may require the publisher to either (i) provide software to allow such display or use; or (ii) provide the material in another format in which it can be read by the depository institution with no significant loss of functionality.

- Where material is available for free access on the Internet, its provision by that means will normally satisfy the legal deposit requirements, except where the depository institution cannot download the material by automated means, in which case it will be entitled to require provision of the data in accordance with the previous paragraph.

- Both electronic and print versions of a work should be required to be deposited, if both are published.

- Legal deposit should apply to broadcasts. The default position should be not that broadcasters have an obligation to deposit copies but rather that the repository has the right to collect copies from the broadcast itself. Depositories should also be given the right to require copies of broadcasts from broadcasters where they have not collected the broadcast when it was broadcast.

- Depository institutions should have the right, within the legislative competence of the Australian Commonwealth Parliament, to require the deposit of materials hosted outside Australia which are published on the Australian (.au) county domain or created by Australians or otherwise considered to be of cultural significance to Australia.

- Depository institutions should have the legal right to make copies of free access web sites (whether or not they are located in Australia) containing legal deposit materials for the purposes of the legal deposit scheme, and to make them searchable. The *Copyright Act* should confirm that depository institutions (and perhaps other search engine providers) are entitled to do this.

- In relation to deposited materials in which copyright has expired, there should be no restriction on access and reproduction. No publisher should be able to impose any such restrictions as a condition of deposit. Steps should be taken to prevent TPMs imposing such restrictions.

- In relation to materials in which copyright has not yet expired, on-site depository access should be permitted, for a single user. More liberal access should be provided to materials that are no longer commercially available. These forms of access should allow users to exercise rights of use of the materials allowed by the Copyright Act.

- Depository institutions should be part of a national scheme to identify which materials they hold that are no longer protected by copyright, and should be entitled to require information to be provided to them at the time of deposit so as to assist them to determine this.
- Consideration should be given to making searchable the full texts of all Australian legal deposit materials in which copyright has expired.
- Consideration should be given as to whether the Copyright Act should allow depository institutions to make the full texts of deposited materials searchable, provided they only provide the minimum amount of contextual information in any search results (or confirm they may do so).

We will not repeat the rest of the recommendations here (as they are readily available), but simply make the point that the outcome of the Legal Deposit review is very important to the health of Australia's public domain. Any recommendations that it makes (or those submitting to it make) should be considered by any more general review of Australia's public domain.

> *21. Which recommendations in response to the Attorney-General's Department / DCITA review of legal deposit should be adopted? (We have made 28 recommendations in Greenleaf, Paramaguru, Bond and Christou, 2008)*

4.4. Problems of identifying and quantifying Australia's public domain

The question of how public legal deposit registers can be used to help identify works in the public domain is part of the more general question 'how do you identify the Australian public domain', in the sense of identifying works with public rights that the searcher is able to utilize? The next section considers the complementary question, 'how do you identify missing rights-holders'[120]? From the perspective of encouraging innovation, how do you make these works findable so that other authors can make use of them as resources which contribute to their own work?[121]

It is of particular value to those who wish to innovate within their own national culture that they be able to identify and locate those works within their own national public domain: Australian creators need to be able to find Australia's public domain.

In the past, this was only a question of being able to identify works in which the copyright term had expired. It is now a question of also being able to identify those works which are available for re-use because of public rights created by a voluntary licence (viral or non-viral), or (possibly) subject to a public domain dedication.

There are two main approaches. One is the use of Internet search engines to locate works subject to public rights licences, and are related to Australia. This approach has its difficulties but they are not insurmountable for works available online (Bildstein, 2007).

The second is the use of voluntary registers or repositories of works under certain types of licences (eg the AEShareNet register), and (if they existed) Library and other catalogs which reliably provide dates of death and allow searching by same.

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[120] The next section mainly concern how to locate rights-holders in Australia's proprietary copyright domain (to negotiate licences with them or to pay collecting society fees to them). Only in the case that they cannot be found (so some means proposed to deal with orphan works might apply) or locating a date of death means that the copyright term has expired, do these enquiries lead to aspects of the public domain.

[121] This is one aspect of the 'Unlocking IP' project. Ben Bildstein is the main postgraduate researcher on this part of the project: see http://www.unlockingip.org for some early development work.

The difficulties of quantifying Australian public domain content are discussed generally in Bildstein (2007) and subsequently in relation to the deficiencies of Google and Yahoo web searching (Yahoo having more problems) and the types of errors you get with each[122]); problems in deciding why the data changed over a six-month period, again implying search engine deficiencies[123]); and more generally the difficulties for quantification research caused by the lack of a cache of the web available for public research purposes[124].

Global repositories of public domain content often do not give any indication of the country of origin of authors of their content. For example, SourceForge.net (one of the main software repositories) has no country-oriented metadata, and the Public Library of Science (PLos.org) containing mostly medical research and arXiv.org containing mostly physics physics research don't either, as is evident from their search forms[125].

The question a Public Domain Review needs to ask is:

> *22. What public resources, if any, should be used to make Australia's public domain, or parts of it, more easily found?*

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[122] Ben Bildstein, House of Commons blog post, 'Table comparing Yahoo and Google's commons-based advanced search options' at <http://www.cyberlawcentre.org/unlocking-ip/blog/2008/04/table-comparing-yahoo-and-googles.html>

[123] Ben Bildstein, House of Commons blog post, 'What does this data mean?' at <http://www.cyberlawcentre.org/unlocking-ip/blog/2007/03/what-does-this-data-mean.html>

[124] Ben Bildstein, House of Commons blog post, 'The problem with search engines' at <http://www.cyberlawcentre.org/unlocking-ip/blog/2008/02/problem-with-search-engines.html>

[125] Ben Bildstein, personal communication, 2008

5. Finding missing rights-holders: orphan works

5.1. The problems of orphan works and missing authors/creators

'Orphan works'[126] arise where the author either cannot be identified, or cannot be located, with the result that a license to use a work cannot be sought. They are a major impediment to all publishing industries and those requiring copyright permissions for performances or displays. If authors could be located, and are still alive, then they are likely to be willing to licence their works for a fee or to do so under some form of public licence (whether mere permission to use or a Creative Commons or similar licence). Both the proprietary and public aspects of copyright are harmed by the orphan works problem.

Another aspect of this problem is to determine whether an author, if identified, is dead or alive. Failure to determine this creates another category of 'frozen' works, where potential public rights are ineffective because of a lack of information. Here, the main problem is the practical one of determining whether an author is dead, and if so when did they die. If it can be ascertained that they have died over 70 years ago (or over 50 years before 2005), then the work is available for public use. Otherwise, this is an orphan work problem, the issue being whether it is a live author who cannot be located or the legal successors to their copyright interest. In any event, such enquiries about the deaths of authors are part of the 'reasonably diligent search' problem (discussed later).

Another related aspect is when it cannot be determined whether a work has been published during an author's life, because if it has not, then copyright will be perpetual (Copyright Act 1968, s33(3)[127]). If the work is anonymous or pseudonymous, then it necessary to know its date of publication, or it is not possible to determine when the period of copyright (s34(1)) commences.

So there are a number of related problems here: identifying authors/creators; determining if and when they have died; locating them or their estate representatives, unless copyright in the work has expired; and determining whether a work has been published, and if so when. These are all aspects of the 'orphan works problems'.

The US Copyright Office's study of the problem states (US Copyright Office, 2006: 1):

> Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

What evidence is available on the adverse effects of the orphan works problem on the Australian publishing industry, cultural institutions, and other creative industries? Hudson and Kenyon argue that for cultural institutions, traditional licensing models may fail 'because of the high costs of licensing, but also because works have become "orphaned": the copyright owner is impossible, in any practical sense, to identify or locate.' (2007: 207) Passage of time, lack of meaningful attribution and breadth of items protected by copyright all add to the problems that orphan works pose to cultural institutions. They identify the problem of orphan works as one of the reasons why

[126] The term was apparently coined by Brewster Kayhle of the Internet Archive – see Ethan Zuckerman's blog at <http://www.ethanzuckerman.com/blog/2006/08/05/wikimania-brewster-kahles-big-goal/>

[127] In some countries such as Canada and the UK, the duration of copyright of unpublished works is limited.

'the selection of works for public digitisation is often driven, in whole or in part, by the ease of copyright compliance' (2007: 208), and the content of online exhibitions is skewed as a result. Further, the time spent attempting unsuccessfully to locate copyright owners restricts the efficiency and increases the costs of the archival process generally (See McDonald, 2006: 157).

The Copyright Law Review Committee (1999: 113-115) found considerable support for an orphan works scheme, particularly from the libraries, archives and educational bodies.

> Each submission in support noted that the mechanism should operate only after reasonable searches have been made and that remuneration should be paid to the copyright owner if she or he becomes known at a later date. The main arguments in favour of the development of such a mechanism were:
>
> • the lack of a mechanism creates practical problems for obtaining approval for the use of copyright material and making payment for its use;
>
> • the electronic delivery and creation of copyright material can be expected to result in an increase in the number of cases where the copyright owner cannot be identified or located;
>
> • a lot of time and expense are expended by the users of copyright materials, trying unsuccessfully to locate copyright owners unrepresented by copyright collecting agencies, or other licensing bodies;
>
> • the introduction of a mechanism would allow the freeing of access to valuable copyright material that presently cannot be accessed because to do so would constitute a breach of copyright; and
>
> • the introduction of a mechanism would allow for the saving of costs associated with searching beyond what would reasonably be required to satisfy the reasonable search standard specified in the mechanism.

Collecting societies have related problems, where they cannot locate (or cannot obtain a response from) individuals and organisations to whom they consider they should make payments. Some have online lists of persons for whom they consider they hold 'undistributable funds'[128]. This is an aspect of the orphan works problem.

Many submissions in response to the government's review of the fair-use exception in 2005 voluntarily raised the issue of difficulties associated with the use of orphan works. As a result, in February 2006 the government announced that it would conduct a review of orphan works in order to address the significant problems that cultural institutions and others experience in relation to orphan works. The Australian Libraries Copyright Council (ALCC) and the Copyright in Cultural Institutions (CICI) group held a joint-seminar on orphan works with over 50 attendees from various libraries, archives, museums, galleries and other cultural institutions in May 2006 (ALCC, 2006). I am not aware of further developments since then. The Australian Digital Alliance was of the view that (quoted in Rimmer, 2006):

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

There are no easy and inexpensive ways in Australia of finding the information needed. It is difficult to determine whether and when Australian authors have died, particularly when Births Deaths & Marriages registries operate at state and territory level so there is no national register, and when a large percentage of Australia's population, as an immigrant nation, have always been born overseas. The lack or any national ID system or residence registration system probably makes it more difficult to locate known individuals than in some countries.

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[128] CAL's 'Do we owe you money?' page <http://www.copyright.com.au/membersearch.htm> lists authors alphabetically under their first names, not their surnames. It might be possible to locate more authors if this was changed.

There are facilities in the USA which do provide publisher contact details for the representatives of some live or recently dead authors. These include the WATCH service (Writers, Authors and Their Copyright Holders), which has some coverage of Australian authors, but searches on some well-known Australian authors produce no result; Poets & Writers's Directory which lists contracts and publications for over 7,500 American authors; and the University of Idaho's Repositories of Primary Sources, which is more about publications than authors but does cover Australia.

The UK-based website, 'New General Catalog of Old Books and Authors'[129] contain an extensive catalog of old books and authors. However, the site does not offer search capability and catalogs authors by year of death or last name. Finding an author in circumstances where limited information about a publication is available to you (for example, the title of a book, or part of a name) is extremely difficult. The related Authors by Year of Death pages[130] lists the authors who died in each year since 1700, to assist in finding whose copyrights expires each year, and the US Catalog of Copyright Entries (Renewals) site[131] helps with finding out whether the US copyright of works published in the US in 1923 thru 1963 was renewed.

There do not seem to be significant Australian equivalents. The relevant author and publisher organisations in the print medium do not provide much assistance. The Australian Society of Authors website has an 'Author Search' facility in 2007, but it only provides an alphabetic list of current ASA members who have websites, with links to them, so is of limited use to deal with the problem of finding authors or their agents generally. The Australian Copyright Council website contains information sheets about how to locate copyright owners. The Australian Copyright Council merely notes that:

> Unlike the systems for trademarks, patents or designs, there is no Australian registration system for copyright, so there are no official records of ownership that you can search. For this reason, you may need to use a variety of resources when looking for copyright owners. In some cases, you may need to do some detective work.[132]

Copyright Agency Ltd in their information sheet are content with the unhelpful observation that:

> Locating the rightsholder, particularly a rightsholder who is overseas, can be time-consuming. However, the fact that you have been unable to locate the rightsholder is no excuse for copying without permission.[133]

There are obviously significant problems here adversely affect the operations of cultural institutions, publishers and collecting societies, among others. A first step in any Public Domain Review would be to gain a better assessment of both the significance of the problem, and why Australian institutions have not yet provided a better answer to it.

> 23. *What is the extent, and the economic impact, of the various problems of locating rights-holders of Australian works? These include the problems of identifying authors/creators of works; of determining whether an author is alive or when they died; and of determining who is the legal representative who may licence or otherwise authorize uses of their works (unless copyright has expired).*

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129 <http://www.kingkong.demon.co.uk/ngcoba/ngcoba.htm>

130 <http://www.kingkong.demon.co.uk/abyod/abyod.htm>

131 <http://www.kingkong.demon.co.uk/ccer/ccer.htm>

132 Australian Copyright Council, "Information Sheet G51, Owners of Copyright How to Find", July 2006, p. 1. Available at < http://www.copyright.org.au/information/specialinterest/G051.pdf> (accessed April 2008).

133 Copyright Agency Ltd, "Getting Permission to Copy", p. 2. Available at < http://www.copyright.com.au/info%20sheets/PA06_permission%20to%20copy.pdf> (accessed April 2008).

5.2. Options for new methods of finding authors and other creators

To what extent should obtaining copyright clearance have to involve 'detective work' and be 'time-consuming'? Should this be unlimited, and generate no result if the author is not found despite the searcher's best efforts? Encouraging author associations, collecting societies, depository libraries, public domain organisations and governments to collaborate to provide a more comprehensive means of determining the status and representatives of both living and dead authors, and the publication status and date of publication of works, would be a significant step toward making Australia's public domain – and its proprietary domain – more effective.

The USA has a voluntary Register of copyright works and their owners, operated by the Copyright Office. Its Public Catalog allows searches of works registered and documents recorded by the U.S. Copyright Office since January 1, 1978. The UK Gowers Review (2006: Recommendation 14b) proposed the establishment of a voluntary register of copyright works, possibly by cooperation between the Patent Office and other owners of databases.

A Canadian Public Domain Registry is being developed in partnership by Access Copyright (The Canadian Copyright Licensing Agency), Creative Commons Canada, Creative Commons Corp. and the Wikimedia Foundation. Started in 2006, a flowchart for the project was released in April 2008[134].

If Australia created one or more voluntary registers of copyright works, one option is that it could be coordinated by the AIPO as an online searchable public register, and involve collaboration between a number of depository institutions, organisations representing authors/creators etc.

Some of the questions that need to be asked here are:

24. *What current Australian institutions and practices provide partial solutions to the problems of identifying authors, their dates of death, their locations and their representatives?*

25. *Why do they not provide a better solution to the problems of orphans works and related problems?*

26. *What effective schemes exist in other countries? Do they include Australian authors?*

27. *Should Australia create a voluntary register of copyright works? What are the options for how such a register, including the organisations that should collaborate in its creation and maintenance, who should operate it, and how it would be funded?*

28. *Should there be more than one such register, depending on the types of works involved?*

29. *How could such register(s) be used to help determine which works are in the public domain because copyright has expired, or otherwise indicate any public rights involved in a work? In particular, how could they be used to assist in identifying authors/creators; determining if and when they have died; locating them or their estate representatives, unless copyright in the work has expired; and determining whether a work has been published, and if so when.*

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134 <http://www.creativecommons.ca/blog/?p=245>

5.3. A right to adopt orphan works - Alternative approaches

The US Copyright Office held an enquiry prompted in part by the extension of the copyright term in the US and concluded (US Copyright Office 2006) that, provided potential users first carried out a ‘reasonably diligent search for the copyright owner’, they should have a right to use the work, with attribution, subject only to a potential liability to pay reasonable compensation for use if the owner did subsequently emerge. Owners would also lose their right to injunct the publication of such derivative works (or obtain destruction of copies), provided the new author had added an original contribution to it. This US approach can be described as a compulsory licence after reasonable enquiry, but it is not one which would involve a collecting society, and nor would it involve the payment of fees in relation to all works used.

The UK Gowers Review (2006: Recommendation 13) recommended that the UK government should propose an orphan works provision to the European Commission, as an amendment to the ‘Info-Soc Directive’[135]. It recommends that, as part of this, its Patent Office should issue guidelines as to what constitutes a ‘reasonable search’ (Recommendation 14a).

The Copyright Board of Canada is empowered to issue licenses on behalf of copyright owners in cases where the owner cannot be located. The Australian Copyright Council recommended a similar approach in its response to the issues paper on fair use. However, the approach has been criticised due to the "unpredictability, delay and transactional expense inherent in the current system in Canada that requires a ruling from the Copyright Board"[136]. The Innovation, Universities and Skills Committee in the UK has similarly proposed that the Copyright Tribunal become responsible for granting licences for the use of orphan works, but the British Academy has rejected this approach.

In New Zealand there have been proposals (in a more limited context of archival protection of early digital works) a statutory requirement of a published notice as a condition of ‘orphan work’ status[137]..

In its reports on simplification of the Copyright Act, the CLRC (1999: para 7.97) did not recommend amendments to create a right to use orphan works, but did recommend further investigation of whether the Copyright Tribunal should operate some type of licensing scheme (as in Canada), or whether collecting societies should be able to represent unknown authors and licence their works in such cases (as in Scandanavia).

In Australia, a further government enquiry was supposed to occur but does not seem to have proceeded[138]:

> Many submissions in response to the government's review of the fair-use exception in 2005 voluntarily raised the issue of difficulties associated with the use of orphan works (works where there is difficulty in tracing or locating the copyright owner). As a result, in February 2006 the government announced that they would conduct a review of orphan works in order to address the significant problems that cultural institutions and others experience in relation to orphan works. The Australian Libraries Copyright Council (ALCC) and the Copyright in Cultural Institutions (CICI) group held a joint-seminar on orphan works with over 50 attendees from various libraries, archives, museums, galleries and other cultural institutions in May 2006.

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135 Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society

136 See A Paramaguru ‘Save the Orphans’ *House of Commons blog*, February 12, 2007 at <http://www.cyberlawcentre.org/unlocking-ip/blog/2007/02/save-orphans.html>

137

138 National Museum of Australia website at <http://www.nma.gov.au/about_us/copyright_and_reproductions/cici/news_and_information/2006/>

Rimmer (2006) has identified six different structures or models that can be used to deal with the orphan works problems, which he labels: (i) Twilight Clauses; (ii) Defences; (iii) Limitation on Remedies; (iv) Registration Scheme; (v) Canadian Model; and (vi) Scandinavian Collecting Society Model. He notes considerable problems with some of the models. For example, 'Twilight Clauses' based on the age of works, or the duration of time since publication, or the date of death of the author, will often be useless because so many of them have such little data associated with them that these dates cannot be established with any certainty. 'Any system attempting to administer trust monies for all orphaned works will necessarily be complex, time consuming an unreasonably burdensome' (Rimmer, 2006, citing views of the Australian Digital Alliance). There is a risk that any scheme involving compensatory payments will 'keep the orphans in the orphanage' because the uncertainty involved in the level of compensatory payments which may be required will deter use (Rimmer, 2006, citing views of Gigi Sohn of Public Knowledge and Lawrence Lessig).

Perhaps there are even more potential models than those identified by Rimmer, depending on how factors such as the following are combined: (i) whether orphan works can be used without application to some tribunal; (ii) how a test of diligent search is framed; (iii) whether the search must involve publication of a notice; (iv) whether use of the orphan work must carry a notice that it is being used, or use must be registered; (v) whether allowed use of an orphan work should be payment-free, or carry some liability for a compensatory payment; (vi) whether any liability for payment should be contingent, only arising if a rights-holder comes forward; (vii) whether any payment upon use is required; and (viii) whether collecting societies should have any role in collection and disbursement of payments.

In this issues paper I don't propose any particular option, but wish to stress the importance of this unresolved problem to innovation in Australia. In assessing which option in creating some greater public rights to use orphan works, a Public Domain Review would need to ask such questions as:

30. *What limitations (if any) does the 3-step test impose on the types of orphan work schemes that are possible?*

31. *Should Australian legislation allow use of orphan works after a 'reasonably diligent search for the copyright owner 'or some similar test, without any further application or bureaucratic requirements?*

32. *Should there also be required, as part of any diligent search, some form of public notice that the author of the orphan work was being sought?*

33. *Should any uses of the orphan work be required to carry a notice disclosing this and advising whom the author or author's representatives should contact, or some registration of its use?*

34. *Alternatively, should the Copyright Tribunal or some Court or Tribunal be empowered to issue licences to use orphan works, on application and based on a set of statutory criteria?*

35. *Should there be provision for reasonable remuneration to be paid to authors/creators or their estates if they subsequently come forward after becoming aware that their works have been so used?*

36. *If so, should such remuneration (a) only be paid at all if and when the previously missing author comes forward or (b) be required to be paid in to some trust fund as soon as the orphan work is used; or (c) be paid to some collecting soeiety in anticipation that the owner of the orphan work might come forward.*

37. *Should the duration of copyright in unpublished works be limited?*

Whatever approach is taken providing a right to use orphan works in Australia, it would work best from all perspectives was coupled with more effective Australian methods of locating authors, so as to make it more likely that diligent searching would locate an author who was available to be located.

