



ADG AND ASDACS SUBMISSION TO DEPARTMENT OF  
COMMUNICATIONS AND THE ARTS – RESPONSE TO THE COPYRIGHT  
MODERNISATION PAPER

**June 2018**

AUSTRALIAN DIRECTORS GUILD &  
AUSTRALIAN SCREEN DIRECTORS AUTHORSHIP COLLECTION SOCIETY

28/330-370 WATTLE ST ULTIMO NSW 2007

[www.adg.org.au](http://www.adg.org.au) and [www.asdacs.org.au](http://www.asdacs.org.au)

## About ADG and ASDACS

The Australian Directors Guild (ADG) is the industry association and union representing the interests of screen directors throughout Australia. Formed in 1982, it has over 800 members nationally and has recently been registered as an association of employees under the *Fair Work (Registered Organisations) Act (Cth) 2009*.

The Australian Screen Directors Authorship Collecting Society (ASDACS) is a collecting society representing the interests of screen directors throughout Australia and New Zealand. It was established in November 1995 and currently has over 1100 members. The primary purpose of ASDACS is to collect, administer and distribute income for screen directors arising from international and domestic secondary usage rights.

In December 2005, directors in Australia were granted a share of retransmission rights<sup>1</sup> (when a free-to-air television broadcast is retransmitted across a different network, such as pay tv). Internationally, directors have primary rights in 35 countries around the world<sup>2</sup> and retain secondary usage rights such as private copying, rental and public lending, simultaneous retransmission by cable or pay TV of primary broadcasts, communication to the public by means of technical equipment, pay-per-view, video on demand, projection in cinemas, sale for private use and use for educational purposes.

The ADG and the ASDACS welcomes the opportunity to provide a submission in response to the Copyright Modernisation Consultation Paper.

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<sup>1</sup> See <https://www.legislation.gov.au/Details/C2005A00130>.

<sup>2</sup> See <http://asdacs.com.au/rights> for the full list of countries whereby directors have copyright in the film.

## Flexible exceptions

### Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

The ADG and ASDACS does not support the introduction of a 'fair use' exception and reiterate the key points made in our previous submission to the Productivity Commission's Inquiry into Australia's Intellectual Property System (June 2016):

- The adaption of a US (civil law) based system in an Australian legal context creates uncertainty in that 'fair use' relies on amassing case law to determine what fits within its broad and open-ended scope.
- Creators and authors (including screen directors) are disadvantaged in that (as individuals), they do not have the financial means to take legal action to test the scope of 'fair use'.
- 'Fair use' reduces the ability for copyright owners (creators and authors) to license material if works are made available for free under its provisions; undermining their ability to generate income from their work and ultimately disincentivising the creation of new works.
- 'Fair use' serves to predominately benefit multinational organisations such as Google and You tube seeking to use copyrighted material for their own commercial purposes and not creators and authors, who would be exploited through the free and open use of their work.
- Screen directors are further disadvantaged in that their rights are currently limited to retransmission rights (if not assigned to another entity such as a Producer, the film is not commissioned, or they are not an employee) and 'fair use' would undermine their already limited remuneration from this right<sup>3</sup>.
- As strongly outlined in previous ADG and ASDACS submissions<sup>4</sup>, we urge the government to amend the Act so the definition of 'maker' of a film specifically includes screen directors, as is the case in 35 countries<sup>1</sup> around the world (including the United Kingdom).
- Screen directors make a vital contribution to culture, diversity and economic growth in Australia as a result of their work in the screen industry; broadening their copyright ownership would further encourage creativity and innovation.

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<sup>3</sup> In the 2017 calendar year, ASDACS collected a total of just \$14,760 from domestic retransmission royalties; compared with \$1,209,828 of royalties received from 17 of ASDACS' international collecting society partners in the same year.

<sup>4</sup> See, for example, the following submissions drafted by the ADG and ASDACS: Submission to the Department of Communication and the Arts: Amendments to the Copyright Act (February 2016); Submission to the Productivity Commission: Inquiry into Australia's Intellectual Property System (June 2016); Submission to the House Standing Committee on Communications and the Arts: Inquiry into factors contributing to the Growth and Sustainability of the Australian Film and Television Industry (March 2017); Submission to the Australian Children's and Screen Content Review (September 2017); Submission to the Attorney General's Department on the Australian Law Reform Commission Draft Terms of Reference on Copyright (April 2012).

- The ADG and ASDACS further urge the government to affirm the rights of screen directors by introducing an unwaivable and inalienable right to remuneration for audiovisual authors, as outlined in CISACS' (International Confederation of Societies of Authors and Composers) Audio visual study<sup>5</sup> to provide certainty for authors to receive remuneration for the exploitation of their works.

The ADG and ASDACS does recognise that copyright law must strike a balance between making content available and protecting copyright owners (creators and authors) work. However, we maintain that the current flexible dealing provisions are adequate in striking that balance and question the need to introduce further exceptions that would undermine a creators or authors ability to be remunerated for their work.

### Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

The ADG and ASDACS recognise (understandably) that both the educational and gallery, library, archive and museum ('GLAM') sector require reasonable access to copyright materials for archival, research, cultural, historical and digitisation purposes.

However, we note that this sector already has adequate provisions available that allows access to copyrighted materials, such as section 200AB, the current fair dealing exceptions (such as research and study, criticism and review), as well as statutory licensing regimes and specific exceptions allowing the use of material for preservation purposes.

