



FreeTV
Australia

Submission by Free TV Australia

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Copyright modernisation

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1 Executive Summary

- Copyright is fundamental to creativity and innovation. The Australian Copyright Act provides the critical framework which incentivises Australian creators and innovators to create and invest in content. Its finely balanced provisions ensure potential creators and the public have access to copyright material on the one hand, and that they receive returns on their investments on the other.
- Commercial television broadcasters appreciate the importance of getting this balance right:
 - As major owners, licensors and licensees of copyright material, commercial free-to-air broadcasters invest \$1.5 billion every year on Australian content. We are the major underwriters of the Australian production sector, employing over 15,000 people directly and indirectly and contributing a total of \$2.8 billion each year into the Australian economy. The local content that Free TV members broadcast delivers enormous cultural and social value by creating and reinforcing our national identity.
 - As users of copyright material, broadcasters frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production and general entertainment programming. The fair dealing exceptions are critical to being able to deliver this programming to the public every day for free.
- For broadcasters it is critical that the Copyright Act encourages this investment in Australian content and innovation in Australia's creative sectors by:
 - Protecting the rights of broadcasters and other copyright creators;
 - ensuring that the regulatory environment provides legal certainty in relation to access of copyright material; and
 - not imposing unnecessary additional costs on broadcasters.
- Free TV opposes an open-ended fair use style exception. It is inconsistent with the existing legal approach to copyright exceptions under the Act, would remove the existing clarity and certainty provided by the current fair dealing exceptions and would introduce in its place an entirely uncertain provision. Under such a provision, whether a use is 'fair' or not would only ever be clear once a determination has been made by a court. This would undermine broadcasters' ability to invest in content or develop new services.
- Any new fair dealing exceptions should be narrow in scope, clearly defined and respond to a clear policy problem that has arisen under the existing legal framework. For this reason, Free TV does not support the proposed exceptions for quotation or for incidental or technical use. The policy basis for introducing these exceptions has not been clearly articulated and there is significant potential for these exceptions to directly undermine copyright owners' markets.
- Free TV supports the proposed solution (option 2) to orphaned works. A limitation on remedies would balance a user's ability to access a work in a timely manner where the copyright owner is not locatable or identifiable, with the copyright owner's right to be compensated should they subsequently become known. It would also recognise that the problem of orphaned works is not limited to public institutions – it applies equally in commercial broadcasting.
- To increase certainty of the existing fair dealing exceptions in the Act, Free TV supports making unenforceable contracting out of these exceptions. They are inherent in the copyright balance that has been struck in the Act.
- The outdated exception at s 212(2) of the Broadcasting Services Act which currently allows retransmission of broadcasters' signals for free and without consent completely undermines the copyright protection afforded to broadcasts under the Copyright Act and should be repealed.

2 Introduction

Free TV welcomes the opportunity to respond to the Department's Copyright modernisation consultation paper (Consultation Paper).

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide a diverse content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. Free-to-air television delivers high-quality programming to 97 per cent of Australian households. 20 million Australians watch broadcast TV each week.

As major owners, licensors and licensees of copyright material Free TV agrees with the comments made by the Minister for Communications, the Hon Mitch Fifield, in 2016 that "copyright protection is an essential mechanism for ensuring the viability and success of creative industries by incentivising and rewarding creators."¹ Australian copyright law provides the fundamental framework that incentivises the production of local content and enables broadcasters and other content industry businesses to invest in the industry.

Free TV members also frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production. Free TV is therefore able to comment on the Consultation Paper with a strong appreciation of the importance of striking the right balance between ensuring adequate protection of copyright on the one hand and facilitating appropriate access for users on the other.

Getting this balance right is critical to ensuring the law incentivises innovation, investment and the production of creative works. For broadcasters, legal certainty is critical to such a balance. For this reason, any new exceptions introduced to modernise the Act should be narrow and most importantly clearly defined. The existing fair dealing exceptions should be retained and contracting out of these exceptions should not be permitted. Exceptions or provisions which are open-ended or unclear create significant legal uncertainties for both users and owners. A new US style open-ended approach to copyright would forgo the existing certainty in the Act and would therefore disrupt existing systems and practices that are operating well.

A balanced approach to copyright also requires appropriate protection of broadcasters' creative works, including their broadcasts. The current situation where broadcasters are not able to control the retransmission of their broadcasts by their competitors because of an anomalous and outdated exception is out of step with the approach to granting exceptions under the Copyright Act and inconsistent with Australia's international obligations and major comparable jurisdictions such as the US.

2.1 Value of Australian content creation

The commercial free-to-air industry, a copyright industry, is a major contributor of value to the Australian economy and positive driver of economic welfare. Free-to-air television is the only platform that delivers high-quality Australian programmes, including news, current affairs, sports and culture to all Australians for free.

