



AUSTRALIAN
COPYRIGHT COUNCIL

**SUBMISSION IN RESPONSE TO PRODUCTIVITY COMMISSION ISSUES PAPER
ON INTELLECTUAL PROPERTY ARRANGEMENTS**

30 NOVEMBER 2015

BACKGROUND

The Australian Copyright Council (ACC) is pleased to have this opportunity to respond to the Productivity Commission's Issues Paper on Intellectual Property Arrangements.

The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. Many of them are making separate submissions to this inquiry. A full list of our members is attached at Appendix 1.

*'Overall, the Committee believes that the system of intellectual property laws acts to promote competition by maintaining the incentives to innovate, while striving to strike a balance through the nature and content of the rights grants and between those incentives and society's interest in the widespread diffusion of ideas. It believes that the terms of that balance are properly specified in the intellectual property laws themselves, securing the greatest clarity for the rights being granted.'*¹

There has been a series of reviews of examining intellectual property from a competition policy perspective over the years. See for example, the National Competition Council *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974* from 1999, the *Review of Intellectual Property legislation under the Competition Principles Agreement* of 2000 (the Ergas Report from which the above quote has been extracted) and the House of Representatives Standing Committee on Infrastructure and Communications' report *At what cost? IT pricing and the Australia tax* (the IT Pricing Inquiry) of 2013. The current inquiry arises out of a recommendation made by the Harper Panel as part of its broad ranging review of competition policy.

The Harper Panel identified intellectual property as a priority area for reform. It recommended two types of inquiry. Firstly, it recommended a 12 month inquiry by the Productivity Commission. The Panel also recommended a separate independent review to assess the Australian Government's processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements. We note that on 24 November 2015 the Government published its response to the Harper Review.² The Government supported the review that the Commission is currently undertaking into IP arrangements but rejected the latter review, noting that '[t]he Government already has robust arrangements in place to ensure appropriate levels of transparency of our negotiating mandate while protecting Australia's negotiating position.' We nevertheless observe that the board range of issues canvassed by the Commission in its Issues Paper purports to cover Australia's approach to intellectual property in international treaty negotiations. We query whether this is either necessary or appropriate.

As we noted in our submissions to the Harper Panel, the Commission is faced with a huge task: reviewing Australia's intellectual property arrangements within 12

¹ *Review of intellectual property legislation under the Completion Principles Agreement: Final Report by the Intellectual Property and Competition Review Committee*, September 2000, p27

² Government Response to Completion Policy Review, p 9
http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt_response_CPR.ashx

months.³ 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.

This submission is concerned only with copyright. Copyright is a significant contributor to the Australian economy. In a study recently conducted by PwC, copyright industries were found to be the fourth largest industry in Australia.

In addition, in 2014 copyright industries:

- employed just over 1 million people (specifically, 1,000,167 people), which constituted 8.7 per cent of the Australian workforce;
- generated economic value of \$111.4 billion, the equivalent of 7.1 per cent of gross domestic product (GDP); and
- generated just over \$4.8 billion in exports, equal to 1.8 per cent of total exports.

This is the fourth study of this kind that the ACC has commissioned since 2000. Based on World Intellectual Property Organisation (WIPO) methodology and using Australian Bureau of Statistics data, these studies enable a longitudinal view of Australian copyright industries and facilitate a comparison with other economies in the region and elsewhere. They report is available on our website.

<http://www.copyright.org.au/admin/cms-acc1/images/1355629560553d73e0a5427.pdf>

It is clear that Australian copyright industries continue to make a significant contribution to the Australian economy. Moreover, as the report acknowledges, important social and cultural benefits flow from the creation of copyright material.

It is also useful to look at the *2015 Global Innovation Index* which ranks Australia 17th out of 141 countries. While the results vary, we note that Australia rates quite highly on creative output.⁴

It is against that background that we make this submission.

