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## Department invites submissions on its review of the *Copyright Act 1968*

The Department of Communications and the Arts is currently conducting a review of the Copyright Act. It has invited submissions on its review by 5pm AEST on Monday 4 June 2018.

### Overview

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The Department's review is intended to coincide with the 50th anniversary of the enactment of the Copyright Act.

The aim of the review is to examine 3 areas of the Copyright Act highlighted in the Productivity Commission's Final report on [Australia's intellectual property arrangements](#) (PC Report) following the Australian Government's [response](#) to the PC Report recommendations which we reported on [here](#).

The Department considers that the following areas may benefit from modernisation particularly in light of the challenges posed by digitisation and emerging technologies:

- flexible exceptions
- access to orphan works
- contracting out of exceptions.

These issues were the subject of recommendations 6.1, 6.2 and 5.1 respectively of the PC Report.

In its response to the PC Report, the Australian Government highlighted the need for reforms to balance the 'interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole.'

This review is intended to complement the Department's disability access and Copyright Regulations initiatives in 2017, the Department's more recent [Review of the code of conduct for copyright collecting societies](#) and its ongoing work on the [Reforms to the copyright safe harbour scheme](#).

The review also follows a number of earlier reports on copyright reform issues, including the Australian Law Reform Commission's *Copyright and the digital economy* report in 2014 and the Copyright Law Review Committee's *Crown copyright* report in 2005.

The Department has released a [consultation paper](#) outlining reform options in each of the 3 areas identified above. It is seeking views on the paper, and is currently liaising with stakeholders on the issues raised.

Following the consultation process, the Department will advise the government on the issues covered in the paper.

### **Flexible exceptions**

The Department is considering 2 different options for reforming the current regime of 'fair dealing' exceptions as follows:

1. *Additional fair dealing exceptions* would add 1 or more exceptions to the existing fair dealing 'prescribed purposes' (these currently cover fair dealings for purposes of 'research or study', 'criticism or review', 'reporting the news', 'parody or satire' and 'giving legal advice').

The Department is consulting on additional prescribed purposes for quotation, non-commercial private use, incidental or technical use, text and data-mining, library and archive use, certain educational uses and certain government uses.

2. *A new 'fair use' exception* would be an open-ended fair-use exception and would be subject to the following fairness factors, used in the research and study fair-dealing exception:
  - the purpose and character of the dealing
  - the nature of the work or adaptation
  - the possibility of obtaining the work or the adaptation within a reasonable time at an ordinary commercial price
  - the effect of the dealing on the potential market for, or value of, the work or adaptation
  - the amount and substantiality of the part copied in relation to the whole work or adaptation.

The application of these 'fairness factors' would be informed by 'illustrative purposes' that mirror the existing fair dealing prescribed purposes and the additional prescribed purposes proposed under option 1 above.

### **Access to orphan works**

'Orphan works' are works for which the copyright owner is unknown or unidentifiable. It is not possible to get a licence or ask for permission to use orphan works and, as a result, these works can often remain underutilised or unused.

The consultation paper presents 3 alternative reform options for facilitating the use of orphan works as follows:

1. A direct statutory exception would allow for the use of orphan works, whether as a stand-alone exception or as part of a more open-ended exception such as fair use or extended fair dealing.
2. Limitation of remedies would limit the remedies available in an action for copyright infringement, provided that the user has undertaken a reasonably diligent search. Libraries, archives and cultural institutions support this option as 'unlocking' value in their collections.
3. A combination of options 1 and 2 above would create a direct exception for non-commercial use by collecting and cultural institutions and also a limitation on liability for copyright infringement for all other uses, provided that a reasonably diligent search has been undertaken.

## Contracting-out of exceptions

Contracting-out occurs when contracts include terms that are inconsistent with a party's right to rely on copyright exceptions. For example, a contract may provide that the buyer of software cannot make any copies of the software, even though there is an exception that would enable the buyer to make a back-up copy. When parties 'contract-out' of copyright exceptions, this can prevent use of copyright material in ways that benefit the public interest.

To address the issues raised by contracting-out, the Department proposes 2 alternative options for reform:

1. Making provisions giving effect to contracting-out of prescribed-purpose copyright exceptions (eg fair-dealing purposes or any fair-use illustrative purposes) unenforceable.
2. Making contracting-out of *all* copyright exceptions unenforceable (ie this would go beyond prescribed-purpose copyright exceptions).

### ***Further information***

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For further information about these proposed reforms, or for assistance in providing submissions or feedback to the Department on the issues raised in the consultation paper, please contact us.

**AGS will also be hosting an Intellectual Property Forum in September this year in which we will discuss the proposed reforms. If you would like to be on our mailing list for that forum, please email [ags@ags.gov.au](mailto:ags@ags.gov.au)**

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