



AUSTRALIAN
DIGITAL ALLIANCE

Submission in response to the

**Productivity Commission's Draft Report
on Australia's Intellectual Property
Arrangements**

June 2016

A. OVERVIEW

The Australian Digital Alliance (ADA) welcomes the opportunity to comment on the Productivity Commission's draft report on Australia's Intellectual Property Arrangements. Our comments are limited to the copyright-related elements of the report.

The ADA in general supports the proposed findings and recommendations set out in the draft report. In particular, we are strongly supportive of the following proposed recommendations:

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Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.

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.

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).

We provide detailed comments on these and other recommendations and findings of the draft report below. Particular suggestions for changes to the draft report are **highlighted below in blue**.

B. FAIR USE

The ADA believes that the Commission's recommendation 5.3 - that the Copyright Act 1968 (Cth) should be amended to replace the current fair dealing exceptions with a broad exception for fair use - is the key recommendation of the draft report in terms of copyright, and the most important step that can currently be taken to ensure an efficient, effective and adaptable copyright system in Australia. We strongly support its inclusion in the Commission's final report and its immediate implementation by the Government.

We particularly support the Commission's framing of fair use as a proactive 'users' right' (p.159). We agree with the Commission that one of the best ways to redress the growing imbalance in copyright law, and the rapid expansion of owner's rights over the last few decades, is to provide clearer recognition of 'user rights' and the important role they play in counterbalancing the monopoly granted to rights holders. We note that the adoption of the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities* by the World Intellectual Property Organisation is an important step towards such recognition in the international arena, as it is the first time a copyright multilateral treaty has provided for minimum standards of user rights. We hope for more such treaties in the future relating to library and education rights.

We agree with the Commission's assessment that the Australian system would be significantly enhanced by the adoption of fair use, and that ensuring users - including individuals, businesses, schools, universities, libraries and other creators - have the ability to make use of copyright materials in fair ways is one of the most effective ways of addressing many of the problems identified by the Commission, including:

- The costs to society of being unable to access or make effective use of copyright material after the end of its commercial lifetime;
- The market failure in relation to orphan works and out-of-commerce works; and
- The inability to legally undertake many uses that are not harmful to copyright owners.

We are disappointed that some stakeholders continue to engage with the fair use debate using hyperbole and unlikely scenarios, such as suggesting that the introduction of the exception would lead to the end of all statutory licensing and closure of all collecting societies in Australia. This is demonstrably not a plausible outcome from the introduction of fair use, based on the international experience.¹ The ADA advocates for fair use as a *supplement* to, not a *replacement for*, statutory and direct licensing, and does not argue that the introduction of fair use would mean that more than a small number of currently licensed uses would be considered fair. However, we do believe that the introduction of fair use will:

- create greater opportunities for the legal use of copyright material;
- smooth off the edges of existing statutory licence schemes and exceptions, allowing more flexibility and reducing administrative and other costs for schools, universities and libraries; and
- increase the adaptability and fairness of the copyright system overall.

Regarding the Commission's discussion of the 2011 Review of Intellectual Property and Growth and whether its decision not to recommend the adoption of fair use in the UK was strategic (p.149) - we note that during his keynote address to the ADA's Copyright Forum 2016, Professor Hargreaves made the following statement:

Australia is not inhibited by the things that inhibited me [while] reporting on the situation in the UK in 2011, by the things that made me certain that ... it was not the right time and the right place to argue [for fair use]. I think you could argue that Australia is a place where that could be argued.²

We do, however, have a number of comments and suggested changes to the details of the Commission's fair use recommendation. These are provided below.

1. We strongly support the Commission's recommendation that Australia adopt a fair use exception, that it be open-ended, and that it be understood that use by third parties can constitute fair use.

The ADA supports these foundation elements of the fair use model proposed by the Commission.

¹ For more detail, see the submission on the draft report of the Copyright Advisory Group to the COAG Education Council, pp.12-15

² See <https://www.youtube.com/watch?v=DojugJQk3lc> at 42:10

The open ended nature of the fair use exception is central to many of the benefits it provides, most specifically its ability to add adaptability to an otherwise rigid system, and to allow innovative and new uses that have not yet been contemplated by the Copyright Act. This is the key benefit of the exception, and essential to any fair use model.

We also believe that it is important that any formulation of a fair use exception potentially allows third parties to use copyright material on behalf of others (provided such use meets the fairness test). As you know, Australian law has been interpreted in ways that limit the ability of third parties to rely on fair dealing exceptions.³ Thus, existing exceptions permit certain uses by school children as part of their homework, but prohibit their parents from assisting them. Without the ability for intermediaries and enabling organisations such as libraries, schools, universities and online service providers to undertake activities with specific reference to the benefits to their users, the applicability of the provisions will be severely limited.

