ARTS LAW CENTRE OF AUSTRALIA

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Ms Helen Daniels
Assistant Secretary
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

By Email: michelle.tippett@ag.gov.au

Dear Ms Daniels

Fair Use and Other Copyright Exceptions: an examination of fair use, fair dealing and other exceptions in the digital age
Issues Paper: May 2005

Thank you for the opportunity to comment on the issues raised by the May 2005 Issues Paper concerning *Fair Use and Other Copyright Exceptions* (**Issues Paper**).

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 over 2500 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 & 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 & 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;
- 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: Arts Law's view on the operation of the exceptions in the Act (particularly the fair dealing exceptions in ss40-43 (2) and ss103A-103C) in providing a balance between the interests of copyright owners and copyright users.

Summary: Arts Law's main concern is ensuring fair remuneration for copyright creators so that the arts and artists flourish in Australia. However, Arts Law also considers that greater consumer and some other legal access to copyright material (particularly Australian copyright material) is socially beneficial. To balance these competing interests in line with the international "three-step test", Arts Law supports adding to the current exceptions in the Copyright Act so long as some of the added exceptions require payment to copyright owners.

Detail: Arts Law:

- considers that more recognition needs to be made in the Act that many artists are also users of copyright material and that, in some circumstances, greater free access to this material for certain transformative creative uses is beneficial;
- acknowledges that the exceptions in ss40-43(2) and ss103A-103C of the Act do not in some ways address the reality of the present digital environment. For example, the current widespread copying of copyright material by consumers exacerbated by the availability of digital technology and social norms that have adapted to this technological shift, and current and future work practices of public institutions like libraries, galleries and museums.

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 essentially the infringing consumer is a user of copyright material. Arts Law, however, 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 so without providing further incentive (through remuneration) for future creators and artists. In other words, they are not engaged in the creative process themselves: they are simply consuming. For this reason, although Arts Law supports some specific exceptions allowing private uses of copyright material, this support is conditional on copyright owners being remunerated for these uses.

When considering the issue of "private copying", Arts Law suggests that the European Union Information Society Directive definition of this term is adopted.[1]

Issue 2: Arts Law's view on whether the Act should be amended to consolidate the fair dealing exceptions on the model recommended by the Copyright Law Review Committee (CLRC).

Summary: We understand that the CLRC proposed consolidation of the current fair dealing provisions, expansion of the exceptions to an unconfined model, and general application of the non-exclusive fair dealing factors.

Detail: At present, Arts Law does not support an open-ended fair use exception because of the resulting uncertainty and the cost necessarily involved in obtaining court decisions on whether a particular use is or is not "fair" under the Act. Arts Law is also concerned that consolidating the current fair dealing exceptions may have the unintended result of substantially changing the law in this area due to the interpretation of the (new) consolidation by the Courts.

Issue 3: Arts Law's view on whether the Act should be amended to consolidate the fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.

Summary: At this stage, Arts Law does not support the introduction of a general fair use exception, similar to the model in the United States (**US**). Arts Law supports retaining the current exceptions (except ss65 and 68 – see Arts Law's response to issue 10) and adding further specific exceptions to the Act.

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

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

Arts Law currently considers that a broad "fair use" exception would not meet these criteria because:

- a fair use principle that is not well defined and which ultimately takes its meaning from the court's interpretation of it, is in fact, complex;
- an open-ended exception is necessarily uncertain, particularly when first introduced, with these consequences:

[1] Defined by the European Union Information Society Directive as "reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial." *Directive 2001/29/EC of the European Parliament and the Council of 22 May 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).

- because our clients are copyright compliant in relation to their arts businesses, it is likely that, rather than promote wider use of copyright material, such an exception will result in a cautious approach to the use of existing copyright material by artists, potentially stifling creative ventures and expression;
- there may be ambiguous outcomes. Firstly, at least at the start, there will be no precedents. And 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. Secondly, there are instances where judges of equal standing may come to different conclusions. Thirdly, the ability to distinguish cases can lead to more uncertainty as to why a use was allowed in one instance and not in others.

- 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 paid legal advice, so they rely on their own interpretation and judgment as to what use they can make of a work or what use they can prevent 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
- the relevance of this aspect of the law in the digital age can be addressed by other, targeted means.

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".

Arts Law would welcome an opportunity to respond to other matters raised in relation to this issue in other submissions.

Issue 4: Arts Law's view on whether the Act should be amended to include specific exceptions for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances – and if so, under what conditions.

Summary: Arts Law supports a copyright exception that is specifically directed at private time-shifting for television and radio broadcasts but only on certain conditions.

The minimum conditions required are:

1. that the broadcast itself is not an infringing broadcast;
2. that the copy is for private and non-commercial purposes;
3. that if the copy is used for purposes beyond time-shifting, such as if it was rented or sold to someone else, it is deemed to be an infringing copy from the time it was made; and
4. that the copyright owners receive remuneration for the copies made of their material.

