



AUSTRALIAN **PUBLISHERS** ASSOCIATION

SUBMISSION TO

PRODUCTIVITY COMMISSION INQUIRY INTO
AUSTRALIA'S INTELLECTUAL PROPERTY
ARRANGEMENTS

NOVEMBER 2015

INTRODUCTION

The Australian Publishers Association (APA) is pleased to have the opportunity to respond to the Productivity Commission's Issues Paper on Intellectual Property Arrangements.

The APA is the peak industry body for the Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has over 180 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, school and academic publishing.

Many of our members have made separate submissions. We support their submissions and the submission of the International Publishers Association. We also generally support the submissions of the Australian Copyright Council and of the Copyright Agency.

SCOPE OF THE INQUIRY AND OF THIS SUBMISSION

The long list of questions in the Issues Paper confirms that the Commission has been asked to address a very broad range of policy issues. 'Australia's intellectual property arrangements' is a deceptively singular rubric. While there may be some ways that different forms of intellectual property are similar, there are also basic differences between them that may be at least as important to any assessment of their operation as any apparent differences between intellectual property and other forms of property.

This submission is concerned only with Australia's copyright arrangements.

HOW GOOD IS THE IP SYSTEM; HOW SHOULD IT BE ASSESSED?

The Inquiry invites comment on its framework for assessing IP arrangements and for recommending welfare-enhancing reforms.

Are there other principles that should be considered when assessing the IP rights system? Are there other factors relating to efficiency, effectiveness, adaptability and accountability that the Commission should consider as part of its inquiry?

The Commission suggests four criteria should be used to assess existing IP arrangements. At face value, they appear reasonable. There can be little objection to the idea that any statutes should be effective and well-targeted, efficient, adaptable and accountable.

However, the Commission proposes to use these criteria within a framework about intellectual property that is more controvertible. The Commission takes as settled

assumptions that the intention of intellectual property rights, with the exception of 'some, such as trademarks and geographical indications' is solely to promote innovation and creativity. It differentiates intellectual property from other property rights on the basis that it is intangible and government-afforded. It makes general claims for intellectual property as a whole, such as that it can limit competition and restrict the diffusion of knowledge.

There are three potential problems with the way the Commission has established its proposed framework. The framework will not be sufficient to ground a thorough or clear-sighted assessment of Australia's copyright arrangements without modification to its assumptions about the goals of Australia's copyright; about the relation between intellectual property arrangements and other property arrangements; and about the differences between copyright and other forms of intellectual property.

First, the Commission's assumption about the goals of Australia's IP system requires further examination. As the Australian Copyright Council has pointed out in its submission:

The Constitutional power to legislate with respect to Intellectual Property is part of the general plenary power of the Commonwealth.

"51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xviii) copyrights, patents of inventions and designs, and trade marks;"

At its highest level, therefore, the goal of the IP system in Australia is peace order and good government – the public welfare. This is to be contrasted with other jurisdictions. For example, in the United States, the copyright power is designed to promote 'science and the useful arts'.

The principal legislation provides little guidance as to the objects of IP. For example, there is no objects clause in the Copyright Act 1968. It is simply an "Act relating to copyright and the protection of certain performances, and other purposes". The Report of the Committee Appointed by the Attorney General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth otherwise known as the Spicer Committee Report of 1959 is commonly cited as setting out the foundation of modern copyright law in Australia.

"The primary end of the law on this subject is given to the author of a creative work his just reward for the benefit he has bestowed on the community and also encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as is possible, that the rights conferred are not abused and that study, research and education are not unduly impeded. In weighing up these factors, we must of course have regard to our existing and possible future international obligations".

While the goals of IP as set out in the terms of reference bear some similarity with this statement from the Spicer Report, they go a good deal beyond the modest purposes set out there.

It is important to be clearer about the objectives of intellectual property laws. Otherwise, the Commission's assessment of the efficiency, effectiveness, adaptability and accountability of Australia's intellectual property arrangements may reveal only the extent to which Australian laws serve the purposes established for United States statutes. In particular, the Commission's framework has not given sufficient weight to the 'primary end' of providing an author of a creative work with 'just reward', and as the Australian Copyright Council submits, 'it is difficult to say that one of the goals of copyright is not to unreasonably impede access to goods and services.'

Secondly, as an introduction to its proposed framework, the Commission differentiates intellectual property from other property rights. However, it does not explain why the criteria for assessing Australia's intellectual property arrangements should as a consequence be different from the criteria for assessing any other property arrangements. Some of the characteristics ascribed to intellectual property are shared by other property. Where there may be differences, it is not clear why they should entail a difference in assessment.

The Commission describes intellectual property as:

- government-afforded;
- time-limited;
- intangible;
- having public goods characteristics, being 'non-rivalrous' and 'non-excludable';
- characterised by high fixed and low marginal costs; and
- involving a balance of costs and benefits.

It is not clear what the Commission means by 'government-afforded'. Authors do not depend on any specific action or approval by government for the copyright in their works. If the Commission means, instead, that copyright is created by laws, that does not distinguish it from other forms of property. Nor is it unique in being a right that is limited by time. That intellectual property is intangible is a commonplace. However it is simplistic to contrast this with the apparently tangible nature of other property. In both cases, what matters is that the owner has the right to carry out and to exclude others from carrying out a set of actions: "Give someone the right to exclude others from a valued resource ...and you give them property. Deny someone the exclusion right and they do not have property."¹ One of the foremost theorists about property rights, Ronald Coase, pointed out that while 'we may speak of a person owning land...what the land-owner in fact possesses is the right to carry out a circumscribed list of actions.'² As Coase illustrates, even in the case of land, the extent of those rights is limited. Land-owners are able to exclude most people from using their land, but others may have the right to travel across it or to explore it. It is exactly the extent of this circumscription that is at issue, for example, in the current policy debates in Australia over the balance of costs and benefits involved in the exploration for and mining of natural gas on land previously used exclusively for residence and farming.

¹ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998);

² Coase, R. H.. (1960). The Problem of Social Cost. *Journal of Law and Economics*, 3, p 44.

