A. VIEW OF THE AUSTRALIAN COPYRIGHT COUNCIL

1. The Australian Copyright Council (ACC) appreciates the opportunity to make this submission in response to the Paper. The attention shown to date by the public and a cross-section of interest groups only serves to highlight the importance of the issues identified in the Paper.

2. The ACC also greatly appreciates the opportunity to have been involved with the entire series of productive roundtable meetings held by the Department of Communications and the Arts (Department) on various issues arising from the Paper. The Department’s release of models for further consultation is also valued, and the ACC has taken those into account in the drafting of this submission.

3. At the outset, the ACC highlights the following points that can be ignored, forgotten or underappreciated by some in the context of considering changes to copyright legislation:

3.1 The term ‘creator’ is often used as an antonym for ‘innovation’. This is a myth predicated on the erroneous assumption that the roles are mutually exclusive;

3.2 At its core, copyright legislation is aimed at ensuring certain protections for creators both as a source of potential income and means of controlling the use of their work. Economically speaking, evidence exists which shows Australia’s copyright sectors represent billion-dollar industries that employ almost 9% of Australia’s workforce;¹

3.3 Wholesale and untested amendments to the Copyright Act 1968 (Cth) (the Act) may, in the absence of significant constraints, only serve to undermine the moral and economic importance played by creators and the copyright industries;

3.4 We appreciate that the Act is lengthy and, in part, technical. However, the present form of the Act is the result of more than fifty years of significant reviews, all of which have taken into account a number of important considerations including not only those of creators, but also of user groups such as those in the education, libraries, and technology sectors. The Act is a culmination of careful analysis of many competing positions and should not be overhauled lightly;

3.5 Open ended defences may account for future and as yet unknown developments in, for instance, technology. However, broad defences also pose a significant risk that creators will suffer unknown consequences; and

3.6 With that in mind, the imperatives of modernisation and simplification are not served by merely choosing to shorten legislation and introduce open-ended, short-term fixes aimed at avoiding difficult future legislative consultations. Beyond that, the ease with which works can be distributed and used by a variety of technological platforms also increases the level of ‘mischief’ that can occur. Rapid technological change only calls for more care when altering copyright protections. Simplification of the Act should not occur for its own sake.

4. With those points in mind, and in response to the questions posed by the Paper, the ACC responds as set out below.

B. FLEXIBLE EXCEPTIONS: QUESTION ONE

<table>
<thead>
<tr>
<th>To what extent do you support introducing:</th>
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<tr>
<td>• additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?</td>
</tr>
<tr>
<td>• a ‘fair use’ exception? What illustrative purposes should be included and what factors should be considered in determining fairness?</td>
</tr>
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5. The ACC has previously indicated – by way of extensive public submissions – that it does not support the introduction of a fair use defence.\(^2\) Those submissions continue to reflect the position of the ACC. Australian law to date has considered a number of specific exceptions by reference to actual, practical, real-life examples. Whether or not that is time-consuming, such a careful, purposive approach to legislative change should continue.

6. The ACC does not seek to repeat its prior submissions in detail, other than to highlight the following non-exhaustive list of concerns:

6.1 In seeking to moderate all competing copyright interests with a ‘one size fits all’ solution, a fair use doctrine will necessarily introduce significant legal uncertainty into the Australian legal system;

6.2 The notion of fairness should also involve predictability. The less specific the drafting of a defence or exception, the less certainty involved in the applicability of that exception in preference to relying on a licence;

6.3 It would be unwise to simply import a section from an American statute in the context of the Australian experience and legal system, noting that Australian courts are not bound to follow American decisions; and

6.4 There is a stronger likelihood that a broad fair use exception will allow those in breach to simply claim ‘fair use’ thereby placing an even greater onus on rightsholders to litigate.

7. The ACC commends to the Department a paper recently published by economist Dr George R Barker of ANU, which is critical of certain arguments and assumptions made in a report issued earlier this year which favoured a fair use defence based on economic considerations.\(^3\)

8. The Act already contains a significant number of fair dealing defences and other exceptions that limit the ability of creators to exploit their works and control reproduction of those works in many instances.

9. With that in mind, if further legislative changes are to be made, the ACC prefers the continued adoption of a purposive approach, namely, the introduction of (at most) carefully considered specific fair dealing defences following a consultative process. This submission will focus on the potential new fair dealing defences previously identified by the Australian Law Reform Commission (ALRC) and which have been the focus of recent roundtable discussions hosted by the Department.

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\(^2\) See, for example, the following submissions drafted by the ACC: Submission to the Australian Law Reform Commission: Response to Copyright and the Digital Economy Discussion Paper (July 2013); Submission in Response to Productivity Commission Draft Report on Intellectual Property Arrangements (June 2016); and Submission to Government in Response to the Productivity Commission Final Report (February 2017).

