

Submission to Copyright Modernisation Consultation Paper, March 2018

The Office of the General Counsel, New South Wales Department of Justice (“NSW Justice”) welcomes the opportunity to make a submission to this consultation paper (the “Consultation Paper”).

NSW Justice manages Crown Copyright for the Attorney General on behalf of the Crown in right of the State of New South Wales (“State of NSW” or “the State”). NSW Justice also has responsibility for negotiating and administering the State’s agreements with collecting societies and acts in an advisory role on whole- of- government copyright issues.

This submission is focussed on issues of immediate relevance to our mandate within the terms of this Consultation Paper.

EXECUTIVE SUMMARY

NSW Justice:

- Agrees that the Copyright Act 1968 (the “Copyright Act”) requires updating to achieve a proper balance of the interests of owners and users of copyright in the digital environment;
- Generally supports the introduction of new copyright exceptions permitting the free use of copyright material in the digital environment where such use is fair and in the public interest, and does not infringe on the legitimate interests of copyright owners;
- Supports additional fair dealing exceptions for government use of third party copyright material to enable the fair and efficient use of copyright material by government in the public interest; and
- Calls for confirmation that the government statutory licences in section 183 and 183A of the Copyright Act (the “government statutory licences”) apply only where use of copyright material is otherwise an infringement of copyright, and in particular, do not apply where material is used by government under a copyright exception.

NSW Justice would be happy to be involved in any further stage of consultation that may arise out of this process, including commenting on any draft text of proposed amendments in due course.

1. Background

NSW Justice makes the following general observations:

- The digital environment is now the dominant medium of information-sharing and service delivery across all economic sectors including government;
- Most copyright material generated or consumed by government comprises *information embedded in copyright material*;¹
- A vast, ever-increasing amount of information is available online for free (whether or not supported by an advertising revenue model) without expectation of payment from end users;
- The State makes available online a wealth of copyright material for public reuse at no charge pursuant to open government and digital data-sharing initiatives;
- The State is committed to the efficient, simple and cost effective digital delivery of its services in the public interest;
- Government use of copyright material in public administration generally has no commercial purpose and often applies to material for which no commercial market exists;
- The State is party to agreements with collecting societies and is the beneficiary of the government statutory licences conferred on it;
- In the commercial sector, the for-fee “premium” digital content licensing market (via so-called “voluntary” or “direct” licensing²) is growing significantly in Australia and globally, aided by the development of new technologies for secure online delivery and payment; and
- The State expends significant public monies across whole-of-government on direct commercial licensing of “premium” professional online information services such as media monitoring services and subscriptions to online journals. This is in addition to commissioning and purchase of original and premium copyright material at department and agency level.

¹ Examples of such material are given in section 3 below.

² A direct or voluntary licence refers in this submission to licences negotiated directly with a copyright owner on commercial terms, as opposed to government use of copyright material which is the subject of equitable remuneration payable under the statutory government licences.

2. Scope of this submission

NSW Justice refers to our comprehensive past submissions on copyright reform, and in particular to our submissions to copyright reviews by the Australian Law Reform Commission³ and the Productivity Commission⁴ in recent years. NSW Justice has previously submitted that the government statutory licences are out-dated, cumbersome and create a significant cost and compliance burden unrelated to the practice or value of government copyright usage. This submission does not rehearse those former arguments in detail, but reserves NSW Justice's position to reiterate these and other arguments for reform should the opportunity arise to comment more broadly in future.

This Consultation Paper states that the Department is seeking to establish reform proposals which have "general support". Accordingly, our submission to this Consultation Paper focusses on the first part of question 1 of the Consultation Paper, and in particular on:

- (1) Confirming the equal application of existing fair dealing exceptions to government; and
- (2) Advocating for additional fair dealing exceptions, already recognised in comparable jurisdictions overseas, to support modern government use of copyright in an efficient manner in the public interest.

In our submission, and for the reasons outlined below, these are minimal "fixes" which should have general support within the scope of this Consultation.

3. State of NSW use and management of copyright

(a) Crown Copyright

Licensing of Crown Copyright

The State owns Crown Copyright⁵ in a substantial and extensive range of original works and other subject matter capable of copyright protection.

