

**ABC Submission on the
Discussion Paper – Exposure
Draft Copyright Amendment
(Access Reforms) Bill 2021 &
Review of Technological
Protection Measures Exceptions
and
Copyright Amendment (Access
Reforms) Bill 2021**

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ABC submission on the Discussion Paper – Exposure Draft Copyright Amendment (Access Reforms) Bill 2021 & Review of Technological Protection Measures Exceptions and Copyright Amendment (Access Reforms) Bill 2021

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Executive Summary

- The ABC generally supports the proposals for:
 - Orphan works subject to the copyright owner being obliged to notify the copyright user of their existence and location once an orphan work has been used,
 - Fair dealing for the purpose of non-commercial quotation subject to clarifying its application to documentary makers,
 - Updating and clarifying the libraries and archives exceptions subject to appropriate limitations to protect the market for streaming content.
- The ABC is concerned about the proposals set out in the Bill to:
 - Update and restore educational exceptions,
 - Streamline the government statutory licensing scheme.

These will likely undermine current statutory licence schemes, impact copyright owners' remuneration, and in so doing, will impact the market for the production of educational content.

- In respect of the Technological Protection Measure (TPM) Review, the ABC submits there should be an exception to support fair dealing, otherwise the current exceptions are appropriate.
- If you have any questions about this submission, please contact Kate Gilchrist, Head of Content & Legal Operations, ABC Legal, by email at: gilchrist.kate@abc.net.au

1. Introduction

The Australian Broadcasting Corporation (ABC) provides this submission in response to the Discussion Paper – Exposure Draft Copyright Amendment (Access Reforms) Bill 2021 and the draft Bill, and the Review of Technological Protection Measures Exception.

This submission is structured as follows. It provides the ABC's general comments on the Bill focusing on whether the Bill meets the underlying policy reforms set out in the Discussion Paper. It then addresses the specific questions raised in the Discussion Paper in relation to the following proposals:

- Orphan Works,

- Fair Dealing for the purpose of Non- Commercial Quotation,
- Updating and clarifying the libraries and archives exceptions,
- Updating and restoring educational exceptions,
- Streamlining the Government statutory licensing scheme,
- TPM Review - Section 40 of the Copyright Regulations.

Background on ABC

The Australian Broadcasting Corporation (**ABC**) is a publicly funded broadcaster and provider of digital media services. Through its distinctive radio, television, and digital services, the ABC is one of Australia's largest copyright creators, copyright owners, and copyright users. A substantial part of its business is producing content, engaging in the market for rights, and negotiating licences with rights owners and rights users.

The overriding concern of the ABC is that it continues to fulfil its legislative mandate under the ***Australian Broadcasting Corporation Act 1983*** (Cth), which includes transmitting content of an educational nature.

The ABC is concerned to ensure copyright policy strikes a balance between the interests of copyright creators, and owners on the one hand and copyright users on the other, acknowledging the changing expectations of the Australian community in the digital age.

2. Orphan Works

The ABC supports the implementation of reforms relating to orphan works subject to the copyright owner being obliged to notify the copyright user of their existence and location once an orphan work has been used.

2.1 Comments on the Bill

The ABC is concerned about the proposal in s116AJB, which creates an obligation on the copyright user to undertake a reasonably diligent search on every subsequent act of copyright use in an orphan work once it has been compiled with other content.

This gives rise to unintended consequences for large content projects containing multiple pieces of copyright, and large organisations like the ABC who may be put on constructive knowledge of the copyright owner, but do not have systems to track constantly the use of orphan works once the content has moved into its publication phase.

This places an unreasonable economic and administrative burden on the copyright user, which is disproportionate and inconsistent with the process of copyright clearance that takes place *at the time the copyright material is first used*.

We recommend that s116AJB be changed so that the copyright owner is obliged to notify the copyright user of their existence. This is consistent with how claims for copyright infringement are activated in practice.

2.2 Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms

Part 11, Division 3 of the Copyright Regulations 2017 sets out the matters to be included in particular kinds of applications and references to the Copyright Tribunal. What matters do you consider should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work?

Most content projects use multiple copyright works and subject matter. Content projects produced by broadcasters, digital media service providers, and producers like the ABC may use an internal rate card to benchmark copyright licence fees relevant to a project and its budget.

The Copyright Tribunal should take into account any such rate card used by the copyright user in relation to that project.

