

Submission to Productivity Commission draft Report - Australia's Intellectual Property Arrangements



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Introduction

Music Australia is the peak music organisation representing the Australian music community. Each of the members of Music Australia is assigned to, and represents, a particular aspect or sector of the Australian music community, such as music creation, production, distribution and education. Music Australia is Australia's representative to the International Music Council, which is based at UNESCO headquarters in Paris.

Music Australia's membership comprises creators, rights holders and users of copyright material. This places us in a small group of organisations that will be making submissions to the Inquiry or responding to the draft Report that represents diverse, as opposed to singular, interests.

Music Australia is the only organisation in Australia devoted to music in its entirety. We are a 50-member national umbrella body with activities spanning education, community and the professional industry. We deliver campaigns, information, resources, sector networking, community engagement, a national school music participation program, and demonstration projects.

This submission responds only to specific findings and recommendations made by the authors in the copyright section of the draft Report.

Overall comments

Music Australia considers that the authors of the draft report have taken an overly utilitarian view of the purpose of copyright protection. They have concentrated almost entirely on the economic justification for copyright as an enabler of creative activity to the exclusion of any consideration as to whether or not copyright works, especially those that are produced for artistic, self-expressive purposes (which need not rule out commercial exploitation of the end result) have any intrinsic value that is worthy of protecting in its own right.

Music Australia also notes that the draft report does make some distinctions between "commercial" and "non-commercial" copyright works. However, in our view it would be useful to develop this distinction and elaborate on whether some of the findings in the draft report that emphasise the utilitarian aspects of copyright protection might apply only, or to a greater extent, to works that have a purely commercial purpose (such as, for example, a database for storing business records) than those that have a primarily artistic focus.

In addition, Music Australia wishes to emphasise that copyright is personal property. Given the central importance of property rights in our current economic system, Music Australia considers that any recommendations that interfere with the personal property of creators and rights holders should be made and enacted with great caution and on the basis of strong evidence rather than economic theory.

Finally, there are recommendations in the report that would drastically change intellectual property arrangements, which are not backed by sound evidence. These would have profound adverse economic impacts on rights holders. It is Music Australia's view that recommendations for substantial legislative change must be based on good evidence.

Term of copyright

DRAFT FINDING 4.2 - While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

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This is a "draft finding" rather than a recommendation. The Commission recognised that Australia's international treaty obligations preclude any immediate change to the term of copyright.

We note that the responsible government Minister, Senator Fifield, has disowned this draft finding. Despite this development, Music Australia considers that the draft finding merits comment.

Music Australia considers that this finding exposes the particular economic approach that the authors of the draft report have taken to the topic of copyright. We consider that the draft finding do not demonstrate full knowledge of the commercial realities of the industries that will be directly affected by the recommendations made about copyright in the draft report.

Following are 3 examples that would result if the term of copyright were 25 years.

- Cattle And Cane, written by Go Betweens' songwriters Grant MacLennan and Robert Forster, did not make the Top 50 charts when released in 1983, but was selected in a 2001 poll as one of the top 30 Australian songs of all time. A person wishing to include the song in a film, or use it for some other purpose, would not need to obtain the consent of Forster (MacLennan died in 2006) or the writer's music publisher to do so and would have no obligation to pay any royalties. In addition, he would no longer receive royalties for public performances or recordings of the song.
- A person wishing to create a "juke box" musical using songs of iconic Australian bands such as Cold Chisel, The Church, InXs and the Hoodoo Gurus, could do so without the consent of any of the songwriters or without needing to pay any royalties, as most, if not all, of their most commercially successful songs were created before 1991.
- The Australian composer Carl Vine's 3rd Symphony was published in 1990, which means that under the Commission's draft finding he would have no control over uses of the work, and would receive no royalties for performances, recordings or other uses of it. A recording of Vine's works, including the 3rd Symphony, was released by ABC Records in 2000. At the lower end of the Commission's preferred copyright term, that recording would now be in the public domain.

These examples are far from atypical. Music Australia considers that the draft finding completely disregards the fact that the copyright system needs to be adapted to protect a very broad range of works, ranging from deeply personal creative pieces produced by individual authors through to large scale works produced by multinational organisations with budgets of tens of millions of dollars. In addition, copyright protects other works that are more utilitarian in nature and conception, including computer programs, business records, spreadsheets, marketing material and the like.

