



# ARTS LAW CENTRE OF AUSTRALIA

*Submission to the Copyright Law Section,  
Department of Communications and the  
Arts **Copyright Modernisation**  
Consultation Paper March 2018.*

**2 July 2018**

## ABOUT THE ARTS LAW CENTRE

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to provide comment on the **Copyright Modernisation Consultation Paper**.

Arts Law is Australia's only community legal centre for the arts sector. Our area of expertise is the provision of legal advice regarding intellectual property (**IP**) matters affecting artists and arts organisations. Arts Law provides business advice, professional development resources, education and advocates on law and policy reform for the benefit of the creative sector.

Artists in the Black (**AITB**) is a specialist program at Arts Law and facilitates legal advice and information about legal issues for Aboriginal and Torres Strait Islander artists and communities. We also advocate on issues relating to cultural appropriation. Our experience is that Indigenous Cultural Intellectual Property (**ICIP**) does not have adequate protection under copyright law. This material is sometimes sacred and sometimes only appropriately shared with certain parts of community. It contains not just the stories of the community to which it applies, but often relates to the connection to land and the legal systems of Indigenous communities. We are concerned that any exception to copyright, including any orphan works exception, take into account the specific concerns of Indigenous communities and the use of their ICIP to avoid the offence and harm that might be caused by inappropriate use of this material.

Arts Law is a non-profit organisation which derives no direct financial benefit from the trade in the works and IP rights of the artists we advise. This positions us to provide independent comment, though clearly with artists' interests foremost in our reasoning.

## COPYRIGHT MODERNISATION CONSULTATION PAPER

Arts Law has reviewed the Consultation Paper and makes the following comment:

### Introduction

Arts Law is aware that all the issues covered in the Consultation Paper have been the subject of policy review multiple times over many years.

Arts Law supports a copyright framework that is fair to creators and those who wish to access content. We are concerned that recent copyright reform recommendations and amendment have assumed that the current balance is skewed towards protecting owner rights over consumer rights, when our assessment of the arts in Australia is that our creators are experiencing unprecedentedly low income streams from their creative works.

Copyright is the leading area about which creators contact us for advice. Queries about copyright represented 36% of the total legal advices sought from Arts Law by creators in the 2017 calendar year. Queries relate to both how creators can assert and protect copyright (and associated moral rights) in their own works, and frequently also what rights they have to reference or quote from existing copyright works. Our advice covers relevant copyright exceptions on which they can rely, and where heritage material is used, looking at copyright duration in different works to see if copyright has expired and they have entered the public domain.

Exceptions are, as their name indicates, supposed to represent the exception, not the rule – the default position is that creators of content are to enjoy copyright in the works they create. Copyright protects creators' economic and moral rights. Where exceptions are adopted, there must be specific and demonstrated public interest reasons for them, and they must specifically consider the economic rights of creators and whether a mechanism for payment is required for reliance on the exception.

Orphan Works is one area in which Arts Law concludes there is a demonstrated problem with access to content, and that there is a need for a policy solution to address this issue, while upholding the legitimate interests of Australia's creators.

Arts Law is also aware of mass digitisation as an aligned but different issue from orphan works, usually of most relevance to cultural collecting institutions, (including libraries, archives, galleries and public broadcasters) which wish to make their collections accessible to the community digitally, in line with their charters. Arts Law understands the desire of these organisations to be able to digitise their collections and believes there is a public benefit to their collections being made available to as many Australians in as many places as possible. However, Arts Law is concerned that the legitimate economic and moral rights of Australian creators should be respected in any model adopted.

## Flexible exceptions

### Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

### Possible additional Fair Dealing Exceptions

Arts Law submits that exceptions adopted into Australian law must comply with the terms of the *Berne Convention's* Three-Step Test as expressed in Article 9 (2):

*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*

For Arts Law to support the introduction of any new fair dealing exceptions, we would need to be reassured that they complied with the obligations contained in the three-step test, and that a need for an additional exception had been demonstrated. In particular, they should consider the economic rights of creators and not stifle the development of evolving and new markets for their works. Erosion of the ability for creators to make a living from innovation will only act as a disincentive to the creation of new content, and this is clearly not in the creator's or the consumer's interest.

