



Aboriginal and Torres Strait Islander Visual Arts and Crafts Issues Paper

13 December 2021

The Australian Copyright Council (the ACC) is grateful for the opportunity to make comment on the Productivity Commission's (the Commission) [Aboriginal and Torres Strait Islander Visual Arts and Crafts Issues Paper](#) (the Paper).

About the Australian Copyright Council

1. The ACC is a small, independent, not-for-profit, non-government organisation dedicated to promoting understanding of copyright law and its application. Representing the peak bodies for professional artists and content creators working in Australia's creative industries and, Australia's major copyright collecting societies, we work to foster collaboration between content creators and consumers. We understand that some representatives from our affiliates are appearing before the Commission.
2. The ACC is a unique organisation:
 - it is the only dedicated copyright expert organisation in Australia
 - its focus is on copyright as it applies to all art forms
 - it provides advocacy, advice and information on copyright issues
 - it is a membership-based organisation, representing over a million creators.
3. The ACC has [27 affiliate member organisations](#)¹ representing over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries.
4. As part of its services, the ACC provides [information, education, training](#) and free, [written legal advice](#) to those who fall within its guidelines including the staff of libraries, galleries, museums and educational institutions.²

¹ See Appendix 1.

² See Appendix 2.

5. The ACC provides brief background comments only on issues raised regarding the rules of the market in section 3 (The role of governments) of the Paper, and the questions raised in relation to the limitations of existing intellectual property protections.³
6. The ACC made a submission to the 2019 Environment and Communications Legislation Committee's (the Committee) inquiry (Inquiry) into the [Competition and Consumer Amendment \(Prevention of Exploitation of Indigenous Cultural Expressions\) Bill 2019 – Parliament of Australia \(aph.gov.au\)](#)⁴ which sought to amend the *Competition and Consumer Act 2010* (CCA) to 'prevent the proliferation of fake Aboriginal and Torres Strait Islander art and art products'⁵. The ACC's CEO, Eileen Camilleri, appeared before the Committee.⁶
7. The *Copyright Act 1968* (Cth) (Copyright Act) provides for economic rights and moral rights for creators of copyright material. We comment below on the division of the two groups of rights and mention other sections of the Copyright Act relevant to the work of First Nations artists.

Economic rights

8. Part III of the Copyright Act outlines the rights vested in original literary, dramatic, musical and artistic works (works).⁷ Visual arts and crafts fall within the definition of 'artistic works'⁸. These economic rights include the right to:
 - (i) reproduce the work in a material form
 - (ii) publish the work, and
 - (iii) to communicate the work to the public.⁹
9. In its submission to the 2019 Inquiry,¹⁰ the ACC outlined that Australian copyright law applies to Aboriginal and Torres Strait Islander visual arts and crafts in the same way as it applies to other artistic works. There are no special provisions in the Copyright Act for Aboriginal and Torres Strait Islander works, and no recognition of customary or traditional First Nations laws. Some of the consequences of this are:
 - (i) copyright in an artistic work usually expires 70 years after the death of the creator so there is no copyright protection for old First Nations artworks such as rock art

³ pp6, 11 of the Paper.

⁴ [Submissions – Parliament of Australia \(aph.gov.au\)](#)

⁵ Explanatory Memorandum, Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) p 1.

⁶ See Commonwealth [Environment And Communications Legislation Committee](#), Senate, 6 November 2019 p 20.

⁷ Part IV of Copyright Act covers copyright in 'subject-matter other than works'.

⁸ Defined Copyright Act s 10.

⁹ Copyright Act s 31 (b).

¹⁰ Australian Copyright Council - Submission in Response to the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (ACC 2019 CCA Response).

- (ii) because copyright does not protect ideas, methods or styles, it does not prevent people using styles belonging to and readily identifiable to certain First Nations communities such as dot painting, and
 - (iii) there is only an obligation to obtain permission from the copyright owner – there is no obligation to obtain permission from a First Nations community whose customary laws apply to uses of a work or style of work.
10. The importance of copyright to the ecosystem in which First Nations artists work is demonstrated by the reliance on copyright to license and transact their work including through organisations including the Copyright Agency.¹¹
11. In cases considering copyright and Indigenous art, the economic impact of copying has been highlighted, in addition to the wider cultural harm caused. In the case of *Milpurrurru & Ors v. Indofurn Pty Ltd & Ors*¹² it was said:
- ... copyright law damages can be awarded only insofar as the "pirating" causes a loss to the copyright owner resulting from infringement of copyright. Nevertheless, in the cultural environment of the artists the infringement of those rights has, or is likely to have, far reaching effects upon the copyright owner.
12. The case of *John Bulun & Anor v R & T Textiles Pty Ltd*.¹³, also noted that in addition to the economic harm of unauthorised reproductions, infringement also caused irreparable harm to the artist's community and their standing in the community:
- It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threatens our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership ...
13. The court accepted that the community could not own the copyright, because only the artist could own the copyright. However, the court found that because of the relationship between the artist and his community, and the responsibilities each had, under equity, the community had a special interest in ensuring the artist used their copyright to prevent misuse¹⁴.