In another context, the Productivity Commission recently identified property rights as one of 'a number of market features that create an environment conducive to an efficient allocation of resources', noting that:

Property rights bestow the right to use a resource, exclude others from its use, and usually also involve the ability to transfer that right, should the holder wish to do so. Well-defined property rights, combined with a sound regulatory framework that underpins their enforcement, help to ensure that decisions about resource allocation reflect their true economic and social value, and make clear the delineation of costs and benefits for market participants.³

The Issues Paper emphasises the potential costs to users of IP rights, the risks that the 'exclusive nature of IP rights' will allow owners to exercise market power or other anti-competitive behaviour, and the dangers of 'excessive' returns. The Commission characterises the right to exclude others from using intellectual property as a welfare-limiting monopoly. By contrast, it describes the right to exclude others from using other forms of property such as pipeline capacity as part of a welfare-enhancing characteristic of a well-functioning market. We submit that in order to appear balanced, the Commission's should assess intellectual property arrangement with the same framework with which it would assess other property arrangements unless it has established a clear justification for any difference. In particular, the assessment should give greater weight to the operation of intellectual property as a fundamental feature of a well-functioning market.

Thirdly, the Commission's framework does not deal sufficiently with the differences between copyright and other forms of intellectual property. Whereas the Issues Paper appears to overestimate the importance of the difference between intellectual property and property in other things, it underestimates the importance of the difference between the fundamental principles of copyright and those of patents, for example. If the Commission uses the 'one size fits all' approach of the Issues Paper in its assessment of intellectual property, it will be a major problem for its conclusions about copyright. In particular, the Commission's framework for assessment is established at the outset as a question of balancing the 'promotion of innovation and creativity...' against 'limiting competition and restricting the diffusion of knowledge'.

Where novelty is the principal foundation of patent, it is originality that provides the basis for copyright. The two laws therefore operate very differently. Once information about it is disseminated, an invention may lose its novelty but an original work remains original. As Abraham Drassinower has recently pointed out:

The doctrine of originality consistently and unabashedly discriminates in favour of bad poetry and against great information ... That the doctrine of originality produces that result is not an argument against it. It is rather an indication that, from the very outset, the incentive-access paradigm has difficulty grappling with basic copyright distinctions.⁴

And, again:

³ Productivity Commission (2015). *Examining Barriers to More Efficient Gas Markets*, Research Report, Canberra. p 29 Accessed at <http://www.pc.gov.au/research/completed/gas-markets/gas-markets.pdf>

⁴ Drassinower, *What's Wrong with Copying?* Cambridge, Massachusetts: Harvard University Press, 2015, 112

...whereas an inventor's patent permits him to preclude others from repeating his act in respect of nature, from operating his invention, an author's copyright permits him to preclude others from repeating his discourse, from reproducing his work. Patent law is about learning and doing things in and to nature. Copyright law is about speaking to one another. Colloquially put, the distinction between patent and copyright is a distinction between technology and culture.⁵

The Commission has been asked by its terms of reference exactly 'to consider whether IP arrangements strike the right balance between incentives for innovation and investment, and the interests of both individuals and businesses in accessing ideas and products. This incentive-access balance model has dominated recent policy debates both in Australia and overseas. However it does not adequately comprehend the nature of copyright or the full complexity of its purpose. The Commission's terms of reference include that it should 'recommend changes to the current system that would improve the overall wellbeing of Australian society'. Although the examples given of such potential changes focus on incentives and access, this is not an exhaustive list. The Commission is asked to have regard, amongst a number of economic assessments, to Australia's international agreements and to the IP arrangements of Australia's top intellectual property trading partners and their experiences in ensuring their IP systems meet the needs of the modern economy.'

Copyright arrangements are fundamental to the operation of many important industries, including classically the business of book publishing. They play a vital role in enabling a well-functioning market in those industries, but they also have a determinative effect on the operation of the public domain. A public domain is no less a need of a modern economy than well-functioning markets.

The Commission should modify its framework so that its assessment of Australia's intellectual property arrangements takes into account the fundamental differences between copyright and other forms of intellectual property. It should ensure that its consideration of the Australia's copyright arrangements includes their effect on matters overlooked by the predominance of debates over balance between incentives and access, including their contribution to the operation of Australia's public domain and within that the integrity of an author's choice of whether and how to publish. The Commission will need to assess whether its recommendations will improve the overall wellbeing of Australian society. That wellbeing includes the welfare attributable to the enjoyment by citizens of personal rights and freedoms and the operation of a public domain. The framework should allow for a more discriminating consideration of copyright so that the Commission can better assess the potential effect of any recommendations not only on the welfare generated by the copyright industries, but also on the operation of the public domain and on the rights inherent in the act of authorship.

Effectiveness

Do IP rights encourage genuinely innovative and creative output that would not have otherwise occurred? If not how could they be designed to do so? Do IP rights reward innovation that would have occurred anyway? What evidence and criteria should be used to determine this?

⁵ *ibid.*, 65

Are IP arrangements in other jurisdictions more effective in generating additional creative output?

Additionality

This section of the Issues Paper confirms the need for the Commission's analysis to discriminate further between copyright and other forms of intellectual property. The Commission's questions and its evaluation that an 'IP system is effective if it promotes the creation of genuinely new and valuable IP that in the absence of such a system would not have occurred', and that 'IP rights cannot be used to protect things that are not innovative' may be reasonable for an assessment of the operation of patent arrangements but they are not appropriate to an assessment of copyright.

As we remark above, novelty is the foundational concept of patent but not of copyright. Identical works might be the subject of separate copyrights provided only that they were created independently.⁶ In practice, the inventiveness of a work is likely to inform judgments about the likelihood that it might have been developed independently. As US comedian Andy Richter remarked in response to a claim that Conan O'Brien had infringed copyright on four jokes: 'There's no possible way more than one person could have concurrently had these same species-elevating insights!'⁷ These practical examples may be trivial, but they illustrate the fundamental difference in the legal ideas that are the basis for copyright as opposed to patent rights.

There is another feature of copyright that reveals difficulties with the Commission's analysis. The Commission points out that 'much creative and inventive work is done with no expectation of remuneration or reward'. The Issues Paper does not explain whether there is a difference between undertaking creative work in this way as opposed to, for example, growing flowers or providing food to the hungry. It seems unlikely that a grower should have no right to exclude others from using flowers grown for pleasure, or that the well-fed might demand access to food offered to the hungry. However the Commission appears to be suggesting that there would be no wrong in the unauthorised publication of the work of authors who produce their work for the 'joy' it provides, or who would create it in the absence of any possibility of financial reward.

