

International
Federation of
Reproduction
Rights
Organisations



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CHIEF EXECUTIVE & SECRETARY GENERAL
Caroline MORGAN

The Director, Copyright Law Section
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3/7/2018

Dear Sir,

Copyright Modernization Consultation – Submission from IFRRO

This submission is made on behalf of IFRRO - the International Federation of Reproduction Rights Organisations - which is the main international network of collective management organisations, called Reproduction Rights Organisations (RROs) in the publishing industry - and authors' and publishers' associations in the text and image sector, with 150 member organisations in over 80 countries worldwide.

Our RRO member organisation in Australia is Copyright Agency, and we support the submission made by Copyright Agency to this consultation. In addition, we make the following comments on the question of flexible exceptions and on orphan works.

Context and Scope for the Consultation

We note the approach of the Australian government to the consultation is to encourage dialogue, and to find common ground so that the law reform can proceed on a consensus basis. IFRRO offers its views and experience in that spirit and hopes the examples we provide of solutions found elsewhere in the world will be helpful in this process.

Shifting Digital Landscape

IFRRO notes the comments made in the consultation paper about the impact of the shifting digital landscape on seeking permission to use and reuse content when there is unreliable information about the copyright owner available. Although IFRRO agrees that this is indeed an issue, it is important to acknowledge that the digital economy is still developing, and that the policy settings adopted by government should encourage the emergence of market-based solutions to such issues rather than overly prescriptive legislation, which might have the opposite effect, making the system less effective, efficient, adaptable and accountable than intended.

In this context IFRRO notes the continued evolution of projects to ‘tag and track’ content as it moves around on the internet and encourages the Department to include in its consideration the ongoing development of projects such as ARDITO (<https://www.ardito-project.eu/>) which builds on and further develops the Copyright Hub initiative.

Three Step Test

We also note the consultation paper’s emphasis that any reform must meet Australia’s international bilateral and multilateral obligations, in particular the Berne three step test. We draw the Department’s attention to the recently published paper by Mihaly Ficsor, former ADG of WIPO, in which he explains why in his view, the current situation in Canada, in particular the addition of education as a fair dealing purpose, has put Canada in breach of its international obligations because of its failure to comply with the Berne three-step test: <https://bit.ly/2tFQUy1>.

Of particular interest to this consultation, is his view that adequate criteria (such as the five fair dealing factors in the research and study fair dealing) should apply to all exceptions in legislation to ensure compliance with the Berne three-step test. In this regard we point to the gap in the Australian legislation, which means that the current library exceptions are not subject to a fairness assessment, and as such the uses permitted under those exceptions may breach Australia’s international obligations. We trust this omission will be remedied as part of this consultation.

Fair Use

IFRRO is not in favour of introducing a fair use copyright exception. We took this view in our submission to the ALRC *Discussion Paper on Copyright and the Digital Economy* in 2013, for reasons such as the lack of compatibility with the existing Australian legal framework, and the time and financial cost of transferring the decision making about the scope of permitted uses to the courts.

If anything, events in the USA, for example the proceedings in the Georgia State University case (*Cambridge University Press v Patton*), where after three different decisions and more than 6 years the question of whether e-reserve copying at a university is a fair use or not has not been finally resolved confirms this view.

IFRRO also draws the Department’s attention to statements regarding the uncertainty and unpredictability of fair use by the Irish government in the Regulatory Impact Analysis published in response to their recent copyright law review: <https://bit.ly/2KFqzk4>.

Flexible Exceptions

IFRRO is aware of the desire for flexibility in exceptions and is sympathetic to the issues faced by those seeking access to copyright works. However, IFRRO is of the view that the problems raised by education, library and government stakeholders could be better addressed by finetuning the existing exceptions and the government statutory licence than by introducing new exceptions.

In respect of the proposed introduction of additional permitted fair dealing purposes, IFRRO supports the submissions of our member, Copyright Agency.

Fairness Factors

We note however, the importance of ensuring that all exceptions are subject to the five fairness factors (as in the research and study fair dealing exception). These factors clearly ensure that any uses permitted by the exceptions comply with the Berne three-step test.

In this context we note the discussion of the possible proposed fair dealing exception for quotation at the Roundtable on 1 May 2018 (as summarised by the Department), and in particular the discussion of which fairness factors should apply to this proposed exception. In IFRRO's view it is extremely important that in the event a quotation exception is introduced, that the fifth factor referring to the possibility of obtaining an alternative copy of the work within a reasonable time at an ordinary commercial price, is included as part of the fairness assessment.

