

Productivity Commission Inquiry into Australia's Intellectual Property Arrangements

Second Submission by the

Australian Libraries Copyright Committee

in response to the Draft Report

The Australian Libraries Copyright Committee (ALCC) welcomes the opportunity to provide further comments to the Productivity Commission for its Inquiry into Australia's Intellectual Property Arrangements.

The ALCC is very supportive of the proposed recommendations set out in the Productivity Commission's draft report into Australia's IP Framework. In particular, we support the Commission's recommendations that:

- Australia should introduce an open ended fair use exception;
- the copyright term for unpublished works should be aligned with that of published works;
- Australian governments should adopt an open access policy for publicly funded research; and
- the safe harbour scheme currently afforded to carriage service providers under the Copyright Act should be expanded to all online service providers.

However, we also recommend that the Commission elevate the following findings to full recommendations of the report:

- that orphan works be explicitly included in the fair use exception (p.159) - we suggest by including it in the list of illustrative purposes in the Act; and
- that copyright licences in the digital world should maintain the copyright exceptions for libraries and archives (p.126).

Finally, we suggest that the Commission's recommendation in relation to open access to publicly funded research be extended to include Crown copyright works.

We provide specific comments in support of these recommendations below.

Copyright Term

The ALCC recognises the economic arguments in favour of the Commission's finding 4.2 that the optimal copyright term would be close to 15-25 years after creation (p.117). These arguments are particularly pertinent in relation to the broad range of materials that are covered by copyright that were never intended for commercial distribution eg emails, government reports, and other ephemera.

However, ALCC also believes that there are multiple arguments to consider in relation to the optimal copyright term, including "just rewards" for creators, the personal interest of the creator in the use of their works throughout their lifetime, and the importance of ensuring flourishing cultural and creative industries. These moral and social arguments hold particular sway in relation to important cultural material like literary works, art and music.

With this in mind, the ALCC supports the Commission's finding that the current copyright term of life plus 70 is excessive, but believes an appropriate term would fall between the two extremes of life plus 70 and 15 years. We suggest that mechanisms such as renewable registration or different levels of protection for different kinds of work might be valuable in achieving an optimal term. We also agree with the Commission that to ensure the continued recognition of the cultural value of Australian creations the government should maintain and encourage direct subsidies for the Australian cultural industries, including the Education and Public Lending Rights schemes (p.132).

Taking into account limitations on changes in copyright term due to Australia's international obligations, the most effective way to address the negative impact of the excessive length of copyright at this point in time would be to introduce a fair use exception. Fair use will address many of the concerns raised by the Commission - particularly in relation to access to and use of works after their commercial lifetime - whilst at the same time maintaining the rights of authors to prevent "unfair" uses of their work.

Fair Use and Orphan Works

We strongly support the Commission's decision, in draft recommendation 5.3, to support the Australian Law Reform Commission (ALRC) in its recommendation that Australia should introduce an open-ended fair use exception. As we have said previously, "fair use is necessary to provide an appropriate balance within copyright law, benefiting the institutions, their clients and Australian society as a whole."¹ We are particularly supportive of the Commission's endorsement of the ALRC's further recommendation that library and archive uses be explicitly recognised in the non-exhaustive list of illustrative purposes for the exception. This will significantly increase legal certainty for libraries and archives wishing to make innovative and socially beneficial use of their collections.

¹ ALCC submission to the PC, p.23

The ALCC is also strongly supportive of the Commission's finding that orphan works should be covered by fair use (p.121).² The explicit inclusion of orphan works in the fair use exception would be of great benefit to libraries and archives, as it would allow them to make available to the Australian community thousands of collections items which are currently only available physically at the institution. However, it would be even more valuable to Australian society as a whole in that it would extend the ability to use these materials beyond the holding institution itself to their collaborators, their clients and the population at large, including private individuals, artists and businesses. It would truly enable these moribund works to find new life.

