Submission to the Commonwealth Department of Communications & the Arts re copyright modernisation consultation paper

Open Source Industry Australia Ltd

Amplifying the voice of the Australian open source software industry

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About OSIA

OSIA represents & promotes the Australian open source software industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;
- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source software industry; and
- Ensuring Australia's global standing as the preferred location from which to procure open source services & products.

OSIA's members are organisations in Australia who invest in or build their future on the unique advantages of open source software. For further information, see the OSIA website at http://osia.com.au.

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1 Executive summary

OSIA welcomes the Department's initiative to modernise copyright in Australia. We welcome this opportunity to contribute to the initiative and we thank the Department for that opportunity.

As the industry body representing Australian free[1] & open source[2] software (FOSS) companies, it is only natural that OSIA have called for modernisation of Australia's copyright regime on multiple occasions over the last 13 years. For example, in 2005[3] we noted the economic opportunities and benefits in terms of competition arising from the then relatively new business models our members pursue (which were threatened by the proposed TPM provisions); in 2013[4] we discussed the great potential for economic benefits to be derived from the new publishing models of the digital economy being at odds with the disturbing global trend towards more restrictive copyright regimes (as exemplified by the draconian IP provisions of TPP); and in 2016[5] we endorsed the Productivity Commission's draft finding that Australia's copyright system had expanded far beyond the point of utility. As recently as last week[6] we raised publicly the threats being posed to FOSS licences (and indeed to the integrity of Australia's copyright system itself) by the electronic commerce provisions of TPP. So suffice to say, Australia's copyright system and the clear & pressing needs both to protect its integrity and to modernise it to suit contemporary needs arising in the digital economy are issues of great importance to OSIA.

We note that in the final report[7] of its inquiry into intellectual property arrangements, the Productivity Commission followed three of OSIA's principal recommendations[8] in full, followed a further six of them[9] in part and followed twelve of our supplementary recommendations[10] in part. Our members are pleased to see the Productivity Commission concurring with our advice (even if often not in full) on so many matters and we commend the Commonwealth on taking these first steps towards implementing those recommendations.

The three issues the Department chose for the first initiative—fair use, contracting out & orphan works—are in our opinion good choices, although as noted elsewhere we would have preferred to see a greater emphasis on TPMs to begin with. We commend the Department on its analysis of those issues to date in general, whilst we note later in this document where our own analysis differs on a couple of minor points.

On flexible exceptions we support the Department's Option 2 (fair use), supplemented by the ability for the Minister to proclaim additional illustrative fair use examples (as has been done in Israel), as recommended to the Productivity Commission in 2016.

On contracting out, we support the Department's Option 2 (make all contracting out unenforceable), supplemented by a new exception for circumvention of TPMs for all purposes other than copyright infringement and by a small amendment to the *Competition & Consumer Act 2010* (Cth), again as recommended to the Productivity Commission in 2016.

On orphan works, we accept the Department's assessment of the problem. The most obvious solution—instituting mandatory copyright registration—is prohibited by TRIPS, so is not on the table. We offer the beginnings of a recommended alternative solution, although that has some issues of its own. In our view, further work is required to find the optimal solution to the various problems arising from orphan works. Naturally, we are willing and able to contribute to that further work over time and look forward to assisting the Department to that end.

[1] "Free software" has nothing to do with price. In this context, "Free" refers to *freedom*, specifically, four essential freedoms that a software licence must bestow on the licensee, as described in the Free Software Definition. See Stallman, R., *What is Free Software?*, Free Software Foundation. Available at http://www.gnu.org/philosophy/free-sw.en.html

[2] Perens, B., *Open Source Definition*, Open Source Initiative, 1998. Available at http://opensource.org/osd

[3] Scott, B., *Submission to inquiry into technological protection measures (TPM) exceptions*, OSIA, 7 October 2005 (hereafter, "Scott, 2005"), available at http://osia.com.au/f/submission%20to%20TPM%20inquiry%20051007b.pdf

[4] Burton, J., Holden, C. & Christie, D., *Submission to the Commonwealth Department of Foreign Affairs & Trade on the Trans-Pacific Partnership*, (hereafter "Burton, Holden & Christie"), s. 1.2, p. 4, available at http://osia.com.au/f/osia_trans_pacific_partnership_submission_0.pdf

[5] Burton, J. & Foxworthy, P., *Final submission to the Productivity Commission's inquiry into intellectual property arrangements*, (hereafter "Burton & Foxworthy, PC/IP submission"), s. 3.1, p. 22; available at http://osia.com.au/f/osia_sub_201605_pc_ip.pdf.