Commercial free-to-air broadcasters are the largest producer and commissioner of Australian content. Commercial free-to-air broadcasters invest \$1.5 billion every year on Australian content. Free TV networks are the major underwriters of the Australian production sector, employing over 15,000 people both directly and indirectly,² and contributing a total of \$2.8 billion

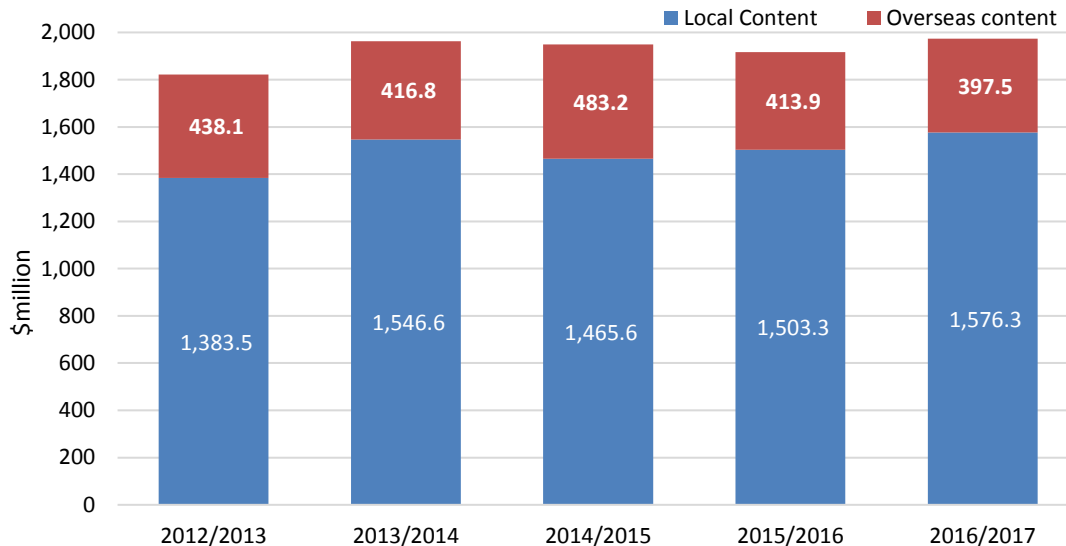
¹ Senator the Hon Mitch Fifield, Media Release "*Conjecture on Copyright Changes Unfounded*", 2016.

² Australian content expenditure figures are compiled by Free TV, figure for 2012-13 is adjusted (up from the previously reported figure of \$1.36 Billion). ACMA "Commercial TV licensees met Australian content quotas in 2013", July 2014.

each year into the Australian economy. This investment represents six of every ten dollars invested in local production.³

The local content that Free TV members broadcast delivers enormous cultural and social value by creating and reinforcing our national identity. The latest financial reports by the ACMA show that local content investment has grown to be 80% of all production spending in 2016/2017 (see Figure 1).⁴

FIGURE 1 FREE TV PROGRAMMING EXPENDITURE



Exports of Australian television productions also help showcase Australia to the world. These direct exports have been valued by Deloitte at \$252 million a year, with a further \$725 million a year coming from related tourism.⁵

The value of Australian content is also reflected in Australians' access of content online. The most recent Australian Video Viewing Report found that Australians played, on average, 347 million minutes of broadcasters' online content on connected devices weekly in Q4 2017:

- 258 million minutes, on average, was catch up (or on demand) viewing
- 89 million minutes, on average, was live viewing.⁶

The amount of broadcasters' online TV content viewed also continues to grow: overall, between 1 and 2 per cent of all broadcast TV content viewed each week is internet delivered.⁷

Screen Australia in its recent report, 'Australian trends in online and on demand viewing also found that broadcaster catch-up services increased from 74% overall platform use in 2014 to 87% in 2017.

Copyright laws that strike the right balance for copyright industries, including broadcasters, therefore have a positive impact on the economy as a whole, and are critical to commercial free-to-air broadcasters' ability to continue to deliver this Australian content.

³ Venture Consulting, The Value of Free TV, the contribution of commercial free-to-air television to the Australian economy, May 2015.

⁴ <https://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/broadcasting-financial-results-report>

⁵ Deloitte Access Economics, 2016, "What are our stories worth? Measuring the economic and cultural value of Australia's screen sector".

⁶ More Screens, Platforms and content choice progressively broaden viewing patterns: Q4 2017 Australian Video Viewing Report http://www.oztam.com.au/documents/Other/Q4%202017%20AVVR_RELEASE.pdf

⁷ Ibid.

3 Approach to introducing copyright exceptions – the proposed reform options

3.1 Fair use/flexible fair dealing or additional fair dealing exceptions?

The Consultation Paper proposes two broad options for introducing flexible exceptions to copyright infringement:

- Additional fair dealing exceptions; and
- A fair use style (or open-ended) copyright exception.

The first option would retain the existing fair dealing exceptions and add one or more exceptions so that fair dealings for additional prescribed purposes would not infringe copyright.⁸ This option is consistent with our existing legal approach to enacting copyright exceptions and would retain existing legal precedents applicable to fair dealing. At the same time, it would allow new exceptions to be introduced as new technologies arise in accordance with an evidence based approach and an assessment of the impact of any proposed exception on copyright owners' markets.

The second option proposed is to amend the Copyright Act to introduce an open-ended 'fair use' copyright exception. This option would be a new approach to copyright exceptions in Australia. Exceptions would be defined by the courts following litigation rather than by legislation. This approach would adopt the fairness factors used in the research and study fair dealing and introduce new illustrative purposes, some of which would be intended to mirror the existing fair dealing exceptions. It would provide a list of specific illustrative purposes that would assist with interpreting the open-ended exception. There would however be no guarantee that existing legal precedents applicable to the fair dealing exceptions would apply in the same way. Whether or not (or the extent to which) this would be the case, would only be clear once a determination in relation to the use has been made by a court.

