



21 December 2015

Intellectual Property Arrangements Inquiry
Productivity Commission
GPO Box 1428
Canberra City 2601

Via email: intellectual.property@pc.gov.au

SUBMISSION ON THE INTELLECTUAL PROPERTY ARRANGMENTS – PRODUCTIVITY COMMISSION ISSUES PAPER (OCTOBER 2015)

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the Productivity Commission Issues Paper.

About the Arts Law Centre of Australia

Arts Law is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Arts Law provides an Indigenous service - *Artists in the Black* (AITB). The aim of AITB is to increase access to legal advice and information about legal issues for Aboriginal and Torres Strait Islander artists and communities.

About our clients and their relevance to the Productivity Commission inquiry

Arts Law works nationally to support the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Our clients reside not only in metropolitan centres, but also contact us from regional, rural and remote parts of Australia and from all Australian states and territories. Arts Law provides expert legal and business advice, publications, education and advocacy services to more than 4,000 Australian artists and arts organisations operating across the arts and entertainment industries each year.

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The comments that we make in this submission are informed by our clients' profiles. Our clients usually:

- are both copyright creators and users;
- are either new, emerging artists or established arts practitioners or arts organisations;
- are operating arts businesses;
- are operating in all arts sectors;
- are working in both traditional and digital media;
- have low incomes/limited funds;
- need to be self-reliant in business;
- have a very limited ability to enforce rights.

The relevance of the Issues Paper to our clients is illustrated by the fact that in 2014 we provided advice on approximate 2,600 legal problems in the following areas relevant to the Issues:

• Copyright	1047
• Moral rights	230
• Indigenous Cultural & Intellectual Property	40
• Trade marks	66
• Performer's protections	27
• Designs	24

Arts Law provides advice on a range of copyright, designs and other intellectual property matters for our clients, including advice on contracts dealing in copyright, the use of secrecy and equitable doctrines of confidential information, trade marks, common law protections of business reputation and goodwill and *Competition and Consumer Act* claims.

This submission is only concerned with the *Copyright Act 1968* and the *Designs Act 2003*. We do not address the other intellectual rights described in Box 1 of the PC Issues Paper as Arts Law does not receive requests for advice on those rights.

Arts Law has made numerous submissions on the *Copyright Act 1968* and *Designs Act 2003*. The purpose of this submission is to summarise our position on copyright and designs, with reference to previous submissions, and illustrate their relevance to the issues paper for the Productivity Commission's inquiry into Australia's intellectual property arrangements (**PC Issues Paper**).

The annexures to this submission are two submissions by Arts Law that are relevant to the PC Issues Paper are:

- ALRC, *Copyright in the Digital Environment*, Discussion Paper (DP 79) - [Arts Law submission dated 2 August 2012](#) (**ALRC Copyright submission 2012**); and
- ACIP, *Review of the Designs System Options Paper* (December 2014) - [Arts Law submission dated 22 January 2015](#) (**ACIP Designs submission 2015**).

1 The role of intellectual property rights

Arts Law's position is that copyright policy development should balance measurable economic objectives against social goals as well as balancing the impact of any proposed changes on rights holders against impacts on consumers and other copyright users.

Arts Law notes that the various forms of intellectual property (as described in Box 1 of the PC Issues Paper) differ as to the role of the specific IP rights and how each IP regime establishes the exclusive rights and the scope of the 'exclusivity' given to the creator or rights owner. IP regimes also address the public interest through exceptions to the exclusive rights and defences to infringement of the exclusive rights.

Arts Law is of the view that that the economic framework that the Productivity Commission would propose to employ to guide its assessment of IP arrangements does not take into account of:

- the special cultural benefits that Aboriginal and Torres Strait Islander creators and their wider Aboriginal and Torres Strait Islander communities obtain from representing their cultural heritage in all forms of cultural expressions, including artworks, craft, dance, music, songs;
- the social welfare benefits all artists, whether Indigenous or non-Indigenous, gain from creating artwork; and
- the cultural and social welfare benefits that accrue to the broader Australian community; that is, the audience who participate in or benefit from the works across all art forms created by both Indigenous or non-Indigenous artists.

The proposed framework appears to only take account of values that can be measured and calculated to a financial value, and does not take account of cultural, personal or social values that are inherent of the creation of artwork. In particular, the proposed framework fails to take account of the differences between utilitarian applications of intellectual property and cultural and aesthetic applications of intellectual property.

1.1 Cultural imperatives of copyright policy

Arts Law agrees with the submission of the Australian Copyright Council (ACC) that there are "*important cultural imperatives of the copyright system*". Those cultural imperatives form the underlying policy of copyright by providing the author (as the first owner of copyright) with exclusive rights that include the right to publish or not publish the creative work. Arts Law therefore supports the ACC's statement that "*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.*"

Arts Law does not wish to overstate the extent that authors actually withhold their creative work from the public as authors have commercial imperatives (to generate income) that they must balance against their cultural imperatives (which may include, but are not necessarily limited to, their views as to the quality of the work or the impact on their reputation of publishing the work). The point being made about the cultural imperatives that underlie copyright policy is that authors may choose whether or not to publish their creative works and copyright policy does not seek to impose an obligation to publish.

