

# ALRC COPYRIGHT AND THE DIGITAL ENVIRONMENT

**A submission in response to the Issues  
Paper 42 (IP 42)**

**Executive Director: Robyn Ayres**

**Co-author: Morris Averill**

**November 2012**



## THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts.

Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries.

Arts Law provides an Indigenous arts service - *Artists in the Black* (AITB). The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address Indigenous peoples' concerns in relation to creative works.

### About our clients

Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. We also represent the organisations that support them.

The comments that we make in this submission are informed by our clients' profiles. Our clients usually:

- are both copyright creators and users;
- are either new, emerging artists or established arts practitioners or arts organisations;
- are operating arts businesses;
- are operating in all arts sectors;
- are working in both traditional and digital media;
- have low incomes/limited funds;
- need to be self-reliant in business;
- have a very limited ability to enforce rights;
- are eager for accessible legal information, although they typically have limited legal education; and
- are (at least professionally) copyright compliant.

### Our essential approach to copyright reform issues:

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between competing interest groups when considering proposed amendments to the *Copyright Act 1968* (Cth) (**Copyright Act**). Our perspective here is in keeping with our 'artists first' policy. That policy is implemented in our protocols as to circumstances in which Arts Law will provide advice or may decline to provide advice. That is, Arts Law's policy is to advise on matters that relate to, or affect the rights of individual 'artists'. In situation where there is the potential for conflict between the interests of

individual ‘artists’ and those of arts organisations and other entities, Arts Law will normally not advise those arts organisations and other entities so as to avoid conflict with the ‘artists first’ policy. Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. We also support fair and reasonable access to copyright material. We believe that balance is crucial in fostering creativity and is essential for the intellectual and cultural development of society.

Arts Law submits that Australian copyright law and the encouragement of awareness about and compliance with Australian copyright law are important elements of any Australian government’s arts policy.

Clients of Arts Law seek advice in relation to copyright issues arising in the digital environment. The following are some examples from the Arts Law client records:

- Indigenous and non-Indigenous artists who find their online promotional artwork images mass printed for sale;
- Indigenous artists/communities who find inappropriate use of their expressions of culture uploaded to the web (without free, prior and informed consent);
- Images and photographs copied and published or distributed by individuals, businesses and the news media without the permission of the owner and without attribution of authorship;
- The digital dissemination of literary works without the consent of the author or publisher.

Every unauthorised copy, publication or distribution of an artistic work, music or audio-visual work may be lost income for an artist who can ill afford it.

### **Executive Summary**

1. The digital environment allows artists and rights holders to engage with the consumers of copyrighted works for mutual benefit. The Internet provides the opportunity for consumers to access any work that has ever been created.<sup>1</sup> Digital technology also provides opportunities for artists and rights holders to generate income streams through the operation of licensing schemes and micro-payment systems. These mechanisms allow consumers to access copyrighted works and artists and rights holders to receive payment for the use of the works.
2. Arts Law submits that the digital environment has evolved to the point where there are enterprises at which web users congregate, including search engines (eg Google) and social networking platforms (eg YouTube and Facebook). Because these enterprises are key nodes in the architecture of the internet, the search engines and social networking platforms should participate in the mechanisms and approaches to both manage compliance with the copyright system (such as ‘take down’ notices) and to implement the licensing and payment mechanisms that allow consumers to access works, and artists and rights holders to receive payment for use of copyrighted works.
3. Arts Law submits that copyright licensing models are an alternative to exceptions to copyright to facilitate user access to copyrighted material.

---

<sup>1</sup> The impact of digital technology in providing opportunities to monetise ‘back catalogue’ titles (such as books, films and songs) is described by Chris Anderson (2006) ‘The Long Tail’ (Hyperion).

4. Arts Law submits that the appropriate balance between the interests of creators and users is not achieved through an exception permitting 'transformative uses' or an exception 'permitting private, non-commercial, transformative uses.' Any exception to copyright should be firmly based in the public policy of fostering the public - not private - discourse; that is, commentary directed to social, political and cultural purposes. This public policy is achieved by permitting reuse of existing works to create new work that achieves a parodic or satirical purpose or involves criticism or review.
5. The experience of Arts Law is that there is not a demand within the artistic community for a greater freedom to engage in appropriation techniques (eg 'sampling', 'remixes' and 'mashups'). Artists that use appropriation techniques operate within existing fair dealing exceptions for parody or satire (s 41A), criticism or review (s 41), or they get permission from the rights holders if there is a risk that they would be considered to be infringing copyright by taking a substantial part of the existing work.
6. Arts Law submits that a significant problem in the digital environment is not with the fair dealing exceptions; rather the problem is with user created content that incorporates copyrighted works where the use does not fulfil the requirements of a fair dealing exception. Education programs that are directed to guidelines as to what is a fair dealing are part of the solution to this problem. For example, Peter Jaszi and Pat Aufderheide and the Centre for Social Media (American University, Washington DC) publish Fair Use Codes and Codes of Best Practices for documentary filmmakers and online video makers.
7. Arts Law submits that in addition to education programs and the development of fair dealing guidelines, any problems with user created content that does not fulfil the requirements of a fair dealing exception should be managed through the implementation of protocols, policies and practices that provide artists and rights holders with effective mechanisms to engage with internet service providers, search engines and internet content hosts to have user created content removed if it does not meet the requirements of a fair dealing exception.
8. Arts Law will be pleased to respond to any specific proposals regarding 'user created content' that incorporates copyrighted material, the publication of which does not conflict with normal exploitation of the copyright material as described in the 'three step test'.<sup>2</sup>
9. Arts Law supports in principle further consideration of a collective licensing scheme for use of orphan works. Arts Law will be pleased to respond to any specific proposals to address the issue of orphan works.
10. Arts Law will be pleased to respond to any specific proposals to the statutory licensing schemes so that those schemes are adequate and appropriate for the digital environment.

---

<sup>2</sup> Article 9 of the Berne Convention modified by Article 13 of the TRIPs Agreement, Article 10 of the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement.

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy.

**Arts Law information:**

- 1.1 The comments that we make in this submission are informed by our records of advice provided to our clients. The review of the Arts Law database of client information allows Arts Law to comment with some evidentiary authority on how artists have engaged with technological change and how artists participate in the digital economy.
- 1.2 Each year Arts Law provides legal advice and other services to approximately 2,500 artists and arts organisations. Typically copyright issues comprise 35% of all problems about which we provide advice.<sup>3</sup>

**Economic analysis:**

- 1.3 The Australian creative industries and artists have been analysed in various surveys and reports. Throsby & Hollister (2003)<sup>4</sup> surveyed Australian artists to obtain information about the financial circumstances of professional artists across all major art forms (excluding film). Throsby & Hollister described the life of the practising professional artist in Australia as being affected in both positive and negative ways by the internet. The surveys also address changes in the career paths of artists and describe how artists' working lives are affected by technological developments.<sup>5</sup> Throsby & Zednik (2010)<sup>6</sup> again surveyed Australian artists. These surveys comment on the ability of creators to earn a living, with the surveys providing information as to how artists engage with the internet,<sup>7</sup> although these surveys do not focus on access to new revenue streams in the digital environment. Artists and rights holders benefit from revenue streams from copyright collection organisations that operate under the statutory licencing schemes in Parts VA & VB of the Copyright Act and collecting societies that manage reproduction and public performance rights. Even small revenue streams are important to artists and rights holders. Therefore the artistic community is concerned about the impact on those revenue streams resulting from activities in the digital environment.
- 1.4 In 2010, Throsby & Zednik described the deteriorating financial status of artists as *"the increasingly bleak economic environment in which artists pursue their creative endeavours is illustrated by the numbers of artists nominating 'insufficient income from arts work' as being the most important single factor inhibiting their career development. The proportion of artists holding this view has risen from 42 percent in 1988 to 56 percent in 2009. This result simply serves to underline one of the principal messages to come from this report, namely that*

---

<sup>3</sup> 975 of 2,851 problems in 2011 (Arts Law Annual Report 2011, p. 13).

<sup>4</sup> Throsby, David and Virginia Hollister (2003) 'Don't Give Up Your Day Job: An economic study of professional artists in Australia' (The Australian Council for Arts).

<sup>5</sup> Throsby & Hollister (2003) 'Don't Give Up Your Day Job' p 12. See also Throsby, David and Anita Zednik (2011) 'Multiple job-holding and artistic careers: some empirical evidence', *Cultural Trends*, 20(1): 9-24.

<sup>6</sup> Throsby, David and Anita Zednik (2010), *Do You Really Expect to Get Paid? An Economic Study of Professional Artists in Australia*. (Australia Council).

<sup>7</sup> Throsby & Hollister (2003) 'Don't Give Up Your Day Job' pp. 28 & 55-56. Throsby & Zednik (2010) 'Do You Really Expect to Get Paid?' pp. 10 & 67-71.

*professional artists in Australia endure considerable economic hardship in order to produce the art that so enriches our society.”<sup>8</sup>*

- 1.5 The 2003 survey of professional artists by Throsby & Hollister considered the incidence of copyright infringement experienced by the artists, with the summary being that “[a]bout one-quarter of all artists claim that their copyright has been infringed on some occasion, but of these only one in four artists have actually taken action to seek restitution .... Of the relatively small number of cases where action has been taken by an artist against copyright infringement, about 60 per cent have been successful.”<sup>9</sup> However the 2003 survey of artists does not identify whether infringement of copyright is internet or non-internet related.
- 1.6 The 2010 survey by Throsby & Zednik also considered copyright infringement, with the authors stating that “[o]ne-quarter of all artists have experienced some copyright infringement, and one in five artists say they have experienced some moral rights infringement, with the proportion in both cases being highest amongst visual artists and craft practitioners. About half of all artists believe that the current provision for copyright protection is adequate or very effective, and about one-third of artists believe that current provision for moral rights infringements is adequate. It is noteworthy that awareness amongst artists about copyright and moral rights issues appears to be growing, as is their satisfaction with the arrangements for protection of their rights.”<sup>10</sup> The 2010 survey of artists does not identify whether infringement of copyright or moral rights is internet or non-internet related.
- 1.7 Reports on the Australian economy identify that the creative industries contribute a greater proportion to GNP as compared to communication services.<sup>11</sup> There is debate as to which sectors of the economy are appropriately collected together under the name creative industries (eg O’Connor, 2011)<sup>12</sup> and the application of different models (based on different assumptions) can result in competing assessments of the size and composition of the cultural production economy (eg Throsby & Zednik, 2007).<sup>13</sup>
- 1.8 Economic analysis and assessment of the potential scope of business sectors in the digital environment can inform the ALRC with regard to participation in the digital environment. However Arts Law submits that any proposals for new exceptions to copyright should be based on clearly identified policy grounds as the economic analysis of the digital environment is contentious.

---

<sup>8</sup> Throsby & Zednik (2010) ‘Do You Really Expect to Get Paid?’ p. 93.

<sup>9</sup> Throsby & Hollister (2003) ‘Don’t Give Up Your Day Job’ p. 57.

<sup>10</sup> Throsby & Zednik (2010) ‘Do You Really Expect to Get Paid?’ pp. 10 & 61.