On initial consideration of the potential additional fair dealing exceptions contained in the Consultation Paper, it appears to Arts Law that a number represent a desire from select user groups not to rely on existing exceptions and well-established industry practices. Others are sought on the claim existing exceptions have failed to keep pace with technological developments and are therefore insufficient. Arts Law believes a number of these proposed exceptions are at odds with Australia's obligations to comply with the three-step test, and pose an attack on creators' rights, and that those based on technological developments are themselves now outdated by a market that does now provide greatly enhanced consumer convenience and address issues that may have presented barriers to access to content in the past.

### Specific possible additional fair dealing exceptions

Arts Law provides comment on areas about which we receive queries from our subscribers.

Arts Law receives queries from creators seeking to use parts of existing copyright works in their new works, including for quotation of text, music, visual art and film. Arts Law supports the adoption of a fair dealing exception for **quotation** crafted in similar terms to the existing s.40 fair dealing exception for private research and study that takes into account the same factors:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

In line with existing moral rights contained in the *Copyright Act* Arts Law advocates for a requirement that where a creator of a new work relies on a **quotation** fair dealing exception they are required to identify and acknowledge the creator of the original work, and if not known, its source. Arts Law is also concerned that the reputational moral right of the creator be considered. This is especially relevant for Indigenous creators to ensure appropriate and respectful use of their works. We submit that an additional fairness factor should apply to the quotation of Indigenous works that covers ICIP/ Indigenous Moral rights.

Arts Law understands that user groups are asking for expansion of the time and format shifting exceptions for **non-commercial private use** to allow consumers greater convenience in their use of digital technologies – especially in the online environment. Arts Law believes a better understanding of the implications of any such change should be gained before an exception is implemented which may stifle innovation in these blossoming industries, and that might counterproductively lead to a diminution in content available online if they were to undermine the ability of content creators to derive necessary income from these platforms to invest in them. An element of many online services is that they are available for consumption at a time and on multiple devices convenient to the consumer, sometimes for a set period. These developments are evident not only in paid-for services such as Spotify, Netflix, STAN, Apple TV and Kindle but also through the national free to air channels – the ABC, SBS and the commercial TV channels. The repertoire made available on subscriber services is becoming more comprehensive daily. Arts Law contends that the market may well have moved ahead of these concerns by developing models available to consumers, therefore making redundant the need for any additional exceptions for these purposes.

Other private uses that Arts Law is very concerned about and would not support an unremunerated fair dealing exception for are the use of works on social media platforms. We are concerned that where individual creators' works are shared on social media for which the platform owners gain commercial benefit through advertising revenue, there is no share in the commercial benefit with the creators of those works. While we acknowledge that these platforms provide easy mechanisms for artists to be discovered by new audiences, we want to ensure that any exception that allows such use should provide for artists to be rewarded appropriately.

Arts Law is concerned at educational institutions seeking to be able to rely on a **fair dealing exception for research and study**. This provision has always been understood to be directed at individuals, not institutions. Arts Law opposes any suggestion that an unremunerated fair dealing exception for research and study be extended to educational institutions. Not only is it unfair to creators who already suffer very low incomes from their creative works, but it would only add to

complexity in negotiating the copyright framework were it to sit alongside the well-established, and relatively well understood, statutory licences for education.

In addition, Arts Law is aware of the Canadian experience where the education sector lobbied for the addition into Canadian law of a fair dealing exception for education claiming that it was not sought in order to reduce licence fees payable to rights owners, but to enable activity they claimed they could not do. Immediately on entry into law of the new exception, a number of key licensees claimed they no longer had to pay licence fees for uses for which they had before the legislative amendment. This has had a disastrous impact on the creation of new Canadian content for the education sector – with educational publishers pulling out of this market and the flow-on of authors not being able to earn an income from their creative work. Now, fewer Canadian authored and published works are available for use in classrooms with students. It means greater reliance on foreign works from territories where the copyright framework supports investment in the creation of new works. Translated to Australia, we would not want a situation where Australian educational publishing were discouraged with a decrease in Australian authored works and a consequent increased reliance on UK and US works in Australian classrooms. In Canada this reform has had poor economic outcomes for creators and poor cultural and educational outcomes for the whole community.<sup>1</sup>

### Fair Use

There is lack of agreement at law over the **US Fair Use** doctrine's compliance with the *Berne Convention's* three-step test – because it is not limited to certain special cases. Apart from having this principled legal objection to Fair Use, Arts Law considers that adopting this system in Australia is unnecessary (we have a well-developed exceptions and statutory licence framework), and in fact detrimental as it would introduce far greater uncertainty into our copyright framework. We believe the uncertainty of Fair Use would only add to the cost of creators upholding their rights, and consumers seeking to exercise this open-ended exception, as litigation is the only mechanism for knowing whether it applies.

