
National Cultural Policy Discussion Paper

Submission by the Australian Digital Alliance and Australian Libraries Copyright Committee

1 Executive Summary

The Australian Digital Alliance(ADA) is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, libraries, schools, IT companies, cultural institutions and individuals. The cultural institutions represented by the ADA include the National Library of Australia, National Film & Sound Archive of Australia, National Gallery of Australia and National Museum of Australia.

The Australian Libraries Copyright Committee (ALCC) is the main consultative body and policy forum for the discussion of copyright issues affecting libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

ADA and ALCC members share the belief that strong protections in copyright law may inadvertently restrict the potential for innovation and creation. The advent of the internet has heightened tensions between monopoly rights of creators and the broad dissemination of knowledge and community participation that is the internet's greatest asset. It's important that protection of the interests of rights holders is balanced against wider public interest in the advancement of learning, innovation, research and knowledge.

A balanced and flexible copyright regime is essential to bring the arts and creative industries into the mainstream of Australian life.

Ellen Broad

Executive Officer

Australian Digital Alliance/Australian Libraries Copyright Committee

ebroad@nla.gov.au

We agree to our submission being made publically available on the www.culture.arts.gov.au website.

2 Do you support the development of a National Cultural Policy, and why?

We support the development of a National Cultural Policy.

The National Broadband Network will enable greater sharing of and participation in Australia's arts and culture than has ever been possible. The ability to make creative content available online, to share it with the Australian community and to facilitate innovative and transformative use of that content are necessary to make the aspirations of the National Cultural Policy a reality:

“supporting, enabling and strengthening communities and developing our creative culture so that we are ready to take on the challenges and opportunities of daily modern life.”

A flexible copyright regime ensures a more expressive and confident citizenry, and supports our ability to describe, share and creatively interpret our diverse experiences with the world.

3 What are your views about each of the four goals?

We endorse each of the goals put forward by the Australian government in developing a National Cultural Policy. As an advocacy body for balanced copyright reform, we are particularly interested in Australia's ability to harness **Goal 2** of the discussion paper:

To encourage the use of emerging technologies and new ideas that support the development of new artworks and creative industries, and that enable more people to access and participate in digital culture.

The strategies proposed in the discussion paper to achieve this goal include:

Recognise and support the development of innovative work which makes the most of new and emerging technologies; and

Strengthen the capacity of artists and performers to manage copyright and intellectual property, particularly in relation to online content.

We support these strategies, but caution that restrictive digital rights management may severely curtail creators' ability to make full use of these new and emerging technologies.

No copyright exception for mash ups, remixes, transformative works

In Australia, artists are not allowed to make new, transformative uses of material in copyright without infringing the rights of the copyright holder. This affects artists creating mash ups, remixes, making performance and installation art, as well artistic works in general that draw on earlier copyright material to offer new interpretation. Artists in Australia seeking to use material in copyright go through a time and cost-intensive process clearing permissions with rights holders, and these can be disincentives to producing transformative works.

Sites like Wikipedia, Facebook, MySpace, YouTube, Tumblr and Flickr encourage users to create, transform and share content with each other and have fostered a diversity of new works across different cultures and local communities. A flexible 'fair' use defence for users in Australia, akin to the defence available for users of copyright material in the United States, would support the development of innovative, transformative works across emerging technologies.

Digitisation of our national collections

It is essential that cultural institutions in the digital age be equipped to provide public access to their materials online. Digitisation is a costly and resource intensive exercise, and institutions face uncertainties as to whether they can make collections available online without infringing copyright.

The issues associated with cultural institutions wanting to mass digitise collections containing 'orphan' works have been rigorously debated. Orphan works arise where the creator is unknown or cannot be located, and can include old photographs, brochures, private diaries, correspondence, home movies, drawings and other ephemera.

Cultural institutions in Australia continue to **strongly oppose** any licensing model involving payments to a collecting society, which purport to "overcome" the issues associated with orphan works in our national collections. The flaws in such a licensing model for orphan works can be described as follows:

- Collection materials are deposited with and donated to our cultural institutions as the appropriate repository to preserve, interpret and **provide access to** our cultural heritage. They should not be required to pay fees in order to fulfil their primary, and in some cases, statutory objects making material available online;
- A large number of orphan works were not created to be commercially or professionally exploited, but have high cultural and social value for institutions to make them available for the benefit of the **Australian community**;
- Licensing fees may affect the acquisition decisions of cultural institutions, resulting in unwillingness to accept collections where the copyright status of any items is unclear; and
- In practical terms, it is unclear how license fees collected on behalf of copyright owners who **cannot be located** would ever be distributed back to the copyright owner.

The Hargreaves Review of Intellectual Property & Growth, endorsed by the UK government in 2011, does consider extended collective licensing but within the framework of statutory supervision and minimum standards for collecting societies, to ensure that they operate in a way that facilitates efficient, open markets. The Hargreaves Review envisages a double regulation of collecting societies by both the Intellectual Property Office and competition authorities.

The ADA and ALCC maintain there is a need for independent regulation of copyright collecting societies, so that they are transparent, accountable and equitable. The internet facilitates broader access to knowledge and use of a diverse range of content than has ever been possible, and it is essential users are able to access that content in a manner that is cost-effective and equitable.

Facilitating access to cultural materials through open licensing

The ADA and ALCC support the use of creative commons licences and open licences to facilitate access to cultural materials held by the Australian government. We are encouraged by the steps taken by government agencies to make public sector information (PSI) accessible online through the Information Publication Scheme, driven by the understanding that this information is a 'national resource'.

Cultural materials created and owned by government agencies should be made available for re-use and transformation under creative commons licensing. If the National Cultural Policy is truly to facilitate an inclusive, creative society, then government agencies must take the lead in making their cultural content available for creators to re-use, interpret and transform in new and innovative ways.

Technological Protection Measures impeding access to cultural materials

While a copyright exception for mash-ups, remixes and other transformative use would greatly assist Australian artists, its usefulness will be severely restricted by the artist's need to circumvent technological protection measures (TPMs) placed on a DVD or CD to make use of that material. Under current copyright laws, artists circumventing TPMs for remix purposes would be liable for breach of copyright and subject to an injunction restricting them from continuing with the art work and/or damages. For transformative use of copyright materials to be recognised as a legitimate and innovative art practice, protections must be put in place to allow artists to circumvent TPMs without infringing copyright.

4 How can you, your organisation or sector contribute to the goals and strategies of the National Cultural Policy?

The Australian Digital Alliance and Australian Libraries Copyright Committee are the peak bodies representing museums, galleries, libraries, archives, IT companies, universities and schools and their interests in a flexible and balanced copyright regime. We have considerable copyright law and policy expertise at our disposal, and are active in submissions to government reflecting the interests of our institutions and users of copyright material.

We believe that, in order to maximise innovation and creativity, Australia should adopt copyright exceptions that allow the market, new technologies and new creativity to evolve. While continuing to support and protect our creative industries, there must also be flexible exceptions that allow transformative, legitimate uses and services to enable full and confident participation in digital culture.

The Australian Digital Alliance and Australian Libraries Copyright Committee are happy to provide further comment on the copyright law and policy issues relevant to the development of a National Cultural Policy for Australia.