FRAMEWORK

The Issues Paper states “The goals of the IP system are articulated in the terms of reference provided to the inquiry:

... that the intellectual property system provides appropriate incentives for innovation, investment and the production of creative works while ensuring it

³ See our submission in response to the Harper Issues Paper, Draft report and Final report on our website.

http://www.copyright.org.au/acc_prod/ACC/Submissions/SUBMISSION_IN_RESPONSE_TO_THE_COMPETITION_POLICY_REVIEW_ISSUES_PAPER.aspx

http://www.copyright.org.au/acc_prod/ACC/Submissions/Submission_in_Response_to_The_Competition_Policy_Review_Draft_Report.aspx

http://www.copyright.org.au/acc_prod/ACC/Submissions/Submission_on_Harper_Final_Report.aspx

⁴ <https://www.globalinnovationindex.org/content/page/gii-full-report-2015/#pdfopener>

does not unreasonably impede further innovation, competition, investment and access to goods and services. (Hockey 2015)”⁵

The Commission then proposes a framework for assessing intellectual property arrangements in Australia: effectiveness; efficiency; adaptability; and accountability.

In our submission, the goals of the IP system require closer examination. The Constitutional power to legislate with respect to Intellectual Property is part of the general plenary power of the Commonwealth.

“51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

... (xviii) copyrights, patents of inventions and designs, and trade marks;”

At its highest level, therefore, the goal of the IP system in Australia is peace order and good government – the public welfare. This is to be contrasted with other jurisdictions. For example, in the United States, the copyright power is designed to promote ‘science and the useful arts’.⁶

The principal legislation provides little guidance as to the objects of IP. For example, there is no objects clause in the *Copyright Act 1968*. It is simply an “Act relating to copyright and the protection of certain performances, and other purposes”.

The *Report of the Committee Appointed by the Attorney General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* otherwise known as the *Spicer Committee Report* of 1959 is commonly cited as setting out the foundation of modern copyright law in Australia.

“The primary end of the law on this subject is given to the author of a creative work his just reward for the benefit he has bestowed on the community and also encourage the making of further creative works.”

The Spicer Report goes on to state:

*“On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as is possible, that the rights conferred are not abused and that study, research and education are not unduly impeded. In weighing up these factors, we must of course have regard to our existing and possible future international obligations”.*⁷

While the goals of IP as set out in the terms of reference bear some similarity with this statement from the Spicer Report, they go a good deal beyond the modest purposes set out there. For example, the Spicer Report simply refers to ‘study, research and education’. In our submission, it is difficult to say that one of the goals of copyright is not to unreasonably impede access to goods and services. Indeed, copyright owners generally have an exclusive right to publish their material. The converse of this is that they also have a right not to publish. For example, the author Harper Lee’s novel *Go Set A Watchman* was written in the 1950s but only published

⁵ Page 7.

⁶ Article I, Section 8

⁷ Paragraph 13, *Spicer Report*.

in 2015. While this might be difficult to explain from an economic perspective, it reflects the important cultural imperatives of the copyright system.⁸ Therefore, the first point we wish to make is that we do not necessarily agree that the goals of IP are as stated in the terms of reference.

The second issue is how to determine the public welfare when it comes to IP? We query whether the parameters proposed by the Commission: effectiveness, efficiency, adaptability and accountability are appropriate measures for scrutinising intellectual property rights.

IP is a form of property. Under sub-section 196(1) of the *Copyright Act 1968* copyright is recognised as a form of personal property and may be assigned, licensed or bequeathed in a will. The question is whether the parameters set out are appropriate for assessing property rights?

By analogy, it may be possible to review the Torrens title registration system according to these parameters, however, it is difficult to imagine a situation whereby real property rights are subject to similar scrutiny. A more recent example and one involving intangibles is the *Personal Properties Security Act 2009* which sets up a registration system for securities over personal property. It is worth noting that a statutory review of this legislation has focused on the effectiveness and efficiency of the system of administration, rather than the rights themselves.⁹ In our submission, this is consistent with the constitutional guarantee of acquisition of property on just terms.¹⁰

In our submission, the systems for administering IP rights lend themselves to this kind of scrutiny more easily than the rights themselves. In this context, we note that unlike other forms of IP, the copyright system has no formalities.¹¹ Therefore we query whether the Commission's methodology is well suited to examining the copyright regime.

