

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

E-mail: info@alrc.gov.au

30th November 2012

Dear Madam/Sir,

Re: Issues Paper *Copyright and the digital economy* (ALRC IP 42)

Thank you for the opportunity to provide a submission to the ALRC regarding copyright and the digital economy.

Who we are

The Small Press Network (SPN) is a not-for-profit representative body for small and independent Australian publishers. It was formed in 2006 as the Small Press Underground Networking Community (SPUNC) to promote independent publishing and support the principle of diversity within the publishing industry as a vital component of Australian literary culture. We represent more than 100 member publishers.

SPN is committed to working to ensure the continued viability of the independent publishing sector in Australia by facilitating collaborative initiatives, networking opportunities, and general communication between small and independent publishers.

Focus and rationale

As independent publishers we both rely on copyright to protect the work we publish, and to support a culture of creativity and innovation amongst Australia's writing community. We support the view set out in the ALRC's Issues Paper on Copyright and the Digital Economy that copyright has always been intended to be a balance between the rights of creators (to manage and be remunerated) and the rights of society (to access and build upon earlier works of creativity).

In recent years, the copyright balance has swung in favour of the copyright owners, who are more likely to be multinational corporations than kitchen creatives. This has threatened the rights of consumers of content, including emerging writers and innovators, to access copyright material for education, inspiration and creativity.

In any examination of Australia's copyright law, the balance between users and creators should be considered, and the balance redressed. To this end, we support:

- introduction of a general right of fair use into Australian copyright law, specifically to cover quotations, transformative use and the sampling and remixing commonly typified in social media;
- copyright exceptions be protected from contracting out;
- moral rights continue to be protected from aggressive contracting out;
- a new exception be created for the use of orphan works;
- allowance for increased access to material by users with a print disability.

We do not support any amendments to the copyright legislation which increase restrictions on users or increase the penalties for copyright infringement.

Response to 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.

Australia's copyright law has proven adept at shaping itself to changing technologies over four hundred years. We suggest that it is not the advent of digital technologies that has rendered a problem with the application of Australian copyright law, but changes orchestrated over the last few decades by copyright owners keen to secure their own economic interests at the expense of emerging creators and users. This affects the creation of new business models and innovation in the creative sectors.

The lack of clarity in clearly identifying owners of works prohibits the efficient use of material.

As Australian users are subject, through international trade agreements and technological protection measures to greater and greater restrictions, they are not able to rely on the same broad fair use exceptions of their counterparts overseas. This puts Australians at a disadvantage to many in the US and restricts our ability to create and innovate.

Question 2. Guiding principles for reform 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?

We suggest that redressing the balance between creators and users should be the guiding principle of the ALRC's inquiry into copyright reform. The rights of established creators and corporations are more than adequately covered by copyright, and it is important to continue to protect the rights of emerging creators and innovators to access and use copyright material.

Although increases in digital technology, allow more access to information than ever before, much of this access requires casual infringement of copyright by users, who sometimes inadvertently risk fines and criminal penalties. Technological protection measures are now reaching the point where they can equally be used to lock away information than free it. Protection of users' access to information, and the protection of exceptions to copyright from being overridden by contract, is an important aspect to consider throughout a review of the copyright law.

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

Yes. To accord with new norms around social media, the restrictions on what private citizens can do with legally acquired copyright material should be relaxed. This could accord with a new exception for fair use.

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?

It is counterproductive to have a law so widely flouted by the general public, and creates a mockery of the legal system if the public as a whole do not respect the legislation. Rather than increasing penalties and making ordinary people criminals, the permitted uses of copyright material in the home should be broadened.

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?

We are interested to see the options put forward by the ALRC as to how to more freely permit use of copyright materials for social, private and domestic purposes. To avoid ongoing confusion, we hope to see either a clear definition of what constitutes commercial or non-commercial use, or more concentration on a fair use of material (in a commercial or non-commercial context) that does not conflict with normal exploitation of the copyright owner.

Question 15. Transformative use 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?

Yes. Transformative use should be included in a new general right of fair use.

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?

Moral rights are an important protection allowed to authors, and despite the lack of case law, have become commonly used as a tool for authors to ensure the integrity of their work is maintained. If the copyright law is amended to allow transformative uses, we suggest that such uses should be introduced in the context of safe harbour or take down provisions. Authors (or rights holders) would therefore have the option to request the take down of transformed works which breach the author’s right to maintain the integrity of the work.

Question 21. Libraries, archives and digitisation 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?

Yes. Public institutions should not be subject to contractual restraints that prevent the maintenance of archival copies of works, or to providing copies suitable for print disabled readers.

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

The time, expense and confusion over seeking permission to use orphan works is a significant impediment to their reuse and dissemination in Australia. Creating an exception or defence for the use of orphan works would create some certainty and free up otherwise forgotten works. Orphan works that would otherwise have the opportunity to be republished are sometimes abandoned because of the time and risk associated with attempts to clear the rights. Amendment in this area would bring clarity and stimulate innovation and new publishing opportunities.

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

Yes. The reuse of orphan works should be encouraged through either a new exception to the Copyright Act or a statutory licensing scheme. If a new exception is established, it could be incorporated within a regime of safe harbour provisions, where the copyright owner could request a work be taken down if and when they come forward.

Question 28 - 30. Educational institutions

We would not support any change that removes free exceptions for educational institutions, increases the scope of statutory licenses in lieu of free exceptions, or substitutes individual contracts in lieu of statutory licenses.

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

Rather than rely on the analogue sampling method of calculating revenue for authors under the existing statutory licensing schemes, technology should increasingly be used to identify exact use of titles and authors.

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

We recommend consideration of a statutory licensing scheme to streamline the process to provide books for print disabled readers.

Question 45. Fair dealing exceptions 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?

The fair dealing exceptions are important protections for users and emerging creators, however they do not cover all the uses that copyright material is subject to in the digital realm. A general right of fair use could address some of the shortcomings of the otherwise excellent fair dealing exceptions.

In addition, the existing fair dealing exceptions do not cover the use of orphan works and are at risk of being overridden by individual contracts and technical protection measures.

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

The fair dealing provisions could be simplified by creating an additional broad right of fair use which would cover social and transformative uses..

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?

Yes. We recommend that ALRC consider introducing (a) a general right to fair use, and (b) a new exception for orphan works, into the Copyright Act.

Question 49. Other free-use exceptions Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

No. Exceptions are an important aspect of the copyright regime to protect the rights of users for the good of society.

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

Yes. We recommend that ALRC consider introducing (a) a general right to fair use, and (b) a new exception for orphan works, into the Copyright Act.

Question 52. Fair use 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?

Yes, the Copyright Act should be amended to include a broad and flexible right to fair use. This should include a broader right to quote material, as well as transformative uses such as remixing and sampling.

Such a right should be balanced with, and be subject to, the author’s moral rights to protect the integrity of the work, and the ALRC should consider incorporating a takedown regime to allow authors to manage their own works.

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

A new fair use exception should be in addition to the existing exceptions, not a replacement.

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

No. The exceptions under the Copyright Act should be protected against contracting out and take precedence over any contract purporting to limit the user’s rights.

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

Yes. The law should be amended to protect against contracting out of all the exceptions.

We hope the ALRC’s deliberations regarding copyright and the digital economy go smoothly and look forward to the outcomes of the review.

Best wishes,



Alexandra Adsett
Publishing Consultant and Management Committee Member
For The Small Press Network

cc: Zoe Dattner, General Manager, The Small Press Network.