



# ARTS LAW CENTRE OF AUSTRALIA

## Intellectual Property Arrangements - Productivity Commission Inquiry

*Submission in response to the Productivity  
Commission Final Report*

**February 2017**

## INTRODUCTION

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to provide additional comments on the Final Report of the Productivity Commission on IP Arrangements (**Final Report**).

Arts Law is Australia's only community legal centre for the arts sector. Our area of expertise is the provision of legal advice regarding intellectual property (**IP**) matters affecting artists and arts organisations. Arts Law provides business advice, professional development resources, education and advocates on law and policy reform for the benefit of the creative sector.

Arts Law acknowledges there are challenges with the current copyright system. We appreciate Australia operates within a global copyright environment and there are tensions arising from expectations about accessibility and use of content, investment, competition, trade, innovation and consumer welfare. We understand the application of the Copyright Act needs review in the digital age. However, we do not agree the solution will be achieved through eroding a substantial part of creator's IP rights. We would prefer an approach of modifying the current fair dealing exceptions rather than an overhaul of the existing framework.

'Artists in the Black' (**AITB**) is a specialist program at Arts Law and facilitates legal advice and information about legal issues for Aboriginal and Torres Strait Islander artists and communities. We also advocate on issues relating to cultural appropriation<sup>1</sup>. Our experience is that Indigenous Cultural Intellectual Property (**ICIP**) does not have adequate protection under copyright law and the proposed changes in the Final Report would wear down the limited protections available.

Arts Law is particularly concerned with the following recommendations and findings in the Final Report which would affect our clients:

- an analytical framework for assessing the IP system (chapter 2);
- copyright term and scope (chapter 4);
- copyright use and licensing (chapter 5);
- fair use and fair dealing (chapter 6);
- registered designs (chapter 11);
- compliance and enforcement of IP rights (chapter 19).

The Final Report's commentary, findings and recommendations that address these areas are tipped in favour of consumers of copyright rather than creators. This is despite the fact that copyright is personal property<sup>2</sup> and is arguably the most important asset for providing an economic return for the time and labour creators invest into their creative output. The notion of dramatically expanding exceptions to copyright infringement in favour of consumers is akin to the suggestion of turning private property into a public park.

## WHAT DOES THE CREATIVE COMMUNITY THINK?

Arts Law is in the unique position of providing legal advice to creators and copyright holders from a diverse range of art forms and as such we are in a position to provide some insight into their relationship with copyright. In 2016, Arts Law advised clients on predominantly IP based matters (81% of our total advices), and of our total advices, 39% were specifically on copyright issues, with

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<sup>1</sup> <http://www.artslaw.com.au/news/entry/bob-katter-mp-takes-fake-art-harms-culture-to-parliament/>

<sup>2</sup> *Copyright Act 1968* s196(1)

12% of total advices on copyright infringement. On a daily basis we engage with creators from the following art form areas:

- i) Community Arts/Cultural Development/Festivals
- ii) Cultural Tourism
- iii) Design
- iv) Fashion
- v) Film/Video/Television/Broadcasting
- vi) Games
- vii) Indigenous Arts
- viii) Literature/Writing
- ix) Multimedia/Digital/New Media
- x) Music (inc performers)
- xi) Performing Arts (not music)
- xii) Photography
- xiii) Visual Arts and Craft

In undertaking advocacy on law and policy reform, Arts Law's goal is to maintain or enhance the rights afforded to artists and promote their ability to access those rights.

As a not for profit organisation, Arts Law does not have any corporate agenda behind our submissions and instead we seek to represent the concerns of the creative community.

In an effort to represent the views of our stakeholders in our response, we invited them to participate in a sample survey. The purpose of the survey was to get more information about whether creators are using other people's content, whether they utilise the fair dealing exceptions and to see if there is an appetite for change to the current exceptions in the Copyright Act.

The short survey was distributed to our recent clients, subscribers of our newsletter and our social media channels. Due to time limitations, we gave respondents a one week period to submit their responses. We received over 500 responses within the first 72 hours and over 600 responses within the week. We would have received even higher engagement with further time for consultation and more resources to widen the reach of the survey. Despite the time constraints, this sample survey reflects an interest from creators to have further involvement in the discussion about copyright.