Fortunately, under existing laws, copyright would be infringed by the unauthorised publication of an unpublished work. The author has the right to control the publication of her work, including the right not to publish it. There is no distinction between a published

⁶ Drassinower makes this point with reference to a famous story by Jorge Luis Borges, but practical examples are not unusual in comedy, especially political satire. See for instance McGraw, Peter, and Joel Warner. "The Humor Code." *Slate*, March 31, 2014. http://www.slate.com/articles/arts/culturebox/features/2014/the_humor_code/joke_t_heart_can_a_comedian_sue_if_someone_steals_his_material.html.

"Conan O'Brien Targeted in Lawsuit Claiming He Lifted Jokes from Twitter." *The Hollywood Reporter*. Accessed November 27, 2015. <http://www.hollywoodreporter.com/thr-esq/conan-obrien-targeted-lawsuit-claiming-811210>.

⁷ Sims, David. "Whose Joke Is It Anyway?" *The Atlantic*, July 28, 2015. <http://www.theatlantic.com/entertainment/archive/2015/07/joke-stealing-comedy-conan-twitter/399800/>.

and an unpublished work that would confine that right of an author not to publish solely to unpublished works. The right not to publish applies both to all an author's works, published and unpublished. Part of the wrong of copyright infringement is that it is 'compelled speech. The fact that an author has already published a work neither does nor can mean that its republication is now free as the air to common use. Most deeply at stake in copyright protection is the integrity of an author's choice whether to publish or not.⁸ This is a right beyond the . The Commission's assessment of the effectiveness of copyright laws will be incomplete without acknowledging this protection it affords an author to control their work.

In addition to any question of additionality, intellectual property rights and copyright in particular, provide the foundation for well-functioning markets. A thorough assessment of the effectiveness of intellectual property arrangements will not focus only on additionality but should also include, as it would for any other property rights, the extent to which they enable the allocation of resources. This includes not only the allocation of the resource of the intellectual property, but also the allocation of all resources involved in the creation and distribution of products that use it.

Dissemination

To what extent does the IP system actively disseminate innovation and creative output? Does it do so sufficiently and what evidence is there of this? How could the diffusion of knowledge-based assets be improved, without adversely impacting the incentive to create? What, if any, evidence is there that parties are acting strategically to limit dissemination?

The Commission says that, in considering the dissemination of innovation and ideas 'there is a more direct tension between the exclusivity that IP rights confer, and the cumulative nature of much intellectual property, and asks how diffusion could be improved without *adversely* impacting the incentive to create.

The Commission's analysis that there is a direct tension risks creating a misleading model of the operation of copyright. The idea of 'direct tension' suggests that any consumption of IP would be against the interest of the author, which is clearly not the case for an author who benefits from increased sales of a book.

This is another case where there is a fundamental difference between copyright and patents. In the case of patents, dissemination is not an essential part of the owner's use of her intellectual property. On the contrary, dissemination is undertaken only in return for a period of exclusive use. Inventors have an alternative strategy available for the economic use of their intellectual property, and the Commission recognised the use of trade secrets in Box 4 of the Issues Paper. Coca-Cola may be the paradigmatic case, but it is far from unique. The first economic decision of an inventor is not how to disseminate through patent, but whether dissemination can be avoided and the intellectual property kept secret.

On the other hand, publication is an essential part of the communication by an author to an audience. For an author seeking to maximise returns from a work subject to copyright, the decision is not whether, but how to disseminate. To the extent that the Commission believes

⁸ Drassinower, *What's Wrong with Copying?* 221

there is a less than optimal amount of dissemination of copyright materials, the remedy is not to weight 'balance' in favour of unpaid or unauthorised access, but to ensure that there is adequate support for intellectual property rights and an adequate incentive for the owners of copyright.

One factor that may affect an author's or a publisher's decision is the extent to which the arrangements for intellectual property rights adequately underpin their enforcement. In genres especially affected by unauthorised copying, for example, some Australian publishers have significantly reduced their investment in new Australian authors. The vulnerability of educational publishing to unauthorised use has made it more attractive, particularly for some specialist authors in technical or engineering fields to consider confining the dissemination of their resources to the exclusive use of private educational providers instead of creating and publishing them for sale to the general public.

The Commission should consider the role of Australia's intellectual property arrangements not only in providing an incentive to create, but also in creating an incentive to distribute copyright materials. In this context, the Commission may note the effect on those incentives of reductions in adequate enforcement. It may also note the success of the statutory educational licence and its 'equitable remuneration' to creators in ameliorating the potential loss of welfare from substantial increases in unauthorised use.

Efficiency

Do IP rights provide rewards that are proportional to the effort to generate IP? Is proportionality a desirable feature of an IP system? Are there particular elements of the current IP system that give rise to any disproportionality? Are there obstacles in the IP system which limit the efficient trade of IP between creators and users? Are there particular areas where trade, licensing and use of IP could be more readily facilitated?

There are two aspects of the commission's analysis that would benefit from modification if they are to be used in its assessment of copyright arrangements: the relationship between creative work and its results; and the limitations for policy formulation of modeling copyright as a public good.

Creative Work

The idea that a framework might be arranged so that the protections afforded under copyright were proportional to the efforts of creators is hard to reconcile with the realities of creative effort. The Issues Paper does not explain the origin of the Commission's apparent interest in mechanisms that would make reward proportional to the amount of effort by creators. Apart from the many practical difficulties of attributing effort since it is only one of the factors involved in the creation of value, it is not clear why reward should be proportional to effort. The idea is so far removed from the well-documented experience of intellectual and creative effort that it appears almost comically puritanical. As just one example of many, David Bowie describes how he "started working [*Life on Mars*] out on the

piano and had the whole lyric and melody finished by late afternoon.”⁹ But the song was described this year by one well-respected and influential music critic, Neil McCormick, as the greatest song written in his lifetime.¹⁰ It appears the Commission may be suggesting that any success accruing to David Bowie from the song should be considered as windfall gain and that he should have fewer rights to control the use of his work because its creation was the work of an afternoon.

The uncertain relationship between effort and success is one of the inescapable features of creative enterprise. In his seminal study of the economic organisation of arts and culture, Richard E. Caves identifies a number of basic economic properties of creative activities that he characterises as, for example ‘*nobody knows*’, ‘*art for art’s sake*’, ‘*infinite variety*’ and ‘*A list/ B list*’.¹¹ In considering the nature of contracts between authors and publishers and the potential for what the Commission might regard as ‘windfall’ gains for the most successful authors, he points out:

a pattern that appears throughout the creative industries. Creative inputs are vertically differentiated (*A list/ B list*), but also subject to pervasive horizontal differentiation (*infinite variety*) and uncertain reception in the market (*nobody knows*). There is a collective interest in keeping enough artists in the game to ensure ample candidates for random success...we call this the *lottery prize* phenomenon: many keep buying tickets despite the rational expectation that their chances of winning are tiny.¹²

The Commission appears to be advancing a policy objective of minimising the possibility for substantial returns on investment attributable to factors with a high level of uncertainty at the point of investment. It would be preferable for an assessment of the framework of copyright to recognise the inevitability of this feature of returns which is typical of, but not unique to, copyright-based industries. It explains the need for publishers, in particular, to manage investment across a wide portfolio of titles. This is frequently not recognised in assessments of the impact of policy proposals including, for example, the removal of the limited restrictions on the parallel importation of commercial quantities of titles published in Australia.

