



# **Australia Council submission to the ALRC Discussion Paper on Copyright and the Digital Economy**

**August 2013**

## About the Australia Council for the Arts

The Australia Council for the Arts is the Australian Government's arts funding and advisory body. The Australia Council operates at arm's length from government with a guiding principle to support artistic excellence. The Australia Council delivers more than \$160 million each year in funding for arts organisations and individual artists across the country. On 13 March 2013 the National Cultural Policy *Creative Australia* was released by the Federal Government. *Creative Australia* presents a national framework for the arts, culture and creativity and includes a \$75.3 million increase in funding to the Australia Council over four years.

The Australia Council is a Commonwealth statutory authority under the *Commonwealth Authorities and Companies Act 1997* (CAC Act 1997). The Australia Council was originally established as an independent statutory authority through the *Australia Council Act 1975*. On 1 July 2013, the *Australia Council Act 2013* commenced, updating the functions of the Australia Council.

## Executive summary

The Australia Council believes that the protection of moral rights and economic incentives for the creation of work are the most important considerations when contemplating copyright reform.

We make the following further comments:

- Any reform to copyright law should address the particular needs of Indigenous artists, custodians and communities by incorporating indigenous cultural protocols.
- There is a diversity of perspectives on copyright amongst, and within, art forms supported by the Australia Council; nonetheless the need to respect the rights of creators is an important consideration for all.
- The Australia Council recognises the proposal for a 'fair use' model is intended to create more flexibility in the copyright system, and agrees increased flexibility could benefit users of copyright material and some creators. However, a 'fair use' model raises some significant issues:
  - The model has created significant concern as to how moral rights would be regarded.
  - Copyright under the current system represents an important source of revenue for artists which could be put at risk.
  - 'Fair use' would require litigation to clarify the parameters of copyright. This puts the artistic community at a disadvantage as low incomes in the sector means limited resources to pursue litigation.
  - Increased public funding would be required for organisations that support the protection of artists' rights in their work.
- Removal of existing statutory licences could increase the administrative burden for both rights-holders and potential users of their work, and may affect the successful operation of existing voluntary licences.
- The adaptation of the current fair dealing exceptions is a more predictable and balanced approach to creating flexibility in the copyright system. Any expansion or modification of the exceptions needs to be guided by the public interest in accessing materials weighed against artists' moral rights and their need for remuneration.
- The Australia Council believes that a stronger evidence base is required to demonstrate the nature of the need for change in the copyright system and to explore potential impacts of any change.

## Introduction

The Australia Council's primary concern is protecting and promoting the interests of artists and arts organisations. In our response (dated November 2012) to the ALRC Issues Paper on Copyright and the Digital Economy, the Australia Council emphasised that copyright has the important role of ensuring that artists own, control and are appropriately remunerated for their work. The response also stated that the Australia Council 'does not see the need for radical changes to existing copyright law'.

On 13 March 2013 the National Cultural Policy, *Creative Australia* was released by the Federal Government. *Creative Australia* presents a national framework for the arts, culture and creativity. In relation to the digital economy, *Creative Australia* states that the policy objective is to achieve 'assurance that digital and emerging platforms have a wealth of high-quality, accessible Australian content'.<sup>1</sup> The ALRC inquiry on Copyright and the Digital Economy is cited as being a key action to achieve this aim, in recognition of 'the role that Australian copyright plays as the primary legal framework supporting the creative economy'.<sup>2</sup> *Creative Australia* also states that the inquiry 'is designed to ensure Australian copyright law continues to provide incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content'.<sup>3</sup> The Australia Council acknowledges the need to strike a balance between, on one hand, respecting authorship and encouraging the creation of work and, on the other, facilitating fair access to content.

The Australia Council's position in response to the Discussion Paper is that the protection of moral rights and economic incentives for the creation of work need to be paramount considerations for copyright reform. This is in line with our response to the Issues Paper on Copyright and the Digital Economy and the emphasis placed by *Creative Australia* on the role of the copyright regime in supporting the creative economy.

The Australia Council notes that our key stakeholders have provided detailed submissions in response to the Discussion Paper. These stakeholders include: Copyright Agency|Viscopy; Australian Major Performing Arts Group; Australian Copyright Council; National Association for the Visual Arts; APRA AMCOS; and Arts Law Centre of Australia.

