

HARPERCOLLINS PUBLISHERS AUSTRALIA'S SUBMISSION IN RESPONSE TO THE DEPARTMENT OF COMMUNICATION AND THE ARTS

COPYRIGHT MODERNISATION CONSULTATION PAPER (THE "PAPER")

INTRODUCTION

HarperCollins Publishers Australia welcomes the opportunity to respond to the Paper.

We support the submissions made by the Australian Publishers Association and the Australian Copyright Council and make the following submissions.

FOUNDATION AND VALUE OF COPYRIGHT

1. We believe that copyright does not stifle innovation, rather copyright facilitates and rewards innovation.
2. The fundamental aim of copyright legislation is to ensure protection for creators and provide a foundation for the means of controlling the use of their work. Work and reward is fundamental to and enshrined within Australian copyright law because ideas are not protected but work product is.
3. Under existing copyright law a level playing field is created whereby:
 - (i) Creators and those who they sell or license to are entitled to the benefit of the work; and
 - (ii) Reliance on fair dealing is not dictated by the size of an entity or its legal budget because specific and unambiguous fair dealing exceptions mean relatively low legal complexity when compared to open-ended exceptions.
4. The existing efficiency, predictability and uniformity of copyright law encourages a diversity of activity. The cultural and economic value of this activity should not be understated.¹
5. The book publishing industry (which now commonly incorporates digital and audiobook formats) is but one industry that is reliant on copyright protection for its continued existence, innovation, and growth.
6. We point to the well documented effect on Canadian educational publishing as an obvious example of the potentially devastating effect of copyright reform gone wrong.²

¹ Australia's copyright sectors represent billion dollar industries and employ nearly 9% of Australia's workforce http://www.copyright.org.au/ACC_Prod/ACC/Research_Papers/The_Economic_Contribution_of_Australia_s_Copyright_Industries_2002-2014.aspx

² Canada: '80% of our licensing income has simply disappeared' www.copyright.com.au/2018/05/80-of-canadian-copyright-licensing-income-has-disappeared/

7. Copyright has adapted well to technological and other developments through legislative changes and business arrangements to meet existing challenges.
8. It is worth emphasising that the Australian publishing industry is self-sufficient and does not rely on Government funding or subsidy.

INVESTMENT IN CONTENT

9. Content based businesses work hand in hand with creators. It is important to recognise that publishers do not merely acquire and exploit copyright material:
 - (i) Publishers bring an enormous amount of value to publishing, with knowledge and expertise in a variety of services from editorial and design, marketing and publicity to sales;
 - (ii) Publishers also have wide networks which assist in exploiting rights to mutual advantage with creators; and
 - (iii) Publishers are continually innovating to keep pace with changes in the marketplace, for example Ebooks and audiobooks are now commonplace offerings along with print books. The level of investment required to develop new formats is considerable.

The above dynamic is equally true for other content based industries.

AUSTRALIAN CONTENT IS IMPORTANT

10. Books are repositories of content that is simply not available in other forms. Book content ranges from pure entertainment and escapism to being an important window on society at any given time (and sometimes both).
11. If copyright protection is weakened, then quite apart from the loss of Australian industry, this means:
 - (i) A reduction in the number and quality of books by Australian authors because of decreased investment in local product; and
 - (ii) A consequent dampening effect on the range and quality of contemporary local social and historical information and commentary.
12. By ensuring that creators receive fair return on their investment, copyright protection is the most effective means of maintaining and developing Australian literary culture. We believe the need for reform should be judged on both economic and cultural factors. To ignore the cultural importance of the Australian publishing industry would be a grave disservice to Australian literature and to Australian society at large.
13. Australia has produced strong Australian content, and we should ensure that Australian creators and publishers are able to continue to do so.