[6] Phillips, M. & Burton, J., evidence given before the Joint Standing Committee of Treaties inquiry into TPP-11, Melbourne, 1 June 2018, in Cth, *Proof Committee Hansard* (to appear); and Burton, J., Stewart, J, & Phillips, M., *Submission to the Senate Standing Committee on Foreign Affairs, Defence & Trade regarding the "Comprehensive & Progressive agreement for Trans Pacific Partnership*, OSIA, 31 May 2018 (to appear, subject to Senate Committee approval for publication), s. 4, pp. 8–10.

[7] http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf

[8] Burton & Foxworthy, PC/IP submission, *op. cit.*, rec. 3, 5 & 10, p. 5.

[9] *id.*, rec. 1, 2, 4, 7, 8 & 9.

[10] *ibid.*, s. 1.2.2, p. 6—all bar supp. rec. 11 & 12.

1.1 Recommendations

OSIA recommends that the Commonwealth:

1. replace the current fair dealing provisions in the *Copyright Act 1968* (Cth) with a broad, flexible, principles-based fair use exception;
2. provide in the *Copyright Act 1968* (Cth) that the Minister responsible may at any time declare additional illustrative fair use examples at his discretion, by simple proclamation in the *Government Notices Gazette*;
3. introduce a new exception into the *Copyright Act 1968* (Cth) explicitly authorising the circumvention of "technological protection measures" (TPMs) for any purpose other than for copyright infringement;
4. amend the *Copyright Act 1968* (Cth) to provide that any contract term which attempts to override any statutory exception in the Act is not enforceable;
5. repeal s. 51(3) of the *Competition & Consumer Act 2010* (Cth);
6. renegotiate without the offending provisions (or alternatively secede outright from) all treaties which oblige the Commonwealth to prohibit the circumvention of TPMs, then (once that outcome has been achieved) repeal all anti-TPM-circumvention provisions from the *Copyright Act 1968* (Cth); and
7. undertake further work, in consultation with OSIA and other industry & civil society stakeholders, towards drafting suitable amendments to the *Copyright Act 1968* (Cth) to address the problems arising from orphan works, taking the approach we propose in Section 4 as a starting point, but noting that this further work should not serve to delay any of the other amendments recommended above.

2 Flexible exceptions

OSIA have consistently called for the Commonwealth to replace the rigid fair dealing exception in the *Copyright Act 1968* (Cth) with a flexible US-style fair use exception[11]. To that end we welcome the Productivity Commission's recommendation and the Department's present initiative to explore enacting a fair use exception.

2.1 Answers to specific questions

2.1.1 Fair use versus fair dealing

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?

OSIA supports the replacement of Australia's existing prescriptive fair dealing exceptions with a broad, flexible fair use exception, along similar lines to those in place in the United States and Israel.

Whilst technically it may be possible to achieve a similar outcome through constant iterative amendment of the fair dealing exceptions, such an approach is impractical. The Department itself noted in the consultation paper that the pace of technological change in this field remains fairly rapid and the Commonwealth has struggled to amend the *Copyright Act 1968* quickly enough to keep up.

[11] Forsstrom, A. & Burton, J., *Submission to the Productivity Commission's inquiry into intellectual property arrangements*, OSIA, 30 November 2015, ss. 4.2–4.3, pp. 5–7, available at http://osia.com.au/f/productivitycommissionreport.pdf; Burton, J. & Foxworthy, P., *Final submission to the Productivity Commission's inquiry into intellectual property arrangements*, (hereafter "Burton & Foxworthy, PC/IP submission"), s. 4.4, p. 28; available at http://osia.com.au/f/osia_sub_201605_pc_ip.pdf.

As OSIA noted in our evidence before the Productivity Commission in 2016[12], legislative change is, of necessity, a very slow and reactive process. Relying on that process alone for the fair dealing exceptions to keep up with technological change has a retarding impact on progress within Australia.

The principal benefit of having a broadly drafted principles-based fair use exception is that it allows the judiciary to step in and make those decisions, in the High Court and in the Federal Court, in a way that keeps pace with technological changes more quickly.[13].

