

COMMUNICATIONS
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Copyright Modernisation Consultation Paper
COMMUNICATIONS ALLIANCE SUBMISSION
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INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission in response to the Department's Copyright Modernisation Consultation Paper.

We have focused our response to the Consultation on flexible exceptions, as the adoption of Fair Use would have the most significant benefit of any reform options the Government could consider.

The introduction of a fair use provision, as recommended by the Australian Law Reform Commission and the Productivity Commission, would support the Government's work on growing a digital economy, while simultaneously contributing towards Red-Tape Reduction. This is critical to the future of Australia's digital economy.

The Fairness Factors, as based on the rights-holder-supported U.S. fair use provision,¹ would provide appropriate protection for rights holders and help achieve the Department's goal of an intellectual property system that is "effective, efficient, adaptable, and accountable."²

Communications Alliance supports the principled-based, technology-neutral approach to a fair use exception which will serve to 'future-proof' changes in the technological environment and provide the necessary flexibility to encourage innovation in the digital economy.

The consultation questions on Orphan Works and Contracting Out, while important, are less directly relevant to Communications Alliance's members.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

¹ Association of American Publishers, *Statement to US House Judiciary Committee, Hearing on "The Scope of Fair Use,"* 6 Feb 2014: https://publishers.org/sites/default/files/uploads/PandP/aap_hearing_statement_scope_of_fair_use_january_28_2014.pdf

Motion Picture Association of America, *MPAA and Fair Use: A Quick History*, 22 Oct 2013: <https://www.mpa.org/press/mpaa-and-fair-use-a-quick-history/>

² Copyright Modernisation Consultation Paper, Pg 5

Flexible Exceptions

Questions from the Department

Question 1

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?

Question 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: Option 2, A Fair Use Copyright exception

Modernisation of the Copyright Act, some 50 years after its initial passage, is now long overdue. This need has been identified by the independent and in-depth Australian Law Reform Commission (ALRC) and Productivity Commission (PC) reviews and has been promised by the Federal Government for several years.

The economic, social, and technical changes that have taken place since 1968 necessitate a review of the base assumptions upon which the Act was developed, and thus the structures of the Act also need review. The creation and dissemination of intellectual property took place in a more straightforward system prior to the creation of the internet. As raised in the Department's consultation paper, "it is easier to make, distribute and consumer content – often in ways not foreshadowed in the analogue world."³

Fair Dealing is one of the structures created in the context of 1968 which is no longer appropriate for today's world. The ALRC and PC both agreed on this point, and have formally recommended Fair Use.

Fair Dealing has a depressing effect on the development of a Digital Economy by creating confusing legal impediments for businesses, innovators and users. The red-tape necessitated by the need to constantly adapt Fair Dealing to new technologies and uses is expensive for Government and ensures the law will always lag behind the economy and technological developments.

With this in mind, Communications Alliance is disappointed that the Department's consultation appeared to begin from a premise of altering Fair Dealing, instead of considering its appropriateness altogether. Holding separate stakeholder meetings on the detailed expansions of Fair Dealing exemplified the unnecessary difficulties and onerous processes created by the need for specific exemptions. The overlap in stakeholders, technologies, and concerns means that clarity of exemptions is impossible, and the legislation can only ever attempt to catch up with innovation.

³ Copyright Modernisation Consultation Paper, Pg 4

The Department's consultation put forward Option 2, a Fair Use provision. A flexible Fair Use exception should focus on the purpose of the copying, rather than the technology platform facilitating it or the subject matter being copied. This also reflects the basic premise of copyright, which is to protect the expression of ideas, rather than the ideas themselves. Government can see a successful implementation of Fair Use in the US model, with clear provisions to protect rights holders.

We suggest that this discussion should begin with a discussion of which fairness provisions would be accurate, instead of continuing to focus on fair dealing. Fair Use will align with the Government's commitment to a Digital Economy and Red-Tape Reduction. It is essential that copyright law is amended to reflect flexible and agile ways of operating in the digital world, where technological distinction is obsolete.

Fair Dealing

Following a multi-year conversation, including multiple reviews and consultations with definitive recommendations to leave behind Fair Dealing, choosing to retain Fair Dealing would not be simply maintaining the status quo. Rather, it would be nothing less than a conscious decision by Government to retain a red-tape intensive, innovation-stifling model that is bad for the economy.

We can see this today with the illegal and/or unclear status of many technological activities – such as caching and indexing – that are vital to the everyday use of the internet and are key requirements for a search engine.