<sup>11</sup> Centre for International Economics (2009) ‘Creative Industries Economic Analysis: Final report’, Prepared for Enterprise Connect and the Creative Industries Innovation Centre (CIIC). p. 25. PricewaterhouseCoopers (2012) ‘The Economic Contribution of Australia’s Copyright Industries 1996-1997 to 2010-2011’, Prepared for the Australian Copyright Council.

<sup>12</sup> O’Connor, Justin (2011) ‘Arts and creative industries’ (Australia Council for the Arts).

<sup>13</sup> Throsby, David and Anita Zednik (2007) ‘Employment and Output for the Cultural Industries’, Macquarie Economics Research Paper 5/2007, Macquarie University.

- 1.9 Watt (2011)<sup>14</sup> describes the problem with the economic analysis of copyright as being due to the difficulty of carrying out empirical research, with significant risk of error in attempts to approximate information (from what can be observed) to any reasonable degree of accuracy. The Hargreaves Report (2011)<sup>15</sup> describes three obstacles to using evidence on the economic impacts of changes to the intellectual property regimes: absence of reliable data from which conclusions can be drawn to guide intellectual property policy; evidence relevant to policy questions involving new technologies or new markets, such as digital communications, is problematic as the characteristics of these markets are not well understood or measured; and the data that is available is held by firms operating these new technologies and the data, when it enters the public domain cannot be independently verified.<sup>16</sup>

## Guiding principles for reform

Question 2. 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?

- 2.1 Arts Law proposes the following as guiding principles as to whether the exceptions and statutory licences are adequate or appropriate in the digital environment:
- 2.1.1 The incentive theory (for creativity and innovation) underlies and continues to drive copyright law. The application of the incentive theory of the Copyright Act provides a mechanism upon which artists rely to produce income or opportunities for employment in the arts or via investment in artists' copyright works;
  - 2.1.2 Exceptions to copyright should operate in a way that acknowledges and respects the rights of artists and creators including their moral rights;
  - 2.1.3 Any exception or statutory licence allowing for the digitisation and/or dissemination of 'traditional cultural expressions', including secret and sacred Aboriginal cultural heritage by museums, archives or other cultural institutions, should be subject to the free, prior and informed consent of Indigenous artists, custodians or communities.
- 2.2 Arts Law makes the following comments in relation to Principle 6: 'Acknowledging new ways of using copyright material':
- 2.2.1 The Issues Paper identifies as challenges for copyright law: the level of understanding by members of the public about what copyright is; and, how copyright issues might be more effectively communicated to the public.<sup>17</sup> The Issues Paper also comments on the asymmetry between social norms in respect of the use

---

<sup>14</sup> Watt, Richard (2011) 'An Empirical Analysis of the Economics of Copyright: How Valid are the Results of Studies in Developed Countries for Developing Countries?' Available at: [http://www.wipo.int/ip-development/en/economics/pdf/wo\\_1012\\_e\\_ch\\_3.pdf](http://www.wipo.int/ip-development/en/economics/pdf/wo_1012_e_ch_3.pdf)

<sup>15</sup> Hargreaves, Ian (May 2011) 'Digital Opportunity: A Review of Intellectual Property and Growth' Report to HM Government.

<sup>16</sup> Ibid. [2.13] p. 18.

<sup>17</sup> Issues Paper [14].

of copyright works by members of the public and respect for copyright law.<sup>18</sup> What is described as a social policy problem is the apparent lack of respect for the 'rule of law'. This is perceived to flow from practices that are widespread in the community whereby people use works on-line with little regard to the effect of their actions on the artists and rights holders who hold the exclusive rights provided in the Copyright Act. This online behaviour fails to acknowledge that the creator of the works may have dedicated their working life to creating works with the expectation of generating income from those works.

2.2.2 While Arts Law acknowledges that a lack of respect for the 'rule of law' is problematic, we do not believe that the solution to this problem lies in an examination of ways in which to diminish the exclusive rights of copyright owners via broad exemptions in the digital environment.

2.2.3 The lack of respect for the 'rule of law' in the digital environment may exist because the perceived anonymity of the World Wide Web leads people to the understanding that there is a low risk of being called to account for failing to get permission to use copyright material. Arts Law argues that the apparent lack of respect for the 'rule of law' can be identified in other areas of human behaviour, such as exceeding the speed limit on motorways. Arts Law notes that this apparent social problem was not addressed by permitting the behaviour. Rather, the problem was addressed through public education programs and through the use of digital technology such as speed cameras.

2.2.4 Arts Law submits that it is not appropriate to respond to the unlicensed use of copyright material in the digital environment by allowing 'free use' exemptions for consumer practices that permit uses that should otherwise be within the exclusive control of the creator or rights holders.

2.2.5 The apparent disregard for copyright law may result from a strong antipathy to the corporate rights holders dominating many sectors of the creative industries or, from antipathy to copyright law's complexity and other faults. However, it is Arts Law's experience that disregard for the work of the artist is not at the core of the apparent indifference of members of the public to compliance with copyright law.

2.3 Arts Law supports the Copyright Council Expert Group (2011) statement regarding the fundamental principles of Australian copyright law:<sup>19</sup>

*In harmony with Australia's international obligations, the Copyright Act 1968 is underpinned by the following four principles:*

- 1. The importance of encouraging the endeavours of authors, performers and producers by recognising economic rights in relation to their creations and productions, including such additional protections as are appropriate to prevent the prejudicial activities of third parties that occur on a commercial scale.*
- 2. The related importance of conferring on human creators and performers personal rights to ensure reasonable attribution for their creations and to prevent unreasonable derogatory treatments of their creations.*

---

<sup>18</sup> Issues Paper [14], [39] & [40].

<sup>19</sup> Copyright Council Expert Group, 'Directions in Copyright Reform in Australia' (2011).



3. *The recognition that the rights referred to in Principles 1 and 2 are not absolute, and are subject to limitations (which may be either absolute or conditional) in relation to:*
- a. uses that cause minimal prejudice to those rights;*
  - b. uses necessary for freedom of expression, information or innovation;*
  - c. uses necessary to promote social, political or cultural objectives;*
  - d. uses necessary to facilitate legitimate commerce*

2.4 The Copyright Council Expert Group then described the need to take account of ‘evolving technologies, social norms and cultural values’ in the application of the 3 principles. In this submission, Arts Law addresses the questions posed in the Issues Paper as to the implications for copyright law of ‘evolving technologies, social norms and cultural values’ having regard to the ALRC Terms of Reference.

## **Caching, indexing and other internet functions**

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia’s copyright law?

### **Summary:**

3.1 Internet-related functions, like caching and indexing, are important for the operation of search engines and other internet intermediaries. However to the extent that these internet-related functions reproduce copyrighted works or assist copyright infringers to access works, then such internet-related functions can prejudice the ability of artists to generate income from their work. These internet-related functions can also prejudice artists to the extent that the reproduced works fail to properly attribute the author of the works or treat the works in a derogatory way in breach of the moral rights of the artists.<sup>20</sup>

3.2 The steps to minimise the negative impact on artists would include providing artists and rights holders with effective mechanisms with which to engage internet service providers (ISPs), search engines and internet content hosts, including providers of cloud computing facilities. These mechanisms would include effective ‘take down notice’ procedures that required ISPs, including search engines, and internet content hosts to remove works from caching and indexing services.

### **Detail:**

3.3 The internet has had an enormous impact on the ability of artists to control and publish their work. While the internet is a valuable tool that has created new opportunities for artists it has also created an environment where copyright infringement is rampant and even normalised as ‘free culture’.

3.4 Artists benefit from the ability to distribute their work at little or no cost to a very wide (often international) audience.<sup>21</sup> The operation of search engines assists artists in gaining exposure in

---

<sup>20</sup> The three moral rights recognised in Copyright Act 1968 (Cth) Part IX: the right to be attributed as the author; the right against false attribution; and the right of integrity, that is, the right not to have one’s work treated in a derogatory way.

<sup>21</sup> Throsby, David and Virginia Hollister (2003) ‘Don’t Give Up Your Day Job: An economic study of professional artists in Australia’ (The Australian Council for Arts). pp. 55-56; Throsby, David and Anita Zednik (2010), Do You Really Expect to Get Paid? An Economic Study of Professional Artists in Australia. (Australia Council) pp. 67-72.

terms of building reputation and a bigger customer base. In addition, search engines assist the development of artistic skills as artists have access to a world wide web of art that they otherwise would never get to see. They may be inspired, learn new techniques, receive tips, make contacts and seek advice from a now much wider and diverse peer group.

3.5 Arts Laws' engagement with artists has not identified any internet-related functions that are being impeded by Australia's copyright law. The operation of internet-related functions such as caching and indexing provide copyright infringers with access to works. Therefore any changes to the Copyright Act to assist the operation of internet-related functions needs to be carried out in such a way as to cause minimal prejudice to the rights of artists and rights holders.

**Question 4.** Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

**Summary:**

4.1 Arts Law supports the introduction of any exception that deals with caching and indexing where the exception is limited to what is necessary for the technical functions of search engines and other internet intermediaries and has no detrimental impact on artists.

**Detail:**

4.2 The specific exemptions provided in Article 13 of the European E-Commerce Directive and in s. 92E of the Copyright Act 1994 (NZ) provide conditions for the operation of caching and indexing of material including compliance with any terms imposed by the copyright owner of the material for accessing that material.

4.3 The operation of specific exemptions should require the implementation of protocols, policies and practices that provide artists and rights holders with effective mechanisms to engage with internet service providers, search engines and internet content hosts, including providers of cloud computing facilities. Such mechanisms would include effective 'take down notice' procedures that required internet service providers, including search engines, and internet content hosts to remove works from caching and indexing services.

## **Cloud computing**

**Question 5.** Is Australian copyright law impeding the development or delivery of cloud computing services?

5.1 Arts Laws' engagement with artists has not led us to the opinion that the development or delivery of cloud computing services is being impeded by Australia's copyright law.

**Question 6.** Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

**Summary:**

---

6.1 Arts Law submits that the operation of the Copyright Act 1968 (Cth) does not impede the development of new cloud computing services.

**Detail:**

6.2 The Issues Paper acknowledges that “[c]loud services, such as digital lockers, may also be used to store and share copyright material illegally.” Therefore any changes to the Copyright Act to assist the operation of cloud computing services should be limited to that which is necessary to facilitate legitimate commerce and should be implemented in such a way as to cause minimal prejudice to artists and other rights holders.

## Copying for private use

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

**Summary:**

7.1 The submission of Arts Law is that the current exemptions for copying of legally acquired copyrighted material for private and domestic uses are appropriate for the needs of consumers to access audio and audiovisual recordings or broadcast material. Those exceptions are the format shifting provision that permits analogue to digital copying of audiovisual material (s 110AA); the time shifting provision related to broadcasts (s 111); and the fair dealing provisions that are discussed later in this submission.

7.2 Arts Law’s primary concern with the storage of legally acquired copyrighted material on multiple devices is to balance the interests of artists in income streams from the primary markets for their copyright material with the rights of consumers to enjoy audio and audio-visual products that they have legitimately purchased. Devices on which copyright works may be stored include remote computer servers for later access for private and domestic viewing (time shifting and format shifting).