\(^3\) More Unfair Claims About Fair Use in Australia, Dr George R Barker (May 2018), responding to ‘Copyright in the Digital Age’, Deloitte Access Economics (February 2018).
GOVERNMENT USES

10. Governments already enjoy a privileged position in relation to the use of copyright works:

10.1 Governments are entitled to rely on very wide-ranging exceptions to copyright infringement compared to other copyright users, noting the very wide definition of ‘for the services of the Commonwealth or a State’ in s. 183 of the Act;

10.2 Put another way, statutory licence schemes give governments broad wholesale copyright access for a fair price as negotiated with relevant collection societies, or in the absence of agreement, assessment by the Copyright Tribunal; and

10.3 Governments become owners of copyright in circumstances where others would not.

11. This provides governments with significant bargaining power when it comes to not only collecting societies, but also uses of works that may not be covered by an agreement with a collecting society that will require individual creators to engage in negotiations with government representatives. Even though the Act requires governments in such situations to notify copyright owners as soon as possible after the use, this is subject to a ‘public interest’ caveat. In situations where copyright owners are notified and appropriate remuneration is not agreed, their only recourse is the Copyright Tribunal, which is often seen as an uncertain and expensive process for many Australian creators.4

12. With the matters set out above in mind, and in relation to the Department’s suggested model for further consultation in relation to Government Use, the ACC says:

12.1 Sections 43 and 104 of the Act provide certain exceptions for ‘anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding’. ‘Judicial proceeding’ is defined as ‘a proceeding before a court, tribunal or person having by law power to hear, receive and examine evidence on oath’ (italics added). While supportive of exceptions to copyright legislation that ensures the proper functioning of judicial and quasi-judicial proceedings, the ACC does not understand in light of the current definition why there is any reason to amend the legislation to make further references to tribunals, Royal Commissions or other statutory inquiries;

12.2 Given the significant protections already afforded to governments, further government exceptions are not required, noting that:

12.2.1 as a matter of legal process, the suggestion that legislative instruments can require those enacting the legislative instrument to make published material publicly available without appropriate copyright remuneration is problematic;

12.2.2 there is no valid reason to introduce special exceptions for parliamentary libraries who already enjoy specific exceptions that others do not;5

12.2.3 the statutory licence scheme is already comprehensive; and

12.2.4 individuals already have very weak bargaining powers where government entities are concerned.

4 For a rare example of proceedings involving creators in their individuals, see the various decisions arising from the matter of Pocketful of Tunes Pty Ltd & Bruce Woodley v Commonwealth of Australia (which concerned the use by the Department of Immigration of the song, ‘I Am Australian’): [2015] ACopyT 1; (No 2) [2015] ACopyT 2, 239 FCR 63, and [2016] ACopyT 1.

5 Copyright Act 1968 (Cth) ss. 48A, 50 and 104A.
QUOTATION

13. Within the terms of the Act, there already exists a significant ability to use ‘quotations’ of a variety of works. Accordingly, the ACC believes that the suggestion that Australian law does not already comply with Article 10(1) of the Berne Convention is a matter of conjecture. Lawful uses of quotations include:

13.1 Where an appropriate licence (whether that be a statutory licence or other voluntary licence) is obtained;

13.2 Where the fair dealing is for the purpose of:

13.2.1 criticism and review (in which the concept of quotation is already inherent, and in certain instances even substantial quotes may be caught within the terms of the defence);\(^6\) or

13.2.2 research or study;\(^7\)

13.3 There will also be instances of significant quotation in relation to the other fair dealing defences as well, whether it be for the purpose of reporting news or satire;\(^8\)

13.4 Incidental use of artistic works in broadcasts;

13.5 The use of a quotation which is less than a ‘substantial part’ of the work or other subject matter; and

13.6 There are, of course, ways to refer to works or other subject matter without reproducing aspects of the works; for example, by way of descriptions or synopses.

14. Rightsholders can take policy decisions that accommodate their audience and market. We are aware that in 2016, the Australian Publishers Association (APA) took a policy position that its members should allow their book covers to be used by libraries to promote library programs, library collections, and connect readers with books and authors. This position was taken in consultation with the Australian Library & Information Association (ALIA) and empowers libraries to use images of book covers in a wide range of promotional activities including marketing materials, social media posts, and website pages, without fear of infringement action.\(^9\)

15. Beyond that, a specific quotation defence may work better for some types of copyright material than others. The concept of quotation is perhaps more readily understood in relation to literary / written works. In relation to other copyright material, licensing models exist for quotations (such as, for example, music and film sampling) and therefore seems to be an issue better mediated by the concept of substantial part rather than by specific exception.

16. Accordingly, discussion surrounding the introduction of a quotation fair dealing defence must be treated cautiously. The only basis for such a defence would seem to be for authorising, on an unremunerated basis, the use of a substantial part (or a work in its entirety) in situations not

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\(^6\) Copyright Act 1968 (Cth) s. 103A.
\(^7\) Ibid ss. 40 and 103C.
\(^8\) Ibid Part 3, Divisions 3 and 6.
already covered by the significant protections applicable to quotations in many instances. For that reason, there are two particular issues for consideration:

16.1 The understanding to be given to ‘quotation’ and the purpose for which a quotation may be used; and

16.2 Relevant fairness factors.

**Definition of Quotation and Relevant Purpose(s)**

17. Care must be taken when defining ‘quotation’. Much of the material on this issue appears to confuse the defining of ‘quotation’ and the ‘purpose’ for which a quotation may be lawfully used by reference to copyright law. Ultimately, the ACC appreciates that copyright law should, where possible, not undermine free expression, and protections for creators can in fact nurture freedom of expression. Ensuring freedom of expression beyond the copyright scheme could be assisted in two ways:

17.1 Defining quotation as an ‘extract’ relied upon for certain defined intents, although further consultation would be required to ascertain appropriate intents; and

17.2 The introduction of appropriate fairness factors (discussed below).

18. Put another way, ascertaining the purpose for which a quotation might be used is central to ascertaining the appropriateness of amending this legislation. The exceptions allowed above are purposive in nature, and all inherently allow quotations to be used for pre-defined and socially approved purposes.