The potential drawbacks of limiting fair use only to an individual's own purpose are most obvious in relation to the disability sector. A narrow interpretation of the exception will potentially prevent Australia's local disability service sector from undertaking fair uses on behalf of its members, or from accessing overseas collections and databases that would provide valuable catalogue expansions and efficiency gains but which by their nature are legally remote from the person wishing to access the material. We advocate for an approach similar to that of Canada, where the primary focus is on the overall fairness of the use, not on the particular individual who happened to do the act.⁴

2. We support the adoption of an inclusive list of factors to assist the determination of fairness, but prefer the factor fairness test recommended by the ALRC.

Regarding the factors used to assess whether a particular use is "fair", we believe that the four factors outlined by the Australian Law Reform Committee (ALRC) in their report *Copyright and the Digital Economy*⁵ represent international best practice and provide an appropriate test that considers both the actions of the user and the potential impact on the copyright owner. **We therefore recommend that the Commission adopt the ALRC's four factor test, rather than the alternative factors proposed by the Commission.**

While we recognise the aims of the Commission in its alternative drafting, including providing more explicit support for transformative use and private use, we are concerned that departing from the more common language used by the ALRC will have unintended consequences.

³ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105–6.

⁴ See eg *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Bell Canada*, 2012 SCC 36

⁵ See ALRC, *Copyright and the Digital Economy* (2014) Recommendation 5-2. The recommendation and the detailed analysis that led to it is available at <http://www.alrc.gov.au/publications/5-fair-use-exception/fairness-factors>

After extensive analysis of the various models being used internationally, the ALRC proposed a test “based upon the four factors that are common to both the US fair use provision and the existing Australian provisions for fair dealing for the purpose of research or study.”⁶ These factors essentially represent a best practice distillation of the core fairness principles from the different fair use models applied internationally, as well as existing Australian copyright law.

As we said in our original submission to the ALRC, these factors strike “an appropriate balance between familiarity, certainty and flexibility”.⁷ Basing the new fair use provision in large part on Australia’s fair dealing provisions will smooth the introduction of fair use to the legal system, and reassure both courts and the general public that Australia’s existing jurisprudence on fairness will not be lost with the transition. At the same time, by aligning with international models the ALRC factors allow Australian courts to also have regard to other jurisdictions in fleshing out the expanded exception. Drawing on international best practice will be helpful in dampening misinformation that might otherwise be spread about how fair use would work in Australia.

Specific comments about the differences between the ALRC’s factors and the Commission’s proposed factors follow.

- *Commercial or Private Use*

The Commission’s proposed inclusion of a direct reference to “commercial or private use” in the final factor has the potential to inadvertently limit the exception. It runs the risk of being read as implying that it is not possible to have a commercial fair use, or that all private uses are inherently fair - undermining the flexibility and case-by-case nature of the exception. The ALRC quotes Bill Patry as pointing out that this has been the result of similar language in the US exception.⁸ We note that “non-commercial private use” is already on the list of illustrative examples that the Commission proposes to adopt, and we suggest that this is sufficient to indicate to a court that such uses should be regarded favourably, without distorting the application of the fairness test in all cases.

- *Transformativeness*

Similarly, we recommend against a direct reference to transformativeness in the provision.

We are once again concerned that any direct reference to ‘transformative’ in the exception would be used to limit its scope. Although transformativeness is an important element weighing in favour of fair use, and should clearly be considered as part of the ‘purpose and character of the use’ factor, it would be undesirable for uses to be

⁶ ALRC, *Copyright and the Digital Economy* (2014) para 5.11, available at <http://www.alrc.gov.au/publications/5-fair-use-exception/fairness-factors>

⁷ Australian Digital Alliance and Australian Libraries Copyright Committee joint submission to the ALRC (2013) p.9, available at http://www.alrc.gov.au/sites/default/files/subs/586.org_the_australian_digital_alliance_and_australian_libraries_copyright_committee.pdf

⁸ See ALRC, *Copyright and the Digital Economy* (2014) para. 5.31, quoting W Patry, *Patry on Fair Use* (2012), 93. Patry points out that Israel did not include these words in its fair use provision.

excluded from the exception merely because they are not transformative. Non-transformative uses that may nonetheless be fair might include: libraries caching copyright material; schools accessing online documents; individuals forwarding emails. As you know, even though transformativeness is not mentioned in the US fair use provision it has become highly influential in US jurisprudence, and some argue that it is determinative.⁹ We are concerned that were it to be directly mentioned in the Australian fair use test, even as an optional factor, non-transformative uses could rapidly become marginalised or excluded entirely.

