

# Inquiry into Australia's Intellectual Property Arrangements

Submission by Australian Policy Online (APO) to the  
Productivity Commission Draft Report *Intellectual  
Property Arrangements*

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## **About APO ([apo.org.au](http://apo.org.au))**

Australian Policy Online (APO) is the largest open access repository for public policy related documents, data, audio, video and other resources from Australia, New Zealand and internationally. Most of the 30,000 plus collection is grey literature sourced from over 4000 organisations including university research centres and departments (one third), government departments and agencies, NGOs, think tanks and consultants. Wherever copyright permits, APO hosts full text documents and data adding extensive metadata on resources, organisations and authors including issuing Digital Object Identifiers (DOIs) for documents and data and integrating ORCID identifiers.

APO is used by researchers, policy makers and analysts, advocacy groups, think tanks and professional associations, practitioners and industry across all sectors with annual visitor numbers at over one million visits. APO is recognised by researchers and research organisations as a key means of disseminating and communicating with key audience groups to achieve both engage and have impact.

APO was established in 2002 by researchers at the Swinburne Institute for Social Research, Swinburne University of Technology, to bring together and make discoverable research and resources on public interest issues, particularly digital grey literature.

National investment in APO amounts to over \$5 million with funding secured through National Competitive Grants Schemes including seven ARC LIEF and two Australian National Data Service grants, as well as contributions from universities and organisations including University of South Australia, University of Canberra, Australian National University, University of Melbourne, University of Sydney, Queensland University of

Technology, RMIT University, and the University of Adelaide. In 2014 APO was awarded 'Best Information Website' in the Australian and New Zealand Internet Awards.

### **Copyright, grey literature and public policy and practice**

A great deal of valuable research literature is produced and disseminated directly by organisations including academic centres and departments, outside of the commercial or scholarly publishing system. They include reports, discussion papers, briefings, case studies, literature reviews, fact sheets, evaluations, submissions, working papers, conference papers, data, technical reports and specifications, policies, strategic plans, infographics and much more. Known collectively by the term 'grey literature', it makes a substantial contribution to public policy, education, commercial innovation and social development.

Grey literature is sometimes described and even defined as 'unpublished' however in terms of copyright law they are usually considered published and subject to copyright on that basis. Perhaps this is why they are thought of as 'grey' as it can be unclear whether they are published or unpublished or even what those terms themselves mean. Grey literature covers the spectrum from highly formal documents – such as those produced by the Productivity Commission itself – to very informal materials distributed to a small group, for example a confidential report or briefing for senior management only. The vast majority of grey literature is made available to the public, or to a limit audience, for free, disseminated in print or digitally online, however a portion is also sold.

A recent ARC Linkage research project undertaken by researchers at Swinburne University and Victoria University investigated the role and value of grey literature for public policy and practice, conducting surveys of users, producers and collectors (Lawrence et al. 2014). Scaled to the national level, the research suggests that the use value of grey literature is **\$33 billion to \$43 billion per annum**. Production costs are estimated at around \$30 billion per annum.'

The surveys asked specifically about respondents' attitudes to various aspects of copyright law. There was overwhelming support from information users, producers, and collecting services for the role of collections and the need for changes to the Copyright Act.

- More than 80% of the information users, producing organisations, and collecting services surveyed support the view that 'Libraries and information services should be able to store copies of print and digital material, including grey literature, for long-term access and use'.
- Two-thirds of surveyed collecting services felt strongly that not being able to copy, store or redistribute online information because of copyright law was a problem for their collection.
- Over 80% of surveyed collection services believe that introducing fair use copyright law is the most important strategy for improving collection and access to grey literature.

Currently there are major impediments to libraries, repositories and other not-for-profit, open access information services making copies of digital documents, even those that are made publicly available for free online in the public interest, due to the restrictions of Australian copyright law. As a result we are now facing a digital black hole of content from the mid 1990s onwards as content that was online and intended for public use is moved or taken down and no copy of it has been kept by a collecting body due to restrictions on copyright. It is estimated that 30% of online content is being lost every few years. This has enormous repercussions on our capacity as a nation to engage in evidence-based policy as the

evidence base is disappearing. Given that a great deal of this content was valuable public policy related material previously intended for public use this is a serious national issue that needs to be addressed.

