Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions

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This submission is made by researchers at the Cyberspace Law and Policy Centre University of New South Wales Faculty of Law. CPLC is a public interest centre specialising in, among other things, the operation of law in networked environments. We have had a long standing research interest in copyright in the online and digital world, and new potential models for supporting creators, trading, and sharing.

We apologise that, due to unforeseen personal circumstances of the Executive Director, this submission is not as comprehensive as we would have wished. However, we look forward to continuing to work with the ALRC as the inquiry progresses, including assisting with fora for discussions, and further contributions on aspects which are not fully developed below. In this submission, we focus on a few specific issues with technological features, and offer general observations at the end.

Principle 5: Responding to Technological Change

Principle 5 of the ALRC inquiry would seem to be both obvious and important. However, it is important to recognise that, even despite best efforts, it is unlikely that copyright law will able to *avoid* responding to new technologies, platforms and services through ongoing amendment. While it is possible to *minimise* the extent to which the *Copyright Act* will struggle to meet future changes in technology, it is not possible to avoid such problems entirely. In other words, technological neutrality is scale, which involves compromises, rather than an achievable goal.

Like all legislation, the *Copyright Act* operates in an assumed socio-technical context (based around the state of affairs at initial enactment, as well as on amendment). Due to the nature of the Act, most assumptions relate to the state of information and communication technologies at different points in history. As these technologies have evolved, the Copyright Act has required amendment. This has been to clarify uncertainties, to ensure that the Act applied to new types of works and new mechanisms for dissemination and to repeal or amend provisions that are no longer required.

While one can be aware of such issues, and draft legislation in order to minimise them, no solution can avoid them entirely due to the unpredictability of technological change.

Technology neutrality is often thought of as a panacea for resolving such problems. Despite frequent references by governments and academics to technological neutrality,[1] the term is ambiguous.[2] Two of its important meanings in this context is (1) the principle that legislation should not treat different technologies differently if the rationale behind the legislation would apply equally to each technology, and (2) the principle that legislation ought not to be drafted so as to avoid future amendment as a result of changes in technological practice. Various drafting techniques can be used to work towards these goals. However, the desire for technological neutrality must be weighed against (1) a recognition that distinctions between different technological practices may sometimes be desirable, and (2) the fact that greater technological neutrality generally leads to legislation being drafted at a higher level of generality, which is not always desirable.[3]

According to a policy of non-discrimination, one would treat different technologies equally provided that there are no relevant differences between them, but discriminate on the basis of relevant difference. Section 109A(c) is an example of a provision that discriminates between technological means of obtaining a digital recording,[4] when in fact, especially given s109A(d), this difference would seem to be irrelevant. Changes in how people access digital music may have highlighted this discrimination (making the existing provision obsolete), but it was avoidable from the outset. As this example demonstrates, avoiding discrimination between existing technologies is relatively straightforward. However, seemingly neutral laws can discriminate against unanticipated future technologies.[5]

The only way to guarantee technology-neutrality into the future so that new technologies will be treated fairly is to enact a law with a relatively high level of generality. This requires an understanding of the true goal behind each statutory provision. If, in addition to non-discrimination, one also wants a law to be "future-proof", in that they will continue to operate as intended in new socio-technical contexts, there are other requirements. Most importantly, one must avoid implicit technological assumptions in language. The *Copyright Act* makes numerous distinctions that are based on socio-technical assumptions, including most obviously the distinctions between types of works (and non-works). However, even if the *Copyright Act* were rewritten to avoid such distinctions (and this is beyond the current inquiry), there will remain the possibility of obsolescence over time – a deliberate policy of technology-neutrality can only minimise problems, not avoid them.[6] There will always be a possibility that the *Copyright Act* will discriminate against or in

[1] Including in Australia, see eg Parliament of the Commonwealth of Australia, Houses of Representatives, Explanatory Memorandum: Electronic Transactions Bill 1999, at 3 ("Technology neutrality means that the law should not discriminate between different forms of technology . . . .").
[2] *See generally* Bert-Jaap Koops, 'Should ICT Regulation be Technology-Neutral?' *in Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* 77, 77 (Bert-Jaap Koops et al. eds., Nat'l Programme for Info. Tech. and Law, Information Technology and Law Series No. 9, 2006).
[3] Lyria Bennett Moses, "Recurring Dilemmas: The Law's Race to Keep Up with Technological Change" (2007) 7 *University of Illinois Journal of Law, Technology and Policy* 239-285.
[4] Catherine Bond, 'There's Nothing Worse a Muddle in All the World: Copyright Complexity and Law Reform in Australia' (2011) 34(3) *UNSW Law Journal* 1145.
[5] Bennett Moses (n 3).
[6] Ibid.

favour of new forms of creativity and new means of production, communication and distribution.