It appears that the authors of the draft report have taken a "lowest common denominator" approach, to arrive at a finding that suggests an excessively short term of copyright that would decimate creative industries if implemented.

The authors of the draft report take issue (at pages 96 and 97) with various estimates that have been made of the contribution of copyright dependent industries to Australia's economy. Without prolonging that debate, it is clear on any measure that the contribution is very large; and recorded music is one of the most significant contributorsⁱ. In addition, almost weekly in the open market, arms length sales of catalogues from long dead composers raise multi-million dollar sums. We urge the Commission to reflect on this and reconsider its view that the value of copyright works is exhausted in a very short period after publication.

While Australia is constrained by international treaties from changing the current term of copyright, it should not be forgotten that successive Australian governments have been accused of ignoring their international treaty obligations in other areas of the law.

In addition, we consider that the authors of the draft report fall into error by emphasising copyright's role in providing an economic incentive for creative endeavour to the total exclusion of any consideration as to why copyright, which the Copyright Act recognises as a species of personal property, should be treated any differently from other species of property and accorded a finite life.

For example, the draft report acknowledges (at page 3) that, while IP arrangements "are not different from the property rights that apply to the ownership of physical goods", "unlike the rights over physical goods, IP rights are not granted in perpetuity and there are limitations on their application." Having made this observation, the authors have not demonstrated why this should be the case, despite their remit to conduct a root and branch assessment of IP arrangements. In our view it is not acceptable to argue that proposing a perpetual term of copyright, for example, would be a radical concept, as the authors of the draft report have not been constrained in that regard with other findings and recommendations.

Finally, it must be noted that the Commission proposes that the shorter term of copyright should commence on creation of the work. The lag time between creation and publication (or other commercial exploitation, depending on the nature of the work) of most copyright work is often a number of years, so the real term of copyright would be significantly shorter than the recommended range.

Music Australia makes no comment on what the ideal term of copyright should be. We simply note that the authors of the draft report produce no compelling evidence that the current term is acting as a serious deterrent or hindrance to innovation.

If the Commission proposes to retain this draft finding in its final report, Music Australia considers that it should only do so on the basis of a cost benefit analysis based on fact (as opposed to philosophical position). In other words, it should present unequivocal evidence as to:

- the cost to creators (both domestic and International) from shortening the current copyright term; and
- who would benefit and by how much there would be a net benefit to Australia.

DRAFT RECOMMENDATION 5.1 - The Australian Government should implement the recommendation made in the House of Representatives Committee report *At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 (Cth)* to make clear that it is not an infringement for consumers to circumvent geoblocking technology. The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

Music Australia considers that implementing this recommendation would effectively put Australia in the middle of a global competition for IP flows. This against a background in which the authors of the draft report lay out that Australia is a significant net importer of IP. Music Australia considers that it is incumbent on the Productivity Commission to balance this recommendation with suggestions as to how Australia should improve the balance between IP outflow and inflow within the framework of our international obligations. In our view, it is naive to think that unilateral action to eliminate geoblocking would be met with benign indifference by our trading partners.

Finally, on this point, no consideration appears to have been given to the benefit that the ability of Australian creators and rights holders to licence and assign copyright on a territorial basis provides and the effect that unilateral action to eliminate geoblocking would have on this.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use. The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users. The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- **the effect of the use on the market for the copyright protected work at the time of the use**
- **the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work**
- **the commercial availability of the work at the time of the infringement**
- **the purpose and character of the use, including whether the use is commercial or private use.**

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission. The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

Music Australia (Music Council of Australia, as it then was) addressed the question of fair use in an Australian context in our submissions to the Australian Law Reform Commission inquiry into Copyright and the Digital Economy.

Our core submission on this issue at the time stated:

On any view, these [the ALRC recommendation to introduce fair use and associated changes] would constitute radical amendments to the current Copyright Act. It is difficult to see them as other than a substantial dilution of the current rights of

copyright owners. In the MCA's respectful submission, the evidence referred to in the Discussion Paper does not demonstrate a compelling case that the social benefit of enacting the Fair Use Proposal would outweigh the social costs (see the further discussion of these below).

Nothing in the material presented in the current draft report has persuaded us to alter that view, notwithstanding that our membership includes creators and rights holders as well as organisations that predominantly are users of copyright material.

