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ARTS LAW SUBMISSION ON DECEMBER 2021 EXPOSURE DRAFT OF COPYRIGHT AMENDMENT (ACCESS REFORM) BILL

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Introduction

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre providing free or low-cost legal advice to artistic creators residing in all Australian states and territories. Arts Law makes this submission on behalf of our broad client base and in particular, creators (and the peak or professional organisations which represent their interests) involved in the following sectors:

- visual arts and craft;
- music;
- literature and writing;
- film, video, television, and broadcasting;
- community arts, cultural development and festivals;
- performing arts;
- photography;
- design;
- multimedia/digital/new media;
- fashion; and
- Indigenous language (via language centres).

Arts Law assists thousands of Australian artists and organisations on an annual basis. Copyright law and the effect of the *Copyright Act 1968* (the **Act**) is the leading area that Arts Law regularly receives queries and advises on. Artists in the Black (**AITB**) is a specialist program at Arts Law that facilitates legal advice and information on legal issues for Aboriginal and Torres Strait Islander artists and communities. Arts Law is in a unique position to provide the Department of Infrastructure, Transport, Regional Development and Communications (the **Department**) feedback on the *Exposure Draft Copyright Amendment (Access Reform) Bill 2021* (the **Draft Bill**) and corresponding discussion paper (the **Discussion Paper**).

Arts Law would like to acknowledge the Traditional Owners of the various lands on which Arts Law works and pay our respects to Elders past and present. Please note that for the purposes of this submission, we respectfully use the terms 'Aboriginal and Torres Strait Islander', 'First

Nations' and 'Indigenous' interchangeably to reference the Aboriginal and Torres Strait Islander people belonging to this country.

Key issues

Arts Law considers that copyright policy should balance measurable economic objectives against social goals, and correspondingly, the impacts on rights holders against impacts on consumers and other copyright users. Many artists rely significantly on revenue streams generated by licensing their copyright works. These revenue streams are, in the vast majority of instances, small but critical. They often support the continuation of an artistic practice.

Arts Law's view is that the Draft Bill and Discussion Paper fail to address concerns raised in previous submissions regarding the disadvantage the proposed reforms will have on copyright owners. In this submission Arts Law reiterates concerns most recently raised in a submission to the Copyright Law Section, Department of Communications and the Arts in response to the *Copyright Modernisation Consultation Paper of March 2018* (available here). These concerns have not been adequately addressed in the Discussion Paper or Draft Bill, including:

1. the economic disadvantage of the reforms for creators;
2. the erosion of creator's rights to control the use of their works; and
3. the lack of consultation and assessment of the effect of the reforms will have for Aboriginal and Torres Strait Islander artists.

Arts Law has also responded to several of the specific questions presented in the Discussion Paper which will have implications on Arts Law's client base, namely:

1. limitations on remedies for use of orphan works;
2. a new fair dealing exception for non-commercial quotation;
3. updates to library and archives exceptions; and
4. updates to education exceptions.

Economic disadvantage for creators

The context for this reform is a copyright regime and a market in which artists are woefully underpaid for their work. In 2021, the average Australian earned a salary of $90,329[1], while, as at 2017, the average gross annual income of an Australian artist was only $48,000[2] (of which, around 33% came from non-arts related sources[3]). This is a stark disparity.

The Act plays a central role in determining when artists are compensated for the use of their work. Expanding unpaid access to copyright material for the benefit of interest groups (where there is no specific and demonstrated public interest justifying it) will degrade the economic viability of being a creator in Australia.

Effect of reforms on Indigenous creators and Indigenous Cultural Intellectual Property

The Discussion Paper and Draft Bill ignore the negative impact the reforms may have on Indigenous Cultural Intellectual Property (**ICIP**). ICIP already does not have adequate protection under Australian copyright law and as such, any relaxation of existing laws may further disadvantage Indigenous peoples. Aboriginal and Torres Strait Islander artists contribute to the cultural fabric of this nation. The Aboriginal and Torres Strait Islander art sector provides employment opportunities for thousands of Aboriginal and Torres Strait Islanders across the country.