Free TV strongly opposes the second option – an open ended fair use style exception. The existing prescriptive approach to considering new exceptions and their impact on rights holders is more certain, less costly and more likely to comply with Australia's international legal obligations. The introduction of new exceptions, or any amendments to existing exceptions, should be the subject of a measured process of review and consultation, submission and report.⁹ An all-encompassing illustrative purpose provision would run the risk of weighing too far in favour of end users.

We outline our concerns with option 2, a fair use style copyright exception, below.

3.1.1 An open-ended fair-use style exception would introduce uncertainty and increase legal costs

Introduction of a fair use exception would require amending the existing fair dealing exceptions. The fair dealing exceptions set out at sections 40, 41, 41A and 42 of the Act and the exceptions at ss 45 and 67 are well established, effective and should be retained in their entirety. Members of Free TV rely upon fair dealing for criticism and review, parody and satire and most importantly, reporting of news, on a daily basis in compiling programming. These exceptions provide clarity and certainty for broadcasters around the uses of copyright material that can be made without obtaining the permission of the copyright owners. They should not be removed in favour of an open-ended exception which introduces them as illustrative purposes.

⁸ Consultation Paper, 9.

⁹ Free TV notes that an example of such a process is the recent Copyright Amendment (*Disability Access & Other Measures*) Bill 2017, which introduced a range of specific exceptions for libraries, archives, key cultural institutions, educational institutions and persons with a disability.

Moving from the existing fair dealing provisions to a new open-ended provision would create significant uncertainty for stakeholders until the scope of the application of the fairness factors and illustrative purposes are litigated in a court in Australia. It will take a number of cases to re-establish a high degree of certainty and it is very likely that it will take a considerable period of time before the uncertainty is resolved. In the interim, the open-ended nature of the provision will also make it extremely difficult for legal advisers to advise on whether something would fall under the new provision or not.

This uncertainty would also lead to significant legal costs for broadcasters. Costs would need to be incurred in litigation, legal advice and renegotiation of agreements by copyright owners and copyright users seeking to rely on the new exemption or to clarify existing legal arrangements. This would be the case even if the existing exceptions are incorporated in a new exception as 'illustrative purposes' as the Consultation Paper suggests given that the proposed new exception would be drafted in accordance with an entirely different drafting approach.¹⁰

In the interim, the lack of certainty will have an impact on the ability of both owners and users to confidently invest in the production of content and/or the development of new services. Broadcasters put significant resources into the creation of content and into making their products and services available legitimately to viewers for free. The copyright framework will only incentivise these activities if it provides a minimum degree of certainty in relation to the protection of this investment and therefore the level of return that broadcasters can expect to receive on their investments. This certainty is required to enable broadcasters to confidently make the investment and business planning decisions necessary to continue to deliver this content.

We note that it is not clear the extent to which US jurisprudence might be used to assist in interpreting an Australian fair use style exception. The US legal framework is significantly different to the Australian legal framework and the interpretation of the provision will vary in response to the different frameworks. Many fair use cases in US law judge fairness having regard to the US Constitution. In particular, US courts have regard to the right of free speech and find fair use where the use benefits free speech under the US Constitution.

3.1.2 Economic evidence suggests fair use does not promote innovation

It has been consistently argued by a number of copyright users that an open-ended fair use exception would promote innovation. However, the economic evidence that has been presented to support this has been one-sided and does not take into account the economic contribution of the creative industries, rights holders' innovations or the benefit of protecting those innovations.¹¹ For example, Google recently commissioned Deloitte Access Economics to analyse the economic impact of moving to fair use in Australia. The Deloitte report, published in 2018, found that a move to fair use would see net economic benefits for Australia, however it has been heavily criticised on the basis that it makes a number of assertions to support its ultimate conclusion which are flawed, and which disregard the costs of fair use and the economic contribution of Australia's creative industries.¹²

Contrary economic evidence suggests that the introduction of fair use in fact has a harmful impact on content producing industries, and that the economic effects of more flexible copyright exceptions on content industries are at best very difficult to measure.¹³

Innovation requires a balanced copyright regime; not free use of copyright material. This is because the creators of the original copyright work are themselves innovators, and will be incentivised to create works only if they are entitled to the fruits of their labour.

¹⁰ Consultation Paper, 11.

¹¹ <https://www.alrc.gov.au/sites/default/files/pdfs/publications/04.caseforfairuse.pdf>

¹² George R Barker, More Unfair Claims about Fair Use in Australia.

¹³ George Barker, 'Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore, (November 2012), Centre for law and Economics.

Therefore, to promote innovation and creativity it is fundamental that copyright law strikes the right balance between allowing access to copyright material to build upon existing works on the one hand and providing adequate incentives for copyright creators to continue to innovate.

A balanced copyright system is essential for promoting long term creativity and innovation across all areas of creative endeavour, including areas such as film, television, art and software. A fair use exception would be detrimental to consumer welfare in the long run by creating inadequate and/or uncertain returns for investment in creative industries.¹⁴

3.1.3 Fair use is inconsistent with international legal obligations

Exceptions to copyright infringement are required to comply with Australia's international obligations and in particular, the three-step-test which is set out in international agreements to which Australia is a party, including both the Berne Convention and TRIPS. The three-step test provides that an exception to copyright can only be granted:

1. In certain special cases
2. Provided that such reproduction does not conflict with a normal exploitation of the work;
3. And does not unreasonably prejudice the legitimate interests of the author.