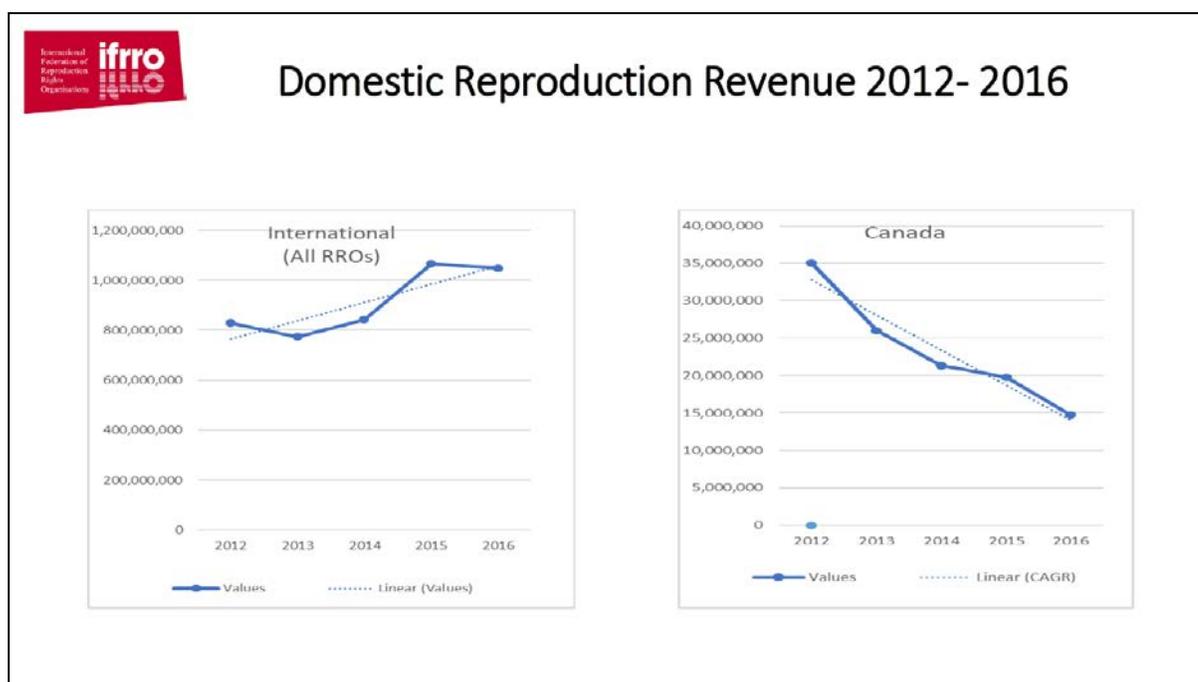
This is because it is the only one of the fairness factors which requires an assessment of the possibility of obtaining a licensed copy of a work, reflecting the second part of the Berne three-step test. This is particularly important if, as seems to be the case from the discussion at the Roundtable, whole works such as images could be used under the exception (the examples given were including an image in a presentation or in a tweet) which would directly impact existing licensing markets for visual artists.

Canadian Experience

As the experience in Canada has shown, the consequences of apparently minor changes to the copyright law, such the addition of *education* as a permitted fair dealing purpose, can be far reaching, catastrophic and expensive. In Canada, the impact on IFRRO's member Access Copyright, and the consequent reduction in the publishing output in that country have been well documented and are currently being considered as part of the INDU Committee review: <https://bit.ly/2KCp7rV>. They are also explored in the joint submission from the Canadian writing and publishing coalition to this consultation.

We are aware that the cause of this impact is questioned by some commentators, who contend that this is an effect of the development of the digital economy. However, we would note that if this is the case, then the impact appears to be much more marked in Canada than elsewhere in the world.

The attached chart shows the trends in the collection and distribution to copyright owners by RROs in the rest of the world contrasted with Canada:



We also make a further point, which is that the York University litigation which is a response to the changed exceptions framework in Canada, has led to significant uncertainty and expense for copyright owner and users.

Exceptions for Education and the Statutory Licence

We note that flexible exceptions were introduced into the Australian Copyright Act in 2006, and in the 12 years they have been in use, the sectors concerned have developed practice guides to those exceptions. We support Copyright Agency's submission that given this experience, the existing provisions could be simplified and updated, to better reflect the scope of activities they permit.

We also note the existence of the statutory licence for education in Australia, which enables education institutions to undertake copying and communication of content for

educational purposes, subject to reaching agreement with the declared collecting society. The statutory licence is a powerful enabler of access to content for the educational sector. Although the licence contemplates payment for the uses permitted, that payment is determined either by negotiation or by the Copyright Tribunal and is not simply imposed by the copyright owners.