The term has also been criticised by Australian rights holders as meaningless or vague.¹⁰ Putting the term in the legislative proposal therefore has the potential to cause confusion and open up the exception to criticism, with a resulting chilling effect.

If transformativeness is explicitly mentioned in the fair use factors, we would suggest that the Explanatory Memorandum contain explicit discussion about its intended meaning and clarify that it is the broader sense of the term used in US copyright law that is to be applied. There was a long debate in the ALRC Discussion Paper regarding the term 'transformative,' and the definition used in that discussion was quite narrow, relating to transformation of the substantive content (eg such as in user generated content). This interpretation of the term would be inadequate to achieve the true benefit of how this principle is used in the US - ie to facilitate uses of copyright content that do not interfere or compete with the copyright owner's own exploitation, whether they be non-consumptive data crunching in research, user generated content, or mass digitisation by libraries. In our view, it doesn't matter so much whether the word 'transformative' is used in the legislation or is the intention is discussed in the EM, as long as this principle is included in the Australian application.

- *Nature of the Use*

We support the ALRC's recommendation to include consideration of the nature of the work in the fairness factors. This factor is common to all other fair use provisions in the world, and its omission seems unnecessary and may even cause confusion. Internationally, the 'nature of the work' factor is often used by courts to take into account whether the work is of a kind at the 'heart' of copyright (eg a literary masterpiece) or marginal (eg a casual email). Using a newspaper article will be fair in very different circumstances than using an oil painting. We note that this factor could also encompass considerations as to whether the work is orphaned or out-of-commerce - considerations that the Commission recommends be taken into account. It seems like a missed opportunity if we do not include this useful, relatively non-controversial factor that aligns both with Australia's existing fair dealing law and international standards.

⁹ For discussion see ALRC, *Copyright and the Digital Economy* (2014) Chapter 10, particularly <https://www.alrc.gov.au/publications/10-transformative-use-and-quotation/transformative-use-and-fair-use>

¹⁰ See, for example, the Screen Producers Association of Australia submission to the ALRC *Copyright and the Digital Economy* inquiry (Submission 281)

- *Commercial Availability*

We do not support the inclusion of the commercial availability of the work as an additional factor in the fair use provision. We understand that the Commission may have intended this recommendation to allow the consideration of such questions as whether a work is orphaned or out-of-commerce. However, we believe such questions could be better considered under 'effect on the market' and 'nature of the work' factors.

We are concerned that inclusion of this language would inflate the importance of commercial factors above other considerations, as it would essentially require them to be considered twice. Due to the principle that legislatures do not include redundant language in legislation, it is likely that Australian courts would interpret the double mention as requiring them to consider both the impact of the use on the copyright owner's market and 'something else,' to give 'commercial availability' - eg perhaps related to licensing options. Indeed, we note that some submissions to the ALRC argued for the inclusion of such a factor for exactly this purpose - to exclude any use for which a licence may be available (no matter the terms or fairness).¹¹ The ALRC ultimately rejected the inclusion of the factor as unnecessary, confusing and inappropriate for many likely fair uses such as 'criticism and review' and 'parody and satire'.

3. We support the Commission's recommendation to include a non-exhaustive list of likely fair uses in the Act, based on the ALRC's proposed list

In particular, we support the inclusion of educational, library or archive use, and providing access to people with a disability in the list. **We also suggest that the Commission make it clear that these purposes should be included in addition to certain specific exceptions that apply to these sectors in the Act, and not as a replacement for them, in line with the recommendations of the ALRC** (see further below).

4. We support the Commission's finding that the fair use exception should cover orphan works.

We suggest that the Commission directly recommend that orphan works be added to the list of illustrative purposes in the fair use exception, to clear up any uncertainty as to its application to this important and underutilised body of works.

Such a recommendation will particularly benefit libraries and archives, who are on the frontline in dealing with orphan works. It will substantially reduce the risks and uncertainty for institutions dealing with these materials, which make up a significant portion of many collections.¹² As is stated in our original submission, the current s200AB provision which is intended to allow libraries and archives flexibility in such situations is confusingly worded and difficult to apply,

¹¹ See ALRC, *Copyright and the Digital Economy* (2014) 5.95-100

¹² See our original submission to the Commission, p.9

particularly with respect to mass digitisation projects, meaning that many orphan works remain locked within their home institutions.¹³

Importantly, an open ended fair use exception will also extend use of these materials beyond the groups already able to rely on s200AB (libraries, archives, schools, universities, the disability sector) to the general population. An orphan work that has been digitised and made available online by a library under s200AB is of little use to Australia's economic and cultural growth if it cannot then be downloaded and repurposed in valuable ways by researchers, private individuals and even businesses. A broad exception that permits reasonable use by all parts of Australian society is essential to ensure such works meet their full potential. Importantly, such an exception opens up the possibilities for orphan works without reducing the level of protection for works that are still commercially available, ensuring that authors are able to continue to derive profit from their works whilst they retain commercial value.