While the ALRC noted that fair use has not been challenged in any international forums, it has frequently been argued that it is not consistent, and the Australian government has previously acknowledged that the issue of whether such an exception would be compliant or not is uncertain. It is for this reason that in implementing a flexible exception in s 200AB of the Copyright Act in 2006, the exception was limited to specific user groups (libraries, educational institutions and institutions assisting people with disabilities), and the Government chose to include the language of the three-step test in s 200AB (see also, section 3.1.4 below).¹⁵ At best it is very unclear whether or how a fair use style exception would be consistent with Australia's international obligations.¹⁶

3.1.4 The existing Australian open-ended exception has not delivered certainty or flexibility

As noted above, there is currently a flexible exception in the Copyright Act, s 200AB, which was introduced into the Act in 2006. Although the provision is limited to educational and cultural institutions and persons (and institutions assisting persons) with a disability, this provision is effectively a 'fair use style exception' in that it is open-ended and allows a broad range of uses which are not specifically prescribed by the provision.

Section 200AB was introduced specifically to 'provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties', and to secure 'some of the benefits that the fair use doctrine provides in US law'.¹⁷ Despite the introduction of this fair use-style provision, the industries that benefit from this exception do not think that it has delivered a sufficient degree of flexibility or certainty in key areas that Government expected it would. For example, the Australian Libraries Copyright Committee in its submission to the PC's Intellectual Property Arrangements Review submitted that s 200AB is 'confusing and difficult to apply' and

¹⁴ George Barker, 'Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore, (November 2012), Centre for law and Economics

¹⁵ S 200AB, Copyright Act 1968; Explanatory Memorandum, Copyright Amendment Bill 2006; See also for example, https://www.vala.org.au/vala2010/papers2010/VALA2010_120_Hudson_Final.pdf

¹⁶ For example, see ALRC Copyright and the Digital Economy Report, 4.134.

¹⁷ Explanatory Memorandum, Copyright Amendment Bill 2006; the Hon Philip Ruddock, Second Reading Speech, Copyright Amendment Bill 2006.

that it has ‘discouraged the target communities from making use of the provisions’.¹⁸ They further submitted that ‘a broad number of educational institutions, libraries and cultural institutions view section 200AB as a failure’.¹⁹ It is for this reason that institutions have continued to argue for a specific exception for orphaned works,²⁰ and the Consultation Paper specifically considers a prescriptive and certain orphaned works exception.

3.2 Regulation making power

The Consultation Paper provides that there are two ways of introducing additional fair dealing exceptions – one is by adding them in the Copyright Act, as has always been the case in most jurisdictions including Australia. The other is by amending the Copyright Act to allow the Minister to add and remove fair dealing exceptions to the Copyright Regulations.²¹

Free TV does not support the proposed new power to add or remove new exceptions by way of Regulation. Such a process would undermine the certainty in relation to both the rights granted to copyright owners under the Copyright Act as well as the exceptions granted to users. It would mean that exceptions could be added and removed much more easily without the same degree of evidence-based consultation. This could undermine or confuse broadcasters’ contractual arrangements if contractual provisions refer to ‘fair dealing exceptions’ where those exceptions are uncertain, or are added or removed on a regular basis. It would also make the exceptions and therefore, the copyright balance that has been carefully struck in the Act, more vulnerable to political pressure.

Recommendations:

- A fair use copyright exception should not be introduced in Australia.
- Any new copyright exceptions should be introduced as additional prescriptive fair dealing exceptions, in line with the current approach under the Copyright Act.
- Exceptions should continue to be added or removed via the Copyright Act rather than the regulations.

¹⁸ Australian Libraries’ Copyright Committee, Submission to the Productivity Commission, Inquiry into Australia’s Intellectual Property Arrangements , 10.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Consultation Paper, 10.

4 Additional fair dealing exceptions

4.1 Incidental and technical use

The Consultation Paper notes that the Department is specifically consulting on an additional copyright exception to cover incidental and technical use.²²

Free TV strongly opposes a new fair dealing exception for incidental and technical use on the information made available in the Consultation Paper and at the roundtables. In Free TV's view, before any new copyright exceptions are granted, it must be made clear:

- What such an exception would cover;
- Why such an exception is required; and
- How it differs from the existing temporary reproduction exceptions in the Act.

As indicated above, the existing prescriptive approach to granting new copyright exceptions requires that those exceptions be well-defined so that their impact on rights-holders can be properly assessed. The proposed exception for incidental and technical use has not been defined and is potentially extremely broad. The extent to which such an exception impacts on rights holders is therefore completely unclear.

Incidental uses and technical uses have been grouped together in the proposed exception however they could potentially cover very different types of uses, with 'technical uses' being much broader and much less clear in scope. Uses which are incidental to the primary use, or are a necessary part of a technical process of using a copy of a work or subject matter are unlikely to interfere with the copyright owner's market and appear to be captured by ss 43B and 111B so far as they are 'temporary reproductions'. The act also recognises that technical uses that involve temporary reproductions which are part of the 'technical process of making or receiving a communication' would be unlikely to interfere with the copyright owners' market – those uses are also exempted by ss43A and 111A.²³

However, to broaden out these exemptions to all technical uses on the internet would have the potential to cover a wide range of uses including those which may directly interfere with the copyright owners market. The recent stakeholder roundtable conducted by the Department canvassed that such an exception could cover a range of uses including caching, crawling, scraping, searching, snippets, storing data and data and text analysis.²⁴ These are an extremely broad range of uses which could directly interfere with the copyright owner's market in a number of ways, for example:

- It could cover the use of 'snippets' by search engines. These can be valuable to copyright owners. Snippets on a search page can contain valuable copyright information and if internet users can obtain that information from a search without having to go to the copyright owner's website, this directly interferes with the rights holder's ability to monetise that content. Free TV notes that a draft copyright ruling endorsed by the European Union last week recognised this and proposed to require Google, Microsoft Bing and other search engines to pay publishers for serving up snippets from the content on their sites in search engine query results.²⁵

²² Consultation Paper, 10.