We also note that the proposal for an exception for education, currently being discussed in the European Union as part of the Directive for Copyright in the Digital Single Market, contemplates either a licence override (used in the Nordic countries, the UK and Ireland) or fair compensation (in other European countries via either a legal licence or a levy) for the uses permitted under the exception.

IFRRO notes that the statutory licence is a unique feature of Australian copyright law, and similar mechanism for access do not exist in other common law countries. In many respects it is similar to an extended collective licence.

In Singapore, where there is a statutory licence, it has not been updated to reflect the concept of a *declared collecting society*. The significance of the declared collecting society is that it is in the position to be able to negotiate agreements on behalf of all content owners whose works may be used under the licence.

This enables the declared collecting society to set the payment at zero for some content or to agree on differential payment rates for different content and different uses. The role of the declared collecting society coupled with the power of the Copyright Tribunal, means that Australian educational institutions already have unparalleled and flexible access to copyright content.

If there is some uncertainty about the ability of the Copyright Tribunal to determine payment rates at zero for some content or some types of usages, then IFRRO suggest that this be made explicit in the Copyright Regulations dealing with the power of the Tribunal. In this regard IFRRO also supports the suggestion made during the discussion on educational uses during the roundtable that collecting societies could publicly state when no payment was required.

Exceptions for Libraries and Archives

IFRRO notes that libraries and other cultural institutions in Australia already benefit from a range of exceptions for specific purposes and also have the benefit of a flexible dealing exception in section 200AB. In addition, a range of cultural institutions may also use the government statutory licence for any activities that do not fall within an exception.

IFRRO notes that none of the existing library exceptions in the Copyright Act are required to be *fair* or to comply with the five fairness factors. We have stated earlier our concern that this gap could mean that the current library exceptions may breach Australia's international obligations in the Berne three-step test.

IFRRO supports the proposal to modernise, streamline and simplify the current library exceptions. We emphasise two principles for that review. Firstly, the review of the exceptions for libraries, should ensure that the five fairness factors apply to all uses by libraries and cultural institutions under exceptions (including the current exceptions). This is essential to ensure that Australia meets its international obligations as contained in the Berne three-step test.

Secondly, that the various record keeping provisions should not be dismissed as merely administration, as they in fact serve an important function of enabling copyright owners to better understand the use that is being made of their content under these provisions. IFRRO is also of the view that streamlining and simplifying the existing exceptions and incorporating the fairness factors into the new approach could be done most effectively if undertaken collaboratively by stakeholders, as was the case with the simplification of the statutory licence for education.

Orphan Works

IFRRO acknowledges that the question of how to make orphan and out of commerce works available is an important one, and possible solutions have either been adopted or are being considered in different countries around the world.

IFRRO considers that it is premature at this stage to make a decision as to the best course of action when considering the issue of "Orphan Works" in Australia.

We support the submission by our member Copyright Agency, that a limited exception for digitisation of orphan works by cultural institutions, could possibly be appropriate, provided it meets certain conditions, such as in the principles agreed by the International Federation of Library Associations and the International Publishers Association.

We acknowledge that this approach has been used in other countries. We share the concerns of stakeholders as regards unintended consequences and therefore welcome the proposal made in the summary notes of the orphan works Roundtable, for the appointment of an external reference group to further explore the issues and develop consensus to enable a widely supported approach to the issue of orphan works to be found. It may be that in the work of the expert group, drawing upon the experiences in Europe might prove useful.

In the EU, for example, Directive 2012/28/EU on certain permitted uses of Orphan Works (an exception) was adopted in 2012, with an obligation for Member States to transpose it into national law by October 2014. As a result, there is experience in Europe on how such schemes work in practice.

Under a “review clause” (Article 10) in the Directive, the Commission should provide a report on the application of the Directive, in light of the development of digital libraries. The Commission should also keep under constant review the development of rights information sources and submit a report on the continued adequacy of the scope of the exception.

We are not aware that any reports have been submitted by the Commission to date and believe it would be interesting to see what conclusions are drawn on the Directive’s application over the last 3-4 years before deciding on what approach does or does not work.

According to a 2017 survey by the EUIPO – which runs the EU’s Orphan Works Database – users appear largely satisfied with the overall experience of using the Orphan Works Database, but diligent search requirements are perceived as being complex.

We would be happy to provide further information to the Department on the situation in Europe.

Thank you for the opportunity to make a submission to the consultation.

Sincerely yours,

A handwritten signature in black ink that reads 'Caroline Morgan'. The signature is written in a cursive, flowing style.

Caroline Morgan
Chief Executive