

The trials of Australian copyright law reform: Australia's Government seeks further consultation

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On 19 March 2018, the Department of Communications and the Arts released its *Copyright Modernisation Consultation Paper (Consultation Paper)* addressing key proposals for the reform (or rather "modernisation") of Australia's copyright laws and regulations. The Consultation Paper is the latest in a series of publications addressing copyright law reform in Australia, some of which were discussed on the blog earlier this year. In the last five years, the Australian Law Reform Commission published its report on *Copyright and the Digital Economy in 2013*, Australia's Productivity Commission published its *inquiry report into Australia's Intellectual Property Arrangements in 2016* and the Australian Government provided its response to the Commission's report in 2017.

The Consultation Paper now asks for further views on:

- **the expansion of flexible exceptions to copyright infringement** - in particular, whether an open-ended 'fair use' exception similar to that in the United States should be introduced in Australia or, alternatively, if the existing list of 'fair dealing' exceptions should be expanded to accommodate changing community, technology and business standards;
- **identifying current or proposed exceptions that should be protected against 'contracting out'** - in particular, whether 'contracting out' of copyright exceptions should be unenforceable for all exceptions or limited to some exceptions for a prescribed purpose.
- **reforming access to orphan works** - in particular, whether remedies for copyright infringement of orphan works should be limited when the user has conducted a "diligent search".

The position in previous publications on these topics can be summarised below:

Topic	Australian Law Reform Commission	Productivity Commission	Australian Government
Introduction of a fair use copyright exception	Supports. The ALRC's view is that fair use builds on fair dealing exceptions but removes the restriction to only a particular type of use, providing factors that should be considered when assessing whether any type of use is fair.	Supports. The Commission argued that fair use affords greater flexibility including for new copyright dependent industries, provided these uses meet the fairness factors.	Unknown. The Government "noted" the PC Report's recommendation while accepting that current fair dealing exceptions were restrictive when compared to international equivalents.
Additional fair dealing exceptions	Supports as an alternative to a fair use exception.	No comment.	Unknown.
Make 'contracting out' unenforceable only for prescribed purpose copyright exceptions	Supports. The ALRC supported limits to contracting out if a fair use exception was not introduced.	Unknown. The Commission's recommendations were to restrict contracting out for all exceptions, not simply prescribed purposes.	Likely to support. The Government supports the view that contracting out should be unenforceable for all copyright exceptions, however the extent of the limitation may depend upon the Government's conclusions on fair use vs fair dealing.
Make 'contracting out' unenforceable for all copyright exceptions	Not supported. The ALRC considers that universal limitations to contracting out "would not be practical or beneficial".	Supports.	Supports in principle.
Limitation of remedies for infringement of orphan works where a diligent search has been undertaken	Supports.	Supports.	Supports.
Allow the use of orphan works through a statutory exception	No comment. However the ALRC noted that a fair use exception would allow an appropriate mechanism for dealing with such works.	No comment but endorsed the ALRC's position.	No comment.

It appears that, at the very least, a consensus is forming around the limitation of remedies for infringement of orphan works, in certain circumstances.

Still, the Government is cautious around the difficulty in managing the competing interests of rights holders and copyright users, particularly on the controversial issue of a proposed fair use exception.

Submissions are due by 4 June 2018 and the Government has proposed a series of roundtables through April-May with stakeholders. The result of this consultation may finally crystallise the Government's view on what reforms, if any, should be implemented.