It is also important to bear in mind that technology-neutrality does not mean that legislation should never make different rules for different technological practices. It only means that any technology-specific provision needs to be justified by reference to features of that technology. For example, in paragraph 80, the Issues Paper notes the Department's comment that differences in markets for different works may mean that different exceptions are appropriate. However, if this proposition is accepted, provisions that take account of these differences may become uncertain or unfair as socio-technical practices evolve and, in particular, as there is convergence in markets for different content types. Again, there is a balance that needs to be struck between useful technology-based distinctions and the desire to avoid frequent amendment.

While the above points are made at a general level, they are applicable in considering various questions raised in the Issues Paper. In particular:

- **Question 4:** This question is framed in terms of caching, indexing and uses related to the function of the Internet. But the Internet, and the technical means used for its functioning, is contingent. One can describe how Google uses caching in its search engine today, but in future the mechanisms used to "find" information will change. Rather than considering the issue from the perspective of the problems posed by particular technological practices, it would be more useful to consider *why* we might want to exclude such practices from copyright law. Is it because copyright owners placing material on the Internet implicitly consent to particular uses? Is it because such uses are "fair" in the American or Canadian sense? If one can identify the goal underlying exclusion of caching or other practices, then one can formulate a (relatively) technologically neutral provision.

- **Questions 19-21:** Implicit in the formulation of these questions, and the preceding passage, is an assumption about the technology used to store works. Currently, digitisation is the most efficient means of archiving. However, that is socio-technically contingent. If the goal is to avoid building avoidable technological assumptions in to new exceptions, then the words used should avoid reference to a particular technology of data storage. The issue is, presumably, not the fact that information is stored "digitally" but the fact that it is stored in a different, more efficient and useful format.

Questions 23 and 24: Orphan works

As the Centre has undertaken significant research in the area of orphan works, we have attached an appendix with a bibliography on this topic, in case the ALRC finds it useful. It covers developments in Canada, UK, EU, US and other countries, with documents from government, legal, academic and technical perspectives, and also draws on observations made at our forum on the topic in 2011, which launched the SBS policy on orphan works (referred to in this attachment). It refers to prototype online risk assessment/due diligence tools, which contribute to any solution.

If the ALRC would like to look at the empirical work we've done on orphan works we are more than happy to provide a copy of our research working paper, which may help put some of the resources referred to above in context, and offer a perspective on some of the issues likely to arise.

We would also be happy, given more time, to offer observations on the strong points and possible concerns arising from recent proposals for a legislative model to address the current problems with orphan works.

Question 25: Data mining

Data-mining is an automated process of analysis that is capable of recognising trends and patterns that may be too laborious or detailed to be analysed manually. As Furnas explains, data-mining 'helps us see the forest without getting lost in the trees' because it helps us to 'simplify and summarize the data in a manner that we can understand, and then allow us to infer things about specific cases based on the patterns we have observed'.[7] Accordingly, data mining is all about discoveries and predictions. It has the potential to grant 'immense inferential power'[8] to allow businesses, researchers and institutions to 'make proactive knowledge-driven decisions'.[9] There are significant potential commercial benefits - data mining has the potential to improve business profits by allowing businesses to better understand and predict the interests of customers so as to focus their efforts and resources on more profitable areas.[10] It is unclear in the ALRC's discussion whether "research" covers marketing research and "commercial" medical research, for example.

Data mining also has the potential to be highly privacy invasive, deceptive and discriminatory. In this capacity, data mining is not only related to commerce and business but also to human rights and civil liberties.

