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ASDACS' Submission to the Department of Transport, Regional Development and Communications (DITRDC) – Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions.

About Us

ASDACS

The Australian Screen Directors Authorship Collecting Society (ASDACS) is a copyright collecting society representing the interests of screen directors throughout Australia and New Zealand. It was established in November 1995 and currently has over 1400 members. The primary purpose of ASDACS is to collect, administer and distribute income for screen directors arising from international and domestic secondary usage rights.

Directors' rights

In December 2005, directors in Australia were granted a share of retransmission rights¹ (when a free-to-air television broadcast is retransmitted across a different network, such as pay tv). Internationally, directors have primary rights in 37 countries around the world² 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.

ASDACS welcomes the opportunity to provide a submission in response to the Exposure Draft Copyright Amendment (Access Reform) Bill 2021 and Review of Technological Protection Measures Exceptions.

As noted in our submission on Copyright Modernisation (2018), ASDACS recognises the need for a balance between access and protection of copyrighted works. However, ASDACS is concerned that several of the changes outlined in the Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions leans too far in favour of access/the user, undermining a copyright rightsholders' control over their work and subsequent fair remuneration for use, ultimately disincentivising the creation of new works. As a member of the Australian Copyright Council (ACC), ASDACS supports the detailed comments made within ACC's submission. However, we have also highlighted our specific concerns and comments under the schedules of the exposure draft below.

Schedule 1: Limitation on remedies for use of orphan works

Under the proposed reform outlined in the Exposure Draft, we note that, if a copyright owner comes forward, no compensation or relief would be required to the copyright owner for the past use of an orphaned work. ASDACS maintains that the core principals of copyright protection should be upheld, and, in the case that a copyright owner comes forward, fair compensation should be due for the past

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

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

use of their works. Without this measure orphaned works are at risk of been unfairly exploited, particularly if, as proposed, they can be openly used for commercial purposes. Making works available for ‘free’ under this proposal sets a concerning precedent that copyrighted works should be openly accessible, more broadly eroding the principal value of copyright protection.

Under the Exposure draft, we note that the user can continue to use the work through ‘reasonable terms’ agreed to by the copyright holder with the option for the parties to make an application to the copyright tribunal or pursue a court injunction should the parties not come to a mutual agreement. This is disempowering and restrictive for copyright owners which include creators and authors (including screen directors), as in practice, individuals working within the creative sector do not have the expertise or financial means to take this action. This approach also fails to give an avenue for the copyright owner to restrict further use of their work if they choose, which is particularly important in the case a work has culturally sensitive material, such as indigenous content.

In ASDACS’ view, a fairer and more balanced approach would be to restrict use of orphaned works for non-commercial purposes only, with a fund to cover any compensation for past use should the copyright holder emerge. The copyright holder should be empowered to restrict use based on the principal that they are the implicit owners of the work and permission had not been granted in the first instance. We also support the establishment of an orphaned works public register (such as is the case in the United Kingdom³) to ensure a consistent approach to orphaned works use and a ‘reasonable diligent search’ of a copyright owner is maintained.

Schedule 2: New fair dealing exception for non-commercial quotation

ASDACS is concerned that under the new quotation exception, excerpts of audio-visual material can be freely used in documentaries (as considered ‘for the purposes of research’). A documentary clearly does not fall under the scope of non-commercial use, as this genre is readily distributed and publicly exhibited through commercial markets (such as broadcasters and online streaming platforms). There is risk that audio-visual material used under the new quotation exception that would otherwise require copyright permission would be used under this exception (for instance footage extracts from a past documentary for reuse in a new documentary). ASDACS’ view is that the new quotation exception should clearly define the perimeters of quotation to non-commercial use only to reduce the risk of a copyright owners’ audio-visual works been exploited without fair compensation.

Further, our view is that the new quotation fair dealing exception should not extend to unpublished material, as again, this would undermine the principal of copyright protection.

Schedule 3: Update and clarify library and archives exceptions

ASDACS supports the bill’s intent to *‘not allow libraries and archives to become quasi-e-book or streaming services or displace their acquisition of commercial products where they are available’*. Allowing libraries and archives to screen content without limitation would seriously impact the commercial viability of the screen industry, which is reliant on the commercial distribution of works to sustain the development of new works. We further support *‘limiting access to registered library users with password protection and for viewing only, as well as providing an appropriate attribution to the author and copyright notice’* as well as the reasonable restrictive measures outlined to ensure works are used for domestic and research purposes only.

Schedule 4: Update and restore education exceptions

ASDACS refer to the ACC submission in highlighting that several exceptions already apply to the educational sector and question the need to extend beyond these exceptions. However, if further exceptions are legislated, we strongly support the limitations as per the library and archive exception proposal (*‘limiting access to registered library users with password protection and for viewing only, as*

³ <https://www.orphanworkslicensing.service.gov.uk/view-register>

well as providing an appropriate attribution to the author and copyright notice⁴) to reduce the risk of a copyright holders' work been widely exploited without fair remuneration.

Schedule 5: Streamline the government statutory license scheme

In principle ASDACS supports the extension of the government statutory licensing scheme to be broadened to include communication (making available online or electronic transmission) of copyright material. However, we maintain that adequate remuneration (over and above the existing government copying license) should be payable to the copyright holder to compensate for the extension to this use. As, according to the Screenrights 2020-21 annual reporting figures, over \$45.3MM⁴ of royalties from secondary usage rights (such as government copying, retransmission, educational copying, and educational communication) was distributed to rightsholder members (including directors, producers, and screenwriters). Screen royalties are critical in sustaining the screen industry, as these monies are ultimately reinvested in the creation of new works.

Review of Technical Protection Measures exceptions

ASDACS' view is that there are adequate exceptions for TPM measures in place and do not support any further extensions of these exceptions which would compromise the protection of copyright material and jeopardise fair remuneration to rightsholders.

Thank you again for the opportunity to make a submission.

Please do not hesitate to contact us if you require any further information.



Deb Jackson
ASDACS Executive Director

⁴ See https://www.screenrights.org/wp-content/uploads/2021/11/SCR_4628_HL_2021-FIN.pdf.