A large percentage of concerns relayed to Arts Law have been around copyright affecting Aboriginal or Torres Strait Islander artists (who make up approximately 30% of our client base). ICIP material can be sacred and sometimes it is not culturally appropriate for it to be shared with certain parts of community without consultation and informed consent. It contains not just the stories of the community to which it applies, but often relates to the connection to

[1] 'Average Weekly Earnings, Australia, May 2021 | Australian Bureau of Statistics' (19 August 2021): https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/average-weekly-earnings-australia/latest-release.
[2] Throsby, David and Katya Petetskaya, *Making Art Work: A Summary and Response by the Australia Council for the Arts* (Australia Council for the Arts , November 2017): https://australiacouncil.gov.au/advocacy-and-research/making-art-work/#Sources-of-income.
[3] (n 2).

land and the legal systems of Indigenous peoples. We are concerned that any exception to copyright must take into account the specific concerns of Indigenous peoples and the use of their ICIP to avoid the offence and harm that might be caused by inappropriate use of this material.

Arts Law suggests that the Department should consult with the Productivity Commission who are currently undertaking a study into the Aboriginal and Torres Strait Islander Visual Arts and Crafts market.[4] Arts Law, the Copyright Agency and the Indigenous Art Code Limited made a comprehensive joint submission to the study which outlines key issues addressing the need for greater protection of Aboriginal and Torres Strait Islander arts and culture.[5] Grounded in the National Agreement for Closing the Gap and the principles of the United Nations' Declaration on the Rights of Indigenous Peoples, the submission provides a snapshot of the Indigenous arts market based on our experiences with clients, communities and stakeholders, and puts forward practical reform options to increase fairness and reduce exploitation.

1. Limitation on remedies for use of orphan works

Arts Law is aware that the use of orphan works, where the owners of copyright in works are not able to be identified or cannot be located, is a problem faced by a wide variety of entities including cultural institutions, broadcasters, companies, and individuals. In principle, Arts Law supports reform to increase certainty around use of orphan works. The issue is one that needs a solution that provides all parties with certainty, considering the creative purposes current creators seek to make of older works along with respecting the creators of works which have become orphaned.

[4] Australian Government Productivity Commission inquiry – Aboriginal and Torres Strait Islander Visual Arts and Crafts: https://www.pc.gov.au/inquiries/current/indigenous-arts#draft

[5] Joint Submission from Arts Law Centre of Australia, Copyright Agency and The Indigenous Art Code Ltd, *Responding to the Productivity Commission Issues Paper – Aboriginal and Torres Strait Islander Visual Arts and Crafts* (9 February 2022): https://www.pc.gov.au/__data/assets/pdf_file/0008/336653/sub031-indigenous-arts.pdf

Arts Law is concerned that practical suggestions on better balancing the interests of rights holders and users of orphan works raised in previous submissions have not been addressed in the Discussion Paper or incorporated into the Draft Bill. These include suggestions around a compensation scheme, procedures for when a rights holder comes forward or is identified, and consideration of moral rights. The proposed reform doesn't consider the time and expense that copyright owners will incur to ensure their material has clear attribution attached to it. Further, the impact of this exception on Indigenous creators and ICIP has not been addressed by the Discussion Paper or Draft Bill.

Registration to track usage of orphan works

As Arts Law has previously recommended, there should be a centralised database/body that users lodge an application through to use an orphan work.[6] A register of such works should be kept so that it 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.

Compensation

Rights holders should be compensated for *past* use through a UK-style model where a licence is granted for a fixed period (a maximum of seven years in the UK[7]) and licence fees are paid and held on behalf of the rights holder. This could be administered by the applicable collecting society or by another appropriately positioned agency appointed by the government. With regard to the calculation of appropriate fees, Arts Law refers to our previous submission to the Department of Communications in 2018[8]:

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[6] Arts Law Centre of Australia, *Submission to the Copyright Law Section, Department of Communications and the Arts Copyright Modernisation Consultation Paper* (March 2018): https://www.infrastructure.gov.au/sites/default/files/submissions/arts_law_centre_of_australia.pdf

[7] UK Government Intellectual Property Department, *Orphan Works Licensing Scheme Overview for Applicants*, (January 2021): https://www.gov.uk/government/publications/orphan-works-overview-for-applicants/orphan-works-licensing-scheme-overview-for-applicants

[8] 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):

- Arts Law supports the establishment of a fee structure that is considered fair and equitable. Arts Law believes the parties wishing to use 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.

