



AUSTRALIAN  
COPYRIGHT COUNCIL

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**SUBMISSION IN RESPONSE TO PRODUCTIVITY COMMISSION DRAFT REPORT  
ON INTELLECTUAL PROPERTY ARRANGEMENTS**

**JUNE 2016**

## INTRODUCTION

The Australian Copyright Council (ACC) is pleased to have this opportunity to respond to the Productivity Commission's Draft Report on Intellectual Property Arrangements. This submission is made on behalf of our affiliate organisations (see Appendix 1), many of whom have also made separate submissions to the Commission.

Reviewing Australia's intellectual property (IP) arrangements within 12 months is a huge task. It is therefore not surprising that, for the most part, the Draft Report's findings in relation to copyright represent a 'mashup' of the recommendations from previous reviews.

It is, however, disappointing that the draft recommendations are not supported by substantial new evidence.

The Draft Report is also compromised by some logical inconsistencies. This is demonstrated by the Commission's treatment of trade in copyright material. For example, its findings are largely influenced by Australia's domestic circumstances: that it is a net IP importer. And yet the Commission's recommendation to abolish the restrictions on parallel importation of books, and to allow circumvention of geoblocks shows a lack of regard for territorial copyright.

It is also disappointing that the Draft Report is side-tracked by theoretical issues such as the duration of copyright, and fails to identify many overarching issues for Australia's IP arrangements.

By adopting the term "copy(not)right" the Draft Report takes on an ideological tone. At a time when stakeholders have worked effectively to agree on principles reflected in the *Draft Copyright Amendment (Disability Accedes & Other Measures) Bill* released late last year, this approach is unhelpful and UNproductive.

In our submission, the Draft Report demonstrates a lack of understanding of the creative sector and content industries. This is seen in its comments in relation to term of protection, unpublished works, moral rights, orphan works, out of commerce works, fair use and by its reference to 'creators' in inverted commas. Contrary to the view prosecuted by the Commission, Australians are not just passive consumers of content or 'follow on creators'. This is backed up by Australia Council data. For example, according to the *2015 Arts Nation Report*, the value of visual arts exported from Australia was at least \$77 million in 2013–14, and the books of 28 bestselling Australian writers generated \$3.6 million in annual physical retail sales in the United Kingdom in 2013 (p26).<sup>1</sup> We have a unique creative voice that delivers economic and cultural value. But that voice will not flourish without the appropriate regulatory framework.

Our submission is primarily concerned with copyright, although we also respond to some cross-cutting issue raised in the Draft Report.

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<sup>1</sup>See, <http://www.australiacouncil.gov.au/workspace/uploads/files/arts-nation-october-2015-5638269193891.pdf>

## DRAFT RECOMMENDATION 2.1

*In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and have regard to the principles of:*

- *effectiveness, which addresses the balance between providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely*
- *efficiency, which addresses the balance between returns to innovators and to the wider community*
- *adaptability, which addresses the balance between providing policy certainty and having a system that is agile in response to change*
- *accountability, which balances the cost of collecting and analysing policy-relevant information against the benefits of having transparent and evidence-based policy that considers community wellbeing.*

As we noted in our submission in response to the Commission's Issues Paper, it is difficult to assess Australia's IP Arrangements without first identifying their objective. This is not expressed in either the Constitution or in the legislation itself. While the Commission addresses the lack of an objects clause with respect to patents (p 186) it fails to grapple with this issue in respect of other forms of IP.

In our submission, it is impossible to assess Australia's IP arrangements without identifying what they are supposed to achieve. In this context, the Commission's default reference to 'well-being' as a measure is simply too vague to articulate in any meaningful way how 'well-being' is either to be assessed or formulated in respect of each area of IP – and particularly in the context of copyright which is concerned both with cultural and economic production.