**Fairness Factors**

19. Fairness factors should continue to be informed by the three-step test underpinning copyright exceptions in international law, namely, that exceptions to exclusive rights should be confined to:

19.1 certain special cases,

19.2 which do not conflict with a normal exploitation of the work, and

19.3 do not unreasonably prejudice the legitimate interests of the rightsholder.

20. With those principles in mind, the ACC does not believe that fairness is achieved if:

20.1 the use of a quotation is covered by the offering of a licence that would be unreasonable to decline;

20.2 the dealing involves the reproduction of a work as a whole. This cannot be a true quotation. It would also significantly undermine copyright protections for items such as photographs, paintings, and other artistic works, as well as other short written works such as short poems, prose, and song lyrics;

20.3 there is a failure to sufficiently acknowledge the creators; and

20.4 the dealing involves a commercial purpose where it would therefore be appropriate to seek a commercial licence (even, for example, the use of thumbnails and book covers featuring artistic works).

21. With that in mind and given the increased possibility that such a fair defence will introduce further unremunerated and unlicensed use of creators’ works, fairness factors should be
applied stringently. The ACC would support as a starting point – consistent with the fairness factors used in relation to research and study\textsuperscript{10} – adoption of at least the following specific non-exhaustive factors:

21.1 The purpose and character of the dealing;
21.2 The nature of the work or other subject matter;
21.3 The possibility of obtaining the work or other subject matter within a reasonable time at an ordinary commercial price;
21.4 The effect of the dealing upon the potential market for, or value of, the work or other subject matter; and
21.5 The amount and substantiality of the part copied taken in relation to the whole work or other subject matter.

22. Given the policy arguments in favour of a quotation defence, there is no valid reason why sufficient acknowledgment should not be required. Such a consideration should not be left to general fairness considerations, which are open to interpretation and run the risk of a legislative interpretation that had acknowledgment been required, it would have been incorporated within the terms of the relevant provision.\textsuperscript{11} We note that acknowledgment is required under comparable UK legislation.\textsuperscript{12}

\textbf{View of the ACC}

23. With the foregoing matters in mind, in relation to the Department’s suggested model for further consultation in relation to Quotation, the ACC says:

23.1 It is supportive, in principle, of a carefully drafted quotation defence separate to that of the criticism and review and other fair dealing defences (which already inherently contain an ability to use quotations without licence) but restricted to carefully defined \textit{purposes} identified by further consultation;

23.2 Any defence should:

\begin{enumerate}
\item[23.2.1] consistent with Article 10 of the Berne Convention, extend to:
\begin{enumerate}
\item[(1)] works only; and
\item[(2)] only works which have already been lawfully made available to the public;
\end{enumerate}
\item[23.2.2] apply to use of \textit{extracts} only (never the entirety of a work) used for a pre-defined purpose, and where no more is used than necessary to achieve that purpose;
\item[23.2.3] specifically require sufficient acknowledgment of the source and author of a work unless there are reasonable grounds for not doing so;
\item[23.2.4] be subject to the five fairness considerations set out in the Act in relation to research or study; and
\end{enumerate}

\textsuperscript{11} Such as \textit{Copyright Act 1968} (Cth) sections 41, 42, 44, 103A and 103B.

\textsuperscript{12} \textit{Copyright, Designs and Patents Act 1988} (UK) s.1ZA.
23.2.5 include a presumption against the use of the defence where a licence is available, which is rebuttable where there are reasonable grounds for not doing so.

INCIDENTAL AND TECHNICAL USE / TEXT AND DATA MINING

24. The increased and rapid change in the use of technology is a two-edged sword that can help and hinder society. When it comes to creators and the copyright industries, this technological impact necessarily requires a very cautious approach to be taken in relation to copyright law amendments that could otherwise expose creators to harm. It would be dangerous (and erroneous) to take a policy approach that saw technological change as always desirable and copyright as a scheme that stymies that process.

25. Despite the flawed tendency of some to pitch creators against innovators when discussing issues of copyright and technology – creators are themselves not only innovative, but in many instances innovative business operators – few fail to appreciate the significant impact that technology can have on creators, in both positive and negative ways. Australian creators are generally not technology-averse and many have lived through the ups and downs that have resulted from the rapid development of online initiatives. Many creators and representative organisations (including collecting societies) rely on technological platforms to reach new audiences. On the other hand, the online world poses a significant problem when it comes to controlling the rights that creators are given under the Act. In one sense, it is a problem consistent with the legal and moral issues surrounding data privacy and protection.

26. An appropriate copyright scheme necessarily acknowledges and respects both authorship and creation. These imperatives should not be undermined simply for technology’s sake. If anything, the expansion and increased reliance on technology calls for a cautious approach to amending the Act rather than seeking a more flexible ‘quick fix’ that leaves creators (and future creators) exposed to the significant risks of the unknown. This concern should not be brushed aside lightly given that the online world has already weakened the ability of creators to control the copying of their work.

27. Some interest groups have advanced the argument that a fair dealing defence should be open-ended because we cannot currently ascertain or fully appreciate future technological advancements. From our perspective, that only highlights that many future trends are unknown and cannot be presently understood. If anything, this begs for caution to be had when considering weakening protections for copyright owners in favour of ‘streamlining’ the use of technology. New distribution platforms have already seen value transferred from creators to technology companies, and even where licences are in place, there may still only be minimal royalties paid to artists.

