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Digital Rights Watch submission to the Copyright Modernisation Consultation

About DRW: Digital Rights Watch (DRW) is a nonprofit charity that supports, fosters, promotes and highlights the work of Australians standing up for their digital rights: <http://digitalrightswatch.org.au>.

Executive Summary

The meaningful modernisation of Australian copyright laws requires new, and overdue, exceptions to copyright infringement for 'fair use' and use of orphan works. These exceptions must be robust and certain. They should not be susceptible to 'contracting out'.

In summary:

- (a) **A fair use exception should be introduced.** Adding new prescribed purposes to the existing fair dealing exceptions will not redress all of the current gaps in protection, and will certainly not future-proof Australian copyright law. Continuing with a regime of *ad hoc*, static exceptions will not further the aim of modernising Australia's copyright law.
- (b) **Use (whether commercial or non-commercial) of orphan works should not amount to infringement.** Whether or not this requires a tailored exception will depend on whether a fair use exception is introduced, and if so, whether in a form allowing for a sufficiently flexible weighing-up of factors (such that a commercial use would not 'tip the balance' in favour of infringement). In the absence of fair use, DRW's preference is for a discrete exception, rather than a statutory licence or limitation on the remedies available to a plaintiff. In our view, there is no guarantee that a mere limitation on remedies would prevent the institution, or threatened institution, of proceedings in unfair cases, nor that defendants would not be pressed into making a settlement payment, regardless of the merits or the remedy likely in the result. Given the low probability that an owner will eventually be found for most uses of orphan

works, the sudden and unexpected obligation to make a retrospective payment may be prohibitively burdensome for creators reusing existing material in good faith.

- (c) **Terms of private contract should be void to the extent they would exclude exceptions to copyright infringement.** A person's right to make the types of uses of copyright material covered by the exceptions (be they the current fair dealing exceptions or a 'fair use' exception) should be viewed as user rights, part of the essential *quid pro quo* in the grant of copyrights. The law already restricts 'contracting out' in analogous circumstances to protect consumers and the public interest, and should do so here.

Responses to Questions

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?

The recent public inquiries conducted by the Australian Law Reform Commission (**ALRC**) and the Productivity Commission (**PC**) have separately culminated in recommendations for the introduction of a 'fair use' exception to copyright infringement.¹ These recommendations were carefully researched on the back of lengthy consultative processes, and there is no reason for the Department of Communication and the Arts (**Department**) to doubt them. The evidence relied upon by the ALRC and PC was sound: fair use would result in net economic benefit, and there is no evidence that fair use will harm creators.

In the context of the current inquiry, we make the following two key points:

- (a) Fair use is needed to modernise and future-proof our copyright laws; and
- (b) Fair use is needed to bring certainty to our copyright laws.

The need to future-proof our copyright laws

If the aim is to *modernise* Australia's copyright laws, we firmly believe in the need to learn from the past and create flexible exceptions that enable the law to adapt to changing circumstances. An approach that requires a lengthy legislative process to add a specific exception once it has become overwhelmingly obvious that the exception is needed, to the detriment of Australian creativity and

¹ See Australian Law Reform Commission, *Copyright and the Digital Economy* (Report No. 122), 13 February 2014 (available at: <https://www.alrc.gov.au/publications/copyright-report-122>), particularly pages 87-158; Productivity Commission, *Inquiry into Australia's Intellectual Property Arrangements* (Report No. 78), 20 December 2016 (available at: <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>), particularly pages 175-197.

culture in the intervening period, cannot be satisfactory. Far from modernising the law, that approach would virtually ensure that the law remains several steps behind developments in technologies, consumer uses and business practices.

The need for certainty

There is another need underscoring the importance of a single unifying exception: the need for certainty. Copyright law must be simplified if it is to be understood and respected.² Research has shown prevailing misconceptions among creators,³ some of whom either think Australia already has fair use, and/or confuse fair use and fair dealing. Others self-censor, not sufficiently resourced to obtain professional advice as to whether they are protected by current exceptions and understandably unwilling to take a risk, or out of legitimate concern that their activities would not be covered. Both reactions are problematic: the former because it may spur creators to infringe copyright unintentionally, and the latter because creative efforts will be avoided or abandoned out of fear of infringement.⁴ It is plain that the current restrictive approach can impede the production of Australian culture. DRW believes that simplifying the Act by replacing multiple existing exceptions with a fair use exception will go a long way to resolving the gap between the text of the law and how copyright law is understood and works in practice.

