



July 12th 2016

Dear Productivity Commission,

Secondary Submission on the Draft Report: Intellectual Property Arrangements

Following the Public Hearings and subsequently digesting some of the comments, we'd like to add further comment to our initial submission (387) and we'd be grateful if the commission would consider these comments specifically in relation to orphan works.

First, the AIPP is concerned at the Commission's statement on page 17 of its draft Report that orphan works are "unusable by libraries, archives and consumers". This is, however, simply not the case, as whether or not a work is orphaned has almost no bearing on the ability of people to use it under the existing "fair dealing" and ancillary provisions (including those permitting consumers to make "private" copies), under all the library and archives provisions and under each of the statutory licences (including those available to educational institutions and government).

In particular, libraries and archives - a term that includes galleries and museums - may rely on section 200AB to use orphaned material. Under that section, a library or archive may do anything with a photo (whether orphaned or not) that is "for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives)". This ability is tempered only by the same considerations that apply at the international level to exceptions - namely, the steps in the "three-step test". As far as the AIPP is aware, commentators on the section - often referred to as the "flexible dealing" section - all seem to agree that the fact that a work is orphaned would likely increase the ability of a library or archives to use it under section 200AB.

Second, the AIPP notes that the Commission's proposal to recommend the introduction of a "fair use" exception would not address what libraries and archives see as the principle problem they face with orphan works: namely, the ability to use them in mass-digitisation projects. This is because "fair use" would still require a case-by-case, photo-by-photo analysis of whether or not the use of that particular item is "fair" in all the circumstances.

It is for this reason that orphan works are still seen as an issue in the US, which has fair use - and why the US Copyright Office has been involved, over many years, in extensive discussions and analysis of the issues raised by orphan works through various reports and roundtables. The AIPP refers the Commission to those various reports, particularly as located at <http://www.copyright.gov/orphan/>.

Third, the AIPP's view is that - if the real issue is with the ability of libraries and archives to use orphan works - then it would be inappropriate to "solve" that issue by introducing an exception of extreme uncertainty, and one that may be available more broadly, including to commercial players. Rather, a solution should be sought that focuses on the exact problems that libraries and archives (or indeed, consumers) claim they are having. Basically, the Commission should not seek to craft a solution until it better knows what the problem is.



In this context, the AIPP particularly notes that section 200AB already stretches right to the boundary of what is permissible under international law. It also strikes the AIPP is ironic that groups that can already rely on section 200AB clamour for “fair use”, thinking that somehow such an exception would be any more certain than what is currently available to them.

Fourth, the AIPP is particularly keen to ensure that the Commission does not make any recommendation in relation to orphan works that would undercut the ability of photographers to license their works (thereby limiting the ability of photographers to innovate and be productive). In particular, the Commission needs to know that images are especially prone to becoming orphaned in the digital world as a result of the actions of third-parties - - including third parties who strip out identifying metadata that photographers use.

Last (and flowing on from our fourth point), the AIPP is extremely concerned that the Commission not make any recommendation in relation to exceptions that would permit the use of high-resolution images of orphan works by commercial players (including in search results). Such use should more properly be the subject of either direct permission (after proper investigation to find the copyright “parent”) or through collecting society licensing (including extended licensing).

Yours faithfully

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