

4 July 2018

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Acting Director
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Canberra ACT 2601
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Dear Ms Shadbolt,

The Australian Publishers Association (APA) is pleased to provide a response to the Copyright Modernisation Consultation Paper (March 2018). We would also like to express our appreciation of the consultative approach the Department has taken throughout this phase of copyright reform.

The APA agrees that copyright law, and the broader intellectual property system, needs to be effective, efficient, adaptable and accountable¹. We support a copyright regime that improves cultural, economic and educational outcomes.

Copyright law needs to balance users' interests and the rights of creators. There is a need for greater flexibility and clarity for users. There is a need for sustainability for the creative industries.

Intellectual property (IP) law is a core element of a functioning economy. It is fundamental to the monetising of innovation across many industries, and copyright is the foundation for Australia's valuable creative industries². Without it, the creative industries could not exist.

Beyond its economic importance, or the instrumentalist perspective of users, which is nonetheless valid, copyright also dignifies authorship³.

We support the views expressed by the Arts Law Centre on the particular importance of copyright for Indigenous creators⁴. The impact of widening copyright exceptions on

¹ Copyright Modernisation Consultation Paper, March 2018, p.5

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https://www.copyright.org.au/acc_prod/ACC/Research_Papers/PwC_Report-Value_of_Copyright_Industries.aspx

³ A Drassinower, *What's wrong with copying?*, 2015

⁴ <https://www.artslaw.com.au/info-sheets/info-sheet/indigenous-cultural-and-intellectual-property-icip-aibt/>

Indigenous Cultural and Intellectual Property (ICIP) should be thoroughly interrogated. We note that an Indigenous creators perspective has not been folded into discussion as yet. We encourage the Department to more deeply engage and consider that perspective.

Flexible Exceptions

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

The APA supports Australia's system of purposive, defined, fair dealing exceptions. The APA does not support introducing the US-style fair use doctrine. We understand from the roundtable discussions that the Australian government will not be proposing legislation for a fair use doctrine. With that in mind, rather than outlining the reasons for the APA's position at length, we will highlight the two most critical points:

- that fair use would come with a high degree of uncertainty in the Australian market which, in turn, would increase the risks for creators (those risks have only reduced in the U.S. through a century of U.S.-specific court judgments to define the boundaries of fair use), and
- that fair use will necessarily result in a loss of remuneration and control for creators, particularly in secondary markets, which could undermine the incentives for content creation in Australia.

The APA contends that the negative impact on rightholders is not proportionate to the assumed benefits to users and is not, therefore, in the public interest.

In line with the APA's approach to reform, we do agree that there is scope for greater flexibility and clarity for users whilst also reiterating the need to remain compatible with the three step test of the Berne Convention and Australia's fairness factors.

In relation to any new/amended exceptions, the beneficiaries of the exception, as well as publishers, and other rights holders will all need to consider specific drafting of exceptions to ensure they are compatible with the Berne convention and the fair dealing factors.

Quotation Exception

The APA endorses the proposed addition of a fair dealing exception for quotation to the Copyright Act. In doing so, this has the advantages of:

- bringing Australian legislation more explicitly in line with the Berne Convention⁵

⁵ However noting, as the Australian Copyright Council and Copyright Agency does, there are various exceptions (including the criticism and review and news reporting exceptions) in Australian copyright law

- providing users of copyright material greater flexibility and clarity
- and avoiding harm to established licensing markets as long as the fairness factors are appropriately applied.

The APA adds the following limitations:

- that author acknowledgement and source attribution be mandatory
- that quotation, as expressed in the consultation discussion, could be a 'substantial part' in order to be meaningful but not so broad as to undermine a 'substantial part test' in determining copyright infringement
- that care be taken in defining 'quotation'. Our comments are confined to written text. Other media such as films, videos, images and photographs will necessarily need different defining parameters.

Education Exception

Educators need flexibility in the way they use copyright material. The first priority for solving users' problems should be to exploit fully the flexibility in the current legislation and statutory licence.

For this reason the APA opposes an exception for "certain educational uses". Education is a market for which educational materials are designed, developed and heavily invested in by authors and publishers. That market, which includes secondary markets, should not be narrowly defined as textbooks alone or material that is produced by publishers solely for pedagogical purposes. Published material such as news, journalism, novels, blogs, vlogs and other materials that have rights holders attached to them and should not be exempt from remuneration simply because they are not created with the sole purpose of codified education. If said material is used, it should be remunerated.

