

Exposure Draft of Copyright Amendment (Access Reform) Bill 2021
Department of Infrastructure, Transport, Regional Development and Communications

14 February 2022

By web form

Dear Sir/Madam,

RE: Copyright Amendment (Access Reform) Bill 2021

EFA welcomes the opportunity to comment on the draft Copyright Amendment (Access Reform) Bill 2021.

EFA's submission is contained in the following pages.

About EFA

Established in January 1994, EFA is a national, membership-based, not-for-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context.

EFA members and supporters come from all parts of Australia and from diverse backgrounds. Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political, and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Paul Ruberry

Board Member
Electronic Frontiers Australia

Executive Summary

EFA welcomes the government's intention to simplify and update Australian copyright law to better support the needs of Australians accessing content in the digital environment. Our review of the draft reforms is offered in the context of EFA's mission to promote civil liberties and consumer rights in the digital space, while advocating for the amendment of laws that restrict free speech and unfettered access to information.¹

EFA believes it is fundamental that copyright laws strike a balance between the interests of rights holders, public institution uses of content, and consumer ability to freely engage with works for personal enjoyment, education and creation.² Against this measure, we consider that the proposed amendments to existing copyright laws in schedules one through to five are all meaningful improvements.

To the extent that EFA has concerns with the proposed changes, it is that they do not go far enough. In particular, EFA supports the introduction of a broad and flexible fair use exception which this review has shied away from recommending.

Regarding the remaining schedules, EFA offers no comment other than in regards to schedule seven, which we oppose on the grounds that it lessens the accountability of government by removing any need for the minister either to go to the parliament for legislation or to the people for comment and engagement.

Finally, regarding Part B, EFA does not believe that technological protection measures (TPMs) should have the force of law. The government should not penalise consumers for what, at most, amount to a breach of contract. Breaches of copyright are already unlawful and do not require additional penalties.

EFA recommends entirely repealing all anti-circumvention laws. If the government chooses to retain these laws then EFA recommends that a broad exception is introduced to the effect that circumventing a TPM to perform any action that is otherwise lawful is itself lawful.

Overall, EFA considers the package of proposed amendments to be a net improvement to the existing copyright law, and we are pleased to see this positive evolution of copyright law in Australia.

¹ <https://www.efa.org.au/about/#what>

² <https://www.efa.org.au/our-work/copyright/>

Copyright generally

Copyright law exists to promote the production of creative works. Too often, the goal of copyright is lost, and what is left is rent-seeking by vested interests who are generations removed from the original creative spark from which they are seeking to profit.

EFA believes that today's copyright protections need to be pared back substantially in order to better serve copyright's aspirational goal.³ There needs to be a shift in focus to prioritising access and consumer rights, and any demands that these rights be restricted should be vigorously interrogated as to how the proposed restriction is necessary for the promotion of creative endeavours.

Fair Use

The discussion paper notes the decision not to incorporate *fair use* into Australian copyright law at this time. EFA is a staunch proponent of fair use, as we believe that it is a “more flexible legal tool, capable of accommodating new and valuable fair uses of copyright material without waiting for legislative change.”⁴

That said, EFA welcomes the expansion of fair dealing, both the past examples recorded in the discussion paper and the new fair dealing rights proposed under the draft bill.

Given the decision not to pursue fair use at this time, EFA strongly encourages the government to continue to expand fair dealing rights, and to ensure that Australian copyright users are not disadvantaged relative to copyright users in fair use jurisdictions.

Part A: Reform Measures

Schedule 1—Limitation on remedies for use of orphan works

Copyright exists for the purpose of encouraging the production of creative works, which it achieves by granting the author a set of exclusive rights that can be monetised. Copyright was never intended to be a tool for locking works away from public enjoyment; that would run counter to the aims of the law.

As noted in the discussion paper, under current copyright law orphan works — copyright material for which the copyright owner cannot be found — represent a significant problem for cultural institutions, educators, and creators. EFA applauds measures such as those proposed that would substantially return works of this kind to the public domain.

Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms

Part 11, Division 3 of the Copyright Regulations 2017 sets out the matters to be included in particular kinds of applications and references to the Copyright Tribunal. What matters do you consider should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work?

³ <https://www.efa.org.au/our-work/copyright/>

⁴ <https://www.efa.org.au/our-work/copyright/fair-use/>

EFA does not take a position on this question.

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

EFA supports this sensible expansion of fair dealing and we would support the right to non-commercial quotation being extended beyond the current academic confines.

Short quotes are often made as part of public discourse. Sometimes another fair dealing may apply, e.g. criticism or review; or parody or satire; but it would be good to have a broad right to make short quotes in line with current public behaviour and expectations.

We note that the proposed changes in schedule 2 are in part a response to the uncertainty of the current “Fair dealing for purpose of research or study” exception. To quote the discussion paper, “Uncertainty exists about whether current fair dealing exceptions adequately cover what may be regarded as fair ‘quotation’ of copyright material.” It is our observation that the existence of this acknowledged uncertainty in existing fair dealing law somewhat undermines the claims made in the discussion paper that fair dealing provides superior certainty compared to fair use.

Question 2.1: Quotation: Unpublished material

Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?

EFA would oppose such an expansion. Assuming the orphaned works provisions are adopted, a quotation right would seem to be of primary use where the author of the unpublished material is opposed to the quotation being published. Robust privacy rights would in this case be hoped to protect the interests of the individual’s right to privacy. EFA is an advocate for increased legislative protections for the right of privacy.