ROLE OF INSTITUTIONS

As noted above, in our submission the systemic aspects of IP lend themselves to the type of analysis proposed by the Commission better than the rights themselves. The Issues Paper notes the significant role played by institutions administering IP. In this regard we note that under the September Administrative Arrangements Order, responsibility for copyright has moved to the Department of Communications and the Arts. We note that this is first time since Federation that responsibility for copyright has moved from the Attorney-General's portfolio. Although it is still being administered separately from industrial property for which IP Australia has responsibility. It has yet to be seen what impact, if any, this will have on the administration of copyright in Australia.

In our submission, it is important that agencies administering IP be:

- experts in their field;
- adequately resourced; and

⁸ See further the submission of AMPAL.

⁹ See <http://www.ag.gov.au/consultations/pages/StatutoryreviewofthePersonalPropertySecuritiesAct2009.aspx>

¹⁰ Section 51(xxxi)

¹¹ Article 5(2) *Berne Convention for the Protection of Literary and Artistic Works*

- impartial.

We also **note** that the Issues Paper mentions the role on international institutions. In our submission, this should not be surprising. Not only does Australian copyright law have its foundations in an imperial statute, Australia joined the *Berne Convention* in 1928, some 60 years before the United States of America. Indeed as the above quote from the Spicer Report indicates, international influence dates back to the earliest times.

ENFORCEMENT

It is instructive to refer to a quote from a recent WIPO report:

*“Most decisions on copyright policy are not influenced by economists because of the relative scarcity of economic literature that analyzes the economics of copyright as a whole. Existing work on the economics of copyright follows different approaches and, in most cases, focuses on a specific area of copyright. One of the most important points of departure in surveying the economic contributions of copyright industries is the adoption of certain assumptions. In order to study the quantifiable characteristics of activities protected by copyright, it is necessary to assume that copyright protection has been enforced and that economic activities are in compliance with the law”*¹²

We note that traditionally Australia does not have a high rate of IP litigation.¹³ In our submission this is partly cultural, partly because we have highly developed blanket licensing models and partly because of the expense and delay that comes with litigation.

In recent years, amendments have been made to allow lower courts such as the Federal Circuit Court to hear IP matters.¹⁴ We do not, however, have a dedicated small claims court for IP matters. We note that the IP Enterprise Court has had some success in the United Kingdom.¹⁵ For example, at his recent Gurry lecture in Australia, Birss J who was the first judge to sit on the IP Enterprises Court commented on the usefulness of the court for photographers bringing copyright infringement matters. We note that the USA has also been discussing a small claims jurisdiction for copyright matters over a number of years. This may be something worth exploring in the Australian context. We also note that the Copyright Tribunal of Australia has a role in setting royalty rates. It is currently reviewing its procedures.¹⁶

While section 115 of the *Copyright Act* enables a court to into account ‘likely infringements’ when assessing damages in matters concerning ‘electronic commercial infringements’ Australia does not have a system of statutory damages such as exists in the United States. In our submission, this is a significant factor in determining whether or not an Australian rights holder will institute legal proceedings.

¹² Paragraph 56, *WIPO Guide on Surveying the Economic Contribution of Copyright industries*
http://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf

¹³ See, for example, the submission of Copyright Agency|Viscopy.

¹⁴ See, for example, the *Intellectual Property Amendment (Raising the Bar) Act 2012*.

¹⁵ See for example, C Helmers, Y Lefouil, I McDonagh *Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013*, 2015.

¹⁶ See <http://www.copyrighttribunal.gov.au/practice-direction>

Indeed, even in relatively straightforward proceedings for copyright infringement, a court still has to go through the process of assessing damage.¹⁷

Australia recently made amendments to address the issue of infringements occurring online. Section 115 A of the *Copyright Act* now enables rights holders to request a court to issue an injunction whereby ISPs are required to block access to infringing overseas websites. This procedure has been effective overseas and it is our expectation that it will be so here too. In addition, members of the content and communications industries have been working to develop a code of conduct that will inform Australia's "safe harbour" for copyright infringements that occur on the networks of ISPs.