As a preliminary point, we note that there appears to be some confusion on the part of the authors of the draft report as to what would become of the current statutory licensing arrangements if the recommendation to introduce fair use were implemented. On the one hand, the draft report comments favourably on the ALRC's proposal that the statutory licensing arrangements should be abolished in favour of voluntary licensing arrangements. On the other hand, the draft report notes with apparent approval the legislation introduced earlier in 2016 that would streamline current statutory licences for educational use, but does not expressly state whether these should be retained. We suggest that the Commission's position on these points should be clarified as soon as possible and that stakeholders who consider that they may be affected be given a further opportunity to comment once this has been done.

In passing, we wish to draw attention to an aspect of the Commission's publicity for the recommendations in the draft report that we consider is misleading. An infographic that the Commission has been circulating on social media suggests that a potential benefit of the enactment of fair use would be that teachers would be able to record television and radio broadcasts for classroom use. The clear implication of this is that teachers currently do not have this ability. This is incorrect; the Copyright Act currently permits educational institutions to copy and distribute broadcasts for educational purposes provided that the educational institution where the teachers work has a remuneration notice in place with Screenrights. The footnoting in the infographic is obscure and does nothing to correct the misleading headline representation, in our view.

This brings us to another point: there is an unspoken assumption in the report that it is reasonable that copyright owners should subsidise educational uses of copyright material. Given the extensive economic analysis that the Commission has brought to bear in other sections of the draft report, Music Australia considers it surprising that this assumption is left unexamined, given that many educational institutions are private and charge very high fees. We are not aware of any circumstances in which suppliers of other goods and services are required to subsidise educational institutions. We make this comment even though some of our members are educational providers simply to make the point that the economic justification appears to have been used selectively in the Commission's examination of copyright.

Finally we note the Commission's dismissal of concerns expressed by some submissions that the introduction of fair use will inevitably lead to litigation and legal uncertainty. We consider that the Commission has not taken sufficient account of the extent to which the introduction of fair use will lead to litigation and uncertainty, with the accompanying potential for a chilling effect on innovation.

The recently concluded U.S. court case between Oracle and Google relating to Google's use of application programming interfaces from Oracle's Java program is a case in point. The trial that has just concluded was a re-litigation of the original case in which Google was found to have infringed Oracle's copyright in the APIs. Google argued that its use was not

infringing because it was fair use. Google has succeeded on that point, but given what is at stake it is likely that Oracle will appeal.

In another entirely different US fair use case, unauthorised and unremunerated appropriation and alteration by the artist Richard Prince of artistic photographs of members of a Rastafarian community taken by the photographer Patrick Cariou were found on appeal not to infringe Cariou's copyright because they were fair use. However, this finding was only made on appeal, after the court at first instance had found that Prince's treatment of the original works infringed Cariou's copyright. Even then, the appeal court only made a definitive fair use finding in favour of Prince in respect of 25 of 30 of the photographs in suit. It is increasingly apparent, in our submission, that fair use disputes in the US are decided on a case by case basis, especially where, as in the Oracle v Google case, the decision is made by a jury and no published reasons are given to provide guidance for similar future cases or even for appeal courts to assess the basis on which the original decision was made.

Conclusion

Music Australia respectfully requests that the above matters be addressed in the Commission's final report. While we recognise that the government has indicated that it has no intention to try and change the term of copyright, this issue was raised as a draft finding in the draft report. Accordingly, we feel the need to emphasise that it is vital to the viability of Australia's professional composers and songwriters that any move to change the current term of copyright does not reduce their ability to derive royalty income. Similarly creators must be able to have the right to be able to control the use of their work and be fairly and reasonably remunerated. Finally, any recommendations for changes to intellectual property arrangements must be backed by sound evidence that demonstrates a net benefit to the Australian community.

We recommend such evidence be gathered through an authoritative study into the copyright industries. This ought to be factually and evidence based, take into account our situation as a significant net importer of copyright material, be compatible with international trends among our most influential trading partners, include a detailed cost benefit analysis, and make recommended changes that would demonstrably lead to improvements, not further deterioration, of Australia's copyright trading position.

The objective of this analysis would be to strike a balance that encourages innovation by rights users and ease of use of copyright material, while providing effective security that harnesses our intellectual property as the basis for economic and export growth of Australia's creative content industries, and properly remunerates rights owners.

Music Australia would be prepared to participate in an appropriately framed study to implement this recommendation.

ⁱ Australian Copyright Council, The Economic Contribution of Australia's Copyright Industries (2015)