



**Response to the Productivity Commission Draft Report:
Right to Repair
June 2021**

Submission by Australian Copyright Council

23 July 2021

EXECUTIVE SUMMARY

The Productivity Commission's (the **Commission**) *Right to Repair, Draft Report (Draft Report)*. outlines four potential reforms to the *Copyright Act 1968 (the Act)* in a bid to limit the barriers to repair for consumers. These include:

- (i) an exception to allow repairers to legally procure tools required to access repair information hidden behind TPMs, such as digital locks
- (ii) a specific copyright exception for the reproduction and sharing of information for the purpose of repair - a new fair dealing exception
- (iii) a general copyright exception that may encompass the reproduction and sharing of information for the purpose of repair (a broad fair use exception), and
- (iv) an amendment to the Act prohibiting the use of contract terms that restrict repair-related activities otherwise permitted under copyright law.

It is the ACC's position that amending the existing Australian copyright law framework is not appropriate for matters which are best dealt with by changes to consumer and competition law, as the issues raised by the Commission are matters of trade and not of copyright policy. This position is borne out by similar solutions in other jurisdictions.

Of the 4 proposals outlined above, option (ii), the introduction of a limited new fair dealing exception, narrowly drafted to allow for repair to the extent that it is necessary, may be appropriate, with further consultation.

1. Introduction

The Australian Copyright Council (**ACC**) is grateful for the opportunity to make a submission on the Productivity Commission's (the **Commission**) *Right to Repair, Draft Report* (**Draft Report**).

About the Australian Copyright Council

- 1.1. The ACC is a small, independent, not-for-profit, non-government organisation dedicated to promoting understanding of copyright law and its application. Representing the peak bodies for professional artists and content creators working in Australia's creative industries and, Australia's major copyright collecting societies, we work to foster collaboration between content creators and consumers.¹
- 1.2. The ACC is a unique organisation:
 - it is the only dedicated copyright expert organisation in Australia
 - its focus is on copyright as it applies to all art forms
 - it provides advocacy, advice and information on copyright issues
 - it is a membership-based organisation, representing over a million creators.
- 1.3. The ACC has 27 affiliate member organisations, several which are making separate submissions in response to the Draft Report. These affiliate members represent over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries.
- 1.4. As part of its services, the ACC provides information, education, training and free written legal advice to those who fall within its guidelines² including the staff of libraries, galleries, museums and educational institutions.
- 1.5. The Commission's proposals pitch consumers' 'right' to repair goods against copyright owners' rights. The ACC recognises the broader philosophical context which must be examined, highlighted in the Draft Report³, but the ACC focusses its comments to the policy reasoning as it relates to copyright owners and consumers.
- 1.6. We note that these proposals for reform sit outside the government's proposed access reforms⁴ despite the Commission's Term of reference highlighting that one of the issues is consumers' inability 'to repair the products due to a lack of access to necessary tools, parts or diagnostic software.'⁵

¹ See Appendix 1 for a list of ACC current affiliate members.

² See Appendix 2.

³ [Draft report - Right to Repair Productivity Commission \(pc.gov.au\) \(Draft Report\)](#) p 38.

⁴ See [Copyright access reforms | Department of Infrastructure, Transport, Regional Development and Communications 13 August 2020](#).

⁵ [Terms of reference - Right to Repair Productivity Commission \(pc.gov.au\)](#) 29 October 2020.

Copyright protection in Australia

1.7. Copyright material is protected in Australia under the *Copyright Act, 1968* (Cth) (**the Act**) and *Copyright Regulations 2017*.

1.8. The Act divides protection of copyright material into two parts – Part III works and Part IV subject matter other than works.

1.9. The first owner of the copyright in Part III works is the author,⁶ and for Part IV works (except for published editions where it is the publisher), it is the maker.⁷

1.10. Part III⁸ works include:

- **literary works** such as journal articles, novels, screenplays, poems, song lyrics, computer programs and compilations
- **artistic works** such as paintings, drawings, cartoons, sculpture, craft work, architectural plans, buildings, photographs, maps and plans
- **dramatic works** such as choreography, screenplays, plays and mime pieces, and
- **musical works**, that is, the music itself, separately from lyrics.

