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Department of Communication and the Arts

2 Phillip Law Street

Canberra
ACT 2601

*Introduction*

ACCAN thanks the Department of Communication and the Arts for the opportunity to contribute to its consultation on the Modernisation of Copyright. The modernisation of copyright and the potential benefits to the digital economy are important issues for consumers today. While ACCAN has not been a leading consumer organisation in these discussions, we have engaged in past consultations on copyright reform.

The modernisation of the *Copyright Act 1968* (Cth) (‘the Act’) has the potential to bring significant benefits to consumers, of which many were enumerated in the Productivity Commission’s report on *Intellectual Property Arrangements* (PC 2016) and in a cost-benefit analysis undertaken on behalf of the Department (DOCA 2016).

The benefits from reform to the Act for consumers are likely to be material and have been estimated at between $10 million and $20 million per year through reforms to orphan works alone (PC 2016, p. 28)*.* ACCAN considers that there will be further benefits through additional reforms if consumers are provided greater protections from inadvertent contracting out, and greater confidence in their ability to engage in legal format shifting.

ACCAN supports further reforms to copyright including:

* Clarification that the system of exceptions set out under the *Copyright Act 1968* (Cth) cannot be contracted out of, as legislation supersedes the common law.
* The creation of a fit-for-purpose framework of regulation for orphan works, that both provides adequate incentives for rights holders to protect their intellectual property, while protecting consumers and the general public from the risk of inappropriate financial sanctions.

*Fair use or fair dealing?*

ACCAN supports the introduction of a fair use exemption to the Act in the manner set out by the Productivity Commission. We believe that a fair use exemption of this nature will provide a more flexible and functional basis for providing exceptions to the Act on an ongoing basis. A limited and inflexible approach is likely to be ineffective in providing an appropriate balance of rights, as the nature of copyright material and its use changes over time.

In 2016 the Productivity Commission undertook a wholesale root-and-branch review of Australia’s intellectual property arrangements and found that the best option for reforming the Act was to adopt a broad fair use approach. Given the full and robust consideration of arrangements by the Commission, and its reputation for high-quality evidence based analysis, ACCAN considers that it is preferable that a fair use exemption be adopted.

*Copyright exceptions and contract*

ACCAN has consistently supported a ban on the contractual override of copyright exemptions under the Act and made this submission in the initial Australian Law Reform Commission Inquiry (ACCAN 2013). Accordingly ACCAN supports the recommendations of the Productivity Commission that the Act be amended to expressly precluded the contracting out of exceptions to the Act (PC 2016, p. 32), noting that the ordinary construction of the law would implicitly bar such contracting out.

A fundamental principle of law is that statute has primacy over the common law where there is conflict between the two. Although in the context of copyright this principle has been somewhat lost, it remains the case that the legislature has the power and indeed has overridden the common law through the Act.

Consumers and the general public face considerable barriers should they seek to dispute unfavourable contractual overrides of exceptions set out in the Act. The cost of seeking legal redress in many instances is significant. Although there may be material social benefits associated with a clear judgment concerning the illegal nature of contracting out at an individual level the cost is likely to exceed the benefits (Kaplow 1986; Shavell 1982). Accordingly rectification through clear legislative drafting is preferable to reliance on individuals to instigate litigation.

*Format shifting*

The ability to format shift copyrighted material is important to ensuring that consumers retain the benefits associated with the intellectual property for which they have paid to access. ACCAN supports the refinement of the Act to provide clarity concerning the right of consumers to engage in format shifting to support their continued private use of material for which they have already paid.

ACCAN considers that clear rights to format shifting may be created as part of the development of a broad fair use exception approach to copyright. As noted in ACCAN’s earlier submissions to the ALRC, the failure to adopt a contemporary approach to format shifting has led to material consumer detriment, insofar that content use and access has been restricted. Rather than result in the re-purchase of property in a different format, the lack of appropriate access to content at a reasonable price has undermined sales and promoted piracy.

ACCAN supports greater rights for consumers to copy and transfer content for private use, and supports the recommendation of the Productivity Commission with respect to the lifting of the bar on consumers circumventing technological protection measures (PC 2016, p. 142) in order to facilitate format shifting for private use.

*Orphan works*

ACCAN does not support the remedies outlined in the consultation paper. The remedies of damages, license fees or account of profits provide little incentive for rights holders to exploit their works through active efforts of dissemination and thus earn a return, which forms the fundamental economic basis for this right.

When developing a framework for regulating use of orphan works ACCAN believes it is important to consider the following principles:

* That the economic rationale for the granting of monopoly rights is that the underlying intellectual property is exploited, and that there is a reward for creation and dissemination;
* That where works are ‘orphaned’ and there is no evidence of exploitation, use of orphan works is unlikely to have an effect on the incentive to create or disseminate intellectual property as no rational creator would create works that were not to be exploited in some form;
* That there are material social benefits that accrue from use of orphaned works (PC 2016, p. 28);
* That rights holders face the least cost of identifying themselves as owners of property;
* That rights holders are incentivised to adequately protect their property or make themselves known;
* That there is a potential chilling effect of allocating unquantifiable financial risks to consumers or institutions in the form of requirements to pay damages, license fees or account of profits;
* That a diligent search may involve expenditures in excess of the benefit of use, and that consequently an efficient or reasonableness search requirement is preferable;
* That there is a potentially significant perverse incentive for rights aggregators to engage in socially costly or ‘copyright troll’ behaviour.
* That rights holders, by making themselves known to users can be empowered to resume their rights within a transparent statutory timeframe, providing certainty to all parties.