Public Good Characteristics

The Issues Paper mentions that ‘knowledge’ can be non-rivalrous and non-excludable and that together with the high fixed and low marginal costs of many intellectual property endeavours, this may result in less production than would be optimal.

⁹ “DAVID BOWIE: I Went to Buy Some Shoes - and I Came Back with Life On Mars.” 2015. *Mail Online*. Accessed November 29. <http://www.dailymail.co.uk/tvshowbiz/article-1030121/DAVID-BOWIE-I-went-buy-shoes--I-came-Life-On-Mars.html>.

¹⁰ McCormick, Neil. 2015. “100 Greatest Songs of All Time”, June 2, sec. Culture. <http://www.telegraph.co.uk/culture/music/11621427/best-songs-of-all-time.html>.

¹¹ Caves, Richard E. *Creative Industries: Contracts Between Art and Commerce*. Harvard University Press, 2000. 2-10

¹² *ibid.*, 57

On the other hand, the Commission identifies the operation of copyright's fair dealing exemption as being to mitigate the worst outcomes of the potential restriction on the input of knowledge to future production.

Apart from the case of an author's decision not to publish, copyrighted material is in general available to the public. Many of the debates about fair dealing or US-style fair use exemptions are not about access *per se* but about cost - either the high transaction cost entailed in securing permission or a claim for access without recognising the value of the use through payment.

In the section of the Issues Paper on copyright in the Issues Paper, the Commission describes copyright as though it is fundamentally the same right as, for example, a patent right, but less stringent. The Commission appears to suggest that the difference is that it applies 'at a very low threshold to works that are *merely* "original" rather than innovative or useful' [emphasis added] instead of recognising it as an importantly different concept and right.

The treatment of facts under copyright law is one clear illustration that copyright is not adequately accounted simply as a remedy to a public goods problem. Facts are elements of knowledge, with abiding significance for social welfare benefits, but they have not been afforded the same protection under copyright as original work.

Copyright law frames its subject matter not through the distinction between public and private goods but through the distinction between the pre-existing and the original. That is why the public goods prism can warn us, it is true, that works of authorship can generate market failure, but it cannot tell us why they are specifically copyrightable.¹³

Although copyright may exhibit some of the features of public goods, there are other features that may be as important to an analysis of the economic operation of copyright. In addition, models of copyright that stress strong public goods characteristics will lead to the conclusion that there is not enough incentive to produce new works and not enough access to existing works. Any policy response will be framed as an unavoidable zero-sum balancing that is inevitably sub-optimal.

An analysis by Christopher S. Yoo suggests an alternative.¹⁴ He points out first that the conventional emphasis on public goods frequently overlooks the key feature identified by Samuelson, namely that 'the same quantity of production can appear as an argument in more than one person's consumption function' and that therefore, there is an incentive for

¹³ Drassinower, *What's Wrong with Copying?* 133

¹⁴ Yoo, Christopher S., "Copyright and Public Good Economics: A Misunderstood Relation" 155 U. Pa. L. Rev. 635 (2007) and Faculty Scholarship. Paper 780, accessed at http://scholarship.law.upenn.edu/faculty_scholarship/780

consumers to understate the value they attach, in this case to copyright works with the expectation that others will carry a share of the first-copy costs. The 'true challenge posed by nonrivalry in consumption is the difficulty in getting consumers to reveal their true preferences.'

Yoo identifies that over-reliance on traditional modeling of copyright focusing on pure public goods characteristics and the possibility of copying with zero marginal costs also risks mischaracterizing the fundamental policy problems. This increases the likelihood of suboptimal remedies.

He points out that very different, and better, conclusions would be reached by modeling more appropriately informed by spatial competition and the economics of 'impure public goods', following analysis by Joseph Stiglitz whose work is also referenced by the Issues Paper.¹⁵ The use of spatial competition as a model recognises that the competition between copyright works occurs on a variety of dimensions. The Commission notes that an efficient intellectual property system would encourage those that can create intellectual property at the lowest cost to do so, as though intellectual property were an undifferentiated commodity. In practice, cultural products are characterised by a very high level of horizontal differentiation. This is important because consumer surplus is not the only source of economic welfare. Consumers also benefit when the goods available to them fit with their tastes and preferences. Increases or decreases in the range or variety of copyright works have an impact on consumer welfare that when considered may result in a different conclusion from an assessment that uses only the operation of the price-quantity space.

Adaptable

How well has Australia's IP system adapted to changes in the economic, commercial and technological environment and how well is it placed to adapt to such changes in the future? What additional challenges does technological change and new methods of diffusion, including digitisation, present for the adaptability of the IP system?

The Commission suggests that those who 'have grown up since mass adoption of the internet are challenging many of the long-held precepts of copyright law'. We respectfully disagree. To some extent, the Commission's impression of the arguments may reflect the limitations of a perspective of copyright disputes as a no-win struggle to trade-off value between creators and users. In our submission, the rights of authorship remain a key base for the public domain and copyright remains the foundation for an important and well-functioning market. We endorse the conclusions of the Attorney-General, Senator the Hon George Brandis:

The principles that underpin copyright ...have adapted to cinema, radio, television and personal computers, why not to technologies of which we are still to dream. ... the fundamental principles of copyright law, the protection of rights of creators and owners, did not change with the advent of the internet and they will not change with the invention of new technologies. The principles and values underlying

¹⁵ *ibid.*, 688

intellectual property law and the values which acknowledge the rights of creative people are not a function of the platform on which that creativity is expressed.¹⁶

We support the submissions of the Australian Copyright Council and the Copyright Agency that attest to the capacity of Australian copyright to adapt to industry changes.