6. Enabling open content licensing to thrive

Voluntary licences made by Australians, or made under Australian law, which purport to give a conditional licence of works to the public at large have become increasingly numerous since 2000, as the examples in Part 1.2 illustrate. This Part discusses voluntary licences over content (texts, photos, videos etc), as distinct from software licences which are discussed in the next Part. They have been used by Australian governments (for example, the NSW and Northern Territory licences of legal materials to the public, or the licence to republish web materials given by the NSW Attorney-General's Department), and by both Australian consumers and creators through Creative Commons licences. In the educational sector, the AEShareNet suite of licences developed in Australia has been used extensively. In its final report, the Productivity Commission (2007: 290) concluded that, while Universities should often commercialise intellectual property,

> …under other circumstances, it is arguably more appropriate for universities to give their research away — for example, if the knowledge or technology is generally applicable to a wide range of firms and the costs of further development and replication of the resulting innovation are low. In this case, seeking to protect the IP and sell or license it delays its transfer and diffusion, potentially imposing substantial costs on firms and the wider community.

Greater government and academic use of such licences creating public rights could stimulate innovation by creating a faster and less costly transfer of knowledge.

6.1. Evidence of use of open content licences

Some work has been done on identification and quantification of the use of open content licences in relation to Australia (Bildstein, 2007; Coates, 2007). The two most widely-used open content licences in Australia are Creative Commons licences and the AEShareNet licences, although other licences such as the GNU Free Documentation Licence (FDL) are also used.

Type	US 1.0	US 2.0	US 2.5	AU 2.0	AU 2.1	AU 2.5
by	574	4,850	5,640	31	1,210	468
by-sa	402	2,660	3,620	1,470	439	2,520
by-nd	1,870	1,040	411	268	162	1,980
by-nc	2,564	2,890	8,540	635	1,850	1,500
by-nc-sa	10,120	11,200	16,300	1,020	10,400	3,010
by-nc-nd	4,474	13,300	5,490	1,280	5,160	7,660

4.2.4 Australian Usage of Creative Commons by Licence Type

Bildstein's figures concerning CC licences show that, as at early 2007, Australians were using both the US[139] and Australian Creative Commons licences. This was early in the life of the Australian licences, so it can be expected that, over time, there may be relatively more use of the Australian licences. As is discussed later, some major user-generated-content (UGC) websites only provide facilities to assist users to use the generic licences, not the Australian licences.

[139] The US ones were then called 'generic' and have now been split into the 'unported' and 'US' sets of licences.

Whatever relative changes in uses of the two sets of licences occur over time, it seems reasonable to expect that both sets of licences will continue to be used in relation to Australian content.

Bildstein's figures also show that usage of CC licences (of either type) which include the 'non-commercial' (nc) attribute is by far the largest category of usage. The high usage of the two licences that use the viral 'sharealike' (sa) attribute is the next most noticeable aspect of the figures. From the figures provided by Coates (2007), this Australian usage seems broadly consistent with international trends. Coates sees a trend toward less restrictive licences (ie more use of sa and less use of nc) in the international figures. The position will become clearer as more statistics on both Australian and international use become available over time.

AEShareNet licences are the second largest source of open content licences in use in Australia. Bildstein (2007: 4.2.1) found, as at mid-2007, nearly 4,000 instances of use of one of the the AEShareNet 'instant licences' (types U, S, P and FfE), which contain 'public rights elements' (the others require individual negotiation of licence conditions). The AEShareNet website licence database[140] identified twice as many licence occurrences than can be found from searching the web (as indexed by Yahoo) for AEShareNet licences. On the AEShareNet database, the 'Share and Return' licence type was by far the most used of the 'instant licences'. On the web (excluding the AEShareNet website), the 'Free for Education' (FfE) licence type was by far the most used licence. He conclude that it is much more common for users to publish something that is 'Free for Education' on the Web than it is to register it on the AEShareNet database.

Table 1. AEShareNet Data

Licence Type	Yahoo Hits	AEShareNet Hits
U	1	11
S	289	2,292
P	1	180
FfE	979	148

6.2. Clarifying the Australian legal status of voluntary commons licences

One of the most detailed published Australian studies of open content licensing is that carried out for the Queensland Spatial Information Office by Neale Hooper, Anne Fitzgerald and others. It explains the legal status of open content licences (Qld Spatial Information Office, 2006: para 5.6) as follows:

> Open content licences involve the granting of permission to other persons to use the copyright material in ways that fall within the bundle of exclusive rights belonging to the copyright owner. In other words, they authorise (permit) users to do certain specified acts within the scope of the bundle of rights which can be exercised exclusively by the copyright owner. Importantly, open content licences grant users rights to do acts that fall within the scope of the copyright owner's exclusive rights and do not impose further (i.e. non-copyright related) obligations on the users of the copyright material. In this respect, open content licences differ from many traditional information licences which seek to impose, by means of a contract between the copyright owner and the recipient, additional obligations or constraints on users (e.g. limitations on re-use or confidentiality requirements).

There is no doubt that such licences will normally be effective to those relying upon them as permissions to do acts otherwise within the exclusive rights of the copyright owner. Even those who question aspects of the enforceability of Creative Commons licences such as Foo (2007) consider that, if they are not valid as contracts, then

[140] < http://www.aesharenet.com.au>

> A more persuasive argument for the legality of open content licences that [they] effectively represent the permission required under contract law by the owners for the user to reproduce, adapt or communicate the material without infringing the copyright in the work.' (Foo, 2007, citing Kumar, 2006)

However, some have expressed uncertainty concerning the exact status, and enforceability, of some aspects of these licences under Australian law. Foo (2007) argues that

> There is considerable debate about whether the GPL or CC licences are enforceable under Australian law. It would be difficult to conclusively state that open content licences are contracts in Australia…. The requirements for consideration and common intent do not appear to be evident in open content licences,

The claimed lack of consideration may be difficult to dispute with those CC licences which do not contain a viral element (ie the by, by-nd, by-nc and by-nc-nd licences), but is weaker in relation to the viral or 'copyleft' CC licences (ie by-sa and by-nc-sa) because it can be argued that the licensee agrees that if they modify the licensed work their modifications will be subject to the same licence. Consideration does not need to be monetary, and it does here constitute a detriment to the licensee because they are giving up some of their exclusive rights to the licensor, as well as to others. Where a licence is non-viral, the detriment is not always so obvious, although it can arise if, for example, a user has expended time and effort in modifying a work (under a by licence or by-nc licence). It will be more difficult to show detriment if a work has merely been used under a by-nd or by-nc-nd licence, but again it may not be impossible. It is difficult to estimate the practical significance of any possible problem here in the abstract: it is possibly not practically significant, but only a theoretical limit.

One possible problem with treating these licences in effect only as a defence or estoppel against copyright enforcement actions (as Foo suggests may be effective) is what happens when a previous grantor of a licence purports to revoke the licence. Perhaps, as Fitzgerald has suggested[141], equitable estoppel may be available to prevent revocation of the GPL, or presumably of other viral or 'copyleft' licences (such as those with CC 'sharealike' attributes: by-sa and by-nc-sa)). But this would seem less likely to work to prevent revocation with those CC licences which do not contain a viral element (ie the by, by-nd, by-nc and by-nc-nd licences), despite what is said in clause 7(b) of the Australian licences purporting to make them 'perpetual' (for the term of copyright in the work).

There are no significant judicial decisions concerning Creative Commons licences. As yet, only a few overseas cases have directly considered the enforceability of these licences, and none seem to be strong precedents. Foo (2007) considers that two cases have 'affirmed the validity of certain CC licences'. First is the Dutch case concerning Curry who published photos of his family on Flickr under a CC Attribution-Noncommercial-Sharealike 2.5 Canada licence. A gossip magazine republished them, then claimed the licence was unclear. The Court ordered the magazine not to publish any of Curry's photographs from Flickr in future. The Dutch court did uphold Curry's claim on the basis that the licence was valid[142]. However, the outcome would have been the same, whether or not the licence was valid (breach of the 'noncommercial' term) or invalid (no licence, simple breach of copyright), so the case is of little significance. The second case is where a jazz club in Spain successfully resisted a claim for licence fees by the collecting society for music performances because the music concerned was licensed under a CC licence. However, it is not as simple as that. As Guadamuz explains[143], while the judge-magistrate did take into account the new practices of clubs playing materials that they are free to use, whether because of Creative Commons licences or other permissions, the effect of this was to nullify the presumption that works played in

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[141] See <www.apsr.edu.au/Open_Repositories_2006/brian_fitzgerald.ppt>

[142] See posting of Creative Commons Canada blog by Prof B Hugenholtz at <http://www.creativecommons.ca/blog/2006/03/14/dutch-court-upholds-creative-commons-license/>

[143] Andres Guadamuz, 'Technolama' blog post 15 May 2007 at <http://technollama.blogspot.com/2007/05/spanish-jazz-club-wins-case-on-copyleft.html>

such clubs would be by artists represented by the collecting society. 'With that presumption in tatters, it is the plaintiff who has the burden to prove that the music played in the locale is managed by them' (translation by Gaudamuz). The individual licence here was not examined.

Hietenan (200?), after surveying the legal status of Creative Commons licences in Scandinavian and Anglo-American legal systems, finds it difficult to come to uniform conclusions:

> Giving a comprehensive answer to a question, whether Creative Commons licenses are contracts or mere permissions, is impossible. Those several legal systems that may have to deal with the licensing instruments contain different rules relating to licensing. Those rules make the legal outcomes local and the global licensing movement fractured.

The arguments discussed here are not conclusive one way or the other, though it is notable that practical problems have not become well-known given that the licences have now been in use for over five years. They only indicate that there is some uncertainty concerning the legal basis, and limitations, of enforceability of CC licences, and that the position may differ depending on the type of licence.

Nevertheless, this seems to be an unsatisfactory situation, for two reasons. The first is that the overall purpose of the CC and similar licences is socially beneficial (particularly from the perspective of enhancing innovation): they aim to provide a uniform method, with low transaction costs, by which copyright owners can permit others to use some of their exclusive rights in relation to works. They expand the choices available to licensors, and the transfer of intellectual goods to licensees.

Second, there is substantial and growing use in Australia of the main types of such licences (those from Creative Common Australia, the Creative Commons generic licences, and those from AEShareNet), including use by our major public institutions in government, academia and the cultural sector, and by a growing proportion of Australians through their use of user-generated-content (UGC) websites.

It would seem to be clearly in the public interest to put such licences on as clear and watertight a legal footing as possible, rather than to wait for any lingering legal doubts to be resolved by court decisions, assuming it is possible for changes to the *Copyright Act* to achieve such an end without causing other problems.

At least the following questions therefore need to be asked by any Public Domain Review:

38. *What are the principal voluntary commons licences used in relation to Australian works, and what is the extent of their usage?*

39. *What is the legal status of these licences under Australian law? For example, does an author's use of a commons licence create a contract, or does it only create a defence against a claim of infringement of copyright? Are any practical problems likely to arise from this?*

40. *What uncertainties (if any) are there in the enforceability of these licences under Australian law, in relation to all parties who may wish to enforce them?*

41. *What amendments to the Copyright Act could make voluntary commons licences more clear in their legal effects, if any additional certainty is needed?*

6.3. Empowering public domain dedications

Where authors or other copyright owners wish to voluntarily place their works completely in the public domain, it will normally be in the public interest, and in the interests of innovation, for

copyright law to make it possible for them to do so. The *Copyright Act* could specify a formality which would be effective to achieve a public domain dedication[144], as this is a much more simple question than that of the enforceability of CC licences or of the GPL.

There seem to be no policy reasons to restrain copyright owners from 'donating' their works to the public domain, provided that in doing so they are properly informed of the consequences of this choice. The choices of the copyright owner are expanded, and the public benefits from an earlier transfer of intellectual goods to its use.

The extension of the copyright term to the life of authors plus 70 years makes it particularly valuable to provide an alternative means by which authors can choose to voluntarily accept a shorter term of copyright. The formalities included in the *Copyright Act* could expressly provide that a 'public domain dedication' could be expressed to only operate from some future date (for example, from the death of the author, or from 14 years hence).

Consideration would need to be given to the options which have been used elsewhere to support public domain dedications, and whether there is any evidence that they are effective. These include the US Creative Commons Public Domain Dedication (US CC, 2008) and the Open Data Commons Public Domain Dedication and License (ODC, 2008). Creative Commons in the USA provides such a Public Domain Dedication[145] 'licence', and so apparently has some belief in its effectiveness, though Lessig queries[146] whether it could be effective under US law.

Creative Commons Australia does not offer a Public Domain Dedication, and its validity is doubtful under Australian copyright law. The status of such a declaration under the Berne Convention is also a matter requiring question, particularly in terms of its international enforceability. Whether it is possible for an author to renounce the right of integrity under moral rights law during the term of copyright is also uncertain under Australian law, but seems unlikely. This has implications for an author who wishes to use a voluntary licence that allows derivatives to be made of their work (Bond, 2008), because the copyright in the work may effectively have been converted into public rights, but if the moral rights have not, then subsequent users will still have to observe them.

A public domain dedication, if it was effective, would be much the same as an irrevocable Creative Commons 'by' licence (ie one requiring attribution only, which is required by Australian moral rights law in any event). Both the Australian and the 'unported' Creative Commons licences set out their revocability as follows[147]:

> Subject to the above terms and conditions, the licence granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different licence terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this Licence (or any other licence that has been, or is required to be, granted under the terms of this Licence), and this Licence will continue in full force and effect unless terminated as stated above.

In other words, a licence cannot be terminated in relation to an existing licensee, or anyone relying on that licensee's use of the licence, but it can be revoked in relation to any other potential future licencees. So the fact that a work was once available under a particular Creative Commons licence does not mean that it will necessarily be so available now or for the future.

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144 If the Berne Convention imposes any constraints on this (particularly in relation to the copyright term), then the Act could specify formalities for a licence to the public closest to a public domain dedication achievable under Australian law.

145 <http://creativecommons.org/licenses/publicdomain/>

146 L Lessig 'Weblogs and the Public Domain' blog post April 13, 2003 at <http://lessig.org/blog/2003/04/>

147 Clause 7 b. of the Attribution 2.5 Australia licence at <http://creativecommons.org/licenses/by/2.5/au/legalcode>

This clause may be consistent with the requirements of Australian law that a 'bare' licence (ie one without consideration) 'may be revoked at will, or at least with reasonable notice', but it may be that 'if the bare licence has been acted upon by the licensee to the detriment of the licensee, then the copyright owner may be estopped from revoking the licence, either completely or without the granting of notice' (Reynolds and Stoianoff, 2003: 197)[148]. Other authors (McKeough, Stewart and Griffith, 2004) state that

> … it would seem that an exclusive licence, being a licence coupled with the grant of a proprietary interest, is irrevocable except in accordance with the terms expressly set out in the grant, whereas a 'bare' licence is revocable at will. In between these extremes are contractual licences. Although the position is far from clear, it appears that a licensor may be restrained from revoking the licence, or at least required to give reasonable notice, where there is a clear express or implied promise not to revoke.

This uncertainty concerning revocability of licences underlines not only that we need to ask whether the *Copyright Ac*t should provide for public domain dedications (ie permanent abandonment of all rights except attribution) , but also whether the Act should underwrite the effectiveness of other more limited permanent abandonment of rights, such as 'no commercial use' or 'no derivatives' (at least until the copyright term expired, and such restrictions would also expire).

A Public Domain Review will need to answer:

42. Can public domain dedications be effective under existing Australian copyright law?

43. If not, what changes to copyright law are needed to make them effective?

44. How can such public domain dedications be made to operate from a future date?

45. Should moral rights also be terminable by a public domain dedication?

6.4. Addressing potential problems with use of open content licences

Whether or not the *Copyright Act* gives greater support to public rights licences, their growing use means that any potential misuse also needs to be considered. Potential issues include whether there is sufficient access to information about voluntary licences, and whether there are situations where there is an undesirable lack of choice in licences.

Sufficiency of access to information about voluntary licences?

Some criticisms of commons licences are based on lack of information available to potential users about the implications of their use, which could lead them to be used in inappropriate circumstances to the detriment of authors. Weatherall (2006) makes the reasonable criticism that some of the literature that comes from those supporting Creative Commons licensing consists of 'boosterism' which 'glosses over the subtleties of licensing'. However, this only leads her to the unsurprising conclusion that they should not be used without careful analysis. Any misleading information supporting Creative Commons licensing seems to be well balanced by misinformation emanating from opponents of the licences. Neither are valuable for potential licence users or the public who benefit from when they are used appropriately.

Weatherall discusses another group of criticisms of Creative Commons licences, that they are 'fundamentally incoherent'. One criticism is that Creative Commons is based on current property-based models of information goods and instrumental views of culture as a resource, to which it can only plead guilty to 'working within the system'. Another is that Creative Commons does not have

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[148],citing *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1988) 83 ALR 492 at 495.

a clear ideology of what form of 'freedom' of information is best for creativity, and thus allows the users of its licences choice in the degree of freedom with which they will allow their creative works to be used. A further variant of this criticism is that too many users choose the 'wrong' licences, the most restrictive ones allowing no derivatives, or no commercial uses. It is tempting to reject this criticism by saying 'so what?: yes, Creative Commons is guilty of expanding the effective range of choices that people have in how to allow uses of their works'. Weatherall (2006) comes close to this position, accepting that 'even restrictively licensed material may be a useful contribution to the public domain and the culture of sharing', but fears that the end result may be that 'we have gained little (and perhaps, lost something) as compared with a world where everyone simply relies on implied licences'. A closely-related criticism raised by Weatherall is the danger of licence proliferation, both within and outside Creative Commons, and the dangers that has for the ability of creators or the end-user public to understand the licences they are using, particularly where content licensed under different licences are combined. To some extent these issues will be resolved by which licences survive over time. In contrast, the dominance of the 'one size fits all' approach of the GPL in relation to software appears to offer greater simplicity, and a viral-induced further proliferation of only one licence.

A Public Domain Review should ask:

> 46. *Do potential licensors obtain sufficient information about the implications of their use of voluntary public rights licences?*
>
> 47. *What information about each commons licence should potential licensors be able to access? How can this information be provided?*

Lack of choice in the use of 'voluntary' commons licences?

User generated content (UGC) web facilities operated outside Australia, such as Flickr, Photobucket, or Myspace are used by very large numbers of Australians. These UGC sites are probably the first time that significant numbers of people in non-professsional activities have been required to make choices about licensing content. They may impose certain licences on their users, or give them a limited choice of which licences can be used, or push users toward using certain licences rather than others[149]. Whether significant quantities of Australian-generated content will, as a result, be licensed under licences based on other legal systems, and whether this could have any adverse consequences, has had little investigation.

While requiring the use of a particular licence as a condition of being able to modify software or content is the basis of the success of viral licensing, contractually imposed licences as a condition of use of a service is different in intent. There may be a need to ensure that requirements to adopt particular licences are not creating harmful side-effects. The 'involuntary' creation of public rights by licences designed only to be used voluntarily should be avoided if possible. A healthy public domain does not mean that we should expand it irrespective of the consequences.

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[149] Another example is that if you want to publish in Wikipedia you must use one particular licence. If you want to publish in Jurispedia you must use a different licence, and the two are incompatible so it is impossible to copy content from one to the other even though both allow re-use of their content.

Flickr offers proprietary rights ('all rights reserved') as the default condition of use, but offers users the option of choosing Creative Commons licences as a default setting. However, although all the Creative Commons information pages that Flickr provides to users offer a choice of licences from all countries where there are CC licences[150], including Australia, the actual licence provided by Flickr is always the 'generic' version of the CC licence[151], and the Australian licence cannot be used within the Flickr system. Since the Australian licences mean something different from the generic licences, particularly in relation to moral rights, this is potentially misleading to Australian users if they think they are getting the use of the Australian licence. It also means that many Australians are licensing their UGC under generic licences, not Australian licences, with no choice if they wish to use Flickr. A very good point about Flickr is that even where a user sets a Creative Commons licence as the default setting for their photos, each time they upload another photo the option is provided to change the licence setting for that photo, including changing it back to 'all rights reserved'.

You can also set a default type of license for everything you upload into Flickr.
Change your default here.

Note You should only add a license to content you've created yourself.

Select the license

- None (All rights reserved)
- Attribution-NonCommercial-ShareAlike Creative Commons
- Attribution-NonCommercial Creative Commons
- Attribution-NonCommercial-NoDerivs Creative Commons
- Attribution Creative Commons
- Attribution-ShareAlike Creative Commons
- Attribution-NoDerivs Creative Commons

SAVE

Two of the other main UGC sites used by Australians, YouTube and Photobucket, do not have any 'built in' method of adding Creative Commons or other licences to works that are uploaded, although there is space in comment fields for users to add any licence details that they wish.