Arts Law notes that those advocating for the introduction of a US style fair use in Australia believe it will create greater flexibility than the existing Australian copyright framework. At the same time many from the sectors seeking an introduction of fair use describe themselves as being risk averse and very concerned that they comply with legal requirements. Fair use by its nature creates uncertainty – it is a standards based exception, as opposed to the more tightly crafted rules-based Australian fair dealing exceptions<sup>2</sup>. Added to the inherent uncertainty of this system, where Fair Use is found not to apply, those who have exercised copyright uses in reliance on it will face the potential for liability for infringement.

Arts Law is concerned that a fair use exception puts the onus on a creator to sue when they don't believe fair use exists. Due to its inherent uncertainty, there will be instances where individual creators are unsure of the status of a particular use. Many of the individual artists who contact Arts Law for advice will not be in a position to pay the cost of litigation to clarify and uphold the copyright interests they own in their works.

Where additional exceptions are considered to be in the public interest, Arts Law has a preference for clearly articulated fair dealing exceptions which create certainty for creators and consumers of content.

### A potential compromise to provide flexibility and certainty?

Arts Law has had the benefit of reviewing David Brennan's article *The Copyright Tribunal as exception-maker: are both flexibility and certainty achievable?*<sup>3</sup> We believe this may present a

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<sup>1</sup> <http://www.accesscopyright.ca/media/bulletins/what-is-educational-fair-dealing-video/>

<sup>2</sup> Brennan (2018) 28 Australian Intellectual Property Journal

<sup>3</sup> Brennan (2018) 28 Australian Intellectual Property Journal

mechanism for updating the exceptions framework that provides greater flexibility while maintaining the certainty of the existing Australian fair dealing exceptions framework. We agree that the Copyright Tribunal has the necessary expertise to understand the issues at stake, is a public forum less likely to be petitioned privately by interested parties, and that the idea of being able to introduce and remove exceptions as they are found to be of use, in the public interest, and to comply with the three-step test, is positive.

We acknowledge that there is a question of how the Copyright Tribunal would be funded to oversee this process. From Arts Law's perspective, the cost to those parties who are currently active in the copyright policy debate would not change materially – we anticipate that the same organisations would participate in any exceptions consideration process that currently advocate to government and ministers and their advisers about such reforms. The benefits of the system proposed by David Brennan include not being subject to a particular government being in power and care-taker periods where no activity can take place, a more transparent process where evidence is produced and arguments held in a public forum rather than in private meetings, and an easier process for addition and subtraction of exceptions.

#### *Question 2*

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

Arts Law believes that David Brennan's suggestion for repurposing section 200AB referred to above could be a very useful amendment to the copyright framework in Australia. As he notes section 200AB is not well understood by users, and this is evidenced by the fact that many consumer industry groups are seeking new exceptions. The adoption of the three-step test into domestic legislation is confusing – it is designed to guide legislators as they contemplate new exceptions not for users to have to interpret as they seek to rely on an exception.

### **Contracting out of exceptions**

#### *Question 3*

Which current and proposed copyright exceptions should be protected against contracting out?

#### *Question 4*

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

Article 17.4.6 of the Australia-United States Free Trade Agreement requires that parties be able to contract freely in relation to copyright. As an integral part of the copyright framework, Arts Law believes exceptions are contemplated by this obligation, and is not confident that without repeal of this section of the AUSFTA any such provision would be able to be enacted by the Australian Government.

Were it legally possible, Arts Law is concerned to know what contractual arrangements would be affected by a ban on contractual provisions limiting the operation of some or all copyright

exceptions. There are some agreements between creator interests and consumer interests which operate commercially on the basis that they are not subject to exceptions or statutory licences – for instance the subscription services in place especially in the tertiary sector which present quality content to the students at participating universities.