1.2 Indigenous intellectual property

The cultural imperatives, referred to in the ACC submission have different forms, including the exclusive rights of authors to control whether to publish (or not publish) their creative works and the legitimate expectation of Aboriginal and Torres Strait people to the protection of their Indigenous Cultural & Intellectual Property (ICIP). The source of the expectation that Australian law will protect the ICIP is located in the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005)¹ to which Australia became a party on 18 September 2009; and the United Nations' *Declaration on the Rights of Indigenous People* (2007) which states that Indigenous people have a right to control their traditional knowledge and traditional cultural expressions.² We further note the ongoing work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is doing on the protection of traditional knowledge (TK), genetic resources (GRs) and traditional cultural expressions (TCEs) of Indigenous people.³

1.3 Moral rights of authors

It is the position of Arts Law that the existence of the moral rights in Part IX, *Copyright Act 1968*, has the consequence that copyright policy development in Australia must take account of the non-economic factors (such as moral rights) as well as the measurable economic objectives in determining the social welfare consequences of reform proposals.

As a consequence of Australia's commitment to the *Berne Convention*, the 'legitimate interests of the author' as discussed in Article 9(2) of the *Berne Convention*, is a factor to be considered in the analysis of the exclusive rights set out in the *Copyright Act 1968*. The 'legitimate interests of the author' also extend to how creative work is presented and not adapted without the permission of the author, including the protection against derogatory treatment of creative works.

In 2000 the moral rights regime became part of the *Copyright Act 1968* to meet Australia's obligations under the *Berne Convention*. Having implemented a moral rights regime consistent with its treaty obligations under *6bis* of the *Berne Convention*, any analysis of the *Copyright Act 1968* must take account of the non-economic factors as well as economic factors.

The significance of non-economic factors in the copyright regime, which although presenting measurement difficulties in an economic analysis, cannot be disregarded. Arts Law is of the view that that the economic framework that the Productivity Commission would propose to employ to guide its assessment of IP arrangements does not take into account the creative activities that contributes to community well-being, where the 'value' of that social welfare contribution cannot be easily calculated.

Arts Law recognises the insights to policy development that can flow from economic analysis of property rights, however any analysis of the copyright regime must take account of non-economic factors (such a moral rights or authors and other creators or cultural imperatives that are based on the author's exclusive rights to publish (or not publish) their creative works) as well as the exercise of property rights (which potentially are protected by the Constitution guarantee of acquisition of property on just terms).

¹ The Convention entered into force three months after Australia became a party on 18 September 2009.

² Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* (2007) refers *inter alia* to "the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

³ WIPO Intergovernmental Committee (IGC) <http://www.wipo.int/tk/en/igc/>

1.4 The correlation of income of artists and creators with copyright incentives

The ACC submission addresses the contribution of copyright industries to the Australian economy. Arts Law would also draw attention to the Australian research of the income of authors and creators that provides some insight into the copyright incentives that are an effect of the scope and duration of protection provided by the *Copyright Act 1968*.

The contribution of Aboriginal and Torres Strait artists and art centres, in economic terms, can be understood from the work of Acker *et al* of the Cooperative Research Centre for Remote Economic Participation (**CRC-REP**) of Curtin University,⁴ which published a report in 2015 on the productivity, income and gender of Aboriginal and Torres Strait Islander artists.⁵ In 2015 David Throsby *et al* of Department of Economics, Macquarie University (**DoE, MU**), published a working paper,⁶ together with briefs of their analysis of surveys on the impact of changes in the industry on the creative practices and livelihood of writers.⁷ Arts Law would draw attention to the following conclusions from these reports:

- A conclusion of the CRC-REP in relation to Indigenous artists and Art Centres is that: “A small number of artists received high returns from the sale of art. Only eight (Art Centre) artists had a total sales value of more than \$1,000,000, just 0.27% of artists. The vast majority of artists’ total sales value was less than \$10,000, (70.80% of artists). Only 157 (5.40%) artists earned more than \$100,000.” (CRC-REP, CR012 – 2015, page vi);
- Throsby, Zwar and Longden (2015) describe the Australian book publishing market and comment that: “In this environment, writers struggle to make a living. A survey of Australian artists’ incomes in 2009 found that “professional writers remain the least well rewarded artistic occupation for their creative work”, with annual income ranging from under \$1,000 for members of writing centres, to slightly more than \$12,000 for other professional writers (Throsby and Zednik 2010, p. 45). Although the Romantic poets popularised the ideal of writers as being above and beyond worldly concerns, the reality is different for most working authors.” (DoE, MU - Research Paper 2/2015). Briefing Paper No. 3 sets out the conclusions of the research into income of Australian authors - that in the 2013/2014 financial year: “The average total income for authors, including all sources of income, is \$62,000 and the average income derived from practising as an author is \$12,900.” (DoE, MU – Briefing Paper No. 3, October 2015, page 2)⁸

