



**MUSIC COUNCIL
of
AUSTRALIA**

Australian Law Reform Commission inquiry into

Copyright and the Digital Economy

Submission in response to ALRC Discussion Paper by the

Music Council of Australia

July 2013

Thank you for the opportunity to respond to the Paper published by the Australian Law Reform Commission (**ALRC**) in its inquiry into Copyright and the Digital Economy (**Inquiry**). This submission is intended to address the proposals and questions put forward in the Discussion Paper and to supplement the MCA's original submission to the Inquiry.

The Music Council of Australia is the peak music organisation representing the Australian music community. Each of the members of the MCA is assigned to, and represents, a particular aspect or sector of the Australian music community, such as music creation, production, distribution and education. The MCA is Australia's representative to the International Music Council, which is based at UNESCO headquarters in Paris.

The MCA's membership comprises creators, rights holders and users of copyright material. This places us in a small group of organisations that have made submissions to the Inquiry and that represent diverse, as opposed to singular, interests.

This submission is divided into 3 sections. The first section briefly discusses the "Framing Principles for Reform" set out in chapter 2 of the Discussion Paper. The 2nd section of this submission contains some general observations about the key proposals advanced by the ALRC in the Discussion Paper and the 3rd section responds to some of the specific proposals and questions that are set out in the Discussion Paper.

1. Framing Principles for Reform

In the MCA's original submission, we proposed that the Inquiry should be guided by the following 5 principles:

1. the prevalence of infringing behaviour does not reflect a 'need' for exceptions to copyright;
2. equitable remuneration for the use of copyright material (and in the case of this particular inquiry, digital or online use);
3. clarity in drafting and interpretation;
4. the need to foster public education around access to and use of copyright material; and
5. harnessing technology to facilitate efficient licensing systems and encourage innovation.

The Discussion Paper proposes 5 "framing principles" for the Inquiry:

Principle 1: Acknowledging and respecting authorship and creation;

Principle 2: Maintaining incentives for creation of works and other subject matter;

Principle 3: Promoting fair access to and wide dissemination of content;

Principle 4: Providing rules that are flexible and adaptive to new technologies; and

Principle 5: Providing rules consistent with Australia's international obligations.

The MCA is generally supportive of the 5 framing principles proposed in the Discussion Paper. Two of the 5 principles (the first 2) direct the Inquiry to consider the importance of authorship and creation of copyright material. In our submission, this is appropriate in view of

the centrality of the author of copyright material in the current copyright regime and the fact that a primary concern of the Copyright Act is to establish the exclusivity of the rights granted to the owner of copyright and the proprietary nature of those rights.

The MCA submits that the Inquiry should apply the proposed Principle 3 with discretion. Legislative intervention to control the exercise of private property rights and to mandate access to private property by the community should not, in our submission, be undertaken lightly. In that context, we consider it relevant that recent Australian case law has arguably raised the threshold at which an “original” work will qualify for copyright protection, by mandating that there must be some expenditure of “independent intellectual effort”. This is likely to have the effect, over time, of denying copyright protection to utilitarian material that arguably should be more freely available to the community than material that has been created by the application of at least a degree of intellectual effort. This in turn, should reduce the need for legislative intervention to ensure access to utilitarian material.

Our final comment on the proposed five framing principles is that we regret that the Discussion Paper has not accepted, or in our view adequately addressed, the point raised by the first of our proposed principles, that the prevalence of infringing behaviour does not reflect a 'need' for exceptions to copyright.

2. General observations

The key proposals

The MCA considers that far-reaching changes to the current Copyright Act should only be made on the basis of clear evidence that the contemplated changes will produce a net benefit to the Australian community.

The Discussion Paper states, at paragraph 3.48:

The ALRC considers that the reform proposals in this Discussion Paper recognise legitimate use of copyright material that does not detract from the rights of owners and will allow markets to operate efficiently”

With respect, the MCA does not agree that the proposals in the Discussion Paper do not detract from the rights of owners.

The Copyright Act currently provides for a limited number of fair dealing defences and statutory licensing arrangements. Outside of those parameters, copyright owners are entitled to regulate the use of their material as they see fit.

One of the principal proposals advanced by the ALRC in the Discussion Paper is that the Copyright Act should be amended to provide for a broad, flexible exception for “fair use”, and that the fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use; and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses.

(the **Fair Use Proposal**).