As we pointed out to the Productivity Commission previously[14], OSIA sees value in the approach taken by the *Copyright Act 2007 (Israel)*, which goes one step further by allowing the Minister responsible to prescribe additional illustrative fair use examples. This provides a third avenue, even faster than the Courts, through which newly emerging fair uses could be taken into consideration as & when they first arise.

2.1.2 Additional changes

> **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.

As noted above, in addition to moving to a fair use exception, we recommend giving the Minister discretion to prescribe additional illustrative fair use examples via some fairly rapid mechanism (e.g. simply by proclaiming them in the *Government Notices Gazette*).

In relation to the specific examples cited, OSIA does not see any specific need to amend s. 200AB of the *Copyright Act 1968*. We make no comment in relation to special provisions for galleries, libraries and museums, as those fall outside our areas of expertise. In relation to archives, we note the Department's comments in relation to digital archives and support the need for a copyright regime that does not restrict worthy efforts to preserve a history of freely accessible works published on the Internet.

There is an urgent need to consider one further exception, in relation to the anti-TPM-circumvention measures in the *Copyright Act 1968*. Whilst OSIA would prefer to see those pointless prohibitions repealed altogether, at a bare minimum we see it as necessary to provide an exception where the circumvention occurs (or in the case of tools, is intended to occur) for any purpose other than copyright infringement. We have raised this issue publicly on numerous occasions in the past, both during the original implementation period[15] and more recently[16].

In particular, OSIA suggest that the *Copyright Act 1968* (Cth) should make an explicit distinction between software that is indeed subject to copyright and any ties to the specific equipment for which the software was originally written. That would then ensure the ability for alternate software implementations on the same piece of equipment. We have seen device-locking TPMs implemented specifically to deny the owners of physical computing equipment this fundamental right. Whilst inappropriate prohibitions on TPM circumvention remain in the Act, it is necessary to craft exceptions to address such consequences of all classes of TPM.

[12] Burton, J., Foxworthy, P. & Jitnah, D., Appearance before the Productivity Commission's public hearing of its inquiry into intellectual property arrangements, Melbourne, 23 June 2016. Reproduced in Koppel, J. & Chester, K., *Productivity Commission—Inquiry into intellectual property arrangements—transcript of proceedings at Productivity Commission, Melbourne on Thursday, 23 June 2016 at 8.49AM*, Productivity Commission, 2016, (hereafter "PC/IP public hearing", pp. 451–459, esp. pp. 456–458. Available at http://www.pc.gov.au/inquiries/current/intellectual-property/public-hearings/20160623-melbourne-intellectual-property.pdf

[13] *ibid.*, p. 457.

[14] Burton & Foxworthy, PC/IP submission, *loc. cit.*; PC/IP public hearing, *op. cit.*, p. 458.

[15] Scott, 2005, *op. cit.*; and Scott, B., *Supplementary submission, including response to question on notice, re provisions of the Copyright Amendment Bill 2006*, OSIA, 8 November 2006. Available at http://osia.com.au/f/submission%20%28supplementary%29%20to%20senate%20on%20copyright%20bill%20061108b.pdf.

[16] Burton, Holden & Christie, *op. cit.*, s. 2.1, pp. 6–7; Forsstrom & Burton, *op. cit.*, s. 4.5, p. 7 & s. 5, p. 10; Burton, J. & Foxworthy, P., *Submission to the Joint Standing Committee of Treaties regarding the Trans Pacific Partnership*, (hereafter "Burton & Foxworthy, 2016 JSCOT submission") s. 6.8, pp. 13–14, available at http://osia.com.au/f/osia_sub_201603_jscot.pdf; Burton & Foxworthy, PC/IP submission, *op. cit.*, s. 2.1.3, p. 9 & s. 4.2, p. 26; and Burton & Foxworthy, *Submission to the Senate Standing Committee on Foreign Affairs, Defence & Trade regarding the Trans Pacific Partnership*, (hereafter "Burton & Foxworthy, 2016 Senate submission") s. 5.1, p. 12, available at http://osia.com.au/f/osia_sub_201610_sscfadt.pdf.

3 Contracting out of exceptions

OSIA shares the Department's concern regarding the ability of some licensors to force licensees into contracting out statutory exceptions, which were added to the *Copyright Act 1968* (Cth) specifically for the benefit of licensees in the first place. This practice does strike us as an "end run" around the Act and therefore undesirable.