Although libraries and archives may in theory be able to make use of orphan works under s200AB, as we pointed out in our original submission (p.10), the utility of this provision is limited by its confusing and complex nature. Many library and archive officers are uncertain as to how to apply the provision, and so by default do not use it. This is particularly a problem in relation to larger scale digitisation and access projects - indeed, advice made publicly available by some stakeholders suggests that s200AB cannot be used such projects.³ These are exactly the kinds of projects that are likely to involve and touch upon orphan works.

The provision is also limited in that it only applies to activities that are part of "maintaining or operating the library or archive." This means that s200AB does nothing for the ability of library clients to make use of orphan works. Allowing a library to scan material and provide it online is one thing, but if library clients are unable to download and make further use of the material, its full benefit to society remains unrealised. Furthermore, this significantly limits the utility of the exception for undertaking collaborative projects with external bodies or building on library material in innovative ways. Cultural institutions are increasingly partnering with other entities to bring more dynamic experiences to their audiences - such as the recent highly successful collaboration between the Museum of New Zealand Te Papa Tongarewa and the Weta Workshop.⁴ It is unclear whether such projects would satisfy the requirements of s200AB, as they move outside a strictly defined "library and archive" space.

To allow such innovative uses of cultural collections, it is necessary to have an exception which is flexible enough to work in an environment where the lines between cultural institutions, their clients and their collaborators are not always clear. Fair use would provide a seamless experience, with cultural organisations, third party collaborators and their clients able to work together to make use of orphan works in any way that is fair. Introducing fair use and extending it to orphan works will ensure that teachers, students, businesses, family historians and artists

² Although we question the Commission's suggestion at pp.121 and 153 that this goes beyond the ALRC's recommendations. The ALRC explicitly found that "Some uses of orphan works can be expected to constitute fair use" (para 13.55).

³ See, for example, this fact sheet from the Australian Copyright Council, which states that s200AB would most likely not apply if the use is not for a specific and identified request (ie large scale projects) or results in a risk of substantial subsequent unauthorised use of the work (ie making it available online). See Australian Copyright Council (Dec 2014)

http://www.copyright.org.au/acc_prod/ACC/Information_Sheets/Special_Case_or_Flexible_Dealing_Exceptions_Section_200AB.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef

⁴ <http://www.gallipoli.tepapa.govt.nz/>

are all able to make use of orphan works in ways that will add value not only to the work, but to Australian society as a whole.

This aspect of the Commission's discussion is, in fact, so important to achieving the societal benefits from fair use that we think it should be explicitly referenced in both the principal recommendation regarding fair use and the proposed exception itself. We therefore suggest that the Commission recommend that the use of orphan works be added to the list of illustrative purposes to be included in any Australian fair use exception.

Restrictive Licensing

We appreciate the Commission's acknowledgement that the problem of contracts overriding copyright exceptions is particularly strong in the library and archives sectors. As we pointed out in our original submission "The practical reality for libraries is that a large number of licences attached to electronic resources seek to limit or eliminate entirely the library and archive exceptions...This is an endemic problem within the library sector, and significantly undermines the usability of electronic materials just as publishers and libraries are seeking to move towards digital."⁵

Although the Commission has not asked for additional evidence on restrictive licensing from the library and archives sector, we would like to bring to your attention a particularly pertinent example which has recently received public attention.⁶ On 6 June the National and State Libraries of Australia (NSLA) announced that they had failed to reach a licensing agreement with SAI Global for digital access to the Australian Standards. The Standards, which are set by non-profit Standards Australia, govern everything from building safety to cot mattresses.⁷ Legislative references mean that Australian companies, from huge multinationals to small owner operators, as well as individuals on some matters, are legally required to comply with these standards. SAI has an exclusive licence to distribute the Standards, and provides online access to them on its website for between \$100-\$500 per standard (there are over 700 in total).⁸

The breakdown in negotiations between the NSLA consortium and SAI means that Australia's National and State libraries will no longer provide access to the standards in digital form. Although price and quality of service are also at issue, we understand that one of the primary motivators behind the NSLA decision to end negotiations was access restrictions in the SAI licences. The licences prohibit all uses permitted under the exceptions in the Australian Copyright Act, including remote delivery to library clients (per s49) and interlibrary loan (per