The recommendations of the current inquiry are an opportunity to make necessary system-wide changes with the evidence to show that across all sectors of society there is widespread support. Without law reform in this area, the cost of collecting will continue to be a barrier to effective management of policy resources. The costs of production, use and collection will continue to escalate, diverting scarce public and private resources from more productive use.

## Responses to the Draft Report Recommendations

### Chapter 4: Copyright term and scope

#### 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.

APO fully endorses the Productivity Commission proposal to bring ‘unpublished works under the same terms as published works.

There is no doubt that the current situation is unnecessarily restrictive and confusing, particularly when it is unclear to many in the community what is ‘published’ and unpublished. A great deal of valuable research data and analysis is produced informally and posted online but whether this content is published or unpublished can be unclear, particularly given the way these terms are commonly applied. Academic ‘working papers’, for example, are often described as unpublished despite the fact that they have been posted online for public access and use.

APO believes that the current Australian copyright law, where unpublished works remain in copyright in perpetuity, creates confusion and unduly restricts the use of a great deal of valuable public interest content. It also exacerbates issues of long-term access to works in Australian cultural collections. APO supports the position of the National Library of Australia and other archives and museums seeking to provide access to unpublished content in their collections. The introduction of a copyright term duration for unpublished works would free up the digitisation of items of historic cultural significance in Australian collections and encourage unknown levels of new create works and innovations.

## Chapter 5: Copyright accessibility: licensing and exceptions

### 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.

APO strongly endorses the Productivity Commission's recommendation that Australia should replace the current fair dealing exceptions with a broad exception for fair use.

To preserve the certainty provided by the current fair dealing exceptions, any open-ended and flexible exception can explicitly refer to the purposes covered by the fair dealing exceptions. This is the approach adopted in the US fair use provision, which states that the fair use of a work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" will not be an infringement of copyright (*Copyright Act*, 17 USC § 107).

While the fair dealing exceptions in Australia have been important for identifying limits to the exclusive grant of copyright afforded to copyright owners under the Act, APO agrees with the PC and the ADA that these provisions are not sufficiently broad to supply an effective balance for both owners and users under Australian copyright law in the digital environment.

## 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.

As an open access repository of public interest research and resources APO naturally is in favour of all levels of government in Australia adopting open access policies for publicly-funded research. We would urge that such policies be as broad and domain and technology neutral as possible.

The policy should be compatible with wider moves around open government and access to information such as the Open Government Partnership.

As the Draft report points out, we must be very careful how open access is defined. Open access is often seen as primarily relating to academic journal articles and requiring only attribution in terms of copyright restrictions. This has two problems.

As producers of government funded research the Productivity Commission is clearly aware that publicly-funded research exists outside of academic journals in the form of reports and many other documents types and non-text formats. As the Draft report correctly points out, there already is a great deal of material published online by organisations, much of it publicly-funded – including by government agencies and departments as well as academic research centres, civil society organisations and consultants. APO strongly recommends that the full range of publicly-funded research, including commissioned research by government departments and agencies, be included in any open access policy.

Secondly, while APO is strongly in favour of open access to publicly funded information in principle, we are concerned that stipulating the nature of the copyright conditions that must be applied within a policy seems to override the benefits of introducing a broad, flexible fair use legislation. Copyright holders of government funded research may wish to prevent derivatives or commercial use for instance for various reasons while still making resources free to access. The case of the NSW Cancer Council trying to prevent access to surveys of children's attitudes to smoking by a tobacco company is an example.

APO strongly endorses the use of open access repositories as a secure form of publishing given that a great deal of publicly funded research and other grey literature is poorly managed by producing organisations. However again we would caution about being too prescriptive in this policy given that in future 'repositories' may not be the preferred method of managing and preserving online content. As per the language advocated for fair use, a policy that is broad and flexible will be the most useful. So

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instead of just ‘open access repositories that recommendation could be:

“All Australian, and State and Territory Governments should implement an open access policy for publicly-funded research and resources in any format. The policy should provide free access through a stable, long term open access repository or similar managed digital curation system for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.”

## Chapter 16: Institutional and governance arrangements

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### 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.

APO strongly endorses this finding and would encourage a recommendation to this effect.

### References

Lawrence, A, Houghton, J, Thomas, J & Weldon, P 2014, *Where is the evidence: realising the value of grey literature for public policy and practice*, Swinburne Institute for Social Research, viewed 10 Nov 2015, <<http://apo.org.au/node/42299>>.