CURRENT FRAMEWORK AND FUTURE CHANGE

14. HarperCollins supports the current copyright framework which is effective, efficient, adaptable and accountable.
15. As with any legislation, the continued modernisation of copyright is desirable but modernisation must take place within the framework of prevailing social, economic and technological realities.
16. A major challenge facing copyright is the digital environment where unauthorised dealing can occur quickly and on a massive scale, with mechanisms for redress being too slow or ineffective.
17. We also point to various digital platforms' rise to global monopoly status built in part on the commodification of copyright material often without the consent of, or proper payment to, owners.
18. The rise of global digital monopolies is arguably an example of what occurs when the principle of work and reward is circumvented, which crystallises the fact that effective copyright protection is fundamental to the balanced operation of a free market economy.
19. It is vital that copyright law should seek to maintain a level playing field and avoid any development which inadvertently delivers strategic benefits to any party (including any existing global monopolies) that will be able to use exceptions made under the guise of "modernisation" to benefit commercially from copyright work without authorisation from or payment to the owner.
20. Unauthorised dealing in the digital environment is destructive whether it is a major isolated act with respect to one work, or many borderline / minor acts with respect to many works on a systematic basis. The second category is deeply problematic if systemic infringement is normalised or is less likely to be compensated by an effective monetary remedy on a case-by-case basis.
21. Due to the above factors, we predict effective modernisation of copyright will likely include a pattern of further honing of copyright protection, rather than the relaxation of copyright protection via for example the introduction of less certain or open-ended exceptions.

FAIR DEALING AND 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?

FAIR DEALING IS A FRAMEWORK NOT A POLICY PROBLEM

22. We do not see fair dealing as a policy problem because the current accepted approach to fair dealing already provides the best framework to evolve the law and address legitimate concerns.
23. We support the continued evolution of fair dealing exceptions by the introduction of specific exceptions in the Copyright Act as and when the legislature determines that there is a policy reason for specific additional exceptions. This is logical, fair, systematic, quantifiable, predictable and consistent with contemporary development of copyright in Australia.

CONSISTENCY, SIMPLICITY, PREDICTABILITY

24. We do not support amending the Copyright Act so that the Minister can add exceptions to the Copyright Regulations. The Paper also contemplates that under the Ministerial option the Minister could later amend or remove those same exceptions - this would only increase uncertainty and add unsustainable complexity to the Copyright Act.
25. If fair dealing is not predictable and systematic, this will hurt:
 - (i) Creators;
 - (ii) Businesses that invest in content and whose continued existence is predicated on that investment; and
 - (iii) Those who seek to rely on fair dealing exceptions particularly if they have fewer resources because fewer resources means less ability to navigate legislative uncertainty and also decreased appetite for risk.
26. Moving from a fair dealing regime with specific exceptions to an open-ended US-style fair use style exception would only benefit:
 - (i) Any party that derives any strategic or economic advantage from increased latitude in the use of copyright works and uncertainty in the enforcement of copyright; and
 - (ii) Those who have more resources including digital monopolies who drive traffic to their platforms or services by leveraging or re-purposing third party copyright content without proper consent or payment, or by systematically enabling users on their platforms or services to post and disseminate third party content.

UNCERTAINTY AND EFFECT ON COMPETITION

27. Due to the above factors, we see the end of result of the introduction of an open-ended US-style "fair use" or any move to an open-ended fair dealing exception as a 'lose – lose' scenario because such a change would introduce an unacceptably high degree of uncertainty and unpredictability and lead to a sustained period of litigation while the contours of the new exception/s are established. This will:

- (i) Hurt existing market participants that are legitimately dealing in copyright material;
- (ii) Discourage entry by new market participants with fewer resources due to uncertainty around enforcement and increased risk; and
- (iii) Consolidate the power of dominant existing digital monopolies which have the resources to weather any legal challenges and whose business model is wholly or partially predicated on leveraging content without paying creators.

FAIR DEALING AND FLEXIBLE EXCEPTIONS (CONTINUED)

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
- Contracting out of exceptions

Question 3

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

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?

FRAMEWORK FOR ADDITIONAL FAIR DEALING EXCEPTIONS

28. The Paper lists various existing and potential additional fair dealing exceptions. We add no specific comment on the possible additional exceptions other than that when assessing any specific exception, policy makers should include an examination of the following factors:

- (i) Has the issue which any exception seeks to address been properly quantified with empirical evidence;
- (ii) Identification of any existing statutory licence in operation to determine:
 - (a) If a statutory licence already addresses legitimate concerns; and