PROPOSALS FOR CHANGE

To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'? What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

At the end of the article quoted above examining possible policy frameworks to deal with the actions of firms that have harmful effects on others, Ronald Coase cautions against comparisons with some imagined ideal world, and recommends that a better approach would seem to be to start our analysis from a situation approximating that which actually exists. Our comments above on a number of the assumptions that appear to be implicit in the Commission's approach illustrate that there may also be difficulties in creating an adequate model of the existing arrangements. Coase concludes:

It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. But in choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others.¹⁷

As the Commission has identified, building the evidence base to assess the operation of Australia's copyright arrangements is challenging. The larger any change to existing copyright, the more uncertain will be its effect. Although the Commission's question appears to assume that a 'better balance' can be found, this has not yet been demonstrated.

The remainder of this submission focuses on two specific areas in which change to the existing arrangements has been canvassed.

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime? How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/ or fair use provisions play in striking a better balance?

¹⁶ Address at the Opening of the Australian Digital Alliance Fair Use for the Future – A Practical Look at Copyright Reform Forum 14 February 2014 Accessed at <https://www.attorneygeneral.gov.au/Speeches/Pages/2014/First%20Quarter%202014/14February2014-openingoftheAustralianDigitalAllianceForum.aspx>

¹⁷ Coase, "The Problem of Social Cost." 44

US-Style Fair Use

The Australian system of Fair Dealing

Australia has a system that facilitates the use of copyright material called 'Fair dealing'. Initially inherited from the United Kingdom, Australian legislators have considered and, in some cases, expanded its scope on a case-by-case basis. The Copyright Act (Cth) sets out the purposes in respect of which a "fair dealing" exception may be available. These purposes are:

- research or study
- criticism or review
- parody or satire
- reporting the news
- advice from a legal practitioner, a patent attorney or a trade mark attorney.

These exceptions apply to all copyright material and clarify when use of that material does not constitute an infringement.

As the Australian Law Reform Commission (ALRC) reported as part of its inquiry into Copyright and the Digital Economy, most creative industry and copyright peak bodies agree that the fair dealing provisions provide a relatively unambiguous, clear guide for the user of copyright material:

"7.20 A number of rights owners and entities representing or assisting rights owners submitted that the current fair dealing exceptions operate adequately and effectively. They were of the view that no change, or at least no substantial change, was required to the fair dealing exceptions¹⁸."

Clarity is critical to the operation of copyright law for rights owners and users alike who enter into long-term business arrangements on the basis of current law. Without clarity, the operation of businesses built on copyright law is inefficient and ineffective, whilst ambiguity does not guarantee adaptability.

As the Australian Associated Press (AAP) commented at the time of the inquiry:

"The current [fair dealing] exceptions, as drafted, together with the guidance provided by judicial interpretation of these exceptions, provide sufficient certainty as to the respective rights of content producers and users. The existing exceptions also strike an appropriate balance between the interests of copyright owners and those who have a legitimate basis for using copyright material without consent."¹⁹

There have been criticisms of the fair dealing exceptions made through the process of the ALRC inquiry. However, fair dealing exceptions have been honed over a long period of time, in the context of clearly defined social benefits that do not unduly undercut the primary purpose of copyright (providing incentives and rewards to copyright owners and people who invest in copyright material).

¹⁸ <https://www.alrc.gov.au/publications/7-fair-dealing/operation-fair-dealing-exceptions-digital-environment>

¹⁹ *ibid*

Further, fair dealing exceptions are supplemented by the statutory licence systems which regulate – in economically efficient ways that don't undermine the purposes or benefits of copyright – where high-volume/ low value transactions should be permitted for socially beneficial purposes.

There is an irony that calls for extensions and increases to copyright exemptions coincide with the growth of the internet and technological changes mentioned in the Issues Paper. Digital technology has made copying easier, but as Productivity Commissioner Warren Mundy has pointed out: 'there is nothing in economic theory that suggests that... that people should not pay for the private benefits that they consume jointly with the public good'.²⁰ The economics of 'fair use' has often been based on the impediments to access caused by transaction costs. As the Commission has noted, the technologies that have made copying easier have also provided new and cheaper means for managing transaction costs. It may be that the better policy response would be for exemptions to be reduced as transaction costs fall.

Fair Dealing versus US-style Fair Use

Fair use is a legal doctrine that permits limited use of copyrighted material without permission from rights holders. Like fair dealing, fair use provides for the free use of copyright material if the use is "fair". While the purposes for which fair use may be relied upon include purposes such as parody, comment, criticism and so on, there is no set list of purposes that may be covered by the exception. Controversially, the way the doctrine has developed in the United States, the key factor in whether a particular use is "fair" is whether the use is "transformative". This is a relatively new development in US copyright law, and to quote Stanford University Libraries' copyright and fair use website:

"So what is a "transformative" use? If this definition seems ambiguous or vague, be aware that millions of dollars in legal fees have been spent attempting to define what qualifies as a fair use. There are no hard-and-fast rules, only general rules and varied court decisions, because the judges and lawmakers who created the fair use exception did not want to limit its definition."²¹

The disadvantage of the fair use system, as is evidenced by the US experience, is the uncertainty it introduces for users and rights owners alike, even though the US has long history with the fair use doctrine. The now famous case of *Cariou v. Prince* demonstrates the near impossibility of the courts to make the kinds of judgements about intention and qualitative extent of change to an original work that the fair use system requires in order to reconcile competing claims. The case was initially won by the French photographer, Cariou, whose photos had been used by artist Richard Prince without permission. The decision of the New York district court was appealed and overturned. Cariou appealed to the US Supreme Court, but his application to have was declined. The case subsequently settled.

²⁰ Mundy, Dr Warren, "*The economist and a lawyer went to lunch... reflections of the Productivity Commission's Access to Civil Justice Inquiry*" (2015). Access to Justice. Paper 34. <http://www.civiljustice.info/access/34>

²¹ <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/#sthash.o9krTxx3.dpuf>

The case highlights the uncertain application of fair use, particularly with the current emphasis on whether or not the use complained of is “transformative”. As reported at the time:

“Traditionally, a fair-use defense succeeds when the new use of the copyrighted work is considered criticism, commentary, educational, or otherwise “transformative.” Of the three judges sitting on the appellate court, a two-judge majority made the surprising argument that “Prince’s work could be transformative even without commenting on Cariou’s work or on culture, and even without Prince’s stated intention to do so.” (Indeed, during the district-court proceedings, Prince was asked: “Were you trying to create anything with a new meaning or a new message?” He answered: “No.”) The judges found that twenty-five of the thirty paintings were transformative; five pieces were sent back to the district court for reevaluation. The dissenting judge, meanwhile, wondered how the other two judges could “confidently” make a distinction between the pieces that were transformative and those that were questionable.”²²

Though hailed at the time by some legal minds in the States as clarifying the law, the decision on what constitutes ‘transformative’ in the *Cariou v. Prince* case can be contrasted with the settlement regarding the Associated Press claim against artist Shepard Fairey over what is now an iconic graphic image of Barack Obama. Associated Press claimed that the image created by Fairey was based on an image owned by Associated Press and the settlement, though reached out of court, favoured the rights owners. Degrees of ‘transformation’ therefore are very questionable.