## Key findings

- 1) 87% of respondents were artists and of these, 44% indicated they earn money from their copyright (through royalties or fees);
- 2) 49% of respondents said they have not used other people's content;
- 3) 49% of respondents said they have used other people's content in their work;
  - i) 60% of these respondents stated that they had tried to get permission to use other creator's content in their work, and that permission was granted;
  - ii) 13% have tried to get permission, but the fee was too high;
  - iii) 6% have tried to get permission, but it was refused;
  - iv) 5% have sought permission, with no response; and
  - v) 6% have used other creator's content without permission, but relied on the fair dealing exceptions.
- 4) 80% of respondents said that creators should always seek permission if they want to use the content of another creator, unless not required to by law.

- 5) 3% of respondents identified as being Aboriginal or Torres Strait Islander and of these respondents, the majority stated they don't use other people's content in their work and don't think others should use their content with their permission.

## Commentary from the creative community

Below are some example comments from respondents of the sample survey. We have included these comments as they provide a perspective from creators on their views about the current copyright system and proposed changes.

### 1. If you have used content created by other people in your work, have you ever considered the legal issues with doing this?

*'Fair Use' will destroy what extra income I rightfully earn, as well as the life of my copyrights for characters, works and art that are mine to use and exploit in manners benefitting me and my dependents. 'Fair use' exemptions would benefit content providers, not the creators themselves, ultimately causing atrophy to the creative arts. Everyone will lose, and Australians will see less of their culture(s) reflected in the arts.'*

– Illustrator

*'Using other people's works without consent or fair compensation robs artists of monies rightfully belonging to them'*

– Musician

### 2. Do you earn money (royalties or fees) from your copyright?

*'The amounts are tiny, and certainly do not feed me or my family, but they do feed my writing spirit, which would otherwise probably waste away. There is precious little validation out there for a writer: with this in mind, a few dollars a year can mean the world. : )'*

– Writer

### 3. Have you ever tried to get permission to use other people's content in your work (select all that apply to your experiences)?

*'I rarely use other content but if I do see something I would like to use I contact the copyright owner. Sometimes it's yes, sometimes no. I always expect to pay and I know what I want to pay and if it's too much for me I decide if I will pay it or not. If not, I don't use it. I work under the same principle as going into a shop. I see something I want, decide if I want it so much I will pay the price or not and go without. It's really quite simple.'*

– Photographer

### 4. Have you ever relied on Australia's 'fair dealing' exceptions to use someone else's content in your work?

*'Yes, I felt they were broad enough to permit my use. But, apart from 'research and study', the fair dealing exceptions lack certainty over how much you can use, so I would add to your survey: No, they were too vague so I didn't use content which perhaps I had a right to use.'*

– Multimedia/Digital/New Media artist

*'Yes, I felt they were broad enough to permit my use. I have used others' material for the purposes of research, study and teaching. I have operated within the appropriate guidelines, and have never found them restrictive...'*

–Writer

*'I didn't know about "fair dealing" until today.'*

– Musician

**5. Do you have a view on whether we should keep the 'fair dealing' exceptions or change the law so we have the United States 'fair use' exceptions?**

*'I STRONGLY support the law staying the way it is. Imagine if you built a car, then had to let someone else drive it around and make money from it while you had to walk. That is pretty much the gist of what is being proposed. Any such changes will benefit everyone but the creators. I for one find this incredibly objectionable, considering that many writers self-fund what they do and earn stuff-all from it. I took more than 12 years to write my first published novel -- that's 12 years of getting up at four in the morning so that I could write before I went to my full-time job in publishing at 7.30 or 8 a.m. I wrote on the weekends (when I wasn't spending them at work without overtime, that is). To be told then that the use without payment of my (or any other author's) work is somehow 'fair' is simply a nonsense. Fair to whom? Not the bloody person who wrote it, that's for sure.'*

–Writer

*'If an artist stands to lose money, or loose recognition is this fair? If a builder for instance was to lose money or recognition for work completed, would this also be fair?'*

– Multimedia/Digital/New Media artist

*'I don't think we should have to get permission to cover a track or use a piece of creative content for non-commercial use but the minute money changes hand then I believe the creator of the original content should be honoured financially and given credit. The new arrangements need to have a value, but without the original content there would be no product. Fair is fair.'*

– Musician

## **SUMMARY OF OUR POSITION AND FURTHER COMMENTS**

**Attached** for reference is a truncated version of Arts Law's submissions to the Productivity Commission IP Arrangements Draft Report April 2016 (**Annexure 1**) and to the Productivity Commission IP Arrangements Issues Paper October 2015 (**Annexure 2**).

In our view, the findings and recommendations in the Final Report do not significantly depart from the previous Productivity Commission IP Arrangements Draft Report April 2016. Accordingly, in the following (using the corresponding chapter headings from the Final Report), we refer to our previous submissions and, in some instances, make additional comments.

