



Via email: copyright.consultation@communications.gov.au

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Subject: Copyright Modernization Consultation

The Association of American Publishers | AAP appreciates this opportunity to provide its views on the reform options put forward in the Government’s “Copyright modernization consultation paper” (“Consultation Document”).

AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy. Our principal focus is a rational intellectual property framework that recognizes, incentivizes, and protects competitive investments of publishers in bringing creative expression, professional content, and learning solutions to the public.

As the consultation paper notes, there have been extensive consultations on copyright law reform in Australia (first through the Copyright Law Review Committee (CLRC), the Australian Law Reform Commission (ALRC), and the Productivity Commission) over the last few years. Most recently, the Government issued its response to the Final Report of the Productivity Commission Inquiry into Australia’s Intellectual Property Arrangements.

In this consultation, the Government identifies three areas that it believes “may benefit from modernisation:

- flexible exceptions, which need to adapt over time to provide access to copyright material in special cases as they emerge
- contracting out of exceptions, which can reduce access to copyright material for users
- access to orphan works, which exist when copyright owners can’t be found and users lose access to copyright materials.”¹

¹ Copyright modernisation consultation paper, March 2018, p. 4

AAP's responses to the questions posed in the Consultation Document, regarding support for or objection to the options as outlined, appear below. Following these consultations, legislation will still need to be drafted to effect the policy direction the Government ultimately adopts. AAP trusts that there will be further opportunities to provide the publishing industry's views on specific legislative language to refine Australia's copyright law regime.

I. Flexible Exceptions

Fair Use Option

AAP has previously submitted comments on the question of whether the "fair use" framework, as it has developed in the U.S., would be appropriate for the Australian legal regime. Certain technology platforms and the organizations they fund promote the notion that adoption of this framework would lead to greater flexibility, which (unsurprisingly) will result in a broader scope within which these entities may more easily make un-permissioned and un-compensated uses of copyrighted works. For the reasons set out below, AAP does not support the introduction of a U.S.-style fair use copyright exception into Australian law (i.e., Option 2 in the Consultation Document).

AAP's views on this question are informed by the perspective of U.S.-based international publishers that operate both in the main jurisdiction that recognizes the fair use doctrine – the United States – and in multiple jurisdictions that do not. The latter group includes both common law legal systems, with many like Australia having in place fair dealing exceptions in their copyright laws, and civil law systems in which only relatively specific statutory exceptions to exclusive rights are recognized.

The consultation paper cites conclusions reached in prior inquiries, such as that of the ALRC and the PRC, as grounds for recommending the adoption of fair use. Among them, the purported "flexibility" the U.S.-style fair use doctrine will afford "new and innovative copyright-dependent industries." While flexibility may indeed be one of the fair use doctrine's strengths, it is also a weakness. Flexibility provides some advantages, but it also imposes significant costs.

A high level of uncertainty is an inherent feature of the fair use model. The uncertainty of the scope and applicability of the fair use exception to any particular set of facts can be a debilitating cost. Indeed, unless this uncertainty can be mitigated by other elements of the fair use system, an orderly marketplace in which copyrighted works are created, published, disseminated, and used in a predictable fashion would be difficult to maintain.

In the U.S., these costs are mitigated, thus allowing the doctrine to continue to operate relatively well because publishers and users have the benefit of nearly two hundred years of case law and precedent that give meaningful context to the broad principles outlined in the statute (17 U.S.C. 107). Absent the context provided by this depth of case law, to which counsel to a publishing house in the U.S. invariably looks for guidance beyond the statutory

factors, the appropriate parameters that should govern the fair use exception will be unclear and likely result in uncertainty for rights holders, and users of copyrighted content.

Fair use applies to a wide range of uses of virtually all works, and constitutes an exception to all of the exclusive rights. While the consultation paper references a number of factors against which a purported fair use should be measured (which are similar to the factors enumerated in the U.S. fair use statute), such factors alone will be insufficient to determine whether a contemplated use that involves the exercise of an exclusive right, and that has not been authorized by the rights holder, will or will not be an infringement. Counsel to a publishing company in the U.S. relies on the depth of case law to provide meaningful guidance as to the application of these factors to facts, and thus, whether a specific use is likely to be treated as “fair.” Publishers rely on this guidance to make critical decisions, not only as to whether to object to particular unauthorized use that is being made of their works, but equally important, about whether a use the publisher itself wishes to make of a work - for instance, incorporating an excerpt of another work without permission – is fair. In short, both as a rights holder and as a user, a publisher in the U.S. can mitigate the inherent uncertainty of fair use by reliance upon case law precedents. Since the same case law resources are equally available to entities whose interests fall more on the user end of the spectrum, all market place participants can have a reasonable level of confidence in the legal boundaries.