As noted in our general observations in section 1 of this submission, Crown Copyright predominantly subsists in *information embedded in copyright material*. That is, information comprised in reports, statistics, archival papers, policies, judgments, legislation, transcripts of official proceedings, software code, plans, drawings, photographs, video footage, information sheets, and written communications created by or on behalf of the State of NSW.

³ Australian Law Reform Commission; *Copyright & the Digital Economy*, submission no. 294 to IP 42 (NSW Government, October 2012) and submission no. 740 to DP 79 (NSW Department of Justice and Attorney General, July 2013).

⁴ Productivity Commission *Inquiry Report No 78, Australia's Intellectual Property Arrangements*; submission no. 39 to public inquiry (NSW Department of Justice, November 2015) and submission no. DR610 on Draft Report (NSW Department of Justice, July 2016).

⁵ *Copyright Act 1968* (Cth) ("*Copyright Act*"), section 176.

Accordingly, the terms on which Crown Copyright is made available to the public, either by licence or under the operation of relevant exceptions, is of vital significance to the public interest.

In some circumstances Crown Copyright material must be restricted from general free use. This includes material which is created for a commercial purpose to provide a return to taxpayers, material which is subject to privacy, confidentiality, cabinet-in-confidence, privilege or other legal restrictions, or where such material is required to be exclusively licensed for a project. Where such restrictions are required, copyright notices and rights of access are limited accordingly.

However, general policy now mandates the default licensing position to be broad and unrestrictive. The State recognises the role that modern democratic governments can play in promoting the free flow of information, efficiency of service delivery, and other benefits of the digital age, and has implemented significant initiatives to meet this policy objective. These include:

- The [Government Information \(Public Access\) Act 2009](#) (“GIPA Act”). The GIPA Act creates a presumption⁶ in favour of release of government information unless there is an overriding policy reason otherwise, and requires all government agencies to release a wide range of information on government websites free of charge;⁷
- The [NSW Digital Government Strategy \(2017\)](#) which sets the vision and imperative for the whole-of-government transformation to a digital, responsive and agile public sector;
- The [New South Wales Open Data Policy](#) (“Open Data Policy”) (initially released 2013, and updated in 2016). The Open Data Policy enables free online access to, and free third party use of, government information. In the context of copyright, the Open Data Policy supports open licensing – that is, licensing which grants third parties broad usage rights to adapt and use Crown Copyright material for no fee. For example, the [Department of Justice copyright notice](#) relevantly reads as follows:

The State of New South Wales, acting through the Department of Justice, supports and encourages the reuse of its publicly funded information.



Unless otherwise stated, all Department of Justice material on this website is licensed under the Creative Commons Attribution 4.0 licence, except as noted below. Terms and conditions of the licence can be viewed at <http://creativecommons.org/licenses/by/4.0/legalcode>.

We request attribution as: '© State of New South Wales (Department of Justice). For current information go to www.justice.nsw.gov.au.'

In addition to these whole-of-government initiatives, open licensing of Crown Copyright material is often enabled under specific policies. For example, New South Wales judgments may be freely reproduced by commercial publishers and others under the terms of the current gazetted [copyright notice](#). This notice extends the limited reproduction right in section 182A of the Copyright Act.

The State also routinely grants bespoke copyright licences of Crown Copyright material without charge for projects which have a public benefit. NSW Justice assists the Attorney General in

⁶ *Government Information Public Access Act (2009)* (“GIPA Act”), section 5(1).

⁷ *GIPA Act*, section 6(1); see also section 18 definition of “open access information”.

considering specific copyright licence queries from academic and cultural institutions and commercial entities. Wherever appropriate, approvals are granted with minimal restrictions.

These policy and legislative initiatives have resulted in the release of significant amounts of the State's Crown Copyright material to the public in digital form, at no charge.

Fair dealing by third parties with Crown Copyright material

The State acknowledges that copyright law permits third parties to avail themselves of applicable fair dealing and other copyright exceptions to quote, use or adapt any Crown Copyright material available on agency websites or otherwise in the public domain, separately to the terms of use stated in any copyright notice.