Although it is still 'early days' in the relationship between UGC sites and public rights licences, questions worth asking include:

48. *How common is it for those who wish to use some type of online facility to provide their own content to the public to be required by the facility operators to adopt a particular version of a public rights licence in order to use the facility?*

49. *What issues arise from such practices imposed on users of UGC sites?*

50. *Are users of UGC sites given a choice of using Australian commons licences?*

51. *Does it matter to the long-term health of Australia's public domain that Australian users of global internet services may not be given a choice of using Australian licence suites, including Australian 'choice of law' clauses?*

52. *Under what circumstances does it matter or not matter that users are forced to use a particular licence in order to provide content via a facility?*

<u>Potentially deceptive or otherwise unfair use of public rights licence?</u>

A different problem is what may be the unwitting loss of control of private photographs to commercial re-use by publishing them in some photo repositories. For example, compare the

[150] For example <http://creativecommons.org/license/>
[151] <http://creativecommons.org/licenses/by-nc-nd/2.0/deed.en>

licences that Photobucket and Flikr require their users to give to them. [152] The Photobucket licence allows wide commercial exploitation of the users' content, whereas Flickr merely requires its users[153] to allow Flickr to use their works to publicise its service. If users focus on which commons licence they can use to control use of their work by the public, they may easily overlook the fact that they give the facility operator a far more extensive licence to use their work.

Coates, Suzor and Fitzgerald (2007), in an examination of YouTube and other Web 2.0 platforms, point out that:

> It is important for YouTube users to be aware that, despite retaining all of the ownership rights in their User Submissions, they grant to YouTube and to other Platform Users very broad licences to use their User Submissions. YouTube can use any the User Submissions made by Platform Users in any way, whether commercially or noncommercially, for YouTube's business. For example, YouTube can create a YouTube 'promotional' DVD which reuses User Submissions and which YouTube could market commercially. Platform Users need to understand that they will not be paid any remuneration by YouTube for such use of their User Submissions.
>
> The TOU permit Platform Users to reuse User Submissions within YouTube for non-commercial purposes, but only to the extent permitted by the YouTube functionality. This includes embedding the video into an external website, but does not currently include downloading or remixing the material (although it may at some point in the future).

Questions that a Public Domain Review should ask include:

53. *Are UGC facility users aware that some facility operators are collecting their own proprietary rights over vast amounts of UGC?*

54. *Are UGC facility users aware that other users sometimes obtain rights to use their content?*

55. *What evidence is there that unfair terms are being imposed on the use of UGC facilities?*

These issues can arise with many types of content, and are likely to increasingly do so as the uses increase of both public rights licences and websites involving user-provided content. However, they will arise most frequently with User Generated Content (UGC) facilities, where content provision (and thus intellectual property licensing) occurs in millions of separate transactions. This is possibly a scale of IP transactions which has never previously occurred. As the vast revenue-generation potential of sites such as Flickr or YouTube show, the relationship between such public rights licensing and innovation is very close. Any review of Australia's public domain must therefore keep User Generated Content within its sights, both in relation to its innovation potential, and its potential for misuse of users.

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[152] 'Your licence to use Photobucket' at <http://photobucket.com/terms>

[153] See cl 9 at <http://www.flickr.com/terms.gne>

7. Maximising value of free & open source software (FOSS)

7.1. Value of FOSS to Australia

Many examples of the contributions of Australians to the development of Free and/or Open Source Software (FOSS[154]), and the innovation that has resulted from those contributions, have been given in Part 1.2. Many more could have been included.

The ongoing evolution of FOSS, such as that licensed under the General Public Licence (GPL), has demonstrated a vitality and creativity that 'closed' or proprietary software has sometimes struggled to match. Some FOSS software is commercial and some is not. Despite this, the community and business organisations that support FOSS development show a remarkable integration and respect for each other's capacity to contribute notwithstanding the great range of sizes (from individuals to global giants) and the business models they embody (from loose groups of colleagues contributing to joint projects for a variety of motives to large profit-oriented businesses).

FOSS is in many ways the most established and mature example of the operation of a commons-based production system in a global commercial environment. Dating in practical effect from the early 1990s, it has approximately a decade more historical evidence demonstrating how it works in the real world than the more recent forms of 'Open Content' licensing. As such, there is potential for fruitful comparative analysis, and there may also be further evolved indications of the sorts of problems that these paradigms experience in widespread practical adoption with real business models, problems that may warrant various forms of support or accommodation if we are to retain the maximum innovation benefit from this model. Many benefits are claimed for software developed under this model, particularly for governments seeking multiple suppliers, low initial investment, limited 'lock-in', access to free or cheap utilities, and limited or no licensing costs for large implementations. There may be a variety of impediments to the realization of these potential benefits.

This is important to Australia for a number of reasons. Due to our small market size and exposure to the products and services of almost every national and international IT industry, we have not yet developed a home-grown global scale IT company or established global industry standards, however we do we have many micro- and small-to-medium IT businesses and experts, capable of contributing to the leading edge of global-scale projects.[155]

Such smaller contributors depend, more than larger players, on access to a range of licencing models, and low cost compatible tools to use in providing competitive services. A key feature is the ready customisability of such software and software models. This flexibility aligns well with the need to customise generic products for the special needs of specific Australian businesses or groups thereof, especially small-to-medium entrerprises (SMEs), who would otherwise often be prevented by cost considerations from tailoring their tools to their requirements. Such tailoring can contribute significantly to productivity and international competitiveness by enabling local businesses to adapt

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[154] Also used as 'F/LOSS' if you accommodate the alternative latin spelling of Free as 'Libre' – I will use 'FOSS'.

[155] Commentators have of course noted the contradictory small country examples global market players from Philips in the Netherlands, Nokia in Finland, and Ireland in general (although Ireland may be a consequence of tax treatment). While there are such encouraging examples demonstrating the potential global product capacity of skill-intensive small economies, they appear to be the exception rather than the rule.

software to their evolving business processes, rather than be constrained to adapt and limit those processes to match relatively inflexible generic software.

There are also substantial initiatives in, for example, the education sector[156] . It increasingly benefit from low-cost compatible tools which can be easily customised. For instance, a project in the US tertiary sector to provide open source accounting and other bespoke software products for that sector, specifically because the education sector, or particular members of it, are not 'big enough' to influence existing software vendors to meet education's needs.[157]

7.2. Usage of FOSS licences

It was until recently difficult to estimate the extent of usage of each type of FOSS licence, because of the lack of linkage between the code which is licenced and the licence itself, and because the usual search engines did not facilitate such searches (Bildstein, 2007). However, the release of the Google Code Search facility[158] in 2007 has made one type of estimate possible. Google crawls and makes searchable as much publicly accessible source code as they can find. Google Code Search finds a total of approximately 18 million FOSS licences worldwide, of which over 17 million are accounted for by the following five licences (in order of popularity), plus disclaimers (similar to public domain dedications): 8.9 M (gpl); 4,6 M (lgpl); 3.1 M (bsd); 0.9 M (mit); and 0.1 M (cpl)[159]. The remaining licences found accounted for 300 or less software items each[160]. The words in parentheses are the licence names Google Code Search uses[161].

The list is not very surprising, indicating that the General Public Licence (GPL)[162], with nearly 9 million licensing instances on the web, is by far the most popular open source licence. It is followed by the 4.6 million instances of the Lesser GPL (LGPL), the difference being that 'using the Lesser GPL permits use of the [software] library in proprietary programs; using the ordinary GPL for a library makes it available only for free programs'[163]. The fact that the GPL accounts for nearly 50% of all FOSS licensing worldwide makes it clear that it is a significant question whether that licence is enforceable at law, even if adherence to its norms are primarily social rather than enforced. These statistics do not distinguish between GPLv2 and the recently-introduced GPLv3, which may have significant differences in terms of validity in some countries, as discussed below.

These figures are global, and it is not possible at this stage to estimate which licences are most commonly used in Australia[164], either by software developers writing new programs and choosing which licence to use, or by those using existing FOSS software, or those developers modifying existing FOSS software. Software is much more global in its use than is open content which is sometimes of much more parochial interest. There are no reasons I am aware of why the Australian

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156 See for a detailed survey, see BECTA (2005).

157 See for example CalConnect's 'Calendaring and Scheduling' projects at <http://www.calconnect.org/urls.shtml>, and Cox (2008) which describes a 'group of U.S. universities … blazing a new path in open source software … building a set of enterprise applications – the big, important, mission-critical ones that have long been the exclusive domain of [large proprietary] software companies.'

158 <http://www.google.com/codesearch>

159 Estimates by Bildstein, 24 April 2008, blog post 'Quantifying open software using Google Code Search' at <http://www.cyberlawcentre.org/unlocking-ip/blog/2008/04/quantifying-open-software-using-google.html>; these estimates have varied widely over a number of days, and these are the lower figures obtained.

160 See blog post, ibid

161 The formal names in the list (in order) are found at <http://www.google.com/codesearch/advanced_code_search?hl=en>

162 <http://www.gnu.org/licenses/gpl.html>

163 <http://www.gnu.org/licenses/why-not-lgpl.html>

164 Google Code Search does not search code by the websites on which it was located, so it is not possible to use measures of Australian location like a search for 'site:au'.

percentages of use would differ markedly from the global pattern, but it is possible that there are some factors in the history of Australian software development that may indicate this.

Quantity of licence use is not the only indicator of importance. Certain licences may be relied upon in various 'mission critical' aspects of the economy or of government, and the validity of those licences might not be reflected in how commonly they are used.

56. *Which free and open source software licences are most commonly used in Australia by both developers and users?*
57. *For which free and open source software licences is enforceability under Australian law of greatest economic and social importance?*

7.3. Validity and enforcement of FOSS licences

The FOSS model has in practice been widely adopted and integrated into substantial investment streams[165], which indicates some level of confidence in its validity and enforceability. Nevertheless, questions persist about the enforceability of the terms of some of the main licences, such as the General Public Licence (GPL), similar to some of the issues already discussed in relation to CC licences. There are also separate issues of the interaction of these licences with the patent system, and issues concerning the use of one 'global' set of terminology, in contrast with the Creative Commons approach of 'porting' licences adapted to the legal terminology of a country like Australia. As discussed in reference to open content licences, there is more likelihood of viral licences being held to involve consideration than those which are non-viral.

The relatively low level of litigation, both globally and in the Australian jurisdiction, has not yet produced any significant case law on the questions of validity and enforceability. For instance, the basis on which voluntary licences to the world are enforceable – as a contract, or as a defence to infringement, or under some other mechanism – is still untested, at least in jurisdictions like Australia.

Fitzgerald and Suzor (2005: Part V B (footnotes omitted)) present a case for the enforceability of the GPL which is based in part on its being enforceable at law in various ways, and in part on their being a vigorous developer community in relation to most FOSS which will use informal pressure to ensure that licence terms are observed.

> There is considerable debate over the enforceability of the GPL and whether it is to be construed as a licence or a contract.[116] Specifically, if it is a contract, is there valid consideration to create an enforceable contract? On the other hand, if it is considered to be a copyright licence, is it possible to enforce the requirements that users distribute any derivative works under equivalent terms? Ben Giles argues that since the only promise that a free software user makes is to redistribute under the GPL if and only if they choose to distribute a derivative work, that promise is not sufficient and there is no consideration to support a valid contract.[117] This argument rests on the doctrine of illusory consideration, which means that promises that are only to be carried out at the promisor's discretion cannot create a binding contract.[118] There has been no significant interpretation or modern restatement of this doctrine in Australian law. Arguably, due to significant changes to the way in which parties do business online, the doctrine has lost some relevance in recent years.
>
> In contrast, Moglen suggests that the GPL is a copyright licence, not a contract: '[l]icenses are not contracts: the work's user is obliged to remain within the bounds of the license not because she voluntarily promised, but because she doesn't have any right to act at all except as the license permits.'[119] The exclusive rights of the copyright owner can be used to restrict reproduction, making a derivative work and distributing the software, and any user who does these things must do so in accordance with the terms of

[165] This has been suggested as evidence that there are in practice few serious matters that are uncertain enough to support litigation, but it can equally indicate that the financial stakes have not yet been high enough.

> the licence.[120] Any obligations in the GPL that purport to do more than this will need to be supported by contractual consideration.
>
> As yet, there has been no significant litigation concerning the enforceability and classification of the GPL, though in 2004 the Munich District Court issued a preliminary injunction against Sitecom Deutschland GmbH for alleged infringement of the GPL.[121] Moglen suggests that 'there have been no such controversies because nobody thinks they're going to win them'.[122] Maureen O'Sullivan notes that the threat of damage to a firm's reputation from the watchful open source community, as well as the possibility of a lengthy court case, has been successful over the last decade in ensuring that firms comply with the terms of the GPL.[123] It thus seems clear that even though the GPL has not been tested in court, questions about its technical legal enforceability are not barriers to its widespread use, because substantial compliance with its terms can be expected to continue well into the foreseeable future.
>
> The other concern about free software licences is that a gratuitous licence can normally be revoked at will.[124] This means that, in the case where one single entity controls a significant portion of the copyright in the source code for a free software package, that entity may be able to terminate the licence and users will no longer be entitled to copy or redistribute the software. Jeremy Malcolm calls this 'one of the best kept secrets of the open source movement',[125] and notes the potential danger that an upstream developer could revoke the licence. This would cause all derived projects to be rendered invalid to the extent that they are derived from the original.[126] In practical terms, however, it would be hard for any single licensor to revoke a licence partially supporting a program — especially one which forms part of a large, distributed project.
>
> In the event that a licence is revoked, it is likely that the doctrine of estoppel would prevent the copyright owner from asserting his or her rights. Equitable estoppel has been developed to prevent a person from unconscionably denying an expectation where they induce in another party (here the licensee) an assumption that a particular legal relationship exists between them, and that party subsequently acts, reasonably, in reliance upon that expectation.[127] If a licensor releases software under a free software licence, they are essentially inviting others to perpetually use, reproduce, modify and distribute that software. If another person does in fact make use of the software, and the original licensor purports to revoke the licence (a departure clearly to that person's detriment), the doctrine of equitable estoppel would arguably prevent the licensor from denying that the licence could not be revoked.[128] Again, to reach this stage in legal proceedings would be quite rare. While revocation may be technically possible, it is unlikely to occur in the face of public opposition and a vigilant open source community. Regardless, as has been demonstrated over the last 12 months by The SCO Group Inc v International Business Machines Corp litigation,[129] the developer community is more than willing to replace any code for which the licence has been revoked or that otherwise infringes copyright. For these reasons, the issue of revocability is much more a theoretical than a practical concern.

The German organisation *gpl-violations.org* claims to have successfully taken action since 2004 in over 100 cases involving GPL violations, with total 'legal success, either in-court or out of court'**.** Some GPL software developers have transferred rights in their software to gpl-violations, in order to enable it to take action[166]**.** Some details of many of these examples of enforcement are available on their website. However, all of the enforcement actions were against German companies and under German law, and they have only in November 2007 commenced their first action outside Germany (in France)[167].

The most significant decision is probably that of the Frankfurt District Court judgment in the *D-Link Case* (Welte v Deutschland GmbH), extracts of which (in translation) follow[168]. The Court held the GPL valid in most respects, under German law, as the basis of deciding the case:

> Sending the cease-and-desist letter was justified as Plaintiff is entitled to make the claims asserted therein. By distributing the data storage unit, in the firmware of which the programs mtd, initrd and msdosfs are included, without complying with the provisions of the GPL, Defendant violated the copyrights in the programs, as a result of which Plaintiff, who is entitled to exercise the copyrights, could assert a claim to cease-and-desist against Defendant (Section 97 of the German Copyright Act (UrhG))….

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166 <http://gpl-violations.org/about.html#history>

167 <http://gpl-violations.org/news/20071120-freebox.html>

168 Availabel at <http://www.jbb.de/judgment_dc_frankfurt_gpl.pdf>

> The GPL applies to the legal relationship between the authors and Defendant. The three software programs are undisputedly licensed only under the terms of the GPL. In the case of free software it is to be assumed that the copyright holder by putting the program under the GPL makes an offer to a determinable or definite circle of people and that this offer is accepted by users [of the software] through an act that requires consent under copyright law; in this respect, it can be assumed that the copyright holder enters into this legal relationship without receiving an actual declaration of acceptance [from the users] (Section 151 of the German Civil Code (BGB)).
>
> In addition, if the GPL were not sufficient to form a legal relationship with Plaintiff, Defendant would not have any right to copy, distribute or modify the three programs, such that a copyright infringement by the Defendant would have taken place. In particular, the conditions of the GPL can in no case be interpreted to contain a waiver of legal positions afforded by copyright law. The GPL precisely stipulates that the freedom to use, modify and distribute the corresponding software initially afforded by way of a grant of a non-exclusive license to everyone is automatically terminated upon a violation of the GPL (cf. Dreier/Schulze, § 69a, Rz.11)
>
> The conditions of the license granted under the GPL must be regarded as standard terms and conditions that are subject to Sections 305 et seq. of the German Civil Code (BGB).
>
> Since the conditions of the license granted by the GPL are easily available on the Internet, they were without a doubt incorporated into the contractual relationship between the authors and Defendant (Section 305, Subsection 2, No.2 of the German Civil Code (BGB)).
>
> Pursuant to Sec. 4 of the GPL the rights under the GPL are terminated and revert to the author if the user violates the obligations set forth in Sec. 2 of the GPL. In particular, these obligations provide that the user has to publish a disclaimer of warranty on each copy [of the program], make reference to the GPL, accompany the program with the license text, and provide the source code of the program. These rules do not unduly discriminate the user and are therefore not invalid pursuant to Section 307, Subsection 2 No. 1 of the German Civil Code (BGB).

The Software Freedom Law Center in the USA similarly provides legal representation and other law-related services to protect and advance FOSS. Its most recent success is settlement of a case against Verizon Communications Inc. for claimed GPL violations[169].

However, the Court's decision in the *D-Link Case* was that the GPL was not valid under German law in some respects, and the decision illustrates that exactly how the GPL will operate will depend on a complex interaction with the laws of each country.

> The obligations [under the GPL] are not a valid limitation of the right to use under Section 31, Subsection 1, Sentence 2 of the German Copyright Act (UrhG), since the possibility to split up into different forms of use requires a sufficiently distinguishable, economically-technically uniform and autonomous form of use from the point of view of the relevant public (BGH GRUR 2001, p. 153, 154 – OEM Version). Section 2 of the GPL does not fulfil this requirement.
>
> The regulations of the GPL must be understood to provide that the grant of the non-exclusive right of use under the GPL is subject to the condition subsequent (Section 158 of the German Civil Code (BGB)) that the licensee must not fail to comply with the terms of the agreement. Upon occurrence of the condition the license [granted under the GPL] is terminated.
>
> This arrangement is not invalid pursuant to Section 307, Subsection 2, No. 1 of the German Civil Code (BGB) and does not, in particular, circumvent Section 31 of the German Copyright Act (UrhG)….

The question 'Is the GPL valid in all respects under the law of country X?' does not seem to be a trivial enquiry, though there does not yet seem to be any evidence of significant problems arising in any legal systems. If this is so, there could be benefit in a detailed analysis to establish whether any legislative changes could assist in ensuring that the GPL and perhaps other FOSS licences have the greatest possible compatibility with Australian law. Another reason why this might be beneficial is that, unlike the Creative Commons licences, there is no 'porting' of the GPL to the Australian legal

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169 < http://www.softwarefreedom.org/news/2008/mar/17/busybox-verizon/>

system, it is a 'one size fits all' jurisdictionally universal licence. While there were quite a few terms and concepts in GPLv2 which seemed to be primarily derived from the US legal systems, a considerable effort was made with GPLv3 to ensure that its terminology was more neutral, based on the terms used in international agreements where possible, and able to take its meaning in some parts from the jurisdiction in which it was being applied. Both FOSS licensed under GPLv2 and FOSS licensed under GPLv3 are likely to co-exist for some time.

Since uncertainty can equate to perceptions of commercial or legal risk, even when not founded in any real or demonstrated flaw, this factor may prompt unnecessary reluctance to use the FOSS model in otherwise appropriate situations, limiting the development of this aspect of the public domain.

58. *Are there any reasons to think that GPL v2 or GPL v3 (or other significant FOSS licence) are not enforceable under Australian law? Do any unresolved questions about enforceability hinder its adoption in appropriate situations?*

59. *Could changes to the* Copyright Act *remedy any potential problems?*

7.4. Australian government use of FOSS

Governments are also beginning to explore the appropriate application of open source models to control, IP and cost containment issues. It is generally accepted that one function of government is to support or provide infrastructure. Supporting FOSS can be seen as helping to provide software and information system infrastructure for business and the community. FOSS is often substantially self-financing, compared with physical infrastructure's steep investment requirements, but there may also be convenient means for strengthening the foundations for this critical national capability which governments could adopt. There are however still reports of direct and indirect biases against the use of FOSS models in some Australian government practice.[170]

60. *Is there bias against the use of FOSS in Australian government-funded work? If so, what legal changes (if any) are needed to reduce this?*

Some government agencies appear reluctant to assess the most effective means for maximising the overall society- and economy-wide benefit of software development or customisation work done on their behalf. They tend to simply and uncritically revert to an 'all rights reserved' copyright position when it comes to the licensing of such assets. This is reportedly the case even where there is little evidence of any real capacity or intent to extract direct commercial value from works protected and locked up using such a model, and where there may be potential, with few risks or further costs, to contribute to FOSS or similar projects in a way which increases the net value of the project. [171]

61. *Should Australian government agencies develop policies that, where software is developed with public funding, it should be FOSS licensed (not necessarily to the exclusion of other licensing)?*

62. *Is there need for any legislative or regulatory support for such a change?*

Many public institutions (and private ones, although this is somewhat outside the scope of this submission) have more or less rigid models for intellectual property 'protection' or 'exploitation' which do not readily accommodate the FOSS alternative to traditional 'commercialisation' models,

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[170] Brendan Scott's Weblog 'FLOSS Best Practice for Business and Government (Draft, April 2008)' at <http://brendanscott.wordpress.com/2008/04/24/floss-best-practice-biz-gov-080423/>

[171] *[Insert examples and references]*

even where such traditional models do not in practice create any significant net benefit beyond the work's initial use by licensing or otherwise, due to the nature of the work or the situation of its use.

