Law Council
OF AUSTRALIA

Business Law Section

**24 February 2022**

Director – Creative Services
Communication Branch
Department of Infrastructure, Transport,
Regional Development and Communications
GPO Box 594
CANBERRA ACT 2601

By email: publishing@infrastructure.gov.au

Dear Director,

**Exposure draft Copyright Amendment (Access Reform) Bill**

1. The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (the **IPC**) makes this response to the exposure draft Copyright Amendment (Access Reform) Bill (the **Exposure Draft**).

**Schedule 1 – Orphan Works**

2. The IPC welcomes and supports the implementation of the Orphan Works proposal in the Exposure Draft.

3. Rather than providing an assumption as proposed in cl 116AJA(5), however, the IPC submits it would be preferable for paragraph 195(2)(a) to be amended to include the reference to s 116AJA expressly.

4. On one view the proposed assumption is not necessary given the terms of cl 116AJA(1)(e)(i) and (ii) as these provisions require the author to be identified in accordance with Division 2 of Part IX. In any event, the introduction of an "assumption" creates ambiguity rather than clarity and is not an appropriate interpretative tool. Instead, the legislative obligation should be clearly expressed by amendment of paragraph 195(2)(a) to insert "or section 116AJA" after the words "this Part".

5. Secondly, cl 116AJA(6) defines the author of a cinematograph film to be the "maker of the film". As it currently stands, the Act has two definitions of "maker of the film": one for the purposes of copyright in s 22(4) and a different one for the purposes of moral rights in s 189.

6. The ambiguity is unhelpful, could lead to significant costs and disruption being incurred and is unnecessary.

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7. If the definition for the purposes of moral rights is intended as implied by the cross-reference to Part IX in cl 116AJA(1)(e), the IPC recommends that cl 116AJA(6) be amended to read:

> *For the purposes of paragraph 1(e),* ***author****, in relation to a cinematograph film has the same meaning as in Part IX.*

8. The IPC submits this formulation is preferable to setting out the definition in s 189 again as, if that definition were repeated rather than referenced, then it would also be necessary to repeat the interpretative aids for that provision.

9. Thirdly, the IPC questions why the provisions come into force 12 months after the legislation is passed rather than at latest 6 months after proclamation.

**Schedule 2 – Fair dealing for quotation**

10. The IPC does not support the proposed new exception to be introduced by Schedule 2.

11. First, the major expert reviews since and including the Copyright Law Reform Committee's (**CLRC**) *Simplification Reference* in 1998 has recommended that Australia should implement a general "fair use" defence, which would satisfactorily cover fair quotations of copyright material.

12. In addition to the CLRC's *Simplification Reference*, these reviews have included:
    - the Australian Law Reform Commission's (**ALRC**) *Copyright and the Digital Economy* report (2013);
    - the Productivity Commission's *Intellectual Property Arrangements: Final Report* (2016).

13. In addition:
    - the Joint Standing Committee on Treaties consideration of the Australia-US Free Trade Agreement essentially supported adoption of a general fair use defence (20--);
    - in the United Kingdom, the Hargreaves Review concluded after detailed consideration that a general fair use defence should be adopted in United Kingdom but for the then constraints of EU law;[1].
    - the Copyright Review Committee (Ireland) also recommended enactment of a general fair use defence.

14. The Intellectual Property and Competition Review (**IPCR**) did not recommend adoption of a fair use defence but considered the matter should be reviewed in the light of further experience. The ALRC and Productivity Commission reviews were of course subsequent to the IPCR and the ALRC reference was chaired by Prof. McKeough, who was a member of the IPCR.

[1] I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 101.

15. The IPC strongly supports and endorses the recommendations and reasoning of those expert reviews. The IPC, therefore, is disappointed that the Exposure Draft proposes to introduce a very restricted "quotation" exception and regards the Exposure Draft as an opportunity lost to make meaningful reforms that would benefit both creators and the broader public.

16. Secondly, the IPC considers the proposed very restricted "quotation" exception to be highly unsatisfactory and most unlikely to assist its intended beneficiaries. There are numerous problems with the drafting.

17. A major difficulty is the limitation to so-called "non-commercial purposes" or for a commercial purpose where the quotation is immaterial to the value of the product or service. These limitations appear to be premised on a false dichotomy between the public sector and the private sector.

18. For example, many teachers would likely include quotations extracted from materials in the course of their research into works which will be exploited commercially such as text books and monographs and learned journals which are typically published by commercial publishing houses. The quotations may also be included in course materials for courses for which fees are charged. Similarly, although the discussion paper indicates a desire to assist documentary makers, many documentary makers will seek to fund their activities by charging fees for the exhibition or communication of their films.