## Indigenous artists

Consideration for the protection of moral rights and economic incentives for the creation of work in the context of potential copyright reform must include regard for the particular needs of Indigenous artists, custodians and communities. The Australia Council refers the ALRC to a report written for our Aboriginal and Torres Strait Islander Arts Board in 2006: *Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006* by Terri Janke and Robynne Quiggin<sup>4</sup>:

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<sup>1</sup> Australian Government, *Creative Australia – National Cultural Policy*, Commonwealth of Australia, Canberra, 2013, p 83.

<sup>2</sup> See note 1.

<sup>3</sup> See note 1.

<sup>4</sup> Australia Council for the Arts, Sydney, 2006. Available from [http://www.austliacouncil.gov.au/resources/reports\\_and\\_publications/artforms/indigenous\\_arts/indigenous\\_cultural\\_and\\_intellectual\\_property\\_the\\_main\\_issues\\_for\\_the\\_indigenous\\_arts\\_industry\\_in\\_2006](http://www.austliacouncil.gov.au/resources/reports_and_publications/artforms/indigenous_arts/indigenous_cultural_and_intellectual_property_the_main_issues_for_the_indigenous_arts_industry_in_2006)

One foundational principle underlies development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways. In order to positively contribute to the integrity of Indigenous cultural life, arts infrastructure must support Indigenous control of ICIP (Indigenous Cultural and Intellectual Property) management. An essential part of this support is acknowledgement of local community authority, communal rights over cultural heritage material, and engagement of Indigenous people through consultation and prior informed consent mechanisms. This must be balanced with acknowledgement of the authority of individual artists and encouragement of creativity and innovation.

The Australia Council believes any reform to copyright law should incorporate indigenous cultural protocols, including provision for group ownership and custodianship of cultural material, and allowance for sophisticated systems for what is shared, how, and by whom. We support the creation of a National Indigenous Cultural Authority, to help all Australians understand indigenous cultural protocols and act as a clearing house for linking potential users with the appropriate authority over specific types of cultural knowledge.

## **Framing principles**

The Australia Council supports the framing principles outlined in the Discussion Paper. We submit that, in line with the framing principles, moral rights and economic incentives for the creation of work should be paramount considerations when contemplating copyright reform.

## **Diversity of perspectives within the arts sector**

There is diversity of perspectives on copyright amongst, and within, art forms supported by the Australia Council. To illustrate this point, for writers, copyright represents a substantial source of income and statutory licensing (particularly in the education sector) is an important mechanism in this context. Writers are among the lowest paid artists and income from copyright represents approximately a fifth of their creative income.<sup>5</sup>

However, for artists exploring new and emerging art practices, there is a strong interest in being able to re-use and re-purpose work without facing limitations from the copyright regime. Notwithstanding this, the need to respect the rights of the original creator (both moral and economic) remains an important consideration in this area of art practice.

## **Fair use model**

The Australia Council recognises that the intent behind the proposal for a 'fair use' model is to create more flexibility in the copyright system. Increased flexibility certainly has the potential to benefit users of copyright material and some creators. However, the suggestion that the 'fair use' model be adopted raises significant issues in relation to both moral rights and the ability of artists to generate income.

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<sup>5</sup> D Throsby and A Zednick, *Do you really expect to get paid? – An economic study of professional artists in Australia*, Australia Council for the Arts, Sydney, 2010.

## Moral rights

A key concern in response to the proposal for a 'fair use' model is the question of how it might interact with moral rights. Recognising an artist's authorship of their work and his or her right to have a say in how that work is used is a principle that must be preserved under any copyright system. There is evidence to suggest that the incorporation of moral rights into the *Copyright Act 1968* in 2000 has correlated with a substantial reduction in the incidences of moral rights infringement experienced by artists. At the time the legislation was amended in 2000, 55% of artists reported not always being acknowledged as the creators of their work<sup>6</sup>; almost a decade on, only 9% of artists reported this.<sup>7</sup> The proposal for a 'fair use' model has created significant concern as to how moral rights would be regarded.