Moral rights

14. The Copyright Act also provides a framework for moral rights¹⁵. These are personal legal rights belonging to individual creators of copyright works and cannot be transferred, assigned or sold. These are distinct to the economic rights which attach to a copyright work. As a

¹¹ See [Licensing Indigenous Artwork - Copyright Agency](#). Copyright Agency also administers the Resale Royalty Scheme, see p6 of the Paper.

¹² (1994) 54 FCR 240 at 145.

¹³ 41 IPR 513 at 519.

¹⁴ ACC 2019 CCA Response p 2.

¹⁵ Copyright Act Part IX.

result, the creator of a work, whilst holding the moral rights, may not be the copyright owner and so, not hold the economic rights.

15. Generally, creators have three moral rights. The right:
 - to be attributed (or credited) for their work
 - not to have their work falsely attributed, and
 - not to have their work treated in a derogatory way.
16. Like the economic rights, these last for the life of the creator plus 70 years. After the creator's death, moral rights are administered by their legal personal representative.
17. Unlike copyright, which may be assigned or licensed, creators cannot assign, transfer or sell their moral rights. Creators can give consent for their work to be used in specific ways but cannot assign the right to grant such consent.
18. Attribution for works of collective ownership is problematic given the personal nature of moral rights. As such, proper attribution and recognition of First Nations works, may be limited under the existing regime.¹⁶

Public art

19. The work of First Nations artists is often used for 'placemaking' in the development of public and community spaces.
20. Section 65 of the Copyright Act provides:

Sculptures and certain other works in public places

- (1) This section applies to sculptures and to works of artistic craftsmanship of the kind referred to in paragraph (c) of the definition of **artistic work** in section 10.
 - (2) The copyright in a work to which this section applies that is situated, otherwise than temporarily, in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast.
21. This exception from infringement for uses of 'public art' results in a diminution of potential income of First Nations artists in these circumstance.

Visual arts projects

22. Recording of film and sound recording of people's stories often occurs as part of recording visual arts projects and multi-arts projects. The joint ownership of these sound and film

¹⁶ For a discussion of the issues concerned the use of First Nations copyright work see the Australia Council for the Arts, *Protocols For Using First Nations Cultural And Intellectual Property In The Arts* (2019).

recordings as part of these projects is a factor to be considered in the development of these projects.

Conclusion

23. The ACC welcomes the Commission's examination of the existing intellectual property protections and their application to Aboriginal and Torres Strait Islander Visual Arts and Crafts. We have provided a brief outline of the issues in anticipation of the draft report. If the Commission requires further information in the interim on the issue of copyright, please let us know.

Eileen Camilleri
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Australian Copyright Council

13 December 2021

Appendix 1

Australian Copyright Council Affiliates as at 3 December 2021

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

1. [Aboriginal Artists Agency Ltd](#)
2. [APRA|AMCOS](#)
3. [Ausdance National](#)
4. [Australia New Zealand Screen Association](#)
5. [Australasian Music Publishers Association Ltd](#)
6. [Australian Cinematographers Society](#)
7. [Australian Directors Guild](#)
8. [Australian Guild of Screen Composers](#)
9. [Australian Institute of Architects](#)
10. [Australian Institute of Professional Photography](#)
11. [Australian Music Centre](#)
12. [Australian Publishers Association](#)
13. [Australian Recording Industry Association](#)
14. [Australian Screen Directors Authorship Collecting Society Limited](#)
15. [Australian Society of Authors](#)
16. [Australian Writers Guild](#)
17. [Big Studio Movie Licence](#)
18. [Copyright Agency](#)
19. [Design Institute of Australia](#)
20. [Illustrators Australia](#)
21. [Media Entertainment & Arts Alliance](#)
22. [Musicians Union of Australia](#)
23. [National Association for the Visual Arts](#)
24. [National Tertiary Education Union](#)
25. [Phonographic Performance Company of Australia](#)
26. [Screen Producers Australia](#)
27. [Screenrights](#)

Appendix 2

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free written legal advice service. This unique service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.