1.11. Part IV⁹ works include:

- **cinematograph films** - the visual images and sounds in a film, video or DVD are protected separately from any copyright in works recorded on the film or video, such as scripts and music
- **sound recordings** - the actual recording itself is protected by copyright, in addition and separate to, for example, the music or story that is recorded
- **broadcasts** - TV and radio broadcasts, separate from the copyright in the films, music and other material broadcast, and
- **published editions** - the typographical arrangements, is protected separately from the copyright in works reproduced in the edition such as poems or illustrations or music.

1.12. Owners of **Part III works** enjoy the follow exclusive rights:¹⁰

literary, dramatic or musical works	<ul style="list-style-type: none"> • reproduce the work in a material form • publish the work • perform the work in public • communicate the work to the public, and • make an adaptation of the work.
artistic works	<ul style="list-style-type: none"> • reproduce the work in a material form • publish the work

⁶ Copyright Act s 35.

⁷ Copyright Act ss 97-100AE.

⁸ Copyright Act ss 31-83.

⁹ Copyright Act ss 84-113C.

¹⁰ Copyright Act s 31.

	<ul style="list-style-type: none"> • communicate the work to the public
literary works (other than a computer programs), musical or dramatic works	<ul style="list-style-type: none"> • to enter into a commercial rental arrangement of the work reproduced in a sound recording
computer programs	<ul style="list-style-type: none"> • to enter into a commercial rental arrangement.

Whilst owners of **Part IV subject matter other than works** have the exclusive right to:

sound recordings¹¹	<ul style="list-style-type: none"> • make a copy • cause the recording to be heard in public • communicate the recording to the public, and • enter into a commercial rental arrangement the recording
cinematograph films¹²	<ul style="list-style-type: none"> • make a copy of the film • cause the film to be seen and/or heard in public, and • communicate the film to the public.
television and sound broadcasts¹³	<ul style="list-style-type: none"> • for television broadcasts visual images - to make a film of the broadcast, or a copy of the filmed broadcast; • for sound broadcasts, or the sounds of television broadcast - to make a sound recording of the broadcast, or a copy of the sound recording, and • for television and sound broadcasts - to re-broadcast it or communicate it to the public otherwise than by broadcasting it.
published editions of works¹⁴	<ul style="list-style-type: none"> • a facsimile copy of the edition

1.13. Information per se, is not protected by copyright.

¹¹ Copyright Act s 85.

¹² Copyright Act s 86.

¹³ Copyright Act s 87.

¹⁴ Copyright Act s 88.

2. Draft Report recommendations for reform

2.1 The ACC confines its response to the Draft Report to the issues of copyright raised particularly in:

- **Draft Finding 5.1 Intellectual Property-Related Barriers to Repair**, and
- **Draft Finding 5.2 Options to Improve Access to Repair Information**.

In doing so, we highlight concerns which go to **Information request 5.1 Improving Access to Repair Information**, to the extent that they concern copyright.

2.2 Draft Finding 5.2 Options to Improve Access to Repair Information considers two options for Copyright Act reform:¹⁵

- (i) amending the Act allowing for the reproduction and sharing of repair information, by introducing either:
 - a general **fair use exception**, or
 - a **repair-specific fair dealing exception**
- (ii) amending the Act allowing repairers to legally acquire tools to access repair information protected by technological protection measures (TPMs). The Commission notes that this may also require the Australian Government to clarify the scope and intent of the existing exception under the Act for circumventing TPMs for the purpose of repair.¹⁶

So, there are 2 issues:

- (i) *access* to the information, and
- (ii) permitting the *reproduction and sharing* of information.

The ACC regards these issues as distinct.

2.3 In addition, the Commission suggests ‘contracting out’ amendments to the Act prohibiting the use of contract terms that restrict repair-related activities otherwise permitted under copyright law, to prevent manufacturers using contractual arrangements (such as confidentiality agreements) to ‘override’ the operation of any reforms to the Act.