7.3 We submit that a levy scheme (discussed below) appropriately addresses the interests of both groups. When considering the issue of ‘private copying’, Arts Law submits that the European Union *Information Society Directive* definition of this term should be adopted: “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.”<sup>22</sup> The problems with identifying what is ‘private and domestic use’ will be considered later in relation to Question 11.

**Detail:**

7.4 Arts Law supports copyright exceptions that are specifically directed at time shifting and format shifting but only under certain conditions. The minimum conditions required are:

- 7.4.1 That the material being format shifted is legally acquired or the broadcast being time shifted is not an infringing broadcast;
- 7.4.2 That the copy is created by a natural person for private and domestic viewing by that person;

---

<sup>22</sup> Defined by the *Information Society Directive* 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJL 167, 22/06/2001, p.0020-0019, Article 5.2(b).

- 7.4.3 That if the copy is used for purposes beyond time shifting or format shifting for private and domestic viewing, such as if it was rented or sold or distributed to someone else, it is deemed to be an infringing copy from the time it was made; and
- 7.4.4 That artists receive remuneration for the reproduction and communication of their material.
- 7.5 Arts Law proposes that the most efficient means of remunerating artists for the reproduction and communication of their material through the use of time shifting and format shifting technologies is to:
- 7.5.1 Impose a levy on blank media used in copying, when a recording device requires blank media to make a copy; and
- 7.5.2 Impose a levy on recording devices when the device does not require additional blank media to make a copy. For example, in the case of videos and DVDs, the levy would be placed on these items as opposed to the video recorder or DVD recorder. Whereas in respect of recording devices that do not require additional media (such as a device that allows a TV viewer to store material digitally to watch later without putting it onto a different medium, or iPods) the levy would be on the device.
- Levies would be collected and distributed back to artists whose work is being format shifted or time shifted.
- 7.6 There is nothing in Australian law preventing the introduction of a levy to benefit artists or more broadly the arts industries. In 1993, the legislation introduced to impose a levy on blank audiotapes was held to be unconstitutional by the High Court.<sup>23</sup> This decision however, related to the method by which the scheme was introduced, rather than its objectives.
- 7.7 We suggest that the Canadian model and the models of several European Union member states be considered as useful starting points for a levy scheme.
- 7.8 We are conscious that it is difficult to monitor and regulate the use of time shifting and format shifting technologies to confirm that the material being format shifted is legally acquired or that the broadcast being time shifted is not an infringing broadcast or that any access is limited to private and domestic viewing. We acknowledge that there remains a risk of market failure as consumers are not dealing with new technologies in a manner that complies with uses permitted by the Copyright Act. Arts Law submits, that a blank media and recording device levy scheme is the correct approach to the market failure. It acknowledges the difficulties in detection and prevention, makes legal what many people are already doing and ensures that the legitimate interests of rights holders are not unreasonably prejudiced by providing remuneration. In our opinion, this approach would comply with the 'three-step test'.<sup>24</sup>
- 7.9 We note the comment made by Screenrights that other countries that provide for broader private copying provisions do so under remunerated schemes. While some of those countries

---

<sup>23</sup> *Australian Tape Manufacturers Association Ltd v Commonwealth* ("Blank Tapes Levy case") [1993] HCA 10, (1993) 176 CLR 480.

<sup>24</sup> Article 9 of the Berne Convention modified by Article 13 of the TRIPs Agreement, Article 10 of the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement.

pay Australian rights holders others do not as Australia does not reciprocate with a similar scheme. We submit that a levy scheme related to blank recording media and recording technology is a pre-requisite to any extension of the current exemptions for copying legally acquired copyrighted material for private and domestic uses.

**Question 8.** The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

**Summary:**

- 8.1 Recent and anticipated changes in the digital environment have produced technologies that can carry out format shifting or time shifting or both format shifting and time shifting. These format shift/time shift technologies may exist in a device that can be purchased or can be provided by a service provider such as a cloud computing service considered in Question 6.
- 8.2 Arts Law submits that both the format shifting exception and time shifting exception should be limited to the circumstances in which the copy is created by a natural person for private and domestic viewing by that person.<sup>25</sup>
- 8.3 Arts Law supports the policy of the current exceptions for format shifting:
  - 8.3.1 To only operate where the natural person (the owner of the original) makes the copy and the original is not an infringing copy;
  - 8.3.2 To only permit one copy in each format as that is sufficient to achieve the private purpose of the exceptions; and
  - 8.3.3 To only permit analog to digital copying of films and not digital to digital copying, so that analog recordings are available for viewing on digital devices.

**Detail:**

- 8.4 It is open to rights holders to license copyrighted material on terms that permit more extensive format shifting than provided in the Copyright Act. The Issues Paper notes that films sold on DVD and Blue-ray discs are sometimes sold with a digital file that permits the viewing of the film on different digital devices. Further, ebooks licensed by Amazon, Inc can be accessed on both the Kindle ereader and on smartphones and other devices that operate a Kindle app.<sup>26</sup>
- 8.5 We submit that an extension to the format shifting exception is unnecessary as the present state of the exception meets the legitimate needs of consumers. Further, rights holders have the ability to adopt business models in which the enhanced format shifting can be a competitive advantage to differentiate that rights holder's products from other suppliers.

---

<sup>25</sup> Defined as "reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial." *Information Society Directive 2001/29/EC* of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJL 167, 22/06/2001, p.0020-0019, Article 5.2(b).

<sup>26</sup> Issues Paper [77].

Question 9. The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

(a) should it matter who makes the recording, if the recording is only for private or domestic use;

**Summary:**

9.1A Arts Law submits that both the format shifting exception and time shifting exception should be limited to circumstances in which the copy is created by a natural person for private and domestic viewing by that person.<sup>27</sup>

**Detail:**

9.2A The Optus TV Now service is discussed in the Issues Paper as highlighting the issue of whether the time shifting exception should cover copying by a company on behalf of an individual. The Full Federal Court in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59 [89] identified the commercial nature of the Optus TV Now service as “*its purpose in providing its service – and, hence in making copies of programmes for subscribers – is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.*” The subsequent application of Singtel Optus for special leave to appeal to the High Court was refused.<sup>28</sup>

9.3A Arts Law notes the intervention by Screenrights in the case. In summary, its submission to the court was that the Optus TV Now service (with its near live functionality enabling viewers to watch free-to-air broadcasts on certain devices almost simultaneously) was sufficiently similar to a retransmission service so as to potentially undermine the operation of Part VC Copyright Act scheme.

9.4A We note and support the submission made by Screenrights that if a new exception to allow time shifting by means of cloud based personal video recorders (PVRs) were introduced, it would be vital that it be a remunerated exception. To implement a free exception to allow for such services would be inequitable to rights holders (including artists who operate or whose work appears in such broadcasts). Further, it would potentially breach Australia’s international obligations.

(b) should the exception apply to content made available using the internet or internet protocol television?

**Summary:**

9.1B Arts Law notes the anomaly resulting from the definition of ‘broadcast’ in s. 10 of the Copyright Act 1968 (Cth).<sup>29</sup>

---

<sup>27</sup> *Information Society Directive* 2001/29/EC.

<sup>28</sup> [2012] HCATrans 214 (7 Sept. 2012).

<sup>29</sup> Issues Paper [84].

**Detail:**

9.2B Arts Law notes and agrees with the submissions made by Screenrights in relation to *Educational institutions (questions 28-31) and Retransmission of free to air broadcasts (questions 35 to 39)* with respect to the impact this anomaly has on the administration of the Part VA and Part VC licences respectively.

Question 10. Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

**Summary:**

10.1 There should be a specific exception allowing individual consumers to make back-up copyrighted material such as images, ebooks, audio and audio-visual material that have been legally acquired.

**Detail:**

10.2 The sole purpose for the back-up would be in case the source copy is lost, damaged or otherwise rendered unusable as provided, for example, in the Canadian Copyright Act,<sup>30</sup>.

### **Online use for social, private or domestic purposes**

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

**Summary:**

11.1 Arts Law submits while some internet users engage in creative re-use of copyright material, a significant number of internet users engage in consumption rather than in creative reuse of copyright materials on social networking platforms. The creation of a new exemption for online uses of copyright works for private or domestic purposes will result in a significant loss of control by artists as to the use of copyright material and may prejudice the moral rights of artists.

**Detail:**

11.2 Arts Law acknowledges the reality of the present digital environment in which there is widespread copying of copyright material by consumers that is facilitated by the use of digital technology. However, this technological shift has been accompanied by the emergence of social norms that have been embraced by substantial numbers of users of digital technologies that do not acknowledge or respect the rights of the artists and creators of the copyright material. Specifically, as a result of the changing copyright environment largely due to the proliferation of digital technology, in addition to creators and users, there is now a major third party in this equation/balance: the consumer who is also an infringer. Some would argue that the infringing consumer is a user of copyright material. However, Arts Law believes that the infringing consumer should be differentiated from a user who may use copyright material for further creation or for the public benefit. The infringing consumer in a modern digital environment simply consumes copyright material, and at present is doing

---

<sup>30</sup> Copyright Modernisation Act, C-11 2012 (Canada) s. 29.24.

so without providing further incentive (through remuneration) for future creators and artists. In other words, they are not engaged in the creative process themselves.

- 11.3 Arts Law submits that defining what is 'commercial' or 'non-commercial' in the digital environment is problematic. For example, user created content (that incorporates copyrighted works) may be placed on video aggregation websites such as YouTube by the creator for non-commercial motives. However, the YouTube platform operates with commercial motives and monetises user created content through online advertising directed to those that access and view video material on websites such as YouTube.
- 11.4 Defining what is a 'non-commercial' use in the digital environment is identified as problematic in the Issues Paper, with the comment, "*especially where a creator of content opts to receive payments from advertising associated with websites.*"<sup>31</sup> Arts Law submits that the definitional problem as to what is a 'non-commercial' use extends beyond the question whether or not the individual derives payment from advertising related to the user-generated content. The websites that host user-generated content are publishing forums that attract advertising based on the number of users of the website, so that social networking websites (such as Facebook) and video aggregation sites (such as YouTube) are intrinsically commercial operations.

#### **Case Study**

*Last year, Arts Law dealt with a client who had produced and directed music video clips for a band more than a decade ago. As the contractual arrangements between the client and the band were incomplete, the advice addressed questions such as who was the 'maker' of the video clip; whether there were joint authors; and the rights of the client or the band to permit the communication to the public of the video clip. The client had subsequently discovered that a re-edited version of one of the video clips had been uploaded to the band's Facebook page. This presented a particular difficulty for the client, who was intending to upload the video clip to her own YouTube channel but was uncertain of how this could be done given that the video clip was already available, in re-edited form, on the band's Facebook page. The client was not attributed as the author of the video clip that was uploaded to Facebook.*

*The uncertainty as to the contractual arrangement between the client and the band flowed into the uncertainty as to rights of the client or the band to permit the communication to the public of the video clip as well as the issue as to whether the band had any obligation to provide the client with any attribution of her role as director of the video clip. The case study also illustrates the uncertain distinction between commercial and non-commercial uses on social media platforms. The fact that Facebook accounts can be held not only by individuals but also by*

---

<sup>31</sup> Issues Paper [130].