If no rate card is available, then the Copyright Tribunal should consider evidence led by the copyright user as to the reasonable rates for similar type usage in the project or similar projects in question.

One of the concerns of a producer of content projects that contain multiple copyright works and subject matter, is to control and limit their potential and future liability, but also to ensure a return on its economic investment in producing that content. There is a risk that an entire project could be sunk or need costly amendment if:

- the copyright owner and user could not come to an agreed position, or
- the cost of proceeding to the Copyright Tribunal outweighed the cost of the project. It should be noted that it would only be in rare cases that it would be worth a party seeking the assistance of the Copyright Tribunal due to the costs of doing so, or
- the Copyright Tribunal determined a fee outside the budget of the project.

The legislation may therefore inadvertently create a chilling effect on the legitimate use of orphan works, which would have a detrimental social impact on the publication of content.

3. Fair Dealing for the purpose of Non-Commercial Quotation

The ABC supports the introduction of fair dealing for the purpose of quotation subject to clarifying its application to documentary makers.

3.1 Comments on the Bill

Documentary Makers

There is a disconnect between the Bill and the Discussion Paper with respect to documentaries. On the one hand, the legislation appears squarely aimed at the academic sector; but the discussion paper says this at page 14:

*The quotation is made by: - a library or an archives (including a museum, gallery or key cultural institution that is a library or an archives), an educational institution, the Commonwealth or a State or Territory, or a person acting under the authority of such an institution or government, or - by a person or an organisation for the purpose of research. This may include individuals such as academics, teachers, students, **documentary makers** [emphasis added] and family historians, and organisations that are engaged in scientific, medical or industrial research such as hospitals, medical research institutes and CSIRO.*

Then at page 15:

Case study: Documentary makers

Documentary makers can struggle to complete their film projects if their project needs to reference third party content. The costs associated with getting copyright clearances for short, sometimes seconds-long, film clips and archived newspaper articles can be prohibitive and lead to compromises being made. A quotation exception will help these creators use excerpts of copyright material in their projects without significant cost or legal risk.

The use of the term ‘complete’ and also the statement: ‘A quotation exception will help these creators use excerpts of copyright material in their projects without significant cost or legal risk’ suggest that the copyright material might be used for more than research, and in the completed documentary production which is capable of publication.

Is it then expected that a documentary producer would need to seek a licence and clear the copyright material when they publish their finished production?

It is unclear.

You have asked whether the proposed reforms are sufficiently clear and workable? No, the reform proposing to allow this defence to apply to documentary makers is not sufficiently clear.

There is nothing in section 113FA(1)(a) of the Bill that suggests that this fair dealing defence can be used by documentary makers in their documentaries other than in their research.

Is it the policy intention to provide documentary makers with access to this fair dealing provision?

If yes, then s113FA(1)(a) of the Bill should be amended to make it clear that it will cover documentary production.

You have asked are the reforms sufficiently clear? In respect of the provision applying to documentary producers, the ABC also submits:

(a) ‘Non-commercial’ and ‘Immaterial’

(i) Non-commercial – s113FA(1)(b)(i)

The use of the term ‘non-commercial’ creates unintended legal risk for any documentary maker seeking to rely on this provision, and so, it will not open access to the public as desired by the underlying policy.

Without a clear definition of ‘non-commercial’, the legislation is ambiguous and unreliable. Consider the following scenarios:

Scenario 1: if a documentary maker were to rely on this fair dealing defence to research copyright material and then included that research in the documentary under fair dealing for the purpose of quotation, and then licensed that documentary to the ABC for a fee in return for the rights to broadcast and make it available on iview, or publish on ABC online, would that be ‘non-commercial’ use? Possibly not.

Scenario 2: if the ABC were to make a documentary, broadcast it, and make it available for free on iview, and then make it available to third parties *whether for free or in return for a fee* so that it was made accessible to the public on other platforms, eg for free to the public on YouTube, or on payment of a subscription eg Spotify, when those platforms’ business models are commercial and derive profit from subscriptions or advertising, would that still be ‘non-commercial’ use? Possibly not.

The ambiguity around the term ‘non-commercial’ transfers the question of clarity to the courts through expensive litigation. This is not a desirable outcome.

You will avoid ambiguity and argument by including a definition of non-commercial.

