



## Submission to the Copyright modernisation consultation paper 2018

**Addressed to:**

Department of Communication and the Arts

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Contributors

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Confidentiality

This submission does not need to be kept confidential and may be made public.

## Summary of Recommendations

**Recommendation 1: Replace current, narrow Fair Dealing Exceptions to copyright laws with broad Fair Use provisions.**

**Recommendation 2: Ensure that it is not a breach of copyright to copy a work purely for the purpose of accessing the work.**

**Recommendation 3: Contracting out should not protect works from being used in a manner in which the artist did not intend, as this sort of use is precisely the basis of Fair Use.**

**Recommendation 4: Laws restricting 'contracting out' of copyright provisions should be enacted.**

**Recommendation 5: Introduce a statutory exception for orphan works.**

Australian Fair Dealing Exceptions do not adequately protect users of copyright material for the creation of derivative works from being in breach of copyright law. Works are exempt under fair dealing only if they are specifically covered by the Copyright Act; any new use not listed in the Act is therefore a copyright infringement, even if it is in the spirit of fair use. In the digital age, these laws place people at risk of breaking the law when using new media that are not covered by the Act. This risk is a disincentive for the creation and use of new technologies in Australia.

In contrast, 'Fair Use' laws (such as those in effect in the USA, Canada, and much of southeast Asia) define broad types of use that should be deemed fair (i.e. not a breach of copyright). These Fair Use provisions do not appear to have harmed creative output in those countries. Amending Australia's copyright law to be more consistent with the USA's has significant trade advantages, through reducing the cost of legal advice to understand the legislation, and by clarifying the terms of trading copyright works into and out of Australia.

## Responses

### 1. Flexible exceptions

To what extent do you support introducing:

- *additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?*
- *a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?*

### **Recommendation 1: Replace current, narrow Fair Dealing Exceptions to copyright laws with broad Fair Use provisions.**

The Science Party supports the introduction of a 'fair use' exception, with the four factors recommended by the Australian Law Reform Commission<sup>1</sup>, namely:

- ❖ the purpose and character of the use
- ❖ the nature of the copyright material
- ❖ the amount and substantiality of the part used
- ❖ the effect of the use upon the potential market for, or value of, the copyright material.

The first of these factors allows, for example, indexation of a full work to allow a search engine to match it with search terms, as it is 'transformative' and does not compete with the market of the original work (and in fact is likely to boost exposure of the original work to its target audience).

The second factor favours the protection of fictional works over compilations of facts, both because creative output has unique value and because the sharing of knowledge should be encouraged.

The third factor is heavily dependent on the original work and its context.

The fourth should not be interpreted to mean that *any* harm to the publisher's market, however minor, should necessarily render the use unfair. All four factors are intended to be considered together.

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<sup>1</sup>Australian Law Reform Commission, 2014. 'Copyright and the Digital Economy' (ALRC Report 122) Chapter 5. The Fair Use Exception. <https://www.alrc.gov.au/publications/5-fair-use-exception/fairness-factors>

## 2. 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.*

### **Recommendation 2: Ensure that it is not a breach of copyright to copy a work purely for the purpose of accessing the work.**

The Copyright Amendment (Disability Access and Other Measures) Act 2017 allows reproduction of copyright material for the purpose of making it accessible to a person who requires it in a different format due to disability. However, some people will find themselves at the legal margins, where they find it considerably easier to access a work in a different format, but can technically access it without transformation.

We therefore recommend that the reproduction of copyrighted works purely for the purpose of accessing the work should not breach copyright, regardless of the attributes of the person accessing the work.

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

### **Recommendation 3: Contracting out should not protect works from being used in a manner in which the artist did not intend, as this sort of use is precisely the basis of Fair Use rules.**

Contracting out should be restricted to ensure that copyright law does not restrict freedom of speech. At the minimum, there should be a limitation on contracting out that prevents contracting out in standard end user license agreements for consumer services.

Previous reviews have identified that some artists support contracting out, as it allows the creator to control the contexts in which their work is seen or heard<sup>2</sup>. However, contracting out should not be used to prevent this sort of use (such as commentary, criticism or parody). Such use is an essential part of the reason for having fair dealing/fair use exemptions.

Copyright law should not be used to stifle freedom of speech. Hence, an argument derived from adhering to the artist's desires should not be used to curtail freedoms afforded under fair use/fair dealings provisions.

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<sup>2</sup>Australian Law Reform Commission, 2013. 'Copyright and the Digital Economy' (DP79) section 17.56. <https://www.alrc.gov.au/publications/17-contracting-out/should-contracting-out-be-enforceable>

**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?*

**Recommendation 4: Laws restricting ‘contracting out’ of copyright provisions should be enacted.**

The Australian Law Reform Commission noted in their relevant 2014 report<sup>3</sup> that some companies believe restricting contracting out would make Australia “less attractive as a hub for business”. We believe the opposite is true.

Restrictive laws are generally bad for business, because of the administrative overheads required for businesses to understand their legal commitments. Contracting out creates extra obligations for users of copyright material, and is therefore likely to increase the complexity of legal requirements for businesses, both local and international. Disallowing contracting out will prevent copyright holders from giving themselves additional rights beyond standard copyright provisions, and therefore represents a simplification of legal obligations. This increased certainty will create a more pro-business environment.

**5. To what extent do you support each option and why?**

- *statutory exception*
- *limitation of remedies*
- *a combination of the above.*

**Recommendation 5: Introduce a statutory exception for orphan works.**

The intention of copyright law is to protect rights holders. Where no rights holders can be found, they do not require protection.

In order to ensure that rights holders are protected: while creators of derivatives of presumed orphan works are protected, the creator of the derivative of the orphan work should be required to demonstrate that they have carried out sufficient research to determine that the work is orphaned.

An alternative is that the rights holder should be required to protect their work. This second option substantially changes existing copyright law presumption of protection.

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<sup>3</sup>Australian Law Reform Commission, 2014. ‘Copyright and the Digital Economy’ (ALRC Report 122) Chapter 5. The Fair Use Exception. <https://www.alrc.gov.au/publications/5-fair-use-exception/fairness-factors>

**6. In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability?**

The Science Party has no response to this question.

**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?**

The Science Party has no response to this question.