



ARTS LAW CENTRE OF AUSTRALIA

ACN 002 706 256 / ABN 71 002 706 256

30 October 2006

Ms Jackie Morris
Acting Committee Secretary
The Senate Standing Committee on Legal and Constitutional Affairs

By Email: LegCon.Sen@aph.gov.au

Dear Ms Morris

Re: Inquiry into the Copyright Amendment Bill 2006

We refer to your invitation to make a submission into the Parliamentary Inquiry into the Copyright Amendment Bill 2006 (**Bill**) dated 19 October 2006. Thank you for the opportunity to make this submission on behalf of the Arts Law Centre of Australia.

About 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 more than 5000 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Our client base is multi-cultural, and both Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

The comments that we make in this submission are informed by our clients' profile, which is that they are usually:

- both copyright creators and users;
- either new, emerging artists or established arts practitioners or arts organisations;
- operating arts businesses;
- operating in all arts sectors;
- working in both traditional and digital media;
- having low incomes/limited funds;

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- needing to be self-reliant in business;
- having a very limited ability to enforce rights;
- eager for accessible legal information, although they typically have limited legal education; and
- at least professionally, copyright compliant.

About 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) (**Act**).

Arts Law advocates equitable remuneration for creators. However, we also support fair and reasonable access to copyright material. We believe that this is important not only in fostering creativity but as essential to the intellectual and cultural development of society.

Arts Law submits that Australian copyright law and the encouragement of respect and support for Australian copyright law should be essential elements of any Australian government's arts policy.

Issue 1: Schedule 6, Part 3, section 200AB (5): Use of copyright material for the purpose of parody and satire

Summary: Arts Law supports the introduction of an exception to copyright infringement for works and subject matter other than works for the purpose of parody and satire. However, the draft conditions under section 200AB(1) of the Bill, which determine whether a work or subject matter other than a work falls within the exception to copyright infringement for the purpose of parody and satire, are inappropriate. Furthermore, any fair dealing exception for the purposes of parody and satire must be subject to account artists' moral rights.

Detail:

Arts Law supports the introduction of an exception to copyright infringement for works and subject matter other than works for the purpose of parody and satire. As Samuel Ricketson states:

“parody ... (is) firmly embedded in our literary and dramatic tradition as distinct and respected art form...”¹

(a) Fair dealing for the purposes of parody and satire encourage artistic practice

Parody and satire are commonly understood to amount to a comment on, or ridicule of, an original work, produced by imitating the original work. To produce a work of parody or satire, it is inevitable that the original work will be referred to in some way. However, parody and satire are productive, rather than just reproductive uses of an underlying work. Parody and satire do not supplant the market for the original work and are not fulfilling demand for the original.

In Arts Law's view, a specific parody or satire exception is justified because:

- it compliments the longstanding exception under sections 42 and 103A of the Act for works or subject matter other than works made for the purpose of criticism & review exception;

¹ Ricketson, S: “Law of Intellectual Property: Copyright, Design and Confidential Information”, LBC at [9.220]

- it serves the public interest, because parody and satire play a valuable role in the cultural fabric of society;
- it does not represent a substantial departure from current Australian copyright law, particularly when it is made subject to certain “fair dealing” conditions;
- it deals with the likely problem of market failure, in the sense that a permission to use an original work for a parody is unlikely to be granted by the copyright owner;
- it satisfies the international “three-step” test; and
- there are international parallels, such as under US copyright law and the European Union Directive (which refers to “caricature, parody or pastiche”).

(b) The draft conditions under section 200AB(1), which determine whether a work or subject matter other than a work falls within the exception to copyright infringement for the purpose of parody and satire, are inappropriate

As mentioned above, a fair dealing exception for the purpose of parody or satire compliments the longstanding exceptions under sections 42 and 103A of the Act for works or subject matter other than works made for the purposes of criticism and review. Accordingly, the inclusion of the exception for the purposes of parody and satire in section 200AB of the Bill is misplaced. The exception would be better served as part of the other Part III, Division 3 and Part IV, Division 6 “fair dealing” exceptions rather than the exceptions for people with disabilities, bodies administering libraries or archives and educational institutions (sections 200AB).

Furthermore, while the conditions contained in section 200AB(1) of the Bill are a literal implementation of the three-step test articulated in Article 13 of the TRIPS Agreement – “the international yardstick for exclusive rights exceptions”² – the Act and Australian copyright jurisprudence already includes a well developed set of conditions based on the three-step test. These are the conditions to the fair dealing exception for research and study contained in sections 40 and 103C of the Act.