*entities such as bands means that content uploaded on Facebook can potentially reach a very wide range of users. A touring band would use a Facebook account to market concerts or licensed downloads of music files so that the video clip can be described as being part of the band's promotional activities – that is, the video clip is used for a commercial purpose.*

- 11.5 Arts Law submits that the use of copyrighted works for private or domestic purposes should be distinguished from a use on a social networking site. That is, from the perspective of the artist or creator of the copyright work, it may be one thing to create a family video that incorporates a copyrighted song and share that video with family by email (or any other person to person communication technology). However, it is another to put such a video on a social networking site, such as Facebook or a video aggregation site such as YouTube, where it is available for viewing by a much broader audience and where the video is published to many (whether that is small groups of 'friends') or even to any user of the website.
- 11.6 This distinction is made in the recent 'Dancing Baby' litigation in the United States.<sup>32</sup> Universal Music as the publisher administering the Prince song 'Let's Go Crazy' argued that it is not correct for Stephanie Lenz to describe a "YouTube posting as a "home video," as though it were a simple family movie available for viewing only by a small circle of family and friends in the confines of a personal residence. The use in question is not making a home video. The use is incorporating the copyrighted work in a posting to YouTube. In 2007, as today, YouTube was a for-profit, commercial website, where postings are available to a mass audience."<sup>33</sup> The U.S. District Court will consider this argument in the context of the plaintiff's claim that the takedown notice issued by Universal Music was an abuse of the Digital Millennium Copyright Act (DMCA), which will involve the court considering the extent a copyright owner is required to "properly consider fair use" under 17 U.S.C. § 107 before sending a takedown notice under the DMCA.<sup>34</sup>
- 11.7 The creation of a new exemption for online uses of copyright works for private or domestic purposes will prejudice the moral rights of artists. The impact on the moral rights of artists is apparent from the decision of the Federal Magistrates Court in *Perez v Fernandez*. The work at issue was a mashup with new words mixed into a song by Mr Fernandez who was a D.J. and music promoter, with the mashup streamed from a web site. Fernandez engaged in this conduct without any authorisation. It involved infringements of the rights of reproduction

---

<sup>32</sup> Stephanie Lenz's 29-second video shows her son bouncing along to the Prince song 'Let's Go Crazy'. Lenz uploaded the video to YouTube. Universal Music issued a takedown notice under the DMCA; Lenz subsequently challenged the take down notice.

<sup>33</sup> *Lenz v. Universal*, Defendants' Notice of Motion and Motion for Summary Judgment (July 13, 2012) <https://www.eff.org/cases/lenz-v-universal>

<sup>34</sup> In denying Universal's motion to dismiss in 2008, the Court stated that a copyright owner could be liable for making a knowingly material misrepresentation under § 512(f) DMCA if it "issu[ed] a takedown notice without proper consideration of the fair use doctrine." *Lenz v. Universal*, 572 F. Supp. 2d 1150 at 1155 (N.D. Cal. 2008). On 17 Oct. 2012 the U.S. Federal District Court (N. D. Cal.) heard further summary judgment motions regarding whether the takedown notice issued by Universal Music was an abuse of the DMCA.

and communication to the public and infringed Mr Perez’s moral rights in the integrity of authorship of the song.<sup>35</sup>

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?

**Summary:**

- 12.1 Arts Law submits that no exception be created for online uses for social, private or domestic purposes because the problems in framing such an exception arising from:
- 12.1.1 The difficulty in defining what is private or domestic in the use of copyrighted works on social networking platforms (because the distinction between ‘commercial’ and ‘non-commercial’ is uncertain given that the social networking platforms operate as commercial enterprises);
  - 12.1.2 The difficulty in permitting such an exception and maintaining the protection of the moral rights of artists; and
  - 12.1.3 The uncertainty in determining whether a specific item of user-generated content is a creative or non-creative reuse – whether it is ‘transformative’.
- 12.2 Arts Law submits that changing the Copyright Act to permit some online uses for social, private or domestic purposes would have limited utility as the popular social networking platforms are located in the United States of America. Users of the social networking platforms commit to terms and conditions that are subject to US law with those terms and conditions usually containing warranties as to ownership of the copyright or the permission of the copyright owner to upload material onto the platform. As copyright is granted in statutes that apply on a territorial basis any exemption provided by the Copyright Act of Australia can only be applied by Australian courts and the United States courts would not apply the exemption provided by the Copyright Act of Australia.

**Detail:**

- 12.3 The Issues Paper references the Copyright Council Expert Group comment that user-generated content “*reflects a full spectrum of creative and non-creative reuses*”<sup>36</sup> of copyrighted work. The Issues Paper also notes that such content is not necessarily ‘transformative’<sup>37</sup> (as considered in Questions 14-16). The uncertainty as to whether a specific item of user-generated content is a creative or non-creative reuse – whether it is ‘transformative’ – illustrates the difficulty of framing an exception for online uses for social, private or domestic purposes.
- 12.4 The ‘Dancing Baby’ litigation, referred to earlier, is an example of user-generated content that resulted in arguments as to whether it is a creative or non-creative reuse of the song and also whether the video is ‘transformative’; that is, whether it transforms the Prince song into a new work or is merely derivative of the existing work - as the concept of ‘transformative’ use is explained by the U.S. courts.<sup>38</sup> In the ‘Dancing Baby’ litigation, Universal argued that

<sup>35</sup> *Perez v Fernandez* [2012] FMCA 2 (10 Feb 2012) [66].

<sup>36</sup> Issues Paper [99].

<sup>37</sup> Issues Paper [98].

<sup>38</sup> Issues Paper [112]-[118].

*“[s]ynchronizing music to video is not inherently transformative, but rather the exercise of a right specifically reserved to the composition owner”*.<sup>39</sup>

- 12.5 The existing exemptions (discussed in respect of Questions 45-53) allow user-generated content to be published to the extent the content satisfies the requirements of the existing fair dealing exemptions.
- 12.6 The digital environment has evolved to the point that there are enterprises at which web users congregate, including search engines and social networking platforms. These enterprises are key nodes in the architecture of the internet, and the search engines and social networking platforms should participate in the mechanisms and approaches to managing compliance with the copyright system.
- 12.7 While the scope of the safe harbour scheme for ISPs is outside the scope of the terms of reference of the ALRC, the Issues Paper refers to the effect of changes to the scope of primary copyright infringement of online users and the consequences for the liability of internet platforms and telecommunications providers under copyright law.<sup>40</sup> Arts Law agrees with the submission of the Copyright Council of Australia to the Attorney-General's Department Consultation Paper, *Revising the Scope of the Copyright 'Safe Harbour Scheme'* (21 November 2011), which stated *“[t]he rationale for the safe harbour scheme is to provide legal incentives for service providers to work cooperatively with copyright owners to deter copyright infringements that are not initiated or controlled by these service providers, but which occur through their systems or networks. The Council supports the safe harbour scheme and recognises that internet service providers are in the best position to take effective action to deter this kind of unauthorised use of copyright works.”* Arts Law does not support changes to the primary liability of users for infringement of copyright on internet services. The safe harbour scheme provides the basis for rights holders and service providers to establish mechanisms to manage the unlicensed use of copyright material, such as through the development of codes of practice that operate between the rights holder and the service provider related to unlicensed use of copyright material by users of the service and guidelines as to appropriate use of copyright material that are available to users of the internet services.<sup>41</sup>
- 12.8 The digital environment allows for mechanisms that give rights holders' choices as to how to respond to unlicensed use of their work. The Issues Paper describes an example of a mechanism that give the rights holders options; the YouTube 'ID Content' policy is described as being intended to allow copyright owners to 'monetize, block or track' uses that are not fair uses of copyright material.<sup>42</sup> Through such a policy, rights holders have choices as to whether

---

<sup>39</sup> *Lenz v. Universal*, Defendants' Opposition to Plaintiff's Renewed Motion for Summary Judgment (August 24, 2012) <https://www.eff.org/cases/lenz-v-universal>

<sup>40</sup> Issues Paper [109].

<sup>41</sup> The code of best practices Patricia Aufderheide and Peter Jaszi (Centre for Social Media), which helps creators of online video material, is discussed later in relation to Question 45.

<sup>42</sup> Issues Paper [101]. The YouTube description of the 'ID Content' policy is that *“YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.”* <http://www.youtube.com/t/contentid>

to block the use of their copyrighted works through ‘takedown notices’; or track the use (as the rights holders may decide that the reuse is beneficial in that it draws public attention to the copyrighted work, with the rights holders deriving value from the work from some other sources); or the copyright owner can engage with internet service providers and internet content hosts to monetize what is otherwise an unlicensed use of the work through accessing advertising revenue related to the user-generated content.

- 12.9 Mechanisms that give rights holders’ choices as to how to respond to unlicensed use of their work allow all artists to decide how to engage with the digital environment. There will be differences in the level of engagement with mechanisms that allow rights holders to ‘monetize, block or track’ uses to use ‘take down’ notice procedures as corporate rights holders have the resources and personnel to implement mechanisms to monitor the use of copyrighted material on the web. Whereas an individual artist may not want to allocate time to monitoring the web or engage with the rights management mechanisms.

**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?

**Summary:**

- 13.1 Arts Law submits that defining what is ‘non-commercial’ in the digital environment is problematic for the reasons set out in relation to Question 11, so that the concept of ‘non-commercial’ use does not provide an effective test to determine what could be permitted use of copyrighted work for social, private or domestic purposes.
- 13.2 Arts Law submits that defining an exemption related to a use that does not conflict with normal exploitation of the copyright material is problematic as the ‘legitimate interests’ of artists extends beyond their economic interests in the exploitation of their work. The ‘legitimate interests’ of artists include avoiding prejudice to the moral rights of artists that results from the way in which their work is used, including attribution as the author and not having the work treated in a derogatory way.<sup>43</sup>

**Detail:**

- 13.3 Arts Law submits that any exception for online uses for social, private or domestic purposes will result in uncertainty about determining whether a use conflicts with normal exploitation of the copyright material in relation to the rights of reproduction and communication to the public.

---

<sup>43</sup> The three moral rights recognised in *Copyright Act 1968* (Cth) Part IX: the right to be attributed as the author; the right against false attribution; and the right of integrity, that is, the right not to have one’s work treated in a derogatory way. Those moral rights are derived from both the Berne Convention and Article 27(2) of the Universal Declaration of Human Rights (1948).