- Unused and 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.

- 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.

https://www.infrastructure.gov.au/sites/default/files/submissions/arts_law_centre_of_australia.pdf
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Disadvantage to Aboriginal and Torres Strait Islander Artists

It is well documented and evidenced that Aboriginal and Torres Strait Islander Artists are faced with disproportionate rates of disadvantage against all measures of socio-economic status.[9] For example, the 2020 Overcoming Indigenous Disadvantage report again showed the significant gaps that remain in socio-economic outcomes.[10] This is of particular concern in the art market, the extent of which Arts Law and other organisations have highlighted submissions to the Productivity Commission's recent Inquiry into the Aboriginal and Torres Strait Islander Visual Arts and Crafts market.[11] There is a higher risk of Aboriginal and Torres Strait Islander artists having their works being considered 'orphaned' due to a range of factors. There has been a substantial loss of connection and/or ownership of cultural heritage and copyright material as a result of the impact of colonisation and the Stolen Generations. Artists who live in regional or remote areas can struggle with accessibility to receive communication. For example, there may be no access (or limited access) to post, internet, email, or mobile/landline reception. In these circumstances, a copyright user will be able to show they have taken reasonable steps to locate and contact a copyright owner. Yet, the copyright owner may not receive the request or enquiry.

Further, ICIP could be at risk of being used inappropriately and without proper consultation with traditional custodians. Examples of inappropriate use that Arts Law has advised clients on includes:

- traditional language being incorrectly quoted/translated in publications;

[9] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2010): https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/submissions_un_hr_committee/3_indigenous_disadvantage.pdf

[10] Steering Committee for the Review of Government Service Provision (SCRGSP) 2020, Overcoming Indigenous Disadvantage: Key Indicators 2020, Productivity Commission, Canberra.

[11] Issues Paper - Aboriginal and Torres Strait Islander Visual Arts and Crafts (Joint submission from Arts Law Centre of Australia, Copyright Agency and The Indigenous Art Code Ltd., 9 February 2022) https://www.pc.gov.au/__data/assets/pdf_file/0008/336653/sub031-indigenous-arts.pdf

- visual artworks being reproduced with culturally insensitive or incorrect interpretations of the story that is depicted in the artwork; and

- works being attributed incorrectly to a particular language group.

We suggest any amendments to the use of orphan works are subject to the provision of other applicable legislation that may be introduced to help address these issues by the Government in the future.

Limitation of term

Arts Law submits that where the orphan works exception is relied upon, it should be limited in term – to a period of several years, similar to the UK model,[12] 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.

Industry Guidelines to determine whether reasonably diligent search was conducted

The Discussion Paper refers to a scheme that will "*set out a range of factors that may be considered in determining whether a reasonably diligent search was conducted, including the nature of the copyright material; purpose and character of the use; who conducted the search and how; available search technologies, databases and registers; and any relevant industry code of practice (guidelines)*" and that "*commencement of the scheme will be delayed for 12 months to allow the development of industry guidelines*".[13] It is unclear who will have input into drafting these industry guidelines and whether peak industry organisations, who are often already operating with limited resources, will be funded to provide a meaningful contribution to this process.

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[12] 'Orphan Works Licensing Scheme Overview for Applicants', *GOV.UK* https://www.gov.uk/government/publications/orphan-works-overview-for-applicants/orphan-works-licensing-scheme-overview-for-applicants

[13] Department of Infrastructure, Transport, Regional Development and Communications, *Discussion Paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021* (December 2021): https://www.infrastructure.gov.au/sites/default/files/documents/discussion-paper--exposure-draft-copyright-amendment--access-reform--bill2021.pdf

Refusal of future use

If a rights holder of an orphan work comes forward, they should have a right to refuse future use of their work. This is provided for in the UK model, where the maximum licence term is seven years, rather than in perpetuity. Rights holders should be able to refuse permission for future use rather than negotiate terms from a position of weakness.