> 63. *Does the FOSS model require reconsideration of the intellectual property policies and practices of Australian public institutions?*
>
> 64. *Are policy or statutory changes needed to recognize FOSS models as appropriate goals of various types of sponsored research and development?*

Open Source Industry Australia Limited (OSIA) in its submission to the Innovation review has put forward 18 recommendations for government and industry actions which could support innovation through the use of free and open source software (FOSS), and though open standards. Many of the matters raised by OSIA are relevant to a general law reform enquiry concerning Australia's public domain.

> 65. *Which of the other proposals concerning FOSS development in Australia put forward by Open Source Industry Australia Limited (OSIA) in its submission to the Innovation review should be adopted by changes to government policies and practices?*

7.5. Financial models and tax incentives

The FOSS model has an underlying reliance on 'free' input[172] particularly from programmers and distributors, often in a voluntary capacity (Breach, 2007). However, there are increasingly significant contributions from global scale corporations (eg IBM), and the hybrid business models using FOSS involve a number of purely profit-oriented approaches. These inputs contribute significantly to the supply of 'free' public goods which can be used for commercial purposes. As FOSS is arguably a new form of industry organisation, it may be that current laws do not recognise some of the business models which support it, as they are sometimes counter-intuitive.

Open Source Industry Australia (OSIA) argues that many metrics do not adequately value FOSS because it 'generates value by providing an opportunity to use or by producing a cost saving'[173], not through sale of a product.

A Public Domain Review of the sort proposed here may need to ask, in order to support this new form of innovation:

> 66. *Are the 'voluntary' contributions of FOSS authors into a form of commons adequately recognized by laws such as taxation and accounting?*
>
> 67. *Are there unintended detriments suffered by FOSS developers or others using FOSS models as a result of inadequate tax or other treatment of the FOSS community and industry model which could be ameliorated by legal changes?*

At present donations to support FOSS are unlikely to attract tax deductible status as they may not fit within the current model for benevolent works. Yet there is an argument that FOSS creates value which is directly useful for persons and organisations of limited financial resources, achieving a similar social object to that which in other domains involves complex taxation, administration, redistribution and other friction-laden welfare activities of government. Accordingly, there may be a case for better recognition of FOSS by the taxation system.

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[172] In both GPL author Richard Stallman's meanings of 'free' as in speech and 'free' as in beer. See 'The Free Software Definition', <http://www.gnu.org/philosophy/free-sw.html>

[173] Brendan Scott's Weblog 'FLOSS Best Practice for Business and Government (Draft, April 2008)' at <http://brendanscott.wordpress.com/2008/04/24/floss-best-practice-biz-gov-080423/>

Open Source Software Foundation repositories are now emerging in other countries, as vehicles which can, through risk-sharing and economies of scale, address some of the problems for small developers such as litigation risk and insurance.

68. *Is there a need for local taxation law reform to enable the operation of Open Source Software Foundation repositories?*

69. *Should donations to such repositories, or distribution mechanisms, be tax deductible?*

8. Moving toward open standards[174]

Standards are an important part of the public domain. Where they exist, anyone must be able to follow them without breaching copyright, or other intellectual property. For example, if a standard includes a two dimensional diagram, a person who makes a three dimensional reproduction of that diagram in order to implement the standard in electrical wiring or some other tangible medium must not be considered to breach copyright. This aspect is of new signficance with 'covenant not to sue' in relation to patent infrigement risks, as mentioned below.

The standards developed and issued by organisations such as Standards Australia, even though they are protected by copyright and payment must be made for each copy of the standard, could be considered to be technically part of the public domain (in the broad usage of the term) because everyone is equally entitled to pay a uniform fee in order to obtain a copy of the standard[175]. and to implement it (including any limited use of authors reproduction rights that implementation may involve). These conventional aspects of standards are not my concern here, although it is a legitimate question whether the current Australian processes for the development of standards, and the fact that obtaining standards is sometimes costly, assists innovation.

8.1. Meaning and benefit of 'open standards'

There is some irony in that there does not seems to be any consensus about what is an 'open standard'. According to Wikipedia ('Open standard' entry[176]):

> An open standard is a standard that is publicly available and has various rights to use associated with it.
>
> The terms "open" and "standard" have a wide range of meanings associated with their usage. The term "open" is usually restricted to royalty-free technologies while the term "standard" is sometimes restricted to technologies approved by formalized committees that are open to participation by all interested parties and operate on a consensus basis.
>
> The definitions of the term "open standard" used by academics, the European Union and some of its member governments or parliaments such as Denmark, France, and Spain preclude open standards requiring fees for use, as does the Venezuelan Government. On the standard organisation side, the W3C ensures that its specifications can be implemented on a Royalty-Free (RF) basis.
>
> Many definitions of the term "standard" permit patent holders to impose "reasonable and non-discriminatory" royalty fees and other licensing terms on implementers and/or users of the standard. For example, the rules for standards published by the major internationally recognized standards bodies such as the IETF, ISO, and IEC permit their Standards to contain specifications whose implementation will require payment of patent licensing fees (none of these organizations states that they grant "open standards", but only "standards"). ITU has a definition of "open standard" that allows "reasonable and non-discriminatory" licensing.
>
> The term "open standard" is sometimes coupled with "open source" with the idea that a standard is not truly open if it does not have a complete free/open source reference implementation available. [2]
>
> Open standards which specify formats are sometimes referred to as open formats.
>
> Many specifications that are sometimes referred to as standards are proprietary and only available under restrictive contract terms (if they can be obtained at all) from the organization that owns the copyright on the specification. As such these specifications are not considered to be fully Open.

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[174] David Vaile has contributed to the content throughout this Part.

[175] There could be definitional arguments about whether the fees charged by standards bodies are independently set.

[176] <http://en.wikipedia.org/wiki/Open_standards>

There is significant debate about what constitutes an 'Open Standard.' Various definitions of 'open standards' state that they are publicly available (for free or a nominal charge), developed and maintained by a collaborative and consensus-driven process, and affirmed by a standards body. Definitions put forward by the ITU[177], the Commonwealth of Massachusetts[178], and the European Commission[179] are consistent with this approach.

What is an 'open standard' is as much about the process by which it developed, modified and maintained, as it is about the technical characteristics of the output of the standards process. Lea-Shannon (2006) supports Sutor's argument that whether a standard is 'open' depends on the answer to these 5 questions: '1. How is that standard created?; 2. How is it maintained after Version 1.0?; 3. What is the cost of getting a copy of the standard?; 4. Are there restrictions on how I can implement the standard?; and 5. Can I use just a part of the standard or extend it and still claim compliance?'.

Other formulations of the issues include the degree to which there is a broad entitlement for anyone to implement a standard without a third party's permission, or without concern for breaching intellectual property rights in copyright, patent or otherwise; the degree to which the governance process of development of the standard has been fair, transparent and open to participation by all with a potential interest; and the degree to which the standard builds on and integrates with other 'open' standards. There are clearly some standards which fall short of one or another of these criteria, yet are seen as a 'standard'. We do not attempt to resolve these debates here; most of the points raised below apply to a number of possible formulations.

The controversies surrounding both the substantive proposed OOXML standard and the international process for consideration of ISO-level ratification as a formal standard provide a recent illustration of both how hotly recognition of such a standard is contested, and also the potential for limitations in the perceived fairness and open-ness of the process[180] to support objections about the open-ness of the resulting standard. These controversies are beyond the scope of this paper.[181]

70. *Would there be a benefit in an Australian definition of (or standard for) what is an open standard, to better enable adoption of open standards by Australian organisations?*

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177 "Open Standards: Specifications for systems that are publicly available and are developed by an open community and affirmed by a standards body.": Commonwealth of Massachusetts 'Enterprise Open Standards Policy', effective 13 January 2004, available at <http://www.mass.gov/Aitd/docs/policies_standards/openstandards.pdf>

178 "Open Standards" are standards made available to the general public and are developed (or approved) and maintained via a collaborative and consensus driven process. "Open Standards" facilitate interoperability and data exchange among different products or services and are intended for widespread adoption: International Telecommunications Union, 'Definition of "Open Standards"', endorsed 11 November 2005, available at <http://www.itu.int/ITU-T/othergroups/ipr-adhoc/openstandards.html>

179 The following are the minimal characteristics that a specification and its attendant documents must have in order to be considered an open standard: The standard is adopted and will be maintained by a not-for-profit organisation, and its ongoing development occurs on the basis of an open decision-making procedure available to all interested parties (consensus or majority decision etc.).; The standard has been published and the standard specification document is available either freely or at a nominal charge. It must be permissible to all to copy, distribute and use it for no fee or at a nominal fee.; The intellectual property - i.e. patents possibly present - of (parts of) the standard is made irrevocably available on a royaltyfree basis'; There are no constraints on the re-use of the standard. – European eGovernment Services, Version 1.0', available at <http://europa.eu.int/idabc/en/document/3761>

180 See Standards Australia's consideration of the proposed Draft International Standard (DIS) ISO/IEC 29500, Information technology - Office Open XML file formats standard in 2007 and 2008, which resulted in two Australian decisions to abstain from the international ratification votes for want of consensus.

181 See references provided for the symposium at UNSW's Cyberspace Law and Policy Centre in December 2007 at <http://cyberlawcentre.org/2007/ooxml/> for an introduction to some of the debates.

There is general recognition that most variants of the concept of 'Open Standard' offer significant value to a wide range of stakeholders, in limiting costs of entry and participation in the markets for various products and services. There is also general, but not universal, recognition of their capacity for improving the financial and practical viability of competition and innovation in such markets.

Much innovation on the Internet is based on open standards. The World-Wide-Web Consortium (W3C) is one of the main sources of open standards. Its goal is interoperability, which has intrinsic and fundamental value in a number of domains, including disability and other access, competitive markets, reduced costs for small participants, simplicity as a goal in itself, and synergy with other W3C goals for a collaborative development model for all Internet capabilities. The other Internet standards system, upon which most of the modern cyberspace platform is built, is the RFC (Request for Comment) de facto collaboratively developed standards collection of over 5,000 specifications describing protocols.[182]

8.2. Australian examples of open standards

There are some Australian illustrations of the way 'Open Standards' can support a variety of benefits, and how these often offer critical support to innovation.

- *Australian federal agencies,* including HREOC,[183] DCITA,[184] AGIMO,[185] and DBCDE[186]. have over the last decade implemented locally specific requirements based on the web accessibility standards and guidelines of W3C. Working to minimise discrimination against people with disabilities includes offering access services in such a way that reasonable requirements for supporting special needs are factored into system design[187] even where this is a challenge.[188] In meeting these 'special' needs, the needs of a much broader range of users, including those potentially seeking to re-purpose or re-use what is provided, are also met more effectively than otherwise. These standards developments focus largely on the values of interoperability, the intrinsic benefits of implementation of other open standards, and the related task of ensuring backwards and forwards compatibility. The prudence of such an approach was illustrated in *Maguire v SOCOG*[189] where the Human Rights and Equal Opportunity Commission (HREOC) and the Federal Court upheld a complaint concerning SOCOG's website. Mr Maguire was blind and used 'web to Braille' technology to access the Internet. It works best when websites are formatted to comply with the *Web Content Accessibility Guidelines*[190] developed by the W3C[191]. Meeting the accessibility needs of specific groups, via open standards, supports a much wider range of other private and public values, including those of collaboration and re-use of patterns, models and tools developed in related areas. Both are important for innovation.

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[182] IETF, *RFC Index*, 05/07/2008 <http://www.ietf.org/iesg/1rfc_index.txt>

[183] HREOC, World Wide Web Access: *Disability Discrimination Act* Advisory Notes, <http://www.hreoc.gov.au/disability_rights/standards/www_3/www_3.html>

[184] Held at <http://archive.dcita.gov.au/2002/05/accessability_program>

[185] AGIMO, 'Online Information Service Obligations', <http://www.agimo.gov.au/information/oiso/>, page last updated 15 June 2007

[186] <http://www.dbcde.gov.au/>

[187] HREOC, 'Don't judge what I can do by what you think I can't: Ten years of achievements using Australia's *Disability Discrimination Act*', March 2003 <http://www.humanrights.gov.au/disability_rights/dont_judge.htm>

[188] Glenda Beecher, 'Disability Standards: The Challenge Of Achieving Compliance With The *Disability Discrimination Act*,' [2005] *AJHR* 5 , < http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/AJHR/2005/5.html?query=maguire w/5 socog >

[189] *Maguire v Sydney Organising Committee for the Olympic Games (SOCOG)* [2000] FCA 1112

[190] Web Content Accessibility Guidelines 1.0 (WCAG) <http://www.w3.org/TR/WCAG10>

[191] World Wide Web Consortium "W3C" <http://www.w3.org>

- *National Archives* is a vigorous participant in discussions about OOXML (above) and other standards. They are acutely aware of the problems created by closed standards and technological platform obsolescence, and consider that 'open document standards are crucial to guarding against software, hardware and operating system obsolescence'[192]. However, the issues raised by NAA do not relate solely to historical records from the perspective of far-future access. The pace of technological change is such that innovation is hindered by the potential loss of access to information over a relatively small time scale, in some cases less than a decade.

- *Macquarie E-learning Centre of Excellence* has been involved in attempts to enable shared development and access regimes for educational material, typically broken into small re-usable components such as learning objects. This is a core function in building future platforms for education and innovation. They have long championed the difficulties of complexity at all levels of this process, and the central role that open standards have in the solutions. [193]

8.3. Open document standards and government

Many potential adverse consequences are claimed to result from closed and/or proprietary 'industry standards' for information-related systems such as digital file formats for data in domains including documents, audio and visual packages, geospatial, bioinformatics and archiving applications. These concerns include vendor support in the long term, lock-in to a single or limited number of suppliers, and limited capacity of organisations to develop skill sets for a wide range of standards. There are also dangers of obsolescence resulting from the long time frames in which digital records, data and works need to be stored (by comparison to some physical media, which can be read by humans and so remain readable indefinitely given controlled conditions).

More recently there have been various moves towards adoption and implementation of more 'open' standards in information-related systems, especially by means of the international standards-making process. This has been controversial in the case of the Office Open XML standard, approved in March 2008 after several years of debate[194] . The Internet community, through its *de facto* standards starting as Requests for Comment (RFCs), offers an alternative model of pragmatic standards development. It also involves occasional transition into formal ISO standards. Useful lessons may be learned from that experience.

There are competing claims about economic implications of both open and proprietary standards, and reliable evidence may as yet be difficult to obtain. Nevertheless, there is likely to be increased development and adoption of open standards in Australia, so it would be desirable to ensure that our intellectual property system was sufficient to cope with any such developments.

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[192] "Open document standards are crucial to guarding against software, hardware and operating system obsolescence, according to Michael Carden, digital preservation software manager at the National Archives of Australia (NAA). The NAA is responsible for storing government records and archival materials in a range of formats and has formerly relied on what Carden describes as, "boxes and boxes of paper, and cool rooms full of negatives and prints, sound, film and video"": Matthew Overington, 'Open standards key to digital preservation', *ZDnet* AU, 31 March 2006 <http://www.zdnet.com.au/news/software/soa/Open-standards-key-to-digital-preservation/0,130061733,139248913,00.htm>

[193] James Dalziel, 'Building Common Services Infrastructure', Macquarie E-learning Centre of Excellence (MELCOE), presentation at the AICTEC Industry Forum, Sydney, 3 - 4 September 2003, <http://www.melcoe.mq.edu.au/documents/CommonServices.doc>

[194] Yu , Fast and Vaile (2007) – See also the proposed follow on discussion series on licensing for adoption.

An important aspect of the current debates about open standards related to open document standards (or 'open formats') and their use by governments. In 2007 the US State of Massachusetts adopted a policy to migrate to the OpenDocument format by 2007, and the decision was explained thus[195]:

> It should be reasonably obvious for a lay person who looks at the concept of Public Documents that we've got to keep them independent and free forever, because it is an overriding imperative of the American democratic system that we cannot have our public documents locked up in some kind of proprietary format or locked up in a format that you need to get a proprietary system to use some time in the future.
>
> So, one of the things that we're incredibly focused on is insuring ... that public records remain independent of underlying systems and applications, insuring their accessibility over very long periods of time. In the IT business a long period of time is about 18 months. In government it's about 300 years, so we have a slightly different perspective.

In Australia various governments have started to consider the implications of open standards[196]. For example, the standards aspects of the *Australian Government Technical Interoperability Framework* Version-2[197] states a preference for open standards:

> The Framework catalogues both open and proprietary standards. Where feasible, preference is given to the deployment of open standards as these require no royalty payments, do no discriminate on the basis of implementation, allow extension, promote reusability, and reduce the risk of technical lock-in and high switching costs.

The South Australian government's ICT Infrastructure Standards 2.3.1 stated that 'Where Government standards are not specified, compliance to Open Systems standards is required'[198]**.** Other State and Territory government policies state a general goal of 'interoperability', but without such stated preference for open standards.

The following questions concerning open standards need to be answered by a Public Domain Review:

71. *Do Australian governments make appropriate use of 'open standards' in Australian government-funded work?*
72. *Should Australian governments have a preference for the use of open standards in Australian government-funded work? What legal changes are needed to support such a policy where it is adopted?*
73. *Are the processes for developing standards, both in Australia and internationally, in areas such as document formats, metadata or other file formats adequate to the task of assessing competing technical, public interest and commercial claims about the benefits or shortcomings of proposed standards?*
74. *If not, do these shortcomings have an impact on the value of the standards so created for purposes of promoting innovation, interoperability and standards compliance?*

8.4. Patent infringement risks

Many proposed open standards involve a 'promise not to sue'[199] those who adopt and implement

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[195] Eric Kriss, Secretary for the Executive Office of the Administration of Finance, cited in Lea-Shannon (2006).

[196] For an overview, see the section 'References – Standards in Government – Australia' <http://olpsc.org/main/?q=node/5> on the OLPSC (Open Legal Practice Standards Collaborative) website

[197] <http://www.agimo.gov.au/publications/2005/04/agtifv2/policies>

[198] Quoted as at 12 March 2006 on the OLPSC website (previous footnote), but the source document is no longer available at its previous location.

[199] or a similar covenant constraining the owners of patents from exercising their normal rights

the standards, even though this may involve using the proposer's patents. The legal issues in the context of the OOXML standard are discussed in Yu, Fast and Vaile (2007), but they reach no firm conclusions beyond reinforcing their hypothesis that 'if there is significant legal uncertainty surrounding the full or partial implementation or use of a standard, then benefits may be offset against cost and risk'.

75. *Are current methods for dealing with the protection of users and developers from patent-related law suits effective and accessible for all parties? If not, how could this aspect be improved?*

76. *What are the implications if there is limited or inadequate protection from this patent infringement risk?*

9. Coexistence of open content and compulsory licences

'Compulsory' or 'statutory' licences under Australia's *Copyright Act* create rights in the public as a whole, or in particular classes of the public, to make use of otherwise proprietary content, on conditions and often for a fee set by the Copyright Tribunal or some other process. This content constitutes one of the largest and most important components of Australia's public domain. Collecting societies administer these compulsory licences, and their practices therefore have a significant impact on the health of Australia's public domain[200].

With the many changes toward the use of open content licences in past decade, particularly with the rise in importance of the Internet, tensions have arisen. This older form of public rights, by which the public use rights of creators in relation to all their works were often administered on their behalf (often via compulsory schemes), now has to co-exist with new forms of public rights whereby creators voluntarily act through open content licences to allow some no-fee uses to be made of particular works. This raises a number of potential problems.

9.1. 'Some rights reserved' from collecting societies?

The membership conditions of some Australian collecting societies have made it difficult for their members to licence any of their works under Creative Commons licences or other licences with public rights.

The Australian Performing Right Association (APRA) requires its members to assign all present and future copyrights to it, and argues that it cannot legally collect fees until this occurs. Ian Oi (in Fitzgerald, 2007:63) explains as follows:

> All APRA's 33,000 members have to assign to APRA all their public performance rights, before APRA can collect the royalties on their behalf. Those 33,000 members include all Australian song writers and composers whose works are applied commercially. That affects a significant proportion of the creators that are already out there and working, and who may wish to participate in the Creative Commons. This is something that APRA members and anyone who potentially wants to become an APRA member will have to be aware of. They will not be in a position to use a Creative Commons licence to license their works, unless they have reached some alternative arrangement.
>
> The wording of the Australian licence accommodates this up to a point, but there is still a danger and a risk for potential APRA members who do not realise what they are doing to potentially get themselves into trouble by trying to license out something that they may have effectively signed away to someone else. This is a follow-up area of work, and the people at APRA have been very good at giving feedback and comments on the effect and the potential interaction with Creative Commons. I look forward to working with them to develop some further commentary and to get some guidance out, and to find easier ways for creators to both work with Creative Commons and to also collect royalties via APRA. That is one area of work that needs to be done: collaboration with collecting societies in Australia and other organisations that are relevant.

[200] For background in addition to the Simpson Report (1995), see the Caslon Analytics pages on collecting societies at <http://www.caslon.com.au/colsocietiesprofile1.htm>

This issue resulted in Creative Commons International unsuccessfully arguing that APRA was involved in anti-competitive conduct (see Creative Commons International, 2005, 2006). The ACCC, in re-authorising APRA's licensing arrangements, commented[201]:

> In its draft decision the ACCC expressed concerns that by generally taking exclusive assignment of its members' rights APRA's arrangements effectively foreclose any realistic prospect of music composers and users dealing directly in most instances.
>
> The ACCC also expressed concerns that APRA's propensity to only offer users licences covering its entire repertoire - irrespective of the needs of the users - eliminates incentives for music composers and users to negotiate performing rights licences other than through it.
>
> In response, APRA modified the arrangements by which it takes assignment of its members rights to make it easier for composers to negotiate rights in respect of their works directly. APRA has also indicated it is prepared to develop alternative licensing arrangements to allow direct dealing between music composers and users where the music user express such an interest.
>
> While the ACCC is encouraged by APRA's response, the utility of these amendments to facilitate direct dealing between music users and rights holders will still be very limited in most cases.