We believe that these are both important initiatives. However, also important is the development of innovative business models to satisfy consumer demand. In our submission, the market is already doing this. See for example, the *Digital Content Guide*. <http://digitalcontentguide.com.au/>

INTERNATIONAL OBLIGATIONS

We comment only briefly to note that while international treaties have attracted some controversy in recent years, they have always been a feature of the Australian IP system. Indeed, in our submission, the international IP system is more important than ever in facilitating trade in the digital environment.

Traditionally, IP treaties have afforded members states a high degree of discretion in relation to domestic implementation. More recently, the IP chapters in Australia's bilateral and plurilateral trade agreements have been drafted with a high level of specificity. It is an open question as to whether this style of treaty drafting is desirable. However, it is important to remember that these trade agreements are economy-wide agreements and are not specific to IP.

The one IP specific agreement that has been negotiated, the Anti-Counterfeiting Trade Agreement was never implemented following a critical report by the Joint Standing Committee on Treaties. In our submission, this tends to show the rigour of Australia's existing mechanisms for assessing its international obligations. This view is supported by the Government's response to the Harper Report referred to in the background section of this submission.

Given the breadth of the Commission's inquiry, we shall not focus on Australia's existing international obligations as this would be largely a theoretical exercise.

COPYRIGHT

In this part of our submission, we address some fundamentals of copyright law. While it is true that at first blush, copyright protection would appear easier to obtain and to last for much longer than other forms of IP protection, the real position is somewhat more nuanced.

¹⁷ See, for example, *Australasian Performing Right Association Limited v Riceboy Pty Limited & Anor* [2011] FMCA 942 (28 November 2011) (Driver FM).

To what extent does copyright encourage additional creative works, and does the current law remain ‘fit for purpose’?

While there is no registration system for copyright, there are some important prerequisites for protection.

Idea/expression dichotomy

Firstly, copyright does not protect ideas. It only protects the particular way they have been expressed. This means that facts, information and styles are not protected by copyright. That is, copyright only relates to the way something is expressed. In this way it is a far more limited form of property than other IP rights such as patents.

Originality

Secondly, something must be original to qualify for copyright protection. Originality does not require uniqueness; rather it requires that the copyright material be the product of the skill and labour of a human author. This reinforces the principle that copyright is intended to reward individual creativity. Hence, in recent cases the courts decided that there was no copyright in a television guide or in a telephone directory produced through automation.¹⁸ And things lacking in substance such as names, titles and slogans will also not qualify for copyright protection, although they may be able to be registered as trade marks. For example, a court recently found that there was no copyright in headlines.¹⁹

The level of protection has a direct relationship with the originality of the copyright material

While the low threshold for copyright protection in Australia is often criticised, in our submission the level of originality has a direct correlation with the robustness of the rights. That is because copyright is infringed when someone uses a *substantial* part of another’s copyright material in one of the ways reserved for the copyright owner without the copyright owner’s permission. Substantiality is a qualitative rather than a quantitative test, but as a rule of thumb, the less original something is, the more of it you will have to use before it is considered a substantial part. For example, reproducing a small part of a highly original portrait might be a copyright infringement whereas reproducing a small part of a line drawing is unlikely to be an infringement of copyright in the line drawing.

Put another way, the more generic copyright material is, the harder it will be to prove that any third party is using the copyright material itself (the expression), rather than the idea behind the copyright material. A recent example which has attracted some attention is the failure of television production companies to prevent others from using television formats.²⁰

Only some uses are covered by copyright

As indicated above, copyright does not cover all uses. For example, lending a book or exhibiting a painting is not an exercise of copyright.

¹⁸ *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149.

¹⁹ *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984.