NSW Justice supports in principle the availability of new copyright exceptions permitting the free use of Crown Copyright and other copyright material where such use is in the public interest.

NSW Justice would be willing to review the proposed form of any new fair dealing exceptions considered by the Department following feedback from consultation forums and submissions.

(b) State of NSW use of third party copyright material

Most internal government use of copyright material does not have a commercial purpose. Rather, it is generally done to satisfy statutory, record-keeping or policy requirements, for client service delivery, or otherwise in the public interest.

Examples include:

- Copying material in a file to comply with a GIPA Act request;
- Copying material for the purposes of researching an internal report;
- Making copies for the purposes of complying with record-keeping;
- Sending a scan of a press release from a corporate website to a team member; and
- Quoting or extracting copyright material for the purposes of discussing or analysing it.

Use of free online material

As outlined in our observations in section 1, government use of third party copyright material is primarily *information embedded in copyright material*. A significant proportion of such information is available freely online. This can include statistical data, reports and policies published by government and private entities, corporate information such as press releases and annual reports, news reports, and commentary on current affairs and matters of public interest on blogs and other free platforms. This is material for which there is generally no commercial market.

Like other users, government employees in the State of NSW who access free online information will often view it without downloading or otherwise copying it. They may "bookmark" it for future reference by storing a link on their computer toolbar. If they wish to convey this information to others, they will often email this link to a colleague or member of the public.

Neither viewing, nor linking to, copyright material on a freely accessible website or online platform requires a copyright licence. Accordingly, much government consumption of information in the digital environment is non-remunerable, as it is for other users.

Increasing use of paid digital subscriptions

As observed in section 1, the State now expends significant and increasing fees on direct licensing of copyright material delivered in digital form. This copyright material primarily consists of information services, such as online journal subscriptions and media monitoring services, necessary for the operation of government in the digital age.

This is in addition to the commissioning of original copyright material from contractors under individual bespoke contracts, and from copyright licences purchased at a departmental or agency level.

Application of existing fair dealing exceptions to government

Like other users, government employees in the State of NSW who access free online information often simply view it without downloading or otherwise copying it.

Where government employees do copy material, whether from online sources or otherwise, they often do so for the purposes of research, or by quoting extracts for critical evaluation, in the course of public administration.

The operation of fair dealing exceptions is therefore highly relevant to whether or not such uses are reportable, and remunerable, under government statutory licences.

There is a long-standing difference of opinion between governments and collecting societies⁸ (and in particular, Copyright Agency Limited⁹) in Australia in relation to the availability to government of fair dealing exceptions, and in particular the general copyright exceptions of “research or study”¹⁰ and “criticism or review”.¹¹ This is despite the drafting of these provisions, which does not restrict the class of users, and can include commercial users.¹² For example, the most significant case in Australia to date concerning fair dealing, the so called “*Panel Case*”,¹³ confirmed that the fair dealing exceptions of “criticism or review” and “reporting the news” were available to a commercial television station which commissioned an entertainment panel program for profit, enabling it to copy the broadcasts of its competitor off air and extract fair portions for use in the program without a licence.

⁸ Gilchrist, John, “Crown Use of Copyright Material” [2010] *Can.Law. Rw.* 2.

⁹ Gilchrist, id at pp 15-16.

¹⁰ *Copyright Act*, sections 40, 103C.

¹¹ *Copyright Act*, sections 41, 103A.

¹² For example, *Copyright Act*, sections 40-53 and 103A-104.

¹³ [TCN Channel Nine Pty Limited v Network Ten Limited](#) [2001] FCA 108.

It is logical and fair that government employees performing what is best characterised as non-profit public administration in the service of constituents should also have the benefit of this exception. Governments should not have to pay for such uses when others do not and accordingly be placed in a less privileged position than others.

A hypothetical illustration of such use by government employees is at **Annexure A**. In our submission, such copying, when it (infrequently) occurs, is within the fair dealing exceptions for criticism or review, research or study, or both, and is non-remunerable.