APRA's modified arrangements[202] allow APRA members to require APRA to re-assign rights back to the member using two mechanisms: an opt-out process (allowing one or more of the exclusive rights to be re-assigned to them, over all of their works, and requiring up to six months notice) and a licence-back process (allowing use of a particular work on a one-off basis, in Australia only). Both procedures require the member to indemnify APRA. Neither procedure allows a member to licence an individual work under a Creative Commons licence or provide it via MySpace or iTunes or similar commercially significant channels[203]. Despite these requirements, APRA claims [204] that it 'has had a policy for some time that allows you to [distribute your music files for free from your own website], while reserving your rights to obtain payment from other web uses'.

In the Netherlands and Denmark collecting societies have during 2008 launched trials allowing creators of musical works more flexible methods of promoting their works[205]. APRA states it is discussing such matters with Creative Commons Australia[206],

> The international collecting society community, through CIS AC, is now working on protocols to allow composers to use certain types of CC licences and retain their rights of payment from their collecting society. This is still in the process of drafting and negotiation, to ensure that the commercial rights administered by societies collectively are not undermined by CC licences. APRA is also currently in discussion with CC Australia in line with our international colleagues. We hope that we will be able to offer APRA members the benefit of using CC licences to self-license the use of their work for non-commercial purposes, while retaining the advantage of their APRA membership to license, monitor and collect royalties for the commercial use of their works.

However, APRA's current information page on Creative Commons[207] gives no indication of that and is clearly hostile to its members' option to 'make up their own minds about wanting to give away their works by way of Creative Commons licences'.

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201 ACCC press release 'ACCC re-authorises collective administration of music performing rights by APRA' at < http://www.accc.gov.au/content/index.phtml/itemId/726809>

202 APRA/AMCOs 'Opt Out and Licence Back' (brochure) at <http://www.apra.com.au/writers/downloads/OOLB_OptOutAndLicenceBack.pdf>

203 Jessica Coates, Creative Commons Australia (personal communication)

204 Scot Morris, Director International Relations, APRA 'International Notes', APRAP Newsletter, December 2005 at <http://www.apra.com.au/publications/APRAP_Au/2005/05_Dec.pd>

205 Jessica Coates, Creative Commons Australia (personal communication)

206 Kirti Jacobs & Scot Morris APRA|AMCOS 'Creative Commons' APRAP Newsletter, December 2007, at <http://www.apra.com.au/publications/APRAP_Au/2007/Dec07.pdf>

The ACCC is now more involved in copyright matters and can become a party to hearings before the Copyright Tribunal. It has indicated that it considers arrangements which prevent 'direct negotiation between copyright owners and users' can indicate anti-competitive detriment (Willett, 2007):

> The ACCC considers the anti-competitive detriment from a collecting society's arrangements will be more limited where:
> • the arrangements do not prevent direct negotiation between copyright owners and users;
> • the output or licensing arrangements are as unrestrictive as possible and strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate;
>
> • licence fees and conditions for use of copyright are clear and readily available to users; and
> • the arrangements allow for alternative dispute resolution processes where appropriate.

As yet these newly-enunciated principles have not been applied to the claim that some collecting society practices unduly prevent direct licensing that includes public rights elements.

Some other compulsory licences and collecting societies do not impose such restrictions on their members. VISCOPY provides 'A guide and checklist for VISCOPY members on WAIVING FEES for the use of your work . . . . .' (VISCOPY, undated). It makes it clear that its members may 'decide to grant a free licence', but the checklist's fourteen questions are so detailed and suggest so many restrictions that it would never be possible for a VISCOPY member to answer 'Yes' to all fourteen. in relation to a standard-form open content licence such as the most restrictive Creative Commons Licence (nc-nd) or the AEShareNet 'Free for Education' licence. This may only mean that VISCOPY is stating that it is prudent for their members to obtain its advice before they consider using such licences, but its Question 11 does seem to indicate a position that its members should never allow their works to be used free for educational purposes:

> 11. *Are your rights to receive income from the use of your work under statutory licences (eg. educational and government use licences) preserved?* You can use the following wording for this purpose:
>
> "Nothing in this agreement will prevent the Artist/Licensor [or whatever term is used to describe you] from being entitled to receive payment for the use of his/her work under statutory licences in force in Australia or under the law of any other country, including licences for educational and government use, and the Publisher/Producer/Licensee [or whatever term is used to describe the other party] will make no claim to such payments."

Are collecting societies providing reasonable means by which creators can choose to use open content licensing? If they are not, then as with the creation of greater certainty for public domain dedications and commons licences, the question needs to be asked whether the *Copyright Act* (or the code of conduct of the collecting society) should both create a right to do so (where one is needed) and to specify an appropriate formality by which it may be exercised.

Questions which a review of the role of public rights in Australian law would need to ask include:

77. *What are the key differences in the membership conditions of Australian collecting societies insofar as their effect on their members use of voluntary commons licences are concerned?*

78. *Is a need for some or all collecting society members to have greater rights to opt-out from collecting society coverage for (a) some works or (b) some uses?*

79. *Should any such changes be through the Copyright Act or the code of conduct of the collecting societies?*

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[207] <http://www.apra.com.au/writers/forms_and_guidelines/creative_commons.asp>

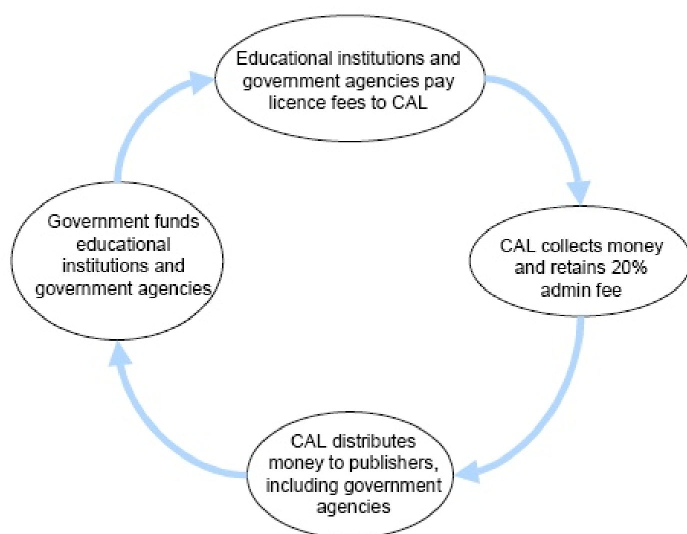
9.2. Are collecting societies charging for the public domain?

Where creators do choose to use open content licensing, they often do not wish fees to be collected for uses of their work that fall within the licence terms. One of the clearest examples is the AEShareNet 'Free for Education' (FfE) licence, where it is most unlikely that any user of that licence would want CAL to be collecting fees from any educational institutions for the use of their work.

The Spanish case involving a collecting society attempting to claim fees for public domain works being played in a club (discussed in Part 7.1) is an example of these issues starting to arise in practice, even in the Courts. Are Australian collecting societies involved in such practices?

VISCOPY states[208] that it will not collect fees on works that its members 'are licensing for free', and asks them to notify it if they are using such licences:

> 'If you grant a free licence you need to do two things:
> 1. Make sure the licence agreement is in writing
> 2. Make sure the agreement is fair and appropriate;
> and then let VISCOPY know which works and what purposes you are licensing for free, so that we will not license the use of those works for a fee – we have a form that you can use for this purpose which has been enclosed.'



VISCOPY states it will not collect licence fees on such works if they are informed by their members. The other question that has to be asked of each collecting society is whether they have adequate practices to otherwise identify works which are subject to licences which mean they should not collect fees? And do they have adequate practices to refund fees which they should not have collected?

There are grounds for concern that these issues are affecting collecting societies. It is possible that Copyright Agency Limited (CAL) may be collecting fees in relation to authors and copyright owners who do not wish to receive CAL payments. The New South Wales government has published standard letters which it recommends that its agencies send to CAL (where appropriate) stating that it does not wish CAL to collect fees in relation to any of its publications. It explains (NSW Toolkit, 2006: 14) that membership of CAL by State agencies is required in order to stop 'the circle of money', which it illustrates as shown at left. 'By becoming a member of CAL and notifying them of your department's copyright policy, it ensures that public sector information is freely available to educational institutions and other government bodies.' (NSW Toolkit, 2006: 14).

The Toolkit then provides a suggested template letter for those agencies which are not members of CAL, by which they apply for membership, agree to receive any fees already collected by CAL on their behalf, and then varies the normal terms of CAL membership by the following statements disclaiming any wish to participate in the CAL licence scheme or obtain any further fee

[208] 'A guide and checklist for VISCOPY members on WAIVING FEES for the use of your work . . . . .' (VISCOPY, undated)

distributions from CAL (NSW Toolkit, 2006: Appendix H):

> The Department does not wish to participate in any voluntary licence schemes. CAL is not authorised to, and should not, collect any moneys related to Department copyright material in relation to any voluntary licence scheme.
>
> The Department recently clarified its copyright policy with respect to works owned by the Department. The new copyright policy allows the public to deal freely with all Department works, unless otherwise marked for restrictive use. This right extends to individuals, private businesses, government agencies, educational institutions and any other organisation, and includes the right to distribute, reproduce and communicate for any purpose. As such, the Department asks CAL to ensure that educational institutions, government agencies and any other licensees from which CAL collects copyright fees are not charged for the reproduction or communication of works owned by the Department.

The Toolkit includes a similar letter for agencies that are already members of CAL (Appendix G). I am not aware if other governments have similar practices or precedents for agencies to use.

These issues are not explored fully in this submission, and do not have the benefit of clarifications from CAL. However, if these practices are occurring, even if they are required by law, then this is a good reason for a review of the obligations imposed on CAL and other collecting societies in order to decide where it is no longer socially desirable that it does collect funds and to determine what steps are necessary so that it is not required to do so.

APRA's limited procedures by which its members can regain rights to licence their works directly have been noted above. Howevers, most organisations pay APRA a flat licence fee, and there is no provision for rebates where an organisation decides to use some material which is licensed under Creative Commons licences for commercial use[209]. This would seem to have two effects: (i) the public, via licence fees, continues to pay for material for which the copyright owners do not intend there should be payment and (ii) there does not seem to be any incentive to organisations to play such material. It is reasonable to ask whether this might have significant anti-competitive results, but that will depend in part on the amount of content which is likely to be licensed in such a way.

The general question 'are collecting societies charging for uses of materials in the public domain?' needs to be answered by a Public Domain Review in relation to all collecting societies.

80. *Are collecting societies charging fees for works where it is inappropriate for them to do so, where such works are under open content licences, or where the copyright owner has made it clear that they do not wish such fees to be collected?*

81. *Do collecting societies have adequate practices to allow their members to inform them of works on which they do not wish fees to be collected, and to observe their members wishes?*

82. *Do collecting societies have adequate practices where non-members do not wish the collecting society to wish to collecting funds in relation to works in which they are the rights-holders?*

83. *Are collecting societies required to collect funds in relation to materials provided for free access where it is not socially desirable that they should so collect them?*

84. *Do collecting societies have adequate practices to otherwise identify works which are subject to licences which mean they should not collect fees?*

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[209] Jessica Coates, Creative Commons Australia (personal communication)

85. Do collecting societies have adequate practices to refund fees which they should not have collected?

9.3. Previous reviews do not cover these issues

The only independent review of the practices of Australian collecting societies was the Simpson Report (1995), the *Review of Australian Copyright Collecting Societies*, more than a decade ago. That report was written before open content practices were significant, and it did not hold public hearings or call for submissions (Simpson Report, 1995: 1.3). There has therefore not been a study of Australian collecting society practices since the Internet became commercially significant. Recommendation 37 of the Simpson Report was that 'as a matter of urgency, further study be made of the impact of new technologies on copyright collecting societies and potential new methods of collection'.

The Simpson report did make some recommendations relevant to the public domain and the rights of both the public and collecting society members, only some of which were acted upon by the Federal government (including the creation of VisCopy). The recommendations included:

- That collective administration should be the preferred mid-way house between the exercise of individual exclusive rights and a compulsory statutory licence where mass usage requires that the community be given access to the rights on reasonable terms. (Recommendation 2)
- That there be a multiplicity of societies so that individual societies can represent the disparate interests of the separate groups of rights owners. (Recommendation 3)
- That Declared Societies be required to allocate a specific proportion of gross distributions and undistributable funds, to cultural purposes. (Recommendation 12)
- That Government should not consider the imposition of statutory licences where commercial voluntary licences, collectively administered, are effective. (Recommendation 13)
- That there be no statutory licence introduced to grant access to copyright material for the purpose of multi-media exploitations. (Recommendation 16)
- That Qualified Societies retain the protection of Section 51 (3) of the Trade Practices Act. (Recommendation 26)
- That a society's input agreement should not be in breach of section 45 if the society is Qualified and the output agreement should not be in breach of section 45 if it is either (a) statutory or (b) approved by the Copyright Tribunal. (Recommendation 27)
- That where there is a purported abuse of a Qualified Society's monopoly power, the prior certificate of the Attorney General be a pre-condition to raising section 46 (1) in legal proceedings. (Recommendation 28)

Seen in hindsight more than a decade later, these recommendations do not seem to have a great deal to offer the stimulation of innovation. Recommendation 3 was apparently adopted as we now have more collecting societies than in 1995. Coupled with the rejection of any statutory licence to allow exploitation of multi-media works, innovators are faced with dealing with a multiplicity of organisations representing rights-holders, and with no option but to negotiate fragmented rights clearances.

Collecting societies are now required to devote some portion of undistributable funds to cultural purposes. Undistributable funds', where authors really cannot be found despite diligent efforts[210], are something like a collecting society tax on orphan works, works for which the society cannot find an author to pay. Now that these 'cultural purposes' funds have been in operation for some years, it may be time to examine whether the purposes for which funds have been allocated have been appropriate, and whether their administration has met the desired levels of transparency and accountability[211].

If CAL and other collecting societies collaborated in the development of a national facility to find authors (or their representatives if deceased), as discussed in Part 6), then this facility could also be used to assist in locating authors to which undistributed funds were owed. CAL's counterpart in Canada is already collaborating with Creative Commons Canada on the development of such a national facility.

Two other recommendations which were not acted upon were that that there be established the position of Ombudsman of Copyright Collecting Societies. (Recommendation 19) and that the Tribunal have the right to review determinations of the Ombudsman. (Recommendation 22). There might now be more justification for such proposals, in an environment where clashes of interests between collecting societies and both their members, and sections of the public, seems more likely. However, it could also be the case that the current Code Review process, discussed below, adequately serves this function (even though it does not adjudicate in disputes).

Since 1995 there have been no major reviews of the practices of collecting societies. The report of the Intellectual Property & Competition Review Committee (Ergas Committee, 2000) did consider competition and collecting societies but did not deal in any significant way with public domain issues. There is a periodic review of the *Code of Conduct for Copyright Collecting Societies*, which is mainly concerned with the handling of complaints received by the societies. The fifth and most recent review (Collecting Society Code Review, 2007) concluded that there was a very high degree of compliance with, and commitment to, the Code by all of the collecting societies. The various aspects of the practices of collecting societies affecting the public domain needs consideration by a more broadly-based Public Domain Review[212].

86. *In light of intervening changes in relation to public rights and the public domain caused in part by the growth of the Internet, should the recommendations of the Review of Australian Copyright Collecting Societies (1995) (including recommendations 12, 19, 22, 26, 27 and 28) be reconsidered?*

87. *Should the 1995 recommendation for an Ombudsman Of Copyright Collecting Societies be adopted, or is the current Code Review process adequate?*

88. *Are collecting societies using undistributable funds for appropriate cultural purposes, given that such funds do not derive from the work of their members but could be seen as deriving from 'orphan works'?*

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210 CAL's 'Do we owe you money?' page <http://www.copyright.com.au/membersearch.htm> lists authors alphabetically under their first names, not their surnames. It might be possible to locate more authors if this was changed.

211 The author's experience of one such scheme indicated this was questionable, but that was a few years ago.

212 Any impediments to the effective exercise of the public rights created by compulsory licences in Australia could be part of a Public Domain Review, as they would have an impact on innovation and on the public interest more generally. The UK Gowers Review (2006) recommending 'a market survey into the UK collecting societies to ensure the needs of all stakeholders are being met' (Recommendation 33).

89. Should collecting societies be required to collaborate with other organisations on the development of a national facility (or facilities) to assist in locating creators, so as to reduce the problem of 'undistributable funds' and reduce the problems caused by orphan works?

10. Re-usable government works

As noted in Part 2, the Berne Convention leaves it to the individual jurisdiction to determine whether "official texts of a legislative, administrative, and legal nature" are to be protected under national copyright law.[213] How individual countries have addressed these issues varies because this Article "permits a high degree of flexibility, enabling members countries to give effect to their differing views of the public interest" (Ricketson and Ginsburg, 2006: [8.108]).

10.1. International momentum toward re-use

At one end of the spectrum is the United States, where a range of government works, including legislation and case law, attract no protection. In the middle are jurisdictions that may provide some protection for legislation or case law, or other government-created works. At the other end of the spectrum all government-produced materials, including primary legal materials, are protected by copyright, or some other type of proprietary right. As a broad generalization, Australia falls into this category.

Crown copyright places government-generated works out of the public domain and into the hands of the Crown as copyright holder.[214] Permission for re-use of information must then be sought from the relevant office in each jurisdiction.[215] There are no consistent policies governing the re-use of government materials across Australia or an equivalent to the general availability of US government works for re-use or the European Union's *Directive on the re-use of public sector information*.[216]. The latter was introduced in 2003 with a view to expanding the use of public sector-generated material in the Members States of the EU, an industry with a value believed to be up to EUR 48 billion.[217] The 'General principle' of the Directive is set out in Article 3, which states:

> Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV. Where possible, documents shall be made available through electronic means.

Additional Articles provide the mechanics of the Directive, including the usage of licences in compliance with the Directive. It is understood that in 2006 the European Commission undertook action against five of its Member States for failure to comply with the terms of the Directive, indicating the seriousness of this Directive within the EU.[218] Strong though it is, the Directive

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213 Article 2(4), Berne Convention.

214 Of course, there are issues as to who the 'Crown', in an Australian context, is for the purposes of Crown copyright. It is generally considered that the 'Crown' encompasses the Federal, State and Territory governments. The question that then arises is whether all three arms of government – the judiciary, legislature and executive – are members of the 'Crown' for the purposes of Crown copyright. However, I will not consider these issues in any great detail.

215 At the Commonwealth level, requests for reproduction of Commonwealth materials can be made to the Commonwealth Copyright Administration section of the Attorney-General's Department. See <https://www.ag.gov.au/www/agd/agd.nsf/Page/CopyrightCommonwealth_Copyright_Administration>. Beyond that, however, there is no central location to request re-use of government materials.

216 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

217 See http://ec.europa.eu/information_society/policy/psi/what_is_psi/index_en.htm

218 See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1891&format=HTML&aged=0&language=EN&guiLanguage=en.

leaves it to Member States to decide 'where the re-use of documents held by public sector bodies is allowed'.

Although the OECD has not yet adopted a general policy concerning re-use of government information, an OECD Working Party on the Information Economy Workshop on Public Sector Information received an expert recommendation of a set of principles (Burkert & Weiss. 2004, noted in Fitzgerald and Pappalardo, 2007) including:

> **IP rights and control of origin principles** - PSI holdings should be exempted from IPR and also copyright and data-base protection regimes. The public sector should, however, be entitled to ensure through minimal regulation that responsibilities for any changes to the original information after its transfer are made appropriately transparent.

10.2. Australian developments

There are no consistent policies governing the re-use of government materials across Australia or an equivalent to the general availability of US government works for re-use or the European Union's 'Re-Use Directive'.

The Australian Federal government has a *Statement of IP Principles for Australian Government agencies*, which says at various points:

> In considering their options, agencies should be mindful of ... the desirability of making IP available to entities that are able to use Government IP to create jobs and commercial opportunities;
>
> Permission for public use and re-use of such material should generally be given on a non-exclusive basis. Exclusive licence to use such materials should only be given in exceptional circumstances.

Some federal agencies see open content as an important infrastructure issue. The Chair of the National Water Commission, Ken Matthews, says:

> Current approaches to sharing data are reminiscent of the times when passengers had to change trains at state borders because each state had its own idea of the best railway gauge. Some of our water data systems are still like this. . . . The availability of, and open access to, accurate water data and information is critical if Australia is to plan and manage its water resources better. (cited in Coates, Fitzgerald and Fitzgerald, 2007)

The Conference Report of the Australian National Summit on Open Access to Public Sector Information, held at QUT in 2007[219] includes in its 'Stanley Declaration':

> "The adoption and implementation by governments of an open access policy to public sector information (PSI) will ensure the greatest public benefit is derived from the increased use of information created, collected, maintained, used, shared, and disseminated by and for all governments in Australia."

