



NATIONAL ARCHIVES OF AUSTRALIA - SUBMISSION

Productivity Commission Draft Report on Intellectual Property Arrangements

Key points

The National Archives of Australia (the Archives) is supportive of the recommendations put forward by the Productivity Commission (the Commission) in the draft report on Intellectual Property Arrangements.

The Archives’ comments pay particular attention to the following draft recommendations: 4.1, 5.3, 15.1 and 18.1, and therefore comments are limited to the sections of the report dealing with copyright term and protection, fair use and orphan works, intellectual property and public institutions, and the safe harbour scheme and online infringement, and their impact upon the Archives.

DRAFT RECOMMENDATION 4.1

The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.

Copyright term

The Archives agrees that the current copyright term is too long and that Australia should work cooperatively to reduce the international standard. We join the Australian Libraries Copyright Committee (ALCC) and the Australian Digital Alliance (ADA) in advocating that the most effective way to address the excessive length of copyright would be to introduce fair use.

Fair use will address concerns around the availability of works after their commercial lifetime, whilst also maintaining the rights of those authors whose works do retain value. It will also allow all authors to retain rights to stop “unfair” uses of their work during their lifetime, even once the commercial value has diminished or disappeared.

Copyright and contract

We appreciate the Commission’s acknowledgement that the problem of contracts overriding copyright exceptions is particularly strong in the library and archives sectors. As evidence from an archive perspective, one of the most common exclusions in library and archive licences is *unpublished works*. We strongly support this recommendation, and note that it has already been proposed in the Copyright Amendment (Disability Access and Other Measures) Bill 2016.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia’s copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- *the effect of the use on the market for the copyright protected work at the time of the use*
- *the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- *the commercial availability of the work at the time of the infringement*
- *The purpose and character of the use, including whether the use is commercial or private use.*

The Copyright Act should also specify a non–exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

Fair use and orphan works

We also strongly support the Commission’s recommendation that fair use be extended to orphan works.

Although the Archives may in theory be able to make use of orphan works under the flexible dealing provision for libraries, educational institutions and cultural institutions (i.e. s200AB of the *Copyright Act 1968*) if another exception is unavailable, it is confusing to interpret and it is not clear as to the extent of use it allows. The Archives, along with a number of other libraries and archives are uncertain as to how to apply the provision, and so by default often do not use it. This is particularly a problem in relation digitisation of the collection. Making material available as a digital copy online is one thing, but if clients or users are unable to make further use of the material, its usefulness is limited (e.g. by family historians or genealogists). Fair use would provide a seamless experience: archives and libraries are able to provide access to orphan works → users are able to make use of them = benefits for all.

DRAFT RECOMMENDATION 15.1

All Australian, and State and Territory Governments should implement an open access policy for publicly funded research. The policy should provide free access through an open access repository for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.

The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.

IP and public institutions

The Archives endorses the Commission’s recommendation that the government adopt a policy for public access to publicly funded works. After the fair use exception, we believe that this is the most important recommendation of the report. We join the ALCC and the ADA in proposing the extension of the recommendation to government created and owned materials, to ensure a coherent open access policy for all government material in Australia.

DRAFT RECOMMENDATION 18.1

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).

Safe Harbour Scheme

The Archives strongly support the Commission’s recommendation that the copyright safe harbour scheme be expanded to all online service providers. Although the safe harbour discussion is often framed as being about the tech sector, archives and libraries are also disadvantaged by the current arrangements, yet we receive less legal protection when our systems are used for illegal activities than commercial ISPs receive. We would benefit significantly from the clarity that would flow from the extension of the current notice and takedown system as well.

Online infringement

We strongly support the Commission’s conclusion that timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.