The supposed advantage of the fair use system is its support of innovation and creativity. In the view of the APA, however, no clear argument has yet demonstrated that seeking permission for use from a rights owner, utilising material under fair dealing or under statutory licence stops creativity, innovation or chills competition. Indeed, to the extent that value in copyright material is available to be unlocked, that is something that publishers are particularly experienced in doing, and something that should be within the province of the creator’s rights so they can allocate value. Introduction of “fair use” would have the opposite effect – allocating value to third parties who have not created the material or invested in its development, publication and promotion.

What can be empirically demonstrated is that, as a result of the uncertainty of the application of fair use in the US there is actually a culture of risk aversion. This is clear from a report released in February 2014 from the College Art Association, an organisation that represents approximately 14,000 artists, arts professionals and arts academics in the US. In that report it was clear that most professionals had no idea how to apply fair use²³.

In addition, even the high-profile advocate for what is sometimes known as copyright minimalism, Lawrence Lessig, is reported as saying that fair use is essentially only a right to hire a lawyer.

²² <http://www.newyorker.com/business/currency/who-owns-this-image>

²³ <http://www.collegeart.org/pdf/FairUseIssuesReport.pdf>

In addition, introducing a fair use system into Australia would introduce further uncertainties, on top of the uncertainties already inherent in fair use as such, as it would be completely unclear as to the extent to which courts here would import US concepts and approaches. One could confidently predict an extended period of litigation and business uncertainty, which would operate to limit innovation.

The Impact of the Implementation of Fair Use

Only a small number of countries, including the US, in which fair use has been implemented.

The UK decided fair use may work fine in those jurisdictions which are used to it, but that it would be highly disruptive and expensive to introduce it anew into UK or EU law. It would be to open the need for many years of litigation as parties sought judicial interpretation of the new parameters. Even in the US, which is well used to Fair Use, there are regular long-running legal battles as to what the provisions actually mean. It would have been wrong to throw out the decades of case law in the UK and EU – which provide precedent for the interpretation of new cases – in favour of a less well-understood framework²⁴.

The Impact of Expanding the Scope of Fair Dealing

Canada has a fair dealing system but since 2012, its Supreme Court has re-interpreted domestic copyright legislation in a way that has dramatically expanded how its fair dealing exceptions apply, including in the context of education. In particular, the Court found that the purposes of an end user of copyright material may be relied upon by the person who is actually using the material (for example, a teacher could rely on the research and study of his or her students).

Following this decision, various educational institutions adopted guidelines that essentially moved all the dealings with copyright material that had hitherto been licensed by Access Copyright in Canada into dealings that would be made for free.

The impact of the changes on educational publishers is irrefutable and negative. A recent report from PriceWaterhouseCoopers (PWC) is pretty clear and damning²⁵:

“Our Assessment finds that, since implementation of the Fair Dealing Guidelines, the educational publishing industry in Canada has been subject to a significant negative impact. Licensing income is substantially reduced. Revenues from sales are experiencing an accelerated decline. These declines, we believe, will accelerate further, causing adverse structural change in an industry already weakened by numerous other negative developments in the educational content market.

Application of the Guidelines significantly compromises the ability of educational publishers to publish original materials and meet varied academic needs. Indeed, we

²⁴ <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>

²⁵ <http://www.accesscopyright.ca/media/bulletins/impacts-of-the-education-sector%E2%80%99s-interpretation-of-fair-dealing/>
https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf

expect that over time, the publishing of new content for K-12 schools in Canada will for the most part disappear, and the quality of the content used by school students will thereby decline."²⁶

This report is corroborated by the experience of individual publishers, such as Oxford University Press.

Do existing restriction [sic.] on parallel imports still fulfil their intended goals in the digital era?

Parallel Import Restrictions and the Printed Book

The Australian Market and Parallel Importation Restriction

Australian law recognises the right of copyright owners to control the distribution of their products in Australia. Those rights are the basis on which publishers invest in the editing, production, marketing and promotion of a title.

The Copyright Act 1968 (s. 37) restricts the importation of books without the permission of the copyright holder. It prohibits importation of commercial quantities of a title that a publisher holds the rights to publish in Australia, provided the title is made available to the Australian market within 30 days of its release anywhere in the world and (if published in Australia within that period) provided the Australian copyright owner is able to supply copies within 90 days of being requested to do so. Importantly, section 37 doesn't apply to individual consumers, who are free to buy books from any market in the world.

The international trade in book rights developed because titles with a publisher in a market do better than those with only a distributor. The Copyright Act allows that trade without compromising availability. Since 1991, the Act has included use-it-or-lose-it provisions. Territorial protection is lost if a book is not published in Australia and made available for purchase within 30 days of its overseas publication or (if published in Australia within that period) if the Australian copyright owner is able to supply copies within 90 days of being requested to do so.

In 2012, the Australian Publishers Association and the Australian Booksellers Association entered into an industry-wide agreement known as the Speed to Market Initiative. Publishers agreed to allow booksellers to import books if the publisher is unable to dispatch an order within 14 days, rather than the 90 days to supply set out in the Act. For most major authors, local publishers are publishing in Australia simultaneously with international release.

also, over the last decade, the average selling price of a book in Australia has fallen in real terms by a third and the changes in price-points show publishers have little control over market prices. Rivalry between similar titles keeps prices highly competitive and publishing firms do not enjoy above average rates of profit.

²⁶ ibid p3

PIRs, in actuality, represent a very limited intervention in the marketplace. They promote – they do not limit – diversity and availability of product for the Australian consumer. They therefore fulfill one of the stated aims of competition policy – supporting diversity of choice in the marketplace.