²³ Copyright Act 1968, ss 43A, s 111A.

²⁴ Copyright Modernisation Review, Roundtable on Incidental and technical use, 2018.

²⁵ <https://www.mediapost.com/publications/article/319851/european-union-ambassadors-endorse-search-engine-s.html>

- It could cover uses of copyright material in accordance with the recently reported new 'paraphrasing algorithm' developed by Google. According to reports, the new algorithm extracts substantial parts of web content from webpages and provides a summary of that content. This would attract users to its summaries rather than the original content, again directly interfering with the rights holder's ability to monetise that content.²⁶
- Scraping and data analysis - Related to the use of snippets, the exception as framed could also cover the act of scraping commercially valuable content by web crawlers, copying and storing that content, and making it available through the search engine's search results. These activities directly impact on click-through rates to the same content on broadcasters' websites, which in turn reduces broadcasters' ability to monetise the content they have invested in, and results in it being devalued. For example, Google scrapes sports results from websites and presents them as featured snippets, reducing what was a significant source of referrals for news sites.
- 'Socially beneficial uses' - at the roundtable discussion on this issue, some user groups suggested this exception should cover 'non-consumptive uses' or 'socially beneficial uses'.²⁷ This would clearly go well beyond what is understood to be 'incidental' or 'technical' and would effectively amount to a fair use provision. It should not be adopted for the same reasons outlined above in relation to fair use.

For these reasons, 'technical' uses are not uses which can be assumed to not interfere with the copyright owner's market. 'Technical uses' covers a wide-range of uses which impact on markets in very different ways and therefore cannot be grouped together. 'Technical uses' which commercially exploit content on the internet for commercial purposes should not come under any exception as they directly interfere with copyright owners' markets. For example, caching by end-users for non-commercial purposes such as ease or speed of access to legitimately acquired content has a very different impact on copyright owners compared to caching by commercial entities for the purposes of extracting commercial value from other rights holders' content. These uses must be considered separately rather than grouped together as 'technical uses'.

In addition to potentially allowing a wide range of uses that would interfere with the copyright owners market, the proposed exception would also likely interfere with the operation of the safe harbour scheme which currently exists in Part 5 of the Act. It is not logical for exemptions to be granted for activities that are subject to the safe harbour scheme. The safe harbour imposes a number of obligations on qualifying service providers before they can access, and have the benefit of, the safe harbour in respect of a range of 'technical' activities. The obligations imposed via the safe harbour scheme are intended to incentivise copyright owners and users to work together to minimise copyright infringement on the internet.²⁸ The Government recently indicated that while there was no evidence to suggest that extending the safe harbour scheme to online service providers would benefit innovation, it considered that incremental expansion of the scheme would allow it to 'continue to consult on how best to reform the scheme to apply other online service providers in the future'.²⁹ Any exemption for activities of online service providers which are currently the subject of the Government's proposed reform of the safe harbour scheme would undermine that process.

²⁶ https://www.searchenginejournal.com/google-article-algorithm/253565/?utm_source=moztop10&utm_medium=email&utm_campaign=moztop10&_hsenc=p2ANqtz-8-SvdNikdndtx8hZ17EMcY4q4PkmtkBD7z6owTbF_u6Avk9DU0kVfjRJGU8CqKi-_tPg4vChz69wjAwBtr2LQ0JJDZlw&_hsmi=63368086

²⁷ For example, representatives from Google and the Australian Digital Alliance suggested this.

²⁸ Explanatory Memorandum, US Free Trade Agreement Implementation Bill 2004, Part 11; Attorney-General's Department, Revising the Scope of the Copyright 'Safe Harbour Scheme, Consultation Paper, October 2011.

²⁹ Second Reading Speech, Senate Hansard, 6 December 2017, p9906.

The ACCC is also currently conducting an inquiry into Digital Platforms and one of the issues raised by stakeholders to that inquiry relates to whether online platforms should be required to pay for the content that they copy and communicate to the public. A broad technical use exception would potentially stymie the outcome of that inquiry.

Free TV notes that in the roundtable discussions held by the Department, user groups called on rights holders to articulate the types of uses that should not fall within the exception.³⁰ The nature of the process however necessarily requires those seeking an exception to establish why there should be any encroachment on the copyright owner's rights and why the exception they are seeking is compliant with international treaties and they have not done so.

Recommendations:

A new exception for incidental or technical uses should not be introduced.

4.2 Quotation

As noted in the Consultation Paper, the Department is specifically consulting on an additional copyright exception to cover quotation.³¹

Free TV does not support a new fair dealing exception for quotation. It is currently not clear what the policy basis for introducing such an exception is. While Free TV recognises that the Berne Convention specifically recognises quotations subject to 'fairness' and the three-step test,³² the provisions of our Act recognise this by providing that a use of a copyright work will only infringe copyright if it is done in relation to a 'substantial part' of a work or other subject matter. Quotations therefore would generally not be in breach of copyright.

