

New South Wales Department of Justice

Response to the Productivity Commission's Draft Report – Intellectual Property Arrangements



The New South Wales Department of Justice ('NSW Justice') welcomes the opportunity to provide further information to the Productivity Commission ('Commission') following release by the Productivity Commission of its Draft Report on Intellectual Property Arrangements.

Comprehensive reform essential

The pressing need for the intellectual property system in Australia to be comprehensively reformed to reflect the rapidly changing technological environment was identified by NSW Justice in its submission to the Commission dated 30 November 2015. Intellectual property protections should foster, not inhibit, creation, development and use of information by providing an appropriate balance between the interests of rightsholders and users.

Draft Recommendation 5.3: Fair use exception

NSW Justice strongly endorses the Commission's Draft Recommendation 5.3 in relation to fair use of copyright material. The proposal to limit copyright infringement to those occasions where unauthorised use would 'undermine the ability of a rightsholder to commercially exploit their work'¹ would restore balance to a scheme that has become, to use the Commission's words, 'weighted too heavily in favour of copyright owners, to the detriment of the long-term interests of users'². NSW Justice further considers that the *Copyright Act 1968* should expressly refer to the underlying reason for copyright, identified by the Commission as 'to prevent only the copying that reduces the economic incentives to invest in creative work'³. NSW Justice notes that it is critical that the non-exhaustive list of exceptions include 'government administration' and 'public access to government-held information'.

The position of government must also be closely considered. Intellectual property arrangements must be tailored in their application to government to ensure that governments are unconstrained in their ability to govern effectively in the modern electronic environment and that members of the public are able to effectively engage in government processes. It is essential that the copyright system facilitate adoption by governments of technological advances to optimise the efficient performance of their service provision and regulatory functions, and to promote government accountability and transparency.

The existing system significantly impairs governments' ability to use copyright material in the performance of their functions through the imposition of notification, sampling and payment requirements where practical implications and costs far outweigh the benefits that copyright owners may ultimately receive⁴. While it is important that the s. 183(1) statutory licence be

¹ Productivity Commission, *Draft Report; Intellectual Property Arrangements*, April 2016, p. 159.

² *Ibid*, p. 159.

³ *Ibid*, p. 160.

⁴ See the remarks of the Copyright Tribunal in *Copyright Agency Limited v State of New South Wales* [2013] ACopyT 1at [62]-[63]: "The submissions do underscore, however, the futility of this litigation. Whatever the Tribunal awards will have little impact on the parties... The Australian Taxation Office will also incidentally benefit through the additional income tax payable by surveyors, as will CAL on the commission it charges for the collection of the remuneration. So

retained, the notification, sampling and payment obligations that attach to the statutory licence impose significant administrative burdens on government, adding to the difficulty and costs of implementing projects that are for the public's benefit.

Below are two illustrative examples of where the NSW Government has had to modify a project or policy having regard to the onerous notification, sampling and payment obligations contained in ss. 183(4) and (5) and 183A:

- **NSW Planning Portal:** The NSW Department of Planning recently modernised the manner in which the public is provided with access to development applications (DAs) to facilitate online rather than hard copy access. DAs often annex third party copyright works such as architectural plans, planning reports and engineers' reports, which are produced by professionals engaged by applicants for the purpose of supporting applications. The NSW Government is presently liable for copyright fees in relation to the online publication of copyright material annexed to DAs. The liability of members of the public who print such material and use it for the purpose of responding to a DA is also in question.
- **Open Data Policies:** The NSW Government supports open data principles and creative commons licensing (see the *NSW Government Open Data Policy* available at <https://www.finance.nsw.gov.au/ict/resources/nsw-government-open-data-policy>). NSW Government datasets may contain information from third party sources (which may be deeply embedded and not easily identifiable). Significant risks attach to the repurposing and online publication of such material, including both liability for making the material available online and, potentially, for secondary infringement of copyright resulting from third party use of material accessed on a Government site. Concern about this possibility and the associated risk can impede the implementation by the NSW Government of open data principles.⁵

In both of these examples the use by government of the relevant copyright material is of considerable public benefit and would have little or no impact in terms of incentivising creation of new work. The vast bulk of government use of copyright material has similarly little or no impact on creation of new works.

In line with the Commission's recommendation in relation to fair use, NSW Justice submits that the notification and payment obligations that attach to the government statutory licence should (if the notification and payment obligations are to be retained at all) be limited to circumstances where government use is akin to commercial use and would 'undermine the ability of a rightsholder to commercially exploit their work'.