The Impacts of the Removal of Parallel Importation Restrictions

There are clear impacts to the removal of PIRs. The most significant impact will be to make investment in Australian authors less viable. PIRs maintain the integrity of Australian territorial copyright - without which, there is no value in holding Australian territorial copyright. If there is no value in holding Australian territorial rights, they cannot be sold. A fundamental of the international publishing trade is gone. The Commission recognises that an efficient intellectual property system will facilitate trade in intellectual property rights. The removal of an effective Australian territorial publishing right will substantially reduce the tradeability of literary works in Australia.

The removal of the PIRs will significantly impact the Australian print industry²⁷. The incentive to use Australian printers to establish and maintain territorial copyright for titles under the use-it-or-lose-it regime will be lost. With it will go a significant business for the print industry. Like the publishing industry, the Australian print industry has undergone massive transformation in recent decades. It is one of the few manufacturing sectors to have done so successfully. To remove a significant proportion of business from an industry, already challenged by the growth of the eBook and the dramatic decline in the use of print for the educational sector, will seriously damage the industry – an industry that has just been through a phase of major infrastructure investment in order to adapt to competition, particularly from Asia.

The publishing industry is also in a period of substantial change and disruption to which it is responding innovatively and competitively. Removing the basis of its property rights will engender further disruption and uncertainty with only negative effects on the industry and dubious benefits for consumers.

Challenging the Assumptions underlying Supposed Benefit of Removing Parallel Importation Restrictions

The supposed benefit of removing PIRs is cheaper books for the Australian consumer. Although not explicitly stated, the benefit would presumably be across all sectors of the market - educational texts, children’s books, trade literary fiction and nonfiction. In reality, each of these sectors operate in significantly differing ways. They demand differing levels of investment and differing kinds of investment. These differences have a variety of implications if PIRs are removed.

Educational texts are closely tied in their development to curriculum and the educational sector. The educational sector is divided between the primary, secondary, tertiary and vocational markets which have different characteristics and interdependencies. All these areas, however, require heavy investment in complex, and often multi-platform development

²⁷ <http://competitionpolicyreview.gov.au/files/2014/06/PIAA.pdf>

tailored to their domestic student market. Textbooks are no longer just print material but integrated with digital multimedia content. They require innovative software development and rigorous application of pedagogical method. To remove the incentive to invest in Australian educational material for the sake of 'cheaper books from overseas' will critically compromise the quality and relevance of educational material and, therefore, the quality of education for Australian students. This effect can be clearly demonstrated by the experience of Pearson in New Zealand and Oxford University Press in Canada. In addition, in recent industry RRP price comparisons of the top ten titles of the top four educational publishers in both Australia and the US - Cengage, Pearson, McGraw Hill and Taylor & Francis - Australia was almost invariably the much cheaper market. If PIRs are removed, many of the global publishers will move to one world pricing. The multinational publishers that produce the majority of educational texts would have no incentive to retain pricing specially for the Australian territory. In moving to one world pricing policy, educational texts will become more expensive, not less expensive. Pricing will become less adaptable to the market.

The children's publishing sector, though part of the larger trade sector, also has some particularities. The children's publishing sector is the crucible of literacy and intersects with educational publishing in some of its market drivers. The value of children's books, as has been demonstrated by innumerable studies, cannot be overstated²⁸. The value Australian authored and illustrated children's books which reflect the lives and experiences of Australian children cannot be overstated. To compromise domestic investment in Australian children's writers and illustrators will have a far-reaching effect on national literacy. Children's books from other larger English-markets will no longer reflect Australian English. Seasons will be the opposite of the southern hemisphere. Those elements of the natural world that form the world of children's stories will be European and North American. All those elements of Australian experience that publishers have heavily invested in representing in response to domestic consumer demand and cultural imperative will increasingly be lost.

Removal of PIRs will ensure that there is greater uncertainty in determining domestic demand for printed books because of the increase in channels for commercial volume imports. This is due to the structure of the industry which has been under-appreciated by the Productivity Commission in the past and the recent Competition Policy Review.

Publishing, and particularly the trade publishing sector demonstrates a high 'blockbuster effect' - more so than any other creative industry²⁹. As part of this market behaviour,

²⁸ <http://www.betterreading.com.au/kids-ya/even-more-reasons-to-make-time-for-reading-self-esteem-creativity-friendship-and-good-sleep/>
<http://www.betterreading.com.au/kids-ya/studies-of-kids-and-reading-weve-been-catching-up-on-this-week/>
<http://www.betterreading.com.au/kids-ya/never-too-old-the-joy-and-benefits-of-reading-aloud-with-older-kids/>
<http://www.betterreading.com.au/kids-ya/can-eating-dinner-together-boost-your-kids-reading/>

²⁹ McCutcheon, Marion, Given, Jock. News and Media Research Centre, University of Canberra, 2013. *Heads and tails: the long tail in Australian media markets*.

industry estimates indicate that most books will sell 50% of their first 26 weeks sales by about week 8, with week 3 usually being the peak week. Publishers take risks with every investment they make. They mitigate their risks by portfolio investment. It is a truism of the industry that out of ten books that a publishers invests in, five will be losses, between three and four will break even or make a small profit and one will be the 'blockbuster'. To get your 'blockbuster', you have to invest in the other nine titles.

As a result, it is not the case that removing PIRs will make the book market more responsive to consumer demand. It will have the opposite effect. Publishers will become more risk averse and the niche title or the experimental novel or the children's book that may not also find sales overseas will not be invested in. This will not be because there will suddenly be no demand for such work. These investments will simply become too risky to invest in for a publisher that must contend with the reality that selling the right for a publication overseas could lead to that very same title being imported back into Australia over the top of the originating publisher. At the same time, removal of PIRs will not guarantee that same title will be cheaper. Instead it will create a bias in the market towards the overseas supplier.

The example that has been cited as the market that benefited from the removal of PIRs is New Zealand. The data, however, does not as clearly demonstrate this as is supposed. Since 2009, the number of titles annually introduced into the New Zealand market has declined. A number of publishers, originally with significant investment in the New Zealand domestic market, exited or wound down their operations after PIRs were removed (Hachette, Pearson, and HarperCollins as example). To quote Lincoln Gould from Booksellers NZ in a recent article in *The Read*:

"It is a difficult situation where New Zealanders can buy a New Zealand-published book cheaper from an overseas retailer who has bought it from the same publisher which supplies New Zealand retailers.