⁴ CRC-REP <http://crc-rep.com>

⁵ Woodhead A and Acker T., *Productivity income and gender: Aboriginal and Torres Strait Islander artists*. CRC-REP Research Report CR012 (2015) Ninti One Limited, Alice Springs; Acker T and Woodhead A., *The Economy of Place - A Place in the Economy: A value chain study of the Aboriginal and Torres Strait Islander art sector - Summary report* (2015) Ninti One Limited. Alice Springs. <http://crc-rep.com/research/enterprise-development/aboriginal-and-torres-strait-islander-art-economies/project-outputs>

⁶ Throsby, D, Zwar J., and Longden. T., *Book Authors and their Changing Circumstances: Survey Method and Results*, Macquarie Economics Research Papers Research Paper 2/2015 (September 2015) http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/reach_network/book_project/authors/BookAuthors_WorkingPaper_2015.pdf

⁷ Briefs: *The Australian book industry: Authors, publishers and readers in a time of change* (October 2015) http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/reach_network/book_project/about

⁸ Australian authors, INDUSTRY BRIEF NO. 3: AUTHORS’ INCOME, *The Australian book industry: Authors, publishers and readers in a time of change* (October 2015) http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/reach_network/book_project/authors/3_Authors_Income.pdf

There are relevant reports and studies from other countries. Arts Law’s ALRC Copyright submission 2012, sections 2.11 to 20.17,⁹ considers the earlier research of David Throsby *et al* into the incomes of professional artists in Australia and the study by Peter DiCola (2013) into income of American musicians and the correlation of income with copyright incentives.¹⁰

Jiarui Liu, a fellow at Stanford’s Center for Internet and Society, conducted an empirical study of market incentives and the intrinsic motivations of musicians in China and concluded that:

“[C]opyright incentives do not function as a reward that musicians consciously bargain for and chase after but as a mechanism that preserves market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs and maximum artistic autonomy during the creative process.”¹¹

Arts Law’s view is the Liu’s conclusion as to the motivation of Chinese artists and creators and their perception of the role of the copyright regime would also apply the Australian artists and creators.

1.5 The consequence of cultural production being driven by ‘hit’ products

Arts Law agrees with the comment in the ACC submission that queries whether the Productivity Commission’s proposed approach to consider whether the IP system is effective, efficient, adaptable and accountable are most appropriate measures to analyse to intellectual property rights. The PC Issues Paper poses questions that are relevant to an ideal model of economic activity that sits uneasily with the environment of the creative process and the markets in which cultural products are distributed to consumers.

The investment needed to create works and other copyright material are different across the various cultural industries, such as the creation of artwork, music recording, book publishing, computer gaming, mobile phone apps, films and other audiovisual productions. Arts Law also acknowledges that there are creators who are not motivated by commercial reward in the production of their work but by other values and benefits.

In relation to the creators and producer of cultural products who are motivated by commercial reward, they operate in industries that share the attribute that they are hit-driven industries. That is, every year, there are a small number of very profitable releases (the successes or ‘hits’, for which the revenue significantly exceeds the cost of production and distribution); in the middle are releases that range from mildly unprofitable to mildly profitable. There are also a significant number of unprofitable releases (when assessed in the relation to the return on the capital invested in the creative production and distribution). In these industries the very profitable releases of producers supports the releases that do recover their production and distribution costs.

The feature film production is a prime example of a hit-driven industry. Hosanagar (2014) reviewed film releases and mobile phone app releases in the United States and observed that winners are rare in hit-driven industries: “20% of movies released in U.S. theaters in 2009 accounted for 92% of box-office collections. Similarly, while Apple’s App Store and Google Play each have nearly a million

⁹ https://www.alrc.gov.au/sites/default/files/subs/706.org_arts_law_centre_of_australia.pdf

¹⁰ Peter DiCola, ‘Money from Music: Survey Evidence on Musicians’ Revenue and Lessons About Copyright Incentives’ (2013) *Northwestern Law and Economics Research Paper No 13–01*.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199058

¹¹ Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation* (2014) 38(4) *Columbia Journal of Law and the Arts* 467 at 473.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633263

mobile apps on their platforms and have generated several success stories such as Instagram, the average revenue per developer is estimated to be under [US]\$21,000 and most developers lose money on the apps they make.”¹²

It is therefore difficult to see how ‘efficiency’ of the copyright regime can be assessed. The calculation of ‘windfall gains’ and ‘windfall losses’ to the community at large in relation to the creation and exploitation of cultural products seems to be problematic given that non-economic factors are important, which it being difficult to calculate a ‘value’ non-economic factors to determine gains or losses. Because of the attributes of creative industries, it is difficult to measure whether rewards are ‘proportional’ or ‘disproportional’ to the effort to generate the creative work. That is, it is difficult to identify whether the copyright legislation results in ‘windfall gains’ to the producers or ‘windfall losses’ to the community at large.