Whether or not a quote is a 'substantial part' will be determined on the basis of quality rather than quantity under existing law, and the courts have not prescribed a particular amount of a work or other subject matter to constitute 'a substantial part'. This is appropriate because the point at which material constitutes 'a substantial part' of a copyright work should be considered in the context of the work as a whole.

Quotes which do form a substantial part should be cleared by the copyright holder because they are more likely to impact on the copyright owners' market for the work or other subject matter. As indicated above, copying of a snippet by a search engine should not be exempt in circumstances where the quote deters users from going to the copyright owner's website, as this directly interferes with the rights holder's ability to monetise that content. This type of use should not fall under a quotation exception.

Free TV notes that it opposes an approach such as was taken in the UK, of reframing the existing exception for criticism and review to incorporate quotation. We are not in favour of any exception which would impact on or involve amending the existing fair dealing exceptions for criticism and review.

The existing fair dealing exceptions for criticism and review at ss 41 and 103A of the Act are regularly relied upon by broadcasters in news and current affairs reporting and entertainment programming. They have been the subject of litigation and therefore there is some certainty in relation to their scope.³³ Amending the existing exceptions would remove any certainty around these provisions. It would also potentially narrow the existing and long-established exceptions which would therefore negatively impact on existing broadcasting practices.³⁴ The existing exception should not be narrowed or amended to incorporate quotation.

³⁰ Copyright Modernisation Review Roundtable, Incidental and Technical use, 2018.

³¹ Consultation Paper, 10.

³² Berne Convention, Article 10(1).

³³ For example see *TCN Channel Nine v Network Ten* [2002] FCAFC 146.

³⁴ See ALRC, *Copyright and the Digital Economy*, Report 122, 9.73.

Recommendation:

A new fair dealing exception for quotation should not be introduced.

5 Specific exception – Orphaned works

The Consultation Paper proposes a number of options to deal with ‘orphaned works’, works where the copyright owners has become unknown or unidentifiable:

- A statutory exception
- A limitation on remedies; or
- A combination of both.

Free TV supports option 2, the introduction of a limitation on remedies available in an action for copyright infringement provided that a user has conducted a reasonably diligent search.

The Consultation Paper also suggests that if an exception was introduced, it could be limited to certain uses or users only. However, the problem of orphan works is not limited in this way, it exists beyond public institutions. Any solution for orphan works should therefore address their use by commercial institutions as well.³⁵ The policy rationale for making these works accessible subject to certain conditions to ensure rights holders are given the opportunity to be compensated should the work cease to be ‘orphaned’ – applies equally in relation to commercial uses. Indeed, uses of orphan works are likely to be a higher risk issue in commercial contexts due to the commercial nature of the use. For this reason, a mechanism to address and encourage the use of orphaned works in commercial contexts is required.

Free TV notes that at the time the existing flexible exception at s 200AB was introduced, it was intended to deal specifically with the issue of orphaned works in libraries and cultural institutions, educational institutions and institutions assisting persons with a disability.³⁶ These organisations therefore can already rely on an exception to infringement subject to the conditions set out in s 200AB. The fact that s 200AB has not dealt with the orphaned works issue for institutions seems to illustrate that specific exceptions provide more certainty and therefore are preferred to a flexible exception such as fair use.

A limitation on remedies could appropriately balance a user’s ability to access a work in a timely manner where the copyright owner is not locatable or identifiable, with the copyright owner’s right to be compensated should they subsequently become known. However, in order for a limitation on remedies to actually promote use of orphaned works, it should provide users with sufficient confidence in relation to the amount and extent of potential liability.

The ALRC in suggested limiting remedies for uses of orphaned works to a ‘reasonable licence fee’, ‘reasonable compensation’ or similar formulation.³⁷ This formulation would be unlikely to give users sufficient certainty in relation to their potential liability and therefore confidence to use orphaned works.

Free TV notes that the Department has not suggested compensation be available for past uses of orphaned works, but that reasonable compensation should be available for future use of the material.³⁸ Free TV supports this restriction on claiming damages for past uses of legitimately orphaned works. This is important firstly because decisions in relation to the use of orphaned works and the production budgets available to pay for a particular work, are made at a point in time. Broadcasters need the relevant certainty in relation to the use of the work at the time they are making these decisions or they will not use the works. Secondly, distribution agreements will often require broadcasters to warrant that they have the relevant copyright clearances. This means that liability for future claims in relation to orphaned works would be borne by broadcasters. If the limitation on remedies does not give broadcasters sufficient certainty in

³⁵ ALCC, ADA, A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions, page 5. See

<https://libcopyright.org.au/sites/libcopyright.org.au/files/documents/FlexibleDealingHandbookfinal.pdf>.

³⁶ Ibid. See also Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).

³⁷ <https://www.alrc.gov.au/publications/13-orphan-works/limitation-remedies>

³⁸ Department of Communications, Orphan works: model for further consultation, 2018.

relation to their potential liability for using an orphaned work in a particular program or production, they will simply not take on the risks involved with using the work.

For the same reasons, the ability to claim for an account of profits should also be restricted in circumstances where an orphan work has been used in good faith. If this is not the case, use of an orphaned work could potentially result in a situation where the broadcaster could not continue to use the new work on the one hand, but would also potentially be in breach of its contractual arrangements in relation to exploitation of the work on the other.