We further note that the Commission's draft recommendation states that IP policy should be informed by a robust evidence base. While we acknowledge that the report is only in draft form, we are concerned that the Commission offers little by the way of new evidence to support its findings. For example, it relies on old data to submitted to the IT Pricing Inquiry in 2013 to support its finding that 'Australia's copyright system has progressively expanded and protects works longer than necessary to encourage creative endeavor, with consumers bearing the cost' (p 2). Given the dynamic nature of markets for copyright material, we query whether the Commission's static view of Australia as a net IP importer is valid.

### **Chapter 4: Copyright term and scope**

#### **Overview of the Copyright System**

The Commission in its Draft Report is critical of the PwC Report on the *Economic Contribution of Australia's Copyright Industries 2002-2014* (PwC Report) which was commissioned by the Australian Copyright Council and referred to in our submission in response to the Issues Paper.

It is worth noting that both PwC and the Commission draw their data from the same source: the Australian Bureau of Statistics (ABS). The Commission prefers to rely on the ABS figure for 'artistic originals'. We note that is based on a narrow category which does not include visual arts or other copyright products that are counted separately in the National Accounts. We therefore query the validity of comparing the GDP attributed to this narrow set of products with the fuller set used in the PwC Report.

While the Commission is entitled to disagree with the findings in the PwC Report, we note that the PwC findings are based on methodology established by the World Intellectual Property Organization (WIPO). This methodology is clearly set out both in the PwC Report and by WIPO. We therefore object to the Commission's statement at page 97 of its Draft Report that the estimate of contribution to GDP in the PwC Report that is quoted in our submission is misleading and request that the Commission retract that statement from the Final Report.

The Commission acknowledges that Australians' use of copyright material is significant. In doing so, it refers to a 2008 ABS Report which shows that Australians spent 3 hours a day consuming audio and visual content in 2006. In our submission, it is not unreasonable to suggest that a decade later this figure has increased and that the consumption has become more interactive.

The Commission does at least agree with the ACC that copyright matters. By any measure, it is a significant contributor to the Australian economy and to Australian cultural life. In our submission this means that radical changes to the copyright system as proposed by the Commission require careful analysis.

#### **DRAFT FINDING 4.1**

*Australia's copyright system has expanded over time, often with no transparent, evidence based policy analysis demonstrating the need for, or quantum of, new rights.*

In our submission, it may be more accurate to say that the Australia's copyright laws have changed over time. These have included changes to both rights and exceptions, and limitations to copyright. Indeed, Australia has an extensive number of exceptions in the Copyright Act.<sup>2</sup>

As far as changes to copyright and its related rights are concerned, these have generally followed the lengthy negotiation of WIPO copyright treaties and domestic implementation processes. As Copyright Agency notes in its submission, the two main changes relate to the introduction of the 'making available right' and the extension of term.

The focus of the Commission's concern seems to be the extension of the copyright term following the conclusion of the Australia-United States Free Trade Agreement. It is worth reminding the Commission that this was an economy-wide trade agreement and that it is artificial to look at it merely in terms of its impact on copyright.

Even if this were not the case, we query the estimated cost of term extension quoted in the Draft Report. In our submission, this figure is vastly inflated.<sup>3</sup>

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<sup>2</sup> See, for example, our information sheet '*Exceptions to Copyright*' [http://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Exceptions\\_to\\_Copyright.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](http://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Exceptions_to_Copyright.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)

<sup>3</sup> See, for example, Barker, George Robert and Liebowitz, Stan J., *Copyright Term Extension Economic Effect on the New Zealand Economy* (April 27, 2016). Available at SSRN: <http://ssrn.com/abstract=2770914> or <http://dx.doi.org/10.2139/ssrn.2770914>

## DRAFT FINDING 4.2

*While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.*

In its Draft Report, the Commission cites the ACC as supporting the statement that “the vast majority of works do not make commercial returns beyond their first couple of years on the market” (p 114). With respect, this is taking the ACC’s submission out of context. The statements at pages 3 and 9 of our submission in response to the Issues Paper were intended to focus the Commission’s attention on practical issues. This is in fact, what we say in our submission:

“The terms of reference for this inquiry make it clear that the Commission is to have regard to Australia’s international treaty obligations. This provides the Commission an opportunity to focus its inquiry on practical issues rather than to be distracted by theoretical issues. For example, while the economic benefit of extending the term of copyright protection in Australia may have been questionable, there seems little point in focusing on this issue in this inquiry.” (p 3)

The Commission purports to base its estimate of the life cycle of various types of copyright material on ABS data (p 14). With respect, we believe that there are problems with both the sources of the ABS data and the way the Commission has interpreted the data.