Associated with this principal proposal are subsidiary proposals that existing statutory licensing schemes in parts VA, VB and VII div 2 of the Copyright Act, and the existing fair dealing defences, should be repealed (the **Associated Proposals**).

On any view, these would constitute radical amendments to the current Copyright Act. It is difficult to see them as other than a substantial dilution of the current rights of copyright owners. In the MCA's respectful submission, the evidence referred to in the Discussion Paper does not demonstrate a compelling case that the social benefit of enacting the Fair Use Proposal would outweigh the social costs (see the further discussion of these below).

For these reasons, and for the further reasons set out below, the MCA does not support the Fair Use Proposal or the Associated Proposals.

The need for technology neutral language

In moving the Copyright Act to a more technologically neutral position, it may be that it is appropriate to add some additional fair dealing defences to infringement to the current defences. However, the MCA considers that this should be done incrementally rather than by adopting a wholesale fair use approach, which has its genesis in US copyright law, where a quite different constitutional foundation for copyright exists.

In the MCA's submission to the Inquiry, we acknowledged that there was some need to clarify aspects of the language in the current Copyright Act. We acknowledge the desirability of making the language of the Copyright Act technology neutral where this is possible. In our view, there would be considerable merit in attempting to "future proof" the language against changes in technology which introduce new methods of creating, storing, disseminating and using copyright material.

However, the MCA considers that the introduction of technology neutral language into the Copyright Act could be achieved without disturbing the current balance between the rights of copyright creators and owners and the rights of users of copyright material. As an example, amendments to the Copyright Act set out in the Copyright Amendment (Digital Agenda) Act 2000 introduced significant technology neutral amendments to the Copyright Act without disturbing that balance.

As a number of stakeholders pointed out to the Inquiry in their original submissions, most of the current fair dealing exceptions are already expressed in technologically neutral language. Accordingly, the need to address this issue of language does not necessitate wholesale changes to the current fair dealing arrangements.

In our view, the desirability of making some amendments to the language of the legislation to make it technology neutral has been used by some stakeholders as a tool for arguing for a substantial diminution of the rights of copyright owners. It is a matter of concern to us that the Fair Use proposal, in particular, would entrench that dilution if enacted.

Potential social costs and benefits of the Fair Use Proposal and the Associated Proposals

The MCA's key concerns with the introduction of a general fair use defence and the repeal of current statutory licensing arrangements in favour of so-called "voluntary licences" are:

1. it is inevitable that there will be substantial litigation as rights holders and users will have different views about what is fair in particular situations and negotiation is unlikely to be fruitful, or even possible, in many cases;
2. the term "voluntary licensing" is deceptive, as rights holders will not be compelled to "volunteer" to enter into licences for particular uses that are outside the boundaries

of fair use (once these have been determined by litigation); rather, users will need to undertake extensive negotiations to obtain the right to do what they currently, in so many cases, have a statutory right to do (subject to payment of the current statutory licence fees);

3. this litigation and the requirement for extensive negotiation will impose substantial cost on the community in a situation where proponents of the fair use approach have not demonstrated a cogent and compelling case for making wholesale changes to current arrangements (other than that there is some reason to remove anachronistic language);
4. these costs will not only be financial; there will also be considerable uncertainty while the new rules are being negotiated and litigated, and this will be a disincentive to innovation;
5. we consider that insufficient regard has been paid to these potential and likely costs of the Fair Use Proposal and the Associated Proposals; and
6. the Discussion Paper does not present compelling evidence to support any conclusion that current arrangements are stifling innovation.

3. Responses to specific proposals and questions

The MCA's general opposition to the enactment of the Fair Use Proposal and the Associated Proposals means that responses here to specific applications of those proposals, or secondary proposals that are contingent on them, are not required. Accordingly, we have only commented here on a select number of the other proposals that stand apart from the Fair Use Proposal and the Associated Proposals or that are proposed as alternatives to them.

1. Proposal 7-4 is that:

If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright has been infringed.

The MCA supports this proposal.

2. Proposal 8-3 is that:

If fair use is not enacted, the Copyright Act should be amended to provide a new fair dealing exception for non-consumptive use. This should also require the fairness factors to be considered. The Copyright Act should define a 'non-consumptive use' as a use of copyright material that does not trade on the underlying creative and expressive purpose of the material.