### **An analytical framework for assessing the IP system (chapter 2)**

#### **Recommendation 2.1**

See Arts Law's previous response:

- Annexure 1 – 2.1 (page 1)

Arts Law's additional comments:

The recommendations and findings in the Final Report do not adequately address concerns raised by Arts Law, Australia Council for the Arts and the Australian Institute of Aboriginal and Torres Strait Islander Studies regarding the protection of ICIP<sup>3</sup>. The Final Report supports the Australian Law Reform Commission's suggestion of a separate review to address the protection of Aboriginal and

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<sup>3</sup> Productivity Commission 2016, *IP Arrangements*, Inquiry Report No. 78, Canberra (p.58)

Torres Strait Islander people's ICIP. The reason given is that ICIP is affected by more than just IP laws.<sup>4</sup> We agree that issues related to the protection of ICIP are not restricted to the effect of IP laws.

However, the need for protection of the world's oldest living culture cannot be ignored or simply hived away. Any changes to copyright and other IP laws will have a real impact on Indigenous peoples' right to their heritage and must be addressed by the Government when responding to the Final Report.

We are in support of the Final Report's suggestion of 'bringing together a range of agencies to examine the issues of Indigenous cultural IP more holistically'<sup>5</sup> and would be pleased to see further information on how this would be implemented. However, any such inquiry should not be conducted in isolation of the recommendations given in the Final Report.

## Copyright term and scope (chapter 4)

### Recommendation 4.1

See Arts Law previous responses:

- Annexure 1 – 4.2 (page 2)
- Annexure 2 – 4.11 (page 4)

## Copyright use and licensing (chapter 5)

The Final Report completely overlooks Creative Commons, the widely accepted and used licensing platform that allows royalty free access to an enormous spectrum of content while maintaining the integrity of the creator's authorship. Creators can opt in or out of this platform and as such it presents a way for consumers and other creator's to interact with existing content. Creative Commons and other licensing solutions need to be considered here. The existence of Creative Commons is completely ignored in the report, which criticizes a system based on an incomplete analysis as to how it functions.

As stated on the Creative Commons Australia website, 'the CC licences provide a simple standardised way for individual creators, companies and institutions to share their work with others on flexible terms without infringing copyright. The licences allow users to reuse, remix and share the content legally.'<sup>6</sup> Without consideration of the Creative Commons licences and their application, we question the level of analysis of existing licensing models and productivity.

### Recommendation 5.1

Arts Law's comments:

Arts Law supports an amendment to the Copyright Act to make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception. We are in support of the current copyright exceptions and therefore believe this would strike a fair balance in the application of the legislation. In Arts Law's 2003 submission to the Review of *Copyright Amendments (Digital Agenda) Act 2000*, we stated 'the view has been expressed that this approach limits the ability of contracting parties to negotiate terms that may be more suited to their needs.'<sup>7</sup> On occasion this may be the case, however, we have concerns that often licensees are forced to accept terms that prevent them making use of the fair dealing or permitted purpose provisions in the Act. We feel that allowing copyright owners to contract out of provisions in the

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<sup>4</sup> Productivity Commission 2016, *IP Arrangements*, Inquiry Report No. 78, Canberra (p.58)

<sup>5</sup> IBID (p. 512)

<sup>6</sup> Creative Commons Australia <http://creativecommons.org.au/learn/licences/>

<sup>7</sup> Response to the Copyright Law Review Committee on Copyright and Contracts, Australian Copyright Council Sydney, 2003

Copyright Act swings the balance unevenly in their favour.’<sup>8</sup> We maintain this view and submit it in response to *Recommendation 5.1* of the Final Report.

In relation to the recommendation to permit the circumvention of technological protection measures for legitimate uses of copyright material, we are not opposed. However we query how the test of ‘legitimate use’s’ of copyright material will be assessed. The circumvention of technological protection measures should not be permitted where the user is infringing copyright.

### Recommendation 5.3

See Arts Law’s previous response:

- Annexure 1 – 5.2 (page 3)

### Recommendation 5.4

See Arts Law’s previous response:

- Annexure 1 – 5.2 (page 4)

## Fair use and fair dealing (chapter 6)

### Recommendation 6.1

See Arts Law’s previous responses:

- Annexure 1 – 5.3 (page 4)
- Annexure 2 – 4.1.2 (pages 4-5)

Arts Law’s additional comments:

Whilst overwhelmingly the submissions of Australia’s creators and creative industries reflect the view that fair use will damage our home-grown creators’ market and income, we note that similar concerns have also been raised by respected US commentators who are nonplussed that Australia would adopt US style fair use to the detriment of Australia’s successful creative industries and exports.