28. The legislature has also recently considered whether or not a safe harbour scheme, currently providing certain protections to carriage service providers, should be extended to other organisations, including online service providers. Following a lengthy consultative process, Parliament chose not to extend the protection to online service providers. Any alternative approach that would now extend the fair dealing provisions to that sector would be nonsensical. Beyond that, safe harbour take down processes are not in any event the saviour of copyright protection, noting the many hours spent by creators monitoring online platforms for copyright breaches and the subsequent need to enforce takedown mechanisms and/or send demands. A broad defence in favour of technical uses will now only act as a ‘backdoor’ safe harbour, contrary to copyright policy recently considered in detail.

29. That said, there are various protections, including both legislative exceptions and licencing regimes, already in place with a view to ameliorate the practical issues that may be associated with using technology, including:
29.1 Certain protections for research or study which may, depending on the circumstances, allow some protection for text and data mining;\(^{13}\)

29.2 Text mining allowed under educational and government statutory licences, as well as licensing by publishers;

29.3 Copying for the purpose of back-up and data recovery is routinely done based on current exceptions and licensing arrangements;\(^{14}\)

29.4 Copying legally acquired copyright material allowed under certain licence conditions (for example, iTunes and Netflix);

29.5 Exceptions relevant to time shifting for television shows and format shifting for music, books, periodicals and photographs;\(^{15}\)

29.6 Storage of legally acquired copyright material on remote servers allowed under most licence conditions (and which may otherwise be the subject of implied licences); and

29.7 Exceptions for temporary reproduction incidentally made as a necessary part of a technical process of using a copy of a work.\(^{16}\)

30. Of course, we are only concerned with copyright protections for the purpose of this submission. Copyright does not have a role to play in the use of data or information per se, and we query the extent to which reproductions of copyright material are required to extract what is purely information.

31. While the recent *Pokémon v Redbubble*\(^{17}\) decision of the Federal Court is repeatedly referred to as a purported ‘failure’ on the part of copyright law in relation to tech companies, the ACC notes that:

31.1 The Court found that Redbubble could have:

31.1.1 automatically blocked the use of trademarked words as tags;\(^{18}\) and

31.1.2 immediately taken down or removed infringing material and could simply have filtered or blocked communications;\(^{19}\) and

31.2 The plaintiff was only awarded nominal damages of $1.\(^{20}\)

32. With the foregoing matters in mind, in relation to the Department’s suggested model for further consultation in relation to Incidental and Technical Use, the ACC says:

32.1 the introduction of a fair dealing defence is concerningly wide in its terms which could undermine appropriate remuneration being paid to creators (including by way of commercial entities implementing business models without the consent of rightsholders);

\(^{13}\) *Copyright Act 1968 (Cth)* ss. 40 and 103C.

\(^{14}\) Ibid Division 4A.

\(^{15}\) Ibid ss. 43C, 47J, 109A, 110AA and 111.

\(^{16}\) Ibid ss. 43A, 43B, 111A, 111B, 200AAA.

\(^{17}\) *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541.

\(^{18}\) Ibid para 15.

\(^{19}\) Ibid para 59.

\(^{20}\) Ibid paras 73 – 77.
32.2 in relation to the making of a temporary copy:

32.2.1 as a matter of statutory interpretation, references to ‘a’ copy will also include copies plural;\(^{21}\) and

32.2.2 before the need for amendments is further considered, consultation should occur to explore whether there is any basis to concerns that certain copies may need to be required, for technical reasons, beyond what might normally be considered ‘temporary’ (even though the ACC understands that this is not in practical terms an issue under standard licenses issued by collecting societies);

32.3 beyond that, this is an area that is better suited for exploring (perhaps via further consultation) non-legislative solutions by way of, say, a compulsory licence scheme;

32.4 if a fair dealing defence of this nature is to be introduced, significant further consultation would be required. The ACC believes that such consultation should include consideration of:

32.4.1 specific limitations to the defence, such as its application to non-commercial uses alone, uses of works or other subject-matter that are not themselves infringing copies, and that any subsequent dealings with the copy would constitute infringement;

32.4.2 how fairness factors relating to \textit{purpose} should be framed, noting that such technology considerations go beyond purely commercial versus non-commercial use considerations (consistent with moral rights obligations);

32.4.3 appropriate fairness factors, which may also include, beyond the five fairness factors set out in the Act in relation to research or study, a requirement that there must be some kind of ‘sufficient acknowledgment’ of the source of the content.\(^{22}\)

33. Given existing statutory licensing arrangements and solutions offered by publishers and third party providers, a specific legislative amendment to allow text and data mining seems unnecessary. If such a change to Australian law is to occur, however:

33.1 it should be subject to at least the same factors as set out in para 32.4 above; and

33.2 further consultation should take place as to \textit{who} may be the beneficiaries of such a defence. Those sectors may include, for example:

33.3 medicine;

33.4 academic research; and

33.5 genomics.

\(^{21}\textit{Acts Interpretation Act 1901} \text{s. 23(b).}\)

\(^{22}\text{As required by the \textit{Copyright, Designs and Patents Act 1988 (UK)} \text{s.1ZA.}\)
C. FLEXIBLE EXCEPTIONS (CONTINUED): QUESTION TWO

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.