The creation of and access to intellectual property is important for innovation. NSW Justice believes that a fair use exception as outlined above achieves a balance between rightsholders and encouraging investment in innovation, and removing undue constraints on dissemination of information that encourages creativity, competition and productivity which is important to the State's economy and communities.

NSW Justice's response to the individual information requests should be read in light of, and subject to, the above comments in relation to the need for more comprehensive reform.

viewed, this litigation appears to offer little benefit to those whose interests are said to be at stake."

⁵ For this reason, it is critical that the Commission's Draft Recommendation 15.1 be supported by a recommendation that an exception be included in the *Copyright Act 1968* in relation to information released by governments pursuant to open access policies. If the Commission's fair use model is adopted and an exception provided for "government administration" and "public access to government-held information" this might also suffice depending on the wording ultimately adopted.

Information Request 5.1: “Contracting Out”

NSW Justice is broadly supportive of proposals to limit the circumstances in which a copyright owner can obviate the current statutory exceptions by ‘contracting out’ of those exceptions.

In considering this issue it is important to distinguish between licence agreements directed to the provision of copyright material for a fee and agreements directed to some other purpose which contain incidental licensing provisions. The latter category may include contractual limitations on the use of material for legitimate purposes such as the need to protect confidential or privileged information or to comply with privacy obligations. An example of the latter category is a consultancy agreement.

The challenge of distinguishing between these two categories of agreements should not dissuade much needed reform in this area. Legislative provisions could, for example, stipulate the circumstances in which limitations may be placed on the dissemination of copyright material and the types of agreements to which such limitation may be applied.

Information Request 5.2: Collecting Societies’ Code of Conduct⁶

NSW Justice notes that the voluntary code of conduct for collecting societies (Voluntary Code) is presently drafted in aspirational terms⁷ and requires more specificity to ensure that collecting societies ‘operate transparently, efficiently and at best practice’ as referred to by the Productivity Commission.

Overseas jurisdictions have examined similar issues with their respective collecting societies, and have recently enacted regulatory provisions to improve transparency and governance obligations on their collecting societies.⁸ Similar provisions should be considered for introduction in Australia. If stronger public disclosure and scrutiny obligations were put in place, more accurate assessments could be made regarding the cost of administering each statutory licence; and identifying circumstances where payment is collected under statutory licences but where little or no payment is passed along to members (such categories may include unpublished material, material made publicly available online, and historic material), and types of use for which private entities do not, in practice, make payments (for example, printing an article that is publicly available online). Such measures would assist in improving transparency and efficiency, and would more evenly balance the interests of rightsholders and users.

Under the *Copyright Act 1968*, declared collecting societies have statutory powers for collection and distribution of public moneys from government and publicly-funded organisations. Therefore it would be appropriate that they be subject to obligations similar to

⁶ NSW Justice notes that the first paragraph on p. 136 of the Draft Report inaccurately paraphrases paragraphs [57]-[59] of the Code Reviewer’s 2014 Report and, in doing so, misstates the concerns NSW Justice held with respect to this issue. The information sought by NSW was not sought “to assist it to determine whether or not to directly negotiate with registered surveyors” but to confirm that payments made by NSW for use of survey plans would be being passed along to surveyors.

⁷ Clause 2.3 of the Voluntary Code states: “Each Collecting Society will ensure that its dealings with Licensees are transparent.”

⁸ *The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 No 898* (UK) provided minimum standards to ensure codes of practice operated transparently, efficiently and subject to government oversight. The UK regulation will be repealed and incorporated into the UK’s adoption of *The Collective Management (EU Directive) Regulations 2016* to avoid duplication. Refer to https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518555/Guidance_on_CRM_Directive_implementing_regulations.pdf

those imposed on public bodies with similar statutory powers - such as transparency, regulatory oversight and safeguards against conflicts of interest.

Information Request 5.3: Applicability of Education Scheme to Government

NSW Justice responds to the second question only: "Should similar reforms be made to the operation of the government statutory licence scheme?"

There are significant and substantial differences between the education sector and other areas of the government sector in terms of copying practices and work environments. The proposed reforms to the education statutory licence set out in the Exposure Draft of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016* (Exposure Draft) are tailored and specific to the use of copyright material in a formal education setting. It is submitted that the proposed reforms to the education scheme are not suited to the far more complex array of use which occurs under to the government statutory licence.

For example, use under the education statutory licence is comprised of use:

- *by* teachers or educators;
- *of* predominantly published material such as books, films, articles and poems;
- for the *purpose* of educating students;
- in circumstances where alternative copyright material is often available and may be substituted if there is commercial benefit in doing so.

