



3 July 2018

Ms Kirsti Haipola
Director, Copyright Law Section
Department of Communications and the Arts
GPO 2154
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By email: copyright@communications.gov.au

Dear Ms Haipola

Submission on Copyright Modernisation Consultation Paper (March 2018)

The National Film and Sound Archive of Australia (NFSA) welcomes the release of the Copyright Modernisation Consultation Paper (the Paper)¹ and thanks you for providing us the opportunity to comment to the Department of Communications and the Arts (the Department).

NFSA also appreciates the opportunity provided to take part in a number of consultative sessions held by the Department following the release of the Paper and in preparation of a final recommendation to Government.

The NFSA is a statutory authority and body corporate established by the National Film and Sound Archive of Australia Act (2008) (Cth) and is Australia's audio visual archive, responsible for collective, preserving and providing access to the nation's moving image and recorded sound heritage.

Although many core functions undertaken by the NFSA, and other cultural institutions, are recognised by the Copyright Act (1968) (Cth), the NFSA believes that copyright reform is essential for the sector to fully deliver the obligations contained in enabling legislation specifically in relation to providing access to collection materials. Therefore we welcome this major step in achieving reform.

In addressing the questions raised in the Paper, this submission considers the extent to which the NFSA's daily functions and activities are currently satisfied by the existing exceptions available in the Copyright Act, offering suggestions for reform where the existing exceptions are deficient.

¹ <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>

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Flexible exceptions

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

Response

The NFSA favours the expansion of the current fair dealing exceptions to include specific exceptions for:

- o non-commercial private use;
- o quotation;
- o incidental or technical use;
- o library, archive and key cultural institution use;
- o education.

The NFSA suggests that the fairness factors should include:

- o the amount of material used;
- o the context in which it is used; and
- o whether the use directly competes with the rights of the copyright holder. ie, whether there is an existing market.

New fair dealing exceptions must not be limited by reference to a *potential* licence or market.

If fair use is enacted in Australia the NFSA considers the list of illustrative purposes and associated fairness factors proposed by the Australian Law Reform Commission in their final report on Copyright and the Digital Economy² would serve Australians well.

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums

Response

The introduction of either a specific exception for cultural institutions or the expansion of

² The Australian Law Reform Commission, Copyright and the Digital Economy, ALRC Report 122, 13 February 2013
<https://www.alrc.gov.au/publications/copyright-report-122>

the current fair dealing exceptions to include use by cultural institutions may mean that s200AB could be repealed.

If neither of these amendments are made then NFSA suggests that s200AB should be amended to:

- o remove the "special case" condition;
- o remove the condition that s200AB is available only if no other exception or a collective licence is not available; and
- o clarify the condition that the proposed use must not be, even partly, for commercial purposes. For example, a definition could be inserted to clarify that "commercial purpose" means for "direct commercial advantage or profit".

In suggesting these amendments, the NFSA is cognisant of Australia's international obligations under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the Australia United States Free Trade Agreement (AUSFTA) but believes the apparent anomalies are sufficiently addressed in the ALRC's final report on Copyright and the Digital Economy³.

If an exception for cultural institutions is introduced either by a new fair dealing exception or by a new specific exception, then other sections of the Copyright Act (1968) (Cth), currently providing exceptions for certain uses by cultural institutions may be able to be repealed.

Contracting out

Question 3

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

Response

The NFSA suggests that all exceptions currently available to cultural institutions be protected from contracting out. Further, the NFSA suggests that the wording of this particular section needs to encompass the extent of exceptions that assist in meeting our legislative obligations.

For example, the NFSA relies on the goodwill of donors and / or depositors to build the national audio-visual collection as there is currently no provision for legal deposit of audio-visual materials in Australia.

NFSA receives this material under individual contracts and we need to ensure that relevant exceptions, ie, the preservation exceptions or the fair dealing exceptions (to identify two) cannot be contracted out in a trade off for the receipt of the material.

Cultural institutions are currently unable to perform the extent of our day-to-day functions with reliance on exceptions alone. It is important that access to these limited exceptions is not lost through contracting oversight.

³ Ibid

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

Response

NFSA supports amending the Copyright Act (1968) (Cth) to make unenforceable the contracting out of all copyright exceptions.

Access to orphan works

Question 5

To what extent do you support each option and why?

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

Response

The NFSA estimates that about 20% of the national audio-visual collection is orphaned material. Our acquisition practices and collection policies focus on the cultural and social significance of potential collection material. Given the breadth of the materials collected, and despite all best efforts for verification of the copyright, this is not always known or available.

The cost of collecting, preserving and storing this material is significant. Without an exception that provides some legal certainty for the use of orphan works, this material cannot be legally used by cultural institutions or provided to our clients without lengthy assessments and significant risk being taken.

The NFSA's use of orphan works is always in response to our legislative functions but currently there is no legal exception to rely on for this. The NFSA must provide access to collection materials to Australians regardless of where they live. Additionally, the digital age has brought an increase in demand for archive material. NFSA currently provides online curated collections for the education and enjoyment of broad audiences and while we often rely on the current fair dealing for criticism or review it is not always appropriate to do this.

Additionally, our clients in the education and documentary sectors require access to the best historical material to include in telling and retelling Australia's tangled histories. Often this material is orphaned. NFSA currently takes a risk management approach to supplying this material balancing the potential socially beneficial use against the risk of legal consequence in doing so.

Where a copyright owner is identified or can be located they are always approached for permission to use and / or supply material held in the national collection.

Before declaring collection material orphaned the NFSA undertakes a due diligent search in an effort to identify and / or locate the copyright holder of material. This research is documented and assessed and filed in the records management database⁴.

NFSA supports a combination of a statutory exception **and** a limitation of remedies in an effort to confidently use and provide access to the orphan works in our collection.

Question 6

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

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

Response

The NFSA supports a combination of options to limit the remedies available for the use of orphan works.

The NFSA is of the view that injunctive relief, for example via a takedown request, is appropriate, along with reasonable compensation in lieu of damages for the non-commercial use of orphan works.

However, we are also of the view that liability should be capped at the standard commercial licence fee for both the non-commercial and the commercial use of orphan works.

The combination of options, as above, would provide enough legal certainty for cultural institutions and their clients to use orphan works.

A standard for commercial use can be ascertained through reference to published rate cards of various audio-visual suppliers. Additionally, Copyright Agency for Visual Arts has already determined appropriate reproduction and usage fees for literary and artistic works.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

Response

In the event that the fair dealing exceptions are not expanded to provide for a specific

⁴ Additional information about orphan works at the NFSA can be found at our website: <https://www.nfsa.gov.au/collection/using-collection/copyright>

exception for cultural institutions, then NFSA supports a separate direct exception for the non-commercial use of orphaned material by the sector.

While this approach still doesn't provide any legal certainty for either use by the clients of cultural institutions, or the commercial use of orphaned material by cultural institutions, it at least provides a minimum level of legal certainty for the sector.

If you require any clarification on the responses provided here or need further general information about this submission, please contact me via email at jan.muller@nfsa.gov.au or telephone: 02 6248 2010.

Yours sincerely,



Jan Müller
Chief Executive Officer