



AUSTRALIAN
COPYRIGHT COUNCIL

**SUBMISSION TO ALRC IN RESPONSE TO INTERIM REPORT ON TRADITIONAL
RIGHTS AND FREEDOMS – ENCROACHMENT BY COMMONWEALTH LAWS**

September 2015

The Australian Copyright Council (ACC) welcomes this opportunity to make a brief submission to the Commission in response to its Interim Report on Traditional Rights and Freedoms- Encroachment by Commonwealth Laws. We shall confine our comments to the aspects of the Interim Report that are relevant to copyright law. Specifically, chapters three (Freedom of Speech) and seven (Property Rights).

WHO WE REPRESENT

The ACC has 22 member organisations. These include the peak bodies for Australian creators as well as the major collecting societies. This represents over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in Australian creative industries. This is consistent with copyright industries employing 8.7% of the Australian workforce as reported by PwC in *The Economic Contribution of Australian Copyright Industries 2002-2014*.

http://www.copyright.org.au/acc_prod/ACC/Research_Papers/The_Economic_Contribution_of_Australia_s_Copyright_Industries_2002-2014.aspx

EXECUTIVE SUMMARY

The Commission is familiar with the work of the ACC from its Inquiry into *Copyright and the Digital Economy*. We do not propose to repeat our submissions to that Inquiry here. As the Commission notes in its Interim Report, arguments about fair use were traversed in its previous inquiry. However, we do take the opportunity to stress the importance of situating this inquiry in the Australian legal framework. Australia does not have a Commonwealth Bill of Rights. And Parliament's power to legislate with respect to copyright falls under its general plenary power. In our submission, these factors are relevant to the Commission's inquiry as it relates to copyright.

The Interim Report addresses copyright in two contexts: as an area of law that interferes with freedom of speech in Chapter 3 and as a property right, in Chapter 7. This is because copyright and freedom of expression are part of the same system of traditional rights and freedoms. And, in our submission, Australian copyright law is designed to mediate between the property rights of copyright owners and the public interest in freedom of expression.

This is often referred to as the "copyright balance" and is demonstrated in a number of ways.

FREEDOM OF EXPRESSION AND COPYRIGHT

Copyright subsists in a wide range of material: literary works, artistic works, musical works, sound recordings, films and broadcasts. For example, articles, photos, cartoons, graphs, videos and computer programs.

This enables the owner of copyright (generally the creator in the case of freelancers or the publisher or broadcaster in the case of employee journalists, photographers and cartoonists) to exercise a range of exclusive rights.

Limitations

While there is no registration system for copyright, there are a couple of prerequisites for protection.

Firstly, copyright does not protect ideas. It only protects the unique way they have been expressed.

Secondly, something must be original to qualify for copyright protection. Originality does not require uniqueness; rather it requires that the copyright material be the product of the skill and labour of a human author. This means that facts and information are not protected by copyright.

And of course, copyright only has a limited (albeit lengthy) duration.

These limitations serve the public interest in the free-flow of information.

Exceptions and Statutory Licences

Australian copyright law also recognises the importance of freedom of expression through a number of free exceptions and statutory licences. These were the subject of the Commission's *Copyright Inquiry*.

Central to these are the fair dealing exceptions which provide that certain dealings will not be an infringement of copyright provided that they are both fair and that they meet one of the specified purposes: criticism or review; news reporting; research or study; parody or satire.

A key issue considered by the Commission in its *Copyright Inquiry*, was whether Australia should move from its purpose-based fair dealing exceptions to an open-ended fair use exception such as exists in the United States. Notwithstanding the Commission's recommendation in favour of fair use, it remains the ACC's view that in the absence of a Bill of Rights providing for freedom of expression, it is not appropriate or workable for Australia to move to an open-ended exception. Rather, it is appropriate for the purposes to be prescribed by the legislature.