²⁰ See, for example, *Seven Network (Operations) Limited v Endemol Australia Pty Limited* [2015] FCA 800 (06 August 2015). This was an application for an interlocutory injunction in relation to *My Kitchen Rules*.

Public Domain

And of course, copyright only has a limited (albeit lengthy) duration. This means any material in the public domain is not affected by copyright. Given Australia's status as a net copyright importer one may query the rationale for this lengthy term of protection. However, this is largely an academic discussion given our international treaty obligations. In our observation, at a practical level, very little copyright material is still in commerce and the rights enforced after a few years.

In addition to these limitations, the copyright system also enshrines key exceptions. These limitations and exceptions are central to the copyright system and make it distinct from other forms of IP. They are key features of the copyright infrastructure that ensure that it is fit for purpose. We discuss the exceptions further below.

Does the 'one size fits all' approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?

We query what the Commission means by 'one size fits all'.

Subject matter

Copyright subsists in eight different categories of material: literary, dramatic, musical and artistic works and sound recordings, films, broadcasts and published editions (known as subject matter other than works).

Rights

Different rights attach to different types of copyright material. For example, there is no adaptation right for artistic works.

Duration

And in many instances there are different periods of protection. For example published edition copyright only lasts for 25 years from publication and copyright material created by the government only enjoys protection for the life of the author plus 50 years.

Ownership

The general rule is that the creator is the first owner of copyright. However, different rules apply for different types of copyright material created in different situations. For example, copyright in photos taken for private or domestic purposes is generally owned by the client rather than the photographer; material created as part of a person's employment is generally owned by the employer and material created under the direction or control or first published by the Crown will be owned by the Crown. All these rules are displaced where there is an agreement to the contrary.

Exceptions

And of course, different exceptions apply to different types of copyright material. For example, it is not an infringement of copyright to reproduce three dimensional art works on permanent public display or to perform a literary work in a class for educational purposes.

As noted above, the level of protection for copyright material will largely depend on the material itself. That is, providing incentives for the creation of additional material is inherent to the copyright framework.

Are the protections afforded under copyright proportional to the efforts of creators?

As we have noted above, in a practical sense, the protection afforded a creator will generally correspond with the originality of their material. Neither does copyright necessarily reward the level of effort. That is left to the market. For example, most film productions make a loss. In our submission, the copyright regime does not differ from other property systems in this regard.

Are there options for a ‘graduated’ approach to copyright that better targets the creation of additional works?

We are not quite sure what the Commission means by a ‘graduated’ approach. We note that minimum standards for copyright protection are set by international law. In our submission, commercial arrangements may be the best way of targeting the creation of additional work. For example, in the publishing industry, it is common for rights to revert to an author if a book goes out of print and remains out of print for a certain period.

Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom’s Copyright Hub in enabling value realisation to copyright holders?

In our submission licensing solutions are the lynchpin of a modern copyright system.

While there will always be a need for detailed negotiations for high value transactions, better licensing solutions will facilitate low value, high volume transactions. Many such models already exist, for example Creative Commons, pre-cleared content from stock libraries such as Getty Images and of course the blanket licences available from copyright collecting societies. We refer to and support the submissions of our collecting society and industry members in this regard.

We believe that there is merit in examining a Copyright Hub type interface in Australia and would welcome the opportunity to discuss the options with the Commission.

At the consumer end of the market, there has been a huge proliferation of digital content services in recent years. For example, the subscription models used by Spotify and Netflix were only introduced to Australia in the last few years but are now common place and replicated by many other services. Many of these are set out in the *Digital Content Guide* referred to earlier in this submission.