There are some significant developments at State level in Australia. The Queensland Spatial Information Council has recommended that Queensland state government agencies move to an information licensing framework for government information, based on Creative Commons (CC) licences, where no issues of privacy, confidentiality or other legal or policy constraints apply (Qld Spatial Information Office, 2006). Pilot agencies were identified for implementation of the Government Information Licensing Framework (GILF). A toolkit has been developed for pilot projects, and agencies identified to carry them out in the next stage (Queensland Government, 2007).

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[219] See <http://datasmart.oesr.qld.gov.au/Events/datasmart.nsf/0/CD8D2AF82A2007D34A25732C0006F9AE?OpenDocument>

The New South Wales Government has also moved towards a more permissive stance on the reproduction of Crown copyright-protected materials, although not quite as extensive in development as the Queensland position. In 2006 the New South Wales Attorney-General's Department developed the *Copyright Management Toolkit*, providing guidance to government agencies on copyright issues ranging from website copyright notices to interaction with collecting societies such as CAL.[220] The templates provided in the toolkit were permissive in nature, and it was noted that such an open policy would be appropriate for the majority of government-produced materials. A circular was released by the NSW Government Department of Premier and Cabinet encouraging agencies to adopt the policies outlined in the toolkit.[221] A study of the intellectual property notices provide on NSW government websites found very wide disparities in approaches (Bond, 2006a).

NSW statistics (NSW Toolkit, 2006: 5) show that 52% of NSW government materials provided via its websites cannot be used for any purposes, and a further 45% only for non-commercial use. Only 3% can be used for some commercial purposes.

Level of protection	Locked: Exceptions allowed under the *Copyright Act* only	Restrictive: Use for personal, non-business purposes	Permissive: Use for all purposes, other than business	Released: Public domain
Sample wording	"All rights reserved"; © ownership statement only; no notice at all	"You may reproduce this work for personal, in-house or non-commercial use."	"You may freely deal with this work for any purpose, other than in a product for sale."	"You are free to use this work for any purpose."
Frequency of use in NSW Government*	52%	45%	2%	1%
Sample agencies	Motor Accidents Authority of NSW, NSW Police	NSW Rural Fire Service	Attorney General's Department of NSW	NSW Legislation and Judgments

*Data current as at August 2006

10.3. The anaemic Crown Copyright review

Compared with these developments, the report of the Copyright Law Review Committee on Crown Copyright (CLRC, 2005) is surprisingly timid. It recommended a few reforms to Crown copyright but the federal government has not yet acted upon them, despite three years having now elapsed since the completion of the report. The CLRC's recommendations were extremely limited, being primarily to replace Crown copyright with a clarified position of the rights of the Crown as employer over works made in the course of Crown employees' duties (Recommendations 1 and 3), plus the abolition of copyright (and any accompanying right, for example, the Crown prerogative) in legislation, case law and similar works at the Federal, State and Territory levels (Recommendation 4). No general licensing scheme for government works was proposed, nor any more general abolitions of Crown copyright. The CLRC's terms of reference were extremely broad, and included an explicit requirement for it to consider the rationale for government ownership of

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220 Copyright Management Toolkit, October 2006.

221 C2006-53 Effective Copyright Management – Publications and Websites, 15 December 2006.

copyright material. Despite this, the CLRC does not seem to have seriously considered (or given reasons for rejecting) any of the alternative ways by which more substantial changes could be made to put Crown materials in the public domain.

The alternatives that could have been considered would at least include (a) complete abolition of Crown copyright (and reliance on other types of law to protect public interests); (b) an attempt to categorise what content should be subject to Crown copyright and what should be in the public domain; or (c) an opt-in scheme by which Crown-generated content was in the public domain unless government opted to claim copyright over it by some declaratory mechanism; (d) a requirement on governments to licence to the public the use of government information (or declare it to be in the public domain), generally at no cost; or (e) a drastically shortened term of Crown copyright (instead of mere acceptance of a 'publication plus 50 year' status quo; it should also be noted that unpublished Crown works will never enter the public domain). In effect, there has not yet been a comprehensive consideration of how a public sector public domain in Australia could stimulate innovation – quite clearly recognized in the European Union directive - and serve the public interest in other ways. The CLRC's report was a missed opportunity rather than a reason to accept the Crown copyright status quo.

The Productivity Commission (2007: 241) explains that the federal government has in recent years moved from cost recovery (based on Crown copyright) to free access with some important data:

> In 2002, the Australian Government agreed in principle to the Productivity Commission's review of cost recovery (PC 2001a) to funding the 'basic information product set' of its agencies from taxation revenue (Minchin 2002, attachment 1). Basic information products are determined in reference to 'public good characteristics', significant positive spillovers, and other Government policy reasons. Subsequently issued cost recovery guidelines contain advice to agencies on determining basic information products (Australian Government 2005a). Agencies such as the ABS, ABARE and the Australian Institute of Health and Welfare now provide data and information online free of charge to users. (References omitted)

However, the Productivity Commission's Report does not take up the general question of what approach to ownership of government-produced information goods would best serve Australia's productivity or capacity for innovation.

Cutler (2007) is more forthright in arguing that 'the failure of government to address the issue of Crown copyright is extraordinary':

> … a change in policy so that governments put the IP assets they develop or control – our assets – back into the public domain is one of the crucial things that could make an enormous difference to not only access to content but also industry development in Australia.

10.4. A re-usable public information seal?

Even if standards, licences and practices are developed separately by each government in Australia for the re-use of public information, it will still be valuable to attempt to obtain some level of uniformity across Australia, particularly for the purpose of communicating to the public which information may be re-used without seeking specific consent. Should a new 'Re-usable government information' licence be developed, with the aim of obtaining consistent usage across Australian governments? If it is not possible to have a uniform licence across all Australian governments, should there be some agreed standard for 'Re-usable government information' in Australia, perhaps with a distinctive stamp or logo to indicate this? The logo opposite was developed by AustLII as a demonstration, with the intention that when this 'seal' was placed on a document, it would be linked to a web page setting out a minimum set of conditions to which the licence complied, allowing reproduction of the information. Would it mean reproduction was allowed for any purpose

or only for non-commercial purposes? It could also be suggested that the minimum conditions would include restrictions such as, 'no distortion of the information', 'no use of Crown indicia', and 'no misrepresentation that the information is "official"'. However, all of these restrictions may be imposed by existing laws (differing between jurisdictions), and do not need to be included in any conditions.

Such an approach would allow governments to choose to use Creative Commons licences, or public domain dedications, or their own licences or disclaimers as they saw fit, but if their methods met the minimum 're-usable' requirement, they could carry this seal, and the public would be much the wiser.

10.5. Options and questions

So the options in relation to re-use of government works include the complete or partial removal of Crown copyright, and adoption of government policies supporting the use of public rights licences (to grant re-use rights in areas where Crown copyright is retained). As yet, Australia has no coherent approach. However, the adoption of a more permissive approach to the management and licensing of public sector information could substantially contribute to Australian innovation. A Public Domain Review needs to re-consider this issue, and ask at least the following questions:

90. *What benefits would arise from broader rights of re-use of government-created works in Australia? Which benefits cannot be achieved merely by providing public rights of access?*

91. *What is becoming international best practice in providing for re-use of government information?*

92. *Which recommendations by the Copyright Law Review Committee should be supported?*

93. *For which categories of 'government works' could copyright be abolished, and under what conditions (if any)?*

94. *What mechanism(s) for allowing greater use of government information are most desirable?*

95. *Should there be a legislative requirement of government licensing of certain categories of government-created works, and if so which?*

96. *Should a new 'Re-usable government information' licence be developed, with the aim of obtaining consistent usage across Australian governments?*

97. *If it is not possible to have a uniform licence across Australian governments, should there be some agreed standard for 'Re-usable government information' in Australia, perhaps with a distinctive stamp or logo to indicate this?*

11. Public rights in publicly-funded research

Research is at the heart of innovation. There are at least three aspects of the rights that the public (including other researchers) should have to access and to use publicly funded research: access to research outputs such as articles in journals; the ability of Universities to communicate the theses and dissertations of its students; and access to and use of the data underlying research outputs.

11.1. Public access to research outputs

Cutler (2007) sees a serious lack of balance in Australia and elsewhere in the 'mindless obsession with the notion that success is getting intellectual property out into a spin-off company as quickly as possible'. Instead, he argues

> The more rapid the technology diffusion, the more rapid the take-up, the greater the externalities that arise from the wide-ranging penetration of new ideas and know-how. But that notion of realising the community benefits of the externalities is completely at odds with the notion of expropriating public sector funded knowledge into the micro-economic level of the firm and start-ups and so forth.

Free access to publicly-funded research outputs is an important part of any broad notion of public rights in works to support the type of technology diffusion advocated here. The Australian Research Council's current policy (ARC 2007) has been moving in that direction:

> The funding rules for schemes under the NCGP are being amended to encourage researchers to consider the benefits of depositing their data and any publications arising from research projects in appropriate repositories wherever such a repository is available to the researcher(s).

The rules for its funding schemes (ARC 2007) now contain the statement that

> The ARC therefore encourages researchers to consider the benefits of depositing their data and any publications arising from a research project in an appropriate subject and/or institutional repository wherever such a repository is available to the researcher(s). If a researcher is not intending to deposit the data from a project in a repository within a six-month period, he/she should include the reasons in the project's Final Report. Any research outputs that have been or will be deposited in appropriate repositories should be identified in the Final Report.

The Productivity Commission notes that 'The action of the ARC and the NHMRC is consistent with an international trend. For example, funding agencies in the United States and the United Kingdom have, in recent years, encouraged access to the results of publicly-funded research, although there is variation in approaches' (2007: 233).

If the ARC started to require that Australian academics report whether they have provided free access to their research outputs[222], this would increase compliance with this otherwise voluntary scheme, because Final Reports to the ARC may affect eligibility for future grants. Such a requirement would also encourage many journals in which academics publish to make their content available for free access, so that they could advise prospective authors that publication with them will fully discharge their obligations to the ARC. With research outputs no time frame is suggested by the ARC, so ARC-compliant journals could still publish for free on the Internet one or two

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[222] With research data the requirement is even stronger: to make it publicly accessible within six months of publication or explain why not.

issues behind print publication if they wished. While it is possible to capitalise on and reinforce[223] the ARC voluntary approach, it is questionable what impact it will have.

The Productivity Commission received numerous submissions on the role that funding bodies should play in relation to dissemination of research outputs (2007: 236-8). It concluded that a stronger approach than that proposed by the ARC and NHMRC was needed (2007: 240):

> The Commission continues to hold the view that funding agencies should take an active role in promoting open access to the results of the research they fund, including data and research papers. Although the ARC and NHMRC's recent announcement of promoting voluntary access is to be commended, the Commission considers that the progressive introduction of a mandatory requirement would better meet the aim of free and public access to publicly-funded research results. US experience suggests that voluntary compliance by authors would be very low.

Given overseas developments, and the Productivity Commission's views, it seems likely that some form of compulsory open access to academic outputs in Australia will soon develop.

The Productivity Commission considers various mechanisms through which the costs of such open access publishing can be met, but does not itself provide any precise meaning as to what 'open access' should mean in this context: (2007: 241):

> Funding agencies need not prescribe the form that open access should take, whether through a conventional scientific journal, an open access journal or a repository. But they would need to provide guidance on what forms of publishing would satisfy its open access requirement. This could link to the work currently done by the Australian Government on the Accessibility Framework, under Systemic Infrastructure Initiatives and under NCRIS.

The Productivity Commission, in referring so generally to 'open access' does not deal with some of the main questions that need to be considered. At its most limited, 'open access' can simply mean free access to content otherwise only available from commercial sources. Mere free access does not allow subsequent users/innovators to do anything beyond what 'fair dealing' copyright principles allow. Alternative approaches to 'open access' allow re-use of the content, either in limited forms (eg no commercial re-use) or unlimited re-use. In the case of publicly-funded academic outputs, at least some more extensive rights to quote from works or build upon them than is provided by fair dealing might be appropriate. These alternatives would no doubt still preserve the author's rights of attribution and other moral rights.

Questions concerning policy and legal changes in relation to research outputs need to be considered by any review of Australia's public domain, including these questions:

98. *Should the ARC and other Australian government bodies providing research grants from public funds require all research outputs to be available in a free access repository within a period of time, as a condition of the grant?*

99. *How are such publicly-funded research outputs which come within the government policy requirement to be identified by potential third party users? Are individual items to be so marked, and/or are particular repositories to be so certified?*

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[223] For example, in the discipline of law, researchers including the author have obtained an ARC LIEF grant for 2008 to build a free access Australian Legal Scholarship Library on AustLII. The ARC requirements will be drawn to the attention of all academic law journals and all Law Deans in Australia through the Council of Law Deans (CALD).

100. Should such research outputs be required to be licensed to the public under some minimum-definition (or higher) public rights licence, so as to allow re-use by third parties, not merely free access and existing fair use rights?

101. Alternatively, should there be more liberal 'fair use' conditions in the Copyright Act *applying to any research outputs which come within government policy requirement?*

102. Are any further Copyright Act *protections (such as 'safe harbor' schemes) needed for University and other repositories which implement public policies in relation to open access to research outputs?*

103. Should any of these provisions be retrospective, so that fine distinctions do not have to be drawn between what uses can be made of research outputs depending on the date of the research?

11.2. Electronic dissemination of postgraduate research

Issues similar to those discussed above in relation to general research outputs also apply to postgraduate research. There are copyright problems concerning dissemination of postgraduate theses which would benefit from support by legislation or by government policies or practices (OAK Law Project, 2006, 2007). The OAK Law Project argues that there has never been any questioning of the practices of Universities thesis copying services, which enable others to read unpublished theses. However, with electronic theses and dissertations (ETDs), they find after a detailed analysis (2006: 6.72-6.92) that there is no clear way by which Universities can be confident that fair dealing or other provisions will protect them against liability for electronic dissemination of theses. They concluded (2006: 6.91):

> The analysis of the operation of the provisions shows that a case can be made for changes within the current structure of the fair dealing provisions which would enable the universities to more confidently make ETD available. These are:
>
> 1 Define 'research' in terms that are sufficiently broad to include dissemination by publicly funded universities of their students' research output (in hard copy or electronic format).
>
> 2 Confirm that a disseminator acting with the permission and in furtherance of or as part of the fair dealing purpose of the author of research or study or criticism or review can rely on the fair dealing exceptions in communicating that material: see further CCH Canadian Ltd. v. Law Society of Upper Canada635.
>
> 3 Extension of the five factors which currently apply in assessing whether there has been a fair use by means of reproduction of a Part III work or by means of any act (including communication) of an audio-visual item so that they also apply to other uses (in particular, communication) of a Part III work: see further the CLRC, Simplification of Copyright Act 1968 Part 1 (1998).

Given that postgraduate research is a major source of innovative ideas, impediments to its publication need to be examined carefully in any review of public rights in copyright. However, care would need to be taken to ensure that any such exception was not so broad as to allow abuse of the interests of third parties whose works were quoted by the postgraduate student.

A Public Domain Review therefore needs to ask:

104. Whether impediments to publication of postgraduate research by Universities need to be removed, including by changes to the definition of 'research' for fair dealing purposes to include Universities' dissemination of student research outputs?

105. How can the interests of third parties whose works are quoted in postgraduate theses and dissertations be protected??

11.3. Open access to research data

Since 1996 there have been many declarations supporting sharing of and/or free access to research data (as distinct from outputs of research, discussed in the previous two sections). Fitzgerald and Pappalardo (2007: 236) identify the following relevant policy statements:

> **International organisations** – among these policy statements are the Bermuda Principles, the Budapest Open Access Initiative, the Berlin Declaration on Open Access to Knowledge in the Science and the Humanities, the World Summit on the Information Society (WSIS) Declaration of Principles, and the Organisation for Economic Co-operation and Development (OECD) Declaration of Access to Research Data from Public Funding;
>
> **Governments and public sector research funding bodies** – including the National Institutes of Health (NIH) Data Sharing Policy, the European Union's Directive on the re-use of public sector information, the Australian Research Council (ARC) and the National Health and Medical Research Council (NHRMC) funding policies, and the Office of Spatial Data Management's (OSDM) Spatial Data Access and Pricing Policy; and
>
> **Private sector organisations** – such as the Wellcome Trust Position Statement.

All of the declarations are discussed in detail by Fitzgerald and Pappalardo. Of the international declarations, the OECD developments are probably of greatest relevance to Australia, even though they do little more than state a common commitment to open access to research data[224]. Steps consistent with these OECD recommendations are being implemented in Australia, but it is contentious whether the implementation is forceful enough.

In relation to academic research data resulting from publicly funded research, Fitzgerald and Pappalardo (2007:219) summarise the new position taken by the ARC as follows:

> The funding rules for ARC Discovery Projects for 2007 (projects for which funding will commence in 2008) effectively mandate that data resulting from funded research is to be made available in accordance with open access principles. The ARC policy does not expressly state that research outputs **must** be deposited in an open access repository, but simply encourages researchers to do so. However, if researchers do not intend to deposit the data from a funded project into a repository within a six-month period, they are required to explain their reasons for not doing so in the project's Final Report. This requirement applies to data but not to publications. The obligation to justify non-compliance means that, at least as far as research data is concerned, it is little short of a direct mandate.

They note that the NHMRC (2007:219) does not go quite as far:

> In December 2006, the NHMRC released its Project Grants funding policy for funding commencing in 2008. The NHMRC policy encourages open access for data and publications resulting from the NHMRC funds and requires research outputs that have been or will be deposited in appropriate repositories to be identified in the project's Final Report. However, the NHMRC policy does not go as far as the ARC policy in requiring an explanation of reasons why research data will not be deposited in a repository within six months.

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224 The OECD *Ministerial Declaration on Access to Research Data from Public Funding* (OECD, 2004) asserts that 'An optimum international exchange of data, information and knowledge contributes decisively to the advancement of scientific research and innovation' and sets out principles to that effect. A *Draft Recommendation Concerning Access to Research Data from Public Funding* (OECD, 2006) reiterated this commitment to open access and called on member countries to increase their efforts to develop policies and good practices relating to the accessibility, use and management of research data (as summarized by Fitzgerald and Pappalardo, 2007). The OECD Council then recommended that member countries take the Principles and Guidelines into consideration and 'apply them, as appropriate for each Member country, to develop policies and good practices related to the accessibility, use and management of research data' (OECD, 2006a). Australia's PMSEIC Data Working Group *From Data to Wisdom: Pathways to Successful Data Management for Australian Science* (PMSEIC, 2006) recommended that the OECD guidelines should be taken into account in the development of a strategic framework for management of research data in Australia (Fitzgerald and Pappalardo, 2007).

The Productivity Commission's draft research report on Public Support for Science and Innovation suggested (in draft finding 5.1) that 'Published papers and data from ARC and NHMRC-funded projects should be freely and publicly available'. It adhered to this view in its final report, discussed earlier, stressing that this should be a mandatory requirement. A Public Domain Review should ask:

106. Is the current ARC policy mandating sharing of publicly-funded research data sufficient? Does it need to be supported by copyright law changes allowing re-use of that research data by others?

107. Do the current NHMRC policies encouraging sharing of research data (and possibly future mandatory requirements) need similar legislative support?

12. Indigenous culture's relationships to the public domain

Australia's indigenous cultures have been a major source of innovation in Australian cultural practices. Both proprietary rights in copyright and the narrow concept of the public domain (ie term expiry) pose considerable problems for indigenous cultural practices, and therefore to innovation in Australia. Bowrey and Anderson (2006) point out that on the one hand there is considerable tension between the 'humanist goals' of the access to knowledge movement (A2K) and the exclusion of indigenous people from participation in the numerous studies of them in 'early governing projects of progress and improvement'. Much of this content is either in the public domain (in the narrow sense) or will be in due course, irrespective of the wishes or interest of indigenous people. They point out that to group 'the indigenous' and 'the public' as united by a category of 'the excluded', opposed to private property and commodification, is to gloss over the role that law (including copyright law) has played in the exclusion of aboriginal people from control of this knowledge.

There are considerable efforts to find multilateral answers to these issues. Some developing countries are seeking to negotiate through WIPO an international instrument on the protection of traditional knowledge, but there is considerable opposition from developed countries. Palombi (2008) notes that in 2007 UN General Assembly voted on a resolution to adopt the *UN declaration on the rights of indigenous peoples*, with Australia and the United States being two of only four countries to vote against it. The Declaration includes the following articles:

> *"Article 11* 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions 4 and customs.
>
> *Article 31* 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, states shall take effective measures to recognize and protect the exercise of these rights."

According to Drahos (cited in Palombi, 2008):

> The fact is that we have been trying to resolve these issues internationally for decades and the time has come to us to accept that progress will come only if we can develop a local model that can be shown to work and so motivate others countries to adopt it or something like it. As much as an international treaty is an aspiration of many indigenous peoples as a mechanism for change, the truth is that change will happen much faster at a local level. The native title legislation and the Mabo case are two examples of that kind of change. Now while it is true that TRIPS does impose limitations it does not prohibit the creation of laws to deal with TK beyond intellectual property.

Dodson and Barr (2007) propose 'an indigenous response to protecting indigenous traditional knowledge'. Drahos and Palombi also have an ARC research grant relating to indigenous culture and biological inventions which commenced in 2008, and which will explore what national solutions can be found to some of the issues concerning indigenous traditional knowledge and the public domain (Palombi, 2008, Drahos, 2004).

In 2003 the Federal government released a draft Copyright Amendment (Indigenous Communal Moral Rights) Bill for discussion, which was both welcomed and criticised to some extent by arts and indigenous organisations and the Copyright Council (MacDonald, 2003) and has not proceeded further. The Bill raised issues about who would exercise rights on behalf of a community, and whether the duration of the rights would go beyond the normal period of copyright, possibly 'until such a time as no person is recognised as a custodian' of that work' (Arts Law Centre, 2006).