EDUCATIONAL USE

34. Consistent with the position taken in relation to the proposed safe harbour legislation,\textsuperscript{23} the ACC has always recognised the importance of the educational sector and its ability to not only complement but bolster the creative sector as an integral part of the Australian community. Not only does the ACC work closely with many in the educational sector as part of its legal advice service, it recognises that many of the future painters, filmmakers, authors and musicians draw their initial inspiration from what they see and learn in the classroom.

35. Wholesale legislative change, however, should not be the presumptive position before contemplating steps to modernise the Act. The Canadian experience is a cautionary tale that should be borne in mind.\textsuperscript{24} Before commenting on any exceptions relevant to the educational sector, it is worth reviewing the copyright framework within which the educational sector currently operates:

35.1 There are broad statutory licence regimes that provide certain protections to educational facilities;

35.2 The statutory licence framework enables different types of content and use to be valued differently and, in appropriate circumstances, that value can be ‘zero’;

35.3 Beyond that, licensees are entitled to approach the Copyright Tribunal where they believe certain activities which are the subject of a licence are ‘unremunerable’;

35.4 In relation to published works, educational organisations are of course able to enter into direct licensing arrangements (via subscriptions or otherwise) with publishers which may allow use of published works for other activities;

35.5 Section 28 makes certain allowances for the ‘public’ performance of literary, dramatic and musical works performed in a class setting for an educational purpose, as well as sound recordings and cinematograph films; and

35.6 Notwithstanding criticism that is often directed to the drafting of s. 200AB of the Act, the provision otherwise applies to a significant number of matters in an educational system, as long as certain criteria are met (such as the essential requirement that the use does not unreasonably prejudice the legitimate interests of the copyright owner and it does not conflict with a normal exploitation of the material). The ACC has always taken the view\textsuperscript{25} that s. 200AB is more likely to apply, as long as the criteria set out in s. 200AB are otherwise met, where:

\textsuperscript{23} Copyright Amendment (Service Providers) Bill 2017 (Cth).

\textsuperscript{24} See, for example, https://publishingperspectives.com/2018/05/canada-copyright-modernization-act-hearing/.

\textsuperscript{25} See Fact Sheet, ‘200AB – When Can It Apply?’ located on the ACC website, www.copyright.org.au.
35.6.1 the number of people the use is for is small;
35.6.2 the time-frame of the use is short;
35.6.3 the proportion of the work used is small;
35.6.4 the material being used has been published;
35.6.5 an infringing copy is not used;
35.6.6 no moral rights are infringed;
35.6.7 Indigenous cultural property concerns are met; and
35.6.8 the use includes marking (for example, ‘made under s. 200AB’).

36. Given what is set out above, three fundamental exceptions – reproduction, communication and public performance (albeit in a more limited sense) – exist for the educational sector to use copyright material in their usual activities of educational services.

37. As the Department is aware, the ACC regularly provides seminars and legal advice via its free legal advice service, not only to creators but also to (approximately) equal numbers of representatives of the education and GLAM (galleries, libraries, archives and museums) sectors. In the ACC’s experience when advising the education sector:

37.1 Given the exceptions / allowances outlined above, advice is usually given that the intended use by a teacher or educational facility is likely to be allowed by an exception (even if some changes in approach are required in the way the use occurs); and

37.2 The kinds of uses that we find are unlikely to be protected by the exceptions / allowances outlined above are usually more in the realm of non-educational uses (although even then, many such uses may be allowable under licences), such as:

37.2.1 showing films as fundraisers;
37.2.2 using content for purely entertainment purposes;
37.2.3 publishing certain content online;
37.2.4 use of works that have been obtained subject to contractually agreed upon licence terms.

38. With the foregoing matters in mind, in relation to the Department’s suggested model for further consultation in relation to Educational Use, the ACC takes the following position:

38.1 In relation to a general fair dealing exception for ‘illustration for instruction’, the ACC believes:

38.1.1 such an exception is unnecessary to the extent that, for instance, the broad statutory licences available to education institutions cover a significant number of uses (including material available online);
38.1.2 noting that the educational statutory licence was amended and simplified late last year, it is premature to assess the effectiveness of that scheme and
properly appreciate what uses might be ‘falling through the cracks’ of the copyright scheme to the detriment of those in the education sector;

38.1.3 such an exception is concerning wide in its terms and would have the capacity to undermine the utility of the statutory licence schemes; and

38.1.4 the statutory licence schemes are bolstered by further protections in the Act (including but not limited to sections 28 and 200AB);

38.2 The ACC is, however, sympathetic to the concern that the form of drafting adopted in s. 200AB has caused some reluctance to rely on the provision in the education sector. For that reason, the ACC would support the establishment of an external consultative group to consider simplified yet effective redrafting of s. 200AB if a need to do so is identified, following further consultation (including with representatives from the libraries and archives sectors). Given the importance of the educational sector and the role it performs, the ACC would also support consultation taking place about whether any legislative amendments are required to ensure there can be an exchange between education institutions about the methods of teaching involving a use of copyright material. That may not be required, however, given such steps would likely be covered by the statutory licence scheme;

38.3 The ACC notes that s. 200AB(3) covers a use that ‘is made by or on behalf of a body administering an education institution’ (italics added). As such, we query whether the education section is really prevented from working with, for example, industry groups for the purpose of furthering educational instruction;

38.4 In any event, if a fair dealing defence in relation to educational use is to be introduced, then:

38.4.1 there needs to first be a careful examination of s 200AB (as discussed above) as well as the scope of the statutory licence scheme for education currently in place and, in light of that examination, whether there is any need for a further fair dealing defence;

38.4.2 more would be required than a statement in the Explanatory Memorandum that the exception is not intended to prevent or significantly reduce licensing of education use of copyright material, noting that judges are, at most, given a discretion to consider extrinsic material when interpreting legislation based on set criteria. Rather any new legislation should (at least) include a presumption against the use of the defence where a licence is available, which may be rebuttable where there are reasonable grounds for not doing so;

38.4.3 it should necessarily be limited to ‘educational institutions’ as currently defined under s. 10(1) of the Act and consistent with legislative developments in this area generally, noting that extending the use of copyright material for educational purposes will apply to a significantly broader range of users using content without a licence. For instance, this could conceivably include business in-house training and other external briefing sessions whether for commercial purposes or otherwise; and

38.4.4 be subject to the five fairness considerations set out in the Act in relation to research or study.