2 The special characteristics of intellectual property

Arts Law acknowledges that intellectual property has the special characteristics described in Box 2 of the PC Issues Paper and that different forms of IPRs have the characteristics described in Figure 1 of the PC Issues Paper. These characteristics of IP also result in complications for the economic framework that the Productivity Commission proposes to employ to guide its assessment of IP arrangements and for recommending welfare-enhancing reforms.

2.1 How the parameters of the IP system came to be set

Arts Law accepts that knowledge has special characteristics and that an important justification for intellectual property is the address the ‘free rider’ problem through the IPRs providing an incentive for creativity and innovation.

The special attributes described in Box 2 of the PC Issues Paper are addressed in distinct ways in the different forms of IP so that each form of IP needs to be assessed in relation to: (1) how it promotes innovation and creativity; (2) the extent to which the grant of exclusive rights can limit competition; and (3) restrict the diffusion of knowledge.

Art’s Law position is that the Copyright Act 1968 is fit for its purpose. The copyright doctrines that define the parameters of copyright protection together with the specific exemptions from infringement act to promote innovation and creativity. These doctrines allow for open access to the building blocks of creativity and they facilitate the dissemination of ideas and knowledge through publication and communication of copyright works to the public. The copyright regime can be contrasted to the patent regime, in that, copyright operates with a low threshold of protection of ‘original’ works.

The copyright doctrines that describe the scope of the exclusive rights and set parameters that advance social welfare by providing access to the copyright material or the ideas inherent in the material, including, that copyright does not exist in ideas but in the form of the expression of those idea (the idea-expression dichotomy) and if there is only one way of expressing an idea that way cannot be the subject of copyright (the merger doctrine).¹³ The application of these doctrines have

¹² Prof. Kartik Hosanagar, *In Hit-Driven Industries Playing To Win Means Sharing Risks*, CIMS Newsletter, (July/August 2014) https://cims.ncsu.edu/cims_newsletter/julyaugust-2014/in-hit-driven-industries-playing-to-win-means-sharing-risks/

See also, Tristan Louis, *How Much Do Average Apps Make?* Forbes (10 August 2013) <http://www.forbes.com/sites/tristanlouis/2013/08/10/how-much-do-average-apps-make/>

¹³ “[W]hen the expression of an idea is inseparable from its function, it forms part of the idea and is not entitled to the protection of copyright” see *Autodesk Inc v Dyason* [1992] HCA 2; (1992) 22 IPR 163 at 172.

the effect of limiting a scope of copyright protection, while acting to facilitate innovation and competition in the form of new products or services.

The Copyright Act also advances competitive creativity and innovation as it does not contain any doctrine of 'misappropriation', in that the Act, as explained in the IceTV case "*does not afford protection to skill and labour alone.*"¹⁴ That is, the Copyright Act provides what can be described as 'thin' protection of ideas and the other building blocks of creative and innovative work.

In contrast the patents regime allows for a statutory monopoly over ideas, albeit for a much shorter period than copyright protection.

2.2 What is the relevance of the motivation of the creator or innovator?

Arts Law accepts that the balancing of the interests of creators and users of intellectual property takes into account of the importance of access to technologies and creative works. This balancing exercise has existed in copyright policy since the *Statute of Anne* (1709).

That creative work may be carried out without expectation of reward, may appear to contradict the copyright as an incentive proposition. The quote from Jiarui Liu, set out above, indicates that there is not necessarily a direct link between market incentives and the intrinsic motivations of people to create work and other material; although the existence of IPRs may provide the opportunities to monetise the work and other material – if there is an audience or market for the work.

Arts Law accepts that IPRs are intended to promote innovation and creativity and that IP contribute to economic growth and social welfare. However, Arts Law would argue that the motivation of the author, creator or innovator is of limited relevance to the policy design of IP systems, so that whether a person is tinkering in their shed without thought to commercialising their creation or innovation or is an entrepreneur with a business plan should not drive the application of the intellectual property regimes to what is the product of their endeavours.

Therefore, the proposition that there are forms of creative and inventive work that do not rely on IPRs must be treated with caution. While some creators may be altruistic in respect to creating or innovating purely to expand the stock of human knowledge, there is much creative activity that does not appear to directly involve a commercial return however some value can be recognised as flowing to the creator. For example, publications in academic journals that enhance the reputation of the author and advance their academic career. The person who writes a travel blog, may not be motivated by a financial reward (leaving aside the advertising revenue that may be generated on the travel blog). However, that some travel bloggers may well look to the copyright to provide remedies in the event of the unlicensed use of the content of their travel blogs in order to prevent others free riding on their creative endeavours.

