



Australia Council Submission to Copyright and the Digital Economy issues paper

November 2012

About the Australia Council for the Arts

The Australia Council for the Arts is the Australian Government's arts funding and advisory body. Its mission is to enrich the lives of Australians and their communities by supporting the creation and enjoyment of the arts. This mission is underpinned by a commitment to:

- Excellent and distinctive Australian art - assisting Australian artists to create and present a body of distinctive cultural works characterised by the pursuit of excellence;
- Access for all Australians - assisting Australian citizens and civic institutions to appreciate, understand, participate in, enjoy and celebrate the arts;
- A strong and vibrant arts sector - providing infrastructure development for Australia's creative arts.

Executive Summary

By ensuring that artists own, control and are remunerated for their creative products, copyright law ensures that countless artists are able to sustain professional careers and create works that document and contribute to the fabric of Australian culture. Indeed, without strong incentives and protections for rights owners, it is arguable that many of Australia's treasured cultural products might have never been created.

The Australia Council does not see the need for radical changes to existing copyright law. Indeed, our principal concern is the erosion of rights and protections provided by existing copyright law.

Whilst we acknowledge that the lack of respect for the 'rule of law' is highly problematic in the context of the illegal file sharing and use of copyright material on the internet, it does not follow that the solution to this problem is to erode the exclusive rights of copyright owners via broad exemptions in the digital environment. This issue is better served by educating the public about the importance of copyright law to our culture and to Australia's artists, most of whom earn considerably less than the median yearly income.

In responding to the respective questions put forward in the Issues Paper, we refer to a number of submissions made by other organisations, in particular those of the Arts Law Centre of Australia and also the Copyright Council, both of whom are funded by the Australia Council in order to provide expert advice and advocacy on issues of importance to the arts sector.

RESPONSE TO ISSUE PAPER QUESTIONS

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- a. affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;**
- b. affects the introduction of new or innovative business models;**
- c. imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or**
- d. places Australia at a competitive disadvantage internationally**

The digital economy is providing both great opportunity and challenges to the arts sector. Whilst illegal file sharing has been detrimental to the incomes of many artists, particularly musicians, artists are looking to the digital economy as a means of improving both their artistic practice and their livelihoods. According to research by Professor David Throsby, 85% of artists see it as likely or very likely that new technologies would open up more creative opportunities in the future. Furthermore, 60% of artists thought it was likely or very likely that new technology would improve their income earning position in the future.

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

The Australia Council endorses the submission of the Arts Law Centre on this question, which proposes the following guiding principles:

- (a) The incentive theory (for creativity and innovation) underlies and continues to drive copyright law;
- (b) Exceptions to copyright should operate in a way that acknowledges and respects the rights of artists and creators including their moral rights;
- (c) Any exception or statutory licence allowing for the digitisation and/or dissemination of 'traditional cultural expressions', secret and sacred Aboriginal cultural heritage by museums, archives or other cultural institutions should be subject to the free, prior and informed consent of Indigenous artists, custodians or communities.

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Internet service providers, search engines, and web hosts rely on indexing and caching for efficient operations. The current provisions in the Copyright Act have the effect of making these incidental functions an infringement of copyright, thereby impeding Australia's copyright law in the digital environment.

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

The current exceptions for private use of legally acquired copyright material are:

- Format shifting from analogue to digital;

- Time shifting of broadcasts;
- Fair dealing.

The Australia Council submits that the current exceptions are sufficient and do not need to be extended. We refer you to the submissions of the Copyright Council and Screenrights for more detail.

It should be noted that traditional copyright balance could become threatened in the digital environment from a variety of sources. Recent expanded use of technological protection measures (and the laws that protect them) and the emerging licensing environment are converging to shift the use of copyright materials to a pay per view environment, which limits access to those who can pay.

Question 8. The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

We submit that Australian copyright law should aim for a balance between the rights of copyright owners to protect their interests through technical means and the rights of users to circumvent such measures for legitimate, non-infringing purposes. The current exemptions should allow users to make copies of certain copyright material for private or domestic use, such as from digital to digital and in new formats. The granting of copyright is a statutory right to be balanced by the public interest.

Question 9. The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how?

The Australia Council submits that the current exemptions are sufficient and do not need to be extended to meet the needs of users and that enhanced format shifting should be controlled by the creators as part of their business model for participation in the digital economy.

We refer you to the submissions of the Copyright Council, Screenrights and the Arts Law Centre for more detail.