### Case Study

*Arts Law has recently assisted a photographer who had been engaged by a client to take photographs of models posing with motor vehicles. The understanding between the photographer and her client, confirmed by email was that the photographs were for “personal use only and not to be used for commercial gain”. Upon receiving payment, low resolution proof photos were emailed to the client, with a ‘water mark’ of the photographer’s logo inserted into the images. The photographer subsequently noticed that the client had uploaded the images to his personal Facebook page, as well as several public group pages, with the photographer’s logo removed. The photographer was concerned that, in the absence of her logo, the client was attempting to pass off the images as his own.*

*This case study illustrates the uncertain distinction between commercial and non-commercial uses on social media platforms. The images were uploaded to a personal Facebook account so that the account holder could assert, from his perspective, that the photographs were not being used for commercial gain. However from the perspective of Facebook the contents of this personal account are being communicated to the public (the ‘friends’ of the Facebook account holder) and the contents of this personal account is part of the commercialisation of the Facebook platform – albeit a miniscule part of the content of that social media platform. This case study also demonstrates that it is important to take into account the impact that the use of copyrighted works on social media can have on the moral rights of the photographer regarding the attribution of authorship and the avoidance of a misrepresentation as to authorship.*

- 13.5 We also submit that the ‘legitimate interests’ of artists include their moral rights.<sup>44</sup> The creation of a new ‘exemption’ for online uses of copyright works for social, private or domestic purposes results in artists effectively losing the ability to avoid prejudice to their moral rights. The impact on the moral rights of artists is apparent from the decision of the Federal Magistrates Court in *Perez v Fernandez*, discussed earlier, in which a mashup with new words mixed into a song was held to be an infringement of the rights of reproduction and communication to the public and infringed Mr Perez’s moral rights of the integrity of authorship of the song.<sup>45</sup>
- 13.6 A new exception for online use of copyright work will also impact on the implementation of Australia’s obligations to provide protective measures for cultural activities (including Indigenous cultural and intellectual property) under the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).<sup>46</sup> A new exception will also impact Australia’s ability to implement the United Nations’ *Declaration on the Rights of*

<sup>44</sup> Issues Paper [33] & [34].

<sup>45</sup> *Perez v Fernandez* [2012] FMCA 2 (10 Feb 2012) [66].

<sup>46</sup> The Convention entered into force three months after Australia became a party on 18 September 2009.

*Indigenous People* (2007) which states that Indigenous people have a right to control their traditional knowledge and traditional cultural expressions.<sup>47</sup>

- 13.7 Arts Law submits that freely permitting online uses of copyright works for social, private or domestic purposes is not consistent with Australia’s obligations under Article 13 of the TRIPs Agreement, as well as, Article 17.4 and paragraph 1 of the US Australia Free Trade Agreement (2004).

## Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

### Summary:

- 14.1 The experience of Arts Law is that there is not a demand within the artistic community for a greater freedom to engage in appropriation techniques. Artists that use appropriation techniques operate within existing fair dealing exceptions for parody or satire (s 41A), criticism or review (s 41),<sup>48</sup> or they get permission from the rights holders if there is a risk that they would be considered to be infringing copyright by taking a substantial part of the existing work.<sup>49</sup>
- 14.2 Arts Law submits that ‘sampling’ and other ‘appropriation’ techniques involve the use of existing works and raise serious moral rights issues with respect to the failure to attribute authorship of material that is sampled, remixed or used in mashups.
- 14.3 Arts Law submits that the exclusive rights provided by copyright and the moral rights of artists function together to require that artists should be asked if they want their work to be incorporated in works by other artists.
- 14.4 Arts Law submits that the appropriate balance between the interests of creators and users is not achieved through an exception permitting ‘transformative uses’ or an exception ‘permitting private, non-commercial, transformative uses.’ Any exception to copyright should be firmly based in the public policy of fostering the public - not private - discourse; that is, commentary directed to social, political and cultural purposes. This public policy is achieved by permitting reuse of existing works to create new work that achieves a parodic or satirical purpose or involves criticism or review.

---

<sup>47</sup> Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* refers *inter alia* to “the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.

<sup>48</sup> The courts of England and Wales have given an expansive understanding to what is criticism and review in *Time Warner v Channel 4* (2003) IPR 459. A documentary film reviewing the social significance of Stanley Kubrick’s film “A Clockwork Orange” was held to be a fair dealing in extracts from that film.

<sup>49</sup> The test for copyright infringement has been described in a number of decisions of the High Court of Australia including in *TCN Channel Nine v Network Ten* [2004] HCA 14, 218 CLR 273). The scope of the criticism or review exception was further reviewed in *TCN Channel Nine v Network Ten (No 2)* [2005] FCAFC 53.

### Case study

*Arts Law has advised an artist who was creating mock advertising material for the purpose of commenting on consumerism and how mass advertising seeks to take advantage of the suggestibility of consumers by triggering desire for products. The artist created new work rather than copying from existing advertising material except where trademarks and brands names were used and the work also used distinctive fonts and incorporated packaging IP of mass marketed consumer products. In relation to the mock advertising material, the brand names were not being used as trademarks associated with the promotion of products or services or used to achieve a passing off of any product or service. To the extent that the mock advertising material incorporated copyright in the fonts and artistic works in the form of packaging design the artist's work could be argued to be fair dealing for purposes of parody or satire. While this exception to copyright infringement has not been tested in the Australian courts, the Artist's work could be argued to be a humorous or satirical imitation of a serious work.*

*The existing fair dealing exceptions can be argued to fulfil their social policy objectives. As this case demonstrates, the parody or satire exception introduced to the Copyright Act in 2006 directs attention to both the intention of the artist and the way in which the new work incorporates existing copyrighted works to make social commentary, to determine whether there is a 'fair dealing' in those existing works.*

### Detail:

- 14.5 U.S. decisions have applied a 'transformative' test to the use of 'appropriation' techniques in relation to photographs and other art works.<sup>50</sup> However a 'transformative' test may not provide the certainty that a use is permitted as its proponents would suggest. In *Cariou v Prince* the Federal District Court rejected Richard Prince's argument that "*appropriation art is per se fair use, regardless of whether or not the new artwork comments on the original works appropriated*" and that "*to the extent that [Prince's works] merely recast, transform, or adapt the photos, [they] are . . . infringing derivative works.*"<sup>51</sup> The court held that Prince's works did not meet the four elements of the U.S. 'fair use' test.<sup>52</sup>
- 14.6 Arts Law has been asked about music sampling by clients on relatively few occasions: 11 clients in the last two years have asked for advice on music sampling (Arts Law provides approximately 2,500 advices each year). During that same time period Arts Law received 6 inquiries about the fair dealing exception for parody or satire of existing works.

---

<sup>50</sup> *Blanch v Koons*, 467 F.3d 244, 252-53 (2nd Cir. 2007) in holding that Jeff Koons' appropriation of a copyrighted photograph constituted fair use, the court accepted that Koons' use of the photograph was "transformative".

<sup>51</sup> *Cariou v Prince*, 784 F.Supp. 2d 337 (S.D.N.Y. 2011). Judge Deborah Batts.

<sup>52</sup> The case is on appeal to the 2nd Circuit in 2012.

- 14.7 Treatment of music sampling by U.S courts does not support an expansive role of a ‘transformative uses’ test to permit ‘sampling’, ‘remixes’, and ‘mashups’. The current state of U.S. law in relation to music sampling is that any sampling, regardless of how minute, constitutes copyright infringement.<sup>53</sup>
- 14.8 The application of the existing fair dealing exception involves a transformative element as in the contexts we have described above as being of most use to artists (that is, parody or satire and criticism or review); it is necessary to establish that the new work achieves a parodic or satirical purpose or achieves a critical purpose. The Issues Paper comments that “*not all use that might be classed as transformative will be parody, satirical or critical. Nor will sampling and mashups usually fall within the scope of these exceptions. Such uses will constitute infringement provided that a substantial part of the work or other copyright subject-matter is used.*”<sup>54</sup> The Issues Paper references *EMI Songs v Larrikin Music* (2011) FCR 444 in relation to the final sentence of this quote. The controversy surrounding that litigation over two iconic Australian songs should not detract from the importance of identifying the public policy justification for any exception to copyright.

#### **Case study**

*Arts Law has advised an artist who created works that incorporated digitally manipulated photographs of signs, symbols, logos and advertising material found in city streets. The artist used partial snippets of the appropriated photos in her work to create what she described as being an information landscape. The artist described the intention of her work as being a satire on information overload in modern society. The artist also appropriated a logo to create multiple patterns using the image. The artist described this work as being intended as a satire on the recycling of information.*

*The advice to this artist was directed to the test for an infringement of copyright; that the use of substantial part is directed to both how much has been taken and the quality of the part taken. So that reproducing a small amount can infringe copyright, although conversely taking that which is of minimum importance or a trifling amount is not an infringement of copyright, as it is a de minimis taking. The intention of the artist also opens up questions as to whether the artist’s works fall within the parody or satire exception. This exception to copyright infringement has not been tested in the Australian courts, however the definitions of parody and satire and the arguments as to the significance of the artistic intention would indicate that courts would be looking to establish that some point was being made by the artist that qualifies the artist’s work as being a parody or satire of the original work or the use of the existing work as part of a satirical commentary on social, political or cultural institutions, values or mores.*

---

<sup>53</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800–01 (6th Cir. 2005).

<sup>54</sup> Issues Paper [120].



Question 15. 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?

**Summary:**

- 15.1 The uncertainty in determining whether a specific reuse of an existing work is ‘transformative’ illustrates the difficulty of framing an exception to permit the materials produced by appropriation techniques to be more freely permitted. Therefore, Arts Law submits that no exception be introduced that would determine that a transformative re-use of an existing work does not constitute an infringement of copyright in the existing work.
- 15.2 Arts Law submits that defining a transformative re-use exemption would conflict with normal exploitation of the copyright material as described in the ‘three step test’.<sup>55</sup> Such a transformative reuse exemption is problematic as the ‘legitimate interests’ of artists extends beyond their economic interests in the exploitation of their work - the ‘legitimate interests’ of artists include avoiding prejudice to their moral rights including attribution as the author and not having the work treated in a derogatory way.

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

**Summary:**

- 16.1 Arts Law submits that a key concern related to a transformative use exception is that it could then be relied upon in defence of further appropriation of Indigenous art and culture both in the digital environment and in relation to things that have a physical form.

**Detail:**

- 16.2 Arts Law provides an Indigenous service - Artists in the Black (AITB). The aim of the service is to increase access by Indigenous artists, arts organisations and Indigenous communities to legal advice and information on arts law issues.
- 16.3 One area that poses particular problems for Arts Law is in relation to appropriation or transformative art. Whilst we acknowledge the history of such practices in contemporary art, both in Australia and internationally, appropriation raises unique issues for Indigenous artists and their communities. The experience of AITB to date suggests that the appropriation of Indigenous culture in the many forms it takes in the arts and tourism industries is a prime cause of distress for Indigenous artists and their communities. The term ‘appropriation’ when applied to Aboriginal art not only refers to practices like the reproduction of fake ‘Aboriginal’ art on items such as tea towels, but also the wholesale commodification of Indigenous cultures by non-Indigenous interests (such as art dealers, collectors, arts professionals, academics, bureaucrats) who are making far more money out of ‘Aboriginal art’ than any Aboriginal artist ever will. The appropriation of Aboriginal art extends to (and is exacerbated by) the digital environment.

---

<sup>55</sup> Article 9 of the Berne Convention modified by Article 13 of the TRIPs Agreement, Article 10 of the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement.

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

17.1 In addition to problems with the distinction between ‘commercial’/‘non-commercial’ in the digital environment, any attempt to frame an exception restricted to ‘non-commercial’ uses must work within the ‘three-step test’.<sup>56</sup> We submit that any exception for online uses for social, private or domestic purposes will result in uncertainty as to determining whether a use conflicts with normal exploitation of the copyright material in relation to the rights of reproduction and communication to the public.