26 Acts Interpretation Act 1901 (Cth) s 15AB.
LIBRARIES AND ARCHIVES

39. As outlined on the ACC website, libraries and archives deservedly enjoy a number of protections in the Act. In particular, libraries and archives:

39.1 have specific exceptions that entitle them to copy and communicate material in their collections for clients and other libraries;

39.2 also have specific exceptions that enable them to use material for preservation, research, and administrative purposes; and

39.3 will not be held liable for ‘authorising’ copyright infringement on their copying machines, so long as they have warning notices in place near copying equipment.\(^{27}\)

40. Further, collecting institutions have specific exceptions that allow them to use:

40.1 copyright material for preservation purposes;

40.2 original copyright material in their collection for research purposes; and

40.3 copyright material for administration of the collection.\(^{28}\)

These exceptions were updated in the 2017 amendments to the Act for greater flexibility.

41. As stated above, the safe harbour provisions will soon be extended to educational and cultural institutions, libraries, and organisations assisting individuals with disabilities.

42. The ACC appreciates the particular challenges faced by libraries and organisations engaging in archive practices. For those reasons, the ACC has in this submission supported the following areas for potential legislative reform relevant to archives and as discussed in more detail in the sections dealing with Contracting Out, Orphan Works and s. 200AB.

43. In relation to the Department’s Library and Archive Use: Model for Further Consultation, the ACC says:

43.1 The introduction of a broad restriction in the Act:

43.1.1 should not occur given the likelihood it will result in further legal uncertainty and, we expect, instances where licenses are not sought from rightsholders. This would place an unfair burden on copyright owners as they would indirectly be supporting public institutions by way of lost royalties / compensation;

43.1.2 could result in further unauthorised uses by third parties who may otherwise access material from a library or archive for a valid reason;

43.1.3 may weaken the statutory licence for governments and, accordingly, a reduction in financial returns to creators; and


43.1.4 is premature without, at the very least, considering the introduction of various initiatives supported by the ACC, namely, those set out in further detail in this submission as they relate to Orphan Works, Contracting Out and s. 200AB.

43.2 That said, the ACC would be prepared to support an amendment of s. 200AB that expressly stated that key cultural institutions are also caught within the terms of the provision, to the extent that their collection is a ‘library’ or otherwise falls within the definition of an ‘archive’ under s. 10(4); and

43.3 If further legislative amendments are anticipated notwithstanding the matters set out above, then those amendments should be referable to – in order for them to be properly modern, streamlined and technology-neutral – agreed core purposes: that is, purposes that will remain consistent with the passing of time. This could perhaps be an area for further consultation, but in our view, it would seem that these purposes:

43.3.1 should not extend to commercial purposes;

43.3.2 should be accompanied by, at the very least, the five factors used in relation to research or study;

43.3.3 need to be referable to core / essential, carefully identified purposes that benefit society as a whole, such as:

(1) documenting and preserving aspects of Australian heritage and culture for the Australian community (both present and future); and/or

(2) enabling Australians to access items in the collections; and

43.3.4 should expressly restrict ‘downstream’ uses of the material by subsequent individuals/entities of that material.

D. CONTRACTING OUT OF EXCEPTIONS: QUESTIONS THREE AND FOUR

3. Which current and proposed copyright exceptions should be protected against contracting out?

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?

44. We appreciate that the topic of contracting out has been the subject of extensive prior written submissions which have been reviewed by the Department in the course of preparing the Paper. Rather than repeating those (still held) views, the ACC simply refers to its previous submissions\(^\text{28}\) which can be summarised as follows:

44.1 **Need.** There is a lack of coherent evidence that this is an issue, especially in light of safeguards provided by contract and consumer laws in Australia (noting that those laws are already made up of extensive legislation and caselaw; there is no reason the Act should be looked at this area in a ‘standalone’ manner);

44.2 **Effectiveness.** Given Australia is a net importer of copyright material, it is unlikely that the governing law of such contracts will be Australian;

44.3 **Uncertainty.** Given copyright transactions are effected by contract, and contracting out amendments are likely to create uncertainty.