Whether data mining tools are impeded by the *Copyright Act* depends on the way that data mining technologies actually work, and in particular the extent of "copying" involved. There is no reason to think that all available data mining tools do or will always "copy" works, although some currently do so. Assuming that an unauthorised copy has been made during the process of data mining, there will be infringement of the copyright holder's exclusive right to reproduce the work in the absence of an express or implied licence to copy. Moral rights also attach to copyrighted works. While moral rights may be contracted out of in Australia, this is not the case in non-Commonwealth countries as well as in Canada which has a hybrid copyright system. One may be able to copy data without infringement but where one uses data in a manner that offends the morale of the data's "owner" copyright has been known to step in to prevent such use.

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[7] Alexander Furnas, *Everything You Wanted to Know About Data Mining but Were Afraid to Ask* (3 April 2012) The Atlantic < http://www.theatlantic.com/technology/archive/2012/04/everything-you-wanted-to-know-about-data-mining-but-were-afraid-to-ask/255388/>.
[8] Ibid.
[9] Kurt Thearling, 'An Introduction to Data Mining: Discovering Hidden Value in your Data Warehouse' (White Paper, 2010) < http://www.thearling.com/text/dmwhite/dmwhite.htm>.
[10] Ibid.

Question 26: Data mining

As the ALRC notes, extensive arguments in favour of and against an exception for data mining have already been made in the UK.[11] The same kinds of tensions between copyright owners on the one side and academic and commercial users of data mining techniques on the other will no doubt be repeated in Australia.

Assuming one wanted an exception, there are difficulties with building it around a notion such as "data mining". Crafting an exception requires understanding the reason why many feel that these practices should be excluded. For example, is it (1) that it is a non-competing use, (2) that copying is minimal, or (3) that the use is "fair" in the American sense. If the reason can be articulated, then so can the exception, in a technology-neutral way that avoids references to particular activities. The relevance of a non-commercial context also needs to be considered in understanding the nature of the justification.

If an exception were adopted to enable data mining, there would be a need to *manage* access to address the technical, competitive and commercial risks. Further, there is a need to ensure that copies made in the course of data mining do not "find their way into other areas".[12]

'Cloud'

We are at present looking into aspects of data sovereignty and 'the cloud', with support from stakeholders in the area. We are not in a position to offer submissions on copyright and 'the cloud', but anticipate being able to do so in 2013.

General observations

As a result of earlier discussions, in addition to the above specific points we offer some observations based on our experience of research and policy discussions with consumer and institutional user stakeholder communities.

Consumer voices: The work of the inquiry occurs at a time when there are regular controversies about the appropriate balance of creator, owner, 'user' and other stakeholder rights in the context of rapid and continuing technological developments, particularly in online networking and digital information technologies. (Indeed, even the notion that copyright law should manifest such a balance is controversial in some quarters.) But generalist consumer, user and citizen policy and advocacy sources in Australia, committed as they usually are to a wide range of policy areas, often struggle to fully engage with the level of technical, econometric and legal specialisation required in the technologically driven aspects of copyright law. And there are few well-resourced specialist sources in this sector.

It would be useful for the inquiry to explore ways to work actively to overcome the comparatively more limited resources and lobbying capacities of the consumer side of the copyright equation, compared with the very well-organised and resourced stakeholders in the corporate sector, many of whom are rights-holders. The aim is not

[11] United Kingdom Government, *Consultation on Copyright: Summary of Responses* (2012).
[12] Ibid.

necessarily to swing the balance in any particular direction, but for the inquiry and policy makers to better understand the impacts on and interests of consumers, and therefore how to take these into account in refining copyright law.

Fair and understandable: One of the general matters which should be taken into account in settling the inquiry's scope and approach is the degree to which copyright law and its myriad 'exceptions' is overall considered by the general population to be understandable and fair. (This group were formerly conceived as passive consumers; they are still willing to pay; but are increasingly capable of playing the role of online intermediaries or global re-publishers, and interested in creative use and re-use of digital versions and fragments of works, as well as consuming when and how they want.)