In our submission, the Harper Panel’s recommendation in favour of the abolition of the exception in s 51(3) of the *Competition and Commuter Act 2010* (CCA) puts at risk the framework upon which rights holders rely to develop these innovative business models. Sub-section 51(3) provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not excepted). We note that similar recommendations have been made in successive reviews, including reviews by the Productivity Commission. Nevertheless, no government has acted on these recommendations. In the present context we note that the Turnbull Government has postponed a

decision on this recommendation until the Commission has completed its inquiry into IP Arrangements.²¹

While such an amendment may 'tidy up' the CCA, it is not apparent to us how it meets the Commission's broader objectives. In our view, this amendment could create further obstacles and uncertainty for rights holders investing in new business models and licensing solutions, such as content licensing hubs for low value, high volume transactions. Indeed, we note that in a recent critique of the Harper Report, Brent Fisse has pointed that while the Panel purports to base its recommendation on international norms, there are some significant differences with the US and EU which, on its face, the Panel does not seem to have considered.

"However, under US law and EU law, 'the relevant circumstances of the transaction' include the efficiencies served by the transaction and not merely the lessening or increasing of competition. The operation of the rule of reason in those jurisdictions is not examined. Yet it is the rule of reason that largely explains why the value of copyright has not been diminished for example in the US by the general application of competition prohibitions to IP-related conduct."²²

In our submission, the proposal put forward by the Harper Panel to give the ACCC power to grant exemptions is a poor proxy for s 51(3). We urge the Commission to consider these matters.

**Are moral rights necessary, or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)?
What is the economic impact of providing moral rights?**

Moral rights are provided for in Article 6*bis* of the *Berne Convention for the Protection of Literary and Artistic Works* which is the foundation copyright treaty. Having joined *Berne* in 1928, Australia finally implemented its obligations in the *Copyright Amendment (Moral Rights) Act 2000*.

With respect to the Commission, we are unaware of any debate about the status of moral rights. They are personal rights, distinct from the economic rights of copyright. Unlike economic rights, they are personal to the author and remain inalienable.

Moral rights comprise three rights:

- the rights of attribution of authorship;
- the right against false attribution of authorship; and
- the right of integrity of authorship.

The right against false attribution of authorship existed in the *Copyright Act* prior to the 2000 amendments. It has some similarity with the common law of passing off or misleading and deceptive conduct in s 18 of the CCA. The rights of attribution of authorship and integrity of authorship do not have proxies elsewhere in Australian law.

²¹ See Government Responses to Harper Review, p 9.

²², B Fisse, 'The Australian Competition Policy Review Final Report 2015: Sirens' Call or Lyre of Orpheus?' (NZ Competition Law & Policy Institute, 26th Annual Workshop, Auckland, 16 Oct 2015) <http://www.brentfisse.com/publications.html>

Moral rights have no direct economic impact. They are intended to enhance respect for creators and to go some way to addressing the inequality of bargaining power creators often have in negotiating commercial transactions. In the words of the then Attorney-General, the Hon Daryl Williams QC, they are about:

‘acknowledging the great importance of respect for the integrity of creative endeavour. At its most basic, this bill is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and of those who create them.’²³

In many instances industry practice is to require creators to provide ‘comprehensive consents’ to potential moral rights infringements. Creators seldom have sufficient leverage to negotiate such clauses.

While we admire the Commission’s concern to undertake a comprehensive examination of IP arrangements, in our submission, moral rights are not relevant to the Commission’s inquiry.

What have been the impacts of the recent changes to Australia’s copyright regime?

The last comprehensive amendments to the *Copyright Act* occurred in 2006. In addition to making the Act compliant with the Criminal Code, these amendments also introduced a range of new exceptions into the Act, including exceptions for time shifting and format shifting, fair dealing for parody or satire and the flexible dealing provision in section 200AB.

There has been very little litigation in relation to any of these provisions. As noted previously, that is not surprising in the Australian legal context. Anecdotally we know that comedians have embraced the parody or satire exception,²⁴ while libraries and educational institutional have been slower to take advantage of the flexibilities in section 200AB.²⁵

One of the few instances where there has been litigation was when Optus purported to rely on the time shifting exception to launch its “TV Now” catch up service. While critics cited this as an example of the limitations of the exception, we do not agree. In our submission, the time shifting exception functioned effectively to prevent Optus from free-riding off content licensed by Telstra. Nor has this stifled the development of many new licensed catch-up TV services.²⁶

²³ *Copyright Amendment Bill 1999* second reading speech The Hon. Daryl Williams QC.

