



Copyright Modernisation Consultation

AIIA response

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About the AIIA

The Australian Information Industry Association (AIIA) is Australia's peak representative body and advocacy group for those in the digital ecosystem. We are a not-for-profit organisation to benefit members.

Since 1978 the AIIA has pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment for our members and to contribute to Australia's economic prosperity.

We do this by delivering outstanding member value by providing a strong voice of influence; a sense of community through events and education; enabling a network for collaboration and inspiration; and through the development of compelling content and relevant and interesting information.

We represent organisations nationally, including global brands such as Apple, Adobe, Avanade, EMC, Deloitte, Gartner, Google, HP, IBM, Infosys, Intel, Lenovo, Microsoft and Oracle; international companies including Optus and Telstra; national companies including Ajilon, Data#3, SMS Management and Technology and Technology One; and a large number of ICT SMEs.

Our national board represents the diversity of the digital economy. There is more detailed information on our web site.



Copyright exceptions not adaptive to technological change and should be broadened to 'fair use'

The AIIA appreciates the opportunity to comment on this important and timely review of the Copyright Act 1968 (Cth) (the Copyright Act).

We support the government's aim of modernising the Copyright Act to reflect the needs of a digital economy. Innovation, culture and creativity are inherently dynamic, but our copyright law is not. There is an urgent need to enact flexible copyright legislation that will keep pace with rapid developments in technology as well as the expectations of consumers and creators.

This paper addresses question 1 of the consultation paper:

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 AIIA strongly urges government to adopt a 'fair use' exception in place of the 'fair dealing' exceptions. This is notwithstanding the additional exceptions proposed. Specifically we support the US model of the four statutory fairness factors and six illustrative purposes – harmonisation with common international practices will mean less barriers for Australian businesses to exploit their copyright and use copyrighted material.

While some of the additional fair dealing exceptions proposed (i.e. the incidental or technical use exception and the text and data mining exception) will go some way in reducing the barriers, the fundamental problem with fair dealing still remains. Fair dealing is more complex, more costly and less fixable than the alternative fair use option.

The fair dealing approach relies on a limited number of specific exceptions that could be considered 'fair'. The almost 30 exceptions distributed throughout the Copyright Act to date are mostly complex and technologically non-adaptive.

For example the following undesirable technicalities could occur:

- It's fine to copy music from a CD to a smartphone **or** tablet but not to a smartphone **and** tablet
- It's fine to copy music from a CD to a tablet but not copy a film from a DVD to a tablet
- It's fine to backup a CD or DVD to a computer, but not to store it privately online to listen to it on a mobile device
- It's fine to use a mobile app to record a TV show on a hardware device stored at home, but not if it is recorded and stored in the cloud
- It's fine to backup your own email attachments and shared pictures, but not emails and attachments someone else sends to you.

A recent report by Deloitte Access Economics¹ found that prescriptive approaches, such as fair dealing, will result in high error cost:

¹ Deloitte Access Economics, 'Copyright in the digital age', 2018



“This report includes a theoretical model for considering the error costs arising under fair dealing and fair use. It finds that in the current environment error costs are greater under fair dealing relative to fair use. It also finds that the relative costs are likely to increase over time as a result of rapid digital transformation.”

A key concern expressed by content creators is that fair use may undermine the incentives to create work, ultimately reducing the number of creative content available. However the same report by Deloitte found no contraction of investment in creative works in the United States since the adoption of fair use in 1841, nor more recently in countries like Singapore, Korea, or Israel that have adopted fair use style provisions.

Another study in the United States found that industries that relied on fair use contributed 16.2 per cent to the US economy in 2007.² A study in Australia indicated that industries relying on copyright exceptions contributed 14 per cent to Australia’s GDP in 2010, and grew significantly faster than the rest of the economy.³ Though this does not necessarily mean fair use itself contributed these portions to the economy, it does identify the importance and growing requirement of these exceptions for industry.

More broadly, if Australia is serious about being a competitive and prosperous nation in the 21st century we need better reforms to boost innovation. Artificial intelligence (AI) is a great case in point.

AI is forecast to grow from \$1.38 billion in 2016 to \$59.75 billion by 2025, globally.⁴ The Australian Government itself announced in its 2018/19 Budget that “it will support the development of Australia’s artificial intelligence ... and machine learning capability to keep pace with global progress and improve our existing expertise in these technologies to maintain our competitiveness.”⁵

However, a key part of training the AI algorithm requires making copies of large data sets. In many cases these data sets include material protected by copyright. Without fair use or safe harbour under our Copyright Act, Australian businesses are at a distinct disadvantage compared to their international competitors.

In the context of outdated copyright laws, low support for R&D⁶, high barriers to skilled migration⁷, not to mention a high corporate tax rate⁸, Australia risks becoming a back water nation that is not open for business.

ICT is a highly mobile, high skilled labour based industry and businesses will move its scarce labour resources to where there is better support.

The clear economic benefits of growing the ICT sector in Australia cannot be overstated:

- The economic contribution of the internet and digital enabled economy is forecast to increase from \$79 billion in 2014 to \$139 billion by 2020, rising from 5% to 7% of Australia’s GDP.⁹
- Going digital provides an opportunity to create new business models, reinvent core processes, improve efficiency, drive productivity and get closer to the customer, but in

² Fair use in the U.S economy: Economic contribution of industries relying on fair use (2007), <http://www.cciianet.org/wp-content/uploads/library/FairUseStudy-Sep12.pdf>

³ Australian Digital Alliance, Potential \$600m Annual Economic Boost From Copyright Reform (September 2012), 3 digital.org.au/media/165

⁴ Tractica, Artificial Intelligence Market Forecasts (2017) Tractica <<https://www.tractica.com/research/artificial-intelligence-market-forecasts/>>.

⁵ Treasury Department, Budget 2018–19 Overview: Stronger and Smarter Economy (May 2018) <<https://www.budget.gov.au/2018-19/content/overview.html>>.

⁶ the government is proceeding with plans to cut the \$3 billion R&D tax incentive, and restrict claims for software R&D. Business R&D in Australia is already below the average of other advanced economies, and we have been in the midst of a R&D recession, with a 12 per cent (or \$2.2 billion) decline in the latest data see <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8104.0>

⁷ Recent migration reforms also make it difficult for Australian businesses to attract talent. Specifically the current eligible skilled occupation lists do not clearly specify ICT specialist in key growth areas that other countries are targeting aggressively such as engineers in emerging systems, artificial intelligence, cloud, cognitive systems/data scientists, and machine learning/analytics.

⁸ Australia has one of the highest corporate tax rate in the OECD see https://stats.oecd.org/index.aspx?DataSetCode=TABLE_I11

⁹ Australia’s Digital Pulse, Deloitte Access Economics, 2016



reality there is wide variation in how aggressive and effective businesses are in pursuing these opportunities. In Australia, small and medium businesses that are advanced in their use of digital technology compared to those at a basic level are 8 times more likely to be creating jobs, 7 times more likely to be exporting, earn 1.4 times more revenue, and are 14 times more likely to be innovating.¹⁰

- Across the economy, the adoption of productivity enhancing technology presents a \$2.2 trillion dollar opportunity for Australia through the years to 2030.¹¹ However in order for Australia to realise the full benefits of this change, Australian business investment in technology, will need to lift to the level of global peers or we risk missing out on our share.

The AIIA urges government to back its innovation policy. Opportunities in the digital economy will not be maximised unless our Copyright legislation supports innovation.

¹⁰ Connected Small Business 2016, Deloitte Access Economics, 2016

¹¹ Google Economic Impact: Australia 2015, Alphabet, 2016