We agree with the Commission (at p.159) that an exception is the most efficient and effective tool for allowing use of orphan works. As noted in our original submission, statutory licensing and similar schemes that have been introduced in relation to orphan works by other countries have proven to be costly, inefficient and ineffective. Problems that have been experienced with such schemes include administrative costs that are higher than payments to authors; fees sitting unused because authors do not come forward;¹⁴ and comments from administrators that show the schemes are designed to tax users rather than to benefit creators.¹⁵ **We recommend that the Commission's final report more explicitly spell out the inefficiencies inherent in using licensing and other bureaucratic systems as solutions to the orphan works problem, and therefore why an exception is a more appropriate approach to enable use of such materials.**

5. We suggest that the Commission recommend that, should fair use be introduced, the s200AB exceptions and other specific exceptions be repealed alongside the fair dealing exceptions, in line with the ALRC recommendations.

As per the ALRC recommendations, the ADA supports retaining some, but not all, of the specific exceptions in the Copyright Act alongside a fair use exception. Where exceptions are frequently used and are generally working well, such is the case for the document delivery (s49)

¹³ See our original submission to the Commission, p.27. See also the Australian Libraries Copyright Committee original submission, pp.10-14

¹⁴ This has been noted by the US Copyright Office in its report on extended collective licensing schemes in relation to Orphan Works and Mass Digitization June 2015 (see <http://www.copyright.gov/orphan/reports/orphan-works2015.pdf>). The Copyright Office stated "the Office agrees with various commenters that ECL specifically for orphan works would end up ultimately as a system to collect fees, but with no one to distribute them to, potentially undermining the value of the whole enterprise".

¹⁵ See Katz, Ariel, 'The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem (July 27, 2012). 27(3) *Berkeley Technology Law Journal*, 2012. Available at SSRN: <http://ssrn.com/abstract=2118886> at 1330. Katz's quotes Mario Bouchard, *The Canadian Unlocatable Copyright Owners Regime*, in *The Copyright Board of Canada: Bridging law and economics for twenty years* 137, 153 (2011) at 153-154.

and interlibrary loan (s50) exceptions for libraries, there seems to be little benefit from disrupting common practice.

However, also as per the ALRC's recommendations, we recommend that should fair use be introduced, in addition to repealing the fair dealing provisions s200AB should also be repealed. Assuming library uses, educational uses and providing access to persons with a disability are included in the non-exhaustive list of examples in the fair use provision, there would seem to be no circumstances in which a use permitted under s200AB would not also be permitted under fair use. Should s200AB be retained, there is the potential that interaction between the two provisions may cause confusion and even lead to the unintentional limiting of the fair use exception eg it may be argued that if s200AB applies to a use, then it is by default not "fair" to make that use under the fair use exception. This could result in the situation in which libraries, schools, universities and disability groups are required to apply multiple tests to make flexible uses, adding to the administrative burden, increasing uncertainty and inevitably having a chilling effect on use of the provision.

The ADA supports the ALRC's decisions on which exceptions should be retained and which should be removed, and encourages the Commission to adopt the ALRC recommendations in this regard.

C. OTHER COPYRIGHT RECOMMENDATIONS AND FINDINGS

Copyright Term

The ADA supports the Commission's finding that the current copyright term is too long. However, we join the Australian Libraries Copyright Committee in their submission in arguing that the optimal term is likely to fall somewhere between the current life plus 70 and the Commission's finding of 15-25 years.

Recognising the limitations set by treaties to which Australia is a party,¹⁶ and the virtually nil possibility of meaningfully winding back copyright terms given international constraints,¹⁷ the ADA advocates that the most effective way to address the excessive length of copyright at this point in time would be to introduce fair use. Fair use counters many of the negative effects noted by the Commission in relation to the excessive copyright term, including general licensing and access costs to society, and more specifically the inability to use materials when copyright owners cannot be identified or located. At the same time, it addresses many of the concerns raised by those who object to proposals that the copyright term, by retaining the rights of authors to exploit their material commercially throughout their lifetime (whether or not they

¹⁶ For example the *Berne Convention for the Protection of Literary and Artistic Works* (as amended on September 28, 1979), Article 7(1) and the *Australian United State Free Trade Agreement* (2005) Article 17.4(4)(a)

¹⁷ For full analysis of these international constraints, see the submission to the Commission produced by Dr Rebecca Giblin (Monash University) and Associate Professor Kimberlee Weatherall (University of Sydney)

choose to take up those rights) and to object to unfair uses of their works even once they are no longer commercially valuable.