²⁴ Interview with Fiona Phillips and Julian Morrow on ABC Radio 13 August 2012
<http://blogs.abc.net.au/victoria/2012/08/satire-and-parody-in-australian-media-is-it-legal.html>

²⁵ See, for example, the research of Dr Emily Hudson <http://www.vala.org.au/direct-download/vala2010-proceedings/110-vala2010-session-8-hudson-presentation/file>

²⁶ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

Is there evidence to suggest Australia’s copyright system is now efficient and effective?

Australia’s copyright industries are in a state of transition. As the latest PwC Report shows, copyright industries continue to form an important part of the Australian economy. But it is not a time for complacency. It is important that we get the regulatory models right in order for copyright industries to meet their growth potential.

What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

We encourage the Commission to take a long term view of Australia’s IP arrangements, rather than be captured by a particular point in time. It is necessary to be satisfied that the benefit of any change will outweigh the costs. In our submission the market is and will continue to find solutions to existing challenges.

How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?

As noted above, exceptions have always been a fundamental part of the copyright ecosystem. In our submission, whether an exception is called fair use or fair dealing is less important than fairness itself. For example, in Canada the way the courts have interpreted “fair dealing” has had devastating effects on the local publishing industry as highlighted in Copyright Agency|Viscopy and Oxford University Press’ submissions to this inquiry. And the way that the “fair use” doctrine has developed in the United States in recent times has facilitated free-riding behaviour.²⁷

Professor Henry Ergas observed at the Copyright Law and Practice Symposium in March 2014, economists are concerned less with fairness and more with efficiency:

“The growing significance of transformative use may increase the importance of both the incentives for investment and of low transactions costs – and both of these tend to make for clearer, if not necessarily stronger, rights. How that affects the desirability of a fair use provision really depends on how you assess the costs, benefits and possible risks such a provision would give rise to. Assessing that requires looking not only to evidence but also to the standard of proof required to justify change. It’s not merely a question of whether there is evidence that circumstances have changed; one also needs to examine whether that evidence is sufficiently compelling to establish that the benefits of change will outweigh its costs.”²⁸

The excerpt from Professor Ergas highlights the significance of ‘transformative use’ in recent fair use jurisprudence in the United States. In finding that a particular unauthorised use of copyright material is ‘transformative’, United States courts have readily been able to find that the use is fair because it is not competing in the same market or potential market as the original copyright material. However, in our submission, the potential market for copyright material is by no means easy to determine given the lengthy term of copyright protection. Put another way, by

²⁷ See for example, *Prince v Cariou* which involved the re-use of a photographer’s images without permission. <http://www.aippblog.com/index.php/courts-making-artistic-judgment-is-simply-not-fair-says-chris-shain-on-behalf-of-the-aipp/>

²⁸ (2013) 31 *Copy Rept* 1.

focusing on transformative use, courts in the United States have tended to get the market definition wrong. And in doing so, they have failed to have adequate regard to the free-riding concerns caused by such uses.

In our submission, fairness should continue to be informed by the three-step test which underpins copyright exceptions in international law. That is, limitations and exceptions to exclusive rights should be confined to:

1. certain special cases:
2. which do not conflict with a normal exploitation of the work: and
3. do not unreasonably prejudice the legitimate interests of the rights holder.

We note that the Commission has been directed to take into account the ALRC's Report into *Copyright and the Digital Economy*. We refer the Commission to our submissions to that inquiry.²⁹

Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?

An important practical element of fairness is predictability, which we discuss further below. In our submission, relying on an exception is always going to be less certain than a licence. Having said that, industry practices have developed around existing exceptions. For example, fair dealing for news reporting is commonly relied on in the media.