Arts Law submits that any conditions to a fair dealing exception for the purposes of parody or satire embodying the “three-step test” must, for the sake of legal certainty, be recognised by Australian jurisprudence and be consistent with the conditions under sections 40 and 103C. Adoption of the conditions proposed under section 200AB of the Bill will create uncertainty for the following reasons:

- the Bill does not define the term “special case” contained in section 200AB(1)(a). Furthermore, this condition is a tautology as the fact that a work or subject matter other than work is a parody or satire is, in and of itself, the “special case” to which the term refers; and
- it is unclear whether a court would consider interpretations of sections 40(2)(d) and 103C(d) – the effect of the dealing upon the potential market for, or value of, the work or adaptation – when considering the conditions contained sections 200AB(1)(d) and (e) of the Bill.

Arts Law submits that the certainty essential in the administration of the law would be better served if the exception for parody or satire was conditional on established legal principles, namely those embodied in sections 40(2)(a),(b),(d) and (e) and sections 103C (2)(a),(b), (d) and (e) of the Act.

² Ricketson, S: “The three-step test, deemed qualities, libraries and closed exceptions”, Centre of Copyright Studies Ltd (2002) at 2.

(c) Any fair dealing exception for the purposes of parody and satire must be subject to artists' moral rights

Arts Law submits that any parody or satire exception must be subject to the moral rights provisions contained in Part IX of the Act. While there is no express exclusion of Part IX in section 200AB of the Bill, Arts Law submits that the provision contained in 200AB(5) should be made expressly subject to Part IX. There is some likelihood that a parody or satire of an original work might amount to a derogatory treatment of a work or subject matter other than a work. In Arts Law's view, unless expressly provided in the legislation, the introduction of section 200AB(5) may sanction an infringement of the right of integrity.

Issue 2: Schedule 7, Parts 1 and 2: Time shifting and format shifting exceptions to copyright infringement

Arts Law supports the copyright exceptions addressing both time and format shifting for private and domestic use. We also appreciate the difficulty in reaching a solution to widespread illegal copying whilst still ensuring that copyright owners, particularly the authors and makers of the works involved, are properly remunerated. However the proposed exceptions do come at a significant cost to the creators. In recognition of this sacrifice by the nation's creators the Government should increase the financial support available to the Australian artists affected by these provisions. This could be done through increasing support programs such as those administered through the Australia Council and the Department of Communications Information Technology and the Arts.

Issue 3: Schedule 7, Part 3, section 200AB(2): Use by body administering library or archives.

Arts Law does not accept that the exceptions provided in section 200AB(2) need to be framed so broadly. Whilst Arts Law agrees that 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, which is what this exception appears to facilitate. For example, 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. A statutory licence system could be put in place to provide effective remuneration to copyright owners for these uses.

Issue 4: Schedule 7 Part 3 Section 200AB (3) Use by body administering educational institution

Similar to the views expressed in the paragraph above, Arts Law does not accept that section 200AB(3) needs to be framed so broadly. While Arts Law recognises the benefits to enabling the dissemination of copyright protected materials for the purposes of educational instruction, these benefits should not be provided at the expense of Australia's creators (or copyright owners). Such uses should be covered by current statutory licence systems.

Issue 5: Other matters arising which have not been dealt with in the Bill.

Indigenous Issues

Arts Law has previously pointed out the need for law reform in order to better protect Indigenous artists and their communities, for example in our submission to the

Attorney General's Department regarding the Exposure Draft of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* (sent under letter dated 23 January 2004) and more recent correspondence concerning this issue. As we have pointed out, western notions of copyright ownership and protection do not adequately take into account the collective processes of producing artworks employed within Indigenous communities. We also acknowledge that Indigenous culture lives in perpetuity whereas copyright and associated rights have a limited duration. While western copyright protects original concepts transferred into *tangible* form, by contrast some aspects of Indigenous culture are transmitted orally or through performance only.

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 motifs and draw from a shared pool of cultural heritage.

The potential for non-Indigenous artists to draw from this pool of ideas and stories to create works that are based on culturally significant material which may be sacred to an Indigenous community needs to be minimised as much as possible in view of the offence and damage such practices can cause.

Whilst the broader issue of the exploitation of Indigenous cultural heritage goes beyond the current Bill, and we acknowledge that the Government's current Senate Inquiry into the Indigenous visual arts and craft sector is investigating aspects of this problem, we emphasise the urgent need for action in this regard. To this end, Arts Law submits once again that the Government looks afresh at the issue of better protection of Indigenous Culture and Intellectual Property (ICIP) as recommended by Terri Janke in the Government's Report, *Our Culture, Our Future*. Arts Law advocates for the introduction of *sui generis* legislation protecting Indigenous cultural heritage and at the very least, in the short term, the enactment of workable Indigenous Communal Moral Rights legislation extending legislative protection to Indigenous communities with a vested cultural interest in the work and knowledge.

Sections 65 and 68 of the Act

Whilst Arts Law is generally in favour of the current exceptions in the Act, Arts Law does consider 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.³ Arts Law attaches a recent letter to the Government dealing with this issue and is prepared to provide a more detailed submission addressing this issue as well.

Yours faithfully

Robyn Ayres

Executive Director
Arts Law Centre of Australia

³ Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, 2002.