## Economic considerations for artists

Copyright represents an important source of revenue for artists. This is particularly an issue for those parts of the sector where earnings from copyright are a substantial proportion of total creative income, namely writers and composers. In 2007/2008, the most recent year for which reliable information on the incomes of all artists is available, it was found that the category of 'royalties, advances, and other copyright earnings' accounted for 22% of creative income for writers and 20% for composers.<sup>8</sup>

## Litigation

A concern shared across the Australia Council in response to the proposal for a 'fair use' model is the level of uncertainty it would create for artists and users of copyright alike. Extensive litigation would be required to clarify the new parameters of copyright under the common law. With the onus being on artists to protect their copyright and in light of the limited resources available to them to pursue litigation, it is the Australia Council's view that this would leave the artistic community at a disadvantage. It is important to note here that artists have low average incomes – around \$41,000 per annum.<sup>9</sup>

A knock-on effect is that increased funding would be required for organisations including the Arts Law Centre of Australia (ALCA) and the Australian Copyright Council (ACC) to protect artist's rights in their work. The services that could be demanded of organisations such as ALCA and ACC are far-reaching – they could potentially range from the development of sector specific codes and guidelines to advice for individual artists and organisations. This is an issue of concern to the Australia Council as we provide public funding for a number of these supporting bodies, as well as to individual artists and arts organisations. We foresee that a fair use model could, in effect, require additional public resourcing for the arts, to support individual creators to clarify and protect their copyright.

## Wording of fair use

While this should not be seen as an indication of support for the 'fair use' model, the Australia Council submits that any proposal for legislative change should include explicit reference to artists' moral rights. The public policy objectives of copyright legislation should also be articulated to ensure that legislation is interpreted with due regard for the both the public interest in safeguarding the integrity and economic interest in artistic work and the public interest in fair access to that work.

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<sup>6</sup> D Throsby and V Hollister, *Don't give up your day job – An economic study of professional artists in Australia*, Australia Council for the Arts, Sydney, 2003.

<sup>7</sup> See note 5.

<sup>8</sup> See note 5.

<sup>9</sup> See note 5. Note this includes all income sources, not only income from creative activities.

## Switch from statutory to voluntary licenses

A second major area of concern across the arts is the proposal in the Discussion Paper to remove existing statutory licences. The literature sector's experience of the current statutory licences is that they operate well by providing appropriate remuneration without imposing heavy administrative requirements. This is particularly the case with regard to the education statutory licence. The Australia Council is concerned that moving to voluntary licensing in these areas would increase the administrative burden for both rights-holders and potential users of their work. This could also lead to a reduction in remuneration for writers.

The Australia Council recognises that some licensing bodies in Australia operate on a voluntary basis, as with APRA|AMCOS in relation to music rights for composers and music publishers. We note in this regard that the APRA|AMCOS submission to the Discussion Paper argues that the current statutory licensing system is an important element in the successful operation of allied voluntary licensing activities<sup>10</sup>:

The existence of the educational and government statutory licences has been an important factor in APRA|AMCOS' ability to negotiate voluntary licences with educational institutions and government. At the very least, without the statutory licences, educational institutions and government would be under no obligation to disclose use of APRA|AMCOS' copyright material.

## Changes to the fair dealing exceptions

The alternative to a 'fair use' model proposed in the Discussion Paper is the adaptation of the current fair dealing exceptions to create more flexibility. Fair dealing exceptions are underpinned by the principle that there is a strong public interest in facilitating access to copyright works in specific circumstances.

The Australia Council believes that any expansion or modification of fair dealing exceptions should be guided by the public interest in accessing materials weighed against respect for artists' right to choose how their work is used and the need for remuneration. The current copyright system respects the inherent rights an artist has in his or her work, with fair access to that work accommodated for on the basis of exception. The Australia Council submits that considering how to create flexibility in the context of the existing system is a more predictable and balanced approach to copyright than moving to a 'fair use' model.

## Need for a strong evidence base

Finally, the Australia Council's position is that a strong evidence base is required to demonstrate the nature of the need for change in the copyright system and to explore the potential impacts of that change – both direct and indirect. Clear evidence is required to show whether the current copyright system is restricting the creation of new and experimental work, and to forecast the impact of any changes on artists' remuneration and incentives to create. An evidence base is also required to look at the transaction and other costs incurred through the statutory licensing system as well as economic forecasts indicating what costs are likely to be associated with removing existing statutory licences.

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<sup>10</sup> APRA|AMCOS, *APRA|AMCOS Response to the ALRC Discussion Paper Copyright and the Digital Economy*, APRA|AMCOS, Sydney, 2013.