EFA would also like to draw attention to the ways in which our digital existence creates vast troves of unpublished information which most would consider to be highly personal or at least private. Codification and judicial recognition of a Right To Be Forgotten is an indisputably complex matter, but the concept speaks to the public’s general expectation that digital communication will not constitute a permanent record.

Consideration of the intent of the creator of an unpublished work should matter if we value individual privacy; a work that never successfully found a publisher is very different to private correspondence or records. Weighing the individual’s expectation of privacy against public benefit cannot be decided on the basis of generic categories.

Schedule 3—Update and clarify library and archives exceptions

The proposed changes would increase the availability of archived works, and save librarians and archivists from pointless busy work. EFA supports these proposals.

The discussion paper notes a decision has been made not to address situations where licence agreements restrict rights granted under the copyright act. EFA believes that the restriction of rights explicitly granted under the copyright act through licence agreements and TPMs/DRM is an area in need of review and reform; we discuss this matter in greater detail in response to Part B, below.

Further, we believe that the commercial availability test under this schedule should allow consideration of licensing terms when considering whether a work is “commercially available”.

Question 3.1: Libraries and archives: Online access - ‘Reasonable steps’

For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archives to seek to limit wider access to copyright material when made available online?

EFA offers the following principles for assessing any system of access control:

- As unrestrictive as possible.
- Must support accessibility.
- Must respect privacy:
 - Don’t require an account unnecessarily.
 - Don’t store user history.
 - Don’t share personal information with third parties.

Question 3.2: Libraries and archives: Illustrations

Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?

EFA does not have a position on this question.

Schedule 4—Update and restore education exceptions

EFA supports the right of teachers to make use of copyrighted materials in their teaching. Amongst numerous other benefits, updating the exceptions in the Act for educational institutions should make it easier for teachers to find and use Australian content in classrooms and as inspiration for performance, which is desired by many in the community.

We noted with approval that in schedule 3 it is proposed to remove the need for the pointless busy work whereby libraries are required to digitise-delete-digitise rather than reuse the one digital copy. Schedule 4 seems to be preparing to create a similarly pointless exercise whereby teachers are required to delete their personal teaching materials at the end of the term before recreating them next term. No one gains from this unnecessary work, not the teachers, not the students and not the rights holders.

EFA suggests allowing personal teaching materials to be retained and reused between terms; recognising a relevant distinction between teaching plans created for personal use and those created to be shared or sold.

Question 4.1: Education: Online access – ‘Reasonable steps’

For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the

course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

EFA offers the following principles for assessing any system of access control:

- As unrestrictive as possible.
- Must support accessibility.
- Must respect privacy:
 - Don't require an account unnecessarily.
 - Don't store user history.
 - Don't share personal information with third parties.

Schedule 5—Streamline the government statutory licensing scheme.

EFA has no concerns with the proposed changes.

Question 5.1: Government: Use of incoming material

Does proposed new section 183G contain effective safeguards to avoid unwarranted harm to copyright owners' commercial markets? If not, what other safeguards would assist?

EFA has no concerns with the proposed changes.

Additional Minor Measures

Schedule 6: Registrar of the Copyright Tribunal

EFA does not take a position on this schedule.

Schedule 7: Streamline the process for making technological protection measure (TPM) exceptions

EFA believes the public consultation process is a vital step in the making of public policy and we have invested countless volunteer hours in making submissions in keeping with that view. We oppose the proposed change as it reduces the accountability of those who are making the rules.

Schedule 8: Archives

EFA has no concerns regarding the proposed changes.

Schedule 9: Referrals to the Copyright Tribunal

EFA has no concerns regarding the proposed changes.

Schedule 10: Notifiable instruments

EFA has no concerns regarding the proposed changes.

Part B: Technological Protection Measures

EFA is broadly opposed to technological protection measures (TPMs) or digital rights management (DRM). In practice, TPMs tend to be used to deprive consumers of rights they would otherwise enjoy⁵, and the disability community has suffered particularly from the inability to make works compatible with their accessibility tools.

Because TPMs don't tend to work very well, copyright publishers have turned to governments to enforce through legal penalties what they could not accomplish with technology. Laws that create civil or criminal penalties for circumventing TPMs are of necessity either a) making already unlawful conduct "double unlawful"; or b) making otherwise lawful behaviour unlawful because a copyright owner decided to lay claim to additional rights through technology that the legislature has not otherwise chosen to grant them. Neither scenario is appropriate.

EFA recommends entirely repealing all anti-circumvention laws. If the government chooses to retain these laws then EFA recommends that a broad exception is introduced to the effect that circumventing a TPM to perform any action that is otherwise lawful is itself lawful.

Conclusion

The small objections noted above notwithstanding, EFA considers the proposed amendments to be positive overall. We recognise the need for the copyright law to remain abreast of the challenges presented by evolving technology, changing consumer usage patterns, and broader global trends; and we thank you for the work that has gone into this consolidation and improvement, and for the opportunity to comment.

Culture is built by the creative endeavours of artists, musicians, authors, playwrights, and other producers of creative works; these people need to be appropriately compensated for their efforts. Yet the copyright conversation can easily become dominated by rights holders at the expense of the consumers of copyrighted materials, and the importance of the creative commons as the seedstock both for new works and for a richer understanding of ourselves as a nation cannot be overstated. We hope that our submission has highlighted some of the aspects of existing copyright law that unfairly and unnecessarily privilege the interests of rent-seeking copyright holders at the expense of both the general public and new creative works.

We appreciate the opportunity to make this submission, and anticipate that the work done in the draft bill and the discussion paper represents but the latest step in a continuing process of copyright reform.

⁵ <https://creativecommons.org/2017/07/09/terrible-horrible-no-good-bad-drm/>