



Music Rights Australia's Submission in Response to the Copyright Modernisation Consultation Paper

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Contents

1.	About Music Rights Australia	2
2.	Additional Fair Dealing Exceptions: incidental or technical use	2
3.	Text and datamining	5

RESPECTING AND PROTECTING CREATIVITY

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Music Rights Australia thanks the Department of Communication and the Arts (the **Department**) for the opportunity to make a submission in response to the Copyright Modernisation Consultation Paper (the consultation paper).

1. About Music Rights Australia

Music Rights Australia (**MRA**) is an organisation that protects the creative interest of artists within the Australian music community. MRA represents over 95,000 songwriters and music publishers through their association with the Australasian Mechanical Copyright Owners' Society (**AMCOS**) and the Australasian Performing Right Association (**APRA**)¹, and more than 125 record labels – both independent and major – through the Australian Recording Industry Association (**ARIA**).²

2. Additional Fair Dealing Exceptions – incidental or technical use

The music industry is on the record for its opposition to the introduction of a broad fair use exception.

MRA welcomes the Government's response to the Productivity Commission Report recommendation 6.1 which notes: "that this is a complex issue and there are different approaches available to address it."³

It is also important that the Government has recognised the need to engage in detailed consultation to ensure the correct structures are in place to support creators' expectations that they will be rewarded for their creative output.

While the current public consultation is also welcome MRA is concerned that a short consultation process on the complex issue of a fair dealing exception for technical or incidental use could result in unintended consequences which negatively impact creators' rights.

MRA welcomes the Department's early consultation meetings but is concerned that with such diverse issues as those contained in the consultation paper there may be little time to explore the complex and highly technical issues and possible alternative approaches which the proposed fair dealing for technical or incidental use exception may require.

¹ See www.apraamcos.com.au

² See www.aria.com.au

³ Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements p 7

MRA would suggest that this topic may be one which requires a longer timeframe for consultation than that currently contemplated for some of the other issues raised in the consultation paper.

This proposed exception is contentious. Its potential impact on creators' rights needs to be understood in the current commercial and technical environment. MRA suggests that there needs to be due consideration given to the threshold question of the *need* for such an exception. Should there be a demonstrated need there must be serious consideration given to the scope of such an exception's operation. Then there needs to be consideration of express limitations on its operation.

Failure to limit the operation of an exception for the technical or incidental use of copyright material would impact creators' rights and their capacity to be rewarded for their creative output.

Additionally, consideration needs to be given to how such a change would impact licensed music services, many of which are extremely sophisticated and offer off line "cached" music as a feature of their services.

An overly broad exception for technical or incidental use of copyright works and other works could impact these licensed commercial services and impact consumers which use the services.

This is just one example of the potentially negative implications if the exception were to be drafted without consideration of the commercial landscape and the legitimate expectations of copyright owners.

MRA is also concerned that this proposed exception may have serious implications for the recent safe harbour amendments. The introduction of a broadly worded exception for technical or incidental use of copyright material could create a "back door" safe harbour protection for the very commercial groups the Government and the Parliament determined should not get the protection.

Were a broadly drafted exception to be introduced those commercial service providers would gain the benefit of immunity for copyright infringement without any obligations to remove the infringing material that those which seek safe harbour protections are required to undertake.

MRA is also concerned about the uses infringing services would make of such an exception in order to frustrate rights holders' ability to take effective enforcement action against them. One example is stream-ripping services, which create downloadable copies of recordings from (typically) licensed streams. An incidental or technical use exception risks, at the very least, emboldening these highly commercially damaging services.

The consultation paper does not give any insight into these issues and there appears to have been little or no consideration of these issues during the recent consultation between the Department and stakeholders.

The issues which the proposed exception raises may not be insurmountable and consensus may be achieved but this will take time and deliberation.

Useful starting points for such consultation and deliberation can be sections 43B and 111B of the Copyright Act 1968 and the EU Directive 2001/29/EC Article 5(1).

Section 111B **exception for temporary copy of subject matter as part of a technical process of use** contains express limitations on the application of the exception and is fit for purpose.

Temporary copy of subject-matter as part of a technical process of use

(1) Subject to subsection (2), the copyright in a subject-matter is not infringed by the making of a temporary copy of the subject-matter if the temporary copy is incidentally made as a necessary part of a technical process of using a copy of the subject-matter.

(2) Subsection (1) does not apply to:

(a) the making of a temporary copy of a subject-matter if the temporary copy is made from:

(i) an infringing copy of the subject-matter; or

(ii) a copy of the subject-matter where the copy is made in another country and would be an infringing copy of the subject-matter if the person who made the copy had done so in Australia; or

(b) the making of a temporary copy of a subject-matter as a necessary part of a technical process of using a copy of the subject-matter if that use constitutes an infringement of the copyright in the subject-matter.

(3) Subsection (1) does not apply to any subsequent use of a temporary copy of a subject-matter other than as a part of the technical process in which the temporary copy was made.

Article 5(1) also includes express limitations on the scope and operation of the exception

Art 5(1) states:

Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

MRA is concerned that the Department is currently asking for comment on a proposal which only applies fairness factors. The Department has not put forward any other proposals which expressly limit the operation and scope of the proposed exception.

It would be inappropriate to not have express limitations on this proposed exception in the Act. It is not acceptable to leave examples of how the exception would work to the Explanatory Memorandum and other extraneous materials. This would create unacceptable confusion and could undermine creators' legitimate expectations that they will be rewarded for their creative output.

The music industry needs both a both a strong rights protection environment and a robust digital environment for its continued growth and health.

MRA believes there is a clear need for more extensive consultation on this issue. It is for this reason MRA requests that this exception be given a longer consultation process so the parties can explore the potential for common ground.

Absent a full and dedicated exploration of the scope of the proposed exception, MRA considers the current proposal to apply fairness factors to its operation to be seriously flawed as it has the real potential to undermine the Government's current policy with respect to creators' rights in the digital environment as articulated in the recent *Copyright Amendment (Service Providers) Act 2018* and the accompanying Explanatory Memorandum.

3. Additional Fair Dealing Exceptions – text and data mining

The proposed inclusion of a fair dealing exception for text and data mining needs further exploration. MRA suggests that proposal could be considered at the same time as the consultation of the exception for incidental or technical use.

A starting point for this discussion could be the United Kingdom's section 29A of Copyright Designs and Patents Act 1988.

29A Copies for text and data analysis for non-commercial research

(1) The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—

(a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and

(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(2) Where a copy of a work has been made under this section, copyright in the work is infringed if—

(a) the copy is transferred to any other person, except where the transfer is authorised by the copyright owner, or

(b) the copy is used for any purpose other than that mentioned in subsection (1)(a), except where the use is authorised by the copyright owner.

(3) If a copy made under this section is subsequently dealt with—

(a) it is to be treated as an infringing copy for the purposes of that dealing, and

(b) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.

(4) In subsection (3) “dealt with” means sold or let for hire, or offered or exposed for sale or hire.

(5) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.

Should the Department have any questions about the MRA submission, please contact Vanessa Hutley at vhutley@musicrights.com.au