Furthermore, the ADA suggests that the Commission recommend that Australia works internationally to ensure that the current copyright term is not extended any further.

Geoblocking

The ADA supports the Commission's draft recommendation 5.1 that the Australian Government should make clear that it is not an infringement for consumers to circumvent geoblocking technology.

In passing, we note that the current government also seems to support the public clarification of the legality of geoblocking in Australia. Prime Minister Turnbull's own blog includes the following FAQ:

Q: Many Australians use a VPN to access Netflix in the US. Is it illegal for me to use a VPN to access Netflix?

- The Copyright Act does not make it illegal to use a VPN to access overseas content.
- While content providers often have in place international commercial arrangements to protect copyright in different countries or regions, which can result in 'geoblocking', circumventing this is not illegal under the Copyright Act.¹⁸

Unpublished works

We strongly support the Commission's draft recommendation 4.3 (which we note is mis-labelled as 4.1 in the current draft) that the Australian Government should amend the Copyright Act to align the copyright term for unpublished works with that of published works.

The ending of perpetual copyright over unpublished works in Australia would not only better align our copyright law with the economic principles underlying copyright (which, as the Commission notes at pp.118-119, do not support the imposition of perpetual monopolies), it would also save a vast amount of Australia's cultural heritage which is literally decaying as a result of existing copyright policy. Aligning the copyright terms for published and unpublished works would result in a massive boon for Australian culture, as literally hundreds of thousands of unpublished works that are currently almost entirely unusable would be simultaneously released into the public domain.¹⁹ This is likely to be the most significant addition to the Australian public domain at any point in history, now or in the future. It should be both encouraged and celebrated.

¹⁸ <http://www.malcolmtturnbull.com.au/policy-faqs/online-copyright-infringement-faqs>

¹⁹ See our original submission to the Commission, p.8

We agree with the Commission that the changes proposed in the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill (CADAOM Bill) do a good job of addressing this problem.²⁰ However, we believe that these amendments should also be extended to unpublished audiovisual works, which were not included in the proposals put forward in the exposure draft.²¹ There seems no argument to differentiate these from other copyright materials, other than perhaps some additional thought required as to drafting. Indeed, there is more urgency as the physical film and tape on which many of these materials are stored decay more quickly than print materials.

We therefore suggest that the Commission recommend that the amendments proposed by the CADAOM Bill be extended to all copyright materials, and that the government table the Bill as soon as possible.

D. RECOMMENDATIONS FROM OTHER SECTIONS OF THE DRAFT REPORT

IP and Public Institutions

The ADA endorses the Commission's draft recommendation 15.1 that all Australian governments implement an open access policy for publicly-funded research.

We endorse this recommendation, and suggest that there should be one overarching policy that applies nationally, rather than separate policies for the national, state and territory governments. We also note that this policy should have some nuance to ensure it focuses on research articles and allows exemptions for creative works such as novels and musical compositions that are the result of research grants.

In addition, we propose the extension of the recommendation to beyond government funded research to Crown copyright material (ie materials for which copyright is owned by the Crown).

We note that the Federal government does have a policy favouring open licensing of materials in which it owns copyright (indeed, we commend the Commission for licensing its own reports, including the draft IP report, under a Creative Commons Attribution licence). The policy was formally adopted as part of the government's 2010 response to the *Government 2.0* report²² and is further expressed in the *Principles on open public sector information* published by the Office of the Australian Information Commissioner in 2011.²³ Furthermore, AusGOAL – an open licensing framework designed for Australian governments based around the Creative Commons licences – was declared by the Council of Australian Governments to be the open access

²⁰ See <https://www.communications.gov.au/have-your-say/updating-australias-copyright-laws>

²¹ Although we note that the issue was raised in the guiding questions provided as part of the consultation.