Arts Law response to Question 1.1

> **Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms**
>
> Part 11, Division 3 of the *Copyright Regulations 2017* sets out the matters to be included in particular kinds of applications and references to the Copyright Tribunal. What matters do you consider should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work?

Once a copyright owner of an orphaned work is identified, where practical (for example for any further manufacture or dissemination of an item that features the work), they should have the ability to refuse future use of the work without needing to provide a reason.

The proposed reforms and the 'example matters for consideration' for the terms for ongoing use by the Copyright Tribunal do not adequately consider the moral right of integrity.[14] This is the right of an author to ensure that their work is not subjected to derogatory treatment, which is any act in relation to the work that is in any manner harmful to the author's honour or reputation.

At a minimum, where the creator of a work considers the use to be derogatory, they should be able to refuse future use of the work on the grounds that in their opinion it infringes on their moral right of integrity.

[14] *Copyright Act 1968*, Part IX, Divisions 4 and 4A.

Further, Arts Law recommends the incorporation of a provision (similar to the UK model's application process for the use of orphan work)[15] which considers whether the use of the work is 'inappropriate', for example, offensive, in poor taste or contentious.

2. New fair dealing exception for non-commercial quotation

Section 113FA of the Draft Bill proposes a new fair dealing exception for non-commercial quotation. The proposal is that certain public bodies (including educational institutions) be permitted to 'quote' from copyright material for *any purpose*, and that individuals or organisations be permitted to do so for the purpose of research. As currently drafted, the exception is highly prejudicial to the economic interests of copyright owners. It is also uncertain in scope, undercuts existing statutory licence schemes, and is not tied to a specific and demonstrated public interest.

Arts Law has previously submitted on its concerns with a general fair dealing exception for quotation, commenting that: [16]

- a quotation exception could benefit creators wishing to use parts of copyright works in their new works, but that it should require compliance with creators' moral right to attribution and have additional fairness requirements when work embodies ICIP; and

- educational institutions should not be able to rely on a fair dealing exception for research and study, because it would be unfair to creators and add complexity to (if not undercut) the well-established statutory licensing regime for education.

[15] (n 12)
[16] 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): https://www.infrastructure.gov.au/sites/default/files/submissions/arts_law_centre_of_australia.pdf .

General concerns with proposed new exception

The Discussion Paper asks only whether this new exception should extend to unpublished material, even though public submissions have not previously been invited on the current form of the exception. Arts Law wishes to briefly outline its general concerns with the new exception before addressing the more limited question posed in the Discussion Paper:

1. The exception for certain public bodies is not justified by a specific and demonstrable public interest. Commonwealth and State governments can easily access and use copyright material under existing statutory licence schemes that compensate copyright owners for the use of their work.[17] The same is true for educational institutions.[18] The activities of libraries, archives and other cultural institutions are protected by bespoke exceptions that are targeted to their activities.[19] These provisions amply protect the relevant public bodies' access to copyright material, while preserving an important source of income for copyright owners. The new exception does not. It will undercut existing statutory licence schemes (discussed further at 4 below) and operate as a broad and indiscriminate cut to funding for the arts.

2. The exception is not available to creators. As Arts Law has previously submitted, there may be some utility in a general quotation exception for artists wishing to use existing works to create new works. For these creators, an exception would reduce the burden and cost of copyright clearance for quotation that is fair to the copyright owner. However, the proposed exception is targeted only at certain public bodies (as well as individuals and organisations conducting research) that are amply provided for in existing legislation (as noted above).

3. There is no provision for ICIP. Arts Law is pleased that ss 113FA(1)(d) and (e) include protection for creators' moral right to attribution. But protection is also (and especially) required for work that embodies ICIP. For example, a film that includes traditional

[17] *Copyright Act 1968,* s 183.
[18] *Copyright Act 1968*, Part IVA, Division 4.
[19] *Copyright Act 1968*, Part III, Division 5 and Part IVA, Division 3.

stories may be subject to cultural protocols for when and where it may be played. Quotation (potentially of entire works) that does not comply with cultural protocols can be extremely offensive to the custodians of that ICIP (i.e., the relevant Aboriginal and Torres Strait Islander community). If the new quotation exception is to become law, the fair dealing criteria in s 113FA(2) should be expanded to include extra requirements for when the work quoted embodies ICIP.