Such use may be contrasted with the far more disparate use occurring pursuant to the s. 183(1) government statutory licence which comprises use:

- by a wide range of public servants with a varying array of duties (for example, police officers, nurses, policy officers, social workers, accountants, engineers, surveyors, scientists, valuers, legal professionals, senior executives, clerical staff);
- of a wide range of copyright material that is not limited to published material and may include any copyright material which is submitted to government;
- for a wide range of purposes including, by way of example, provision to the public of basic government services, processing of applications, responding to submissions, proposals and correspondence, investigating crimes and administering other laws, researching and advising Ministers and statutory officers, maintaining registers, record-keeping (including as required by the *State Records Act 1998*) and provision of access to members of the public (for example, pursuant to the *Government Information Public Access Act 2009*);
- in circumstances where there is often no alternative for the Government but to use the particular work including, by way of example, where material submitted to government is copied for the purpose of processing an application.

Due to the significant differences between the education setting and the broader government statutory licence, the proposed education statutory licence scheme is an unsuitable template for any revised government statutory licence scheme. If the Exposure Draft's proposed amendments are applied to the government statutory licence, this could result in governments being required to enter agreements with collecting societies in order to rely upon the s. 183(1) statutory licence. This would place unacceptable difficulties in the way of governments performing their duties and would undermine the purposes for which the government statutory licence was introduced.

Access rights

NSW Justice has considerable concerns in relation to the proposed inclusion of any provision providing collecting societies with compulsory entry and access rights to government agencies.

Collecting societies are private entities. They are not subject to the same obligations and oversights imposed on statutory bodies and it would be inappropriate for a private entity to be given rights akin to those of a government body charged with enforcing the law and permitted to access government property without any adequate safeguards (such as completion of working with children checks). It is also noted that the clause 113S of the Exposure Draft does not provide an obligation on a collecting society to act reasonably, nor a basis for a recipient to make a reasonable objection to an entry notice. In these circumstances, the inclusion of the offence provision is inappropriate and potentially exposes government institutions to criminal liability for resisting inappropriate access requests⁹.

The implications of permitting such access rights (if they were to be applied in the broader government context) would be further exacerbated by privacy, confidentiality and practical considerations given the diversity of services, occupations, hardware and technology used and potentially conflicting legislative and regulatory obligations or public interest considerations. For these reasons, inclusion of entry rights in the government statutory licence scheme is opposed.

Government statutory licence scheme

As stated earlier, NSW Justice supports the retention of the s. 183(1) statutory licence, and the provisions would be improved by amendments as follows:

- confirmation that the s. 183(1) statutory licence only operates where an act by the relevant government would otherwise constitute an infringement of copyright and that this question is to be determined without reference to the statutory licence¹⁰;
- if notification and payment obligations were to remain when fair use provisions or licence arrangements do not apply, then these should be limited to circumstances where government use is akin to commercial use and would otherwise 'undermine the ability of a rightsholder to commercially exploit their work';
- confirmation that the limitation period provided by s. 134(1) applies to non-infringing acts done by governments pursuant to s. 183(1); and
- if s. 183A is to be retained, confirmation that s. 183A applies in relation to all copyright acts and is not limited in its application to reproduction acts¹¹.

⁹ NSW Justice notes that even without an express enforcement provision, legal action can always be taken to compel performance of a statutory obligation. If it is considered that there is a need for express enforcement provisions, these should be limited to a power to seek Tribunal orders requiring access subject to appropriate safeguards.

¹⁰ The purpose of this amendment would be to ensure that governments are not placed in a disadvantageous position as compared to private entities in terms of their ability to rely on exceptions to copyright infringement and express and implied licences.

¹¹ It has been suggested on behalf of copyright owners that governments should notify them and negotiate terms in respect of all communications of their works, in addition to payments made under s. 183A. This would mean, for example, one act (such as sending a copyright work by email) may be subject to two separate regimes under the statutory licence with different reporting and remuneration obligations. NSW Justice does not agree with this interpretation, but the request indicates the extent of problems in the current drafting of the provisions.

For the reasons given earlier on page 2 of this submission and in its previous submission, NSW Justice has concerns over s. 183A and the way it currently operates. If s. 183A were to be retained, it would require substantial overhaul and flexibility to accommodate rapidly changing technology, multiple types of copying circumstances, practical limitations and privacy/security considerations, and would need to be complementary to fair use provisions.

Further information

NSW Justice thanks the Productivity Commission for the opportunity to comment on the Commission's Draft Report and is happy to provide further information if required.