2.4 These suggested reforms, and their greater impact on the landscape of copyright law in Australia, are addressed below.

¹⁵ Draft Report p 32.

¹⁶ *Copyright Regulations 2017* reg 40(2)(d)(ii).

3. Proposed changes to the copyright regime to access repair information and to facilitate the sharing and reproduction of repair information

- 3.1 It appears that the Report has conflated access and the sharing and reproduction of information.
- 3.2 We understand that the proposals recommending change to the Copyright Act's TPM regime and contracting out, go to the issue of accessing of repair information.
- 3.3 Proposals relating to fair dealing, fair use and the doctrine of exhaustion, go to the sharing and reproduction of copyright information.
- 3.4 The Draft Report makes clear that the 'the extent to which intellectual property protections restrict repair is patchy and largely anecdotal.'¹⁷ Further, the Draft Report points out that,
- The case for such reforms is not clear cut. In addition to uncertainty about the materiality of the underlying barriers to repair, other considerations include:
- potential unintended impacts from attenuating copyright protections (such as heightened product safety and security risks)
 - implementation challenges associated with adherence to international copyright obligations.
- 3.5 The ACC therefore highlights that *any* change to the Copyright Act without a thorough analysis is pre-emptive given that there are other legislative tools which are better served to deal with the issues raised.

¹⁷ Draft Report p 31.

4. Access - technological protection measures - TPMs

4.1 As part of its services, the ACC offers information and advice to creators as to how to protect their copyright material. Some of the ways we suggest include the use of TPMs and Electronic Rights Management Information (**ERMI**).¹⁸

4.2 There are two main types of TPMs:

- (i) those that restrict access to the material (access control TPMs), and
- (ii) those that limit or prevent copying of the material (access control TPMs).

These protections include:

- access codes
- password-only access
- view-only documents, and
- low-resolution images.

4.3 Electronic Rights Management Information¹⁹ is information that has been embedded or attached to copyright-protected material and may include details about the material, the copyright owner and related data eg. details embedded in the metadata of an audio file or the watermarking and other data embedded into an image or video file. A copyright owner may act against anyone that alters or removes such data with the aim of enabling, concealing or facilitating infringement of that material.²⁰

4.4 One of the Draft Report proposals to overcome perceived barriers to repair, is to introduce an exception to the Copyright Act allowing repairers to legally procure tools required to access repair information hidden behind TPMs (such as digital locks).²¹

4.5 Currently, the Copyright Act prohibits:

- the circumvention of an access control TPM - ss 116AN(1), 132APC
- the manufacture of a circumvention device for a TPM – ss 116AO(1), 132APD, and
- providing a circumvention service for a TPM - ss 116AP(1), 132APE.

4.6 The Act contains several exceptions and defences to sections 116AN(1) and 132APC(1), which facilitate circumvention of TPMs in those circumstances²². The ACC is most concerned with, any changes to:

- s 116AN(1) Circumventing an access control technological protection measure

¹⁸ [Protecting Your Copyright - Australian Copyright Council](#).

¹⁹ Copyright Act s 116B.

²⁰ Copyright Act s 116B(2).

²¹ Draft Report p 16.

²² Copyright Act ss 116N (2) - (9). Defences are outlined in ss 132APC (2) - (9).

The ACC made 2 submissions to the Attorney-General's Department's, 'Review of Technological Protection Measures made under the Copyright Act 1968' (2012).

- s 116AO(1) Manufacturing etc. a circumvention device for a technological protection measure, and
- s 116AP(1) Providing etc. a circumvention service for a technological protection measure.²³,

which would result in increasing access to TPM circumvention devices, and the related offences outlined in:

- s 132APC(1) Circumventing an access control technological protection measure
- s 132APD(1) Manufacturing etc. a circumvention device for a technological protection measure, and
- s 132APE(1) Providing etc. a circumvention service for a technological protection measure.

