



June 3rd 2016

Dear Productivity Commission,

Submission on the *Draft Report: Intellectual Property Arrangements*

The AIPP has over 3000 professional photographers – that is, photographers looking to make their living from photography. As a result of that membership, and the broad experience of the AIPP’s executive, the AIPP is well placed to represent the photography industry more generally.

The AIPP therefore has a very strong and clear interest in ensuring that the legal and economic environments in which photographers work enable its members to make successful and profitable careers. It is only by providing such environments that Australian society as a whole will gain from the skills that the AIPP’s members bring to image-making in this country. This view finds strong support in the recently reported comments of the World Trade Organization’s chief economist, Mr Robert Koopman, who stated that “*to have a strong innovative economy, you need to have a strong IP*” system.

The AIPP is, however, extremely disappointed with the Commission’s draft *Report* insofar as a number of its draft Recommendations and Findings on copyright are concerned. The Commission seriously needs to rethink that draft. In particular, the draft:

- (a) demonstrates that the Commission has no understanding of copyright-based industries generally or photography businesses in particular;
- (b) displays no consciousness that most professional photographers operate as sole traders or very small partnerships or companies, with little market power other than provided for by copyright;
- (c) is informed by a barely disguised anti-copyright and anti-creator bias;
- (d) proceeds on the basis of premises which are faulty and/or naïve;
- (e) seems to imagine only a stunted future for Australia in the international knowledge economy, as never anything more than a net importer;
- (f) has a stunted view of the ability of Australian creators to make a contribution to either the local or international economies, including by licensing their works internationally;
- (g) fails to provide the evidence-base to support its conclusions; and (as a result of all the above)
- (h) reaches “Recommendations” and “Findings” that lack credibility and that, if acted on, would seriously damage the ability of photographers to be innovative or to carve out careers while providing a free-ride to sectors that can and should pay for images.

We comment below in more detail on a number of the concerns relating to copyright that the AIPP has with the draft as it currently stands. The AIPP has also seen in draft the submissions from the Australian Copyright Council, the Arts Law Centre of Australia and Copyright Agency, and strongly supports those submissions.



1. Draft Recommendation 2.1: *the Commission's analytical framework*

The Commission is fundamentally mistaken in its assertion that copyright (and intellectual property generally) should only provide sufficient protection to encourage additional innovation that would not otherwise have occurred. That is a view that would consign most creative effort in Australia to a hobby, and that would fail to ensure that creativity remains the economic engine room of the future.

Instead, in a “knowledge economy”, intellectual property should encourage creativity and investment by providing incentives that take into account the potential for bountiful rewards when a creator creates something that society values.

Visual images – including those created by members of the AIPP – are vital ways of drawing eyeballs to sites for the economic benefit of the site owner. They have an undoubted value, but AIPP members often find that others use their images without any licence or, indeed, attribution. Photographic images in particular are vulnerable to unlicensed online use. Such unauthorised use is difficult to police and, despite the Commission's assertions, is not a product of images not being available for sale.

Further, intellectual property should particularly encourage – and protect – innovation by creators. Intellectual property should not merely protect innovation by parasitic third parties, and particularly by “Big Data” – Google, Facebook, Pinterest, Instagram and so on. Rather, except in exceptional and special circumstances (such as the current fair dealing provisions), the use of copyright material by third parties must carry with it a corresponding benefit to the relevant creators.

This is both a matter of fundamental fairness and a way of ensuring that innovation both underpins increased creativity and benefits Australians (rather than overseas tech company shareholders).

The AIPP also notes that, in making various recommendations that, if implemented, would fundamentally change how Australian copyright operates, the Commission has failed its own test to produce the evidence that those changes would lead to overall societal benefit. This is despite clear and certain warnings from organisations that made submissions to the Commission in response to its *Issues Paper* that it must do so.

See, for example, the submission of the Business Council of Australia that stated that the Commission should prioritise continuity and consistency and that, in particular, before recommending the introduction of “fair use”, the Commission should clearly identify what exact problem with the current framework it is trying to solve and only make recommendations for change if the cost-benefit of doing so is clear. In this context, the AIPP particularly notes the critique of “fair use” by PricewaterhouseCoopers, and the defence of that report by Copyright Agency.

There are, then, three fundamental issues that the Commission has failed fully to explain or explore in its draft *Report*:

- (a) the purpose of copyright (as distinct from IP generally) needs to be better articulated – and in a way that avoids taking solid rewards into account;
- (b) any actual problems with the current copyright system need to be identified and closely examined; and
- (c) solid evidence needs to be put up that a proposed change to deal with the identified problem will in fact effectively deal with that problem, having regard to the purpose of copyright.