45. The ACC says further:

45.1 While certain contracting out prohibitions have already been enacted in the area of consumer protection – and with good reason – introducing such prohibitions in the area of copyright law, where creators more often than not have limited bargaining power, will further weaken a creator’s ability to seek meaningful value and control consistent with the intended purpose of the Act and the long-standing principle that individuals have a freedom to contract (subject to countervailing public policy grounds);

45.2 Noting the intent of the Copyright Modernisation Review, there should be an acknowledgment that, particularly in an increasingly digital and cross-jurisdictional marketplace, it is fundamental to business that contracts can be freely entered into. Contracting out restrictions could impact on some start-up tech companies who may benefit from flexible licensing arrangements, and introduce uncertainty that causes harm (by way of expense, complexity or otherwise) to not only creators, but all parties involved in the transaction;

45.3 The three-step test underpinning copyright exceptions in international law may not be complied with if contracting out prohibitions conflict with the normal exploitation of a creator’s work(s); and

45.4 Irrespective of the arguments in favour of prohibiting contracting out of copyright exceptions, there are bound to be clear situations where contracting out provisions should not be invalidated. For instance, it would seem non-sensical to allow exceptions to the use of copyright material in breach of non-disclosure or confidentiality, especially where access to that content was only granted on that basis.

46. The ACC is aware that the Productivity Commission, ALRC and to some extent the Government have shown broad support for a prohibition (or further restrictions) on the ability of parties to be able to contract out of copyright exceptions.\(^\text{30}\)

47. This support appears to be based, at least in part, on assisting consumers and other users who may – unknowingly or otherwise – sign up to restrictive licensing clauses, especially given changing methods of accessing copyright content in an online world. The ACC appreciates (as shown in its Values Statement\(^\text{31}\)) that it is important to balance the interests of creators, consumers and service providers. That said, the concept of ‘user rights’ has not been acknowledged in Australian or international law, even though certain instances of copyright use without remuneration may be desirable when assessed in accordance with purposive,

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community standards. Further, the fact that consumers can more easily access content online should act as a reminder of the potential for weakened copyright protections over what creators have had traditionally.

48. That said, the ACC appreciates this is a vexed issue in the context of libraries and archives where subscription licensing obligations may undermine the utility of exceptions in the Act that seek to enable the activities of such organisations (such as, for instance, inter-library loans). Libraries and archives provisions reflect the importance of such institutions in a geographically disparate nation.

49. While we do not understand there to be an issue in practice, similar arguments could no doubt be made in favour of organisations assisting people with a disability. The ACC also appreciates that in some cases, this may present difficult issues for organisations reporting news on a good faith basis.

50. With the foregoing matters in mind, in relation to the Department’s suggested Contracting Out Option for Further Consultation, the ACC says:

50.1 The introduction of a broad prohibition in the Act relating to all fair dealings/exceptions is strongly opposed given:

50.1.1 the lack of evidence that supports there being a demonstrated need for such a provision; and

50.1.2 its potential weakening of contractual bargaining power on the part of creators;

50.2 That said, the ACC:

50.2.1 supports a legislative amendment that would make unenforceable a contractual provision restricting or preventing the doing of an act which would otherwise be permitted by the fair dealing exception for the purpose of assisting people with a disability; and

50.2.2 may be prepared to support a similar prohibition in relation to very specific fair dealing defences (such as certain libraries and archives exceptions and s 200AB), although it would be premature to make detailed submissions in this area while potentially new fair dealing defences are considered as part of this Review, and further evidence of the need for such provisions would need to be considered;

50.3 If even more comprehensive legislative amendments are made, then:

50.3.1 a contracting out prohibition should itself only be allowed to apply where it is fair and reasonable in all of the circumstances;

50.3.2 any new provision(s) should:

(1) apply to non-commercial uses only;

(2) expressly state that the moral rights provisions are not affected (rather than being stated in the Explanatory Memorandum alone, noting our comments above in 38.4.2); and
(3) Consultation should include consideration of appropriate fairness factors that must be fulfilled in order for the contract override to be fair, by reference to at least the following:

- the purpose and character of the use;
- whether the use subject to the exception is itself a commercial rather than non-commercial use (in the absence of a specific requirement that the prohibition only apply to non-commercial uses);
- the appreciation that the party wishing to rely on the exception had at the time of entering the contract; and
- whether the user only had access to the work as a result of the contract and/or contracting our provision.

E. ACCESS TO ORPHAN WORKS: QUESTIONS FIVE, SIX AND SEVEN

5. To what extent do you support each option and why:
   - statutory exception
   - limitation of remedies
   - a combination of the above.

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.

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?

51. Few areas of copyright evoke a sympathetic response like orphan works. That sympathy sometimes follows from the misconception that the works have been abandoned when, in fact, the parent creators are in an endless pursuit to locate their creative ‘products’.

52. Creators are vulnerable as a result of the online world when it comes to orphan works, especially when it comes to photographers and creators of other images, films and animations. Such material can become easily orphaned once distributed over the internet.

53. The ACC acknowledges that the problem of orphan works complicates the work of cultural institutions when taking steps to protect the heritage of Australia. Mass digitisation projects aimed at preserving historical works may, for example, involve a hybrid of orphan and non-orphan works.
54. While there are no express legislative protections for orphan works in Australia, there are aspects to the Australian copyright system that do in fact provide certain protections. For example, orphan works are:

54.1 like all works, caught within the terms of all of the fair dealing defences and other many and varied exceptions used in the Act; and

54.2 covered by statutory licences and other blanket licensing arrangements (or may be eligible to be covered).