19. None of these activities is likely to be considered "non-commercial".

20. It will also be far from clear whether a quotation in such cases is "immaterial" to the value of the product or service. The quotation may be small in terms of quantity compared to the length of the work in which the quotation is included but that does not mean it will be "immaterial" in terms of the value of the product or service. It is also unclear what kind of "value" is relevant here – social, intellectual, cultural, or economic? The contribution a quotation makes to the value or significance of an argument is often a very important consideration in determining whether a dealing is fair under the existing exception for fair dealings for the purpose of research or study. That is, a dealing will often be fair only where the extracted material makes an important contribution to the argument over and above what would be achieved merely by stating its effect. If the value added by the quotation was immaterial, there would be little point including it.

21. Further, the draft legislation is unclear as to which product or service is relevant in making this determination. This is the case even if we assume that the value alluded to is purely economic in nature. Consider the case of an academic journal article published by a commercial publisher, for example. Is the relevant question the materiality of the quotation to the value of the article, the value of the physical journal volume, or the value of the electronic database service in which it is included? The permissibility of the use may well hang on which of the various possible understandings of "product or service" is adopted.

22. The commercial exclusion is not just unwieldy and uncertain, but unnecessary. In order to be permitted under this exception, all dealings must be "fair", with fairness determined by taking into account all relevant circumstances. This includes, under the proposed subsection 113FA(2), the effect of the dealing upon the potential market for, or value of, the material. The more it interferes with that market, the less likely it is to be fair. This already appropriately protects rightsholder interests. There is no need for the additional carveout for commercial uses. Including it will add substantial cost, burden and compliance costs without any corresponding benefit.

23. Further, it is highly questionable whether such ordinary use as publication in a text book or documentary film would qualify as "for the purpose of research" as required by cl 113FA(1)(a)(vii) in the case of dealings by persons other than institutions or the Commonwealth or a State. For example, *De Garis v Neville Jeffress Pidler* [1990] FCA 352; 37 FCR 99 can be understood as holding that commercial distribution for consumption by others does not qualify as "research". Additionally, although the discussion paper suggests the proposed exception is intended to cover publication of research, the legislative text is silent as to whether it will extend to third parties who assist researchers to disseminate their research. In *De Garis*, it was held that fair dealing exceptions only protect the person who actually performs the act for the enumerated purpose – not third parties who assist them to do so. The situation is even more complex when it is a commercial publisher that is involved, or a service that accepts fees for distributing research. Even if the exception would prima facie apply, those commercial aspects may nonetheless be disqualifying, even though this is precisely the kind of use the exception was intended to cover.

24. These very considerable uncertainties will likely have at least a serious "chilling effect" by deterring many people from incurring the risks and costs of litigation by relying on the provision. For at least the reasons indicated, it is unlikely that such uses will qualify for the benefit of the defence.

25. Another serious deficiency is that the proposed defence is limited only to published material. This is particularly problematic for historical research, which relies heavily on unpublished documents such as letters, diaries, maps and government records. Once again, this limitation is unnecessary: the fairness factors already ensure that the purpose and character of the dealing and the nature of the copyright material be taken into account in determining whether a use is permissible. This includes consideration of whether the work is unpublished, adequately safeguarding rightholder interests without disproportionately stifling original historical research.

26. Problematically also, as a consequence of these limitations, the introduction of this very restricted exception risks narrowing the existing fair dealing defences for research or study, criticism or review and reporting of news. Whether a dealing is a fair dealing must take into account the structure and content of the Act as a whole. Thus, for example, the existence of the statutory licence provisions

permitting photocopying for educational purposes necessarily limited what would be a fair dealing for research and study.[2] Correspondingly, the introduction of the narrowly constrained permission to quote for the purposes of research but only of published works and only for non-commercial or "immaterial" purposes will necessarily affect what can be a fair dealing for the purposes of s 40. The enactment of s 113FA, therefore, has the potential to weaken the existing fair dealing defences.

27. The IPC is also concerned by the language of the chapeau to cl 113FA(1) that applies to a fair dealing that "… involves a quotation". This may be contrasted with the language of the existing fair dealing defences which requires a fair dealing *for the purpose of* research or study, criticism or review, parody or satire etc. It is not apparent to the IPC why different language is used.

28. The IPC notes that "quotation" can have a wide range of potential meanings; the simplest being "a group of words taken from a text or speech and repeated by someone other than the original author or speaker". From some of the examples of the ordinary meaning of "quotation" given in the Discussion Paper, this may be what is intended. In the context of copyright exceptions, however, "quotation" as contemplated by art. 10(1) of the Berne Convention would usually involve more than mere repetition but also illustrating or defending some point or argument made by the quoter.[3] It is not clear from the Exposure Draft or the Discussion Paper which meaning or objective is intended to be achieved. If the more specific meaning is intended, the legislation should make this clear.

