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Department of Communications and the Arts  
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Canberra ACT 2601  
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4 July 2018

Dear Sir/Madam

**Copyright modernisation consultation paper**

Thank you for the opportunity to make a submission in response to the Copyright modernisation consultation paper, released in March 2018 (the **Paper**).

As was articulated in Foxtel's responses to the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements, Foxtel's fundamental view is that overall wellbeing improves when intellectual property arrangements support our ability to contribute to Australia through investments in jobs, local and national economies and Australian culture.

This view continues to frame Foxtel's response to copyright policy and frames our response to the Paper.

**Executive Summary**

This submission includes Foxtel's views on questions 1, 3 and 4 of the Paper, relating to fair use/dealing and contracting out.

In summary Foxtel submits that:

- **Flexible exceptions** – we support clarity and certainty and opposed open-ended exceptions that will increase litigation and could enable others to free ride on our investments.
- **Contracting out** – content owners should be free to determine the terms on which their content is distributed to both encourage and protect creative investment.



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## Flexible exceptions

Question	Foxtel response
<p>1. To what extent do you support introducing:</p> <ul style="list-style-type: none"><li>• additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?</li><li>• a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?</li></ul>	<p>As per previous responses to PC and ALRC reviews – Foxtel does not support the introduction of fair use in Australia and asserts the case for its introduction has not been made.</p> <p>Foxtel only supports the introduction of specific additional fair dealing exceptions where a legitimate purpose is available.</p>

## Fair use

Foxtel's firm view, as outlined in previous responses to the ALRC and PC reviews, is that it does not support the introduction of a fair use exception in Australia and that the case for fair use in Australia remains unsubstantiated. Foxtel does not believe that fair use or a multitude of additional fair dealing exceptions is required in order for Australia's IP system to be, per the policy framework outlined in the Paper, effective, efficient, adaptable, and accountable.<sup>1</sup>

Foxtel strongly argues that the current IP framework already achieves those outcomes<sup>2</sup> and that any reform should only be sought where clear and indisputable evidence exists which demonstrates both the need for, and the benefits of, introducing significant changes to Australian copyright law.

As articulated in our responses to those reviews, Foxtel's key concerns regarding fair use remain as outlined below:

- Fair use will introduce significant and unnecessary uncertainty into Australian law. A fair use exception would be wide, vague and uncertain, while at the same time it would significantly erode the scope of copyright protection which is so critical in protecting and encouraging investment in Australia's cultural industries.
- The parameters of fair use will need to be tested through the Courts, which will be expensive and will result in the Courts making policy decisions rather than the Parliament. It will take many years to develop new precedents and the scope of fair use in Australia will need development through the Courts, at rights holders' expense. Copyright owners should not have to incur significant litigation costs to protect their investments and to set the boundaries of new and uncertain law.
- The introduction of fair use will weaken copyright protections and allow unlicensed third parties including commercial online platforms, to benefit at the expense of rights holders, at a time when there is clear evidence of unauthorised use of copyright materials by a significant proportion of the Australian population.

<sup>1</sup> Department of Communication and the Arts, Copyright modernisation consultation paper, March 2018, p 5.

<sup>2</sup> Per the concepts listed at page 5 of the Copyright modernisation consultation paper.



- Fair use will have negative economic consequences and have a significant impact on creative output due to the associated uncertainties that it will create.

Foxtel does not agree with the Paper's assertion that Australian copyright law needs radical change to match the "exponential rate of change in contemporary society".<sup>3</sup> Despite changes in society, the fundamental importance of strong copyright protection to the creative industry remains unchanged. Rather, Foxtel believes that Australian copyright law currently sets a fair and finely struck balance between the interests of rights holders and those of end users. To ensure ongoing investment, the existing balance must not be disrupted unless there is clear evidence of the benefits offered by any proposed amendments. We are yet to be presented with such evidence.

In Foxtel's view the most important factor that will determine whether Australian companies will continue to innovate and make such investments is the strength of the Australian copyright protection framework.

We do not agree that fair use is a pre-condition to innovation. We continue to believe that both the Productivity Commission and the ALRC inquiries, did not give sufficient weight to the finding of the UK Hargreaves Review of Intellectual Property that the economic benefits imputed to the availability of fair use in the US have sometimes been over stated.<sup>4</sup> Rather, we believe that a strong copyright protection framework ensures strong competition in the creative sector.

We also agree with Dr George Barker that those most likely to come forward and rely on fair use are those who stand to gain the most from use of copyright works, including global digital platforms. It is high value users avoiding both transaction costs and paying upstream creators, who will benefit most from fair use, not consumers.<sup>5</sup>

### **Fair dealing exceptions**

Where a strong case for change exists, Foxtel believes incremental reform is the best way in which to deal with that change, in order to rebut the above concerns regarding fair use.