The APA is concerned that some stakeholders may see copyright reform as a way to address perceived unfairness in the statutory licensing regime. The argument of the education sector has been to say that the statutory licence captures material that is free of charge and freely available on the internet, or should be free of charge and freely available. And that an education exception solves such a problem. This approach is dangerous as it risks undermining the creation of the very content which those stakeholders wish to make use of. Those stakeholders are confusing free use and fairness - whether in the form of fair use or fair dealing⁶.

is an implementation of Article 10 of the Berne Convention. In the U.K. the existing exceptions were maintained to achieve maximum certainty while introducing a new quotation exception, thereby avoid any suggestion that the existing exceptions had been rolled back (see <http://webarchive.nationalarchives.gov.uk/20140603102645/http://www.ipo.gov.uk/response-copyright-tec-hreview.pdf>). The APA would advocate the same approach here.

⁶ Note the comments by Judge Pierre Leval, Senior United States Circuit Judge of the United States Court of Appeals for the Second Circuit, in his address at the Copyright Symposium 2017, in the context of discussion of the *Cambridge University vs Georgia State University* case: "Our doctrine of fair use would not give universities and schools free access to copyrighted educational texts, to be distributed among students, regardless whether in paper copy or digital form. Allowing that as a fair use would obviously harm the value of copyrights for educational materials, especially as such materials are published to be sold to the students at universities and schools. If that were our law, it would sound the death knell of

The APA urges the Australian government to heed the lessons from the Canadian experience.⁷ The latest U.S. Special 301 Report⁸ on IP protection around the world upgrades Canada to the priority watchlist, saying, “The United States also remains deeply troubled by the ambiguous education-related exception to copyright that has significantly damaged the market for educational publishers and authors.”

The statutory licence is a market-facing and flexible mechanism that can be negotiated to include and exclude material. This is a better mechanism, and potentially a more granular and accurate mechanism, for determining remunerated content. Furthermore, the Copyright Tribunal is available to licensees and has jurisdiction to determine whether the proposed fees under a statutory licence are unreasonable⁹.

To note, s.200AB has functioned as a fair dealing exception for educational purposes. It gives education practitioners significant freedom with material that is not covered by the statutory licence or other licence arrangements. Simplification of the s.200AB would produce a better result for rights holders and users¹⁰.

Illustration for Instruction Model: The proposed model is too broad to function as a specified purpose exception – if the Department is seeking to introduce an exception for illustration for instruction, the model clause should be amended to make it consistent with the three-step test, and tightly controlled by strict fairness tests (including mandatory author and source acknowledgement). The APA considers that, to satisfy those tests, the current proposed model should be restricted to the act of giving or receiving instruction for non-commercial purposes.

Libraries and Archives Exception

The APA supports the aim of improving access for research purposes through libraries and archives. Recent changes to copyright legislation have dealt with a number of concerns of the library and archive sector. Solutions to the use of orphan works will also benefit the library and archive sector.

The APA does not support the proposed new exception. The proposed fair dealing exception is far too broad to be practical for both the publishing industry and the library and archive sector. Furthermore, the model allows commercial use and has no safeguards specified. Such a broad exception is uncertain and the risk of market harm is too great. It is asking librarians and archivists to judge market harm when more grounded guidelines for document supply and interlibrary loans would provide the kind of certainty that users and rights holders benefit from.

educational publishing.”

⁷ <https://publishingperspectives.com/2018/05/canada-copyright-modernization-act-hearing/>

⁸ <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>

⁹ <http://www.copyrighttribunal.gov.au/about>

¹⁰ refer to response to Question 2

Rather than the option of a new exception, the APA supports the proposal to modernise existing exceptions to facilitate access to library and archive materials. We would support the repeal of the existing requirement to destroy electronic copies of collection material made for the purpose of document supply and interlibrary loan. We would support the modernised exceptions to apply to Key Cultural Institutions to the extent that they undertake library and archive work. However, we do not support the reduction of safeguards (currently in the form of declaration and notice requirements and only responding to specific requests). Such safeguards are essential to preserve the fairness of the exception, which would otherwise be open to high-volume use, which could cause significant market harm. However, we support specified safeguards or requirements being set out in regulations rather than the Act. We would like to work with the library and archive sector to simplify and streamline those administrative safeguards to ensure both certainty for rights holders and users.

We would be open to further discussion with the library and archive sector as part of the proposed reference group to discuss the details of modernising existing legislation.

Incidental and Technical Use Exception

The APA does not support an exception for incidental and technical use. There is a question as to whether such an exception is necessary given the expansion of safe harbour legislation and the existing exceptions for temporary copying and caching. It remains a concern of publishers and other creative industries that the copying of infringing material, however unintentioned, facilitates piracy. Without care, a fair dealing defence for copying for technical and incidental use will be open to significant abuse without the remedy that a safe harbour scheme seeks to incentivise for online platforms and services. An incidental and technical exception further removes the incentive for digital platforms to pay for third party content, creating a significant commercial imbalance and undermining rights holders.

