

Viscopy Board's submission on the ALRC Discussion Paper

Viscopy's Board of Directors is very concerned by the proposals advanced in the ALRC's Discussion Paper. For that reason it is making a separate submission from that of Copyright Agency-Viscopy.

This separate submission has a particular focus on the interests of Viscopy's 10,000 artist members. Its purpose is to draw the ALRC's attention to the potential impacts of its proposals on the interests of visual artists, as well as reiterating the concerns expressed in the submission of Copyright Agency-Viscopy.

In short, Viscopy's Board is troubled by the impact that the ALRC's recommendations regarding the introduction of fair use and the abolition of the statutory licences will have on its artist members if implemented.

The artists who join Viscopy - about half of Australia's practising artist population - are interested in the protection and management of the copyright in their artistic works. They see the value in having an organisation expert in copyright management perform this function for them, leaving them to focus on their artistic practice. They want to be compensated fairly when their works are used by teachers in schools, by galleries in advertising campaigns and in all manner of other ways, but they do not want to have to negotiate all these licensing arrangements individually. They value the relative certainty that the current arrangements afford them when it comes to licensing their works and receiving fair payment. Artists are not, on the whole, a highly paid group of people and copyright royalties can be an extremely important source of income, particularly for remote Indigenous artists. Viscopy is concerned that an open-ended fair use provision coupled with the abolition of the statutory licences in Parts VA and VB and in section 183 will severely undermine the opportunities for artists to license their works for payment and receive fair compensation for use of their works in education, in the government sector and by broadcast retransmitters.

Fair use

The Viscopy Board does not think that the ALRC has made a sufficiently compelling case for introducing an open-ended fair use defence into Australian copyright law. We think a fair use defence would be detrimental to artists and to the development of new business models involving the licensing of their content. We address some of the bases on which the ALRC has argued that a fair use defence is appropriate below.

Flexibility

Flexible, open-ended, principles-based provisions, can give rise to very large amounts of litigation. Section 52 of the Trade Practices Act (now section 18 of the Australian Consumer Law), cited by the ALRC, is a case in point. The fact that a legislative provision is simple and flexible on its face does not mean that the litigation it gives rise to is simple. A fair use defence of the nature proposed by the ALRC will add cost and uncertainty into the system.

We think the current fair dealing defences represent a reasonably fair balance between the interests of copyright owners and the public interest in certain specific activities. Having said that, we have firsthand experience of how commercial interests push the

boundaries of these defences (particularly criticism and review and reporting news) for their own purposes, making it difficult to license certain uses of artists' works. By way of example, publishers of art books and art catalogues will routinely argue that their extensive use of artistic works is fair dealing for the purpose of criticism or review. Similarly, reporting the news is used as a defence for blogs and other online publications as well as newspapers and magazines engaged in activities more akin to advertising than news.

This sort of issue is likely to arise to an even greater degree with an open-ended fair use defence when all manner of purposes might be argued to come within the defence. We note the ALRC's view, expressed in several places in the Discussion Paper, that the availability of a licence would not be determinative in applying the fair use provision. Virtually all of Viscopy's licensing activities might be challenged as a matter of principle under a fair use regime, leaving Viscopy with no alternative to litigate at its members' expense to test the boundaries of the defence.

We also think the "future-proofing" or "self updating" benefits of a fair use defence are exaggerated. Copyright law in the US is regularly under review by the legislature in spite of their longstanding fair use provision.

Suitable for the digital economy and assist innovation

We do not see why free use of others' content is a pre-condition for innovation. The assertion at 4.44 that unless the use of third party copyright material comes within an exception it is an "automatic no" to its use, regardless of whether that use could be perceived as innovative, is false. Artists who join Viscopy are not locking their works up and saying no to innovation. On the contrary, by virtue of joining a collecting society they are offering their works for all manner of innovative purposes. The fact that a use does not come within a free exception is not a "no", but an opportunity to negotiate and share the proceeds of that innovation.

In Copyright Agency-Viscopy's submission on the Issues Paper, we provided the example of the Google Art Project, a recent innovation in which some of our artists participated. Doubtless, other parties involved in that transaction would have preferred to have used the artists' content for free, as this would have reduced their cost base. We do not see, however, why it would have been "fair" if the only party not benefiting financially from the innovation was the artist. (Having said that, the parties were free to ask artists if they wanted to donate their content.) This innovative project, and many others in which Viscopy's artists' works are used, did not depend upon the existence of a fair use exception.