Free TV does not support a requirement for users to provide prior notice of their proposed use of an orphan work via a register of orphan works in order to have the benefit of the limitation on remedies. This would be impractical in a broadcasting context. In a fast-moving news environment, orphaned works would be less likely to be used if their use was subject to onerous and time-consuming administrative requirements. Such a requirement would therefore undermine the public policy goal of making orphaned works accessible in the first place.

Recommendation:

A limitation on remedies available for copyright infringement actions should be introduced in respect of uses of orphaned works.

6 Contracting out

The Consultation Paper recognises that contracting out can prevent copyright exceptions from operating as intended and proposes two reform options:

1. Make unenforceable contracting out of prescribed purpose copyright exceptions; and
2. Make unenforceable contracting out of all copyright exceptions.

Free TV supports Option 1, making unenforceable contracting out of prescribed purpose copyright exceptions, and in particular, it is critical for broadcasters that contractual terms purporting to contract out of the fair dealing exceptions for criticism and review, parody or satire and reporting the news, should be made unenforceable.

6.1 Fair dealing

The fair dealing exceptions are inherent to the balance struck by the Copyright Act between the right of owners to protect copyright and the right of users to access material. This has been recognised by the High Court.³⁹ They serve an important social purpose in promoting freedom of expression and information. Contractual relationships should not be able to interfere with these limited and defined rights that are essential in order to better protect the public interest. This has been supported by a number of copyright reviews, including the CLRC's *Copyright and Contract Review* and the ALRC's *Copyright and the Digital Economy Review*. In Free TV's view, Australia should amend the Copyright Act to clarify that any contractual terms purporting to contract out of the fair dealing exceptions are unenforceable.

Free TV notes that the UK has recently implemented the recommendations of the *Digital Opportunity: Review of Intellectual Property and Growth* (May 2011) (**Hargreaves Review**) and its fair dealing exceptions now provide that they cannot be set aside by contract (any contractual provisions that purport to do so will be unenforceable).⁴⁰ In the process of making its recommendations the Hargreaves Review outlined the significant risks associated with contracting out, to the extent it grants rights holders the ability to "rewrite the limits the law has set on the extent of the right conferred by copyright"⁴¹. One of the key arguments centred around the legal uncertainty created by contracting out. It stated the following:

"Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted."

This legal uncertainty is further reinforced by the issue of "contractual override"⁴²:

"Even if unused, the possibility of contractual override is harmful because it replaces clarity ("I have the right to make a private copy") with uncertainty ("I must check my licence to confirm that I have the right to make a private copy")."

Free TV agrees. Any ability to contract out of the fair dealing exceptions risks undermining the 'central objective of copyright' and the delicate balance that has been struck in the Act.

We note that at the recent roundtables, a suggestion was raised for any ban on contracting out to be subject to an 'unfairness' requirement, so that contractual terms purporting to contract out of the copyright exceptions would only be unenforceable in circumstances where the contract is unfair.⁴³ While we have not seen full details of this proposal or how such a requirement would work, Free TV opposes such a proposal in relation to the fair dealing provisions. In the broadcasting context, it is unlikely that contractual terms purporting to contract out of fair dealing would ever be found to be 'unfair'. However, such terms do impact on the operation and

³⁹ Stevens v Kabushiki Kaisha Sony Computer Entertainment and Others [2005] HCA 58.

⁴⁰ UK Copyright, Designs and Patents Act 1988.

⁴¹ 5.40, I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

⁴² Ibid.

⁴³ Copyright Modernisation Review Roundtables, Contracting Out, 2018.

effectiveness of the fair dealing provisions in the broadcasting environment. For example, broadcasters frequently enter agreements for premier broadcasting rights in relation to sporting events. These contracts sometimes purport to contract out of the fair dealing exceptions. In these circumstances, the broadcaster who has legitimately acquired the rights will be at a disadvantage to its competitors who have not acquired the rights and who would be able to make fair dealing uses of the content in accordance with the Copyright Act for the purposes of their news, current affairs and other entertainment programs.

6.2 Other copyright exceptions

Free TV recognises the importance freedom of contract and ensuring it is not unnecessarily interfered with. It was noted at the recent roundtable discussions on this issue that there are numerous exceptions to infringement and there may be circumstances where both parties to a contract might genuinely prefer to be able to contract out. For this reason, our view is that the case for making unenforceable contracting out of the other copyright exceptions should be considered on a case by case basis.

Recommendation:

The Copyright Act should be amended to make clear that contractual terms purporting to contract out of the fair dealing exceptions are unenforceable.

7 Copyright in broadcasts – retransmission consent

While the Consultation Paper does not raise this issue directly, the free exception at s 212(2) of the Broadcasting Services Act 1992 (BSA) currently undermines the copyright protection afforded to broadcasts under the Copyright Act and should be repealed. This was recognised by the ALRC in its report '*Copyright and the Digital Economy*', which also recommended removal of this free exception.⁴⁴

7.1 Copyright in broadcasts

Since the Rome Convention of 1961, a broadcast has been widely recognised as subject matter in which copyright subsists. Section 91 of the *Copyright Act 1968* ("the Copyright Act") recognises copyright in broadcasts in Australia and section 87 provides that the maker of a broadcast has the exclusive right to authorise the re-broadcast and communication of that broadcast to the public.⁴⁵

These exclusive rights acknowledge the creative and economic value of broadcasts. They recognise the endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment.