4. What constitutes quotation is unclear. Section 113FA(5) includes a non-exhaustive list of examples of legitimate 'quotation' (for the purpose of explanation, or illustration, or authority, or homage). Quotation itself is said to extend to "*the whole or part of the copyright material*." As currently drafted, protected quotation is not limited in purpose (i.e., it could be for any purpose) or in quantity (i.e., use of a whole work could be a quotation). This creates an exception that is theoretically unlimited in scope. Relying on the ordinary meaning of quotation does not provide further guidance: the *Macquarie Dictionary* (online ed) defines "quoting" as "*to repeat (a passage, etc) from a book, speech, etc., as the words of another, as by way of authority, illustration, etc.*" The exception will have the tendency to cover any repetition of copyright work by the entitled public bodies, robbing copyright owners of all revenue under statutory licences (or direct licences).

5. Assessing non-commercial use will be difficult and is misdirected. It is important to note that just because the purpose of use is non-commercial does not mean it has no commercial impact on copyright owners, which is implied by the Discussion Paper: "*these reforms have been designed to minimise commercial impacts on copyright owners. For the most part, the reforms relate to non-commercial use of copyright material…"*. As discussed above, statutory royalties paid by government bodies and the education sector are important sources of income for artists. Moreover, while *direct* commercial value may be relatively obvious (i.e., if copyright material is incorporated into goods or services for sale), it is very difficult to assess *indirect* impacts on commercial value (such as the reputational benefits of being associated with high quality copyright material).

The Discussion Paper explains that the "*exceptions available to cultural and educational instructions, and the government statutory licensing scheme… are outdated, narrow and overly prescriptive."* If the government's intention is merely to improve certainty and efficiencies for certain public bodies and cultural institutions, it should do so in a way that compensates copyright owners fairly. Otherwise, being a creator in Australia will become more financially untenable than it already is, drying up the output of local creative work that is the lifeblood of the institutions these reforms seek to protect.

Arts Law response to Question 2.1

> **Question 2.1: Quotation: Unpublished material**
> Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material.

On the much narrower question posed by the Discussion Paper, Arts Law's view is that the new quotation fair dealing exception should not be extended to unpublished material. Doing so unnecessarily abrogates a copyright owners' right to first publication[20] and, potentially, their moral right to integrity.[21]

Copyright owners may elect not to publish their work for a variety of reasons, including, for example, that they are unsatisfied with the quality of the work, the work contains private or sensitive information, the work contains controversial material for which they fear backlash, or the work embodies ICIP that is not appropriate to share publicly. Publication in these circumstances could have reputational and other serious effects on the copyright owner. Arts Law submits that the safest and fairest approach is to respect the wishes of the copyright owner in choosing not to publish the work.

[20] *Copyright Act 1968*, s 31(1)(a)(ii).
[21] *Copyright Act 1968*, Part IX, Divisions 4 and 4A.

3. Updates to library and archives exceptions

This provision to broaden existing exceptions for libraries and archives to digitise works would significantly erode copyright owners' right to communicate their work and earn income. For example, libraries, archives, galleries, and museums are currently required to seek permission to reproduce copyright material online from the copyright owner. Arts Law regularly advises copyright owners on licensing agreements with these institutions and is of the view that permission should continue to be sought before works are communicated online. Amendments to 113KC (publishing items from a collection on the internet) and 113H (publishing preservation copies on the internet) would reduce or eliminate payments to artists for online publication of their works by public galleries, archives and libraries.

Further, as discussed above, ICIP is inadequately protected under our current legal system. The vulnerability of ICIP has been exacerbated through the ease with which it can be exploited through online platforms once it is made digitally available.

Arts Law response to Question 3.1

Question 3.1: Libraries and archives: Online access - 'Reasonable steps'
For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archives to seek to limit wider access to copyright material when made available online?