For example, as part of the ABS approach to measuring capital stock, the ABS has calculated the ‘mean asset lives’ of IP in years, which is ‘the average length of time they are used in production’; and ‘the retirement distribution’, which is ‘the extent to which assets are retired before, on or after the asset life for that asset’ (p 375)<sup>4</sup>. For ‘artistic originals’, this is ‘the distribution of the number of years for which artistic originals yield an income or royalty’ (p376). A key point to note is that whilst the ‘[i]nformation obtained from peak industry bodies implies that retirement distributions are heavily skewed to the left because the vast majority of artistic originals receive an income over a relatively short period (often one or two years). *However, a small percentage receive an income over a much longer period, and represent the majority of income received*’ (emphasis added p 376). In reporting the mean asset lives for artistic works, the Commission has omitted this important point about the distribution of asset lives (that the majority of income is for assets that don’t conform to the average distribution), and has misattributed this key point as being a description of the asset lives of visual art works (which are not included in the ABS model).

In summary, the ABS data counts film and television, music and books; capital formation based on expected earnings; a model using average life cycles that are based on out of date and incomplete industry data. In our submission, this data should not be used without taking into account the retirement distributions of works that have a longer life cycle than the average (and which are the works that create the most earnings).

The Commission has chosen to ignore our suggestion that it focus on practical issues and instead posits an “optimal” copyright term of 15-25 years.

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<sup>4</sup> ABS 2015, Australian System of National Accounts: Concepts, Sources and Methods 2015 (cat. no. 5216.0).

The basis for this estimate is unclear. As submissions from our affiliate organisations such as the Australian Society of Authors (ASA), the Australian Writers' Guild and Screen Producers Australia demonstrate, this estimate certainly does not reflect the reality of the creative process. For example, a feature film may spend a decade in development before commercial release.

Nor does this estimate accord with the incomes of most creators, which as the Australia Council points out in its submission in response to the Issues Paper, are modest. As the ASA indicate in its submission in response to the Draft Report, the estate planning of creators is based on the current term of copyright.

Proposing that Australia advocate for a term of protection less than the standard set in the *Berne Convention* and in *TRIPS* is, in our submission, highly specious. It also ignores the constitutional implications of winding back the term of copyright. That is, any reduction of the term of copyright is likely to amount to an acquisition of property under s 51(xxxi) of the Constitution. In this context it is hardly surprising that the Minister for Communications and the Arts issued a press release on 23 May distancing the Government from the Commission's Draft Finding.

It is difficult to escape the impression that the remainder of the Commission's draft findings and recommendations in relation to copyright are infected by a view that the duration of copyright is far too long.

#### **DRAFT RECOMMENDATION 4.1**

*The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.*

This recommendation is already the subject of the *Copyright Amendment (Disability Access & Other Measures) Bill* which was released as an exposure draft in December 2015. While this proposal involves some complexities, the principle has been generally accepted by stakeholders, at least in relation to material deposited with collecting institutions. We therefore query the purpose of the Commission's recommendation.

We also note that the Commission fails to address the impact that its draft recommendation would have on the ability of creators to control the exploitation of their work- an important feature of copyright protection. In our submission, this failure suggests that Commission does not have a proper understanding of the creative sector or content industries.

#### **Chapter 5: Copyright accessibility: licensing and exceptions**

The Commission's proposal for 'user rights' is radical and raises potential constitutional issues with respect to acquisition of property. In our submission it is based on an outdated understanding of the power of 'rights holders' and 'users'. In many instances, right holders are individual creators and the users of their material are large technology companies.