Question 10. Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

The Australia Council does not believe further exceptions are needed for back up copying. Technological solutions to issues of storage, such as cloud computing and video streaming, are making the need for backup copies less necessary.

We refer you to the submissions of the Copyright Council for more detail.

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

The Australia Council is particularly concerned about the implications for creators' ability to control the use of their work, including the impact it may have on their moral rights, through the use of copyright work in social media.

We refer you to the submissions of the Copyright Council and the Arts Law Centre for more detail.

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Questions 12-13. The Australia Council notes the submissions of the Arts Law Centre, Screenrights and Copyright Council which caution against conflating the definitions of private or domestic use and online use (even if for private purposes) of copyright material. For instance, while a copy of a copyright work maybe made legally for private use, once that is then posted online the private user is infringing the right of the copyright owner to communicate their work to the public.

We also support the call by these submissions for careful consideration regarding the meaning of commercial and non commercial usage as it applies in the Copyright Act.

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

The Australia Council supports the Copyright Agency in asking the question: what are the socially beneficial 'transformative' uses of works that cannot be enabled by existing exceptions and available licensing solutions? The Australia Council believes more work needs to be done on this question before further consideration is given to widening the exceptions.

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

The Australia Council refers to our answer to question 14.

We refer you to the submissions of the Copyright Council and the Arts Law Centre for more detail.

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

The Australia Council is concerned that a new transformative use exception could be used to defend further appropriation of Indigenous arts and culture.

We refer you to the submission of the Arts Law Centre for more detail.

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

In order to protect the economic and moral rights of the artist, exceptions should be limited to private and domestic use. We refer you to the submissions of the Copyright Agency and the Arts Law Centre for more detail.

Question 18. The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

The Australia Council does not support any change to the current moral rights provisions.

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

The Australia Council notes the submission of the Australian Publishers Association in relation to the impediments to commercial exploitation of published works by the current libraries and archives exceptions. The Australia Council agrees with the submission of the Arts Law Centre that there may be merit in examining a statutory licensing scheme. We also note the submission of the Copyright Council that consideration needs to be given to whether, to the extent that there are impediments, these are the result of copyright law and not questions of resourcing.

Question 20. Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

Question 21. Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

The Australia Council believes that Australian copyright laws should aim for a balance between the rights of copyright owners to protect their interests and the rights of users to circumvent these measures for legitimate, non-infringing purposes. However, we are wary of any proposal that would limit the ability of the copyright owners to licence material in the way that they see fit.

It is also worth considering whether greater digitisation and communication by public and cultural institutions is impeded by the legislation or whether this is a question of the resources provided to these institutions to cover the costs of using copyright material.

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

The principle of free, prior and informed consent should guide the digitisation of Indigenous works by museums, archives and other cultural institutions.

We refer you to the Arts Law submission for more detail.

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Question 24. Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works?

It is important to note that there have been instances where non-Indigenous institutions such as galleries and museums classify unattributed material as 'orphan' when Indigenous people and communities are more than capable of identifying the material. Misuse and abuse of the material and its owners in these circumstances is likely and can be extremely hurtful to the people concerned.

Question 33. How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

The Australia Council notes that material owned and managed by Indigenous people can be claimed under western copyright laws. Such assertions may contradict basic human rights and should be carefully considered.

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41. How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42. Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Questions 40 to 44: we refer you to the submission of the Copyright Agency.

Question 45. The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:

- a. research or study;
- b. criticism or review;
- c. parody or satire;
- d. reporting news; and
- e. a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

Questions 45 to 47. The Australia Council submits that the basic principle is that the fair dealing provisions should not be changed so as to give consumers and users greater freedom to undermine the rights of creators. We refer you to the submissions of the Copyright Agency and the Arts Law Centre for more detail.

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?

Question 50. Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?

Question 51. How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?

Questions 48 to 51. In relation to these questions the Australia Council submits that exceptions should not be extended, unless it can be proven that licensing mechanisms are failing to balance the right of artists to remuneration with the reasonable opportunities of users to access. We refer to the submissions of the Copyright Agency and the Arts Law Centre for more detail.

Question 52. Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Questions 52 to 53. The Australia Council is reluctant to see the current exceptions replaced by a broad, flexible exception. We refer to the submissions of the Copyright Agency and the Arts Law Centre for more detail.

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Question 55. Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

Questions 54 to 55. The Australia Council takes the general view that contract law should not override copyright law. The Australia Council has a strong preference for the interests of creators to be met by a system of licences and a limited number of exceptions as indicated above. We refer to the submissions of the Copyright Agency and the Arts Law Centre for more detail.