



ARTS LAW CENTRE OF AUSTRALIA

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26 February 2008

Ms Helen Daniels  
Assistant Secretary  
Copyright Law Branch  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

By Email: [copyrightlawbranch@ag.gov.au](mailto:copyrightlawbranch@ag.gov.au)

Dear Ms Daniels

**Re: Review of sections 47J and 110AA of the Copyright Act 1968**

We refer to your invitation to make a submission on whether sections 47J and 110AA of the Copyright Act are operating satisfactorily or whether either provision should be modified in some way. 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;

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- 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 the format shifting 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.

### **Our approach to the format shifting exceptions**

In general, Arts Law supports the copyright exceptions addressing format shifting for private and domestic use on the basis that artists copyright interests need to be balanced with private 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. We appreciate that the exceptions have been framed narrowly and understand the importance of a realistic approach to the issues that digital technologies present.

Despite this, it is essential that if the Government wishes to support the arts, that it recognises that this expansion in use has chipped away at a potential revenue stream for Australian artists. This is especially relevant if the Government intends to extend the format shifting exceptions to copying films for private and domestic use as the monetary investment required to create film and the limited exploitation revenues for film, as opposed to exploitation opportunities of sound recordings and the less expensive production costs associated with sound recordings.

### **Cost to creators**

In an attempt to create a 'better balance between the legitimate interests of copyright owners and consumers in the digital environment'<sup>1</sup>, Arts Law submits that further consideration should be given to the cost to the creators under the exceptions. Such costs include lost licence fees which would ordinarily be payable were it not for these exceptions allowing non-infringing use of artistic works and cinematograph films. An example of the ramifications resulting from the introduction of this exception is that a filmmaker's right to income from the sale of a film is reduced where an individual is

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<sup>1</sup> 'Copying Photographs and Films in a Different Format for Private Use: Review of sections 47J and 110AA of the Copyright Act 1968'

permitted to reproduce a videotape version of a film to digital format. This cost, over a period of time, will be significant both the individual creator and the arts in general.

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, the Department of Communications Information Technology and the Arts, the Australian Film Commission, Film Finance Corporation Limited, Film Australia, Australian Broadcasting Corporation and the Special Broadcasting Service.

### **Archiving**

Section 51A adequately covers photographs. Section 110AA only covers films aged 50-70 years. Potentially, archiving may be necessary of more recent films given the deteriorating of media (including videotape and digital media stored on DVDs) and physical factors of an institution. At the moment 110AA does not permit such copies to be made. This may unfairly lead to a difficult situation whereby the institution is prohibited from preserving culturally significant films. Although Arts Law does not as a general position advocate the unlicensed reproduction of works, in this specific circumstance it would be a great loss to Australian cultural heritage if institutions were not able to retain culturally significant works and allow the public access to such works.

### **Commissioned works**

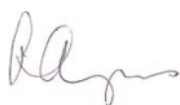
Under section 35(5) copyright of a photograph that has been commissioned for private or domestic purposes vests with the commissioner. There is no provision permitting the photographer to use the photograph for non-direct commercial purposes, such as a portfolio, whether in hardcopy or digital, without first obtaining the commissioner/ owner's consent. Similarly under section 98(3) where a film has been commissioned, the commissioner is the owner of the copyright in the film. Again, the directors of the film are not provided a right to use the film for non-direct commercial purposes.

The right for the photographer and the filmmaker to create viable commercial careers in industries is dependent on their body of work. The format shifting and fair use exemptions do not provide them with an ability to use the works for non-direct commercial purposes, even on a reasonable basis for example not being permitted to reproduce an entire film for show reels.

With the increasing dependence on the online market as a means of disseminating their artwork, photographers and filmmakers can not promote themselves without infringing the copyright of their past commissioners since these rights go beyond the concept of "format shifting for private use". Where the owner of a work pays another to format shift the work for private purposes, the exception should also include this other individual providing the private format shifting service for the owner.

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

Yours faithfully



Executive Director  
Arts Law Centre of Australia