The objective of the framework of intellectual property is to promote the creation and exploitation of intellectual property to the benefit of rights holder and the broader public. Where rights are abandoned or ‘orphaned’ for prolonged periods of time, this core objective is not met. As a consequence the rationale for protection is diminished or often eliminated.

Orphan works and their use have the potential to add significantly to society (PC 2016, p. 28).The failure to exploit them inherently entails an ongoing loss to society at large on the order $10 million to $20 million a year in terms of benefits forgone. Cumulatively in the years since the completion of the ALRC report, the benefits forgone by society would represent between $50 million to $100 million.

Historically, where an individual has had a right to real property (that is land), and they have failed to exploit, use or maintain that property, the law of adverse possession has provided for reallocation to those that in good faith that have sought to exploit or occupy it. Reallocation occurs under specific circumstances; most notably where the property has not been maintained or occupied by the original owner for a period of time and a third party has taken up residence.

Rights holders have the greatest incentive to make themselves known publicly as the owner of the underlying property and prevent orphaning. Moreover the costs that rights holders face in making themselves known to be the owner of property, are often materially lower than the costs associated with undertaking a diligent search by consumers or institutions. Where a potential loss or damage can accrue, it is a well-defined principle that the obligation to prevent or minimise that risk be allocated to that party which is best placed to mitigate it – in this instance rights holders.

Accordingly the imposition of a requirement for a diligent search on the part of consumers and institutions is likely to result in the search costs faced by these parties exceeding the benefits of using the underlying work, resulting in inefficient underutilisation of the property. In contrast the imposition of a requirement to undertake a ‘reasonable’ search, where reasonableness is understood to be determined by reference to the relative expected costs and benefits of searching for the right holder, is a more appropriate test.[[1]](#footnote-1)

There is not a clear economic rationale as to why owners of intellectual property are not required to use, exploit or maintain their property in order to retain title. ACCAN notes that maintaining intellectual property by being publicly identifiable as the owner entails a minimal cost, compared to that required for land.

The reallocation of real property in the above circumstances reflects the inherent societal costs associated with a failure to utilise a scarce resource, which has the potential to add significant value to the economy and community at large. Similarly the failure to use orphaned works results in society forgoing considerable economic and social benefits, in some instances possibly lasting for a period of 70 after the authors’ death, which were it carried through for all orphaned works would imply a loss of between $700 million and $1.4 billion to society over this period.

ACCAN has concern that the implementation of the proposed remedies set out in the consultation paper is likely to dissuade consumers and institutions from using orphaned works. The proposed remedy of an account of profits is a particularly excessive remedy, and rewards rights holders or rights aggregators that fail to take any steps to exploit/productively use their intellectual property. This failure represents a loss of potential value to the economy and society at large which cannot be recovered.

A failure to maintain intellectual property should not entitle a rights holder to seek financial compensation from legitimate third party users. A party that seeks to productively use copyrighted material should not in principle be subject to punitive financial measures to reward the failure of another party to exploit the monopoly rights that they have been granted. This is particularly the case for collecting and cultural institutions which in many instances are seeking to preserve important copyright material to the benefit of society at large and future generations.

The create of remedies of damages, license fees or in the extreme case, account of profits, has the potential to provide perverse incentives for aggregators of rights, who will then have incentives to behave in a fashion similar to that of ‘patent trolls’. In particular the remedy of an account of profits is likely to provide material incentives

ACCAN supports the limitation of liability for using or accessing orphaned works, in instances where the rights holders cannot be identified. This could entail development of a statutory framework to allow resumption of full rights by rights holders following a period of between 18 to 24 months upon either re-publication in some form or through provision of notice to parties using the material.

A notice framework would provide both certainty to consumers and the general public concerning their exemption from liability in instances where they use orphaned works, and provide a clear process for rights holders to resume their rights. Within this framework all parties have certainty as to their rights, and incentives are set for rights holders to take active steps to ensure that they are both readily identifiable as the underlying owner of their intellectual property, and more importantly to exploit their works to the benefit of themselves and society at large.

Should you wish to discuss this submission further please do not hesitate to get in contact.

Yours Sincerely,

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**Reference List**

ACCAN (Australian Communications Consumer Action Network) 2013, *Copyright and the Digital Economy Discussion Paper - Submission to the Australian Law Reform Commission (ALRC)*.

DOCA (Department of Communications and the Arts) 2016, *Cost benefit analysis of changes to the Copyright Act 1968*, prepared by Ernest & Young on behalf of the Department, Canberra.

Kaplow, L. 1986, ‘Private versus Social Costs in Bringing Suit’, *The Journal of Legal Studies*, vol. 15, no. 2, pp. 371–85.

PC (Productivity Commission) 2016, *Intellectual Property Arrangements*, Canberra.

Shavell, S. 1982, ‘The social versus the private incentive to bring suit in a costly legal system’, *Journal of Legal Studies*, vol. 11, no. 2, pp. 333–9.

1. . In the economic analysis of law reasonableness is understood to synonymous with efficiency. [↑](#footnote-ref-1)