Any new exception will necessarily involve a level of uncertainty. And the less specific the exception, the more uncertain. This is particularly relevant in Australia where there have only been four fair dealing decisions.³⁰

For example, section 200AB is effectively a fair use exception for a particular sector. However as mentioned above, that sector is traditionally risk averse and so has been slow to take advantage of the flexibilities offered by that provision. This may be contrasted with Optus, for example, who were quick to test the boundaries of the time sifting exception in the *Copyright Act*.

In our experience, a party's willingness to rely on an exception depends to a large degree on their attitude to risk. The less clear an exception is, the more they will need to engage in risk management. This is often difficult for small businesses and individuals. The ACC publishes a range of easily accessible information sheets to assist people in that process.³¹

Do existing restriction on parallel imports still fulfil their intended goals in the digital era?

Parallel importation is an area that has received much scrutiny over the last two decades. We do not support the removal of restrictions as they relate to books as recommended by the Harper Panel. And we are disappointed that the Government

²⁹http://www.copyright.org.au/acc_prod/ACC/Submissions/SUBMISSION_TO_THE_AUSTRALIAN_LAW_REFORM_COMMISSION_COPYRIGHT_AND_THE_DIGITAL_ECONOMY_.aspx

³⁰ For further information on copyright litigation statistics, see the submission of Copyright Agency|Viscopy.

³¹ See the 'Find an Answer' section of our website.

http://www.copyright.org.au/acc_prod/ACC/Find_an_Answer/ACC/Public_Content/Find_an_Answer.aspx?hkey=b0de2cd4-daa3-47da-95a5-1e7ecdc8dddc

has pre-empted the work of the Commission and announced its support for this recommendation (while retaining the restriction for cars). In our submission, this downplays the economic and cultural significance of Australian copyright industries.

Consumers already can and do use the Internet to price compare and purchase goods from other jurisdictions, for example, through Amazon. The parallel importation laws do not prohibit this. They only apply to commercial entities wanting to import stock from other jurisdictions. As we noted in our submission to the Harper Panel, there are sound cultural reasons for Australia's remaining parallel importation restrictions in relation to copyright material.

To quote Dr Warwick Rothnie:

'if you want people to write Australian books, the publishers are going to have to earn most of their income back from Australia, or that's where the publishers expect they will have to earn most of their income back. Now I raise that because that's one of the ramifications that might flow from the committee's recommendations. It might be illustrated by Canadian experience back in the 1980s and 1990s. The Canadian publishers and authors claimed they needed to charge a higher price for books by Canadian authors due to the volume of sales available to offset the cost base. However, most of the buying public in Canada lives something like within 50 miles or so of the border with the USA and the consumers were able to go across the border and pay lower US prices for books. This was said to be undermining the price that could be charged in Canada for books by Canadian and so leading, or potentially leading, to reduced investment in publishing Canadian authors. Now that can be a real worry for us. I don't know about you, but I quite enjoy reading books written by Australian authors.'³²

We are also perplexed why the Harper Panel has singled out books for attention and not addressed other copyright industries that enjoy parallel importation restrictions.³³ The point made powerfully by Australian authors and publishers (including in submissions to the Commission) also applies to other copyright industries. For example, local distribution of DVDs impacts on the revenue available for investment in local film and television programs. Viewed in this way, the restrictions on parallel importation may actually foster diversity in the interest of consumers.

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?

The ACC does not advocate radical amendment of the *Copyright Act*. Rather we look to the market to deliver licensing solutions that will enable creators to earn a living and the public to benefit from that creative output.

³² 'At What Cost? The IT Pricing Inquiry and Copyright' (2013) 31 *Copyr Rpt* 8.

See also, Canadian Heritage *The Role of the Book Importation Regulations in Canada's Marketplace for Books*, April 2012.

³³ See our information sheet 'Importing Copyright items'

http://www.copyright.org.au/acc_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=a720c3f1-cb87-4406-9fef-1f1bbb3442d0&iFileTypeCode=PDF&iFileName=Importing%20Copyright%20Items

We trust that the Commission finds this submission useful. Please do not hesitate to contact us if we can be of further assistance.

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 2 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 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
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