We note that in the report on its round-table on contracting out (to which OSIA was not invited, so did not participate), the Department states that "Copyright law only makes clear there cannot be contracting out for computer programs." In fact, the scope of anti-contracting-out provisions in the Act is even narrower than that. Whilst s. 47H makes unenforceable any contract term which purports to override the exceptions provided for at ss. 47C, 47D, 47E & 47F, there is no equivalent provision with respect to, for example, s. 44E (importation of non-infringing copies), as OSIA have pointed out before[17]. Thus, even for computer programs (which are OSIA's chief concern) the Act as it stands provides insufficient protection against contracting out.

The consultation paper discusses the need to balance freedom of contract against statutory rights. In principle we agree that such a balance is desirable. However, we note that in relation to computer software (and indeed several other classes of work), particularly commodity software, there is a profound lack of any sort of negotiating between licensor & licensee. This occurs principally because copyright, by its very nature, puts the licensor in a monopoly position (albeit a time-limited monopoly, but the term "limited" has become rather toothless, now that copyright terms last for multiple lifetimes[18]).

In other areas of endeavour, the Commonwealth addresses the inherent problems of monopolies or near-monopolies through sensible competition policy, principally through the *Competition & Consumer Act 2010* (Cth) and before that its predecessor the *Trade Practices Act 1974* (Cth). However, s. 51(3) of the *Competition & Consumer Act 2010* currently excludes IP from the application Part IV of that Act. We see this as contradictory: it is precisely *because* of the monopolies bestowed by IP rights (including but not limited to copyright) that these areas need good competition policy safeguards, such as those provided for other fields of endeavour by that Act. OSIA have commented on this issue before[19].

In the consultation paper the Department asserted that Option 2 (make unenforceable contracting out of all copyright exceptions) is "only a relevant option if a fair use replaces the existing fair dealing exceptions". We contest that assertion. As noted above, s. 44E provides a counter-example of a specific exception (even in the absence of fair use) that would not be covered by the Department's proposed Option 1.

Whilst we would vastly prefer to see fair use enacted *and* contracting out of all exceptions made unenforceable, it is important to realise that the latter is still a valid option for reform, even if the former is defeated.

OSIA welcomes the Department's recognition, as expressed in the consultation paper, that in addition to contract terms, anti-TPM-circumvention provisions are being abused by some licensors to defeat various exceptions enshrined in the Act. This too is a point which OSIA have made before[20].

However, we disagree with the conclusions drawn by the ALRC that "there may be little point in restricing contracting out of exceptions if TPMs can be used unilaterally by copyright owners to achieve the same effect". We see that conclusion as rather defeatist. OSIA welcomes the Department's statement in the consultation paper that it "notes some exceptions to access control TPMs exist and is considering whether further exceptions are required after this consultation" but we caution that the limitation of such exceptions to access-control TPMs only will not go far enough.

Ideally, all anti-TPM-circumvention provisions should be repealed from the *Copyright Act 1968*, since there is clearly no public policy purpose whatsoever in prohibiting the mere circumvention of TPMs. It is the act of copyright infrigement which must remain prohibited and other provisions of the Act do so more than adequately without the aid of the TPM provisions. The act of TPM circumvention is incidental.

However, we recognise that Australia has entered into a number of highly ill-advised treaties which oblige the Commonwealth to prohibit TPM circumvention. Until such time as those treaties can be replaced with more sensible iterations (which we have consistently called upon the Commonwealth to do as soon as possible), TPM circumvention for the purpose of copyright infringement must unfortunately continue to give rise to a secondary, altogether redundant wrong. Nevertheless, those treaties do not oblige the Commonwealth to prohibit TPM circumvention for purposes other

[17] Burton & Foxworthy, PC/IP submission, *op. cit.*, s. 2.1, pp. 7–9.
[18] Burton & Foxworthy, PC/IP submission, *op. cit.*, s. 3.2, p. 22.
[19] Scott, 2005, *op. cit.*, p. 2; Forsstrom & Burton, *op. cit.*, p. 9; Burton & Foxworthy, PC/IP submission, *op. cit.*, s. 4.7, p. 30.
[20] Burton & Foxworthy, 2016 PC/IP submission, *op. cit.*, s. 2.1.3, p. 9.

than copyright infringement. Accordingly, we contend that a blanket provision authorising TPM circumvention for all purposes other than copyright infringement should be inserted into the Act urgently (along with a similar provision rendering unenforceable any contract term which overrides statutory exceptions, as discussed above).