²² <https://www.finance.gov.au/files/2012/05/Government-Response-to-Gov-2-0-Report.pdf>

²³ http://www.oaic.gov.au/images/documents/information-policy/information-policy-agency-resources/principles_on_psi_short.pdf

licensing framework and programme of choice for governments around Australia in 2009-2010.²⁴

However, varying degrees of priority for its implementation have led to varying degrees of open access maturity among the Australian Governments. Many governments have focused on open data initiatives which, while helpful, should be applied in concert with whole-of-government open access policies.²⁵ For example, while the NSW Minister for Finance endorsed AusGOAL as part of its open data strategy in 2013,²⁶ it has been slow to engage with the framework and programme; many government websites in New South Wales remain all rights reserved and its whole of government Intellectual Property Management Framework makes no mention of open licensing.²⁷ In contrast, in Queensland numerous government websites and materials are published under the Creative Commons Attribution Licence, although the policy is not mandated. Only some State and Territory governments have similar policies.

This means that the open access status of government materials across Australia is patchy at best, and determining the rights to use different materials is difficult. Lack of uniformity in government handling of intellectual property can cause problems for those wishing to access materials. Organisations, such as the National Archives of Australia and National Library of Australia, which have extensive collections of government material, cannot undertake any number of projects seeking to make use of this body of work because of incompatible or unknown licensing. Closed licensing policies by individual governments can also result in the loss of significant public benefits that would otherwise flow from the use of government data by individuals and private entities. Such was the case when Google was banned from accessing government bushfire data during the Victorian bushfires in 2009.²⁸

We therefore suggest that the Commission extend its recommendation to include a default open access policy for all Crown copyright materials at the National, State and Territory levels.

Institutional and Governance Arrangements

We agree with the Commission's observation that the principle concern among stakeholders with respect to the transparency of Australian copyright policy relates to the negotiation of international agreements, rather than to domestic consultations.

In our experience the government's Copyright Branch, whether in their current home in Communications or their former home in the Attorney-General's Department, prioritise and do a

²⁴ <http://www.ausgoal.gov.au/>

²⁵ Western Australia, South Australia, New South Wales, Tasmania and Victoria all have specific open data policies in one form or another, which generally refer to CC licences with a few mentioning AusGOAL. Corresponding whole of government IP policies have only been modified to recommend open access in Victoria, Queensland, and Western Australia.

²⁶ <https://www.finance.nsw.gov.au/ict/resources/open-access-and-licensing-framework>

²⁷ See http://arp.nsw.gov.au/sites/default/files/Intellectual_Property_05.pdf

²⁸ <http://www.zdnet.com/article/vic-govt-limited-googles-bushfire-map/>

good job of engaging with stakeholders. One example is the CADAOM Bill process, with the draft bill developed in close consultation with stakeholders such as the Copyright Agency and CAG, and an exposure draft released early in the process to seek broad public input.

The ADA also recognises that the Australian government is improving its efforts at engagement even within closed negotiations for international treaties. The stakeholder consultation meetings recently held alongside Perth negotiations for the Regional Cooperation Economic Pact (RCEP) provide a good step towards seeking input from industry, civil society and private individuals on these important and binding agreements. However, we agree with other stakeholders quoted by the Commission (at p.430) that it remains to be seen whether the impact of such consultations is apparent in the final agreements. Public engagement is still minimal.

By comparison, the European Commission has committed to make its Transatlantic Trade and Investment Partnership negotiations with the United States at least partly transparent.²⁹ Although still closed from the US side, the EC publishes summary fact sheets, EU negotiating texts and EU proposals. This allows industry, civil society and the public to understand and provide proper commentary on the text. Without such text release protocols there is no ability for experts to spot potential problems or errors in the proposals, and no true input or oversight from any group other than the negotiators themselves. Even parliamentary ability to influence the agreement is limited, with texts such as the Trans Pacific Partnership Agreement (TPP) being presented to Australia's Joint Senate Committee on Trade on a "take it or leave it" basis.

We therefore propose that the Commission include in its recommendation that Australia should commit to transparency measures that, at a minimum, include release of Australian negotiating texts and proposals for all future trade agreements.

Compliance and enforcement rights

We strongly support the Commission's draft recommendation 18.1 that the copyright safe harbour scheme be expanded to all online service providers.

An important element to note in the debate surrounding the safe harbour scheme is that this change does not, as some would suggest, prejudice the law in favour of intermediaries. The scheme is intended to provide a carrot to encourage online service providers to cooperate with copyright holders – as a quid pro quo for receiving the protection afforded by the scheme, intermediaries are expected to comply with certain protocols designed to assist with copyright enforcement online. It is intended to be a win-win scheme, which provides benefits to both rights holders and intermediaries.