It is NSW Justice’s position, made in previous submissions and reiterated here, that copyright exceptions under the Copyright Act are available to government in circumstances illustrated in the hypothetical and otherwise, provided the use satisfies the applicable purpose and meets any other criteria of the exception that applies.¹⁴

NSW Justice submits that the correct position is that the government statutory licences apply only as a default where the use would otherwise be a copyright infringement – that is, where there is no direct or “voluntary” licence, where the use is a “substantial” reproduction of copyright, or where no copyright exception applies. This default position was taken by the High Court which held that: “In cases where [fair dealing provisions or other provisions in Pt III, Div 3] do apply, Pt VII, Div 2 respecting Crown Use and equitable remuneration is not engaged.”¹⁵

Confirmation of this position via an express amendment to the government statutory licence provisions of the Copyright Act would finally remove disagreement on this issue, as recommended by the Australian Law Reform Commission in 2014.¹⁶ The amendment would confirm that the State’s taxpayers should not ultimately be subject to an impost for such uses, when such uses are free to all other users large and small.

NSW Justice submits that the Copyright Act should be amended to confirm that the statutory licences do not apply where copyright material is used under a copyright exception or would not otherwise constitute an infringement of copyright.

Need for additional fair dealing exceptions for certain government uses

As noted above, government use of copyright material is generally not for any commercial purpose, but is in the nature of “non-profit” administrative use in the public interest. Meanwhile, government legal and policy obligations in the digital environment, and in particular obligations to release and share information digitally, have increased. These obligations are outlined in section 3 of this submission.

¹⁴ It is uncontroversial that government has the benefit of copyright exceptions pertaining to specific user subsets, such as exceptions for libraries and archives, operating within government. See for example, Copyright Act sections 48A, 49, 50, 104A, and 200AB. These specific user exceptions are not discussed further in this submission.

¹⁵ *Copyright Agency Ltd v NSW* [2008] 233 CLR 279 at [11].

¹⁶ ALRC 122, [Recommendation 8-1](#).

At present, there are only limited copyright exceptions available specifically to government in the exercise of its public administration functions.¹⁷ These exceptions have not kept pace with the modern government environment. For example, there is no copyright exception covering the mandatory copying of material under a GIPA Act request where third party copyright material is incidentally included.¹⁸

In contrast, in recent years, other comparable jurisdictions have implemented exceptions supporting a range of modern government activities in the public interest.

For example, in the United Kingdom there are a suite of copyright exceptions known as the “public administration” exceptions in the *Copyright, Patents and Designs Act 1998* (UK)¹⁹ (“UK Copyright Act”). These public administration exceptions were updated and enhanced in 2014²⁰ following a lengthy copyright reform process to modernise the UK Copyright Act in the digital age.²¹

Copyright exceptions available to government agencies performing administrative functions in the United Kingdom now relevantly includes “acts done under statutory authority” (section 50) and other activities promoting open government in the modern digital environment. These include exceptions (paraphrased for purposes of brevity) for:

- Anything done for the purposes of a Royal Commission or statutory inquiry ([s 46](#));²²
- Making copies (including electronic copies) of material on a public file open to inspection pursuant to a statutory requirement to enable material to be inspected at a more convenient time or place ([s 47\(2\)](#));
- Copying and making available to the public (including electronically) material containing matters of scientific, technical, commercial or economic interest from a statutory register for

¹⁷ See eg sections 43, 48A, 104 and 104A which provide exceptions for use of copyright material in judicial proceedings or for members of parliament.

¹⁸ Such information can include third party documents, images, reports or other material previously provided to government by third parties for administrative purposes.

¹⁹ [Copyright, Designs and Patents Act 1988 \(UK\)](#) (“UK Copyright Act”).

²⁰ [Copyright \(Public Administration\) Regulations](#) No 1385 of 2014 (UK) (“UK Public Administration Regulations”) which amended ss 47 and 48 of the UK Copyright Act. The [Explanatory Memorandum](#) for the regulations prepared by the United Kingdom’s Intellectual Property Office explains the background and process behind their introduction.