Text and Data Mining Exception

The APA opposes an exception for text and data mining (TDM). We endorse the position of the International Association of Scientific, Technical and Medical Publishers¹¹.

Text and Data Mining (TDM) is already covered in the licensing arrangements of major science, technical and medical (STM) publishers. STM publishers are committed to permit text mining of their content at no additional charge to academic/non-profit customers and have enabled academic text mining through publisher and industry efforts such as CrossRef. For commercial bodies, licensing arrangements can be based on commercial agreements with publishers or on solutions like RightFind® XML for Mining.

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<https://www.stm-assoc.org/copyright-legal-affairs/licensing/text-and-data-mining-stm-statement-sample-licence/>

TDM is already amply served by publishers and vendors supported by publishers and there is no compelling requirement for legislation in this field. However, if policymakers do intend to intervene, any legislative provision should respect existing agreements and should be narrowly drawn to be limited to the sole purpose of research by not-for-profit public interest research organisations. All content being mined must be lawfully acquired and any works copied for the purposes of TDM should be deleted once the mining has taken place. Publishers should be permitted to maintain technical protection measures and utilise APIs in order to maintain the stability and security of their platforms.

A fair dealing exception that could allow the use of TDM that is counter to public interest, let alone privacy, is not an exception the APA supports. A distinction between commercial and non-commercial use does not sufficiently minimise that risk.¹²

Government Use Exception

The APA does not support an exception for government use. The APA supports the position expressed by the Copyright Agency that governments already enjoy significant freedom to use copyright material as well as broad immunity. As with the educational statutory licensing scheme, the government statutory licence is a negotiated and flexible mechanism. The scope of the licence can be negotiated. Amendments to the Copyright Act¹³ have simplified the government statutory licence already.

It is not credible that the government sector argue for an exception to copyright whilst enjoying extensive immunity and not paying statutory licence fees.

Non-commercial Private Use Exception

The Copyright Modernisation Consultation Paper raised the proposal of an exception for non-commercial private use. This proposal was not raised as part of the subsequent consultations. For completeness, however, the APA does not support a broadly defined private use exception if it damages the legitimate interests of creators and rights holders or allows individuals to override Technological Protection Measures (TPM) or Digital Rights Management (DRM). Publishers do not see the sharing of, for example, an e-book on more than one device for an individual as causing market harm. However, publishers do not see this scenario as justifying an exception that would potentially open copyrighted material to being shared broadly. (It has long been proven that peer-to-peer sharing has had a significant and lasting negative impact on the creative industries. One need only look at the music industry¹⁴, movie industry¹⁵ and the

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<https://www.gizmodo.com.au/2018/06/guy-who-gave-cambridge-analytica-all-that-facebook-data-actually-my-data-sucked/>

¹³ [Copyright Amendment \(Disability and Other Measures\) Act 2017](#)

¹⁴

<https://www.nytimes.com/2014/12/08/technology/grappling-with-the-culture-of-free-in-napsters-aftermath.html>

¹⁵

continuing impact on the educational and scholarly publishing sector¹⁶.)

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary?

For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

Many stakeholders agree that there may be an undesirable complexity in the way s.200AB is drafted. We support the suggestion of the Australian Copyright Council to establish a committee of experts and stakeholders to consider changes to s.200AB. We note, however, that despite the complex drafting of s.200AB, the education sector has had, for some time, working guidelines for teachers in schools, TAFEs and universities¹⁷.

Contracting out of exceptions

The APA does not support a blanket prohibition on contracting out of exceptions. We endorse the comments of the Australian Copyright Council¹⁸ that:

- there is no clearly established need
- Australian consumers, as a net importer of copyright material, may be subject to contracts which would be governed by the laws of other jurisdictions, and
- freedom to contract is a fundamental part of business.

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

The APA considers that a blanket prohibition would inevitably negatively impact some commercial arrangements that benefit both users and rights holders. However, the APA would consider a prohibition on contracting out, or similar legislative provision, for purposes which are in the public interest. Public interest, however, does not neatly fit into any one exception - proposed or established. For example, there is a strong public interest argument to be made for print disability organisations (or “authorised entities”

<https://www.gizmodo.com.au/2011/02/movie-piracy-costs-australian-economy-1-3-billion-according-to-afa-ct/>

<http://www.businessinsider.com/illegal-streaming-is-dominating-online-piracy-2016-8/?r=AU&IR=T>

¹⁶

<http://www.sciencemag.org/news/2017/07/sci-hub-s-cache-pirated-papers-so-big-subscription-journals-are-doomed-data-analyst>

¹⁷ <http://www.smartcopying.edu.au/>

[https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Section_200AB - When Can It Apply.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Section_200AB_-_When_Can_It_Apply.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)

¹⁸ Australian Copyright Council’s previous submissions to the Australian Law Reform Commission and to the Productivity Commission and in response the Copyright Modernisation Consultation paper.