The MCA supports this proposal with the following qualification. There is a danger that the word "trade" in the proposed definition of the term 'non-consumptive use' would be interpreted to mean that any non-commercial use of copyright material was non-consumptive. We suggest that more neutral terminology that emphasises the transitory nature of the permitted use would be appropriate and less likely to lead to disputes over the scope of the exception.

3. Proposal 9-2 is that:

If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

The MCA does not support this proposal. We refer to page 10 of our original submission, in which we made the following points:

However, the MCA stresses the distinction between 'social' uses on the one hand and 'private or domestic' uses on the other. Social uses of copyright material are by definition not private or domestic, and should not be the subject of an exception under the Copyright Act.

...

If the ALRC arrives at the view that copying for private and domestic use should be more freely permitted, care must be taken to ensure that any exception does not permit businesses that operate platforms on a commercial basis to avoid remunerating copyright authors and other owner on an equitable basis.

...

The MCA does not believe that it is necessary to expand or amend the existing format shifting exceptions to copyright infringement. If the ALRC nonetheless believes that these exceptions should be expanded, care must be taken to ensure that copyright owners are still equitably remunerated for the use of their works where such use is not private or domestic in nature or where such use is facilitated by service providers conducting a commercial enterprise.

In particular, we note that it is not clear whether the words “private and domestic” in proposal 9-2 would permit, for example, publication by an individual of copyright material without the consent of the copyright owner on a closed social media network. In our view, this would not be appropriate, but there is no proposal that the words “private and domestic” be defined and we do not consider that the proposed fairness factors would assist in such a case.

4. Proposal 10-3 is:

If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

The MCA does not support this proposal. We refer to the following extract from page 23 of our original submission.

Consistent with the MCA's response in relation to transformative use, the MCA believes that there may be difficulties in expressing such an exception in a manner that would provide certainty to both copyright users and owners...There is already sufficient uncertainty in the nature of the application of the tests concerning a 'substantial part' without including a further similar flexible (and thereby inherently uncertain) concept into the fair dealing exception. The MCA considers that any exception drafted on that basis may raise more problems than it purports to solve.

5. At this stage, the MCA has no comment on proposals 11-3, 11-4, 11-5, 11-6 or 11-7 or question 11-1.
6. In relation to the Orphan Works proposals (proposals 12), it is not clear whether proposals 12-2 and 12-3 are intended to be alternatives to proposal 12-1 if fair use were not enacted. We assume that this is what is intended.

We note that our suggestion that orphan works should be subject to a separate collective licensing regime has not been adopted. We urge the Inquiry to reconsider this and note that neither of these proposals allow for the possibility that the author of an orphan work might be located after the event. In the MCA's view, the phrase "reasonably diligent search" are not sufficiently precise.

The MCA does not support proposals 12-2 and 12-3 in their current form.

7. Proposal 13-2 is:

If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

The MCA does not support this proposal in its current form. The word "education" is susceptible to extremely broad interpretation. Although the Discussion Paper implies (at paragraph 13.63) that the proposed exception would only be available to educational institutions, it is not at all apparent from the wording of the proposal that this limitation would apply.

The current arrangements for use of copyright material by educational institutions are quite narrow, but are, in the MCA's view, appropriate in general. We are reluctant to see any broadening of the current arrangements that would adversely affect the current level of remuneration that flows to rights holders from these institutions.

However, one area which the MCA considers could be considered by the Inquiry in this context (even though it arises independently of digital technology) is the scope of the definition of educational institution in the current exception. We have member organisations, such as youth orchestras, which have a primary educative function, but which do not qualify for the current educational institution exceptions and statutory licensing arrangements because they fall outside the scope of the definition.

8. The MCA makes no comment at this stage on the government use proposals.
9. In relation to Proposal 15-1, the MCA would be satisfied with either Option 1 or Option 2, provided that, if Option 2 were enacted, the MCA would support proposal 15-2, as the removal of the internet exclusion is consistent with the approach advocated in our original submission to the Inquiry.
10. The MCA makes no comment at this stage on the Broadcasting Rights proposals.
11. The MCA does not consider that a blanket prohibition on contracting out in all of the listed circumstances is desirable. We would have greater concerns about how this proposal would operate, as suggested, if fair use were enacted and statutory licensing regimes were abolished. To couple this with a blanket prohibition on contracting out would further entrench the dilution of the rights of copyright owners that would be effected by the Fair Use Proposal and the Associated Proposals.