"The flight of international publishers from New Zealand also causes concern because of the loss of capital to support New Zealand authors. It is difficult to think that the capital put into publication of New Zealand titles by the likes of Hachette can be fully replaced by local publishers. **After all, publishers are risk takers in the sense of venture capitalists. They put huge effort and expense into the publication of a book with no certainty that it will succeed. You have to have strong financial backing to be able to take on that risk to any major extent. Publishers with small lists, which means most New Zealand publishers, will be risk averse, as evidenced by their preference in many cases not to supply on a sale or return basis.**"³⁰

The flight of international publishers from New Zealand in recent years has been, in part, or in whole, due to the opening of the New Zealand domestic book market. This has directly led to a decline in investment in New Zealand authored titles:

"The Big Four in New Zealand publishing over the last 25 years have been Random House, Penguin, HarperCollins and Hachette. We don't know yet what shape the

³⁰ [http:// booksellers.co.nz/ members/ services- membership/ future- publishing- new- zealand](http://booksellers.co.nz/members/services-membership/future-publishing-new-zealand)

slow and considered merger of Random House and Penguin will take in this market or even many international ones.

What we do know is that Hachette will now only have a sales and marketing presence here as of next month; they have also stated they will not be undertaking any publishing for the New Zealand market from their Australian offices.

And we do know that HarperCollins NZ customer service and distribution are now run from Australia; as of October 2013, only the sales, publicity and marketing and editorial functions will exist in New Zealand. The heads of each of these functions will report to their respective directors in those areas in Sydney. As a result of the bookselling recession in this market, HarperCollins NZ intends to produce only 20 local titles per year, down from a previous 40 - 45 titles.”³¹

THE BROADER LANDSCAPE

Institutions

Are there reforms to public institutions involved in defining, allocating and enforcing IP rights in Australia that would provide net benefits to the community?

The APA supports the comment of the Copyright Council in their submission that “the systemic aspects of IP lend themselves to the type of analysis proposed by the Commission better than the rights themselves”³². We support the view that assessment and administration of copyright should be done by:

- experts in their field
- adequately resourced, and
- impartial³³.

Our copyright institutions play a vital role in the operation of copyright in the market, either through the communication and education functions of the Copyright Council, the effective and efficient administration of the statutory licence system through the Copyright Agency, or the legislated role of the Copyright Tribunal. We view that current institutions are adequate and fit-for-purpose but ongoing joint efforts to work with all stakeholders to simplify copyright are important and remain a priority for the APA.

Enforcement

Are IP rights too easy or hard to enforce in Australia, and if so, why? To what extent can Australian firms enforce their rights internationally? Does this differ across regions and/ or countries? What improvements could Australia adopt from overseas approaches?

³¹ *ibid*

³² Copyright Council, *Submission in Response to Productivity Commission Issues Paper on Intellectual Property Arrangements*, November 2015.

³³ *ibid* p5

The APA supports the three primary principles of sound compliance and enforcement - proportionality, consistency and transparency. In the context of copyright legislation, we interpret proportionality to mean that enforcement action undertaken, through whatever mechanism available in law, will be proportionate to the seriousness of the breach of compliance and resulting rightsholder detriment. By consistency, it is meant a predictable approach taken in interpreting, applying and enforcing copyright legislation. By transparency, it is meant that copyright legislation is simplified as to be accessible to the layperson and that copyright institutions and government have a key role in communicating the tenets of copyright.

International experience provides a useful guide to enforcement options for the future in Australia. A new small claims process in the UK is the Intellectual Property Enterprise Court (IPEC)³⁴ It is used largely by very small businesses in the design and trademarks field although there is a route for copyright. IPEC has not been tested in the publishing arena to any significant extent according to the UK Publishers Association (UKPA), however photographers, who face constant infringement challenges from the internet, have used the court to enforce their rights effectively.

It is still too soon to assess the success of the recently passed *Online Copyright Infringement Bill 2015* (Cth) in deterring and reducing online copyright infringement. However, online copyright infringement is a significant issue across the creative industries and particularly for educational publishers. Some overseas experience may provide a guide to the potential impact of the legislation.

In the UK, the main redress to online copyright infringement has been through the High Court. The UK PA successfully brought a Blocking Order under Section 97A of the UK's *Copyright, Designs and Patents Act 1988* in May 2015³⁵. No damages in the case were awarded. The legislation only allows for an injunction against the ISPs to prevent access to the sites. Though the process is expensive and complicated both factors are reducing as more cases are brought. Indications show that the actions can reduce use of the infringing sites by up to 75%.

More broadly with ISPs, the Creative Content UK programme 'Get it Right from a Genuine Site' has just launched³⁶. This is the "top cover" tv ad and marketing in advance of a programme of notifications to go from the ISPs to infringing subscribers on their networks early next year. The notifications will not include any sanctions – or even threats of the sanctions – but are at least an effort by ISPs to help rights holders tackle peer-to-peer or torrent infringement.

Australia has also sought, through stakeholder-consensus and industry-led solutions, to assist consumers in the marketplace to find non-infringing content. The Digital Content

³⁴ <https://www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court>

³⁵ <http://www.v3.co.uk/v3-uk/news/2410381/uk-publishers-association-secures-book-piracy-site-takedowns>

³⁶ <https://www.getitrightfromagenuinesite.org/>

Guide³⁷ initiative led by Music Rights Australia and supported by representatives across the creative industries was developed to help consumers to find legitimate content. Like the Copyright Hub³⁸ in the UK, and the WeCreate³⁹ website in New Zealand, it shows what can be achieved through market-led solutions.

The APA is of the view that the first and best step in enforcement is good, clear communication.

International obligations and their constraints

What principles should guide decision making for future international negotiations on IP rights?

Australian copyright law has its roots in international law. Australia is a signatory of the Berne Convention (1928). Australia is a member of the World Intellectual Property Organisation (WIPO). There is an implication in the Issues Paper that international law is a negative constraint on Australian copyright law. However it has long been recognised that for IP, and copyright, to operate effectively and efficiently, it must operate globally. This is no more true than in a post-digital revolution, globalised marketplace.

Rather than constraint, Australia has had a significant influence on international copyright legislation. One only need to see the achievement of the Marrakech Treaty⁴⁰ and the strong Australian presence throughout the negotiations of the Treaty to recognise Australia's international influence.

³⁷ [http:// digitalcontentguide.com.au/](http://digitalcontentguide.com.au/)

³⁸ [http:// www.copyrighthub.co.uk/](http://www.copyrighthub.co.uk/)

³⁹ [http:// wecreate.org.nz/ # 2](http://wecreate.org.nz/#2)

⁴⁰ [http:// www.wipo.int/ treaties/ en/ ip/ marrakesh/](http://www.wipo.int/treaties/en/ip/marrakesh/)