In a research project supported by Consumers International about consumer attitudes to the changes in the 2006 amendments which belatedly 'legalised' iPods and TiVos, we found limited but encouraging evidence that, where the changes to law went in the direction from clearly 'unfair' (as many considered the apparent illegality of format shifting music you'd purchased from your CD to your iPod to have been) to 'fairer' (the format shifting and time shifting exceptions legalising this common use), there was also a modest but significant improvement in the level of respect for the copyright law as a whole, and a matching modest increase in the deprecation of, say, illegal file sharing.[13] Perceptions of fairness have potential indirect benefits.

As a part of that research, we were also surprised to hear the view put by a senior copyright industry lawyer that *it did not matter* that the law in this area had become so complex, impenetrable and technologically specific (despite constantly repeated good intentions to move towards 'technological neutrality') that it was almost impossible for 'mere mortals' (among whom were the vast majority of infringers) to understand.[14] The notion that 'it may be difficult for ordinary people to comply with an obligation if they can't understand it' seemed to have no place in this perspective. However, while this may accord with past insider assumptions, it fails the sort of 'usability' test increasingly recognised as essential in the development of any workable technological system involving a mass user base, such as, say the Internet.

If the findings of our research are any guide, an important outcome for the inquiry's work would be to improve both the perception of fairness, and the perception of comprehensibility, about those copyright provisions which have most impact on ordinary people. This would have a flow on effect, if our research is correct, of somewhat improving respect for the general copyright law, and somewhat better voluntary compliance with those clear provisions that target behaviour widely accepted as unfair. (This in turn could help reduce reliance on draconian legal and technical options some in industry seem to assume are their only choice.)

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[13] Vaile, D. 'Shifting Sands? The moderate impact of Australia's 2006 copyright exceptions,' chapter 3 in Malcolm, J. *A2K for Consumers: Reports of Campaigns and Reports 2008-2010*, Consumers International, Kuala Lumpur, Malaysia, September 2010, including extensive references, available at: <http://cyberlawcentre.org/2010/a2k-reports2010-ShiftingSands.pdf> or <http://a2knetwork.org/a2k-consumers-reports-campaigns-and-reports-2008-2010/>. Sample responses attached to that report, full data sets of the results of the survey of 1500 respondents available on request.

[14] Private communication, 2010.

Business models, supply on good terms? Some rights-industry stakeholders fund consultancies aimed at producing 'evidence' in support of their proposals and preferred options, particularly in relation to technological and legal protection of existing business models against online infringers. However, consistent with comments from some regulators,[15] some of this 'evidence' appears unconvincing, not independent and dubious methodologically, with limited capacity for external review of primary data or algorithm assumptions. The inquiry should consider assessing where such weaknesses in methodology of research and evidence exist, and the extent to which they may contribute to claims and proposals resting on unreliable foundations.

One issue which deserves to be taken into account is the potential relevance of existing stakeholders who are unwilling to offer for 'sale' all the digital online items Australian consumers want, on good terms, after having in many cases stimulated demand for them on a global basis. For instance, consumer concerns about price, timeliness, compatibility, interoperability, lack of multiple vendors, durability, availability, catalogue depth, and the like appear to adversely affect many of the offerings of some stakeholders, while others (including Apple with the iTunes store) appear to have got enough of these issues right to generate massive cash flows.[16]

Behind the use of sometimes questionable 'evidence' sources to deflect attention from this issue may be an unwillingness to accept that, in a market economy, the 'customer is always right'. And rather than being inveterate and committed law breakers, many online consumers may turn to infringing sources because they unable to find the items they want on good terms and in good form from a range of user friendly and respectful vendors; were the items available on good terms, they would be purchased. This is not always the case, and the issue is controversial, but one avenue for inquiry may be the potential for obligations to supply on good terms to contribute to both advances in viable business models for rights holders, and consumer benefit more generally with a wider range of cheaper, more acceptable format content and reduced emphasis on punitive solutions.

As noted above, we attach a research bibliography in relation to orphan works developments. We hope these observations and materials of are value to the inquiry.

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and Jacqueline Au (intern) for the
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[15] Recent press reports of ACCC submission to inquiry. There are also substantial collections of more reliable primary data available; see 'Shifting Sands' report above for some examples.
[16] See October 2012 copyright policy position from the peak body Australian Communications Consumer Action Network (ACCAN) for an articulation of this perspective.