The ADG and ASDACS are concerned that, by introducing additional exceptions and opening up use to this sector further would, again, potentially undermine creators and authors ability to receive fair remuneration for use of their work. Therefore, we would in principle, only support any changes or specific exceptions, that would not, in anyway threaten this.

We would also like to reiterate, as per our previous submission<sup>6</sup>, unfortunately directors are one of the few class of authors in Australia that miss out on remuneration through statutory licence schemes due to their limited retransmission right. A simple change to the Act to include the director as the 'maker' of the film would ensure directors are fairly remunerated for their work through these schemes. Further, an unwaivable and inalienable right to remuneration for audio-visual authors (including screen directors) would ensure broader remuneration for the exploitation of their work.

## Contracting out of exceptions

### Question 3

Which current and proposed copyright exceptions should be protected against contracting out

<sup>5</sup> See 'Audiovisual Authors Right to Equitable Remuneration for the Exploitation of their Works', International Study by Prof. Raquel Xalabarder, Intellectual Property Chair Universitat Oberta de Catalunya (UOC), Barcelona, CISAC, (May 2018) located at <http://www.cisac.org/Newsroom/News-Releases/Audiovisual-organisations-unveil-new-international-legal-study-supporting-fair-remuneration-for-audiovisual-authors>.

<sup>6</sup> See ADG and ASDACS: Submission to the Department of Communication and the Arts: Amendments to the Copyright Act (February 2016).

#### Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- All copyright exceptions?

The ADG and ASDACS support the view of the Australian Copyright Council (ACC) in regard to contracting out of copyright exceptions. More specifically, the ADG and ASDACS affirm that restricting the ability of creators and authors to contract out of copyright exceptions weakens their already minimal contractual bargaining power and further limits the control they have over their work.

Additionally, in the case that a work contains sensitive or restricted material (for cultural, personal and / or legal reasons), the rightsholder should have the freedom and flexibility to restrict the work for use under copyright exceptions; given that it may not be appropriate for the material to be used in that way. For instance, a documentary filmmaker should have the contractual power to restrict the use of a program with indigenous content, as a further measure beyond Indigenous Cultural and Intellectual Property (ICIP) protocol, to ensure that the work is not used in a culturally insensitive or inappropriate way under any of the copyright exceptions.

#### Access to orphan works

#### Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

#### Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

#### Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

The ADG and ASDACS understand that access to orphan works (or works whereby the copyright holder is untraceable and/or unidentifiable) is a problematic and a long running issue, again posing an ongoing challenge in particular for the 'GLAM' sector.

However, the ADG and ASDACS are again concerned that if a specific exception was introduced in order to open up the use of orphaned works further, creators and authors are at risk of missing out on remuneration through their work having been misused under this exception.

As the ACC has pointed out in their submission in response to the Copyright Modernisation Paper, creators and authors are vulnerable to their works being exploited, particularly in an ever-increasing digital world in which works can be easily uploaded and made available to the public online without permission<sup>7</sup>. Works are at risk of being used under the assumption that they have no copyright owner, when in fact the user had not done their due diligence to identify the copyright holder. This leaves the copyright owner with little control over the use of their work and left without fair remuneration for this exploitation.

As noted previously, the ADG and ASDACS note that the GLAM sector (understandably) already has a range of exceptions available to them. Further, comprehensive policies are in place among the main cultural institutions (such as The National Sound and Film Archive<sup>8</sup>) and broadcasters (such as the Special Broadcasting Service<sup>9</sup>) which mitigate risk of orphan works use, with compensation available for the use of the works if a copyright holder comes forward; therefore, we question the need for a specific exception.

Also, the ADG and ASDACS note that works are available in the public domain after the relevant copyright term (which serves as an adequate and important protection measure for rightsholders); leaving orphaned works available for use after this term.

Having said that, if measures around orphan works were to be formalised, the ADG and ASDACS would only support a limitation of remedies, restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (non-commercial use only); specifically, available to the 'GLAM' sector only.

In any case, the ADG and ASDACS, affirm the importance of ensuring that effective measures are in place that enable copyright holders to be compensated based on the nature and purpose of use should they later be identified or recognise that their work had been used, with clearly defined protocols set in place to ensure due diligence has been met in attempting to find the copyright holder of a work before use.

## Conclusion

The ADG and ASDACS recognise the need for a balance between access to and protection of copyrighted works. However, we argue that the introduction of US 'fair use' provisions, broadening exceptions, restricting contracting out of exceptions and opening up access to orphaned works, risks tipping the balance too far in favour of access / the user, undermining creative rightsholders control over their work and eroding any fair remuneration for use, which ultimately disincentivises creativity and innovation.

We strongly urge the Department of Communication and the Arts to instead strengthen and protect creators and authors rights (including screen directors) to assure that, particularly in an uncertain digital age of disruption, creators and authors are fairly remunerated for their work.

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<sup>7</sup> See, for example, <http://www.abc.net.au/news/2015-08-15/copyright-infringement-nets-photographers-thousands-of-dollars/6695906>.

<sup>8</sup> See, <https://www.nfsa.gov.au/collection/using-collection/copyright>.

<sup>9</sup> See, <https://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-orphan-works-1.0-February-2011>.

## CONTACTS

Deb Jackson (Executive Officer, ASDACS)  
E: [deb.jackson@asdacs.com.au](mailto:deb.jackson@asdacs.com.au)  
T: +61 2 9555 7042

Kingston Anderson (CEO, ADG / ASDACS)  
E: [kingston@adg.org.au](mailto:kingston@adg.org.au)  
T: +61 2 9555 7045