The creator or innovator that is not motivated by commercial imperatives may choose to publish their innovation without thought to the patenting the invention or make their creative work available under a creative commons licence. However just because the initial motivation of the

Data Access P/L v Powerflex P/L [1999] HCA 49; (1999) 202 CLR 1 [23] & [24]. *State of Victoria v Pacific Technologies (Australia) P/L (No 2)* [2009] FCA 737.

¹⁴ *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458, [2009] HCA 14 (22 April 2009). [131] per Gummow, Hayne and Heydon JJ, who also stated "[a] safer, if necessarily incomplete, guide when construing Pt III of the Act is the proposition that the purpose of a copyright law respecting original works is to balance the public interest in promoting the encouragement of "literary", "dramatic", "musical" and "artistic works", as defined, by providing a just reward for the creator, with the public interest in maintaining a robust public domain in which further works are produced." [71].

creator or innovation was purely ‘creative’ or ‘altruistic’ is no justification for denying intellectual property rights as their work may become ‘successful’ and therefore commercially valuable.

3 A framework for assessing IP arrangements

Arts Law accepts that Figure 2 of PC Issues Paper set out classical statements of what is ‘effective’ and ‘efficient’, however Arts Law would question whether these principles are adequate to interpret or explain with any certainty as to what is the optimal level of IP protection necessary to promote innovation and advance social welfare.

3.1 Effectiveness: do IP rights target additional innovation and creative output?

The policy framework of the copyright system (as discussed above) can be said to be agnostic as to whether the creative work is original (beyond the minimum standard of originality for a work to be protected by copyright) or has any ‘additionality’ (as that term is used in the PC Issues Paper at pages 7 - 9). As a consequence, it is difficult to measure whether the copyright system “*promotes the creation of genuinely new and valuable IP that in the absence of such a system would not have occurred.*” Although an analysis of the principles and doctrines of the copyright system (as discussed above) supports the conclusion that those principles and doctrines promote competition for the ideas and building blocks of creativity and innovation.

The literature on the drivers of innovation describes innovators being engaged in a constant process of innovation to create new products or the next generation of existing products that results in what some commentators describe as ‘creative destruction’, in that creativity and innovation is driven by the opportunities that entrepreneurs view as being available in markets where high prices can be achieved or are being achieved by existing producers. The implications of ‘creative destruction’ that flow from the characteristics of IP would appear to be to discount the effect of the scope and duration of protection afforded by the IP system and to highlight the effect of entrepreneur driven competition driven by profitable opportunities that may be perceived to exist in a market. The ‘creative destruction’ encourages the creativity, investment and new innovation that provides the social welfare benefits of new and improved products and services with price competition between suppliers of competing technologies and products.

3.2 Efficiency: getting the balance right

Arts Law position that the copyright system does not fit a simple economic model. The production and consumption of cultural products such as music, film, novels, paintings and other artwork, would appear to have economic attributes different to many utilitarian products. As consequence there are difficulties in measuring the efficiency and effectiveness of the copyright system in relation to the creation of cultural products.

The economics of music production have been described by Pitt (2010) as being that:

“The nature of the production process in popular music is that of high risk, high fixed capital costs, upfront artistic labor costs, and low marginal cost of production.

The risk level involved in each investment in each artist or even existing successful artists is highly speculative and significant because the level of

expected future sales cannot be determine even using past success as a guide.”¹⁵

Arts Law accepts that utilitarian products that include intellectual property may have to be priced at or near marginal cost, depending on specific factors of the product or the market for the product, including the availability of substitutes for the product. It can be argued that product substitution is primary way that consumers address rent-seeking behaviour and product substitution limits the ability of producers to price their creative work or innovations above marginal cost. However, a cultural product may be freed from pricing at or near the marginal cost of the product. For example, some consumers purchasing decisions with regard to cultural works, such as paintings, may be described as “*essentially the price of desire; if that price is greater than your desire, you won’t buy it. On the other hand, if it’s something so alluring that you simply must have it, you’ll pay almost any price for it.*”¹⁶

Arts Law is of the view that that the ‘efficiency’ framework of considering whether the copyright system encourages returns that are proportional to the cost of generating the work, does not appear to be an appropriate framework to consider the production and consumption of cultural products.

The report of CRC-REP (2015) on the income of Australian Aboriginal and Torres Strait Islander art centres and artist and the report of DoE, MU (2015) on the income of Australian writers indicates that in these creative endeavours, a small number of artists and writers generate the largest proportion of the revenue from the sale of artwork and literary works. At page 11 of the PC Issues paper the questions posed include: *How should effort be measured? Is proportionality a desirable feature of an IP system?* Art Law’s view is that it is a flawed approach to attempt to measure ‘effort’ in generating IP or to assess the ‘proportionality’ of ‘rewards’ to the ‘effort’ in generating IP.