Arts Law proposes that the most efficient means of remunerating artists for this use is to:

1. impose a levy on blank media used in copying, when a recording device requires blank media to make a copy; and
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 on these items as opposed to the video recorder or DVD recorder but for 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 could be collected and distributed back to artists whose work is being recorded.

Detail: There is nothing in Australian law preventing the introduction of a levy to benefit artists or more broadly the arts industry. We know that, in 1989, the legislation that was introduced to impose a levy on blank audiotapes was held to be unconstitutional by the High Court. This decision, however, related to the method by which the scheme was introduced, rather than its objectives. The Canadian levy scheme could be considered when looking at overseas models of levy systems.

We are aware that there are many people who already undertake time shifting illegally and Arts Law is conscious that this is a hard activity to monitor and regulate. We submit that, as the Act is treated with such contempt, it should be amended but that this obligation rests with the legislature not with the judiciary. We acknowledge that there has been a market failure, as consumers are not dealing with new technologies in a compliant manner, and consequently suggest that reform is appropriate.

Arts Law submits that a blank media and recording device levy scheme is the correct approach to the market failure as it acknowledges the difficulties in detection and prevention, makes legal what many people are already doing but 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".

Arts Law would welcome the opportunity to further consult on the specific conditions to be placed on a time-shifting exception.

Issue 5: Arts Law's view on whether the Act should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.

Summary: Arts Law supports a specific exception allowing private format shifting of audio and audio-visual material so long as certain conditions are met. The minimum conditions required are that:

1. the original copy of the copyright material was purchased by the person making the copy in a new format;
2. the original copy is a legitimate copy and is not an infringing copy;
3. the copy is for private and non-commercial purposes;
4. if the copy is used for other purposes, such as if it was rented or sold, it is deemed to be an infringing copy from the time it was made; and
5. the copyright owners receive remuneration for the copies made of their material.

Detail: Our primary concern with both time shifting and format shifting 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. We submit that the levy scheme (discussed under issue 4) appropriately addresses the interests of both groups.

An exception allowing private format-shifting is an obvious extension of an exception allowing time-shifting. To record a broadcast for viewing later, usually involves recording the broadcast onto a different format. Arts Law submits that these amendments should be introduced at the same time.

It is not clear under the US broad principle model[2] whether time-shifting and format-shifting fall within the fair use exception. Arts Law supports the addition of specific copyright exceptions aimed at time shifting, format shifting and other exceptions (addressed under issues 6 and 8 below).

Issue 6: Arts Law's view on whether the Act should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.

Private back-up copies

There should be a specific exception allowing individual consumers to make back-up copies of audio and audio-visual material for private and domestic use.

Remuneration for this exception would be provided through a levy (see Arts Law's response to issues 4, 5 and 7).

Libraries and Archives

Back-up copies for the purposes of preservation and internal record management by libraries, museums and galleries should be provided for in a specific exception, rather than left to falling within a general fair use provision. These copies should not be made available for public use without remunerating copyright owners.

Arts Law supports the Australian Copyright Council's (**ACC**) submission that libraries and archives should be able to make back-up copies of their collection if unable to purchase replacement copies under a statutory licence, subject to payment of equitable remuneration.

Broadcasters

Arts Law supports the submission made by the Special Broadcasting Service (**SBS**) on this issue and agrees that there should be a specific exception for broadcasters to make back-up copies of copyright material for the purpose of digital storage systems. Again, these copies should not be made available for public use without remunerating copyright owners.

Issue 7: The Government seeks your views on whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances.

Summary: Arts Law has addressed this question in our response to issues 4, 5 and 6. We are in favour of a levy scheme that would be directed at time-shifting and format-shifting for private, non-commercial use.

Detail: 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.

[2] As expressed in decisions such as US Supreme Court decision, *Betamax* case (*Sony Corp v Universal City Studios* 464 US 417 (1984); and 9th Circuit Court of Appeals decision in the *Recording Industry Association of America v Diamond Multimedia Systems Inc* 180 F.3d 1072. There is also currently debate in the US as to whether personal copying is fair use under the US broad principle model.

Issue 8: Should the Act be amended to include other specific exceptions or statutory licences, and if so, under what conditions?

Three issues that are not specifically dealt with in the Issues Paper, but which are commonly raised by Arts Law clients, are:

- use of another's copyright material in particular forms of new copyright material, especially for parody or works constituting political/social comment;
- the difficulty experienced tracing some current copyright owners, 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 copyright owners of some copyright material.

Arts Law proposals

1. *That there is a specific exception for parody.*
2. *That there are new provisions dealing with orphan works.*

Parody

As Samuel Ricketson states:

> "parody …(is) firmly embedded in our literary and dramatic tradition as distinct and respected art form…"[3]

Parody is commonly understood to amount to a comment on, or ridicule of, an original work, produced by imitating the original work. The concept is sometimes distinguished from satire, which is typically understood as a comment on society, which may include its culture.