It is also worth noting that the Commission's recommendations in relation to geoblocking are likely to prevent consumers from being able to rely on consumer law remedies.<sup>5</sup>

In our submission, it is a mistake to conflate 'users' rights' with issues about price and availability. The online market place for copyright material is highly dynamic and well-placed to deal with these issues.

## **DRAFT RECOMMENDATION 5.1**

*The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.*

*The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.*

We are disappointed that the Commission has chosen to adopt this recommendation from the IT Pricing Inquiry.

Firstly, we note that the market for online delivery of content is highly dynamic. There has been a proliferation of online content services launched in Australia since 2013.<sup>6</sup> Therefore, we query the validity of the Commission relying on data submitted to that Inquiry to support its conclusion that Australians are paying more for content.

Secondly, as the Harper Panel recognised, market-based mechanisms are the best way of addressing geographic price discrimination. For example, Netflix is now making its original content (*Orange is the New Black*, *House of Cards*) available at the same time all over the world. The quid pro quo of this is that it is only available through Netflix and no other distribution channels. It is our expectation that issues in relation to price and availability will continue to dissipate over time as online business models mature.

As we set out in our submissions to the Harper Review, there are many legitimate reasons why online platforms will apply geoblocks.<sup>7</sup> In our submission, the Commission's draft recommendation jeopardises new business models and investment in the local market.

In most instances, a geoblock will not be a technological protection measure within the meaning of the *Copyright Act*. However, if the effect of circumventing a geoblock is that content which is licensed in a particular territory is in fact being made available in a different territory, that is likely to amount to a breach of contract. And if that

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<sup>5</sup> See our submission on the Harper Panel Draft Report <file:///C:/Users/Fiona%20Phillips/Downloads/final-harper-draft-report-submis.pdf>

<sup>6</sup> See, for example, the Digital Content Guide. <http://digitalcontentguide.com.au/movies-tv/>

<sup>7</sup> See, for example, our submission in response to the Draft Report [http://www.copyright.org.au/acc\\_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=ceea5c6e-27a3-4fba-8687-e567e1b5b259&iFileTypeCode=PDF&iFileName=Submission%20in%20Response%20to%20The%20Competition%20Policy%20Review%20Draft%20Report](http://www.copyright.org.au/acc_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=ceea5c6e-27a3-4fba-8687-e567e1b5b259&iFileTypeCode=PDF&iFileName=Submission%20in%20Response%20to%20The%20Competition%20Policy%20Review%20Draft%20Report)

means that content is being reproduced or communicated in Australia without the permission of the copyright owner, it is also likely to be an infringement of copyright.<sup>8</sup>

This is to be distinguished from proposals currently being discussed in Europe. As we noted in our response to the Harper Panel's Final Report, the approach to geoblocks at EU level is premised on the basis that the EU is a single market. That is not the situation here, where the relevant single-market is all of the Australian states and territories.

For these reasons, in our submission, the Commission's recommendation in relation to geoblocks is not feasible from either a legal or a policy perspective.

## **DRAFT RECOMMENDATION 5.2**

*The Australian Government should repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.*

The Commission's recommendations in relation to parallel importation of books are in stark contrast to its recommendation in relation to circumvention of geoblocks. On the one hand it states:

“In submissions to this inquiry, rights holders typically argued the remaining PIRs were not inconsistent with competition policy, because consumers could circumvent the restrictions and parallel import for personal use. However, to the extent that this is true, there are few foundations for a law that users can easily evade.” (p 126)

On the other hand, the Commission proposes that consumers should be able to circumvent geoblocks without infringing copyright law. In our submission, consumers importing books for personal use is not an evasion of the parallel importation law, as the parallel importation law is only directed at commercial importation. This is in contrast to the circumvention of geoblocks by consumers which at least, amounts to a breach of contract.

As we note at the outset, the Commission seems to have conflicting views about territorial copyright.

Beyond that, we note that the Commission's draft recommendation simply endorses Government policy announced in October 2015. It is unclear why it does not deal with the remaining parallel importation restrictions for copyright material other than books such as print music and feature films.

