



Australian Government



Australian
Charities and
Not-for-profits
Commission

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The Director, Copyright Law Section
Department of Communications and the Arts
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Submission to the Department of Communications and the Arts for review of the Copyright Act 1938

1. The Australian Charities and Not-for-Profits Commission (**ACNC**) welcomes the opportunity to provide a submission to the Department of Communications and the Arts (**the Department**) on its review of the *Copyright Act 1968 (Cth)* (**Copyright Act**).
2. This submission focuses on the Department's two options for reforming the current regime of 'fair dealing' exceptions set out in the 'Copyright modernisation consultation paper',¹ this being the proposed change of most relevance to the charity sector. The ACNC notes that the Department invites comment on which option would be preferable. The ACNC would urge the Department to implement option 2, on the basis that it is a simpler system to implement and a more comprehensible exemption system for the end user. Fuller discussion of the two options is below.

Option 1- Additional fair dealing exceptions

3. The ACNC understands that this option is intended to sit alongside and complement the Department's 2017 Disability Access and Copyright Regulations initiatives.
4. The *Copyright Amendment (Disability Access and Other Measures) Act 2017 (Disability Access Amendment Act)*, (enacted on 15 June 2017) expanded the fair dealing provisions to allow for an 'Access by or for persons with a disability' exception. The Disability Access Amendment Act added two new provisions under sections 113E and 113F of the Copyright Act. According to the exposure draft of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016*, these provisions assist educational and disability-services organisations by making copyright material available to persons who cannot normally access materials due to their disability. Such a provision is of assistance for charities working in the disability sector and the ACNC welcomed this reform.

¹ Copyright modernisation consultation paper 2018, <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>



5. The ACNC notes that this option involves introducing additional fair dealing exceptions into the Copyright Act. It would not involve removing the existing exemption for disability access. The consultation paper provides a list of prescribed purposes that will be considered eligible for the fair dealing exemption under the Copyright Act. However, the ACNC considers that none of these new purposes will affect the charity sector.² Accordingly, the ACNC considers that this option will have very little impact on the charity sector, either negative or positive.

Option 2- A fair use exception

6. The second reform option set out in the Department's consultation paper is for the introduction of an open-ended, principles-based 'fair use' copyright exception. We understand that this fair use provision would, if implemented, replace the current fair dealing regime.
7. According to the consultation paper, the fair use provision would adopt the 'fairness factors' currently used in the 'research and study' fair dealing provision of the Copyright Act to assist in determining what constitutes 'fair use'. Such factors would include: the purpose and the character of the dealing, nature of the work, possibility of obtaining the work within a reasonable time at an ordinary commercial price, effect of the dealing upon potential market for or value of the work, and the amount and substantiality of portion used. We support the adoption of the fairness factors as these have been applied under the current 'research and study' fair dealing exemption.
8. The ACNC notes that the Department is proposing to include illustrative purposes. We understand that these would include the existing 'disability access' exception under the current fair dealing provisions and so would not negate the reforms made by the Disability Access Amendment Act.
9. Unlike the existing fair dealing framework, the proposed 'fair use' exception would not be confined to a limited set of prescribed purposes. The ACNC supports the introduction of a broader, more flexible and open-ended exemption framework under the Copyright Act.
10. The ACNC notes that 67% of charities are small (earning less than \$250,000 in revenue in a financial year), with 40% of charities being extra small (annual revenue less than \$50,000).³ The charity sector would gain greater benefit from the increased flexibility afforded to users under a 'fair use' exception as the question of whether a given use is a 'fair use' would be assessed on a case-by-case basis, having regard to the fairness factors. When consideration is given to the 'purpose and character of use' factor, the use of copyright materials for non-profit educational purposes, and other non-commercial purposes may be more likely to constitute fair use.

² Ibid p 11 lists additional fair dealing exceptions for 'quotation, non-commercial private use, incidental or technical use, text and data mining, library and archive use, certain educational uses, and certain government uses'.

³ The Australian Charities Report 2016, <http://australiancharities.acnc.gov.au/download/>



11. The ACNC notes that there may be increased opportunity for the voluntary sector to use more copyright material without charge under the proposed new 'fair use' exception. The ACNC therefore supports the introduction of an open-ended, principles-based 'fair use' regime.
12. The ACNC is able to provide further information on any of the matters raised above, should this be useful to the Department of Communications and the Arts. Contact information is provided below.

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