The safe harbour scheme is intended to provide a streamlined process for dealing with online infringement. The narrow application of the scheme in Australia undermines the efficiency gains from this, as it means that different segments of industry are operating under different rules for

²⁹ See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

what is essentially the same problem. It is not clear what steps Australian online service providers – other than carriage service provider (CSPs) – should take when approached about copyright infringements on their services. Or, indeed, how copyright owners should approach them. In theory, the appropriate process would be to hire a lawyer and commence communique – a process that is inevitably going to be significantly slower and more costly than the safe harbours’ regulated notice and takedown scheme. Many rights holders therefore choose to act as if the notice and takedown system under the safe harbour scheme applies to all Australian online service providers, either ignoring or ignorant of the fact that it only applies to CSPs. Intermediaries to whom it does not apply will in many cases be uncertain as to what legal steps they should be taking in response.

As is noted by the Commission in its draft report (at p.489) in these confusing circumstances, many non-CSP service providers who have sufficient knowledge of the safe harbours (eg large international groups such as Facebook who operate under the scheme in other jurisdictions) do choose to comply with their requirements. However, voluntary adoption by segments of the market does little to remedy the lack of clarity for other less informed parties, whether copyright owners or online service providers, as to the steps they should be taking. Non-CSP intermediaries may choose to act as if the notice and takedown scheme applied, but if they do so, and are still accused of authorising infringements over their systems, their legal position is unclear. They do not have the legal protections set out in the Act, but must argue under the ‘common law’ of authorisation.³⁰

In essence, this results in a situation where copyright holders are in many circumstances gaining the benefits of the scheme in terms of rapid takedown of material, without Australian online service providers receiving the corresponding legal and process certainty. It leaves us in a position where public libraries have less protection re third party copyright liability than commercial CSPs, and Australian businesses are more vulnerable than their international peers.

In short, the safe harbour system is an important efficiency mechanism in the Australian copyright enforcement space. It benefits both rights holders and intermediaries and provides the certainty important to incentivising innovation and entrepreneurship in Australia.

As with the Commission’s recommendation with respect to unpublished works above, we note that the CADAOM Bill, if tabled, would effectively introduce the Commission’s recommended change. **We therefore once again suggest that the Commission recommend the expeditious tabling of the Bill in the new Parliament.**

E. INFORMATION REQUESTS

5.1 - Copyright and contract

³⁰ although we acknowledge that such steps might be considered by a court in common law proceedings

Although we agree with the Commission that the problem of contracts overriding copyright exceptions is particularly strong in the library and archives sectors, we argue that it also causes significant disadvantage to other consumers.

For examples of licences outside the library and archives sector that restrict user rights, a good starting point is the education sector, which is subject to many of the same restrictions as libraries and archives as a result of the increasing move to digital. We endorse the comments of the Copyright Advisory Group (CAG) to the COAG Education Council on this issue.

But the problems aren't restricted to libraries, archives and educational institutions, who are at least generally aware of the licences they are entering into. The growth of digital products in the marketplace also means that consumers are increasingly restricted from making use of goods they have (in their mind at least) purchased – restrictions they are often unaware of until they try to make a prohibited use.

Furthermore, we would suggest that the same arguments and concerns regarding restrictive copyright licensing apply equally to the abuse of technological protection measures (TPMs) to prevent uses otherwise legally permitted under the Copyright Act. The ban on circumvention of TPMs essentially allows copyright owners to extend their control beyond the limits set by the Copyright Act, and have these extended rights enforced by copyright law.

The problem is arguably worse in relation to TPMs than licences, as:

- there is currently no requirement that TPMs be providing protection against copyright infringement for protection under the Copyright Act to apply. Thus they are not only are they frequently used to prevent uses permitted under copyright exceptions (see example below), they can also be used to prevent use of public domain material and (arguably in Australia at least) to limit products which have little or no link to copyright;³¹
- Where circumvention of a TPM is permitted in accordance with exemptions set out in the Copyright Regulations Schedule 10A, it is still illegal to supply technologies or services to enable such uses. This seems to rely on the idea that individuals and institutions wishing to legitimately crack a TPM (eg a library wishing to make a preservation copy under s51) will be able to create the technologies required to do so themselves. This is clearly implausible, and creates an environment in which users are required to access illegally created products to conduct legal acts.

We therefore recommend that the Commission extend its consideration of the problems arising from contracting of copyright exceptions to include the use of TPMs to prevent legal use of copyright material.

³¹ See for example the US cases relating to garage door openers (*The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004)) and printer cartridges (*Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. Oct. 26, 2004)). Although neither of these cases was successful, there is no protection against such cases being brought and potentially being upheld in Australia.