While this system works relatively well in the U.S., AAP urges the Government to take a more skeptical approach as to whether this system can be successfully transplanted to Australia by simply repealing its fair dealing statute and replacing it with fair use. The fair use doctrine is not the fair use statute. Statutory change can introduce the latter into Australian law; but without likewise importing U.S. case law, the doctrine, or at least its constructive role in encouraging a robust marketplace in copyrighted works, will not be similarly transported to Australia. Fair use requires a case-by-case evaluation that is appropriate to the consideration of individual uses; it is not, however, intended or appropriate for application to systematic activities.

Fair Dealing Option

AAP believes that the introduction of additional, but well defined and appropriately cabined, fair dealing exceptions is the better option. Exceptions and limitations specifically defined in relation to particular types of works, uses or users can offer more clarity and certainty in application, and thus, are more likely to benefit users of copyrighted works. AAP cautions against merely “dropping” undefined and overbroad exceptions into an enumeration of fair dealing purposes, as doing so can have severe, adverse effects on key copyright sectors. Any new exception must be drawn narrowly and adequately defined such that it clearly delineates the circumstances and conditions under which the excepted use is in fact fair. It is axiomatic that any new exceptions introduced must comply with the three step test under the Berne Convention, i.e., that it be 1) limited to certain special cases, 2) not conflict with a normal exploitation of the work, or 3) unreasonably prejudice the legitimate interests of the rights holder. In short, the exception must not be so broad as to leave room for opportunistic free

riders to abuse the exception. In this light, the five fairness factors drawn from Australia's current fair dealing exception for research or study are generally acceptable: (1) the purpose and character of the use; (2) the nature of the copyright material; (3) the amount and substantiality of the part used; (4) the effect of the use upon the potential market for, or value of, the copyright material; and (5) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

AAP addresses a few of the proposals outlined in the consultation document (some of which refer back to the ALRC recommendations of 2013). However, as the consultation document does not yet define the proposed exceptions, nor outline scope and application (other than footnote references to the ALRC 2013 Report, which in several instances point to the need for more detailed government consultation), AAP cannot adequately opine on nor endorse any of the proposed exceptions, at this time.

- Non-commercial private use

AAP counsels against adopting a "non-commercial private use" exception. Enactment of a blanket private use exception could create a significant impediment to enforcement against online infringement, since even massive and unquestionably unauthorized downloading of copyrighted works could plausibly be characterized as "non-commercial private use" from the point of view of the infringing end-user. Unfortunately, high volume, commercially harmful infringements are now frequently carried out using personal devices located in people's homes or carried on their persons. To categorically exclude these uses from all liability for infringement would likely truncate exclusive rights in the digital age. In addition, expanding access to copyright works that end-users increasingly enjoy through licensed streaming and downloading arrangements would be jeopardized if a private use exception were enacted.

With legitimate, licensed markets for copyright works increasingly involving deals that take place in private and domestic settings, the enactment of a "non-commercial private use" exception could have much broader, even global, repercussions on rights holders. AAP urges the Government to exercise caution in this area, and to adjust its inquiry to focus on whether existing statutory exceptions in current law that already apply to certain activities for "private use" are adequate. Given the success of, and the flexibility enabled by current licensing arrangements, care should be exercised before introducing any exception(s) that could be disruptive of well-functioning markets.

- Text and data mining

AAP believes an exception for copying works for the purpose of data analysis or text and data mining (TDM) is unnecessary. AAP member companies continue to develop business models to meet the needs of researchers to text and data mine.² Business models based on

² <https://www.elsevier.com/about/our-business/policies/text-and-data-mining>

licensing, rather than a statutory exception, are the best approach to ensuring researchers are able to effectively mine text and data.

The problem with a very specific statutory TDM exception is that it would lack the flexibility required to adapt to changing circumstances and technologies. TDM is an important research tool, but it is a means to an end, not the goal itself. Researchers use TDM to accomplish research objectives that continually progress. TDM is constantly evolving to meet the needs of researchers and to adapt to changing technologies. A statutory TDM exception would likely lack the flexibility to adapt to these evolving needs.

Given the nascent character of text and data mining, the scope of permitted TDM activities is likely best determined through a licensing arrangement, not by a fixed exception. Licensing agreements allow publishers to provide customized and innovative TDM solutions to meet evolving needs and to adapt to evolving challenges in the market place. A licensing approach incentivizes publishers to develop initiatives to facilitate TDM solutions that effectively support researchers. Licensing contracts also provide certainty for researchers regarding the permitted scope of activities for using and analyzing data. Should TDM be subject to a statutory exception, contractual arrangements would be undermined because researchers and copyright owners may be less likely to agree on permitted uses and would be unclear on the enforceability of contract provisions. As technology and research evolve, the precise scope of activities covered by the proposed exception would become less and less clear, and researchers could be subject to unnecessary litigation.

