



## SUBMISSION TO THE COPYRIGHT MODERNISATION CONSULTATION PAPER

4 JUNE 2018

News Corp Australia appreciates the opportunity to make a submission to the *Copyright Modernisation Consultation Paper* (the Paper).

News Corp Australia has been an active participant in copyright issues for many years, including make submissions and representations regarding to the Australian Law Reform Commission review on copyright, the Government's copyright consultations regarding no fault injunctive relief/safe harbour/authorisation, the Productivity Commission's review of intellectual property including copyright, and the Government's consultation on amendments to safe harbour legislation. We refrain from detailing again here those submissions and representations.

We note the Government response to the Productivity Commission Report regarding the formulation of copyright policy, that the Government is committed to evidence-based policy making and the importance of balancing the interests of all parties including content creators.

To extend this, we note that evidence-based policy making requires the Government being aware of the marketplace and commercial environment, and the ways in which the technical and commercial intertwine. These are vital aspects of evidence-based policy making, particularly in the digital environment.

We make the following comments regarding the proposals put in the Paper.

### **Additional fair dealing exceptions**

News Corp Australia does not support a broad fair use exception – the case has not been made.

Nor do we support proposals for fair use or fair dealing exceptions where, again, the case has not been made including incidental and technical use, text and data mining, non-commercial private use and quotation as included in the Paper.

It is also difficult to ascertain the prescribed purpose for many if not all of these, including unspecified 'certain uses' by entities.

We also add that the so-called 'fairness' factors are inadequate to assess the marketplace and commercial impacts

We also note that there is a lack of consideration of licensing and options, rather the Paper dives into references for legislative exceptions.

Regarding incidental and technical use, and also non-commercial private use and text and data mining, it is vital that all aspects of these claims are well understood – particularly in the digital environment.

### Regarding incidental and technical use

It remains unclear what this is, and the extent to which this could or would be used. This alone, without considering the multitude of consequences, makes this issue highly concerning for rights holders operating in the digital environment.

Furthermore, it is possible that such an exception could be a Trojan horse for fair use and/or safe harbour for those commercial service providers that are not intended to be the beneficiaries of the copyright safe harbour.

Given the limited documentation and description about an exception of this type it is difficult to comment more fully. Regardless however, we hold serious concerns about such an exception and do not support such.

#### Legislation or regulation to give effect to fair dealing

We preface our response by re-stating that we do not support exceptions included in the Paper.

The Paper suggests that there are two ways of adding fair dealing exceptions – being by legislation (as is the current process) or by amending the Copyright Act to enable the Minister to make regulations. Regarding this specific matter we do not support the ability to amend copyright exceptions, including adding exceptions, by regulation.

#### **Contracting out**

News Corp Australia does not support amending the Copyright Act to make contracting out unenforceable.

To be clear, we do not support either of the options put in the paper being making unenforceable the contracting out of all copyright exceptions or a prescribed subset of such.

We are concerned that some recommendations regarding contracting out see this as purely a consumer issue. It is important to note that contracting out can function as a useful business-to-business tool.

Regarding consumer contracts, there is a requirement to comply with existing consumer protection laws (including prohibitions on unfair contract terms).

Furthermore, we hold that rights holders should be free to determine the terms on which their content is distributed to ensure a sustainable and virtuous cycle of continued creativity and investment.