Non-consumptive uses are essential to the functioning of other technologies which should be considered fair use. For example, music recognition software, anti-plagiarism software, and many other incidental, transformative and non-consumptive use of copyright.

It seems absurd that in 2018, Industry continues to lack certainty that according to the law, the basic operation of the internet and software programs in use across Australia do not constitute or facilitate copyright infringement.

These are two of many examples of fair dealing being incapable of keeping up with the economy, and it is a foregone conclusion that there will be additional unintended consequences. Already, Australia is seeing a comparative lack of innovative digital business such as those working with Artificial Intelligence, partially due to the unclear copyright situation in which they would have to operate.

Proposed model

In stark contrast to Fair Dealing, a Fair Use provision will support innovation instead of repressing it, by reducing red-tape while protecting rights holders, as has been seen in the successful implementation in the US.

Fair Use is not a 'green light' to infringement, use must still be 'fair', a well established concept under Australian copyright law. Communications Alliance contends that it is better to focus on the principle of whether a 'use' is fair, rather than on a consideration of what technology is used. In order to allow for innovation, Communications Alliance asserts a principled, technology-neutral approach to third party uses is appropriate.

Fair Use provides appropriate protections for rights holders. The US structure includes the following "statutory fairness factors":

- Purpose and character of use, including if commercial or non-profit educational

- o Nature of work
- o Amount and substantiality of portion used
- o Effect of use on potential market or value of work

Similar factors were recommended by the Australian Law Reform Commission in its November 2013 report *Copyright and the Digital Economy*.

The Fairness Factors proposed represent a reasonable way in which to consider the circumstance of use of copyright material. The final fairness factor addresses the majority of concerns we have heard raised by rights holders and, on the whole, rights holders are appropriately protected by the fairness factors. In fact, the Motion Picture Association of America has pointed to the copyright framework in the United States, including Fair Use, as integral to the economic success of content creation:

Because of the framework our founding fathers so wisely created, America's core copyright industries stand today as a vital part of our social and economic well-being. In 2013 those industries added more than \$1.1 trillion dollars in value to the U.S. GDP, accounting for almost 7% of our economy. The motion picture and television industry, one of the most prominent among them, directly and indirectly employs 1.9 million Americans, and annually pays out \$111B in wages and \$15.9B in sales, state income, and federal taxes.⁴

As such, Communications Alliance submits that any concern that the introduction of a fair use regime will create legal uncertainty is unwarranted. We also note that the current Fair Dealings are the subject of considerable uncertainty

Fair use regimes have been successfully introduced in a number of jurisdictions internationally, particularly those with a forward looking, innovation culture, including Israel, South Korea and Singapore. As the ALRC states *"It is well established that foreign case law may be used by Australia courts..."*.

A principles-based approach to Fair Use will ensure it continues to be relevant and responds to changing conditions, essential for today's rapidly changing economy.

Benefits of Fair Use

The Government has confirmed that a Digital Economy is vital to Australia's future. Former Industry Minister Sinodinos stated upon release of the Digital Economy Strategy consultation, "we can...become a world leader in digital innovation which could boost the Australian economy by \$140 billion to \$250 billion over the next eight years."⁵ There is extensive work being done to support this goal, including the Digital Economy Consultation and the National Innovation and Science Agenda. Government is working to create jobs and chart a future for Australia in the evolving world economy.

We are already seeing success in this goal, with **nbn** recently reporting that access to fast broadband has created 230 new companies in South Australia, and up to 35,700 digital jobs will be created there by 2021.⁶ Transforming Australia's economy by making it a global

⁴ Motion Picture Association of America, Future of Copyright, 2 Mar 2015: <https://www.mpa.org/press/futureofcopyright/>

⁵ Deciding our Digital Future, Media Release, Minister Sinodinos, 19 Sep 2017: <http://minister.industry.gov.au/ministers/sinodinos/media-releases/deciding-our-digital-future>

⁶NBN to create 'thousands' of SA businesses, Benjamin Weir, Associated Press, 7 June: <https://www.theaustralian.com.au/news/latest-news/nbn-to-create-thousands-of-sa-businesses/news-story/a834f6542042429d374b04cd8dd4a63b>

digital leader is a laudable goal, but one which requires alignment across legal frameworks, as raised in the Digital Economy Consultation Paper:

“As technology advances, outdated or inconsistent regulation can stifle innovation and drive up costs. New businesses may find themselves operating in a regulatory grey area and new risks may not be anticipated by old legislation.”⁷

Fair Dealing creates significant barriers to this goal. The legislative change required to add specific exceptions as a technology or a use is developed will slow and stifle progress. Innovative start-ups will avoid operating where there are legal questions about their technology's status, preferring to locate themselves in another country where greater clarity is available. We are already facing challenges, being ranked by the Fletcher School's *2017 Digital Evolution Index* as facing “slowing momentum...at risk of falling behind.”⁸ While exceptions could be created each time a new technology or use is developed, the legislative change required is a slow and lengthy process.