If it were possible for Australia to isolate certain exceptions and prevent the use of contracts to limit their operation, Arts Law contends there should be specific public interest reasons for such an arrangement. We would argue that they had to be prescribed and kept to a minimum – i.e. we believe few would consider that copyright should be used to prevent the operation of the justice system, and therefore support a provision that insists on the paramount nature of the right to rely on the copyright exception for provision of legal advice and in the conduct of court cases. Arts Law would support a similar special protection of the exceptions for reporting the news and for review and criticism – on the basis that these exceptions are necessary for the proper functioning of a civil society committed to democratic processes and the rule of law.

## Access to orphan works

### *Question 5*

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

Arts Law provides advice to individual creators about their legal rights and obligations. Among advice sought is that relating to what would be termed orphan works – where the copyright owners of works cannot be identified or in other cases located. This issue is of particular concern to creators wanting to use older works, such as photos and diary entries and letters. Orphan works that creators contact Arts Law about include material they have found in family estates, in op shops and sometimes material they have found in the collections of Cultural Institutions.

Arts Law is aware that the issue of orphan works is one faced by a wide variety of entities including cultural institutions, broadcasters, companies and individuals. Arts Law believes the issue is one that needs a solution, and a solution that provides all parties with certainty, taking into account the creative purposes current creators seek to make of older works along with respecting the creators of works which have become orphaned.

Where an individual or family is seeking to make use of orphaned works relating to their family, Arts law believes there is grounds for an unremunerated exception to apply. This issue is particularly relevant to Indigenous artists / community members who often have older photographs relating to their families, but have no identifying information about the photographer who took the pictures.

In this response, Arts Law is addressing the issue of orphan works, that is where the owners in copyright of works are not able to be identified or cannot be located. The model we propose for Orphan works is for case-by-case use and does not address the issue of mass digitisation projects where the hurdles are predominantly not orphan works issues, but rather the time and cost of having to seek individual permissions for many separate works the user is attempting to digitise and make publicly available. In any event, Arts Law notes that for both orphan works and mass digitisation projects the Copyright Office of the US has concluded that fair use is not a satisfactory solution – due to its inherent uncertainty.<sup>4</sup>

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<sup>4</sup> <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>



We have reviewed the draft orphan works model circulated by the Department of Communications and the Arts and consider that it does not provide adequate certainty for owners of copyright work, nor the utility for future users who would benefit from an orphan works register. In addition, we are not persuaded that the distinction between commercial and non-commercial uses is able to be clearly defined and therefore whether it provides any useful distinction for parties wanting to rely on any orphan works proposal. For certainty's sake we believe that a model such as the UK model which contains clearly articulated fees for use of works in reliance on the orphan works scheme is preferable – for the user it will mean that they have acquitted their liability before their use of the work. For owners, it will mean that they do not have to enter into discussion after the fact about what 'fair payment' for the orphan work use is.

To create greatest certainty and to ensure the economic rights of creators of orphan works are respected, Arts Law supports the following orphan works solution, based heavily on the UK orphan works solution<sup>5</sup>:

- a statutory exception that contains a diligent search requirement before the exception can be relied upon.
- The terms of a diligent search should be clearly set out after consultation with owner and user groups, and should be adequate to demonstrate a thorough search without being so burdensome that they present an administrative hurdle that few creators or users could reasonably be expected to meet.
- A notification to a centralised body in relation to works to which users believe they can apply the term 'orphan'- to affirm that a particular use comes under the orphan work exception and so that a register of such works is kept that can be searched by owners and subsequently by other users. This may be a database managed by government or by another appropriately positioned agency appointed by government.
- Fees should be payable for uses made in reliance on the exception – taking into account the sort of work and sort of use covered, and also set at rates which are not out of reach of individual creators seeking to create new works based on orphan works. The rates applied in the UK Orphan works scheme are a good reference point.
- Where the exception is relied upon, it should be limited in term – to a period of several years, with the ability for the user to re-apply after that period. Exceptions should not be held to apply in perpetuity or for the whole term of copyright.
- Payment of licence fees should be upfront, so that liability is covered before the act of reproduction and making public, and the transaction is finalised at point of use. This will lead to certainty for the user that their licensing activity has been completed and that they will not face a future unknown liability.
- Where a creator identifies themselves after reliance on an orphan works exception, they have the ability to prevent future use of their work in reliance on any orphan works exception – and to negotiate licensing terms for any future uses.
- Unused/ undistributed licence fees should after a set period be used in ways that benefit the class of creators for which the licence fees were collected – i.e. where licence fees are collected for the use of orphaned photos and the photographers do not come forward within a specified period, the licence fees should be used for projects or initiatives that benefit photographers.

