



*Supplementary response to ALRC enquiry on Copyright and the digital economy issues paper.
9th September 2013.*

Orphan works

We just don't agree that there is a legitimate and substantive Orphan Works problem in Australia that is in some way holding back the digital economy. The ALRC hasn't provided any evidence to support an argument that there is a problem, so we fail to see how introducing this concept into the report addresses the terms of reference that the ALRC is responding to.

The AIPP re-iterates its opposition to any exception for so-called "orphan works", and particularly for the ALRC's proposals that "fair use" apply when determining whether a use of an "orphan work" infringes copyright: Proposal 12-1 to 12-3.

The collecting institutions (and we are meaning public libraries, galleries and museums) that want to deal with so called "Orphan Works", are not really a part of the digital economy - our members would rarely have substantive commercial transactions with these bodies, unless we may be asked to donate works or perhaps one of our commercial clients may be required to hand over our members work for archival purposes

Some of these collecting institutions have made submissions that "orphan works" are holding up their ability to deal with material in their collections, However the AIPP notes that:

Firstly - provisions in the existing Act already address the issues collecting institutions such as galleries, libraries and museums have raised – namely, section 200AB (which even the Copyright Council has stated is "particularly likely to apply ... where you are unable to identify or locate a copyright owner" (2008) ACC, Special Case Exception at 31) and section 183 (which allows government to use material for any government purpose, and which collecting institutions should first discuss with Copyright Agency before running to the ALRC or to government for different exceptions);

Secondly - while "fair use" is already available in the US and has been for a very long time, we would highlight strongly that the US experience for photographers, to us doesn't appear to have addressed the sorts of issues people have raised in submissions to the ALRC.

Introducing a "fair use" orphan works provision, then, is therefore not only unnecessary, but is likely to be no simpler than applying the current provisions. Further, it is unlikely to be helpful even to the intended beneficiaries (particularly if the government also repeals section 183, as also proposed by the ALRC).



From the AIPP perspective, we feel very strongly that the primary focus of any "solution" to any orphan works issues MUST be on reconnecting an orphan with its copyright owner – and not on the spurious needs of third parties.

Without addressing this fundamental issue – together with issues such as whether the Act should also be amended to introduce statutory damages, whether extended collective licensing would be preferable to "fair use" and whether uses of "orphans" only be permitted on payment of fees (to dissuade people using an argument about orphans as a substitute for using licensed images) – the AIPP is not in a position to state what it believes should constitute a diligent search. We are however, very concerned that the current Proposal 12-3 sets the bar far too low, as it appears to be relying on "how and by whom the search was conducted" and not by reference to the types of searches that those people employed, for example, by the collecting societies, would undertake.

Fair use

As we have raised previously, one of the serious concerns of photographers is both the uncertainty and the unfairness of so-called "fair use" as it applies in the United States. Some concepts around current US "fair use" legislation look likely to apply in Australia if any of the proposals of the ALRC are taken up.

We'd remind the ALRC of the following US cases which to any commercial photographer, demonstrate how difficult it is to predict whether "fair use" will apply:

- the Prince v Cariou case (see <http://hyperallergic.com/69683/court-of-appeals-reverses-ruling-on-prince-v-cariou/>);
- a case involving photos of the Sex Pistols (see http://www.huffingtonpost.com/artinfo/fresh-copyright-fight-ove_b_2584280.html); and
- a case involving an artist's use of photos of feet and sandals (see <http://homepages.law.asu.edu/~dkarjala/Copyright/BlanchVKoons%282C10-2006%29.htm>).

The AIPP also strongly states its position that, where these cases found that the use of the photographer's work was OK without permission under copyright law, then in light of current Australian licensing practices, such results are grossly unfair.

Each of these cases show situations where people can ride on the skills and efforts of the original photographer without giving them any say in how their work is used and without providing for any payment. The AIPP rejects any changes to Australian law that would have photographers work merely treated as some kind of generic "raw material" for someone else to use without payment and artistic control. If "Fair Use" were enacted, we'd probably have no certainty that even Moral Rights would have any effect.



The AIPP's 3000 + members would remind the ALRC that current Australian copyright law, and current Australian licensing practices support the digital economy, it allows us to have some hope of making money out of our work. The ability of photographers to make a meaningful contribution to that economy is dependent on it being clear that people need licences to use their work.

As a professional representative body, we speak with copyright lawyers regularly, and they often remind us that in the day-to-day thrust of commercial activity, we'd need to think very carefully about pursuing potential infringements in taking action against someone claiming "fair use". The uncertainty of court decisions and the very real possibility that any action would result in financial loss to the photographer – the only party benefiting is probably the lawyers.

We have to remind the ALRC that instigating commercial legal action in the federal court is horrendously expensive. Our members are usually one-person micro businesses who are generally dealing with much larger clients and governments with very deep pockets. We don't need any further impediment to our ability to make an income.

The creator of copyright work, really the whole point of copyright in the first place, has the potential to be completely swamped by loud and large voices with much deeper pockets than us, who will have the added ability to refuse permission or pay for the use our work, rather than the original creator who is more often than not, a small one-person micro business with passion for creativity – please don't forget them.