3.1 Answers to specific questions

3.1.1 Scope of protection

> **Question 3**
> Which current and proposed copyright exceptions should be protected against contracting out?

In short, all of them. There seems little point in allowing contract terms to override statutory exceptions, particularly when in most cases licensors are in a position to dictate such terms with little or no opportunity for licensees to engage in genuine negotiations.

Sanctity of contract is a noble principle to apply in the absence of any artificial market distortions. But copyright itself, by its very nature, distorts the market and it is to limit the damage done by that distortion that the statutory exceptions were introduced in the first place. Allowing them to be overridden by contract terms defeats the purpose of that damage limitation.

To be clear, we are *not* arguing against the need for copyright. Our members recognise that need just as much as our closed-source competitors do, as it is copyright that gives FOSS licences force of law, just like any other copyright licences. However, we do recognise that the inevitable shortcomings of any (even limited) monopoly approach require suitable safeguards through non-overridable exceptions and/or suitable competition policy.

3.1.2 Extent of amendments

> **Question 4**
> To what extent do you support amending the Copyright Act to make unenforceable contracting out of:
> - only prescribed copyright exceptions?
> - all copyright exceptions?

OSIA supports amending the *Copyright Act 1968* to make unenforceable the contracting out of all copyright exceptions, current & future.

Whist there is some benefit in amending the Act to make unenforceable only a few additional exceptions (so long as that set of exceptions includes at a minimum s. 44E, plus a new exception for circumvention of TPMs for any purpose other than copyright infringement), such a piecemeal approach is likely to require far more frequent amendments to the Act in future than a clear principles-based signal that “no copyright exception may be contracted out”.

4 Access to orphan works

OSIA accepts the Department's assessment of the problems associated with orphan works. We have commented on these issues ourselves in the past ourselves too[21].

We recognise that the issues associated with orphan works are difficult ones to solve comprehensively. Nevertheless, it is well worth attempting to do so.

4.1 Answers to specific questions

4.1.1 Options

Question 5
To what extent do you support each option and why?

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

OSIA proposes a hybrid solution, along the following lines:

Firstly, where a downstream author cannot find (or cannot determine the identity of) a copyright holder of a work after an exhaustive search, he should have the opportunity to apply for a determination that the work is an orphan work.

It is envisaged that that application would be made to a new statutory board established specifically for that purpose (in order to avoid the excessive costs that would be associated with having the Federal Court administer the scheme, although naturally there should be a right of appeal to the Courts).

If such a determination is made, that should give rise to a new class of statutory licence (with no licence fees, since it makes no sense to collect fees on behalf of a missing or fictional person) being applied to the work. By way of model terms for such a licence, we suggest the terms of the ISC licence[22], which is the most modern of the three licences widely recognised as the most permissive FOSS licences in common use[23]. That licence is suitable because it is simple to understand, it provides the licensee with the maximum latitude in terms of copyright, whilst still reserving to the author the moral right of attribution and provides the author with the maximum indemnity in any given jurisdiction.

If the copyright holder were subsequently to emerge and assert copyright, there would need to be a process (again, ideally administered by a new statutory board, with a right of appeal to the Courts) for the copyright holder to prove ownership of the copyright, after which no further licensees could take advantage of the statutory licence for that work.

In order to avoid the risks associated with retrospective application of an order for statutory licence cancellation, the statutory licences taken up during the period in which a copyright holder was unidentifiable or uncontactable would need to remain valid, perhaps only with respect to derivative works published prior to the application for cancellation order.

This approach is still not ideal—clearly further work is required on the details before considering enacting such a change—but in our view it represents a good first step in the right direction.

[21] Forsstrom & Burton, *op. cit.*, s. 5., p. 8. See also the examples cited in T. B. Macaulay's speech, referenced in footnote 6 therein.

[22] https://opensource.org/licenses/ISC

[23] the other two being the two-clause BSD licence, available at https://opensource.org/licenses/BSD-2-Clause and the MIT licence, available at https://opensource.org/licenses/MIT