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under the Marrakesh Treaty) to override, for example, TPMs in order to make accessible copies of copyright material. Arguably this is already legal under the Treaty. However, fairness factors and the three-step test should inform the scope of any provision that makes elements of a contract unenforceable. In the context of the print disability sector, the aim would be to protect the potential of an accessible format commercial market.

The proposed model does not have the appropriate balance of clarity (ie. explicit and limited prohibition on contracting out for specific purposes) and fairness considerations. The arbitrariness of a broad prohibition on contracting out could have unintended consequences that actually damage public interest aims, user interests and rights holders.

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

We repeat our responses to Question 3 as they are also relevant here. In reference to the Copyright Modernisation Consultation Paper, the APA would provisionally support Option 1 - Make unenforceable contracting out of only prescribed copyright exceptions (with comments above considered). A prohibition on contracting out of broad exceptions would not allow parties to address the uncertainty inherent in broad exceptions. That could harm investment and undermine provision of certain services.

Access to orphan works

The APA acknowledges that orphan works are a problem, and particularly a problem for the library, archive and cultural institution sector. Publishers are also affected by the orphan work issue. There should be better access to, and more flexible use of, orphan works. However, orphan works can only be defined as such until after a diligent search for the copyright owner has been undertaken. And that there are clear guidelines for what diligent search means to minimise risk for both users and rights holders.

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

The APA does not support a broad exception for orphan works given it is likely to incentivise the 'orphaning' of creative works. (Noting that it is already very common for, for example, digital images to have the metadata stripped out of them, making it

difficult, if not impossible, to identify the rights holder, even after a diligent search by a user.)

A limitation of remedies acts as an incentive for the use of orphan works by minimising the risks posed to users should a creator or rights holder be identified posteriori. But there is also a need to consider appropriate compensation for rights holders. It is entirely feasible for an 'orphaned' creative work to be used in a public campaign and for a rightsholder to be subsequently identified. A limitation of remedies that does not sufficiently take into account that the future commercial exploitation of the work is compromised is not 'fair' for the rights holder.

The APA endorses an approach that is a combination of prescribed exception and limitation of remedies that:

- allows the use of orphan works by libraries, archives and Key Cultural Institutions for all core activities (preservation, interlibrary loans, user access and, if needed, mass digitisation)
- use by, as per Australian Copyright Council¹⁹ proposal, other bodies recognised in the tabled exposure draft of the safe harbour legislation²⁰ (including print disability organisations, educational institutions)
- that allows for reasonable compensation
- and considers the nature of the use (whether commercial or non-commercial)

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

Should an owner or owners (right holders and/or authors) lay claim to a work used, they should be entitled to compensation for that use. Considerations should include:

- the purpose and character of the use (commercial/non-commercial/public interest)
- the nature of the work
- the amount and substantiality used
- the effect of the use upon the potential market

Injunctive relief should always be allowed. And moral rights of the creator, once identified, should be considered.

¹⁹ Australian Copyright Council's response to the Copyright Modernisation Consultation Paper, 56.3.2

²⁰ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1718a/18bd101
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Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

The problems around the use of orphan works are of the most significance for libraries, archives and Key Cultural Institutions. There have been efforts to address these problems for the library and archive sector. To note there has been in place since 2007 an agreement between the International Federation of Library Associations (IFLA) and the International Publishers Association (IPA)²¹ on the use of orphan works. The principles of the agreement were adopted by the National and State Libraries Australasia (NSLA) in 2011. Some institutions have used orphan works relying on these guidelines and s200AB.

In addition, and in line with the above agreement, the Copyright Agency proposed a Memorandum of Understanding in 2017 with the Australian Libraries Copyright Committee (ALCC)²² to facilitate the use of orphan works.

The orphan works problem does extend beyond the 'GLAM' sector but as first step in reform, the APA would endorse pursuing a limited direct exception or other mechanism to legalise the non-commercial use of orphaned material for this sector.

The APA is the peak national body for Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has approximately 210 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, schools, tertiary and academic publishing.

We thank the Department of Communications and the Arts for its consultative approach. We look forward to the opportunity to be involved in crafting consensus-based legislation.

Yours sincerely,



Lee Walker - President

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<https://www.internationalpublishers.org/images/joint-statements/2007/ifla-ipa-orphan-works-20070607.pdf>

²² Copyright Agency response to the Copyright Modernisation Consultation Paper, appendix 3 Orphan Works Proposal