7.2 Anomalous exception in the BSA

Despite this protection however, broadcasters are currently unable to control the retransmission of their broadcasts by their competitors, because section 212 of the BSA effectively provides an exemption to the copyright protection provided by the Copyright Act, by allowing the retransmission of broadcasts by third parties.

While s 212 was introduced to allow retransmission by self-help providers in areas where viewers were unable to receive terrestrial reception or suffered poor reception, the exception is currently being used for commercial purposes by direct competitors of free-to-air television providers.

The Explanatory Memorandum to s 212 makes clear that it was never intended to allow commercial services to retransmit FTA signals without authorisation.⁴⁶ It provides:

"It is recognised that there are small communities, or pockets within licence areas which, because of distance from main transmitters or for reasons relating to the topography of their areas, are unable to receive adequate broadcast signals. It is intended that arrangements be permitted between such communities and broadcasters for broadcasting services to be re-transmitted, unaltered, to those communities."

Section 212 has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law.⁴⁷ For example, The Copyright Convergence Group in its 1994 report *Highways to Change: Copyright in the New Communications Environment* found that the retransmission of FTA signals for commercial purposes should be subject to the ordinary principles of copyright law. It recommended that retransmission without authorisation should only be permitted where it was required to address inadequate signal quality.⁴⁸

The exception appears to be inconsistent with Australia's international obligations under the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting*

⁴⁴ ALRC, *Copyright and the Digital Economy* (DP 79), Chapter 15.

⁴⁵ Copyright Act 1968, s 87.

⁴⁶ Explanatory Memorandum, Broadcasting Services Bill, 1992.

⁴⁷ 1996 Federal Government Election Policy, *Arts Online*, Broadcasting Services Amendment Bill 1998 Explanatory Memorandum, Communications Law Bulletin *Retransmission Rights: The Free to Air Broadcasters View*, Volume 17, No 3, 1998

⁴⁸ Copyright Convergence Group, '*Highways to Change – Copyright in the New Communications Environment*', August 1994, 47–48 and 57-58

Organisations, and out of step with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the three-step test for assessing the permissibility of copyright exceptions.⁴⁹

7.3 Anti-competitive nature of exception

In spite of this recognition however, s 212 continues to be used by subscription TV platforms to retransmit FTA channels without having to obtain consent from, or negotiate a commercial fee with, FTA broadcasters. This is inconsistent with general copyright principles and places commercial free-to-air broadcasters at a significant commercial disadvantage with their competitors.

It means that they are unable to control the means of delivery of their service and associated issues such as quality of services and placement. For example:

- The Pay TV provider determines the location and placement of EPG information of the free-to-air channels as well as the technical quality of the service received by the viewer. This can result in highly discriminatory positioning for free-to-air channels, particularly the secondary channels, which can be 'buried' in the EPG. It could also result in picture quality which is less than competing pay TV channels on the same service.
- On its satellite service Foxtel only retransmits the primary commercial free-to-air channel and one standard definition channel of each broadcaster. Viewers must pay for a premium HD service to access the free-to-air high definition channels (such as 7Mate, One HD, GEM, ABC News 24) on their Foxtel equipment.

The existing retransmission regime has also enabled Pay TV operators to replace terrestrial broadcast receivers in the home with Pay TV equipment.

7.4 Economic benefits of recognising copyright in broadcasts

Free TV commissioned independent research in partnership with ITV in the UK and German commercial broadcasters in relation to the economic impact of retransmission consent schemes on audio-visual content markets, using the US scheme as an example.

The report, "*Delivering for Television Viewers: Retransmission Consent and the US Market for Video Content*," by NERA Economic Consulting, found the US scheme has contributed significantly to the overall health of the US broadcasting industry.⁵⁰

The NERA report found that retransmission consent:

- has led to higher levels of investment in content, better quality content, and greater diversity of content;
- has allowed broadcasters to compete more effectively with pay TV networks for high quality programming, including widely viewed sporting events;
- has resulted in a significant increase in spending on news and other public interest programming;
- accounts for less than 3% of pay TV's revenues and has little or no impact on pay TV prices; and,
- is good economics that generates benefits for the entire digital video ecosystem.

Significantly, the report observes that the retransmission consent scheme in the US has seen consumers reap the benefits of competition and innovation in the video marketplace, including

⁴⁹ Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention).

⁵⁰ NERA Economic Consulting, *Delivering for Television Viewers: Retransmission Consent and the US Market for Video Content*, July 2014.

through the upgrade of facilities, improved quality of signals as a result of investment in digital multi-casting, and an increase in the quantity and quality of programming.

In other words, the report clearly shows that removing the exception to retransmission consent would assist broadcasters' capacity to continue to invest in Australian television production industry and would not adversely impact on pay TV providers.

7.5 ALRC recommendation on Retransmission

Free TV notes that, while it supports the ALRC's recommendation in relation to retransmission in so far as it recommends the removal of the free exception to copyright infringement at s 212(2) of the BSA, Free TV is strongly opposed to the removal of the Part VC statutory licence in the Copyright Act.

Removal of Part VC would mean that broadcasters would have to clear underlying rights in content for broadcast individually, which would be very impractical, complex, and would significantly increase the administrative burden on broadcasters.

Part VC provides an effective way of making broadcast content available to users and caters to the various interests of stakeholders. Free TV believes that there is little justification for repealing the compulsory licence scheme.

Recommendation

The free exception at s 212(2) of the Broadcasting Services Act 1992 (BSA) currently undermines the copyright protection afforded to broadcasts under the Copyright Act and should be repealed.