²¹ The [Explanatory Memorandum](#) to the *UK Public Administration Regulations* prepared by the United Kingdom’s Intellectual Property Office explains the background behind their introduction, including the public consultation process beginning with the so-called “Hargreaves Review” and leading to the 2012 government policy response “[Modernising Copyright](#)”.

²² The exception in section 46 of the *UK Copyright Act* is *additional* to the exception for acts done in the course of “judicial proceedings” in section 45 of the *UK Copyright Act*. In contrast, our Copyright Act only has an exception for “judicial proceedings” (*Copyright Act*, sections 43 and 104).

the purpose of dissemination of information where such material is not commercially available to the public from the copyright owner ([s 47\(3\) and \(3A\)](#));

- Copying and making available to the public (including electronically) material which, in the course of public business, has been communicated to the Crown with permission of the copyright owner and the copying is done for the purpose for which the material was communicated and is not otherwise published; ([s 48](#)); and
- Copying and making available to the public material which is comprised in public records which are open to public inspection ([s 49](#)).

NSW Justice notes briefly that:

- New Zealand's Copyright Act²³ contains public administration exceptions for government use which largely mirror those of the UK Copyright Act;
- Canada's Copyright Act²⁴ contains exceptions for any person to disclose a record under public disclosure legislation similar to the *GIPA Act*, and under other specified statutory obligations; and
- The Australian Law Reform Commission recommended that such exceptions be introduced in its *Report on Copyright and the Digital Economy* in 2014.²⁵

The exceptions set out in ss 45-50 of the UK Copyright Act, if enacted in the Australian Copyright Act, would:

- Not conflict with a normal exploitation of copyright works;
- Not unreasonably prejudice the legitimate interests of creators; and
- Be in the public interest by enabling government to deliver services, comply with statutory obligations and implement open data policy efficiently and cost effectively.

NSW Justice submits that public administration exceptions modelled on sections 45-50 of the United Kingdom Copyright, Patent and Designs Act 1988 should be included in the Copyright Act.

²³ Copyright Act 1994, New Zealand, sections 58-60.

²⁴ Copyright Act RSC, 1985 (C-42), clause 32.2.

²⁵ ALRC 122, [Recommendation 15](#).

Annexure A

Hypothetical example

Government copying of online copyright material for research or study, criticism or review

Rani, a senior policy officer, is tasked with preparing an internal report based on desktop research of public industry responses to a government compliance program administered by her Department.

Rani reviews relevant corporate websites containing copyright material in the form of compliance statements, annual reports, press releases, newsletters and “from the CEO” blog posts. All the websites are publically accessible and are not behind a pay-wall. However, as is commonly the case, these websites are not licensed under a Creative Commons 4.0 attribution or similar “open use” licence. Rather, the website terms have a standard reservation of copyright disclaimer and do not expressly permit reproduction of material on the website except for “non-commercial” and/or “personal” use.

*In the course of her research, Rani downloads and saves pdfs of “pages” of website material necessary for further review to her laptop (the “**saved copies**”) as she is attending an offsite meeting to discuss progress with her manager and she is concerned there may not be wi-fi available. On returning to the office Rani prepares the report. She selects and includes quotations from the **saved copies**, followed in each case by her commentary analysing each quotation against the government’s policy objectives.²⁶ She attributes each quotation and inserts a hyperlink back to the page of the relevant corporate website.*

When completed, Rani circulates the report in electronic form to her manager and team.

*A few days after completing the report, Rani deletes the **saved copies** from her laptop as she no longer needs them.*

In this hypothetical:

- Rani’s making of “saved copies” of downloaded pdfs of web pages to her laptop for temporary reference purposes while writing a report is an example of fair dealing for research or study under section 40 of the *Copyright Act*; and
- Rani’s select use of quotations from the “saved copies” in her report is an example of fair dealing for the purposes of criticism or review under section 41 of the *Copyright Act*.

²⁶ For the purposes of this hypothetical, it is assumed that each of the excerpts copied for quotation would comprise a “substantial reproduction” of an original literary work under section 10 of the *Copyright Act*. However, quotation of such material would not always be “substantial” in these circumstances, and if not, would not constitute a use of copyright.