It is only once these issues have been analysed that concepts such as “*effectiveness*”, “*efficiency*”, “*adaptability*” and “*accountability*” can be assessed.



In this context, the AIPP rejects the Commission's apparent comfort in an approach that can only promise "likely" benefits. In the AIPP's view, "likely" benefits are no basis for making recommendations.

That said, the AIPP submits that the Australian photographers are indeed, by the Commission's own criteria, effective, efficient, adaptable and accountable.

Commercial photographers are very much at the forefront of technology innovation – they have to be, otherwise they would not survive. They have adapted seamlessly to new technology probably way ahead of other sectors. From a productivity perspective, the professional Australian photography community is held back not from any copyright or licensing impediments but rather by appallingly slow internet speeds that Australian businesses have to endure.

Professional photographers are already fully accountable. All photographers are accountable as a result of market forces – if they do not provide what their customers want, they will quickly go out of business. In addition, as a result of the ACCC's certification of the "AIPP Accredited Professional Photographer" logo, professional photographers who are members of the AIPP are able to gain professional accreditation that both ensures high standards (including ethical standards) and enables an individual photographer to be more visible and additionally accountable to the public generally and to the people commissioning them.

The AIPP also notes that a significant part of the business of photographers in Australia is tied to the economic health of other sectors of Australia's copyright industries – and particularly Australia's publishing industry. Insofar as those sectors would suffer from weakened copyright law in Australia, photographers would also be affected.

The AIPP particularly notes – and approves – the Commission's comments on "Plant Breeders Rights":

PBRs have helped transform agricultural plant breeding in Australia by introducing competition and price signals to a market that was previously characterised by a high degree of state provision. Growers now pay directly for access to new plant varieties, and their willingness to pay rewards successful breeders.

Professional photography in Australia is not marked by government subsidies or other state provisions: people who use copyright-protected images pay (and should pay) for their use, and successful photographers should be rewarded – and rewarded generously – through such payments.

2. Draft Finding 4.1: Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights

The Commission's "finding" that "Australia's copyright system has expanded over time" is trite. That it has expanded is both an obvious and a necessary corollary of technological change.

The Commission seems not to be aware that, each time copyright law in Australia has "expanded", the overall "balance" has also been addressed – and consciously so by legislators having regard to all the available evidence and weighing all the relevant policy considerations both for creators and for users.

In this context, the AIPP particularly refers the Commission to the submissions of the Copyright Agency in relation to the "expansion" of copyright.

3. Draft Finding 4.2: *the optimal copyright term would be closer to 15 to 25 years after creation*

The Commission's finding that an "optimal" copyright term would be somewhere between 15 to 25 years after creation has been rightly slapped down by Government and in the media generally.

However, the AIPP remains concerned that this "finding" – which is based on both a stunted view of copyright's purpose and of the role that creators should play within an innovative economy – has fundamentally affected the Commission's views and recommendations. In particular, the AIPP is concerned that this "finding" – against the background of the Commission's acknowledgement that there is little that Australia can do to shorten copyright's term – has led the Commission, even subconsciously, to consider alternative ways in which the economic effects of copyright and of its benefits to copyright owners can be dampened or curtailed.

The Commission should dump this "finding" from its final report, having regard to the economic data supporting the benefits of copyright to the Australian economy referred to in the various submissions from the Australian Copyright Council and Copyright Agency.

4. Draft Recommendation 5.3: *a broad exception for fair use should replace the current fair dealing exceptions*

The AIPP is strongly opposed to any introduction of an open-ended exception.

Essentially, such an exception – and particularly one that would make it clear that use by third parties on behalf of users is acceptable – would further move the balance of economic power away from photographers and towards larger and better funded third parties (and particularly towards parasitic and foreign tech-companies who innovate at others' expense).

Such an exception would also unacceptably move power from politicians to courts. The proper balance between creators and users of copyright material is a matter of policy. Politicians should remain in charge of policy, not judges or – even worse, users themselves (given the cost of litigation and the fact that most photographers are sole traders or small businesses and unable to fund fair use litigation).

The AIPP has watched with concern as various US courts have reached what the AIPP regards as unfair conclusions in relation to "fair use" – and particularly in the case of photographs used without permission. The AIPP does not see that the outcomes in cases such as *Cariou v Prince* or *Kienitz v Sconnie Nation LLC* represent desirable policy outcomes.

The Commission does not appear to be aware that the introduction of "fair use" would almost certainly lead to an open season on copyright material as people would think that just because they think something is fair to use, it must be so.