29. In addition, the significance of the language "for the purpose of" is that it ensures that the subject use is tied to the permitted purpose. That is not necessarily the case with the proposed wording of cl 113FA. The IPC submits therefore that, if a fair dealing defence for "quotation" be proceeded with, the defence should expressly require that the dealing be for the purposes of quotation, not just involve a quotation and, if the more specific sense of quotation contemplated by the Berne Convention be intended, this be clarified.

30. At a purely formalistic level, the IPC notes that the proposal to include the quotation defence as cl 113FA means that "fair dealing" defences will be located in three different parts of the Act. That is likely to cause confusion, making access to the defence by its intended beneficiaries more difficult and expensive.

31. The unusually tight timeframe for submissions does not permit us to provide detailed analysis regarding other deficiencies we have identified within the proposed quotation exception, but the above points should be sufficient to demonstrate our serious concern at its deficiencies. As to a section which is

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2 *Haines v Copyright Agency Ltd* (1982) 42 ALR 549 at 555–6 (Fed C of A — full court).

3 Ricketson and Ginsburg, *The Berne Convention* (2edn) pp. 786 – 787 [11.41]. See also Case C-516/17 *Spiegel Online GmbH v Beck* EU:C:2019:625; [2019] Bus. L.R. 2787; [2019] 7 WLUK 458 (ECJ (Grand Chamber).

within the parameters of article 10(1) of the Berne Convention, there are a number of elements which are not currently addressed in cl 113FA. These include:

- proportionality (refer to the "*and their extent does not exceed that justified by the purpose*" requirement of article 10);
- being clear about whether derivative and transformative use is withing the proposed defence, noting the accepted notion is that "quotation" draws its power from using something significantly unaltered; and
- source materials and attribution. The IPC submits that these requirements may not be met by cl 113FA where use of copyright materials do not trigger the moral right of attribution (cl 113FA's attribution requirement is linked to Part IX Division 2).

32. The Discussion Paper asked a specific question regarding cl 113FA, namely:

    *Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?*

33. In its current form, the IPC submits that it should not. Please refer to our comments above regarding published versus unpublished materials. In any event the relevant requirement (in cl 113FA(1)(c)) that "*the copyright material has been made public*" should be changed to reflect the language of article 10(1) of the Berne Convention, namely that "*the copyright material has been lawfully made available to the public*".

34. The IPC does welcome the draft to the extent that it may be seen as an attempt to address perceptions that Australian law is not compliant with article 10(1) of the Berne Convention and hence is not in compliance with Australia's obligations under article 9(1) of the TRIPS Agreement of the World Trade Organisation or the Australia-United States Free Trade Agreement.

35. Article 10(1) of the Berne Convention, however, is not limited to the circumstances set out in cl 137FA(1)(a) or (b). Accordingly, cl 137FA does not in fact resolve the problem of our non-compliance.

36. If (contrary to the recommendations of the expert reviews), it is desired to introduce a "quotation" exception, it would be far preferable to enact a simple clause based on the terms of article 10(1) of the Berne Convention rather than proceed with what is proposed in Schedule 2 of the Exposure Draft.

37. A clause merely implementing Australia's obligations under article 10(1) of the Berne Convention, however, would not provide protection for quotation from unpublished materials which is often the very type of quotation which it may be expected the intended beneficiaries of the proposed quotation defence wish or need to do. For this reason (along with the many other reasons developed by the CLRC, the ALRC and the Productivity Commission after their painstaking, lengthy, and evidence-based investigations), the IPC submits this too is not an appropriate course and it is preferable to introduce a general "fair use" defence.

38. IPC also submits that cl 113FA requires further review in any event because of the recommendations of the Productivity Commission in its *Right to Repair Inquiry Report* No. 97 of 29 (October 2021). Following a detailed review, the Commission's Recommendation 5.2 was to introduce a new 'use' exception in the *Copyright Act1968* (Cth):

> *The Australian Government should amend the Copyright Act 1968 to include an exception that allows for the reproduction and sharing of repair information. In the immediate term, this exception should be included through the existing fair dealing framework in the Copyright Act.* (page 35 of the Report).

39. Recommendation 5.2 continued with the further recommendation that:

> *In the medium to long term, the Australian Government should pursue a more flexible copyright extension regime, including a principles-based fair use exception.*

**Other schedules**

40. In the time available especially having regard to the time of year when the Exposure Draft was released, it has not been possible for the IPC to fully analyse the remaining schedules of the Exposure Draft or the issues in relation to Technological Protection Measures. Accordingly, the IPC is not in a position to comment on those matters at this time.

41. The IPC would be happy to elaborate on its concerns with Schedule 2 of the Exposure Draft, should it be of assistance. If you wish to discuss, please contact Angus Lang, the Chair of the Intellectual Property Committee on 02 9232 4609 or lang@tenthfloor.org.

Yours faithfully

**Philip Argy**
**Chairman, Business Law Section**