The problems created for consumers by the combined use of restrictive licensing and TPMs are demonstrated well by the example of the “closed environment” created by most digital music services. When consumers purchase, or rather license, music from an online music service they are routinely restricted (by both license and TPM) from transferring that music to devices that are not licensed for that particular service (eg non-Apple products for iTunes). This is in direct contravention of the individual’s rights under s.109A of the Copyright Act to transfer legally acquired music to other devices for private and domestic use. Similarly, few music services permit remixing or public performance of their products, even where it would be permitted under a fair dealing or fair use exception.³²

This problem will only increase if fair use is introduced, as it will almost inevitably result in an expansion of the activities that consumers can legitimately undertake. Activities that are currently technically illegal - such as transferring a DVD you own to your computer to watch at a later time – would most likely be considered legal under fair use. Yet licences and TPMs covering these materials will almost certainly continue to prohibit them. We argue that if fair use is truly to be regarded as a user right as the Commission proposes, rather than just a narrow defence, it must be protected both against contracting out and against exclusion by TPMS.

We therefore recommend that the Commission include fair use in their list of exceptions that should be given legislative protection against contracting out.

Furthermore, we recommend that the Commission provide feedback in their report on TPMs, and state that the prohibition on circumvention of TPMs should be strictly limited to the purpose of enforcing copyright, by:

- **expanding the current exemptions to the TPM ban to include all exceptions in the Copyright Act (including fair dealing and any future fair use exception);**
- **(if possible under Australia’s international agreements)³³ amending those exemptions to include the supply of TPM devices and services, not just the act of circumvention; and**
- **linking the prohibition on circumvention to the prevention of copyright infringement, so that it does not apply where the material being protected is in the public domain or the user has a legitimate right to access the work.**

5.2 - Collecting Society Code of Conduct

³² For more discussion of the restrictions imposed by music services, see <https://www.eff.org/pages/customer-always-wrong-users-guide-drm-online-music>; and for other TPM controlled products, see <https://www.eff.org/issues/drm>

³³ It seems likely that this would not be permitted under the Australia-United States Free Trade Agreement AUSFTA). However, it may be allowed under the Trans Pacific Partnership Agreement (TPP) should it come to force, as a result of a side letter between Australia and the US. The legal position where conflicts exist between these two agreements is not yet clear; however it may be possible for Australia to take advantage of the additional flexibility negotiated in the TPP, and/or, enter into negotiations with a view to include the TPP language in the AUSFTA via amendment of the text or negotiation of a side letter.

The ADA supports the CAG submission on this information request.

Specifically, the ADA supports the CAG proposal that:

- **The Minister be given greater powers to direct and oversee the operation of collecting societies, particularly with respect to transparency in sampling methods and distributions;**
- **That the Act be amended to require collecting societies to take into account the interests of both their members and licensees in determining fees and licence conditions; and**
- **That the process for determining and amending the collecting societies' voluntary code of conduct be reviewed to ensure more independent oversight and a more workable process for when changes are needed.**

5.3 - Educational Statutory Licences

The ADA supports the exposure draft of the CADAOM Bill, including its proposed amendments in relation to the educational statutory licences. We agree with the government, the education sector and the relevant collecting societies that these amendments will improve the efficiency and effectiveness of the educational statutory licences set out in the Copyright Act. These changes will allow educational institutions and collecting societies to adapt the administrative and bureaucratic elements of system to take advantage of the latest technologies and recognise current norms, rather having their hands tied by increasingly outdated and inappropriate legislative requirements. We also agree with the Commission that one of the most important elements of the proposed amendments is that they make it clear in the Act that users may enter into voluntary agreements that operate alongside and supercede the operation of the statutory licences to increase efficiency and effectiveness.

However, we agree with the Commission (at p.139) that simplification of the existing licences is not sufficient to make the system effective. In addition to the licences, exceptions are still needed for:

- efficiency – for example, in cases where the bureaucratic and administrative costs of operating a statutory licence is out of balance with the benefits to copyright owners. This may occur, for example, in relation to the use of orphan works;³⁴
- practicality - where tracking or enabling uses through licences becomes impractical, such as the micro-uses that occur daily through the ordinary use of technologies;
- ethics - some activities simply shouldn't be subject to remuneration because the societal benefits they provide make any barriers created by licences or fees unacceptable. An example here is the provision of access to people with a disability, and the use of copyright material within the classroom; and

³⁴ See our original submission to the Commission, p.13

- economics - to avoid windfall payments to copyright owners who don't want them eg people who have put their material online for free and do not intend to elicit payments for school access and copying.

The introduction of fair use and the inclusion of educational uses in the list of illustrative purposes for the exception is the best way of ensuring that free use of materials in the educational environment is permitted where it is fair and necessary for an efficient system, whilst at the same time maintaining payments to copyright owners for large scale uses for which licensing is clearly appropriate.