We refer to and repeat our submissions on parallel importation from our response to the Commission's Issues Paper. We also support the submissions of our affiliate organisations, the Australian Publishers' Association and the Australian Society of Authors. Australian authors and publishers have expressed vocal opposition to this recommendation. This deserves proper consideration.

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<sup>8</sup> See our information sheet, 'Geoblocking, VPNs & Copyright' [http://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Geoblocking\\_VPNs\\_Copyright.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](http://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Geoblocking_VPNs_Copyright.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)

## DRAFT RECOMMENDATION 5.3

*The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.*

*The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.*

*The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:*

- *the effect of the use on the market for the copyright protected work at the time of the use*
- *the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- *the commercial availability of the work at the time of the infringement*
- *the purpose and character of the use, including whether the use is commercial or private use.*

*The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.*

*The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.*

The Commission's draft recommendation for fair use proceeds on the basis of a flawed understanding of the current fair dealing provisions. The Commission states at p 141 of the Draft Report that:

"The key difference between fair dealing and fair use is where responsibility lies for determining the 'fairness' of new uses of copyright material. In Australia, legislative change is required to expand the categories of use deemed to be fair. In contrast, US courts have the latitude to determine if, on the facts, a new use of copyright material is fair. This allows the exception to be flexible and adaptive over time."

With respect, this is not correct. For fair dealing to apply, the behaviour in question must be both or a prescribed fair dealing purpose and meet the fair dealing factors. For example, the factors for fair dealing for research or study are:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is reproduced--the amount and substantiality of the part copied taken in relation to the whole work or adaptation.<sup>9</sup>

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<sup>9</sup> See sections 40 and 103C of the *Copyright Act 1968*.

These factors are similar to the factors that US courts take into account in determining fair use (apart from factor c). The key difference is that while the US Copyright Act contains a number of illustrative purposes – “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” – it does not contain prescribed purposes. As we explain in our submission in response to the Issues Paper, the difference may be explained by our different legal frameworks.<sup>10</sup> Firstly, the constitutional power to legislate with respect to copyright in the US is “for science and the useful arts”, whereas in Australia it is part of the general plenary power of Parliament. Neither does the Australian Copyright Act include an objects clause which may help to identify the ‘special cases’ that might be the subject of an exception. Secondly, unlike the US, there is no federal Bill of Rights in Australia. Although implicit rather than explicit, freedom of expression considerations are a key part of the fair use doctrine in the US. As Professor David Tan has observed, US fair use jurisprudence is imbued with First Amendment accommodations.<sup>11</sup>

In our submission, these differences are significant in determining what may be “fair” in the US compared with Australia, and may explain why it is appropriate for Australia to retain a purposive approach in its copyright law exceptions.

The Commission’s Draft Report also fails to recognise that there are mechanisms in the Australian Copyright Act that do the same work as fair use does in the US. In our submission, table 5.2 of the Draft Report gives the impression that a licence must be negotiated for each of the activities in question. This is not accurate. For example, the educational statutory licences facilitate many of the activities in the table while enabling the copyright owners to be paid. (See further, Copyright Agency and Screenrights submissions). Importantly, where no other exception applies, educational and cultural institutions, and institutions assisting people with a disability, have the benefit of the ‘flexible dealing provision’ in section 200AB. This provision is an ‘open exception’ that applies in special cases identified by Parliament and supported by public policy. We note that the Commission does not examine this exception in making its recommendation in favour of “fair use”.

The formulation of fair use put forward by the Commission not only goes further than what was proposed by the ALRC, it differs from the fair use doctrine in the US in a number of important ways:

1. It does not require an assessment of the nature of the work;
2. It limits consideration of the effect on the market to *at the time* of the use;
3. It purports to extend application of the exception to third parties; and
4. It includes a commercial availability test.