The Australian Senate has recently conducted an inquiry *Indigenous Art - Securing the Future*: *Australia's Indigenous visual arts and craft sector* (Australian Senate, 2007). It envisions promoting and supporting indigenous arts as the basis of 'cultural reinvigoration and communication within, between and beyond Indigenous communities' and as a vehicle for 'economic growth amidst poverty and economic disadvantage'(2007: Ch1. para 1.1.). In relation to intellectual property rights, the inquiry recommended the introduction of *sui generis* legislation for Indigenous Cultural and Intellectual Property (ICIP). The practicalities of how such a framework would interpolate with the public domain or a strengthened public domain would require considered study and consideration.

Speaking of the practices of Australian cultural institutions, Hudson and Kenyon (2007) note that 'While 1990s Australian cases about Aboriginal art demonstrate copyright law's flexibility in recognising certain Indigenous interests in some forms of cultural material, the scope of legal protection available in that way is substantially narrower than the range of Indigenous concerns about material in cultural institutions' (p 202-203). 'These concerns have led to the development of policies and protocols directed to Indigenous collections, including varying degrees of restriction on the accessibility of certain materials, but also recognising how digitisation and online technologies can be used to promote access by Indigenous people.' (203). The Australia Council for the Arts has in 2008 revised its protocols for the production of various types of indigenous Australian arts[225].

A Public Domain Review would need to pay special attention to the often different considerations and issues raised by indigenous culture, and ask questions such as:

108. Where copyright applies to traditional knowledge and other cultural expressions of indigenous peoples, should the same rules relating to the public domain (such as term expiry) also apply?

109. What affect do international conventions or proposed conventions have on these questions?

110. How could sui generis legislation on indigenous culture intellectual property relate to copyright's ??? public domain?

111. What is the relationship between national approaches (distinctive to Australia) and the approach taken in international conventions?

112. Do the protocols and practices of Australian cultural institutions in relation to indigenous peoples require review, or supplementation in legislation?

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225 The revised protocols are by Terri Janke; see a list at <http://www.australiacouncil.gov.au/publications/indigenous>

13. Conclusion: It's time to review public rights in copyright

13.1. Interlocking issues

This submission has raised more than 100 issues which need to be answered before we sufficiently understand Australia's copyright public domain, and the role it can play in stimulating innovation and meeting the public interest. These issues are set out in the Table following this conclusion.

A series of themes recur in these questions, including what latitude Berne and TRIPs allow for further exceptions to copyright protection; the roles of a copyright register or deposit schemes; the various roles that voluntary licensing can play, and whether the legal foundations for such licences in Australian law need strengthening; and the need for further copyright protections for institutions, including Universities, carrying out government policies.

13.2. A review focusing on the public domain

These issues are interlocking, and they are important to innovation in Australia. This means, I submit, that the Review should recommend that as a matter of priority there should be a comprehensive review of Australia's copyright law (and possibly other intellectual property laws) with the question of public rights in information goods as the focus of the enquiry. Such a review has never taken place in Australia, or to our knowledge elsewhere in the world[226].

The Australian Law Reform Commission may be best placed to undertake such a large-scale review, which will require consultation with many stakeholders over a considerable period of time. The Copyright Law Review Committee no longer exists, and I am not suggesting it should it be revived for this purpose. Nor is an internal review by the Attorney-General's Department appropriate, because it is responsible for the day-to-day implementation of government policy in this area. Weatherall (2007) argues that the history of changes to the *Copyright Act* in recent years show a decline in the significance of reviews by external bodies and an increase in the involvemnt of the executive branch of government in the ongoing operation of the Act. Independence from the operation of the 'copyright industries', and lack of any long history of engagement with its stakeholders, may be advantages in reviewing copyright law from such a different perspective. The ALRC has experience and a successful track record in conducting major and innovative reviews of intellectual property issues, having previously completed an internationally renowned reference on gene patenting and on protection of human genetic information.

Australia will benefit from a considered view that focuses on public rights and their relationships with proprietary rights, and the balance between them that will maximise the national interest.

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[226] The Copyright Law Review Committee's report on *Simplification of the Copyright Act* (1998) was pursuant to a reference requiring it to report on 'how to simplify the *Copyright Act 1968* to make it able to be understood by people needing to understand their rights and obligations under the Act, with particular attention to simplification of the various provisions and schemes that provide exceptions to the exclusive rights comprising copyright' (see <http://www.austlii.edu.au/au/other/clrc/4.html>). Exceptions to exclusive rights are only one part of the reference suggested here.

13.3. Future work in the Unlocking IP Project

This submission is a brief and preliminary statement of some of the issues that support the need for a full law reform review of the role of the public domain in Australian copyright law: it is in the form of an Issues Paper, seeking to raise issues rather than to resolve them. By September 2008 I and other researchers involved in the Unlocking IP Project intend to publish a Discussion Paper refining these issues, canvassing possible or alternative solutions, and putting forward proposals for discussion. Following further work on this Discussion Paper, including discussions those who wish to discuss it with us, we will publish a final Report in early 2009, probably to coincide with the 3rd Unlocking IP Conference[227]. We hope that this submission and the two proposed documents to follow will aid the full consideration of these issues by the Australian government and the various review bodies reporting to it, and better informed public discussion.

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[227] The first two Unlocking IP Conferences were help in 2004 and 2006.

Table: Questions a Public Domain Review could answer

The following is a list of all of the questions suggested in the preceding Parts.

3. Scope for more balance by exceptions to copyright

3.1. The 3-step test Down Under – restricting or not?

1. Do the 3-step test and s200AB of the Copyright Act limit the extent to which Australia can create further exceptions/defences to copyright, or compulsory licences?

2. Which feasible legislative expansions, within the requirements of our international obligations, are most needed to support Australian innovation?

3.2. Fair's fair – Would 'fair use' give more balance?

3. Would it be beneficial for Australia to adopt a flexible 'fair use' exception to copyright, based closely on that in force in the USA?

4. Is there any practical likelihood of Australia being found to be in breach of its international obligations if it took this approach?

3.3. Cultural institutions and the public domain

5. Are the new s200AB and s51B working well enough to resolve the problems identified in relation to cultural institutions, or do they need to be strengthened?

3.4. Contracts over-riding exceptions

6. Should purported contractual exclusions or modifications of exceptions to copyright be made to have no effect, as recommended by the Copyright Law Review Committee in 2002?

7. Do the 2002 recommendations need to be supplemented in light of changes to the Copyright Act, or changes to practices, since then?

3.5. What is the work?

8. Is there a need for a statutory definition of 'work', or statutory clarification of the factors to be taken into account when determining what is a work?

3.6. Other issues concerning limits and exceptions

Implied licences

9. Does the law concerning implied licences unnecessarily impede innovation and other public interests?

Authorisation

10. Is there potential for the concept of authorisation to unduly restrict legitimate efforts to provide public greater access to information?

Technological protection measures

11. Is there a need for further exemptions from the Copyright Act provisions concerning technological protection measures (TPMs), taking into account the submissions made in 2006 and subsequent developments?

4. Expanding legal deposit's role in the public domain

4.1. Importance of legal deposit to the public domain

12. Will the scheme guarantee that when the copyright term expires a copy is available for anyone to reproduce, so that they can obtain a copy to further transform?

13. After a copy is deposited what steps should be taken to ensure that the item can be found?

14. Does a scheme provide for users to both access materials held under legal deposit during the term of copyright in a work, and to exercise any fair dealing or other public rights which exist?

15. Should the existing legal deposit schemes be re-examined from this perspective in relation to non-digital textual works as well? Should the resulting policies be included in copyright legislation?

16. Can legal deposit schemes also be used to assist in the resolution of the problem of orphan works and unlocatable authors?

17. What changes to the law (if any) would ensure that Australia was best place to participate in any consolidation of digital libraries in the Asia-Pacific region?

4.2. Technological protection measures (TPMs) and legal deposit

18. Will the scheme guarantee that, when the copyright term expires, there will be be no impediment to access or reproduction because of the use of TPMs in relation to the work?

19. Does Article 17.4.7 of the Australia-US Free Trade Agreement prohibit exceptions to ss116A0 and 116AP to allow depository institutions to effectively obtain and create devices to ensure that materials lodged under legal deposit schemes may be accessed?

20. Alternatively, should deposit be required of copies which are not protected by technological protection measures?

4.3. Expansion of legal deposit to audio-visual works

21. Which recommendations in response to the Attorney-General's Department / DCITA review of legal deposit should be adopted? (We have made 28 recommendations in Greenleaf, Paramaguru, Bond and Christou, 2008)

4.4. Problems of identifying and quantifying Australia's public domain

22. What public resources, if any, should be used to make Australia's public domain, or parts of it, more easily found?

5. Finding missing rights-holders: orphan works

5.1. The problems of orphan works and missing authors/creators

23. What is the extent, and the economic impact, of the various problems of locating rights-holders of Australian works? These include the problems of identifying authors/creators of works; of determining whether an author is alive or when they died; and of determining who is the legal representative who may licence or otherwise authorize uses of their works (unless copyright has expired).

5.2. Options for new methods of finding authors and other creators

24. What current Australian institutions and practices provide partial solutions to the problems of identifying authors, their dates of death, their locations and their representatives?

25. Why do they not provide a better solution to the problems of orphans works and related problems?

26. What effective schemes exist in other countries? Do they include Australian authors?

27. Should Australia create a voluntary register of copyright works? What are the options for how such a register, including the organisations that should collaborate in its creation and maintenance, who should operate it, and how it would be funded?

28. Should there be more than one such register, depending on the types of works involved?

29. How could such register(s) be used to help determine which works are in the public domain because copyright has expired, or otherwise indicate any public rights involved in a work? In particular, how could they be used to assist in identifying authors/creators; determining if and when they have died; locating them or their estate representatives, unless copyright in the work has expired; and determining whether a work has been published, and if so when.

5.3. A right to adopt orphan works - Alternative approaches

30. What limitations (if any) does the 3-step test impose on the types of orphan work schemes that are possible?

31. Should Australian legislation allow use of orphan works after a 'reasonably diligent search for the copyright owner 'or some similar test, without any further application or bureaucratic requirements?

32. Should there also be required, as part of any diligent search, some form of public notice that the author of the orphan work was being sought?

33. Should any uses of the orphan work be required to carry a notice disclosing this and advising whom the author or author's

representatives should contact, or some registration of its use?

34. Alternatively, should the Copyright Tribunal or some Court or Tribunal be empowered to issue licences to use orphan works, on application and based on a set of statutory criteria?

35. Should there be provision for reasonable remuneration to be paid to authors/creators or their estates if they subsequently come forward after becoming aware that their works have been so used?

36. If so, should such remuneration (a) only be paid at all if and when the previously missing author comes forward or (b) be required to be paid in to some trust fund as soon as the orphan work is used; or (c) be paid to some collecting soeiety in anticipation that the owner of the orphan work might come forward.

37. Should the duration of copyright in unpublished works be limited?

6. Enabling open content licensing to thrive

6.2. Clarifying the Australian legal status of voluntary commons licences

38. What are the principal voluntary commons licences used in relation to Australian works, and what is the extent of their usage?

39. What is the legal status of these licences under Australian law? For example, does an author's use of a commons licence create a contract, or does it only create a defence against a claim of infringement of copyright? Are any practical problems likely to arise from this?

40. What uncertainties (if any) are there in the enforceability of these licences under Australian law, in relation to all parties who may wish to enforce them?

41. What amendments to the Copyright Act could make voluntary commons licences more clear in their legal effects, if any additional certainty is needed?

6.3. Empowering public domain dedications

42. Can public domain dedications be effective under existing Australian copyright law?

43. If not, what changes to copyright law are needed to make them effective?

44. How can such public domain dedications be made to operate from a future date?

45. Should moral rights also be terminable by a public domain dedication?

6.4. Addressing potential problems with use of open content licences

Sufficiency of access to information about voluntary licences?

46. Do potential licensors obtain sufficient information about the implications of their use of voluntary public rights licences?

47. What information about each commons licence should potential licensors be able to access? How can this information be provided?

Lack of choice in the use of 'voluntary' commons licences?

48. How common is it for those who wish to use some type of online facility to provide their own content to the public to be required by the facility operators to adopt a particular version of a public rights licence in order to use the facility?

49. What issues arise from such practices imposed on users of UGC sites?

50. Are users of UGC sites given a choice of using Australian commons licences?

51. Does it matter to the long-term health of Australia's public domain that Australian users of global internet services may not be given a choice of using Australian licence suites, including Australian 'choice of law' clauses?

52. Under what circumstances does it matter or not matter that users are forced to use a particular licence in order to provide content via a facility?

Potentially deceptive or otherwise unfair use of public rights licence?

53. Are UGC facility users aware that some facility operators are collecting their

own proprietary rights over vast amounts of UGC?

54. Are UGC facility users aware that other users sometimes obtain rights to use their content?

55. What evidence is there that unfair terms are being imposed on the use of UGC facilities?

7. Maximising value of free & open source software (FOSS)

7.2. Usage of FOSS licences

56. Which free and open source software licences are most commonly used in Australia by both developers and users?

57. For which free and open source software licences is enforceability under Australian law of greatest economic and social importance?

7.3. Validity and enforcement of FOSS licences

58. Are there any reasons to think that GPL v2 or GPL v3 (or other significant FOSS licence) are not enforceable under Australian law? Do any unresolved questions about enforceability hinder its adoption in appropriate situations?

59. Could changes to the Copyright Act remedy any potential problems?

7.4. Australian government use of FOSS

60. Is there bias against the use of FOSS in Australian government-funded work? If so, what legal changes (if any) are needed to reduce this?

61. Should Australian government agencies develop policies that, where software is developed with public funding, it should be FOSS licensed (not necessarily to the exclusion of other licensing)?

62. Is there need for any legislative or regulatory support for such a change?

63. Does the FOSS model require reconsideration of the intellectual property policies and practices of Australian public institutions?

64. Are policy or statutory changes needed to recognize FOSS models as appropriate goals of various types of sponsored research and development?

65. Which of the other proposals concerning FOSS development in Australia put forward by Open Source Industry Australia Limited (OSIA) in its submission to the Innovation review should be adopted by changes to government policies and practices?

7.5. Financial models and tax incentives

66. Are the ‘voluntary’ contributions of FOSS authors into a form of commons adequately recognized by laws such as taxation and accounting?

67. Are there unintended detriments suffered by FOSS developers or others using FOSS models as a result of inadequate tax or other treatment of the FOSS community and industry model which could be ameliorated by legal changes?

68. Is there a need for local taxation law reform to enable the operation of Open Source Software Foundation repositories?

69. Should donations to such repositories, or distribution mechanisms, be tax deductible?

8. Moving toward open standards

8.1. Meaning and benefit of ‘open standards’

70. Would there be a benefit in an Australian definition of (or standard for) what is an open standard, to better enable adoption of open standards by Australian organisations?

8.2. Australian examples of open standards

8.3. Open document standards and government

71. Do Australian governments make appropriate use of ‘open standards’ in Australian government-funded work?

72. Should Australian governments have a preference for the use of open standards in Australian government-funded work? What legal changes are needed to support such a policy where it is adopted?

73. Are the processes for developing standards, both in Australia and internationally, in areas such as document formats, metadata or other file formats adequate to the task of assessing competing

technical, public interest and commercial claims about the benefits or shortcomings of proposed standards?

74. If not, do these shortcomings have an impact on the value of the standards so created for purposes of promoting innovation, interoperability and standards compliance?

8.4. Patent infringement risks

75. Are current methods for dealing with the protection of users and developers from patent-related law suits effective and accessible for all parties? If not, how could this aspect be improved?

76. What are the implications if there is limited or inadequate protection from this patent infringement risk?

9. Coexistence of open content and compulsory licences

9.1. 'Some rights reserved' from collecting societies?

77. What are the key differences in the membership conditions of Australian collecting societies insofar as their effect on their members use of voluntary commons licences are concerned?

78. Is a need for some or all collecting society members to have greater rights to opt-out from collecting society coverage for (a) some works or (b) some uses?

79. Should any such changes be through the Copyright Act or the code of conduct of the collecting societies?

9.2. Are collecting societies charging for the public domain?

80. Are collecting societies charging fees for works where it is inappropriate for them to do so, where such works are under open content licences, or where the copyright owner has made it clear that they do not wish such fees to be collected?

81. Do collecting societies have adequate practices to allow their members to inform them of works on which they do not wish fees to be collected, and to observe their members wishes?

82. Do collecting societies have adequate practices where non-members do not wish the collecting society to wish to collecting funds in relation to works in which they are the rights-holders?

83. Are collecting societies required to collect funds in relation to materials provided for free access where it is not socially desirable that they should so collect them?

84. Do collecting societies have adequate practices to otherwise identify works which are subject to licences which mean they should not collect fees?

85. Do collecting societies have adequate practices to refund fees which they should not have collected?

9.3. Previous reviews do not cover these issues

86. In light of intervening changes in relation to public rights and the public domain caused in part by the growth of the Internet, should the recommendations of the Review of Australian Copyright Collecting Societies (1995) (including recommendations 12, 19, 22, 26, 27 and 28) be reconsidered?

87. Should the 1995 recommendation for an Ombudsman Of Copyright Collecting Societies be adopted, or is the current Code Review process adequate?

88. Are collecting societies using undistributable funds for appropriate cultural purposes, given that such funds do not derive from the work of their members but could be seen as deriving from 'orphan works'?

89. Should collecting societies be required to collaborate with other organisations on the development of a national facility (or facilities) to assist in locating creators, so as to reduce the problem of 'undistributable funds' and reduce the problems caused by orphan works?

10. Re-usable government works

90. What benefits would arise from broader rights of re-use of government-created works in Australia? Which benefits cannot be achieved merely by providing public rights of access?

91. What is becoming international best practice in providing for re-use of government information?

92. Which recommendations by the Copyright Law Review Committee should be supported?

93. For which categories of 'government works' could copyright be abolished, and under what conditions (if any)?

94. What mechanism(s) for allowing greater use of government information are most desirable?

95. Should there be a legislative requirement of government licensing of certain categories of government-created works, and if so which?

96. Should a new 'Re-usable government information' licence be developed, with the aim of obtaining consistent usage across Australian governments?

97. If it is not possible to have a uniform licence across Australian governments, should there be some agreed standard for 'Re-usable government information' in Australia, perhaps with a distinctive stamp or logo to indicate this?

11. Public rights in publicly-funded research

11.1. Public access to research outputs

98. Should the ARC and other Australian government bodies providing research grants from public funds require all research outputs to be available in a free access repository within a period of time, as a condition of the grant?

99. How are such publicly-funded research outputs which come within the government policy requirement to be identified by potential third party users? Are individual items to be so marked, and/or are particular repositories to be so certified?

100. Should such research outputs be required to be licensed to the public under some minimum-definition (or higher) public rights licence, so as to allow re-use by third parties, not merely free access and existing fair use rights?

101. Alternatively, should there be more liberal 'fair use' conditions in the Copyright Act applying to any research outputs which come within government policy requirement?

102. Are any further Copyright Act protections (such as 'safe harbor' schemes) needed for University and other repositories which implement public policies in relation to open access to research outputs?

103. Should any of these provisions be retrospective, so that fine distinctions do not have to be drawn between what uses can be made of research outputs depending on the date of the research?

11.2. Electronic dissemination of postgraduate research

104. Whether impediments to publication of postgraduate research by Universities need to be removed, including by changes to the definition of 'research' for fair dealing purposes to include Universities' dissemination of student research outputs?

105. How can the interests of third parties whose works are quoted in postgraduate theses and dissertations be protected??

11.3. Open access to research data

106. Is the current ARC policy mandating sharing of publicly-funded research data sufficient? Does it need to be supported by copyright law changes allowing re-use of that research data by others?

107. Do the current NHMRC policies encouraging sharing of research data (and possibly future mandatory requirements) need similar legislative support?

12. Indigenous culture's relationships to the public domain

108. Where copyright applies to traditional knowledge and other cultural expressions of indigenous peoples, should the same rules relating to the public domain (such as term expiry) also apply?

109. What affect do international conventions or proposed conventions have on these questions?

110. How could sui generis legislation on indigenous culture intellectual property relate to copyright's ??? public domain?

111. What is the relationship between national approaches (distinctive to Australia) and the approach taken in international conventions?

112. Do the protocols and practices of Australian cultural institutions in relation to indigenous peoples require review, or supplementation in legislation?