A Digital Economy requires an adaptive and agile legal framework that can keep up with the pace of technological change - already a challenge today. Fair Use provides exactly this, while maintaining an appropriate balance with rights holders benefits and creating incentive both for creators of copywritten material and innovators.

In addition to supporting Australia's Digital Economy, the Government has made a commitment to the Deregulation Agenda and to cutting red tape. As outlined above, the requirement to continuously go through the lengthy process of changing legislation to keep up with the economy creates enormous unnecessary costs for Government and red tape that impedes innovation and damages businesses.

With the confirmed significant negative consequences of Fair Dealing, and the benefits of Fair Use, Industry is unclear why Fair Use is not being seriously considered as a valid option for our economy. Rights Holders' concerns with Fair Use are addressed by the fairness factors proposed, as has been shown via the success of the US system. Communications Alliance strongly urges Government to support innovation and small businesses by taking on the strong recommendations of the ALRC and PC to modernise and balance our copyright system.

⁷ The Digital Economy: Opening Up the Conversation, Sep 2017, pg 16:
<https://www.industry.gov.au/innovation/Digital-Economy/Documents/Digital-Economy-Strategy-Consultation-Paper.pdf>

⁸ New Zealand Ranked as top digital economy, Stuart Corner, Computerworld New Zealand, 12 July 2017:
<https://www.computerworld.co.nz/article/621708/new-zealand-ranked-top-digital-economy/>

Option 1, Additional Fair Dealing Exceptions

The Consultation Paper suggests as Option 1 that additional exceptions could be added to Fair Dealing to address some of the current problems. It invites comment on the following proposed new fair dealings:

- Quotation – evolution of ‘substantial part’ test
- Non-commercial private use - supplementing the ‘time and format shifting’ exceptions;
- Incidental or technical use;
- Text and data mining;
- Libraries and archives;
- Certain educational uses;
- Certain government uses - that are of a “public interest nature” and “not commercially available”

As stated in the previous section, expanding Fair Dealing is a backwards step for Australia, and will not ultimately resolve the policy problem under consideration.

Expanding fair dealing to address a few identified exceptions would not support innovation and would mean that Government would have to ultimately spend additional resources in coming years as more needed exceptions are identified.

Incidental or Technical Use, Text and Data Mining

If Government chooses to take the regressive step of expanding fair dealing instead of adopting Fair Use, it is vital that simple and everyday tasks such as using a search engine are legalised, and that we make at least some attempt to support innovation in the Digital Economy.

We understand the Department has proposed the below as a discussion starter in regards to incidental or technical use and text and data mining:

- Fair dealing exception for ‘incidental or technical use’
- Relates to all copyright material
- Five fairness factors from research or study (ss 40, 103C)
- Repeal temporary use and proxy web caching exceptions (including ss 43A, 111A, 43B, 111B, 200AAA)
- Explanatory memorandum (EM) clarifies that new exception enables uses covered by the previous temporary use and proxy web caching exceptions.
- Text and data mining for non-commercial purposes would be covered by the exception, subject to fairness factors. This could also be clarified in an EM.

This proposal still locks Australia into the ineffective fair dealing model. While it may address some of the specific concerns about technology types and uses we know about today, it in no way supports innovation.

Additionally, expanding fair dealing only to **non-commercial** uses, such as text and data mining, will prevent Australian companies from participating in the global marketplace, as in the coming

years these tools will be central to almost every activity in the economy. It is essential that any fair use or fair dealing exceptions apply equally to commercial and non-commercial uses, subject of course to the fairness factors.

The proposal itself acknowledges that fairness factors are a useful tool and can appropriately determine if a use is fair, and Communications Alliance asks why, if fairness factors are appropriate, they are not being used across copyright to avoid stifling innovation and future extensive consultations.

Whether for education, tools to help persons with disabilities, or purposes as yet unimagined, the need for practical and fair rules around copyright extends far beyond technical use, and should not be stifled by the need to consult and undertake legislative change for each and every evolution.



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