(ii) Immaterial – s113FA(1)(b)(ii)

The same issues arise with the word ‘immaterial’ in the phrase ‘immaterial to the value of the product or service’ in s113FA(1)(b)(ii) in relation to ‘commercial’ products or services’, so that the proposed reform is not sufficiently clear.

Use of this term ‘immaterial’ makes it sound like the quote must be an insubstantial part of the copyright work. Yet the point of a fair dealing defence is to allow a copyright user to use a *substantial* part without a licence if that dealing is fair.

What is a substantial part but still immaterial? Explanation, illustration, authority, or homage, as you have set out in s115(5) would render the quote material, yet these are given as examples of quotation that would fall under this defence.

Further, how does ‘immateriality’ interact with the three step test enshrined in s113FA(2)?

(b) In relation to a product or a service

With respect to documentaries, we recommend that the words ‘*in relation to a product or a service*’ in s113FA(1)(b)(ii) be deleted as documentaries are neither a ‘product’ or a ‘service’.

3.2 Question 2.1: Quotation: Unpublished material

Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?

The ABC made a previous submission supporting the defence as applying to published material only. It has reconsidered this position, and supports the extension of the defence to unpublished material in the context of research, and documentary making.

4. Update and clarify the libraries and archives exceptions

The ABC supports the library and archive access reform from remote locations but acknowledges the concerns from the television industry that this should not supplant existing markets for content.

4.1 Question 3.1: Libraries and archives: Online access - ‘Reasonable steps’

For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archives to seek to limit wider access to copyright material when made available online?

The ABC submits that a library or archive should be required to:

- set out the terms and conditions on which the content can be used,
- watermark the content being made available, where doing so is resource and cost effective,
- only make it available to the copyright user for a finite, short period of time,
- be satisfied that the provision of the content online does not undermine the commercial market for that content, for example, by only making a certain number of copies available at any one time.

4.2 Question 3.2: Libraries and archives: Illustrations

Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?

The ABC does not intend to make a submission on this question.

5. Update and Restore Educational Exceptions

[REDACTED]

5.1 Comments on the Bill

This proposal highlights the efficacy of the educational statutory licence administered by Screenrights, which has not been modernised, and the difficulty that presents in juxtaposition to the proposed reforms. Further consideration should be given to this policy dilemma in light of the increasing usage of educational content delivered over IP platforms.

The ABC has had the benefit of reading the submission of Screenrights on the educational reforms and agrees with and supports its submissions on this aspect of the Bill.

The ABC is concerned that the Bill undermines the educational statutory licensing regime in s113P, particularly with respect to section 113MA, which we read to be contrary to the policy intention set out in the Discussion Paper.

This is because the new provision s113MA allows ‘copying’ and ‘communication to the public’ of any ‘material’, giving rise to a significant overlap with s113P’s statutory educational copying licence. The threshold test in s113MA is whether these acts ‘facilitate’ the performance of the work – ‘facilitate’ is a term broad enough to permit any act of copying and communication.

Currently, s113MA(3) states: *A provision of this Act (other than this section) does not, by implication, limit this section.* We submit that this provision should be replaced with a statement to the contrary, that the section is limited to those acts outside the statutory licence contained in s113P.

5.2 Question 4.1: Education: Online access – ‘Reasonable steps’

For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

The ABC lists the following measures:

- appropriate cyber security measures,
 - technological protection measures such as:
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- required login into the platform where the copies are made available and communicated to students,
 - authenticated user procedure– so that usage can be tracked,
- terms and conditions that specify no copying.

6. Streamline the Government Statutory Licensing Scheme

The ABC is supportive of the objectives outlined in the Discussion Paper to streamline government use of copyright material. However, the ABC does not support the provisions as drafted in the Bill which undermine the statutory licence that remunerates copyright owners.

The proposed drafting undermines the statutory licence. We have had the benefit of reviewing the submissions made by Screenrights, and we agree with and support those submissions.

6.1 Question 5.1: Government: Use of incoming material

Does proposed new section 183G contain effective safeguards to avoid unwarranted harm to copyright owners' commercial markets? If not, what other safeguards would assist?

The government statutory licence is already sufficiently broad and section 183G is unnecessary.

7. TPM Review – Section 40 of the Copyright Regulations

The ABC submits that the current TPM exceptions should extend to fair dealing for reporting news, criticism or review, and parody and satire, otherwise the current scheme is appropriate.