References

ARC, 2007 - Australian Research Council 'Linkage Infrastructure, Equipment and Facilities - Funding Rules for funding commencing in 2008', 2007

Arts Law Centre (2006) - Arts Law Centre *Executive Summary - Arts Law Submission on draft Copyright Amendment (ICMR) Bill 2003*, 2006, available at <http://www.artslaw.com.au/_documents/files/ICMRLetterAndExecutiveSummary2006.pdf>

Attorney-General's Department (2007) - Australian Government, Attorney-General's Department, 'Draft Guidelines: Copyright Amendment Regulations 2006: Infringement Notices and Forfeiture of Infringing Copies and Devices Scheme', August 2007, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightInfringementNoticeScheme

Attorney-General's Department (2005) - Australian Government, Attorney-General's Department, 'Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age', Issues Paper May 2005, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005>

Australian Government (2007) – Australian Government *Statement of IP Principles for Australian Government Agencies* , 2007, available at <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf/$file/Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf>

Australian Senate (2007) – Australian Government, Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art - Securing the Future. Australia's Indigenous visual arts and craft sector*, 2007, available at <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/report.pdf>

Bainton (2007) – Bainton, T. "The public domain and the librarian" in C. Waelde & H. MacQueen (eds) *Intellectual Property: the many faces of the public domain* (Cheltenham, UK: Edward Elgar, 2007)

BECTA (2005) – British Educational Communications and Technology Agency (BECTA), 'Open Source Software in Schools: A study of the spectrum of use and related ICT infrastructure costs', Project report, May 2005, available at <http://publications.becta.org.uk/download.cfm?resID=25907>

Berne Convention (1886) – *Berne Convention for the Protection of Literary and Artistic Works*, 1886, as revised [1978] ATS 5

Bildstein (2007) - Bildstein, B. "Finding and Quantifying Australia's Online Commons", (2007) 4:1 *SCRIPT-ed* 8, available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-1/bildstein.asp>

Bond, Paramaguru and Greenleaf (2007) –Bond, C., Paramaguru, A. and Greenleaf, G. "Advance Australia Fair?: The Copyright Reform Process" (2007) 10 (3/4) *Journal of World Intellectual Property* 284

Bond (2007) – Bond, C. “Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review” (2007) 12(3) *Media and Arts Law Review* 343

Bond (2006) – Bond, C. “iShufflin’ that law through…”, *ActNow*, November 2006, available at http://www.actnow.com.au/Opinion/iShufflin_that_law_through.aspx

Bond (2006a) – Bond, C. ‘The State of Licensing: Towards Reuse of NSW Government Information’ *Unlocking IP Working Paper* [2006] *Australasian Intellectual Property Law Resources* 43, available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/43.html>

Bond (2008) –Bond, C. unpublished draft doctoral thesis (part of Unlocking IP project), University of New South Wales

Bowrey and Anderson (2006) – Bowrey, K. and Anderson, J. ‘The imaginary politics of access to knowledge: whose cultural agendas are being advanced?’ [2006] *Australasian Intellectual Property Law Resources* 13, at <http://www.austlii.edu.au/au/other/AIPLRes/2006/13.html>

Boyle (2003) - Boyle, J (ed) *The Public Domain*, special issue of *Law and Contemporary Problems*, 66:1&2 Winter/Spring 2003; republished as Boyle (ed) *The Public Domain – The Duke Conference on the Public Domain, Collected Papers* (no publication date)

Breach (2007) –Breach, G. ‘Free Speech, Free Beer and Free Labour – Volunteering Social Capital, and the Individuals who author Open Source Software’, UTS School of Management Working Paper: No. 2007/2, at <http://www.business.uts.edu.au/management/workingpapers/files/Breach2007.pdf>

Burkert & Weiss (2004) – Burkert, H. and Weiss, P. “Towards a Blueprint for a Policy on PSI”, in G. Aichholzer and H. Burkert (eds), *Public Sector Information in the Digital Age* (2004), as cited in DSTI/ICCP/IE(2005)2/FINAL, reproduced in OECD, Working Party on the Information Economy, *OECD Workshop on Public Sector Information: Summary* DSTI/ICCP/IE(2006)14, 27, at <http://www.oecd.org/dataoecd/34/42/37865140.pdf>

BSAC report (2006) – British Screen Advisory Council *Copyright And Orphan Works - A Paper Prepared For The Gowers Review*, August 2006, at <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>

Chesbrough, Vanhaverbeke and West (2006) – Chesbrough, H., Vanhaverbeke, W. and West, J. (eds), *Open Innovation: Researching a New Paradigm* (Oxford: Oxford University Press, 2006)

Clarke (2007) – Clarke, R ‘Business Models to Support Content Commons’, (2007) 4:1 SCRIPTed 59 at <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-1/clarke.asp >

Clarke & Dempsey (2004) – Clarke R. and Dempsey G. ‘The Economics of Innovation in the Information Industries’ April 2004, Xamax Consultancy Pty Ltd, at http://www.anu.edu.au/people/Roger.Clarke/EC/EcInnInfInd.html

Coates (2007) – Coates, J. “Creative Commons – The Next Generation: Creative Commons licence use five years on”, Special Issue: Creating Commons (2007) (1) *SCRIPT-ed* 75

Coates, Fitzgerald and Fitzgerald, 2007 – Coates J, Fitzgerald B and Fitzgerald A ‘Creative commons licensing and the re-use of public sector or government copyright material’, *iCommons Annual 2007*, at <http://www.icommons.org/annual07>

Coates, Suzor and Fitzgerald (2007) – Coates, J., Nic Suzor N. and Fitzgerald, A. *Legal Aspects of Web 2.0 Activities: Management of Legal Risk Associated with Use of YouTube, MySpace and*

Second Life, Queensland University of Technology, July 2007, at <http://creativecommons.org.au/socialnetworkingreport>

Collecting Societies Code Review (2007) – Burchett J *Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct, for the Year 1 July 2006 to 30 June 3007*, available at <http://www.copyright.com.au/reports%20&%20papers/CodeOfConductReport2007.pdf>

CLRC (2005) - Copyright Law Review Committee *Crown Copyright*, available at <http://www.austlii.edu.au/au/other/clrc/18.pdf>

CLRC (2002) - Copyright Law Review Committee *Copyright and Contract*, available at <http://www.austlii.edu.au/au/other/clrc/2/>

CLRC (1999) – Copyright Law Review Committee *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues*, (Attorney-General's Department, Canberra, 1999), available at <http://www.austlii.edu.au/au/other/clrc/5.html>

CLRC (1998) – Copyright Law Review Committee *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (Attorney-General's Department, Canberra, 1998), available at <http://www.austlii.edu.au/au/other/clrc/4.html>

Cox (2007) –Cox, J. 'Universities build open source enterprise applications: Ambitious Kuali project targets a suite of administrative tools' (27 March 2008) *Network World*, available at <http://www.networkworld.com/news/2008/032708-universities-open-source.html>

Crawford (1989) - Crawford, J. "Pointing the Berne: 1 – Opinion on Australia's Obligations Under the Berne Convention to Introduce Moral Rights" (1989) 7(1) *Copyright Reporter* 8

Creative Commons International (2005) *Submission to ACCC concerning APRA*, available at <http://www.law.qut.edu.au/files/ACCCFinal31.pdf>

Creative Commons International (2006) *Further Submission to ACCC concerning APRA*, available at <http://www.law.qut.edu.au/files/ACCCFollowupltr31.pdf>

Cutler (2007) – Cutler, T. (contributor to discussion) 'Why Governments and Public Institutions Need to Understand Open Content Licensing' in B. Fitzgerald, J. Coates and S. Kiel-Chisholm *Submission to the Government inquiry on the extension of legal deposit to electronic and audiovisual materials*, Intellectual Property: Knowledge, Culture and Economy, Queensland University of Technology, 2008 Fitzgerald, Coates and Kiel-Chisholm (2008)

Dodson and Barr (2007) – Dodson M and Barr O 'Breaking the Deadlock: Developing an Indigenous Response to Protecting Indigenous Traditional Knowledge' (2007) *Australian Indigenous Law Review*, 11(2), p 19-32

Drahos (2004) – Drahos, P. 'Towards An International Framework For The Protection Of Traditional Group Knowledge And Practice' UNCTAD-Commonwealth Secretariat Workshop on Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices, 2004, available at <http://cgkd.anu.edu.au/menus/PDFs/Drahos_tkframework.pdf>

Fitzgerald, Coates and Kiel-Chisholm (2008) – Fitzgerald, B., Coates, J. and Kiel-Chisholm, S. *Submission to the Government inquiry on the extension of legal deposit to electronic and audiovisual materials*, Intellectual Property: Knowledge, Culture and Economy, Queensland University of Technology, 2008

Fitzgerald et al (2007) – Fitzgerald B, Fitzgerald A, Middleton G, Lim Y and Beale T, *Internet and E-Commerce Law, Technology, Law and Policy* , Lawbook Co, Australia, 2007

Greenleaf (2003) – Greenleaf, G. 'IP, Phone Home: Privacy as Part of Copyright's Digital Commons in Hong Kong and Australian law' in L. Lessig (ed) *Hochelaga Lectures 2002: The Innovation Commons* (Hong Kong: Sweet & Maxwell Asia, 2003)

Greenleaf (2007) - Greenleaf, G. "Creating commons by friendly appropriation" (2007) 4:1 SCRIPT-ed 117

Greenleaf, Paramaguru, Bond and Christou (2008) 'Legal deposit's role in the public domain' Submission to the Attorney-General's Department and DCITA Review of the Extension of Legal Deposit, 2 May 2008, available at <http://www.dbcde.gov.au/home/intellectual_property/extension_of_legal_deposit_submissions>

Greenleaf, Maurushat, Vaile, Bond and Paramaguru (2007) – Graham Greenleaf, Alana Maurushat, David Vaile, Catherine Bond and Abi Paramaguru 'Not a Fair Trade: Australia's TPM Protection and AUSFTA-Inspired Reforms' Submission on the exposure draft Bill on technological protection measures (TPMs)' (submitted 22 September 2006), available on SSRN-LSN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977118>

Gowers Review (2006) – Gowers, A. *Gowers Review of Intellectual Property*, December 2006, HM Treasury, available at <http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm>

Guibault & Hugenholtz (2006) - Guibault, L. and Hugenholtz, R.B. (eds) T*he Future of the Public Domain* (Netherlands: Kluwer Law International BV, 2006)

Heffernan and David (2007) – Heffernan, M. and David, N. *Legal and project agreement issues in collaboration and e-Research: Survey Results*, 2007, Legal Framework for e-Research Project, available at <http://eprints.qut.edu.au/archive/00009112/01/9112.pdf>

Hietanen (2007) – Hietanen, Herkko A., "A License or a Contract, Analyzing the Nature of Creative Commons Licenses", NIR, *Nordic Intellectual Property Law Review*, (forthcoming), available at <http://ssrn.com/abstract=1029366>

Hudson and Kenyon (2007) – Hudson, E. and Kenyon, A. "Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions" (2007) 4(2) *SCRIPT-ed* 197, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007391>

Hugenholtz and Okediji (2008) – Hugenholtz, P. B. & Okediji, R. L. *Conceiving An International Instrument On Limitations And Exceptions To Copyright: Final Report*, March 06, 2008, available at <http://www.ivir.nl/publications/hugenholtz/limitations_exceptions_copyright.pdf>

IIPA (2007) - International Intellectual Property Alliance (IIPA) - Scorecard of WIPO Internet Treaties, as at May 8, 2007, available at <http://www.iipa.com/pdf/WIPOtreatiesWCTWPPTRatificationAccessionStatusScorecardCHART050807.pdf>

Innovation Review (2007) – Review of the National Innovation System (Australia) *Call for Submissions*, January 2007

Lea-Shannon (2006) – Lea-Shannon, R. "Open standards and technology in government and law: ODF Massachusetts and WCAG" [2006] *Australasian Intellectual Property Law Resources* 9, available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/9.html>

Legal Deposit DP (2007) – Department of Communications, Information Technology and the Arts 2007 *Discussion Paper on the Extension of Legal Deposit*, November 2007, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6C58A15A095D9476CA25737200035E3E >

Lessig (2004) – Lessig, L. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York: The Penguin Press, 2004)

Lessig (2006) – Lessig, L. "Re-crafting a public domain" (2006) 18 *Yale Journal of Law and the Humanities* 56

Lindsay (1918) - Lindsay, N. *The Magic Pudding* (1918), available on Project Gutenberg, available at <http://www.gutenberg.org/etext/4910> which states: "Not copyrighted in the United States. If you live elsewhere check the laws of your country before downloading this ebook."

McDonald (2006) –McDonald, I. "Some thoughts on Orphan Works" (2006) 24(3) *Copyright Reporter*, available at <http://www.copyright.org.au/a06n05.pdf>

McDonald (2003) –McDonald, I. 'Indigenous Communal Moral Rights', Australian Copyright Council, 16 July 2003, available at <http://www.copyright.org.au/pdf/acc/articles_pdf/A03n24.pdf>

McGowan (Undated) – McGowan, David, "Legal Implications of Open-Source Software" (Undated), available at <http://ssrn.com/abstract=243237>

McGuinness (2004) – McGuinness, P.P. "In Search of the Magic Pudding" *HR Nicholls Society Proceedings* Vol 5, 2004 available at <http://www.hrnicholls.com.au/nicholls/nichvol5/vol51ins.htm>

McKeough, Stewart and Griffith, 2004 – McKeough J, Steward A and Griffith P *Intellectual Property in Australia* (3rd Ed), 2004, LexisNexis Butterworths Australia

Menell (2007) – Menell, P. S., "Knowledge Accessibility and Preservation Policy for the Digital Age" (July 10, 2007). UC Berkeley Public Law Research Paper No. 999801, available at <http://ssrn.com/abstract=999801>

Moses (2006a) –Moses, A. "The $65,000 question: do you own an iPod?", *The Sydney Morning Herald*, 20 November 2006 at <http://www.smh.com.au/news/technology/the-65000-question-do-you-own-an-ipod/2006/11/20/1163871308087.html>

Moses (2006b) –Moses, A. "Backdown on draconian laws", *The Sydney Morning Herald,* 5 December 2006 at <http://www.smh.com.au/news/biztech/backdown-on-draconian-copyright-laws/2006/12/05/1165080919601.html>

National Library of Australia (Undated) – National Library of Australia. "Submission to the Copyright Law Review Committee on Reference to Review and Simplify the Copyright Act 1968", available at <http://www.nla.gov.au/policy/clrc.html>

NSW Toolkit (2007) – NSW Attorney-General's Department *Copyright Management Toolkit*, 2007 <http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0019/11791/CopyrightManagementToolkit.pd>

OAK Law Project (2006) – OAK Law Project *Creating a legal framework for copyright management of open access within the Australian academic and research sector* (Project Report No 1), 2006, available at <http://eprints.qut.edu.au/archive/00006099/01/Printed_Oak_Law_Project_Report.pdf>

OAK LAW Project (2007) – OAK LAW Project *Building the Infrastructure for data access and reuse in collaborative research: an analysis of the legal context*, 2007, available at <http://eprints.qut.edu.au/archive/00008865/01/8865.pdf>

ODC (2008) – Open Data Commons *ODC Public Domain Dedication and License*, available at <http://www.opendatacommons.org/odc-public-domain-dedication-and-licence/>

OECD (2004) – OECD, Committee on Scientific and Technological Policy *Ministerial Declaration on Access to Research Data from Public Funding* C(2004)31/REV1, available at <http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/3A5FB1397B5ADFB7C12572980053C9D3?OpenDocument>

OECD (2006) – OECD, Committee on Scientific and Technological Policy *Draft Recommendation Concerning Access to Research Data from Public Funding*, 2006, available at <http://www7.nationalacademies.org/usnc-codata/OECD_Principles_and_Guidelines.pdf>

OECD (2006a) – OECD, *Recommendation of the Council concerning Access to Research Data from Public Funding* (2006)184, available at <http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/3A5FB1397B5ADFB7C12572980053C9D3?OpenDocument>

Paramaguru, Vaile, Bond and Maurushat (2007)_- Paramaguru, A., Vaile, D., Bond, C. and Maurushat, A. "Copyright Infringement Notices Scheme: A Submission to the Attorney-General's Department", [2007] University of New South Wales Faculty of Law Research Series 62, available at <http://law.bepress.com/unswwps/flrps/art62/>

Palombi (2008) – Palombi, L. 'TK & IP – Where Are We And Where Are We Going?', Australian & New Zealand IP Teachers Conference, Wellington, New Zealand, 2008

PMSEIC (2006) – Prime Minister's Science, Engineering and Innovation Council, Working Group on Data for Science, 'From Data to Wisdom: Pathways to Successful Data Management for Australian Science' (2006) available at <http://www.dest.gov.au/sectors/science_innovation/publications_resources/profiles/Presentation_Data_for_Science.htm> at 26 March 2007.

Productivity Commission (2007) – Productivity Commission *Public Support for Science and Innovation*, 2007 available at <http://www.pc.gov.au/study/science/docs/finalreport>

Queensland Government (2007) - *Government Information and Open Content Licensing: An Access and Use Strategy* (GILF Stage 2 Report), 2007 available at <http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/navigators/Key%20Projects>

Qld Spatial Information Office (2006) – Qld Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury, 'Government Information and Open Content Licensing: An Access and Use Strategy', Government Information Licensing Framework Project Stage 2 Report, Oct 2006, available at <http://www.qsic.qld.gov.au/QSIC/>

Reynolds and Stoianoff (2003) – Reynolds R and Stoianoff N *Intellectual Property: Text and Essential Cases*, 2003, Federation Press

Ricketson (1989) - Ricketson, S. "Is Australia in Breach of Its International Obligations With Respect to the Protection of Moral Rights?" (1989) 17 *Melbourne University Law Review* 462.

Ricketson and Ginsburg (2006) –Ricketson, S. and Ginsburg, J. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Volumes I and II, 2nd edition (Oxford: Oxford University Press, 2006)

Rimmer (2007) – Rimmer, M. *Digital Copyright and the Consumer Revolution: Hands off my iPod*, (Cheltenham, UK and Northampton, Mass.: Edward Elgar, 2007)

Rimmer (2006) – Rimmer, M. 'Finders Keepers: Copyright Law and Orphaned Works' (audio and slides), Australian Libraries' Copyright Committee, Australian Digital Alliance and Copyright in Cultural Institutions, 22 May 2006,, available at <http://www.digital.org.au/alcc/HomeArchives.html>

Rimmer (2006) – Rimmer, M. 'Copyright Proposals Fail Test of Brevity, Simplicity and Fairness', The House of Commons, 14 November 2006, available at <http://www.cyberlawcentre.org/unlocking-ip/blog/2006/11/copyright-proposals-fail-test-of.html>

Rimmer (2004) – Rimmer, M. "Facing the music: the restoration of copyright", *Australian Library and Information Association*, May 2004, available at <http://www.alia.org.au/publishing/incite/2004/05/free.trade.html>

Samuelson (2003) – Samuelson, P. "Mapping the digital public domain: Threats and opportunities" in J. Boyle (ed) *The Public Domain*, special issue of *Law and Contemporary Problems*, 66:1&2 Winter/Spring 2003; republished as J. Boyle (ed) *The Public Domain – The Duke Conference on the Public Domain, Collected Papers* (no publication date)

Samuelson (2006) – Samuelson, P. "Challenges in mapping the public domain", in L. Guibault and R. B. Hugenholtz (eds) T*he Future of the Public Domain* (Netherlands: Kluwer Law International BV, 2006)

Simpson Report (1995) – Simpson, S. *Review of Australian Copyright Collecting Societies*, A Report To The Minister For Communications And The Arts And The Minister For Justice, 1995, available at <http://www.austlii.edu.au/au/other/clrc/14/>

Tawfik (2005) – Tawfik, M. J. "International Copyright Law: W[h]ither User Rights?" in M. Geist (ed) *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005)

US CC (2008) – US Creative Commons Public Domain Dedication , 2008, at <http://creativecommons.org/licenses/publicdomain/>

US Copyright Office (2006) – United States Copyright Office *Report on Orphan Works*, 2006

US Copyright Office (2007) – 'Copyright Registration' at <http://www.copyright.gov/register/>

Waelde (2007) - Waelde, C. 'Database copyright: the story of BHB' (draft chapter, book edited by Torremans in publication)

Waelde & MacQueen (2007) – Waelde, C. and MacQueen, H. (eds) *Intellectual Property – The Many Faces of the Public Domain* (Cheltenham, UK: Edward Elgar, 2007)

Wright, Christie and Kenyon (2008) – Wright, R., Christie, A. and Kenyon, A. 'Three steps where? – Examining the Three-Step Test for Copyright Exceptions' Australasian Intellectual Teachers Conference, Wellington, NZ, January 2008

Weatherall (2006) – Weatherall, K. “Would you *ever* recommend a Creative Commons license?” [2006] *Australian and New Zealand Intellectual Property Law Resources* 4, available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html>

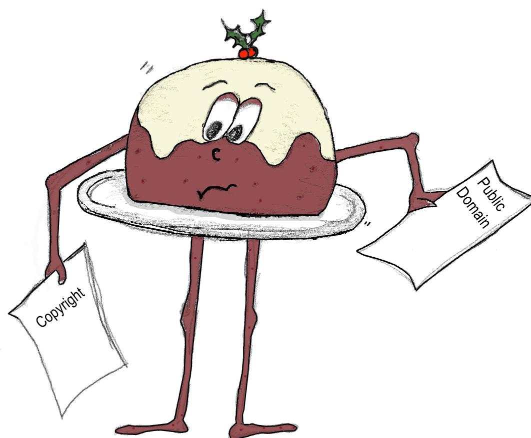
Weatherall (2007) – Weatherall, K. “Of Copyright Bureaucracies And Incoherence: Stepping Back From Australia’s Recent Copyright Reforms” (2007) 31 *Melbourne University Law Review* 1, available at <http://ssrn.com/abstract=1091076 >

Wikipedia (2007) – ‘List of parties to international copyright treaties’ at <http://en.wikipedia.org/wiki/List_of_countries_party_to_the_Berne_Convention>

Willett (2007 – Willet, E ‘Copyright collecting societies, the Copyright Tribunal and the ACCC – a new dynamic’ at <http://www.accc.gov.au/content/index.phtml/itemId/788161>

Yu, Fast and Vaile (2007) – Yu, R., Fast, S. and Vaile, S. ‘Office Open XML and the promise not to sue: Opportunity or minefield?’, Working paper produced for OOXML Symposium University of New South Wales Cyberspace Law and Policy Centre, 14 December 2007, available at <http://cyberlawcentre.org/2007/ooxml/background_v12.pdf>

[228]



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