⁵ ALCC PC Submission, p.15

⁶ See, for example, the following news articles: Lucy Cormack, Free access to Australian standards no longer available in public libraries, Sydney Morning Herald (7 June, 2016) <http://www.smh.com.au/business/consumer-affairs/free-access-to-australian-standards-no-longer-available-in-public-libraries-20160607-gpd8ng.html>; Aimee Chanthadavong, SAI Global's refusal to share sees Standards Australia begin arbitration proceedings, ZDNet (8 June, 2016) <http://www.zdnet.com/article/sai-globals-refusal-to-share-sees-standards-australia-begin-arbitration-proceedings/>

⁷ See <http://www.standards.org.au/>

⁸ See <https://www.saiglobal.com/>

s50). This means that remote or rural users would have to either pay SAI's fees or physically visit their State or National libraries to have access to the Standards. SAI also sought through licensing and TPMs to prohibit any printing or reproduction by individuals of the documents, in direct contravention of fair dealing and insubstantial portion rules of copyright. While several institutions hold hardcopy versions of the Standards, either through purchase or legal deposit, most have a policy of not lending these documents or providing document supply to portions of them (ie under ss49 and 50) due to a past agreement with SAI which sought to prohibit such uses - even though lending a book is not a right controlled by copyright.⁹ Some are now reversing those policies.

As stated in their press release, NSLA felt that their own responsibilities as public institutions meant that they could not agree to licences which did not at a minimum recognise the user rights set out in the Copyright Act. NSLA has clear licence principles, which are available online and state "Any Licence entered into by the Members must recognise and should not restrict or abrogate the rights of the Members or their User community permitted under Australian copyright law, or comparable fair dealing provisions of the jurisdiction of the licence."¹⁰ SAI's licences would clearly have violated these principles. Furthermore, in this case they felt that there was an overriding public interest in access to the Standards that needed to be recognised. As you know, a basic principle of the rule of law in democratic nations is transparency of the law - individuals and companies must have reasonable access to standards to which they are legally required to adhere if the law is to have any legitimacy. We understand that there has already been one case in the Victorian County court in which the defendant's lawyers successfully argued that he was not bound by a Standard as he could not access it.¹¹

The Legislative Council of Western Australian is currently conducting an inquiry into access to Australian Standards adopted in delegated legislation. The inquiry "arose out of the Committee's observation that delegated legislation (including government regulations, rules and local government local laws) frequently adopt Australian Standards but Australian Standards are not accessible at no charge to the public and the Parliament in the same way that primary legislation (Acts) and delegated legislation are publicly available."¹² You can find NSLA's submission to the inquiry, which provides details on restrictions in their previous licence with SAI Global, on the Committee's website.¹³

SAI Global is just the most recent and one of the harshest examples of a vendor providing terms and conditions which do not permit use at a minimum as allowed under Australian copyright law.

⁹ <https://www.nla.gov.au/research-guides/standards>

¹⁰ See 2.1 at <http://www.nslaconsortium.org.au/about/licenceprinciples.html>

¹¹ See <https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2016/maurice-blackburn-wins-helmet-camera-appeal-in-county-court/>

¹² See media release by the Legislative Council on 4 December 2014, available from <http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28EvidenceOnly%29/DF600B884DEC6B648257D570013D717?opendocument>

¹³ See <http://www.parliament.wa.gov.au/Parliament/commit.nsf/a7b778ee55fef62a4825772700174a2c/3a7d8230676538ba48257df100058136?OpenDocument>

They defended this decision by suggesting that they were “safeguarding NSLA against the misuse and breach of copyright laws” – despite the fact that all NSLA sought was use permitted by copyright law.

Below is a list of particularly common prohibitions from licences offered to libraries and archives for access to digital materials. We can provide examples of these to the Commission should they seek it. Licences frequently expressly seek to ban:

- interlibrary loan eg “a library may not lend any material or publication comprising the Service to another library”
- document delivery eg “the library may only permit its Members to view or access the material or publication comprising the Service from the Member’s web browser”
- onsite access to non-members of the library (ie walk-in clients)
- printing or downloading material for any purpose - here the onus may be put on libraries to physically prevent these activities.

