



4 July 2018

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

By email: copyright.consultation@communications.gov.au

Dear Sir/Madam,

Thank you for the opportunity to provide comments to the Department of Communications and Arts on the copyright modernisation consultation.

By way of background, the Digital Industry Group Inc (DIGI) includes representatives from Facebook, Google, Oath, and Twitter. DIGI members collectively provide digital services to Australians including Internet search engines and other digital communications platforms. These services and platforms facilitate new distribution, marketing, and revenue generating channels for Australian businesses and content creators. They are also driving fundamental changes to the way that business is conducted and content is created and distributed.

This submission should be read in conjunction with those parts of DIGI's submissions to the Productivity Commission that refer to fair use.¹

DIGI thanks the Department for the opportunity to make this submission. If you have any questions or require any additional information, please let me know.

Yours sincerely

A handwritten signature in black ink that reads "Nicole Buskiewicz".

Nicole Buskiewicz
Managing Director
DIGI

¹ Digital Industry Group Incorporated, Submission No 111 to the Productivity Commission, *Intellectual Property Arrangements*, 18 December 2015, 2 - 7. Digital Industry Group Incorporated, Submission No DR528 to the Productivity Commission, *Intellectual Property Arrangements*, 7 June 2016, 2.

Executive Summary

DIGI has always advocated for replacing Australia's current fair dealing regime with a broad exception for fair use. This position is consistent with the views reached by both the Australian Law Reform Commission² (the **ALRC**) and Productivity Commission³ following their comprehensive reviews. DIGI also notes that Ernst and Young (**EY**) found the benefits of introducing a fair use provision clearly outweigh the costs in the cost benefit analysis commissioned by the Department of Communications and the Arts (the **Government's Economic Report**).⁴

Globally we are seeing rapid advances in technological innovation, which require a flexible copyright framework to develop and evolve. We are concerned that the lack of flexible exceptions will particularly hinder the development of artificial intelligence (**AI**) and machine learning (**ML**) technology in Australia to the detriment of both businesses and consumers.

DIGI's members rely on fair use in a number of ways, including to develop AI and ML that is used in many of their products and services. Across the industry we use these technologies to: identify terrorist content before its reported; identify spam and malicious automation; scale and better respond to issues and user reports; and enable autonomous cars to recognise and distinguish objects safely (to name a few examples). Australia risks being left behind in these, and other critical areas of software development if it does not make the urgent changes required to the *Copyright Act 1968* (Cth).

Flexible exceptions

A flexible copyright framework is essential to the growth of Australia's digital economy, and not just in the technology sectors, but across various businesses and organisations seeking access to best practice technologies. This is why there has been support across various sectors - education, cultural and technology - for a fair use scheme in Australia.

As DIGI previously put forward in our submission to the Productivity Commission:

One of the key differences between fair dealing and fair use is the greater flexibility that fair use offers to new and innovative industries. In DIGI's view, this issue lies at the heart of the problem of the existing fair dealing exceptions. And as the speed with which new technologies and business models emerge and replace existing ones gets faster, Australia's fair dealing defences will simply become less fit for purpose over time...

² Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 132.

³ Productivity Commission, *Intellectual Property Arrangements*, Report No 78 (23 September 2016)

⁴ Ernst and Young, *Cost benefit analysis of changes to the Copyright Act 1968* (2016) 29.

...Further, given the extensive experience that DIGI members have operating in both Australia and the United States (under a fair use system), they can report that it is not their experience that the United States fair use system is particularly uncertain, nor does it present any unique challenges for the operation of their businesses. In fact, it is the flexibility of the fair use system that has helped facilitate the development of innovative goods and services that they have been able to export around the world, including to Australia.⁵

For the purposes of such a fair use exception, DIGI generally supports the illustrative purposes proposed in the Consultation Paper. These include:

- criticism or review
- parody or satire
- reporting news
- research or study
- giving professional advice
- disability access
- quotation
- non-commercial private use
- incidental or technical use
- text and data mining
- library and archive use
- certain educational uses
- certain government uses

(This list together will be referred to as the **Illustrated Purposes.**)

DIGI understands an ‘incidental or technical use’ purpose would cover unlicensed ‘non-expressive’ uses, such as is required for AI and ML. This is consistent with the view of the ALRC.⁶ To the extent necessary, that should be clarified in an explanatory memorandum, or alternatively, a ‘non-expressive’ use could be included as an illustrative purpose.

In terms of the appropriate fairness factors, in DIGI’s view the four fairness factors included in the fair dealing for disability provision in s.113E(2) of the *Copyright Act* are appropriate. Namely:

- (a) the purpose and character of the dealing;
- (b) the nature of the copyright material;
- (c) the effect of the dealing upon the potential market for, or value of, the material;

⁵ Digital Industry Group Incorporated, Submission No DR528 to the Productivity Commission, *Intellectual Property Arrangements*, 7 June 2016, 2.

⁶ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 132 at 264.

- (d) if only part of the material is dealt with—the amount and substantiality of the part dealt with, taken in relation to the whole material.

DIGI does not support the adoption of the additional fairness factor, “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price”, contained in the research and study fair dealing exception. The ALRC considered and rejected the inclusion of that factor finding that it was inappropriate in determining the fairness of a range of uses.⁷ DIGI also submits that the reason for the inclusion of that factor in the research or study exception is irrelevant in the present circumstances, namely because at the time of its original inclusion in the *Copyright Act* it was difficult to obtain works in the Australian market, and that factor was therefore relevant to determining whether it was possible to copy an entire work for research or study purposes.⁸

Generally speaking DIGI does not support the introduction of additional fair dealing exceptions into the *Copyright Act* for the simple reason that it renders the Act permanently obsolete and incapable of facilitating rapid and socially beneficial changes in technology. This failure results in real economic costs to Australia’s economy as identified in the Government’s Economic Report.⁹ These costs will only increase over time as the speed of technological changes increases. However, to the extent the Government is nevertheless minded to include specific fair dealing exceptions in the Act for political reasons, DIGI believes the Government should adopt the ALRC’s “second best” option, namely a consolidated closed-ended fair dealing exception, confined to uses of copyright material for the Illustrated Purposes (as set out above).

Contracting out

As noted in the Consultation Paper, the ALRC, the Productivity Commission, and Copyright Law Review Committee recommended making contracting out unenforceable to varying degrees.

DIGI supports the inclusion of a provision which would make unenforceable any part of an agreement restricting or preventing use of copyright material that is permitted by any exception under the *Copyright Act*.

Liability for use of orphan works

DIGI believes that consumers and businesses alike should have rights to use orphan works legally following a diligent search, not just a limitation on liability. Use of orphan works can create social and economic value; it is therefore particularly important that any exception for orphan works permits use by both commercial and non-commercial entities, and that the

⁷ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014) 143 [5.104].

⁸ Franki Committee, *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) 18 [1.51].

⁹ Ernst and Young, *Cost benefit analysis of changes to the Copyright Act 1968* (2016) 29.

permitted uses extend to exercising all rights, including making available and communicating copyrighted content.