In our submission, this formulation of ‘fair use’ is likely to be in breach of international law. In our view, it is likely to fall outside the 3-step test set out in the *Berne Convention* and other treaties in that it omits consideration of the nature of the work and limits assessment of market impact to the impact at the time of the use. This is problematic because the 3-step test requires that in addition to being for ‘certain special cases’ exceptions ‘not conflict with the normal exploitation of the work’. This necessitates a consideration of what the work is. The final ‘step’ is that exceptions

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<sup>10</sup> See pp 4-5.

<sup>11</sup> “The Lost Language of the First Amendment in Copyright Fair Use: Leval’s “Transformative Use” Doctrine Twenty-Five Years On” 2 016 *Fordham IP Media & Entertainment Law Journal*.

'must not unreasonably prejudice the legitimate interests of the author'. In our submission, the legitimate interests of author extend for the duration of copyright and are not limited to a single point in time as proposed by the Commission.<sup>12</sup>

Secondly, even if the Commission's proposal conformed with international law, introducing a uniquely Australian fair use exception is likely to bring with it added uncertainty. The Commission has suggested that Australia would be able to minimise uncertainty by following US fair use jurisprudence. 'While US court decisions would not be binding on Australian courts; the Commission sees no reason why Australian courts would not draw on the principles laid out in US decisions as a starting point.' (p 160). We do not accept this premise. In our view, the predictability of fair use jurisprudence in the US has been overstated. It continues to be a largely fact driven doctrine and approaches between different courts vary.<sup>13</sup> Furthermore, in our submission, the differences in our legal frameworks (notably the lack of an objects clause and a Bill of Rights) mean that Australian courts are likely to approach the interpretation of a fair use exception differently from US courts. If Australia adopts a different fair use exception from the US, it will render US case law even less instructive for Australian judges.

In our submission, an illustrative list of fair use purposes as proposed by the Commission is unlikely to do much to address the uncertainty that a new fair use exception would bring. The inevitable result is that copyright owners will be required to enforce their rights through the courts, or suffer the consequences.

It is also worth noting that the Commission favours dealing with issues associated with use of orphan works and out of commerce works through fair use rather than a *sui generis* mechanism which allows for the compensation of authors. In our submission, this should not be the only basis for dealing with works which are out of commerce or where the author cannot be located. As the AIPP and the ASA state in their submissions, this risks unfairness to creators. In our submission, extended collective licensing is better suited to deal with this kind of material, and particularly under models that would allow for both payment and further research on the identity of the relevant copyright owner/s.

Lastly, the Commission fails to grapple adequately with the costs and benefits of introducing a fair use exception into Australia. We note that a number of our affiliates sought to assist the Commission by submitting a cost-benefit analysis prepared for them by PwC. We refer to and support Copyright Agency's submission in response to the Draft Report which addresses the Commission's criticisms of that cost-benefit analysis. Whether or not the Commission accepts PwC's estimate of the cost of introducing fair use into Australia, this does not itself mean that introducing fair use here is a good idea. We are concerned that the Commission fails to put forward a positive case for fair use in its Draft Report.

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<sup>12</sup> See Hughes, Justin, Fair Use and Its Politics - At Home and Abroad' (April 17, 2015). *Copyright Law in the Age of Exceptions and Limitations*, Ruth Okediji, editor, Cambridge University Press, 2015, Forthcoming; Loyola-LA Legal Studies Paper No. 2015-18. Available at SSRN: <http://ssrn.com/abstract=2595717>

<sup>13</sup> Jon Baumgarten, "Building a Fairer Framework for the Future: Fair Use: Evolution or Revolution?" *Copyright Reporter*, Vol 33(3) Dec 2015.

## **Chapter 14: Competition policy**

### **DRAFT RECOMMENDATION 14.1**

*The Australian Government should repeal s. 51(3) of the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act).*

*The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.*

We note that this recommendation has been made by successive inquiries and refer to our submission in response to the Issues Paper. If the Government were to accept this recommendation, then we support the ACCC issuing guidance on the application of Part IV of the *Competition and Consumer Act 2010* to IP.