- (b) Whether any established licensing scheme or any trial related to a statutory licence might provide the architecture for administering a new exception;³
 - (iii) Assessment of whether the exception is fit-for-purpose and if likely application of any new exception is consistent with both the stated aims of the exception and the overall application of the Copyright Act. This involves modelling examples of likely use and who is likely to be involved in any relevant supply chain, any ancillary benefits that might be derived and likely possible downstream or “transformative” uses;
 - (iv) Assessment of the scope for systematic commodification or abuse; and
 - (v) Consultation with relevant market participants to assess whether proposed or existing industry-led initiatives will effectively address legitimate problems with access or use.
29. Consultation with industry and consideration of industry-led initiatives are significant because they can:
- (i) Foster significant analysis, co-operation, investment, planning, implementation and ongoing administration often at no cost to Government;
 - (ii) Inform legislative initiatives because industry-led initiatives can provide real-world solutions involving relevant stakeholders; and
 - (iii) Deliver concrete solutions to social policy concerns within existing supply chains.

EDUCATIONAL, LIBRARIES AND ARCHIVES

30. We believe the same factors detailed above for examining additional fair dealing exceptions should apply in relation to any proposed changes for the educational sector and libraries and archives. In relation to these sectors a cautious approach should be taken when considering any additional rights because:

- (i) Existing statutory exceptions exist;
- (ii) Existing statutory licence schemes are comprehensive; and
- (iii) The Canadian experience already mentioned above in relation to the educational sector is a cautionary tale, noting the irreparable damage done to the educational publishing sector in that jurisdiction due to redefining rights of use under an open-ended educational exception.

³ For example, the licences managed by Copyright Agency enable copying and sharing with minimal transaction costs and are subject to continued development and refinement with the cooperation of industry. We also point to the current trial of FLEX which HarperCollins and other Australian Publishers are participating in. FLEX is an initiative by the Copyright Agency and involves working with the Australian Publishers Association, the UK collecting society Copyright Licensing Agency and the technology company Kortext to develop a system that combines a digital central shared repository where universities can access both original publisher material protected with Digital Rights Management and scans of publishers works that have been made by universities in reliance on the educational statutory licence.

CONTRACTING OUT

31. As noted in the Paper the Copyright Act presently only contains a prohibition on contracting out in relation to computer programs (so that purchasers of computer programs are not prevented from relying on copyright exceptions and can make a back-up copy); and in addition, any extension of a rule against contracting out for other content faces practical challenges because:
- (i) Contracts that deal with copyright material often contain provisions related to other subject matter, for example, access to interview subjects or private locations, and it may be difficult to isolate the “copyright” provisions from other contractual provisions;
 - (ii) Agreements are increasingly across national borders, particularly in relation to digital formats. This means remedies available under Australian law may be of limited relevance and contractual conflicts regarding jurisdiction, applicable law and enforcement, need to be resolved internationally; and
 - (iii) Technological Protection Measures (TPM) applied by copyright owners to control access to digital copies of copyright material mean that TPM may be embedded regardless of any local law.
32. Given the above problems with enforcement and the highly transactional and context driven nature of contracting out, we submit that any amendment prohibiting contracting out:
- (i) Should be approached by way of specific prohibition i.e. it should follow the same logic that presently applies for fair dealing whereby additional specific exceptions are added; and
 - (ii) Should not extend to a broad prohibition relating to *all* fair dealing exceptions because this could have unintended consequences and fails to consider the reason why contracting out has been adopted with respect to any given use or transaction. The need for a broad-based prohibition on contracting out should be counterbalanced against:
 - (a) The ease of access to content in the digital world; and
 - (b) The fact that the broader the prohibition, the less likely it will meet with any meaningful compliance and enforcement.

INCIDENTAL AND TECHNICAL USE

33. As per our earlier comments, we consider that the effective modernisation of copyright will focus on the digital environment and will likely include a pattern of further honing of copyright protection.
34. This reflects the fundamental purpose of copyright i.e. to protect (and by direct implication facilitate) creation as well as ongoing innovation in relation to the range, format and quality of content.

35. We are very concerned that the introduction of an exception for incidental and technical use will have unintended consequences, particularly in circumstances where it appears to be driven by the operating model of “online service providers.” We submit that very careful consideration would need to be given to the parameters of any such exception, noting that it might even extend to text and data mining, when digital content is already exceptionally vulnerable to commercialisation by online service providers. As noted above, it is technologically very easy for content platforms to commercialise copyright content without consent or payment, and an ability to rely on an exception for incidental and technical use has the potential to significantly strengthen the bargaining position of such platforms in circumstances where they are already disproportionately powerful. There is ample availability of licensing solutions and for the operations of content platforms and other online service providers, without the need for a free exception that would only undermine the position of copyright owners.