4.7 These exceptions are underpinned by Copyright Regulations²⁴ regulation 40 which provides in summary, that the circumvention of TPMs is permitted in certain circumstances for:

- libraries
- archives
- educational institutions
- access by or for persons with a disability, and
- the making of interoperable products.

There is also a limited exception for repair in reg 40(2)(d)(ii).

4.8 In a practical sense, the existence of access-control TPMs, provide a framework for the protection of copyright material safeguarding the time and financial investments of copyright owners. These protections have become of critical importance with the ease of digital dissemination of copyright content. This highlights the importance of having a scheme which protects copyright material and shows that the balance to consumers and others is already struck.

4.9 The Draft Report notes that some industries are dependent on TPMs for the running of their business and allowing greater access to TPM circumvention devices would 'better arm malicious actors'²⁵. In response, the Commission states that unauthorised use of copyright material carries substantial penalties which would still provide deterrent to non-repair TPM circumvention.²⁶

4.10 Whilst the Commission states that the 'uncertainty' about what constitutes a breach of copyright and 'the associated penalties (along with the cost of litigating) could discourage self and small independent repairers from undertaking repairs'²⁷, it fails to recognise that it is displacing the onus to litigate against the 'malicious actors', on copyright owners many of whom may themselves be individual creators and small businesses lacking the financial means to do so.

²³ Copyright Act ss 116AN(2)-(6), 116AO(2)-(6), 116AP(2)-(6).

²⁴ Copyright Regulations 2017, Part 7- Technological protection measures.

²⁵ Draft Report p 168 quoting the Interactive Gaming and Entertainment Association (IGEA) submission 103 (at p 24) to the Commission's *Right to Repair Issues Paper*, December 2020.

²⁶ Draft Report p 181.

²⁷ Draft Report p 177.

Australia’s international obligations.

4.11 Australia is a party to several international conventions and agreements, which gave rise to the current TPM provisions of the Act. The major TPM legislative developments are listed below²⁸:

	WIPO Copyright Treaty Article 11 - Obligations concerning Technological Measures	
2000	<i>Copyright Amendment (Digital Agenda) Act 2000</i>	
2001	‘Cracking Down on Copycats’, report of the House of Representatives Committee on Legal and Constitutional Affairs	Recommendation 3: technological protection devices The Committee recommends that industry be encouraged to develop technological protection devices that are used to protect copyright material. The Committee further recommends that the Copyright Act be amended so as to provide legal sanctions against the removal or alteration of technological protection devices.
2005	House of Representatives Standing Committee on Legal and Constitutional Affairs Review of technological protection measures exceptions ²⁹	
2005	Australia–United States Free Trade Agreement (AUSFTA) Article 17.4.7	
2006	<i>Copyright Amendment Act 2006</i>	
2012	Attorney-General’s Department, Review of Technological Protection Measure Exceptions made under the Copyright Act 1968	Completed in 2015. Made public September 2017
2017	<i>Copyright Legislation Amendment (Technological Protection) Regulations 2017</i> ³⁰	Updated the 1969 Copyright Regulations to <i>Copyright Regulations 2017</i>

4.12 Chapter 17 of Australia United States Free Trade Agreement (AUSFTA) deals with intellectual property rights.³¹ Article 17.4.7 of the AUSFTA requires that ‘adequate legal protection and effective legal remedies against the circumvention of effective technological measures’ must be provided for in our legislative framework. Changes to the Copyright Act in 2006, shown above, gave effect to this Article.³²

²⁸ Further detail may be seen in the Joint Submission from the Australian Film/TV Bodies (of which, ANZSA is an ACC affiliate) to the Draft Report at paras [23]-[28] (**Film/TV Joint Submission**), a copy of which the ACC has viewed.