However, if the Government deems an exception necessary, the proposed exception should differentiate between commercial and non-commercial activities. For certain strictly non-commercial uses, it may be the case that business models for TDM are not available or impractical. However, extending a TDM exception to commercial activities would effectively provide a significant benefit to commercial entities on the backs of the publishers that have invested the resources to publish the content, and in the infrastructure to make the content discoverable and searchable. Any TDM proposal should recognize that TDM solutions are most effectively provided through licensing, which provide certainty and faster, more flexible ways to adapt to evolving circumstances. The introduction of a copyright exception to facilitate TDM should be considered as a last resort – such as when a licensing approach is either unavailable or impractical. As the market currently stands, publishers are providing users with the access they need to undertake TDM activities to accomplish their research objectives.

- Certain educational uses

Many types of publishers sell and license copies of their works for a broad range of educational purposes. Textbooks and related materials are created, developed, and marketed with formal educational uses in mind. However, many other kinds of books, journals, periodicals, and other copyright materials can productively be employed to carry out an educational function. Published materials are used, both within formal, not-for-profit educational institutions at all levels (primary to post-tertiary), and in a host of other settings,

including for-profit trade schools; continuing education of professionals and skilled workers; and all manner of training and current awareness environments.

Accordingly, in order to provide strong incentives for investment in the development and distribution of copyright works that can be used for educational purposes, it is critical that any proposal in this space assure that publishers can control, through the exercise of exclusive rights, the terms and conditions under which their works may be exploited for such purposes, or at a minimum provide consistent, predictable and adequate compensation for such uses. AAP strongly believes that the best route for achieving this result is to foster a robust and competitive marketplace in the sale and licensing of copyright works for educational uses. Not a broad, parameter-less exception for education.

Introducing a broad fair dealing exception for “educational uses” creates the risk of destabilizing established markets for published materials, including textbooks and similar products. In the Australian case, in which some (though not all) of these potential markets are covered by statutory licenses, a broad free-use exception is likely to divert potential uses from the marketplace, where reasonable and balanced licensing arrangements can be negotiated, to the courts. This risk is especially high when advocates for expanded fair dealing seem to clearly expect that its adoption will expand the scope of the free-use exceptions and thus will be encouraged to test the extent of that expansion by embarking on extensive unlicensed uses.

In the consultation document, the Government references the ALRC Final Report where the ALRC recommended that a “new fair dealing exception with a prescribed purpose for education”³ be adopted. This proposal (as would a fair use exception if that is the path taken) would seem to replace the educational statutory licensing regime currently in place with a broadly phrased and highly uncertain new exception for educational uses.

There is no evidence or information to suggest that such a change will encourage voluntary licensing. On the contrary, it is far more likely to have the opposite effect. Entities that wish to use copyright material for educational purposes, and that are no longer required to pay statutory licenses, will have very little incentive to negotiate licenses, and stronger incentives to eschew the licensing market entirely and take refuge in the broad new free-use “educational” exception. In such circumstances, publishers will be compelled to take on costly and protracted litigation in order to obtain any compensation. Courts then, not the marketplace, would be deciding how much users need to pay – if anything – to use copyright material. Such an outcome will be highly disruptive of settled expectations, and inimical to the consistent investment needed to develop and bring to market the highest quality educational materials.

One need only look to the Canadian market where this scenario has already played out. Since the adoption of Canada’s Copyright Modernization Act 2012, overbroad interpretations of

³ https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf

the fair dealing exception for education has led to systematic, uncompensated copying in the country's schools. The wide spread un-permissioned and uncompensated use of millions⁴ of pages of books, journals, magazines, and newspapers by educational institutions has contributed enormously to the significant decline in income for authors⁵ who create the works that are widely copied, and publishers⁶ that bring such works to market. Licensing revenue distributed to publishers and authors has declined by some 89 percent.⁷ A once thriving licensing market is now in decline, and domestic publishers have withdrawn from their own markets due to dwindling returns.⁸

- Government Uses of a “Public Interest Nature” and “Not Commercially Available”

AAP believes the Government should not adopt a broad “government use” exception; rather, the needs of government agencies to expeditiously and effectively discharge their duties and functions will be better served by the adoption of narrowly defined, specific exceptions. The risk of a broad government use exception, similar to the risk of introducing a broad exception for education, is that it will interfere with established markets for copyright materials, and likely lead to unnecessary litigation. Stakeholders should be provided the opportunity to properly consider the specific exceptions, in particular, how the proposed exceptions are defined in legislation to ensure that such exceptions are appropriately tailored to reduce so-called transaction costs that may weigh on government agencies as it conducts the government's business but in the same vein, adequately cabined to prevent misuse of the exception.