The Executive Director of international IP for the Global IP Center at the US Chamber of Commerce (**US Chamber**), Patrick Kilbride, published an opinion piece in response to the Final Report in *The Australian* newspaper on 9 February 2017. He articulated the US Chamber’s concerns around the unfair disadvantages that could flow from implementing the US ‘fair use’ model. Kilbride said ‘...a major false premise of the commission’s report is that “fair use” offers users of copyrighted works some degree of certainty. In fact, “fair use” is a famously ambiguous doctrine, its metes and bounds circumscribed in the US not only by statutory language but by more than a century of judicial interpretation.’<sup>9</sup> We agree with his comments, particularly in relation to the ambiguity of fair use.

We refer also to the recent findings by Dr. George S. Ford (the Chief Economist of the Phoenix Center for Advanced Legal and Public Policy Studies) on the economic and productivity effects stemming from fair use as published in his paper “Fair Use in the Digital Age”<sup>10</sup>. Dr Ford states ‘fair use can reduce the market potential of the original property and such reductions will slow the flow of new works, to the detriment of creators, consumers, fair users and society at large.’<sup>11</sup> Further, Dr

<sup>8</sup> Arts Law’s 2003 submission to the Review of *Copyright Amendments (Digital Agenda) Act 2000*

<sup>9</sup> Patrick Kilbride, *Unfair disadvantages could flow from US ‘fair use’ proposal*, *The Australian*, 9 February 2017 <http://www.theaustralian.com.au/arts/opinion/unfair-disadvantages-could-flow-from-us-fair-use-proposal/news-story/69b1604108094b09cb929ac8804bf07c>

<sup>10</sup> T. Randolph Beard, George S. Ford, Michael Stern, Phoenix Center Policy Paper No 51. *Fair Use in the Digital Age*, September 2016 <http://www.phoenix-center.org/pcpp/PCPP51Final.pdf>

<sup>11</sup> *Ibid*

Ford states ‘I believe that policymakers should focus first on significantly reducing theft, and that any discussion of expanding or altering provisions related to copyright’s exceptions and limitations must be accompanied by better enforcement of copyright than currently exists.’<sup>12</sup> We agree with Dr Ford’s view and would encourage consideration of his findings in any revisions to the current copyright exceptions in Australia.

As seen from the above, IP experts in the US are concerned that the application of fair use would be of detriment to Australian creators. Clearly, there’s further work to be done before implementing a fair use exception based on the US model.

### **Recommendation 6.2**

See Arts Law’s previous responses:

- Annexure 1 – 5.3 (page 7)
- Annexure 2 – 4.1.1 (page 4)

## **Registered designs (chapter 11)**

### **Finding 11.1**

See Arts Law’s previous responses:

- Annexure 1 – 10.1 (page 7)
- Annexure 2 – 4.2 (page 5)

## **Compliance and enforcement of IP rights (chapter 19)**

### **Recommendation 19.1**

See Arts Law’s previous response:

- Annexure 1 – 18.1 (page 8)

### **Finding 19.1**

See Arts Law’s previous responses:

- Annexure 1 – 18.1 (page 9)
- Annexure 2 – 3.3 (page 2-3)

### **Recommendation 19.2**

See Arts Law’s previous response:

- Annexure 1 – 18.1 (pages 10-11)

## **CONCLUSION**

Arts Law is concerned with the above discussed findings and recommendations in the Final Report. We appreciate that the Copyright Act needs modernising to better serve us in the digital age. A more sensible approach to overhauling the entire system would be to conduct a proper review of the current exceptions, limitations, enforcement provisions and proposals on how to amend them. The majority responses from an Arts Law sample survey support this view.

Alternative licensing solutions, such as Creative Commons, need to be considered as part of this review. The potential benefits of increased investment for, and education about, alternate licensing solutions should be explored.

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<sup>12</sup> Ibid



Arts Law maintains that the recommendations in the Final Report remain detrimental to the protection of ICIP and have not adequately addressed our concerns. Arts Law would like to see consultation with Indigenous creators and a clear plan moving forward on how ICIP protection will be addressed.

Arts Law would be pleased to provide further information or be involved in future consultation regarding the Government's response to the Final Report.

## **ANNEXURES**

**Annexure 1** – Arts Law's June 2016 submission to Productivity Commission IP Arrangements Draft Report April 2016

**Annexure 2** – Arts Law's Dec 2015 submission to Productivity Commission IP Arrangements Issues Paper October 2015