## **Chapter 15: IP and public institutions**

### **DRAFT RECOMMENDATION 15.1**

*All Australian, and State and Territory Governments should implement an open access policy for publicly funded research. The policy should provide free access through an open access repository for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.*

*The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.*

We are concerned that the Commission may have conflated the concepts of ‘open access’ and ‘free access’. Dissemination of knowledge is a valuable objective and lies at the centre of copyright law. We note that significant work is already being done in this space by publishers, educational institutions and funding bodies. The submission of STM (which we have seen in draft form) in response to the Draft Report provides valuable insights in this regard. In our submission, the economic and moral rights of copyright should continue to apply to such material. This view is supported by our affiliate, the NTEU.

We note that the Copyright Law Review Committee addressed the issues of Crown Copyright in a report in 2005. We note that the law in relation to government ownership of copyright is in many instances, at odds with modern government policy and that this may be something the Commission wishes to address as a separate issue.

## **Chapter 16: Institutional and governance arrangements**

### **DRAFT FINDING 16.1**

*Model agreements on intellectual property would have the benefit of being fully transparent to Australian industry and to the broader community, as well as to foreign governments, so that all stakeholders are aware of what Australia sees as the ideal outcomes from a treaty.*

While we do not oppose this finding, we query its practical utility.

## **Chapter 17: International cooperation**

### **DRAFT FINDING 17.1**

*Approaches to international cooperation and lowering transaction costs will be most effective when pursued multilaterally rather than through bilateral arrangements. Moreover, harmonisation of laws is not the sole, or necessarily desirable, form of cooperation. Other approaches to international intellectual property cooperation can achieve their goals at lower cost and with greater flexibility.*

In our submission, the viability of this finding is dependent on both government funding and treaty outcomes. We also note that a lot of international cooperation in the area of copyright is carried out under the auspices of the private sector, such as industry organisations.

### **DRAFT RECOMMENDATION 17.1**

*Australia should revive its role in supporting opportunities to promote global cooperation on intellectual property policy among intellectual property offices through the World Intellectual Property Organization and the World Trade Organization to avoid duplication and reduce transaction costs.*

As discussed, above the viability of this recommendation depends on government funding.

## **Chapter 18: Compliance and enforcement**

### **DRAFT RECOMMENDATION 18.1**

*The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).*

While we note that this proposal formed part of the *Copyright Amendment (Disability Access and Other Measures) Exposure Draft Bill*, it is also worth noting that its inclusion in the Draft Bill was controversial. We query the basis for the Commission's recommendation and refer the Commission to the submission of Music Rights Australia and APRA|AMOCs and to our submission in response to the Draft Bill.<sup>14</sup>

### **DRAFT FINDING 18.1**

*The evidence suggests timely and cost effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.*

We query the basis of the Commission's finding. The music industry is a prime example of where there is 'timely and cost effective' access to copyright material, and yet online copyright infringement remains an issue. In our submission, this is but part of the solution to online copyright infringement. It is not a complete answer. We refer to and support the submission of Music Rights Australia in this regard.

### **INFORMATION REQUEST 5.1**

*Other than for libraries and archives, to what extent are copyright licence conditions being used by rights holders to override the exceptions in the Copyright Act 1968 (Cth)? To what extent (if any) are these conditions being enforced and what are the resulting effects on users?*

<sup>14</sup> [http://www.copyright.org.au/acc\\_prod/ACC/Submissions/Exposure\\_Draft\\_submission.aspx](http://www.copyright.org.au/acc_prod/ACC/Submissions/Exposure_Draft_submission.aspx)

*Would amendments to the Copyright Act 1968 (Cth) to preserve exceptions for digital material have any unintended impacts?*

We are concerned that impediments to freedom of contract may have the effect of stifling new business models. We refer to and repeat our submission to the ALRC Issues Paper in this regard.<sup>15</sup>

## **INFORMATION REQUEST 5.2**

*Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?*

Yes. We refer to and support the submissions of Copyright Agency, APRA|AMOCS, Screenrights and PPCA in this regard.