For these reasons, we agree with the Commission’s finding (at p.126) that “copyright licenses in the digital world should maintain the copyright exceptions for libraries and archives.” We trust that in its final report the Commission will elevate this to the level of a full recommendation, to ensure it is given due importance by the government.

Unpublished Works

We strongly support the Commission’s draft recommendation that the Australian Government should amend the Copyright Act so the current terms of copyright protection apply to unpublished works.

We believe this is an obvious place where the Australian Copyright Act is out of alignment with the cultural and social interests of the country. It is very hard to think of a group who benefit from perpetual copyright in unpublished works, and it is the cause of a significant segment of the orphan works problem – once copyright lasts past the lifetime of the author and their immediate offspring, it rapidly becomes almost impossible to trace a rightsholder to provide permission for desired uses.

We note, as does the Commission, that this recommendation would be implemented by the Copyright Amendment (Disability Access and Other Measures) Bill, of which the government released an exposure draft in late 2015. We strongly support the approach taken to unpublished works in this draft bill. Works whose authors are known (eg the Captain Cook diaries and Jane Austen letters held by the National Library) will enter the public domain 70 years after their death; works whose authors are unknown will do the same 70 years after their creation. This last part is particularly important, as it effectively creates a partial solution for orphan works - institutions and users will at least have a clear date after which they can use them. We look forward to the tabling of this Bill in the early days of the new parliament.

IP and Public Institutions

The ALCC endorses the Commission's draft recommendation that all Australian governments – national, state and territory – should adopt an open access policy for publicly funded research. This would ensure that Australian academics are appropriately supported in their negotiations with publishers, and that Australians are guaranteed access to research they have already paid for. It will also hopefully lead to a greater range of Australian research being available through Australia's libraries.

We also join the ADA in proposing the extension of the recommendation to government created and owned materials (ie Crown copyright materials), to ensure a coherent open access policy for all government material in Australia. This would provide greater clarity and assurance for libraries as to what they may do with government materials. Government publications and reports represent a large category of "low hanging fruit" which could be used to meet community demands for more online materials available through libraries. Many such materials could provide important historical documentation, but are only maintained online for a short period of time, and disappear once their publishing department or agency dissolves or shifts focus. However, the lack of a coherent policy by government institutions means that it is difficult for libraries to make this material available online - even where it seems likely that it is intended to be accessible to the public. The uniform application of a clear default open access policy for Crown copyright materials across all levels of government would greatly simplify the collection and management of such materials, and make them available for reuse as intended.

Safe Harbour Scheme

We strongly support the Commission's recommendation that the safe harbour scheme currently afforded to carriage service providers under the Copyright Act be expanded to all online service providers.

Discussion around the safe harbour extension is often framed as being about large tech companies such as Google v artists.¹⁴ However, we wish to point out that libraries and archives are even more disadvantaged by the current arrangements. In NSW alone, there are more than 7.7 million internet sessions each year in public libraries. Yet these libraries receive less legal protection when their systems are used for illegal activities than commercial ISPs. Furthermore, libraries and archives do not have the resources or expertise to deal with copyright infringements on a case-by-case basis, and many are unclear what to do when they are alerted to alleged illegal activities undertaken over their systems. They would therefore benefit significantly from the clarity that the safe harbour scheme would provide regarding processes such as notice and takedown.

Online Infringement

Finally, we strongly support the Commission's conclusion that timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright

¹⁴ Take, for example, this quote from a story recently published in the Australian <http://www.theaustralian.com.au/news/inquirer/creative-community-rallies-against-planned-copyright-law-changes/news-story/848dfbb08c27898b96110e12638406f4>

infringement. As we said in our original submission (p.18), access to ebooks has been severely limited by geographic licensing, and publishers have historically refused to license ebooks to libraries. The ALCC welcomes any move that encourages copyright owners in all sectors - film, music and books - to increase diversity of access to their materials through all distribution methods available.

In Conclusion

The ALCC supports the overall aim of the Commission's copyright recommendations, to create a copyright system that reflects the public good, promotes innovation and is flexible enough to accommodate technological changes - whilst also supporting the rights of creators to be rewarded for their works.