In contrast to the Google Art Project, where we were able to license the museums but not Google itself, is the Google Books Project which has proceeded on the basis of the US fair use defence. Attempts by Viscopy's US and European partners to engage Google on the subject of a licensing solution for the visual art works component of the project have been stymied by the long running fair use case.

Restores balance

As a copyright management agency, Viscopy sees many cases of copyright infringement of its members' works and is very conscious of the difficulties artists face when

attempting to ensure their rights are respected. Costs of enforcement are generally prohibitive, even for a collecting society, and this puts artists at an automatic disadvantage. This means that assertions about copyright law being out of balance in favour of creators or copyright owners do not ring true. Artists already face an uphill battle to keep their work from being infringed and recover licensing fees.

Meets consumer expectations

Consumer expectations about what they can do with copyright material are not necessarily reasonable or consistent with appropriate copyright policy. We disagree with the ALRC's view that its proposals regarding fair use do not detract from the rights of owners and will allow markets to operate efficiently. We believe that, rather than supporting rights owners in their efforts to develop new digital markets, the fair use proposal will cut across and undermine current and future markets. In this regard, we note eBay's comments about the photography of artworks. Viscopy has had licensing arrangements in place for many years to cover this sort of use by similar services. We are happy to provide the ALRC with information about these licences on a confidential basis if requested.

Issues for Indigenous artists

Viscopy represents almost 5000 Indigenous artists or their beneficiaries. We are concerned that fair use has the potential to raise particular cultural concerns for these artists. Indigenous artists are often at least as interested, or more interested, in the cultural appropriateness of the use of their works than in the commercial market for them. Licensing their works through Viscopy provides them with an opportunity to take these considerations into account. It is unclear whether fair use would accommodate these concerns and, in addition, how it would interact with our current moral rights regime.

Abolition of other exceptions

In Copyright Agency-Viscopy's submission on the Issues Paper, we argued for the removal or restriction of the exceptions allowing the free use of certain public art works and the incidental filming of art works. We gave several examples of where these exceptions operate unfairly. If a fair use defence were to be introduced, we submit that these exceptions should be also removed from the Act.

Statutory licences

The Viscopy Board believes that the ALRC has overestimated the benefits and underestimated the costs of moving from a statutory licensing regime to one comprised of ad hoc voluntary arrangements.

Approximately half the annual revenue earned by Viscopy's artists comes from the statutory licensing regimes allowing for the use of artistic content in educational institutions, including through the use of broadcast content, in government agencies and through the retransmission of broadcast content. Viscopy's members value this income as fair compensation for providing something of benefit to others.

The other half of Viscopy's members' income is earned through "voluntary" licensing

arrangements with various sectors, including the art market, the cultural sector and publishing. Viscopy has first-hand experience of the difficulties and costs associated with putting in place transactional and blanket voluntary licensing arrangements on behalf of our members. Some of these arrangements can be very hard won, the result of protracted negotiations, sometimes stretching over years, and in some cases procured under threat of copyright infringement litigation.

One of the big differences between statutory and voluntary arrangements is that of mandate. Users of content under the current statutory arrangements do not have to concern themselves whether a particular rights holder is represented by a collecting society. This is not so for voluntary licensing. The licences Viscopy offers are all dependent on users checking our mandate, in some cases on a work by work basis. In addition, the statutory licences obviate the need for any pre-use clearance or checking whereas even blanket voluntary licensing arrangements may require pre-approval of certain uses.

We believe that a move from statutory licensing to voluntary arrangements in the educational sector is likely to lead to fewer resources being legitimately available for teaching and greater risk of copyright infringement litigation.

In summary, the Viscopy Board believes that if the ALRC's proposal to abolish the statutory licences in Parts VA and VB and s183 is implemented, this would result in cost and uncertainty to the detriment of both Viscopy's members and users of their content. In addition, we do not support the abolition of the statutory licence for retransmission in Part VC.

We support the submissions of Copyright Agency-Viscopy and Screenrights in relation to the statutory licences.