The problem with proposed framework is that it does not appear to take account of the different characteristics of the forms of IP. The rules that determine the scope of the rights and boundaries of each form of IP can be described as acting to prevent imitation but encouraging competition by substitution. That is, producers of IP products seek to differentiate their products and services from their rivals in the market, however competitive behaviour may involve rival producers imitating the ideas used by their competitors. The IP regimes act to prevent imitation by the specific rules and doctrines of each IP regime.¹⁷ The literature that considers the effect of innovation supports the view that the social welfare losses resulting from IPRs inhibiting allocative efficiency over the short to medium term are more than off-set by the welfare gains achieve by improvements to dynamic efficiency that flow from innovation and creativity. For example, Gans, Williams & Briggs (2004)¹⁸ identified that the exclusive rights provided by copyright law do not prevent close substitutes emerging, what copyright prevents is the copying or unauthorised adaptation of the copyright work or material.

Arts Law’s view is that the economic framework proposed by the Productivity Commission does not take account of how authors and creators of copyright works do not have a monopoly over ideas so that other authors and creators can rework ideas to create works that are ‘original’ (as understood in copyright law as not copied from another work). That is, copyright provides authors and creators with protection against the imitation of an existing work (the ‘substantial copy’ test) but allows other

¹⁵ Pitt, Ivan L., *Economic Analysis of Music Copyright: Income, Media and Performances*, Springer Science & Business Media (16 July 2010) 10.

¹⁶ Pesce, Mark D., *Hyperpeople* (2005) 38 <http://www.fringer.org/wp-content/writings/hyperpeople.pdf>

¹⁷ Drahos, Peter, *A Philosophy of Intellectual Property* (Dartmouth, 1996). Page 135.

¹⁸ JS. Gans, P. Williams and D. Briggs, 'Intellectual Property Rights: a Grant of Monopoly or an Aid to Competition' (2004) 37(4) *Australian Economic Review* 436.

authors and creators to produce new works that compete with an existing works in that the same ideas can be presented.

Page 10 of the PC Issues Paper considers possible problems that could be described as resulting in an inefficient IP system that does not generate IP at the lowest cost to society. With cultural products, it is difficult to identify whether the copyright legislation results in ‘windfall gains’ to the producers or ‘windfall losses’ to the community at large. That is, it can be argued that the production and distribution of cultural products does not fit the efficiency model described in pages 9 & 10 to the PC Issues Paper.

3.3 An efficient system ensures that IP rights are tradeable

Arts Law would question whether it is the design of the IP system that determines how innovation and creative output is disseminated – rather dissemination on IP products is carried out through business models and distribution practices adopted by participants in the value chain from creator and innovation to manufacturer and distributor to the end users.

For example, in relation to the copyright in cinematographic film: distribution strategies are used that result in a ‘window’ release that separates the film being available to the public in cinema, different forms of television (pay TV, pay-per-view, free-to-air) and consumer sell-through (digital download or DVD release). The allocation of exclusive rights may allow film, television and music industries owners to act strategically to limit dissemination – that is, to control the release in different media in an attempt to maximise the financial return from the copyright material. However, such business strategies are susceptible being damaged through changes in distribution technologies. The film distribution industry move from 120 day theatrical release window to a 90 day window can be attributed to the impact of unlicensed viewing of feature films as the result of consumers being able to illegally access the films online.¹⁹ The impact of digital technologies can be seen to put pressure on business strategies to evolve into distribution strategies that take account of the expectations of consumers of entertainment products and the technologies available to consumers to access those products.

Arts Law’s position is that business strategies that enhance the value obtained from dissemination of IP should be regulated by competition policy rather than by changes to the IP systems. Arts Law’s position on pricing and timing of dissemination of works to the public is set out in our submission to the *Online Copyright Infringement* discussion paper (July 2014), which stated:

“It should remain the decision of owners of copyright material as to the business model and the price at which they make material available to the public and the timing of when the material will be available in different markets and delivered through different distribution media. However it is apparent from the available studies that availability and pricing are factors that are relevant to the level of unauthorised downloading or viewing of material. That is delayed availability and limits as to media in which the material can be legitimately accessed both have consequences in terms of incentivising copyright infringement.”²⁰

¹⁹ Don Groves, *Aussie films face a 90-day release window* (4 December 2015)

<http://if.com.au/2015/12/03/article/Aussie-films-face-a-90-day-release-window/VZMKSTSAWG.html>

²⁰ Page 14, Para 9.3 of Arts Law’s submission dated 5 September 2014 to the *Online Copyright Infringement* discussion paper (July 2014) issued by the Australian Government (Minister for the Arts & Minister for Communications).

