



Roundtable on contracting out

On 1 May 2018, we hosted a roundtable on contracting out as part of our Copyright Modernisation consultation. We have listed the attendees below.

Summary of roundtable

We noted the Productivity Commission and Australian Law Reform Commission have recommended making unenforceable any agreement that limit copyright exceptions. We also recognised the government supported this recommendation in principle. We noted the purpose of this and other roundtables was to find areas of meaningful reform, not to repeat previous submissions. We recognised the ongoing work of many stakeholders on other copyright policy areas. This included the [Copyright Amendment \(Service Providers\) Bill 2017](#), the review of [Copyright \(Online Infringement Amendment\) Act 2015](#) and the [Review of Code of Conduct for Copyright Collecting Societies](#).

We noted that contracting occurs when contracts limit or might limit copyright exceptions. Copyright law only makes clear there cannot be contracting out for computer programs. We recognise rightsholders want certainty in contracts. We also recognise users want to be able to use exceptions. The question is how to achieve both without impacting on existing business models.

The roundtable agreed that contracting out is a problem for fair dealing exceptions. Rightsholders agreed that it was rare for Australian creators to contract out of fair dealing exceptions. Some noted that contracting out may be also a problem for other copyright exceptions. For example, libraries, archives and their users might want to be more certain that existing exceptions allow document supply and inter-library loans. Others noted that prohibiting contracting out of all copyright exceptions would impact on freedom to contract. Some rightsholders raised concerns with a broad restriction against contracting out of exceptions. This could affect established licensing practices that provide consumer choice of how, when and where they access copyright content. There was also a concern about affecting the enforceability of technological protection measures, such as passwords and technological locks which prevent unauthorised access to copyright content.

The roundtable recognised that some people, including users, might genuinely prefer to be able to contract out. For example, people may wish to make non-disclosure agreements. A celebrity might insist their interview footage is only aired by a broadcaster for one week, but other broadcasters could rely on fair dealing for news reporting. A playwright might only licence their play to a theatre with conditions on how it is staged that restrict copyright uses. Some attendees noted that fairness factors mean that copyright exceptions do not always allow a use. For example, a fair dealing exception might not allow disclosure of a work if there is a non-disclosure agreement in place.

We committed to come back to attendees with further material they could take to their members as part of the consultation. The recent changes to UK law, which prevent contracting out of some fair dealing exceptions provides one option. This would help us advise government on policy options, the pro and cons, and the level of consensus between different groups. We asked for submissions by 4 June. We noted that we planned to appoint an external reference group. This would represent diverse views across copyright and improve our advice to government.



Attendees

The attendees of the roundtable were:

- Delia Browne, National Copyright Director, *Copyright Advisory Group to the COAG Education Council*
- Jessica Coates, Executive Officer, *Australian Digital Alliance*
- Bronwyn Dowdall, Manager Licensing and Rights, *National Film and Sound Archive*
- Kate Haddock, Chair, *Australian Copyright Council*
- Michael Handler, Professor, *University of New South Wales*
- Paul Muller, CEO, *Australian Screen Association*
- Cate Nagy, *Law Council of Australia*
- Sarah Runcie, Strategy and Policy Manager, *Australian Publishers Association*
- Juliet Rogers, CEO, *Australian Society of Authors*
- Nic Suzor, Associate Professor, *Queensland University of Technology (QUT) Law School* and Chief Investigator, *QUT Digital Media Research Centre*
- Sarah Waladan, Head of Legal and Regulatory Affairs, *Free TV Australia*
- Robin Wright, Manager, Licensing, Acquisitions and Copyright, *Swinburne University*
- Kate Gilchrist, Team Leader, Acquisitions & Productions, Legal Services, *Australian Broadcasting Corporation*
- Helen Owens, Assistant Secretary, Content and Copyright Branch
- Sam Ahlin, Director, Content and Copyright Branch (by teleconference)
- Erin Driscoll, Assistant Director, Content and Copyright Branch
- Alan Hui, Assistant Director, Content and Copyright Branch
- Hari Sundaresan, Senior Policy Officer, Content and Copyright Branch (by teleconference)