## **INFORMATION REQUEST 5.3**

*Will the Australian Government's proposed reforms to simplify and streamline education statutory licences result in an efficient and effective scheme? Should similar reforms be made to the operation of the government statutory licence scheme?*

We are hopeful that the proposed reforms to the educational statutory licences will be effective in streamlining current licensing mechanisms.

We note that the Government statutory licence is much wider than the educational licences, but would be supportive of mechanisms to streamline that licence.

## **INFORMATION REQUEST 16.1**

*What institutional and governance settings would best ensure that IP policy benefits from a policy champion and is guided by an overarching policy objective and an economy-wide perspective?*

*Would vesting IP policy responsibility in a single department further these goals, and if so, which department would be best placed to balance the interests of rights holders and users, including follow on innovators?*

*Are there any complementary or alternative measures that would help facilitate more integrated and evidence based IP policy making?*

In our submission, the institutional and governance settings for IP policy are a matter for Government. As we stated in our submission in response to the Issues Paper, what is important is that there are sufficient resources and expertise deployed to IP policy. It is also important that the policy function is conducted with professionalism and impartiality.

## **INFORMATION REQUEST 16.2**

*Is there merit in establishing a clearer separation between policy and administrative functions for intellectual property, and if so, where should the dividing line lie?*

*What mechanisms are available for transparently setting out the separation of IP policy and administration responsibilities?*

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<sup>15</sup>[http://www.copyright.org.au/acc\\_prod/ACC/Submissions/SUBMISSION\\_TO\\_THE\\_AUSTRALIAN\\_LAW\\_REFORM\\_COMMISSION\\_COPYRIGHT\\_AND\\_THE\\_DIGITAL\\_ECONOMY\\_.aspx](http://www.copyright.org.au/acc_prod/ACC/Submissions/SUBMISSION_TO_THE_AUSTRALIAN_LAW_REFORM_COMMISSION_COPYRIGHT_AND_THE_DIGITAL_ECONOMY_.aspx)

This is not an issue for copyright as there is no registration system.

### **INFORMATION REQUEST 16.3**

What features should be included in a model agreement covering intellectual property if one were to be adopted?

We do not consider a model agreement a practical outcome.

### **INFORMATION REQUEST 18.1**

*Would changes to the jurisdiction of the Federal Circuit Court improve access to dispute resolution by small- and medium-sized enterprises? Should additional rules be introduced, such as caps on the amount of costs claimable in a case? What is the upper limit on damages claims the court should hear?*

*Are there resourcing impediments to the proposed reforms to the Federal Circuit Court?*

*Can greater use be made of cost orders in the Federal Court, including for discovery, to reduce costs further? Should additional Federal Court rules be introduced, such as caps on the amount of costs claimable in a case?*

A likely impact of the Commission's recommendations is an increase in litigation. The ACC is concerned about the ability of the Federal Circuit Court to provide an adequate enforcement mechanism for copyright creators. In our submission, a specialist body, such as the IP Enterprise Court in the UK may be better equipped to determine disputes for creators and SMEs. We refer to and support the submission of AIPP in this regard.

### **CONCLUSION**

We encourage the Commission to take this submission into account in preparing its Final Report to Government.

We have registered to attend the public hearings in Sydney on 24 June. Please do not hesitate to contact us if we can provide further information.

Fiona Phillips

Executive Director

## Appendix 1: Australian Copyright Council Affiliates

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artists' Agency  
Ausdance  
Australian Commercial & Media Photographers  
Australian Directors Guild  
Australian Guild of Screen Composers  
Australian Institute of Professional Photography  
Australian Music Centre  
Australasian Music Publishers Association Ltd  
Australian Publishers Association  
APRA AMCOS  
Australian Recording Industry Association  
Australian Screen Directors Authorship Collecting Society  
Australian Writers' Guild  
The Australian Society of Authors Ltd  
Christian Copyright Licensing International  
Copyright Agency|Viscopy  
Media Entertainment & Arts Alliance  
Musicians Union of Australia  
National Association for the Visual Arts Ltd  
National Tertiary Education Industry Union  
Phonographic Performance Company of Australia  
Screen Producers Australia  
Screenrights