²⁹ [House of Representatives Committees – laca protection report.htm – Parliament of Australia \(aph.gov.au\)](http://aph.gov.au)

³⁰ [Consultation on copyright laws opens | Department of Infrastructure, Transport, Regional Development and Communications](http://www.infrastructure.gov.au)

³¹ [Chapter Seventeen - Intellectual Property Rights | Australian Government Department of Foreign Affairs and Trade \(dfat.gov.au\)](http://dfat.gov.au)

³² *Copyright Amendment Act 2006*

4.13 As outlined in the Draft Report, any diminution in the current protections under the Act, will require an amendment to AUSFTA with resulting time and resource costs.³³

4.14 The ACC opposes amendments to the Copyright Act which would result in third parties accessing information protected by TPMs. These parts of the Act and regulations form a framework where TPMs protect existing business models as well as secure pathways for new and emerging business models. The available exceptions under the Act provide sufficient avenues for the legitimate use of copyright material for the purposes of repair.

³³ Draft Report p 181-182

5. Access - contracting out

- 5.1 Contracting out provisions prohibit or limit the ability of contracting parties to 'contract out' of, in this case, copyright exceptions under the Act.
- 5.2 The Commission notes that in the proposed fair dealing exception, 'it may be beneficial to include in the exception (or Copyright Act generally) a prohibition on the use of contractual agreements to 'override' exceptions.'³⁴
- 5.3 Whilst we note s 47H of the Act allows for limited contracting out for computer programs, the ACC opposes the inclusion of contracting out provisions in the Act, particularly any 'general' ones which apply across the board.
- 5.4 The ACC refers to its previous submissions to prior proposed contracting out amendments³⁵ which may be summarised as follows:
- **Need.** Given the safeguards provided by contract and consumer laws in Australia (noting that those laws are already made up of extensive legislation and case law, there is no reason the Copyright Act should be amended to provide for contracting out.
 - **Effectiveness.** Given Australia is a net importer of copyright material, it is unlikely that the governing law of such contracts will be Australian.
 - **Uncertainty.** Given copyright transactions are affected by contract, contracting out amendments in the Copyright Act are likely to create further uncertainty.
- 5.5 The ACC says further:
- 5.5.1 While certain contracting out prohibitions have already been enacted in consumer protection laws, introducing such prohibitions in copyright law, where creators more often than not, have limited bargaining power, will further weaken copyright owners' ability to seek meaningful value and control, consistent with the intended purpose of the Act and the long-standing principle that individuals have a freedom to contract (subject to countervailing public policy grounds).
- 5.5.2 In a digital and cross-jurisdictional marketplace, it is fundamental to business that contracts can be freely entered into. Contracting out restrictions may cause harm to some start-up tech companies who may benefit from flexible licensing arrangements and introduce uncertainty that gives rise to contractual transactions which harm (by way of expense, complexity or otherwise) not only to copyright owners, but to all parties involved in the transaction.
- 5.5.3 Many goods and services are provided to Australians under contracts governed by the laws of foreign jurisdictions, making any restrictions on contractual freedom:

³⁴ Draft Report p184.

³⁵ See ACC submissions: '[Submission in Response to the Copyright Modernisation Consultation Paper](#)' (July 2018); '[Submission to Government in Response to the Productivity Commission Final Report](#)' (February 2017); '[Submission to the Australian Law Reform Commission: Copyright and the Digital Economy](#)' (November 2012).

- irrelevant, and
- risk incentivising more contracts to be pushed offshore – which may cause harm to Australian consumers and potentially put Australian goods and services at a competitive disadvantage.

5.5.4 Restrictions on freedom to contract may affect innovation inhibiting new business models or affecting the willingness of copyright owners to make their material available online at all where, for example, they could not protect the integrity of the work or their commercial interests.³⁶

5.5.5 The contracting out prohibitions may fail the three-step test underpinning copyright exceptions in international law, if they conflict with the normal exploitation of a creators' works, and

5.5.6 Irrespective of the arguments in favour of prohibiting contracting out of copyright exceptions, there are bound to be clear situations where contracting out provisions should not be invalidated. For instance, it would seem nonsensical to allow copyright exceptions which breach non-disclosure or confidentiality, especially where access to that copyright material was only granted on that basis.