Supporting the Australian fair dealing defences are many years of Australian precedent and jurisprudence and in Foxtel's opinion, these exceptions are clear and well understood. Any further exceptions should be achieved via additional specific fair dealing exceptions and thorough consultation, rather than a radical change to copyright jurisprudence which is not fit for purpose in the Australian context.

Foxtel has significant concerns with the broadened exceptions listed in Option 1, and agrees with Dr George Barker that broadening the exceptions beyond uses for purposes which deliver specific public benefits, would imply imposing costs in areas without commensurate public benefits.<sup>6</sup>

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<sup>3</sup> **Copyright modernisation consultation paper, p 9.**

<sup>4</sup> **Professor Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth, May 2011, page 45 – available at [https://orca.cf.ac.uk/30988/4/1\\_Hargreaves\\_Digital%20Opportunity.pdf](https://orca.cf.ac.uk/30988/4/1_Hargreaves_Digital%20Opportunity.pdf).**

<sup>5</sup> **Dr George R Barker (24 May 2018): "More Unfair Claims About Fair Use in Australia", page 22 – available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3184614](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184614).**

<sup>6</sup> **Dr George R Barker (26 November 2012): "Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore", page 10 – available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2180769](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180769).**



Dr Barker has since also noted that copyright should be strengthened, not weakened, in the digital age. He argues that the digitisation of content and the internet have led to significant economic disadvantage for creators as the costs of copying have decreased and piracy or free riding on creators' works is more feasible and has plainly increased.<sup>7</sup> Indeed Foxtel also believes that rather than introducing additional statutory exceptions, flexible licensing terms are best suited to determine the appropriate value split between creators and downstream users. Copyright licensing is both flexible and technology neutral.<sup>8</sup>

Therefore, Foxtel does not support the majority of the proposed additional fair dealing exceptions listed in Option 1.

### Contracting out of exceptions

Question	Foxtel response
<p>3. Which current and proposed copyright exceptions should be protected against contracting out?</p>	<p>Content owners should be free to determine the terms on which their content is distributed to both encourage and protect creative investment.</p> <p>However, per previous response to the PC report, Foxtel is not opposed to any specific restrictions being introduced for libraries and archives, as was contemplated in the Final Report.</p>
<p>4. To what extent do you support amending the Copyright Act to make unenforceable contracting out of:</p> <ul style="list-style-type: none"> <li>• only prescribed purpose copyright exceptions?</li> <li>• all copyright exceptions?</li> </ul>	<p>Do not support.</p> <p>Must exclude ability to contract out of TPMs. TPMs very important for subscription based digital services.</p>

As we submitted in response to the ALRC and PC reviews, Foxtel strongly believes that to encourage and protect creative investment, content owners should be free to determine the terms on which their content is distributed. Freedom of contract is fundamental to commercial negotiations and we believe that if two parties acting rationally agree that the terms of their bargain should override the parties' rights at law, then parties should be free to do so.

In the case of consumer contracts, terms excluding fair use would still have to comply with existing consumer protection laws (including prohibitions on unfair contract terms). In the case of business contracts, we firmly believe that negotiated agreements tailored to particular business needs should take precedence over a broad statutory exception to copyright.

Foxtel also notes that if fair use or a number of additional fair dealing exceptions are introduced, the ability to contract out of fair use or open-ended exceptions will be critically important as the uncertainty of fair use may be partially offset through the certainty of precise contractual terms.

<sup>7</sup> Dr George R Barker (24 May 2018) at page 6.

<sup>8</sup> Dr George R Barker (24 May 2018) at page 6.



In these circumstances, we do not support amendments which would result in untested and potentially very broad exceptions taking precedence over business-specific commercial agreements. However, Foxtel is not opposed to any specific restrictions for libraries and archives, as was contemplated in the Productivity Commission's Final Report.<sup>9</sup>

Similarly, Foxtel has strong concerns with the Paper's suggestion that the Department is considering whether further exceptions to access control technological protection measures (TPMs) are required following this consultation. Current uncertain industry and financial conditions make it increasingly important that media businesses have the ability to determine how to best monetise their content.

By their very nature, Foxtel and other subscription services, offer subscriptions to a service for a *limited period of time*. When customers subscribe to streaming and other subscription services they are not purchasing a permanent copy of or permanent access to programming and the subscription pricing reflects this value exchange. TPMs therefore have a substantial role to play in the viability of digital media businesses – enforcing usage rules and ensuring customers do not have access to material once their subscription has lapsed.

Thank you for the opportunity to comment on these matters.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Holly Brimble', written in a cursive style.

Holly Brimble  
Manager Policy and Regulatory Affairs

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<sup>9</sup> **Productivity Commission, Intellectual Property Arrangements: Productivity Commission Inquiry Report No. 78, 23 September 2016, at pages 139 – 141, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>.**