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?

18.1 The creation of new exceptions allowing transformative or collaborative uses of copyright material results in artists effectively losing their moral rights protection. The impact on the moral rights of artists is apparent from the decision of the Federal Magistrates Court in *Perez v Fernandez*,<sup>57</sup> discussed earlier, in which a mashup with new words mixed into a song was held to be an infringement of the rights of reproduction and communication to the public and infringed Mr Perez’s moral rights of the integrity of authorship of the song. Moral rights are highly valued by artists and it took many years to achieve proper recognition of artists’ connection with their work in Australia (in 2000). To remove or dilute this protection would erode the value of artists and their creativity in this country.

## Libraries, archives and digitisation

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

### Summary:

19.1 Arts Law acknowledges that libraries and archives fulfil an important role by collecting copyrighted material and making that material available to the public. However, in the digital environment the publication of copyright material online and the communication to the public of copyrighted material by libraries and archives has the potential to impact on the commercial exploitation of the material by the rights holders.

### Detail:

19.2 Arts Law acknowledges the public benefit served by public libraries, galleries, and museums, particularly in the dissemination of information to the public. We acknowledge the need for these institutions to benefit from advances in technology for the preservation, storage and management of their collections and for those reasons support an extension of the current provisions to enable these functions to occur in a cost effective and efficient manner.

---

<sup>56</sup> Article 9 of the Berne Convention modified by Article 13 of the TRIPs Agreement, Article 10 of the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement.

<sup>57</sup> *Perez v Fernandez* [2012] FMCA 2 (10 Feb 2012).

However, where the reproduction of the copyright material is to enable public access to a work in a form other than the original, such as a public art gallery making reproductions available on a computer terminal in the gallery, or making the gallery's collection available online, then the fundamental principle of ensuring remuneration of the creators (or copyright owner) should apply.

- 19.3 Whilst there is a public benefit in increasing the dissemination of copyright protected material held by our public institutions, it should not be at the expense of Australia's artists and other creators. A statutory licence system could be put in place to provide effective remuneration to rights holders for these uses.

**Question 20.** Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

- 20.1 Arts Law has not identified any problems in the operation of s 200AB. Arts Law submits that in any review of the operation of s 200AB, the scope of the exceptions for libraries and archives must take account of the potential economic impact on artists and other rights holders.<sup>58</sup>

**Question 21.** 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?

- 21.1 Arts Law submits that a distinction can be made between the digitisation of collections for non-commercial access within that institution (by curators and members of the public) and digitisation of collections for publication on the internet. The availability of copyrighted works on the internet will impact on the ability of creators of those works to generate revenue from those works. Therefore the scope of library and archive exceptions needs to be limited to digitisation for archival purposes with protocols, policies and practices limiting access while the work remains subject to copyright.

**Question 22.** What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

- 22.1 Arts Law submits that the principle of free, prior and informed consent (FPIC) should guide the digitisation of Indigenous works by museums, archives and other cultural institutions. This is in accordance with Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* as well as various protocols, policies and practices within Australia.<sup>59</sup> Economic harm is magnified by the potential for significant cultural and other harm that may arise for Indigenous artists through the digitisation of works and the communication of the works to the public in ways that are not culturally appropriate. In consequence, Arts Law advocates that even Indigenous works that are not protected by copyright (for instance, because of duration), ought, in many cases, not be exploited via digitisation without explicit permission (FPIC) from the relevant

---

<sup>58</sup> s. 200AB (c) refers to uses that do not 'conflict with a normal exploitation of the work' and (d) refers to uses that do not 'unreasonably prejudice the legitimate interests of the owner of the copyright'; which provisions apply elements of the 'three-step test'.

<sup>59</sup> For example: *Protocols for producing Indigenous Australian visual arts*, Australia Council for the Arts (2007); Terri Janke, *Pathways and Protocols: A guide to protocols for filmmakers working with Indigenous content and Indigenous communities*, Screen Australia (2008).

community. The creation (without FPIC from cultural descendants) of new, copyright protected works by and for non-Indigenous peoples where that work is derived from digitised Indigenous artwork in the public domain may cause cultural as well as economic harm to that particular Indigenous community. Libraries, archives and other cultural institutions therefore need to be careful with their own treatment and uses of Indigenous works and also in terms of how they go about protecting those works and informing the public about their significance and the need to obtain FPIC before any use.

#### **Case study**

*A major public collecting institution obtained a 'standard' royalty free release from an Indigenous visual artist over the use of her work in an educational video to be made freely available under a Creative Commons licence. The broad wording of that consent permitted a still of the artwork to be extracted from the film. Effectively the consent granted an unlimited non-exclusive licence allowing her work to be altered without any consultation and used without attribution, thereby removing her ability to grant an exclusive licence of copyright which would generate income in licence fees.*

## **Orphan works**

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

### **Summary:**

- 23.1 By 'orphan works' Arts Law means published or unpublished works and other subject-matter protected by copyright (and fixed live performances and fixed communications to the public) whose copyright owners or relevant performers cannot be:
- identified; or
  - located.
- 23.2 Arts Law supports the exploration and potential introduction of a scheme to facilitate access to works that are described as orphan works. Necessary conditions for an orphan works scheme include the need to determine that the person requiring use of orphaned work has followed all necessary steps to locate and identify the copyright owner and the payment of a licence fee to the appropriate collecting society or government body and remuneration of the rights holders when they have been identified. We welcome the opportunity to comment on concrete proposals to this end.
- 23.3 Two issues that are commonly raised in relation to orphan works by Arts Law clients are:
- The difficulty experienced tracing some current rights holders, especially those of old unpublished texts of historical interest such as private letters, and the owners of some copyright material available online. Documentary filmmakers can be particularly affected by the current requirement to obtain permission to use substantial parts of copyright material in circumstances where current exceptions do not apply to their proposed use; and
  - The time and money (transaction costs) that can be involved in searching for rights holders of some copyright material.

23.4 Media organisations can adopt adopted practical polices to manage their risk in relation to publishing orphan works (eg the *SBS Statement on Orphan Works [1.0 February 2011]*)<sup>60</sup> . However individual artists and the small publishers and other media organisations may be risk adverse so that orphan works become an issue in clearing works for publication.

**Detail:**

23.5 Arts Law’s position overall with respect to orphan works involves the desire to achieve a genuine balance between the needs that artists may have to use, access and disseminate orphan works, with artists’ and other rights holders’ interests in their original works, even if such artists and rights holders are unknown, unpublished and/or difficult to identify and/or locate. We refer to the discussion paper published in February 2012, ‘The Use of Subject Matter with Missing Owners – Australian Copyright Policy Options’, by David Brennan and Michael Fraser (commissioned by Screenrights) (the ‘Orphan Works paper’), and endorse the further exploration of appropriate mechanisms through which to achieve this balance.

23.6 Arts Law is concerned that artists are able to use, access and disseminate orphan works in circumstances where all efforts to contact the relevant copyright owner have been exhausted and in circumstances that are fair (the suggestion in the Orphan Works paper of a regime catering for published subject matter with missing owners comprising requirements of a diligent user search and lodgement of a public notice; a remedial limitation if the owner comes forward or is identified/located; and a compulsory licence administered by a declared collecting society would seem to be necessary minimums).

23.7 In any iteration of a model for dealing with orphan works in Australia, Arts Law would be concerned that artists’ interests in being fairly remunerated for the use of their work, and in their moral rights being acknowledged and upheld.

23.8 Arts Law also notes the particular situation facing Aboriginal artists and communities with respect to orphan works and welcomes attention being paid to the consequences of any mechanism that became a ‘trojan horse’ for copyright infringement and/or cultural harm caused to Indigenous creators and peoples.

**Case Study**

*Arts Law recently dealt with a case where a printmaker and designer sought to use prints from the early 20th century as part of her work. Determining whether the works were in copyright, and the identity of the copyright owner, was very difficult due to the context in which the works were produced, even after reasonable inquiries were made. The lack of an orphan works licensing scheme left the printmaker in uncertainty about whether she was able to use the works. This creates a chilling effect among artists, resulting in many works becoming unusable despite their value to artists and to the broader community.*

---

<sup>60</sup> <http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011>

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?

**Summary:**

24.1 Arts Law supports in principle further consideration of a collective licensing scheme for use of orphan works. Again, we refer to the Orphan Works paper on this point.

**Detail:**

24.2 The following is an example of a situation where an 'orphan work' provision may have been beneficial given the nature of the material.

**Case Study**

*A time capsule containing old letters and other copyright material was discovered in a public place undergoing renovation. It seems clear that the owners of the material wanted it to be discovered and disseminated at a later time. The material has historical value. Yet, under the current provisions of the Act, much of the material cannot be used because it consists of unpublished literary works that are still protected by copyright, and, so far, the current copyright owners have been impossible to identify and locate (see ss 51, 52 of the Copyright Act).*

24.3 Currently s 52 of the Copyright Act allows some uses of copyright material where the identity of a copyright author is not known. The provision is very narrow and, we suspect, is little used in practice.

24.4 As mentioned there are various existing models that can be considered and Arts Law would welcome the opportunity to comment further on any specific model proposed (and any definition of the kinds of material to be covered by the model). In the meantime, Arts Law considers that the preferred model would:

- provide a definition of 'orphan works' that covers copyright owners or relevant performers who cannot be:
  - identified; or
  - located.
- provides a clear description of the necessary steps that a person must take to attempt to locate and identify the copyright owner;
- provide for the payment of a licence fee to the appropriate collecting society or government body; and
- provide that the copyright owner would receive compensation for the use, when the owner is identified;
- include a mechanism for ensuring compensation for moral rights infringements; and
- take account of the special situation facing Aboriginal and Indigenous artists, communities and rights holders in Australia.

## Data and text mining

Questions 25 - 27. Relate to the use of text, data mining and other analytical software.

Arts Law has no comments on these questions at this stage of the ALRC inquiry.

## Educational institutions

Question 28. Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

28.1 It is in the interest of artists and rights holders to receive 'fair' remuneration from educational institutions, with statutory licensing schemes operating in ways that do not disadvantage artists and rights holders.

28.2 At a later stage of the ALRC inquiry Arts Law may respond to submissions from the education sector and submissions on reforms of the current statutory education licensing schemes to meet the challenges of the digital environment.

Question 29. Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

29.1 See comment below at 31

Question 30. Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the Copyright Act 1968 (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

30.1 See comment below at 31

Question 31. Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

(a) It is in the interest of artists and rights holders to receive 'fair' remuneration from statutory licensing schemes in parts VA and VB and that statutory licensing schemes operate in ways that do not disadvantage artists and rights holders.

(b) At a later stage of the ALRC inquiry Arts Law may respond to submissions from the education sector and submissions on reforms of the current statutory education licensing schemes to meet the challenges of the digital environment.

## **Crown use of copyright material**

Question 32. Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

32.1 Arts Law supports the position of Screenrights in relation to the use of copyright material for the Crown in Division 2 of Part VII of the Copyright Act 1968 (Cth).