To produce a work of parody, it is inevitable that the original work will be referred to in some way. If the reference is made by substantially reproducing the original text, the author of the parody will be infringing the original author's copyright, unless the former has obtained the latter's permission for the parody use. Because of the nature of the subsequent work, the required permission may be hard to obtain. Yet the parody:

- is a productive, not just a reproductive use;
- is only using the original work as part of the new work; and
- is not supplanting the market for the original work and is not fulfilling demand for the original.

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

- it fits within a broad understanding of the longstanding criticism & review exception;
- it serves the public interest, because parody has a valuable function to perform in society;
- it does not represent a big departure from current Australian copyright law, and can still require analysis of the "fair dealing" factors;

[3] Ricketson, Samuel "Law of Intellectual Property: Copyright, Design and Confidential Information", LBC at [9.220]

- 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 "3-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").

Any parody exception would also need to ensure that it was not an infringement of an author's moral rights in relation to a work to produce a parody of that work in accordance with the parody exception under the Act.

Finally, Arts Law:

- would not object if the parody exception was restricted to apply in relation to published original works;
- would support a restriction of the parody exception so that it only applied to works having a predominately cultural purpose, as distinct from a predominately commercial one (such as advertising and marketing purposes); and
- does not at this stage support a broader satire exception because we consider that more general social and political comment can be made by a satirist either using his or her own original works or by obtaining the permission of the copyright owner if the satirist wants to use another person's copyright material.

Orphan works

Arts Law strongly supports the insertion of provisions in the Act that deal with "orphan works". Without these provisions, copyright material that could well be valuable to other copyright creators and to the public is, in effect, inaccessible, potentially indefinitely. And there is no real benefit to the copyright owner, as no licence fees are paid and the owner is never given the chance to decide whether or not to release the material.

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;

after certain conditions have been met. For example, these 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.

An example of a situation where an "orphan work" provision would be beneficial has come to Arts Law's attention recently. A time capsule containing old letters and other copyright material was been 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 ss51, 52).

At the moment there is one provision in the Copyright Act that allows some uses of copyright material where the identity of a copyright author is not known. The provision is very narrow though and, we suspect, is little used in practice.

The issue of "orphan works" has been addressed in a number of overseas jurisdictions, and is the subject of an inquiry this year by the US Library of Congress, Copyright Office. 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) once the principle of allowing an exception to infringement in these cases is agreed. In the meantime, Arts Law considers that:

- the current UK legislative provisions are too narrow, and should not be adopted;
- a model like that operating in Canada is to be preferred, i.e. one:
    - that adopts a broader definition of "orphan works" than that presently used in the UK;
    - under which a copyright owner may receive some compensation for the use; and
    - that requires a potential user of the material to make reasonable search efforts to identify and locate a copyright owner.

In any case, it will be important that the definition and the required search efforts are sufficiently certain, so that copyright creators are clear about all necessary steps.

Archiving, preservation, and record management

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.

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. 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 copyright owners for these uses.

Issue 9: Arts Law's view on other options for implementing reform and the costs and benefits of those options.

Arts Law refers to its responses in the rest of this submission. We would be happy though, to make additional comments on the costs and benefits of options proposed by others, should we have the opportunity to do so.

Issue 10: Other matters arising out of this Issues Paper.

Arts Law submits that there are other issues arising out of this Issues Paper that should be addressed, including:

Education Campaign

Whether copyright laws are amended or not, 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 what is permitted and what is an infringement. Public awareness is essential to the success of any regime.

Libraries

Arts Law supports the submission made by the ACC, and specifically their suggestion that the definition of "library" in the Act is amended to exclude profit-making entities.

Indigenous Issues

Arts Law is currently trialing 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. We therefore feel we are in a special position to address Indigenous peoples' concerns in relation to fair use.

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 Western 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.

Whilst the current protections under Australian laws, including the Copyright Act, are inadequate to address the problem of appropriation of Indigenous art and culture, at present Arts Law would be most disinclined to see a broadening of the current fair dealing exceptions available to include a more general fair use exception. A key concern is that it could then be relied upon in defence of further appropriation of Indigenous cultural materials.

Arts Law has previously pointed out the need for law reform in order to better protect Indigenous artists and their communities, most recently in our submission to the Attorney General's Department on the exposure draft bill on Indigenous Communal Moral Rights (sent under letter dated 23 January 2004). As we pointed out in that submission, western notions of copyright ownership and protection do not adequately take into account the often very collective processes within Indigenous communities of producing artworks. We 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).

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.

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.

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 Government looks afresh at 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 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.

Copyright and Contract

Arts Law submits that contract law should not override exceptions provided for in the Act. Arts Law supports the CLRC recommendation in 2001 that the Act should be amended to preserve the integrity of these exceptions.

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.[4]

Arts Law looks forward to hearing the outcome of the review and we are prepared to expand on any aspect of this submission, verbally or in writing.

Yours faithfully

Robyn Ayres
Executive Director

Arts Law Centre of Australia

[4] Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, 2002.