55. Further, in the ACC’s view:

55.1 The fact that a work is thought to be orphaned may, in certain circumstances, factor into a possible application of the s. 200AB exception;

55.2 Digitisation by libraries, museums and galleries could be covered by statutory licence arrangements;

55.3 In practice, orphan works concerns are usually resolved without escalation to a legal dispute where users adopt appropriate risk management strategies and respond quickly to ‘found’ owners;

55.4 Even then, liability for use of orphan works will be further limited by the following:

55.4.1 Limitations of actions legislation where relevant;

55.4.2 Informal resolution of concerns raised by the owners of works believed to be orphaned will result in, if dealt with quickly:

(1) an aggrieved creator / owner acting in an unreasonable manner in relation to compensation facing the risk of significant costs penalties should she/he pursue the matter by way of formal proceedings not having accepted any reasonable offers; and

(2) Little to no risk of injunctive proceedings being sought (given that there may be nothing to injunct);

55.4.3 The damages principles established by, for instance, s. 115 of the Act which effectively prevent the likelihood of undue or inflated compensation; and

55.4.4 The fact that all works will enter the public domain eventually. We note that amendments were made to the Act last year as a consequence of the Copyright Amendment (Disability Access and Other Measures) Act 2017 that removed the distinction between published and unpublished works (that is, the latter can no longer be protected by copyright law indefinitely).

56. With the foregoing matters in mind, in relation to the Department’s suggested model for further consultation in relation to Orphan Works, the ACC says:

56.1 Further non-legislative means should be explored and encouraged before further consultation on legislative amendments takes place;

56.2 Noting the matters outlined in paragraph 55 above, the introduction of a direct exception for the use (limited or otherwise) of orphan works is:
56.2.1 unnecessary; and

56.2.2 inconsistent with the principle that a work can no longer be considered orphaned once ‘found’;

56.3 In an effort to provide some protection for certain uses of orphan works, however, the ACC supports what is referred to as a hybrid of Options 1 and 2 in the Paper, with the main focus being on a limitation of remedies. Any such limitations should only apply:

56.3.1 to non-commercial uses of Orphan Works (a distinction made in, for example, the UK scheme);\(^{32}\)

56.3.2 to certain designated organisations engaged in, to adopt the words of the ALRC, ‘socially productive uses of orphan works’;

56.3.3 in a way that still allows for ‘reasonable compensation’ to be paid (equivalent to any standard fees in the relevant industry), noting that that even the relevant European Union Directive\(^ {33} \) requires fair compensation to be paid for prior uses once a rightholder puts an end to orphan works status;

56.3.4 following further consultation as to the factors (ie steps) that need to be taken before the limited liability protections might apply – that is, what might constitute a reasonably diligent search – with the ALRC’s recommendations being used as a starting point, namely:

1. the nature of the copyright material;

2. how and by whom the search was conducted;

3. the search technologies, databases and registers available at the time; and

4. any guidelines, protocols or industry practices about conducting diligent searches available at the time;

but with further appropriate factors drawn from consultation, including:

5. the size of the audience to which the orphan work may have been distributed;

6. the purpose of the use; and

7. the provision of a sufficient acknowledgment in the circumstances, that is, an appropriate level of information that may in the future assist in locating the rightsholder;

56.4 Any new provision(s) that expressly limit liability should be stated to cease applying once the owner of an orphan work is identified, and should restrict ‘downstream’ uses of the material by subsequent individuals/entities of that material. Consideration should be given to the introduction of a provision (akin to the kind of restrictions on circumventing an access control technological protection measure as per s. 132APC), that makes it unlawful to remove metadata on electronic publications.

\(^{32}\) The UK framework is set out in (among other things): Enterprise and Regulatory Reform Act 2013 (UK); The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014/2863); The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (SI 2014/2861).

\(^{33}\) 2012/28/EU.
F. ABOUT THE AUSTRALIAN COPYRIGHT COUNCIL

57. The ACC is an independent, non-profit organisation that represents the peak bodies for a significant cross-section of professional artists and content creators working in Australia’s creative industries and Australia’s major copyright collecting societies. A full list of our affiliates is available on our website, copyright.org.au, and also appear in the Schedule.

58. We are expert advocates for the contribution of creators to Australia’s culture and economy. Copyright is important for the common good.

59. As part of our activities, we wish to foster collaboration between content creators and content users. One of the ACC’s core values is a belief that copyright laws should, among other things, balance the interests of creators, consumers and service providers. Indeed, such an understanding on the part of the ACC is only heightened by the fact that we regularly provide legal advice and educational programs to affiliates, creators of all backgrounds, and representatives of user groups such as libraries and the education sector alike.

G. CONCLUSION

60. Thank you for considering the terms of this submission. Should the Department have any queries or require any further information, please let us know.

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Grant McAvaney
Chief Executive Officer
Australian Copyright Council
4 July 2018
SCHEDULE: AFFILIATES OF THE AUSTRALIAN COPYRIGHT COUNCIL

As at the date of this Submission, membership of the Australian Copyright Council is comprised as follows:

1. Aboriginal Artists Agency
2. APRA AMCOS
3. Ausdance National
4. Australian Guild of Screen Composers
5. Australasian Music Publishers Association Ltd
6. Australian Directors Guild
7. Australian Institute of Architects
8. Australian Institute of Professional Photography
9. Australian Music Centre
10. Australian Publishers Association
11. Australian Recording Industry Association
12. Australian Screen Association
13. Australian Screen Directors Authorship Collecting Society Limited
14. Australian Society of Authors
15. Authentic Design Alliance
16. Australian Writers Guild
17. Christian Copyright Licensing International
18. Copyright Agency
19. Media Entertainment & Arts Alliance
20. Musicians Union of Australia
21. National Association for the Visual Arts
22. National Tertiary Education Union
23. Phonographic Performance Company of Australia
24. Illustrators Australia
25. Screen Producers Australia
26. Screenrights