Question 33. How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

33.1 Arts Law does not support the use of the Copyright Act by government agencies to acquire copyright by contract in all or in an inappropriately broad class of material and to otherwise assert ownership of artwork that is created during the time the artist has some relationship with a government agency. For example, prison policies regarding the sale of artworks of incarcerated Aboriginal artists. The Aboriginal Legal Service (NSW/ACT) shares the concern of Arts Law as to the application of prison policies to Aboriginal prisoners who have created artworks whilst in custody.

### **Case Study**

*It has come to the attention of Arts Law that Indigenous artwork made in some prison workshops is sold without payment to the artist or attribution of authorship of the artist. Prison authorities often use privacy laws and issues of prison security as a means of justifying a refusal to attribute incarcerated artists whose work is exhibited or published by the prison. There seems to be no reasonable basis for this and the effect is to undermine the capacity of the artist (usually Indigenous) to generate some reputation which would assist them to build a business as an artist upon release.*

Question 34. Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

34.1 Arts Law supports the position of Screenrights in relation to the operation of the statutory licence in s 183.

## **Retransmission of free-to-air broadcasts**

Question 35. Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

35.1 See comment below at 39



Question 36 Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

36.1 See comment below at 39

Question 37. Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

37.1 See comment below at 39

Question 38. Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

38.1 See comment below at 39

Question 39. What implications for copyright law reform arise from recommendations of the Convergence Review?

In relation to Questions 35-39:

- (a) Arts Law supports the position of Screenrights in relation to the operation of the current scheme for the retransmission of free-to-air broadcasts and that Australia should take appropriate steps to replace the internet exception<sup>61</sup> with a requirement to limit retransmitted signals to their intended geographic markets.
- (b) Arts Law submits that the public policy of the retransmission licensing scheme is to foster a competitive market for the delivery of audiovisual programming and that the exception to copyright resulting from the operation of the retransmission licensing scheme should be a remunerated exception for which equitable remuneration is paid.
- (c) It is in the interest of artists, who are the "relevant copyright owner", to receive 'fair' remuneration from the retransmission licensing scheme in Part VC of the Copyright Act.

## **Statutory licences in the digital environment**

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

40.1 See comment below at 44

Question 41. How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

41.1 See comment below at 44

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

42.1 See comment below at 44

---

<sup>61</sup> s 135ZZJA, Copyright Amendment (Digital Agenda) Act 2000 (Cth) as reinforced by Article 17.3(10) (b) of the Australia-United States Free Trade Agreement.

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

43.1 See comment below at 44

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

In relation to Questions 41-44:

- (a) It is in the interest of artists and rights holders to receive 'fair' remuneration from statutory licensing schemes and that those statutory licensing schemes operate in ways that do not disadvantage artists and rights holders.
- (b) At a later stage of the ALRC inquiry Arts Law may respond to submissions on reforms of the current statutory licensing schemes are appropriate to meet the challenges of the digital environment.

### **Fair dealing exceptions**

Question 45. 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?

#### **Summary:**

45.1 Arts Law submits that a significant problem in the digital environment is not with the fair dealing exceptions; rather the problem is with user created content that incorporates copyrighted works but where the use does not fulfil the requirements of a fair dealing exception. Education programs that are directed to guidelines as to what is a fair dealing are part of the solution to this problem. For example, Peter Jaszi and Pat Aufderheide and the Centre for Social Media (American University, Washington DC)<sup>62</sup> publish Fair Use Codes and Codes of Best Practices for documentary filmmakers<sup>63</sup> and online video makers.<sup>64</sup> While guidelines are not legislative instruments, and can create hazards for copyright owners and

---

<sup>62</sup> <http://centerforsocialmedia.org/>

<sup>63</sup> Documentary Filmmakers' Statement of Best Practices in Fair Use (Centre for Social Media, November 18, 2005) <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

<sup>64</sup> Code of Best Practices in Fair Use for Online Video (Centre for Social Media, June 2008) <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

users of the guidelines;<sup>65</sup> well drafted guidelines can provide a workable compliance standard.<sup>66</sup>

- 45.2 Arts Law submits that in addition to education programs and the development of fair dealing guidelines, any problems with user created content that does not fulfil the requirements of a fair dealing exception should be managed through the implementation of protocols, policies and practices that provide artists and rights holders with effective mechanisms to engage with internet service providers, search engines and internet content hosts to have user created content removed if it does not meet the requirements of a fair dealing exception.

**Detail:**

- 45.3 Arts Law submits that the existing fair dealing exceptions permit consumers to engage in creative re-use of existing works or the application of existing works for the public benefit such as to achieve a parodic or satirical purpose or achieve a critical purpose.
- 45.4 The problems that exist in the digital environment can be attributed to a lack of awareness of the consequences of the failure to respect artists' creativity and their rights in relation to their work. Arts Law submits that the fair dealing exceptions should not be changed so as to give consumer/infringers greater freedom to disregard the rights of artists.
- 45.5 Arts Law submits that the more effective approach to managing the problem would be the implementation of protocols, policies and practices that provide artists and rights holders with effective mechanisms to engage with internet service providers, search engines and internet content hosts to address the problem of user created content that takes copyrighted work and is not a fair dealing in such work; such mechanisms would include effective 'take down notice' procedures that required internet service providers, including search engines, and internet content hosts to remove infringing works from caching and indexing services.
- 45.5 Arts Law supports an education campaign directed at informing Australians of their copyright rights and obligations. There seems to be a lack of public understanding as to how web users can engage with the fair dealing exceptions. Public awareness is essential to the success of our copyright laws. This campaign needs to focus on the rights of Australia's creators and the importance of their creative work to our unique Australian culture.

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

- 46.1 Arts Law supports simplification along the lines of the proposed CLRC simplification but notes that the purposes listed are inclusive and therefore open ended. Arts Law does not support an open-ended fair dealing exception because of the resulting uncertainty and the cost necessarily involved in obtaining court decisions on whether a particular use is or is not for a like public purpose and therefore a purpose that permits 'fair dealing' under the Act. Notwithstanding Arts Law's position, we are concerned that drafting a simplified and consolidated provision will need to be carefully considered or it could have the unintended

---

<sup>65</sup> Kenneth D. Crews, 'The Law of Fair Use and the Illusion of Fair-Use Guidelines' (2001) 62 Ohio State Law Journal 602 <http://www.centerforsocialmedia.org/fair-use/related-materials/documents/law-fair-use-and-illusion-fair-use-guidelines>

<sup>66</sup> Aufderheide, Patricia and Peter Jaszi (2011) 'Reclaiming Fair Use: How To Put Balance Back In Copyright' (University of Chicago Press).

result of substantially changing the law in this area due to the interpretation of the Copyright Act by the Courts.

**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?

- 47.1 Arts Law notes there are existing exceptions providing for a fair dealing that may involve a quotation from an existing work: criticism or review; research or study; and for news reporting. Arts Law submits that the existing fair dealing exceptions provide an appropriate basis for the quotation of an existing work.
- 47.2 Arts Law submits that the framing of a fair dealing exception for the purpose of quotation will be problematic as works vary in length and determining what would be a permissible quotation would need to address the current infringement of copyright test – whether there is a reproduction of a substantial part of a work. This test has both elements of quantity and quality of what is used.
- 47.3 Arts Law submits that notwithstanding the quotation right in the Berne Convention, the framing of a fair dealing exception simply for the purpose of quotation and for no other public purpose will be problematic. In the Berne Convention the quotations need not be text based and could be of any work. Arts Law would consider any fair dealing exception if there was shown to be a public benefit but is opposed to the general broadening of the exception.

### **Other free-use exceptions**

**Question 48.** What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

#### **Summary:**

- 48.1 Arts Law submits that the Copyright Act provides for copyright users to access material in the digital environment to create original works or to use the work for the public benefit under the existing fair dealing exceptions to copyright that meet public policy purposes of research and study, criticism or review, parody or satire and reporting the news.
- 48.2 Arts Law submits that the problems in the digital environment relate to the inadequacy of the mechanisms for copyright consumers to engage with rights holders; so that the right holder (or a copyright clearance entity acting on behalf of the rights holder) can make the decision to either licence or refuse to licence the use of copyright material.

#### **Detail:**

- 48.3 Arts Law submits that there are different business models or mechanisms that can mediate the relationship between copyright consumers and rights holders. The existence of free exceptions to the exclusive rights provided in the Copyright Act denies the rights holder the choice as to how to make work available. Business models that support the rights holder having the choice as to how works are used by consumers include:
- 48.3.1 Procedures that allow rights holders to grant an explicit permission and to licence specific users and uses of the work;
- 48.3.2 The use of technology protection measures (TPMs) to control access to the work;

- 48.3.3 Creative commons licensing by which rights holders can make material available in accordance with licencing terms that describe categories of use that are permitted – which may involve free use or payment for use of the work; and
- 48.3.4 Mechanisms that allow rights holders to engage with internet service providers, search engines and internet content hosts such as effective ‘take down’ notice procedures and mechanisms that allow rights holders to choose to engage with providers of such internet-related functions to monetise uses of their work that are not a ‘fair dealing’ by the copyright consumer, such as accessing the advertising revenue related to the use of the copyrighted material.
- 48.4 Arts Law notes that s 55 Copyright Act is an exception that exists to facilitate the recording of musical works, for which a ‘prescribed royalty’ is paid. The definition of a ‘record’ now includes electronic files; however the drafting of s 55 sits uneasily in the digital environment as s 55 refers to “retail sale” and the “sale or supply” of records. As many music download services purport to licence the music files, the reference to the “the sale or supply” of records could lead to arguments as to whether the licensing of digital files is a “sale or supply”.

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

- 49.1 Arts Law is generally in favour of the current exceptions in the Act. However Arts Law considers that sections 65 and 68, which allow the free copying and publication of public art and artistic works, should be repealed, at the least insofar as they permit commercial uses of any reproductions made under them. The repeal of these provisions was recommended in the Myer Report (2002).<sup>67</sup>
- 49.2 The United States, France and other countries do not permit the commercial exploitation of images of sculptures installed in public places.<sup>68</sup> In October 2012 the Wikimedia Foundation<sup>69</sup> complied with a DMCA notice to take down 59 photographs of images of various publicly-installed sculptures around the world created by Claes Oldenburg and Coosje van Bruggen.<sup>70</sup> The internet facilitates the communication of images of publicly-installed sculptures. The DMCA notice issued by the Oldenburg van Bruggen Studio brings attention to level of complexity that exists in the application of conflict of law principles between jurisdictions that permit or do not permit the commercial exploitation of images of sculptures installed in public places. Arts Law submits that exemption given to the exploitation of images of sculptures installed in public places no longer works in the digital environment and that the exception unreasonably prejudices the legitimate interests of Sculptors. Arts Law submits that Copyright Act of Australia should be amended so as to confirm the right of Australian sculptors to control the commercial exploitation of images of their work in accordance with Article 9 of the Berne Convention.

<sup>67</sup> Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, 2002. pp.141-142.

<sup>68</sup> Also known as the ‘freedom of panorama’ - derived from the German word ‘panoramafreiheit’.