Libraries should have to do more than require users to login to protect copyright material. Arts Law recommends there should be further measures required by libraries or archives, such as:

- Preventing users from downloading material onto personal devices and include copyright notices (see also below responses to Question 4.1); and

- only allow access through the library or archive portal.

Arts Law response to Question 3.2

Question 3.2: Libraries and archives: Illustrations

Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?

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. As outlined in Arts Law's previous submission to the Department of Communications in 2018,[22] Arts Law has reviewed provisions in Europe, Asia and North America, and believes, given Australia's legislative history, Extended Collective Licensing (ECL) 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 a 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.

[22] 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): https://www.infrastructure.gov.au/sites/default/files/submissions/arts_law_centre_of_australia.pdf .

- Limited to heritage material (with a careful definition of what constitutes heritage works) so that works that are still being commercially exploited by their creators/ owners are not digitised and made available under mass digitisation.

- A mechanism for copyright owners of works which are digitised and made available by institutions to have their works removed from the scheme – the ability to opt-out.

- The provision for fair payment for the copyright works among those in the mass digitisation of works.

- Where a specific item/items are selected for use by individuals or institutions that have been digitised in reliance on any mass digitisation provision in the 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.

4. Updates to education exceptions

The Draft Bill includes a range of extensions to the existing exceptions for educational activities and charitable organisations. Arts Law sets out below its views on certain aspects of those changes.

Section 106 should not be extended to public bodies

Arts Law does not support extending the exception to copyright infringement in s 106 of the Act to public bodies like schools and TAFEs because it would reduce royalty payments to copyright owners. Licensing to the education sector is an important source of income for producers of sound recordings.

Public bodies like schools and TAFEs currently have more than sufficient free access to copyright material for their essential functions: s 28 of the Act allows teachers and students to perform musical works or play sound recordings in the course of education, and s 200AB provides a flexible dealing exception where use of subject matter other than works (e.g., sound recordings) for educational activities is not covered by s 28. For non-curricular activities, OneMusic (the umbrella body for the collecting societies APRA AMCOS and PPCA) makes it very easy for public bodies to purchase bundled licences to use music, lyrics and sound recordings in way that fairly compensates copyright owners for the use of their work.[23]

In any case, the exception in s 106 only refers to sound recordings. For an educational institution to play a sound recording at a non-curricular activity, it would still require a licence from APRA to use the underlying musical and literary works (i.e., the musical composition and lyrics) incorporated into the sound recording. In this context, the extension of s 106 eats into the economic interests of copyright owners without providing a substantial improvement in efficiency or certainty to the public bodies seeking to rely on the exception.

Arts Law response to Question 4.1

> **Question 4.1: Education: Online access – 'Reasonable Steps'**
> For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

Arts Law agrees that educational institutions should be required to take reasonable steps to limit access to copyright material. These steps are necessary to prevent downstream copyright

[23] Additionally, since 1 January 2021, TAFEs in all States except Victoria can rely on the TAFE Music Licence with APRA AMCOS, ARIA and PPCA to perform musical works live and use sound recordings in different ways outside the classroom. See Smartcopying, *Music Copyright Guide for TAFEs* (2 February 2022): https://smartcopying.edu.au/music-copyright-guide-for-tafes/.

infringement, which is extremely difficult to monitor for copyright owners, especially when infringement occurs online (often anonymously). Infringements pop-up and disappear with such frequency and speed that copyright owners are often unable to keep up and protect their rights.

So, what are reasonable steps? Educational institutions should have to do more than require students to login to a platform. Other technological measures should be required to meet this standard. In particular, measures that reduce the ability of students to download material onto their personal devices is paramount. For example:

- Disable right click on the platform where the copyright material is provided.
- Require copyright material to be provided using a secure platform that prevents third party applications from extracting content hosted on it.
- If copyright material is ever made available for download, provide only snippets or low quality versions of that material.
- Hide information (i.e., a digital fingerprint) in the electronic file for the copyright material so that any future infringements can be more easily tracked.
- Include prominent disclaimers instructing students what they are and are not permitted to do with copyright material made available to them.

Conclusion

Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion and consultation. Please contact Arts Law by email to artslaw@artslaw.com.au or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.

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