



**Avenue de France 23
1202 Geneva
SWITZERLAND**

3 July 2018

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

By email only to copyright.consultation@communications.gov.au

Copyright modernisation consultation — Submission by the International Publishers Association

The International Publishers Association (IPA) is the world's largest federation of national, regional and specialist book publishers' associations. Established in 1896, our membership comprises 76 organisations from 65 countries around the world, including the Australian Publishers Association (APA).

We are pleased for the opportunity to respond to the Copyright Modernisation Consultation, and the IPA's responses to the specific questions raised in the consultation appear below are informed by the outcome of the roundtable discussions. The IPA has previously made submissions to the consultations on copyright that were conducted by the Australian Law Reform Commission (2013) and the Productivity Commission (2015-2017)

From the outset, we want to express appreciation for the Australian Government's consensus-building approach to this consultation. The IPA has always held the position that copyright exceptions must be determined locally so that they accurately reflect local policy considerations for creative industries. The IPA therefore endorses the submission of its Australian member, the APA, and its proposals for local, practical solutions.

We respond below to the questions in the consultation under the main headings set out in the consultation document.

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?

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.

Publishers accept that exceptions are part of the copyright landscape and support purposive and well-defined exceptions where circumstances warrant them.

To this end, the IPA:

- supports the APA in its proposals in relation to fair dealing and other exceptions, specifically the APA's proposal for a fair dealing exception for quotation on the terms set out in its submission;
- accepts that the five-factor test as currently set out in the exception for private research and study is, in general, appropriate for determining 'fairness' when allowing third parties to undertake acts in respect of copyright works that would otherwise be subject to the exclusive rights of the copyright owner;
- re-states, as in its earlier submissions, that 'fair use' is undesirable for the legal uncertainty it will cause and for its effect of transferring the economic benefit in copyright works from copyright creators and owners to the developers of new technologies. We refer you to the almost three pages of arguments against the introduction of 'fair use' we made in our submission to the Productivity Commission's Draft Report 'Intellectual Property Arrangements'.

We submit that Australia has a well-functioning statutory licence for education, and we are concerned that new exceptions for 'educational uses' will have a detrimental impact on legitimate licensing of re-uses of copyright-protected materials under the statutory licence. We are of the view that the exception in Section 200AB sufficiently caters for the legitimate needs of libraries and archives and of educational institutions for unpermissioned uses of copyright material and would therefore not propose any changes.

It would be important to consider the impact of exceptions in other countries, for which we propose two examples relating to exceptions for education:

The one is the extension of 'fair dealing' to the purpose of education in Canada, which has had disastrous consequences for authors and publishers alike in respect of publishing for the education market. It should be noted, however, that the Province of Quebec applies the fair dealing clause differently, and a consideration of developments in Quebec compared to the rest of Canada would be instructive. (See the IPA submission to the Senate Sub-Committee of the Canadian Parliament dealing with the review of its Copyright Act at

<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9921768/br-external/InternationalPublishersAssociation-e.pdf>).

The other example is France, where textbooks produced for the education market are expressly excluded from the exception for digital uses in relation to education. This arrangement has allowed French educational publishers to continue to invest in the highest quality educational resources, to the benefit of teachers, students and ultimately the French education system.

We have noted the discussion around simplifying the record-keeping requirements in favour of libraries in Sections 49 and 50. In principle, IPA would have no objection to a simplification of the administrative requirements governing record-keeping of activities under the exceptions, provided that it is made clear that the exceptions only permit deliveries of reproductions to library patrons in Australia and other public libraries in Australia.

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?

Freedom to contract is a key principle that allows copyright owners to make their works accessible to the public. This principle is even more important in the context of works made in digital format, where licensing is the usual route to the market for publishers.

Contracting out of exceptions should therefore only be banned in relation to 'prescribed purpose copyright exceptions' where specific policy considerations warrant it, such as for free speech.

From the arguments underlying the suggestion for ban on contracting out, one gets the notion that copyright owners go about specifically countering exceptions in their agreements with their customers. This notion conflicts with our experience in the publishing industry. In fact, there is evidence to the contrary. Such notions need to be further investigated systematically in order to avoid unwarranted legislative intrusions into the freedom of contract.

The IPA therefore strongly opposes a blanket provision banning contracting out of all copyright exceptions, or applying such bans to contracting out to copyright exceptions across the board without consideration of the real need for it or policy considerations that would justify it. The IPA also opposes a ban on contracting out in respect of open exceptions, such as those in Section 200AB, for the uncertainty that it would cause.

Access to 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?

In principle, IPA agrees that the copyright owners of works misidentified as orphan works, should only be entitled to reasonable compensation for any past use, but we see no reason why the copyright owner, once they have identified themselves to the person that has carried out the restricted act in respect of that work, should not be entitled to injunctive relief in the future.

Yours sincerely,


José Borghino
Secretary General