ORPHAN WORKS

Question 5

To what extent do you support each option and why?

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

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

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?

ORPHAN WORKS FRAMEWORK FOR CHANGE

36. HarperCollins takes its obligations in relation to identifying copyright owners extremely seriously. We meticulously research unidentified materials and take all reasonable steps to ensure that third party material in books published by us is properly identified, approved, and attributed.

37. In relation to orphan works we support:

- (i) The identification of any legitimate deficiency in existing copyright law by the analysis of empirical evidence;
- (ii) A combined approach involving a combination of:
 - (a) Specific statutory exception(s), in keeping with the need for uniformity, consistency and predictability; and
 - (b) A limitation on remedies provided conduct falls within the exception(s) because this is consistent with the general proposition that damages are tied to conduct.

DIGITAL OPPORTUNITIES AND CHALLENGES

38. We recognize that the digital environment:

- (i) Offers significant benefits in terms of archiving, searchability and ongoing access;
- (ii) Is an important means by which cultural institutions adopt modern practices and engage with Australians and the world; but
- (iii) Poses unique challenges in terms of infringement, commodification and manipulation because:
 - (a) Infringement in the digital environment is easy to engage in and can be difficult to effectively address;
 - (b) In much the same way user (and client) data is commodified and exploited by digital platforms to encourage traffic to certain web sites, or to facilitate customer loyalty / proprietary lock-in under an umbrella of interconnected services, orphan works might constitute a digital asset which can be leveraged to achieve market dominance by a digital repository;
 - (c) Digital platforms often manipulate the user experience through the use of algorithms which skew search results – search results are manipulated to favour pages, products, services and content which deliver an economic benefit to that digital platform (be it ad revenue, products or services); and
 - (d) Non-sharing and exploitation of data by digital platforms is a particularly pervasive practice which severely undermines competition and has monopolistic outcomes – this element must be analysed when considering if orphan works will simply become akin to data in the hands of digital monopolies.

EFFECTIVE DETERRENCE

39. Any limitation on remedies for orphan works should be carefully drafted so as not to effectively permit sharp conduct or commercial use of orphan works by anyone on a systematic basis. For example:
- (i) A cap on reasonable compensation may not be an effective remedy and may be a disincentive to act where multiple small infringements by one party are spread across different rights holders; and
 - (ii) An account of profits may not be effective where use of copyright material has not delivered direct revenue but rather strategic benefits such as member benefits offered by a given institution, or increased traffic to a digital platform.

INSTITUTIONS AND “NON-COMMERCIAL PRIVATE USE”

40. Care must be taken when formulating any orphan works exceptions dealing with cultural or educational institutions to ensure policy aims are achieved without rendering the concept of “non-commercial private use” meaningless. Factors to consider are:
- (i) Likely scale of dealing in orphan works;
 - (ii) Whether the works have been used for a public purpose;
 - (iii) Other downstream issues including likely long-term impact on the market for the rights holder;
 - (iv) Underlying digital architecture or functional partnerships with digital monopolies which further entrenches digital monopolies’ structural dominance; and
 - (v) Whether use of orphan works effectively commodifies usage of orphan works even where no monetary transaction occurs.
41. Regarding the search requirement for orphan works:
- (i) The concept of ‘reasonably diligent search’ is useful in determining orphan works;
 - (ii) The onus to undertake the reasonably diligent search must be on the party seeking to deal in the orphan work (for example by digitisation) – the onus must never be placed on the rights holder; and
 - (iii) Close examination of the need for any “presumption of orphaning” for cultural and educational institutions, because this lowers the bar in favour of use en masse by institutions that fit within the relevant exception – and we point to the issues discussed above in relation to the digital environment.

CONCLUSION

42. As publishers who are both copyright owners and users of third party copyright material we submit that any changes to the Copyright Act should be guided by the following principles:

- (i) Copyright law should ensure that creators are supported and rewarded;
- (ii) Copyright is integral to ensuring the ongoing creation and availability of Australian literature; and
- (iii) A healthy and diverse local publishing industry is a valuable economic and cultural asset.

We thank you for giving us the opportunity to make this submission and would be happy to provide any further information you require.

HarperCollins Publishers Australia

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