³⁶ ACC submission, 'Submission to the Australian Law Reform Commission: Copyright and the Digital Economy' (November 2012) p 56.

6. Reproduction and sharing of information - fair dealing exception for repair

- 6.1 Fair dealing exceptions are provisions under the Copyright Act which allow acts which would otherwise infringe copyright.
- 6.2 The Draft Report outlines a specific copyright exception for the reproduction and sharing of information for the purpose of repair - a new fair dealing exception.³⁷
- 6.3 The existing fair dealing exceptions are:
- research or study - ss 40 and 103C
 - criticism or review - ss 41 and 103A.
 - parody or satire - ss 41A and 103AA
 - reporting news - ss 42 and 103B
 - professional advice by a lawyer, patent attorney or trade mark attorney – ss 43 and 104,³⁸ and
 - enabling a person with a disability to access the material ss 113E – 113F.
- 6.4 So, but for being included under the fair dealing umbrella, these acts would be infringements of copyright.
- 6.5 To rely on any fair dealing exception, the particular use of the material without permission must be for one of the purposes outlined above and must be 'fair' in the circumstances. This must be assessed on a case-by-case basis. It should be noted that an assertion of fair dealing by a user of copyright material does not make it so – only a court may determine this.
- 6.6 Factors which may be considered when determining whether or not a particular use is 'fair', include:³⁹
- the purpose and character of the dealing
 - the nature of the work or adaptation
 - the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price
 - the effect of the dealing upon the potential market for, or value of, the work or adaptation, and
 - in a case where only a part of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

When determining whether a particular use is 'fair', no one factor will be determinative.

- 6.7 These 'fairness factors' are an articulation of the three-step test⁴⁰ underpinning copyright exceptions in international law, namely, that exceptions to exclusive rights should be

³⁷ Draft Report p 178.

³⁸ The fairness requirement is only required for section 43, not section 104.

³⁹ Copyright Act s 40(2) and Katzmann J. in *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434 at [301].

⁴⁰ Article 9(2) of the Berne Convention of which Australia is a member.

confined to:

- (i) certain special cases,
- (ii) which do not conflict with a normal exploitation of the work, and
- (iii) do not unreasonably prejudice the legitimate interests of the rightsholder.

6.8 So, any proposed fair dealing exception for repair, must at least meet this threshold and only apply where there is not a licence available for use of the material.

7. Reproduction and sharing of information - fair use

- 7.1 Fair use was codified as a defence to infringement under United States copyright law in 1976.⁴¹ Under the regime, US courts are guided by four fairness factors to determine if a use of copyright material is fair. Unlike Australia's fair dealing framework, the US does not provide an exhaustive list of uses, but a list of illustrative purposes.
- 7.2 The Draft Report outlines in the alternative, a general copyright exception that may encompass the reproduction and sharing of information for the purpose of repair ie. a broad fair use exception. Again, this proposal is not about access to repair information; it is about the reproduction and sharing of information.
- 7.3 The introduction of fair use has been the subject of Commission recommendations in the past.⁴²
- 7.4 The ACC has previously indicated by way of extensive public submissions, that it does not support the introduction of a fair use defence.⁴³ The ACC position is unchanged. Australian law to date has considered several specific exceptions by reference to actual, practical examples. Such a careful, purposive approach to any necessary legislative change should remain.
- 7.5 The ACC will not repeat its prior submissions in detail, but highlight once again the following non-exhaustive list of concerns⁴⁴:
- attempts to moderate all competing interests with a 'one size fits all' solution, a fair use defence will necessarily introduce significant legal uncertainty into the Australian legal system.
 - it is unwise to import an American style system of fair use in the context of the Australian experience and legal system, where Australian courts are not bound to follow American decisions.
 - because the US fair use defence⁴⁵ is a non-exhaustive list of illustrative purposes that may be fair use as opposed to Australia's clearer and more certain exhaustive list of fair dealing exceptions, there will be less certainty for both users and rights holders.
 - further, the notion of fairness should also involve predictability. The less specific the drafting of a defence or exception, the less certainty involved in the applicability of that exception in preference to relying on a licence. This will increase transaction costs for both users and creators.
 - there is a stronger likelihood that a broad fair use exception will allow those in breach to simply claim 'fair use', placing an even greater onus on rightsholders to litigate.