3.4 Adaptability: making sure IP rights are apt for the future

The policy design of the copyright regime indicates that the impact of copyright must be considered in relation to time frames of the duration of copyright. That is, the social welfare effects of the copyright system must be considered in relation to the long term – rather than short term to medium term - for considering issues related to “access to and cost of goods and services” (PC Issues Paper, Scope of the Inquiry, para 1 (b)) and the social welfare benefits that flow from “access to technologies and creative works” (PC Issues Paper, Scope of the Inquiry, para 2 (a)) or “access to an increased range of quality and value goods and services” (PC Issues Paper, Scope of the Inquiry, para 2 (b)).

3.5 Accountability: a transparent, evidence-based system

Arts Law’s ALRC Copyright submission 2012,²¹ quoted the Hargreaves Report (2011) to the U.K. government stated that reform of the IP System should supported by high quality evidence:

“1. Evidence. Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.”²²

Arts Law’s ALRC Copyright submission 2012 also referred to the Merrill Report (2013),²³ as describing a best practice approach to carrying out research on the economics of IP. The Arts Law submission noted that the Hargreaves Report warns of reform inquiries being presented with what is described as ‘lobbysomics’ rather than research conclusions that can be independently verified.²⁴ The response of the Intellectual Property Office (IPO), to the Hargreaves Report recommendation was the publication of ‘Good Evidence for Policy’.²⁵ This document sets out guidance that describes the standards of evidence that is appropriate for use in the development of IP policy and is aimed at reports and research carried out in order to inform policy-makers. Arts Law’s ALRC Copyright submission 2012 stated as a summary:

- 3.12 Arts Law submits that two key elements should drive the reform of the Copyright Act 1968:
 - 3.12.1 analysis of objective evidence; copyright policy development should balance measurable economic objectives against social goals as well as balancing the impact of changes on rights holders against impacts on consumers and other interests; and
 - 3.12.2 the existence of the moral rights regime in Part IX, Copyright Act 1968, has the consequence that copyright policy development in Australia must take

²¹ [3.18], page 19 https://www.alrc.gov.au/sites/default/files/subs/706.org_arts_law_centre_of_australia.pdf

²² | Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 8.

²³ *Copyright in the Digital Era: Building Evidence for Policy* (2013) Stephen A. Merrill and William J. Raduchel, Editors; Committee on the Impact of Copyright Policy on Innovation in the Digital Era; Board on Science, Technology, and Economic Policy; Policy and Global Affairs; National Research Council http://www.nap.edu/catalog.php?record_id=14686

²⁴ | Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 18.

²⁵ *Good Evidence for Policy* (2011) Intellectual Property Office (IPO) <http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>

*account of the non-economic factors (such as moral rights) as well as the measurable economic objectives in determining the social welfare consequences of reform proposals.*²⁶

4 Improving arrangements for specific forms of IP

4.1 Copyright Act

4.1.1 Pressures on the copyright system

The duration of copyright (as set out in the *Copyright Act 1968*) is the result of Australian's commitments to providing the minimum level of protection described in international copyright conventions and agreements as well as the higher standards of copyright protection that are the result of bilateral and regional trade agreements, including the *Australia-United States Free Trade Agreement*.

Arts Law recognises that the extension of the copyright term has exacerbated the 'orphan work' problem that that mechanisms should be put in place to manage the difficulty of identifying the copyright owner of older works and implementing licencing arrangement for the use of those 'orphan works'.²⁷

Arts Law views the Collecting Societies as important mechanisms to efficiently manage licensing of public performance of musical works and sound recordings, the recording of television programming for educational use, as well as managing educational uses of other copyright material.²⁸ Arts Law notes that arrangements like the United Kingdom's Copyright Hub²⁹ can be implemented to more efficiently manage licensing of copyright works and other material.³⁰

4.1.2 Transaction costs resulting for changes to the copyright regime

Arts Law's ALRC Copyright submission 2012 describes the policy context of the reform of the Copyright Act 1968,³¹ and a critique of the economic papers that discussed consequences of changing the existing categories of the 'fair dealing' defences to a U.S. style 'fair use' defence.³²

The definition and description of the scope of those the exclusive rights that are the copyright are subject to the exclusions or defences from liability that are established in the *Copyright Act 1968*. Changes to that legal framework potentially result in uncertainty as to the scope of the rights which increase transaction costs of those dealing with the rights. A significant transaction cost will be the

²⁶ I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 97.

"11.2 We do not propose any diminution of existing non-economic IP rights, as we take the view that rights granted for non-economic purpose, such as the moral rights of creators to prevent usage of their work in unacceptable contexts, are compatible with the economic goals upon which the Review was asked to focus."

²⁷ Section 12 (pages 76-79) of the Arts Law submission to ALRC Discussion Paper 79.

²⁸ Section 6 (pages 56-63) of the Arts Law submission to ALRC Discussion Paper 79.

²⁹ The Copyright Hub <http://www.copyrighthub.co.uk/>

³⁰ Section 4, [4.2.13]-[4.2.16] (pages 39-40) of the Arts Law submission to ALRC Discussion Paper 79.