Significantly, we do not believe the UK distinction between commercial and non-commercial uses is particularly useful in Australia. A number of what are classed as 'non-commercial' uses are covered by existing commercial or statutory licences in Australia and we do not believe it is in individual creators' interests to have these modest income streams diminished.

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<sup>5</sup> <https://www.gov.uk/guidance/copyright-orphan-works>



### Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

As mentioned in our answer earlier, Arts Law supports the establishment of a fee structure that is considered fair and equitable. Arts Law believes the parties representing those wishing to use the orphan works and those representing the rights of the owners of orphan works should in the first instance attempt to come to an agreement on what equitable licence fees are. In the absence of agreement, the Copyright Tribunal should be given the authority to determine an appropriate licence fee. We believe the UK model provides a good reference point for any Australian model. Any licence fee set should be affordable for individual creators – to set rates that are out of reach for this sector will diminish the public benefit of enabling use of orphan works. Fees should be paid to a government agency or an appropriate agency/ agencies appointed by government to run the scheme.

### Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

As stated above, Arts Law understands the problem of orphaned works is common to collecting and cultural institutions as well as to individuals and to other organisations. In the interests of certainty and clarity over any proposed solution, Arts Law supports one legislative exception that could be relied on by all. While individuals may well find orphan works in the holdings of collecting institutions, the uses they wish to make of works and therefore the solution that they should be able to rely on should be the same as that which they should be able to rely on if they had obtained a work through another channel – such as an op shop or a private family estate.

Where Cultural Institutions want to make use of orphan works for their own publications/ productions, Arts Law can see no compelling reason why the process should be different – they should still have to undertake a diligent search and register the details of the work and use they wish to make of it in the same way as an individual or private user would.

### Mass Digitisation by Cultural Collecting Institutions

Mass digitisation projects that cultural and collecting institutions may wish to undertake with their collections are a separate issue, though a component of the works in their holdings they may wish to digitise are orphan works. Arts Law recognises that the cost of obtaining individual permissions for all material held by collecting institutions would be unaffordable and an undesirable use of public resources. Arts Law accepts that enabling collecting institutions to digitise and make available their collections, especially older ‘heritage’ works, is in the public interest, including for the benefit of the creators who seek advice from Arts Law. Arts Law has reviewed provisions in Europe, Asia and North America, and believes, given Australia’s legislative history, Extended Collective Licensing would provide a satisfactory mechanism to underpin mass digitisation programs in Australia. It presents a fair balance between the public interest in providing access to content while protecting the rights of creators.

Arts Law supports an ECL framework that would enable mass digitisation by collecting institutions on the following provisos:

- provision for the appointment of Collective Management Organisation to manage an ECL for a specific class of works – with appropriate requirements relating to its operating structure, governance, reporting and membership.
- limited to heritage material so that works that are still being commercially exploited by their creators/ owners are not digitised and made available under mass digitisation schemes.
- Careful definition of what constitutes heritage works. We note that reliance on ‘orphan’ works for mass-digitisation creates particular concerns for photographers where through digital supply of works often the identifying data on files is stripped, despite a lot of works in the holdings of cultural institutions being by current, working photographers.
- A mechanism for copyright owners of works which are digitised and made available by cultural institutions to have their works removed from the scheme – the ability to opt-out.
- The provision for fair payment to copyright owners for the copyright works among those included in any such the mass digitisation scheme.
- Where a specific item/ items are selected for copyright use (reproduction, publication, communication etc.) by individuals or institutions from among those digitised in reliance on any mass digitisation provision in the *Copyright Act*, the user should seek to find the copyright owner and negotiate terms of use where the work is still in copyright. Where the user cannot identify or locate the copyright owner of a work, they should rely on any orphan works mechanism adopted into Australian law.

## CONCLUSION

Arts Law understands Government intends to form an external reference group to progress the consideration of matters covered by this review. Arts Law welcomes this development and considers it is critical that any such group fairly represent the different interests in copyright policy in Australia, and that in particular there must be creator representation on such a panel to ensure the best policy outcomes are reached.

Arts Law would be pleased to provide further information or be involved in future consultation regarding the areas covered in the Copyright Modernisation Consultation Paper.



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