⁴¹ [Section 107 US Copyright Act 1976](#).

⁴² Productivity Commission, '[Intellectual Property Arrangements](#)' (September 2016) (**Productivity Commission Report**). See also Productivity Commission, '[Intellectual Property Arrangements Issues Paper](#)' (October 2015).

⁴³ See, for example, ACC submissions: *Submission to the Australian Law Reform Commission: Response to Copyright and the Digital Economy Discussion Paper* (July 2013); '[Submission in Response to Productivity Commission Draft Report on Intellectual Property Arrangements](#)' (June 2016); and 'Submission to Government in Response to the Productivity Commission' Inquiry into Intellectual Property Arrangements *Final Report* (February 2017).

⁴⁴ See for example, Australian Copyright Council, '[Submission in Response to the Copyright Modernisation Consultation Paper](#)' (July 2018) [6].

⁴⁵ [Section 107 US Copyright Act 1976](#).

- 7.6 The Act already contains a number of fair dealing defences⁴⁶ and other exceptions that limit the ability of creators to exploit their works and control reproduction of those works in many instances.
- 7.7 With that in mind, if further legislative changes are to be made, the ACC prefers the continued adoption of a purposive approach, namely, the introduction of, at most, carefully considered specific fair dealing defences following a consultative process.
- 7.8 We also note, The Minister for Communications, Cyber Safety and the Arts, Paul Fletcher's public statement:⁴⁷

Some argue for a more flexible approach, including a US style fair use approach. However, I am concerned that such an approach would bring greater ambiguity or uncertainty, impose additional time and cost burdens on both users and copyright owners and lead to either increased litigation or, alternatively, risk averse behaviour by users - with the result that content is not used. In my view, there is a better case for more specific and targeted reforms.

- 7.9 The ACC respectfully agrees with the Minister, noting that fair use in relation to 'right of repair' is not supported by sufficient evidence to potentially erode the work and investment of copyright owners.
- 7.10 In addition to these general concerns about the superimposition of fair use into the Australian copyright law ecology, the ACC questions the relevance of the fair use defence to the specific topic of the Productivity Commission's Draft Report. Recent regulatory initiatives in the United States indicate that the fair use exception is not well adapted to the issue of repair rights.
- 7.11 As we note at 7.1, fair use was codified in the United States with the enactment of the *Copyright Act 1976 (US)*. The fair use defence therefore predates by many decades the technical innovations leading to the prevalence of, for example, embedded software in consumer products. And yet, US regulators have *not* relied on fair use as a vehicle for addressing the issue of repair rights.
- 7.12 Invoking the detailed rule-making power under the 1976 Act, the Librarian of Congress recently issued a detailed report directed specifically at repair rights⁴⁸. The rulemaking extends repair-focused exemptions adopted in a previous rulemaking.⁴⁹ Regulators did not rely on fair use.

⁴⁶ See **4. Fair dealing exception for repair.**

⁴⁷ Hon. Paul Fletcher MP, '[Speech to the Australian Digital Alliance: Copyright in 2020](#)', (Speech, Digital Alliance, 6 March 2020).

⁴⁸ [83 Fed Reg 54010, 54018 \(26 October 2018\)](#).

⁴⁹ See [80 Fed Reg 65944, 65954 \(28 October 2015\)](#).

7.13 These recent regulatory initiatives in the United States suggest that fair use is not an appropriate legal tool for the consumer repair context. The need for US regulators to rely on a *separate* regulatory process, when recourse to fair use was already available, underscores the ACC's view that this is not the occasion to revisit the issue of fair use in the Australian context.