The decision of Perram J in *Dallas Buyers Club LLC v iiNet Limited* (No 4) [2015] FCA 838 highlights how the absence of a Bill of Rights can influence Australian copyright law and practice. That case involved an application for preliminary discovery of ISP customer details to enable a copyright owner to send letters of demand to alleged infringers. In considering the supervisory role of the Court, his Honour noted:

'English and Canadian authorities have exercised a power to superintend the correspondence that parties in the position of DBC have proposed to send: cf. *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch); *Voltage Pictures LLC v John Doe* [2014] FC 161. Those decisions suggest that those Courts will exercise a supervisory role, almost akin to that of a consumer protection authority, in scrutinising proposed correspondence with account holders. This reasoning flows from the fact that in both the United Kingdom and Canada there are human rights instruments which guarantee privacy, the application of which requires the Courts in those countries to engage in a proportionality analysis foreign to Australian law.' [para 7].

Australia does not have a Bill of Rights guaranteeing freedom of expression. Instead, the High Court has implied a right to freedom of political communication into the Constitution (See, for example, *Theophanous v Herald and Weekly Times* [1994] HCA 46; *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63). To the extent that Australian copyright law may interfere with freedom of speech, in our submission it is proportionate and appropriate.

COPYRIGHT AS A PROPERTY RIGHT

In our submission, it is important to understand copyright as a property right in the Australian legal context.

Copyright is dealt with in a range of international treaties to which Australia is a party. Apart from treaties administered by the World Intellectual Property Organisation and the World Trade Organisation, copyright is recognised in two human rights documents.

The *Universal Declaration of Human Rights* (Article 27) provides:

‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

And Article 15 of the *International Covenant on Economic, Social and Cultural Rights* which recognises the author’s right:

‘To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

However, Parliament’s ability to legislate with respect to copyright does not derive from these international treaties. The Commonwealth Constitution gives Parliament the right to legislate with respect to copyright as part of the general plenary power (s 51 (xvii)). This is to be contrasted with the United States, where Congress’ power to legislate with respect to copyright is for ‘science and the useful arts’ (Article I, Section 8).

Copyright in Australia is largely a creature of statute (see s 8A in relation to Crown prerogatives). The *Copyright Act* 1968 is not expressed to be for a particular public policy purpose. Under sub-section 196(1) copyright is recognised as a form of personal property and may be assigned, licensed or bequeathed in a will.

A copyright owner has certain exclusive rights to exclude others from doing certain acts in relation to a substantial part of their copyright material without their permission. As discussed above, this is subject to certain exceptions.

In addition to the economic rights of copyright, in Australia authors also enjoy moral rights. That is the right to be attributed as the author of their material, the right not to be falsely attributed and the right to integrity of authorship. Unlike the economic rights of copyright, these rights are personal to the author and as such are inalienable. Interestingly this is another area where the Australian system differs from the United States. One may query whether this is because a right to integrity of

authorship which enables an author to object to derogatory treatments of their work would be inconsistent with the First Amendment right to freedom of expression.

CONCLUSION

The purpose of this submission is simply to draw the Commission's attention to the specific nature of copyright and freedom of expression in Australia and how this may differ from other jurisdictions.

While international standards are increasingly important in copyright law, differences remain in national legal systems. In the ACC's view, the Australian copyright system is well adapted to our national circumstances and does not represent an unnecessary interference with freedom of expression.

Fiona Phillips

Executive Director

Appendix 1: Australian Copyright Council Affiliates

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 2 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artists' Agency
Ausdance
Australian Commercial & Media Photographers
Australian Directors Guild
Australian Institute of Professional Photography
Australian Music Centre
Australasian Music Publishers Association Ltd
Australian Publishers Association
APRA AMCOS
Australian Recording Industry Association
Australian Screen Directors Authorship Collecting Society
The Australian Society of Authors Ltd
Christian Copyright Licensing International
Copyright Agency|Viscopy
Media Entertainment & Arts Alliance
Musicians Union of Australia
National Association For The Visual Arts Ltd
National Tertiary Education Industry Union
Phonographic Performance Company of Australia
Screen Producers Australia
Screenrights