³¹ Section 2 (pages 7-15) of the Arts Law submission to ALRC Discussion Paper 79.

³² Section 3 (pages 18-25) of the Arts Law submission to ALRC Discussion Paper 79.

litigation that is a consequence of the uncertainty as to the what are the exclusive rights provided by the Copyright Act.

A possible example of this effect would be if Australian moved from the category based 'fair dealing' exceptions to a U.S. style 'fair use' exception, it would result in an increase in transaction costs, as the scope of the rights will become more uncertain, and rights owners and users will be exposed to the risk of litigation costs to resolve disputes as to the scope of the rights and the 'fair use' exceptions to those rights. Lawrence Lessig has describe the U.S. 'fair use' exceptions as a "licence to hire a lawyer".³³

4.1.3 Moral rights

In response to the statement at page 19 of the PC Issues Paper, that "[d]ebate exists about the purpose and effect of moral rights, and whether they are primarily personal rights or have economic effects similar to the underlying copyright in a work", Art Law's view is that the Berne Convention's statement of moral rights results in personal rights. However, there can be an economic effect in so much that an infringement of moral rights can result is an award of damages. Arts Law would note that in the limited number of cases that have considered moral rights since they were introduced to the *Copyright Act 1968*, courts have awarded damages for infringement of copyright and have largely subsumed any damages for the moral rights infringements within the award of damages for infringement of copyright.³⁴

The obligation to comply with the moral rights of an author will also have an economic impact in that there can be costs of identifying who is the author and ensuring attribution of authorship is carried out in the use of the author's work. There can also be costs related to the infringement of the right of integrity of the work, including costs of contracting with an author so that the consent of the author is obtained to edit and make changes to the author's work.

4.1.4 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?

Arts Law notes that implementing moral rights in the *Copyright Act 1968* is the result the obligation set out in *6bis* of the Berne Convention.

While the protection of against false attribution of authorship may act in a similar way the prohibitions on misleading and deceptive conduct in the Australian Consumer Law (ACL), there is nothing unusual with having rights in the IP legislation that bear some similarity to rights or statutory protection provided in other legislation or in common law causes of action. For example, there is a substantial degree of overlap between the statutory protection of logos and brand names provided by the *Trade Marks Act 1995*, the tort action in 'passing off' and the misleading and deceptive conduct provisions of the ACL.

³³ Lawrence Lessig 'Free Culture' (2004) p. 187 (referenced at page 34, f/n 126, of the Arts Law submission to ALRC Discussion Paper 79.

³⁴ *Meskenas v ACP Publishing Pty Ltd* (2006) 70 IPR 172; [2006] FMCA 1136 (14 August 2006); *Perez v Fernandez* (2012) 260 FLR 1; [2012] FMCA 2 (10 February 2012); *Corby v Allen & Unwin Pty Limited* [2013] FCA 370, (2013) 297 ALR 761, 101 IPR 181 (24 April 2013); *Monte v Fairfax Media Publications Pty Ltd* [2015] FCCA 1633 (7 August 2015).

It is Arts Law view that the moral rights regime in the *Copyright Act 1968* is intended to provide a positive obligation to provide attribution of authorship, which addresses the personal rights of the author to be recognised as the author of their work.

Arts Law would argue that the ‘derogatory treatment’ element of moral rights act as a protection of that reputation of authors and creators, as *6bis* of the Berne Convention is intended to create personal rights that reflect cultural imperatives underlying copyright system. This protection is intended to be separate from any other causes of action that could be invoked to deal with damage to reputation.

4.2 Designs Act

The Arts Law submission to the ACIP Options Paper in relation to reform of the *Designs Act* considered possible changes to the copyright/design overlap provisions.³⁵ The ACIP Options Paper suggested three broad options for revising the copyright/design overlap provisions:

- Try to clarify areas in the overlap provisions that are currently uncertain;
- Allow a limited term of copyright protection for an industrially applied design equivalent to that under the registered designs system (currently 10 year); and
- Abandon the policy entirely.

Arts Law submission to the ACIP was that the second option, which would allow designs to retain a period of copyright protection once industrially applied, would alleviate the current copyright/design confusion without extending copyright protection to purely utilitarian designs (e.g. utensils, tools and machinery parts). Such a system is already in place in New Zealand. In addition, the second option could assist artists who wished to industrially apply their designs but could not afford formal registration under the *Designs Act* to retain some protection under copyright laws.³⁶

FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing.

Yours faithfully,

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³⁵ http://www.artslaw.com.au/images/uploads/Arts_Law_Response_to_ACIP_Designs_Act_Options_Paper_FINAL.pdf

³⁶ Arts Law supports revising Copyright/Design Overlap Provisions – Response to ACIP Designs Review (2 February 2015) <http://www.artslaw.com.au/news/entry/arts-law-supports-revising-copyright-design-overlap-provision/>