8. Doctrine of exhaustion

- 8.1 The common law doctrine of exhaustion or ‘first sale’, provides that an intellectual property rights holder’s exclusive rights are exhausted or limited, after the first sale of an item.
- 8.2 The High Court decision in *Calidad Pty Ltd v Seiko Epson Corporation*⁵⁰, introduced the US doctrine of exhaustion into Australian patent law, replacing the implied licence doctrine. This means that patentee’s rights in relation to a product are extinguished at the point of sale and patentees are no longer able to control purchasers’ repairs or improvements to their patented material.
- 8.3 However, the High Court emphasised the difference between ‘repair’ and ‘making’, with only the former being permitted under the doctrine of exhaustion. While this decision is significant in the field of patents, the ACC notes that the decision did not comment on patentee’s ability to prevent repairs through other means such as, through contracts or licence agreements, or through copyright law.
- 8.4 The Commission examining the doctrine in the context of copyright law and the difficulties it raises in the Australian framework, illustrates that it is not appropriate in the Australian context.
- 8.5 We support the Commission’s position that pursuing a copyright law of exhaustion, noting that it is in any event a common law doctrine, is not preferred.⁵¹

⁵⁰ [2020] HCA 41

⁵¹ Draft Report p 189.

9. Conclusion

- 9.1 The ACC recognises that consumer attitudes towards the right to repair are following a global trend. We do not support the view that changes to the Australian copyright law are the avenue to facilitate this shift. Governments across the world have recently addressed the right to repair, albeit from slightly different perspectives.
- 9.2 On 9 July 2021, US President Biden issued an executive order aimed at addressing competition in the American economy in which he addressed the right to repair and singled out the repair of farm equipment such as tractors and mobile phones, as areas of concern. There have as yet, been no proposed amendments to the Copyright Law of the United States,⁵² although the ACC will continue to monitor this area for any developments.
- 9.3 Both the United Kingdom (UK) and European Union (EU) have agreed to implement 'right to repair' legislation, aimed at reducing electronic waste and making planned obsolescence unlawful. The UK agreed to address these issues before leaving the EU. The reforms focus on the supply of replacement parts by manufacturers and mandate that certain products must be 'repairable' for at least 10 years after sale. These reforms have not resulted in changes copyright law in either jurisdiction.⁵³
- 9.4 Thank you for considering the terms of this submission. If the Commission requires further information, please let us know.

Eileen Camilleri
Chief Executive Officer
Australian Copyright Council

23 July 2021

⁵² 17 U.S.C. §§ 101 - 810

⁵³ <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92118/parliament-wants-to-grant-eu-consumers-a-right-to-repair>.

Appendix 1

Australian Copyright Council Affiliates

as at 23 July 2021

The Australian Copyright Council's views on issues of policy and law are independent, however we seek comment from the organisations affiliated to the ACC when developing policy positions and making submissions to government. As at the date of this response, the Australian Copyright Council affiliates are:

1. [Aboriginal Artists Agency Ltd](#)
2. [APRA|AMCOS](#)
3. [Ausdance National](#)
4. [Australia New Zealand Screen Association](#)
5. [Australasian Music Publishers Association Ltd](#)
6. [Australian Cinematographers Society](#)
7. [Australian Directors Guild](#)
8. [Australian Guild of Screen Composers](#)
9. [Australian Institute of Architects](#)
10. [Australian Institute of Professional Photography](#)
11. [Australian Music Centre](#)
12. [Australian Photographic Judges Association](#)
13. [Australian Publishers Association](#)
14. [Australian Recording Industry Association](#)
15. [Australian Screen Directors Authorship Collecting Society Limited](#)
16. [Australian Society of Authors](#)
17. [Australian Writers Guild](#)
18. [Copyright Agency](#)
19. [Design Institute of Australia](#)
20. [Media Entertainment & Arts Alliance](#)
21. [Musicians Union of Australia](#)
22. [National Association for the Visual Arts](#)
23. [National Tertiary Education Union](#)
24. [Phonographic Performance Company of Australia](#)
25. [Illustrators Australia](#)
26. [Screen Producers Australia](#)
27. [Screenrights](#)

Appendix 2

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free written legal advice service. This unique service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.