Indeed, the Commission has fallen into this trap itself, stating at page 18 of its draft *Report* that certain categories of use under current fair dealing are "deemed" to be fair, even though purpose is but one of the criteria that needs to be assessed in any particular situation. This problem would be greatly exacerbated by the Commission's recommendation.

The AIPP is also particularly alarmed at the suggestion that material that is orphaned should be subject to use under "fair use". Photographic images are particularly at high risk of being orphaned online, as such images are frequently used without attribution and with relevant metadata stripped out. That an image is orphaned should not by itself present an opportunity for it to be freely used other than within the current carefully calibrated exceptions in the Copyright Act (including for libraries, archives, galleries and museums).

The AIPP also notes with concern the considerable uncertainty that still exists in the US in relation to the scope of fair use, particularly between various court circuits.



5. Draft Finding 18.1: *timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement*

This draft finding simply does not apply to photographic images. Professional images generally are available for further licensing in timely and cost-effective ways, including via the relevant photographer and via image libraries.

This draft finding does, however, underline the AIPP's concerns that the Commission's review demonstrates a tin ear to the nuances of copyright generally, is simplistic and ideologically driven. Copyright owners – and the distribution of copyright material – cannot be characterised in monolithic terms. Rather, the legitimate issues and needs of photographers – who will usually be sole-traders or small businesses – will be very different to the legitimate issues and needs of the record industry, the book publishing industry, the software or the film industry.

In terms of photographic images, licensing is generally as efficient and effective as it can and should be.

The AIPP would, however, welcome recommendations from the Commission for effective education campaigns targeting the use of copyright material – and particularly images – without permission by small businesses.

6. Information request 16.1: *What institutional and governance settings would best ensure that IP policy benefits from a policy champion and is guided by an overarching policy objective and an economy wide perspective? Would vesting IP policy responsibility in a single department further these goals, and if so, which department would be best placed to balance the interests of rights holders and users?*

The AIPP is sceptical – indeed, highly wary – of any need for a “policy champion”. As noted earlier, policy is a matter for politicians, who are best placed to make political decisions. That said, the AIPP would not be averse to the government maintaining an expert panel, provided that expert copyright panel to provide comment and analysis, provided that panel properly represents the diverse interests of the various sectors.

Insofar as departmental responsibility is concerned, however, the AIPP is opposed to any move to give copyright responsibility to any department other than the Attorney-General's Department or the relevant department with responsibility for the arts. In particular, departments that are industry or science-based would likely prove entirely ill-placed to deal with the cultural issues necessarily embedded in the policy considerations.

Information Request 18.1: *Can greater use be made of cost orders in the Federal Court, including for discovery, to reduce costs further? Should additional Federal Court rules be introduced, such as caps on the amount of costs claimable in a case?*

For photographers, cheap and effective enforcement of their rights remain matters of high concern. Infringement of copyright in photographic images is rife, particularly online, and both detection and enforcement are difficult. The AIPP, however, is concerned that one of the Commission's suggestions – capping recoverable costs – will just make the matter worse, not better.

This is because litigation – including in the Federal Circuit Court – is already expensive, and there is always a risk of a shortfall between costs and damages, particularly where a defendant uses every procedure available to string out proceedings. This problem would be exacerbated if a “fair use” exception were enacted as in the current draft *Report*. In this



context, the AIPP particularly notes that even large companies like Getty Images do not have any appetite to take on companies like Google:

“Given the size of Google versus Getty, a lawsuit on particular copyright issues—you know how that would go. That’s years and years of time. Plus, the ability for them to really use the courts to draw this out and potentially wipe us out from a cash perspective, just doesn’t make that practical for us from a U.S. perspective.”¹

Generally, the Federal Circuit Court is now no less formal or expensive than the Federal Court – and a successful litigant already faces the prospect of being awarded costs on a scale that is markedly less than the Federal Court scale.

The problem, then, is the expense caused by the procedures themselves. The AIPP would therefore welcome a detailed analysis of enforcement procedures along the lines of the Intellectual Property Enterprise Court in the United Kingdom, which has specialist judges, streamlined procedures and both a “Small Claims Track” and a “Multi-Track” means of settling claims. While the AIPP would welcome a recommendation to this effect from the Commission, the AIPP does not have the confidence that the Commission has the expertise to carry out that task itself, given that the matter would require more than an assessment of economic issues.

Please let us know if we can be of further assistance, including in any face-to-face meetings, at which the Commission would be able to discuss issues with working photographers.

Yours faithfully

PETER MYERS

AIPP EXECUTIVE OFFICER

¹ <http://www.pdnonline.com/news/legal/copyright/Too-Big-to-Sue-Why-Getty-Images-Isn-t-Pursuing-a-Copyright-Case-Against-Google-in-the-U-S-16515.shtml>.