12 June 2018

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

Dear Sir

Submission to Department of Communications and the Arts: Copyright Modernisation Consultation Paper

We welcome the opportunity to make a submission in relation to the issue of flexible exceptions raised in the Copyright modernisation consultation paper, which has previously been addressed in the Productivity Commission Report on Intellectual Property Arrangements (2016). In making the submissions below, we have considered the importance of maintaining a robust copyright industry in Australia, as well as the necessity for a considered balance between the rights of creators and end users of copyright.

In our submission we will deal with the following two issues:

a. Whether additional fair dealing exceptions are supported and if so, for which purposes;

b. Whether a fair use exception should be introduced and if so, for which purposes and subject to which factors.

a. **Introduction of additional fair dealing exceptions**

In the context of Higher Education Institutions, we recognise that there may be a certain level of uncertainty about the scope of some of the current fair dealing provisions in the Copyright Act (the Act), such as the need for clarification the limits of “library and archive use” in the digital space, referred to in the Australian Law Reform Commission Report on *Copyright and the Digital Economy*. Additionally, it could be argued that topical issues such as “non-commercial private use” of copyright material and “text and data mining” may need to be clarified by specific reference in the Act. However, we are in agreement with the reasoning that:

“Most of Australia’s exceptions are ‘technology neutral’ circumstances. For example, the statutory licence for education has been able to encompass developments such as learning management systems, electronic whiteboards, tablets and Massive Open Online Courses (MOOCs)” [Copyright Agency submission: Response to Productivity Commission final report on Intellectual Property Arrangements (February 2017)]

Thus, to the extent that technology neutral language is used in a fair dealing exception, we do not support any further changes to that exception. Where, however, it can be demonstrated, for example, that there is a particular educational use of copyrighted
material which should fall under the exception, but which cannot currently be included due to the wording of the fair dealing provision, that exception should be amended to allow for inclusion of the new platform or technology.

We do not see the need to add further copyright exceptions. The additional “prescribed purposes” listed in the Copyright modernisation consultation paper (p.10) should not be regarded as “additional” fair dealing exceptions as they refer to existing purposes; rather, the existing exceptions should be amended or clarified where necessary to include new technologies and platforms.

b. Introduction of a “fair use” exception

For reasons discussed below, we do not support the introduction of a U.S. type broad “fair use” exception. We note the statement in the Copyright modernisation consultation paper (p.11) that “[i]n other jurisdictions such as the US, fair use operates within a broader copyright exceptions framework. Importantly, the existence of fair use does not negate the operation of other definite copyright exceptions”; however, we do not agree that this is the case in practice. Given the choice to pay or not for copyright usage, there is every indication that the latter choice would be favoured.

A fair use exception would broaden the scope for using copyright materials without compensating the rights holder where users are merely unwilling to pay a fee. As was pointed out by Macmillan Publishers in its response to the Productivity Commission’s Issues Paper, payments from Copyright Agency make a significant contribution—the 2014 Australian Publishers Association industry report showed that Copyright Agency contributed 7.3% of revenues to the schools sector, equivalent to 43.4% of net profit (http://www.pc.gov.au/data/assets/pdf_file/0003/194439/sub016-intellectual-property.pdf). It follows that a loss of these revenues would have a damaging effect on educational institutions.

A central problem with “fair use” is the vagueness of its scope and meaning, and the reliance on subjective interpretation of ‘what is fair’ by different judges and Courts. The landmark U.S. copyright infringement lawsuit, Authors Guild Inc. et al v Google Inc. (2015, 2d Circuit) is an apt illustration of how far the ambit of “fair use” may be stretched—over the ten year history of this case the proposed scope of the fair use doctrine as argued by Google was disputed by thousands of rights holders to no avail. The result was the unprecedented expansion of the fair use doctrine—holding that Google’s copying and providing access to some 4 million copyrighted books for profit-making purposes was a fair use. This case should serve as a warning of the increased power of large corporations to manipulate copyright exceptions for their own gain to the detriment of content creators and rights holders.

Original content creators are already at a disadvantage in the digital sphere—enforcing their copyright is a difficult, expensive and onerous process and a broad fair use exception would only add to their inability to deal with piracy of their copyrighted work online. Limited fair dealing provisions (which extend to technology based platforms and applications) will provide greater certainty about the allowable uses of copyrighted works going forward. Furthermore, there is sufficient scope for fair use within the licencing framework that exists in conjunction with fair dealing, which also ensures reasonable remuneration to copyright owners.

A comparison with the U.S. approach to copyright exceptions is inappropriate given the large disparity between the two countries’ economies. In the U.S. the significantly larger copyright economy may justify expanded copyright exceptions; in Australia the
government should be wary of extending the exceptions to the disadvantage of content creators, as the incentive to create may be significantly impacted by the potential loss of financial reward. This will impact on the creative sector as a whole and have far-reaching repercussions for the creative industries. Additionally, individual rights holders may be rendered powerless against unauthorised use due to the cost involved in litigating against large media corporations.

The fundamental tenets of copyright law have not changed – one of which is that copyright supports and incentivises creativity - and novel technology and publishing platforms should not result in a dilution of creators’ rights. If anything, the challenges associated with digital piracy and enforcing copyright online should militate against the adoption of an uncertain doctrine such as the "fair use" exception. In view of the concerns expressed in this submission, we regard the proposed introduction of a "fair use" exception as counter-intuitive to the continuance of a flourishing Australian copyright industry, and injurious to Australian creators.

This submission was written by Dr Francina Cantatore on behalf of the Centre for Professional Legal Education, Faculty of Law, Bond University.

Yours sincerely

[Signature]

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