<sup>69</sup> [https://commons.wikimedia.org/wiki/Commons:Village\\_pump#DMCA\\_Take-Down](https://commons.wikimedia.org/wiki/Commons:Village_pump#DMCA_Take-Down)

<sup>70</sup> Artists' Studio Wants Photos of Their Work Removed From Wikipedia (DMCA notice from Oldenburg van Bruggen Studio, October 23, 2012) <https://www.chillingeffects.org/N/694827>

49.3 Arts Law acknowledges that there should be an exception for ‘non-commercial’ use of images of sculptures installed in public places. The submission of Arts Law to the Myer Inquiry was that “[i]n the public interest, if these acts were undertaken for ‘non-commercial purposes’, such as by tourists or art students it may be better to make them non-infringing acts where a licence would not be required.”

#### **Case Study**

*Arts Law is consulted by both sculptors and creators of public art with questions about the related to the commercial exploitation of reproductions of sculptures and public art. A particular concern of sculptors is the ability of professional photographers and others to commercial exploit images of the sculptures and public art as postcards, including digital postcards, where the sculpture is the focus of the images rather than merely incidental to the view of the public place in which the sculpture appears.*

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

50.1 Arts Law does not identify any compelling need to add any copyright exceptions to the Copyright Act.

**Question 51.** How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?

51.1 Arts Law’s main concern is ensuring fair remuneration for copyright creators so that the arts and artists flourish in Australia. Arts Law submits that the balancing of the competing interests of the public in obtaining increased access to copyright material and the legitimate interests of rights holders must be addressed in line with the international ‘three-step test’;<sup>71</sup> including the remuneration of rights holders for uses that conflict with the normal exploitation of the work.

#### **Fair use**

**Question 52.** 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?

#### **Summary:**

52.1 Arts Law does not support the introduction of a general fair use exception. Arts Law supports retaining the current exceptions (except ss 65 and 68 – see Arts Law’s response to Question 49).

#### **Detail:**

52.2 Arts Law believes that law reform should be driven by a desire to:

---

<sup>71</sup> Article 9 of the Berne Convention modified by Article 13 of the TRIPs Agreement, Article 10 of the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement.

- simplify the law,
- provide certainty in the law,
- promote accessibility of the law; and
- maintain the relevance of the law.

52.3 Arts Law considers that a broad ‘fair use’ exception would not meet these criteria because:

52.3.1 A fair use principle that is not well defined and that ultimately takes its meaning from the court’s interpretation of it is in practice complex and complicated;

52.3.2 An open-ended exception is necessarily uncertain, particularly when first introduced. It cannot be assumed the Australian Courts will follow US court decisions. The US legal system is very different from Australia’s – to start with the US has a Bill of Rights, which expressly protects freedom of speech.

52.3.3 Our clients are usually low income earners who are unlikely to be able to afford to bring or defend a court action to determine if a use is fair or not. In other words, their access to justice both in terms of their wish to use another’s copyright material and to protect their own copyright material from infringement is limited. Furthermore, our clients cannot usually afford to pay for legal advice, so they rely on our advice and their own judgment as to what use they can make of a work or what use they can prevent being made of their work. Our clients therefore need clear and precise copyright law so that they can access the law and apply it themselves on a daily basis; and

52.3.4 the relevance of this aspect of the law in the digital age can be addressed by other, targeted means.

52.4 Arts Law is also concerned that a general fair use exception may not comply with Australia’s international obligations that any copyright limitation or exception meets the ‘three-step test’.<sup>72</sup>

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

**Summary:**

53.1 The uncertainty in determining whether a specific reuse of an existing work is ‘transformative’ illustrates the difficulty of framing a broad ‘fair use’ exception (see Questions 14-15). Therefore Arts Law submits that the Copyright Act is not amended to provide a broad ‘fair use’ exception, such as an exception that transformative reuse of an existing work does not constitute an infringement of copyright in the existing work.

53.2 Arts Law submits that defining a transformative reuse exemption would conflict with normal exploitation of the copyright material as described in the ‘three step test’.<sup>73</sup> Such a transformative reuse exemption is problematic as the ‘legitimate interests’ of artists extends beyond their economic interests in the exploitation of their work - the ‘legitimate interests’ of artists include avoiding prejudice to the moral rights of artists that results from the way in which their work is used, including attribution as the author and not having the work treated in a derogatory way.

---

<sup>72</sup> Article 9 of the Berne Convention modified by Article 13 of the TRIPs Agreement, Article 10 of the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement.

<sup>73</sup> Ibid.

**Detail:**

- 53.3 The experience of Arts Law is that there is not a demand within the artistic community for a broad 'fair use' exception. As noted earlier in respect to Question 14, artists operate within existing exceptions of parody or satire, criticism or review.
- 53.4 The experience of Arts Law is that artists have a strong regard for their moral rights. Each year Arts Law gives advice to approximately 150 artists, primarily concerned about how to deal with an infringement of moral rights or how to best protect moral rights.
- 53.5 Arts Law submits that the creation of a broad 'fair use' exception would result in artists effectively losing the ability to avoid prejudice to their moral rights as any 'transformative' use of their work would be a permitted use.

**Contracting out**

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

**Summary:**

- 54.1 Arts Law submits that contract law should not override exceptions provided for in the Copyright Act. Arts Law supports the recommendations in the CLRC report on 'Copyright and Contract' (2002) that the Act should be amended to preserve the integrity of these exceptions.
- 54.2 The existence of clauses that purport to exclude or modify the statutory exceptions to copyright infringement raises the issue of whether copyright is being reduced to an access right. Arts Law submits that using contracts to override the Act is detrimental to the public policy objectives of copyright and is thus at odds with the balancing of differing interests that is the basis of the Act.

**Detail:**

- 54.2 Arts Law identifies three general interest groups among its subscribers affected by issues regarding contracts that purport to override the copyright exceptions in the Copyright Act, these are:
- creators/authors of copyright material
  - copyright owners (such as publishers) and
  - copyright users
- 54.3 Whilst noting that these interest groups may overlap, for example where a creator retains ownership of copyright, or a user accesses material in order to create new copyright material, the groups are quite distinct. In particular Arts Law recognises that the economic interests of creators and owners are often separated. Arts Law submits that there is a public interest in the recognition of the rights of creators and the balancing of rights between not only owners and users but between the three distinct groups, creators, owners and users.
- 54.4 It has been Arts Law's experience that creators are in a disadvantageous bargaining position when dealing with their copyright; the inequality in negotiating strength results in agreements in which there is inequitable remuneration in respect of the creator's intellectual skill and effort. For example, it is the practice of investors or purchasers of copyright to acquire all rights or as wide a collection of rights as possible to maximise the return on their investment.



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

**Summary:**

55.1 Arts Law submits that the copyright exceptions benefit artists, such as the use of existing copyright material for parody and satire, so that it is not in the interests of artists to be deprived of the benefits of the copyright exceptions through the application of contract law in the form of licences to use existing works. Arts Law notes how s. 47H of the Copyright Act makes contracts unenforceable where the terms of the agreement excludes the operation of a specific section of Div. 4A (reverse engineering and other computer related exceptions).

55.2 Arts Law submits that the Copyright Act should be amended to prevent contracting out of the copyright exceptions that have a strong public policy basis: research or study; criticism or review;<sup>74</sup> parody or satire; and reporting news.

**Detail:**

55.3 The application of contract law to copyright exceptions cuts both ways in that artists may wish to licence works under terms that contract out of copyright exceptions, however artists may be presented with licence terms that result in the artist losing the benefit of copyright exceptions.

55.4 As some of the copyright exceptions have a strong public policy basis the balancing of the benefit and detriment to artists of the use of contract law in relation to copyright exceptions is argued by Arts Law to fall on the side of supporting the public policy objectives of the copyright exceptions – that is, Arts Law submits that the copyright exceptions benefit artists, such as the use of existing copyright material for parody and satire, so that it is not in the interests of artists to be deprived of the benefits of the copyright exceptions through the application of contract law in the form of licences to use existing works.

## **OTHER MATTERS ARISING OUT OF THIS ISSUES PAPER**

### **Indigenous Issues**

Arts Law submits that the ALRC should consider the engagement of the Copyright Act with Indigenous artists, arts organisations and Indigenous communities:

1. Arts Law provides an Indigenous service *Artists in the Black* (AITB). The aim of the service is to increase access by Indigenous artists, arts organisations and Indigenous communities to legal advice and information on arts law issues.
2. Arts Law has pointed out the need for law reform in order to better protect Indigenous artists and their communities on many occasions, and most recently in our submission to IP Australia in the Indigenous Knowledge Consultation. As we pointed out in that submission, western notions of copyright ownership and protection do not adequately take into account the collective processes within Indigenous communities of producing some artworks. We

---

<sup>74</sup> *People of the State of New York v Network Associates*, No. 400590/02 (NYSupCt Jan. 14, 2003). The court struck down a clause in a software licence agreement that restrict a purchaser's rights to conduct benchmark tests or publish product reviews.

also acknowledge that Indigenous culture lives in perpetuity whereas copyright and associated rights have a limited duration. Again we note that whereas western copyright protects original concepts transferred into tangible form, some aspects of Indigenous culture may be transmitted orally or through performance only (rather than in material form).

3. Materials produced by Indigenous artists have a life and significance beyond the author. Indigenous notions of ownership are held communally. Under Indigenous customary law the right to create artworks depicting Creation and Dreaming stories reside in the traditional owners as custodians of the images. Works produced embody significant cultural images and draw from a shared pool of cultural heritage.
4. The potential for non-Indigenous artists to draw from this pool of ideas and stories to create works that are based on materials of cultural significance and which may be customarily sacred to an Indigenous community needs to be minimised as much as possible in view of the damage such practices can cause.
5. As stated earlier, the appropriation of Aboriginal art extends to (and is exacerbated by) the digital environment. Whilst the broader issue of the exploitation of Indigenous cultural heritage goes beyond the current review, this is an issue which urgently needs to be addressed. To this end, Arts Law submits that the ALRC address the issue of better protection of Indigenous Culture and Intellectual Property (ICIP) as reported upon by Terri Janke in the Government report *Our Culture Our Future*. Arts Law continues to advocate for the introduction of *sui generis* legislation protecting Indigenous cultural heritage as the most suitable way in which to protect the rights of Indigenous peoples.

#### **Case study**

*Arts Law has been approached by peak Indigenous arts bodies on behalf of Indigenous communities distressed over the use by a non-Indigenous Australian artist of images, artistic elements and styles clearly derived from the work of three very senior deceased Arnhem Land artists. The resulting artworks are not 'substantial reproductions' which raise copyright infringement issues but are instantly recognizable by Indigenous people as an appropriation of culture by a non-Indigenous person. The artworks use the imagery in an overtly sexual context which is considered so offensive that the works cannot be viewed by men and women simultaneously. Neither copyright laws nor consumer laws are available as recourse. This highlights the inability of the existing legal framework of intellectual property laws in Australia to deliver the protections required under Article 31 of the Declaration of the Rights of Indigenous Peoples.*

## FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at [artslaw@artslaw.com.au](mailto:artslaw@artslaw.com.au) or on (02) 9356 2566.

Yours faithfully,



Robyn Ayres  
Executive Director  
Arts Law Centre of Australia



Morris Averill  
Senior Solicitor  
Arts Law Centre of Australia