II. Contracting out of exceptions

Publishers in all sectors (trade, educational, professional and scholarly), like all users of copyrighted works rely on licensing agreements to facilitate use of copyrighted works within their own works. Such agreements allow the parties to more clearly define the scope of rights and privileges between rights holders and users, and thus to better delineate what can and cannot be done with respect to the works subject of the contract. A broad proposal providing that copyright exceptions supersede contract terms will have the unfortunate effect of creating uncertainty in the market. A rights holder (publisher) and user may disagree as to the scope or applicability of an exception, and rather than this potential disagreement having been settled through the clear terms of a licensing agreement, parties may be compelled to litigate in order

⁴ <http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-103/evidence#Int-10086242> (See Mr. Degen's testimony.)

⁵ *Id.* See also Mr. Rollans' testimony, under Statutory Review; Permits & Licenses, where he notes that Access Copyright (the collecting society) licensing revenue for K-12 and post-secondary education is down 89%.

⁶ <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9762443/br-external/BroadviewPress-e.pdf>

⁷ *Id.*

⁸ <http://www.cbc.ca/news/arts/copyright-law-educational-books-1.3640331?platform=hootsuite> (Accessed May 25, 2018).

to come to terms. Thus, rather than facilitating ease of use and access, this proposal to allow contractual overrides may well do the opposite.

Licensing or contractual arrangements already play an important role in providing certainty in the marketplace. Given its importance to current, and future business models, AAP cautions the Government against denying parties the freedom to contract, particularly any proposal that would make “unenforceable any part of an agreement or contract restricting or preventing a use of copyright material that is permitted by any copyright exception.”

III. Access to Orphan Works

AAP and its member publishers have an interest in supporting the wide dissemination and use of copyrighted works under established principles of copyright law. As publishers are themselves users of copyrighted works, AAP member publishers well understand the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining the permissions necessary to use a specific work or works. AAP believes that legislation is necessary to provide a clear framework within which the needs of potential users and the rights of the owner of an orphaned work can be equitably satisfied, particularly where no other exceptions can apply.

Of the proposals presented in the Consultation Document, AAP believes Option 2 to be the better approach, i.e., a limitation of liability for copyright infringement, *provided* that a reasonably diligent search has been undertaken by the purported user. The key elements of this new orphan works framework include:

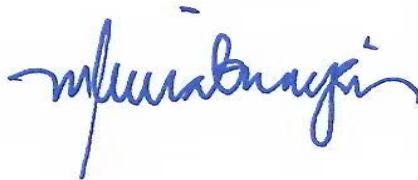
- A common standard applied to all types of copyrighted works, whether published or unpublished, regardless of their age or national origin.
- Use of orphan works without discrimination regarding the type of use or the status of the user (e.g., for-profit or not-for-profit) after the would-be user has made a reasonable, but unsuccessful search to identify and locate the copyright owner for permission.
- Case-by-case good faith diligent search requirements for occasional uses of orphan works requiring personal documentation of the search.
- No requirement that the user of an orphan work file a search report or a notice of intent-to-use the orphan work.
- Robust limitations on infringement liability:
 - using “reasonable compensation” as an appropriate monetary remedy that would remain available to rights holders that wished to bring a claim against an infringer for using a work after conducting a proper diligent search; and
 - Ensuring that the limitations on injunctive relief do not undermine the limitations on monetary damages.

- Clear language explaining that legislation addressing occasional uses of orphan works does not affect any right or any limitation or defense to copyright infringement already in law.

In sum, AAP supports legislation with diligent search requirements that minimize misclassification of works as orphans, are clear and simple to apply in practice, and do not create unnecessary burdens on prospective users of orphan works. A legislative solution that adheres to these objectives should increase the use of orphan works, protect the rights of copyright owners, and benefit the public by opening the vaults in which are hidden away many works of unknown importance.

AAP appreciates the Government's consideration of its views. We look forward to continuing to engage on the important question of how best to shape a copyright legal regime that provides rights holders with high-level standards of protection for their creations and their investments, while also affording users a greater degree of certainty regarding the privileges under which they can use and enjoy copyrighted works.

Sincerely,



M. Luisa Simpson
Vice President, Global Policy