Given its position on fair use, DRW has not considered the additional prescribed purposes exceptions in detail, apart from to note that they would go some, but far from all, of the way toward redressing the most commonly cited shortfalls of the current list of exceptions. As an example, we compare the would-be position against the 'Illustrative US fair uses of copyright that require a licence in Australia', from Table 6.1 of the PC's 2016 report. It is DRW's position that (in the absence of any further details) none of the activities listed in the table should require a licence in circumstances where the use is fair:

Activity	Current Australian fair dealing exceptions	US fair use	Current Australian fair dealing exceptions + new prescribed purposes
An Internet search engine publishes thumbnail images of websites in its search results.	✘	✓	✘
An author quotes a number of unpublished letters and journal entries in a biography.	✘	✓	? Depending on the scope of the 'quotation'

² See Paula Dootson & Nicolas P. Suzor (2015) "The game of clones and the Australia tax: divergent views about copyright business models and the willingness of Australian consumers to infringe" 38(1) *University of New South Wales Law Journal* 206, 233-7 (available at <https://eprints.qut.edu.au/75933/>).

³ See Kylie Pappalardo, Patricia Aufderheide, Jessica Stevens and Nicolas Suzor, *Imagination Foregone: A qualitative study of the reuse practices of Australian creators*, November 2017 (available at: <https://eprints.qut.edu.au/115940/>).

⁴ *Ibid*, pages 25-29.

			exception
An artist creates a collage using images from a photography book.	✗	✓	Only if for private and non-commercial purposes
A database of TV clips enables users to search broadcasts using keywords, and then view a clip containing the keywords.	✗	✓	✗
Scenes from a film are used in a subsequent biographical film about the lead actor.	✗	✓	✗
An election advertisement uses a sample of a song used in an opponent's advertisement.	✗	✓	✗
A rap song pays homage to another well-known song by using the opening lyrics.	✗	✓	? Depending on the scope of the 'quotation' exception
Researchers access a database for text and data mining.	✗	✓	✓
A teacher wants to record a specific TV or radio news program for use in class.	✗	Potentially fair use	? Depending on the scope of the 'certain educational uses' exception
A teacher copies a single chapter of a book for inclusion in a set of class materials (30 copies).	✗	Potentially fair use	? Depending on the scope of the 'certain educational uses' exception
A teacher scans pages from textbooks to use in their lessons via an interactive whiteboard.	✗	Potentially fair use	? Depending on the scope of the 'certain educational uses' exception
A school library copies thumbnail images of books from the Internet for use in an online library catalogue.	✗	Potentially fair use	? Depending on the scope of the 'certain educational uses' exception

To take some further examples, we would add that (unless 'quotation' was broadly construed) none of the prescribed purposes would provide blanket coverage for public or commercial 'transformative'

uses of copyright works (such as mash-ups of sound recordings, or collages of artistic works). The existing parody and satire exception is not sufficient to protect public uses that do not directly parody or satirise the material being used, even though licences are not available for many such uses. This creates major barriers for ordinary creators, and comes at a cost to freedom of expression in Australia.

On the question of which factors should be relevant to determining fairness, DRW strongly supports a four-factor test that allows Australian courts to draw guidance from US case law. Those factors are:

- (a) The purpose and character of the use, including whether it is commercial or non-commercial;
- (b) The nature of the copyrighted work;
- (c) The amount and substantiality of the portion used in relation to the copyright work as a whole;
and
- (d) The effect of the use upon the potential market for, or value of, the copyrighted work.

DRW does not support inclusion of “*the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price*” as a factor. That factor would likely give rise to arguments that any use that can potentially be licensed will automatically not be a ‘fair’ use. This kind of categorical approach would be inconsistent with the purpose and intent of the fair dealing and fair use provisions, both in Australia and the US. The US experience shows that the legitimate concerns this factor is meant to address (impact on legitimate markets) is adequately dealt with under the other four factors. There is no benefit to be gained by introducing this extra factor into a general fair use exception, and doing so could come at great cost to legitimate and socially beneficial use.

For completeness, and to address one option raised in the discussion paper, DRW strongly disagrees with any approach that would hand the power to prescribe exceptions to the Executive, without parliamentary oversight and scrutiny. That is, exceptions must remain in the body of the Copyright Act rather than (as the Department presents as one option) in the Copyright Regulations - regardless of whether there existed an obligation to consult prior to prescribing an exception. An optional consultative process is not a substitute for parliament. This would remain our view even if *ad hoc* additions to fair dealing exceptions were to continue to be made.

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.

We believe that there are major benefits to simplifying the Copyright Act by replacing s 200AB and many other specific exceptions with a new fair use exception.

Question 3

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

Question 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?

The right to creative self-expression, including by making fair re-use of copyright material, is linked directly to the fundamental right of Australians to participate in culture and democratic society as a whole. It is a key contributor to human happiness and flourishing.

Intellectual property laws:⁵

... control people's ability to participate in cultural development and are at the heart of what Madhavi Sunder has called the "struggles over discursive power – the right to create, and control, cultural meanings." ... As Rebecca Tushnet has argued, "respect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy."

This is not only because of the wider creative and cultural possibilities that flow from permitting more minds and hands to participate in the practice of shaping existing culture and building new culture, but also "because of how the process of making meaning contributes to human flourishing." Allowing users to experience, discuss (sometimes by sharing), experiment and "tinker" with cultural products offers opportunities for self-fulfillment; it is a kind of "antidote to the poison" of an empty life.

Against a backdrop of recognition that exceptions to infringement are user rights,⁶ it is critical that the exceptions to copyright infringement are not open to 'contracting-out'. This is especially because most copyright transactions are entered into in circumstances of severe power imbalance. For consumers of digital content, most contracts are entered into via online 'click-wrap' agreements which the consumer will not have had any genuine opportunity to review or negotiate.

⁵ Kylie Pappalardo, *A tort law framework for copyright authorisation: PhD thesis* (2016) Australian Catholic University (available at: <https://eprints.qut.edu.au/102226/>), pages 87 - 88 (internal citations omitted).

⁶ There is support for this position from the Canadian Supreme Court: see *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 S.C.R. 339 [48], where it was found: "The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."

A consumer purchasing a licence to stream-on-demand content (for example) from a provider like Spotify, iTunes or Netflix is in a very similar position to a consumer purchasing off-the-shelf domestic, household or personal goods. There is no opportunity to negotiate the terms, which are usually voluminous and incomprehensible, even if technically available to read.⁷ To add to the confusion, a consumer of digital products will often find themselves reading terms which have been prepared according to overseas (usually US) laws.

In recognition of the power imbalance and practical vulnerability of a consumer buying domestic goods “from the shelf”, section 64(1) of the Australian Consumer Law⁸ renders void any term in a consumer contract to the extent that term purports to exclude, restrict or modify the consumer guarantees in that legislation.

Of similar provisions in residential tenancy legislation, the NSW position is illustrative:⁹

219 Contracting out prohibited

(1) A term of any residential tenancy agreement, contract or other agreement is void to the extent that it purports to exclude, limit or modify the operation of this Act or the regulations or has the effect of excluding, limiting or modifying the operation of this Act or the regulations.

(2) A person must not enter into any contract or other agreement, with the intention, either directly or indirectly, of defeating, evading or preventing the operation of this Act or the regulations.

Other examples of protection against contracting out (whether by voiding the offending term or the setting of a default position that applies irrespective of private contract) include legislation governing retirement village tenancies,¹⁰ employee minimum entitlements,¹¹ and superannuation guarantee payments.¹² These pieces of legislation govern critical personal economic, health and welfare rights. The human right to participate in cultural life by using copyright material in circumstances judged ‘fair’ by the legislature should be similarly protected from exclusion in asymmetrical contracts.

Question 5

⁷ In a study conducted in the US, 91% of respondents (and 97% of respondents aged 18 - 34) did not fully read the terms of service for an online platform before agreeing to be bound: Jonathan Obar and Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services* (2 April 2016) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465). In the privacy policy context, see *Consumer Policy Research Centre, Submission to ACCC Digital Platforms Inquiry - Issues Paper* (5 April 2018) (available at: http://cprc.org.au/wp-content/uploads/CPRC_DigitalPlatformInquiry_updatedsubApril2018v2.pdf) - finding that of the 67% of respondents who had read at least one privacy policy in the last 12 months, two-thirds continued to sign up for one or more products even though they did not feel comfortable with the contents of the policies (page 4).

⁸ *Competition and Consumer Act 2010* (Cth), Schedule 2.

⁹ *Residential Tenancies Act 2010* (NSW) section 219.

¹⁰ See, for example, *Retirement Villages Act 2012* (ACT) section 261.

¹¹ See, for example, *Fair Work Act 2009* (Cth) sections 55 and 61.

¹² See *Superannuation Guarantee (Administration) Act 1992* (Cth) section 30.

To what extent do you support each option and why?

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

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

We envisage that virtually all otherwise infringing uses of orphan works would fall within the 'fair use' exception, and suggest that this be clarified as an illustrative purpose within the legislation. In the absence of fair use, it will be important to have a clear legislative exception for the use of orphan works after a reasonable search for the owner. This would ideally take place by way of a discrete exception to infringement, rather than a limitation on remedies or statutory licence. But the critical overarching point is that, whatever form the protection takes, users should not be exposed to the risk of substantial payouts or damages awards where the owner of an apparently orphaned work surfaces. A reasonable search for the owner should be sufficient to provide comfort that the material is safe for use. Owners of copyright material who seek royalties should bear the responsibility of ensuring that they are identifiable and that licences are available. Where an owner has chosen not to maintain the commercial availability of a copyright work and it is not reasonably locatable at the time of use, there is little justification for the Copyright Act to allocate an entitlement to a retrospective windfall profit at a later date. Such a scheme would come with significant risks for users. The low probability of an owner emerging is likely to make it difficult to estimate – and therefore manage – the risk of using orphan works, and the sudden obligation to pay retrospective licence fees could prove prohibitively burdensome in many cases.

This submission may be made public.

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