

## Submission by Robert J. Bouvet

### Productivity Commission Draft Report – April 2016.

**FEED BACK (Positive)** : Very well formatted draft report. Elaborate and well documented. Even though voluminous in nature, easy to navigate through.

**FEED BACK (Negative)** : Terms of reference limit transparency and somehow restrict optimum freedom of expression. Regrettably, the majority of its content predominantly reflects a lawyer's perspective on IP Law (especially Copyright Law) to the disadvantage of authors, creators and innovators, who seem to have a more up to date understanding of the recent progress made in computer sciences and electronic technology.

**SUMMARY** : Draft Recommendation 4.1 and Draft Finding 4.2 should be rejected on the grounds that the underlying motive of the Australian Legal Profession with regards to IP Law is most obscure when it comes to devising Copyright legislation. Section 219 of the ORIGINAL Australian Copyright Act, 1968 should be re-introduced by reason that there could not be a more **EQUITABLE** method for the calculation of the **JUST** rate of royalties owing to an author, creator or innovator. The **TRUE** definition of the French word "**Auteur**" should be taken seriously.

**QUALIFICATIONS** : I am the author of the original artistic work for the highest ever grossing Australian film at the box office worldwide. The said film's commercial earnings are still unsurpassed after 30 years, let alone equaled. The said film also generated an economic boost to the Australian economy shortly after its release in 1986. This enormous boost was in the form of a massive influx of foreign currency into the country that had never been seen before. This economic boost added several billions, if not trillions of dollars to the national economy.

**SUBMISSION** : In reference to : **Draft recommendations, findings and information requests – Chapter 4: [Pages 29 - 31]**

#### **DRAFT RECOMMENDATION 4.1**

The Australian Government should amend the *Copyright Act 1968* (Cth) so the current terms of copyright protection apply to **unpublished** works.

#### **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.

**Comment by the author of this submission :** Based on personal experience, **draft recommendation 4.1** and **draft finding 4.2** are quite evidently inputs from lawyers whose perspective on IP Law reflects their clear intention to ONCE AGAIN force statute time limitations to expire, so as to evade legal disputes initiated by authors and innovators for the infringement of their copyright/patented work/s that are UNBEATABLE from an economic and from the voting public's point of view.

Reducing the duration of copyright **from 50 years to 15-25 years** would be a SURE WAY of evading the resolve of ONE particular legal dispute that has been forced to remain unresolved for more than 30 years.

Please refer to the attached PDF document titled : “001.The Reactions of the Lawyer”

**Such a course of action would be in conflict with Clause 1-2 of this draft report.**

Since new ideas are a major source of economic growth, any defects in arrangements that encourage their creation and diffusion are very costly.

## 1.2 What has the Commission been asked to do?

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Under the terms of reference, the Treasurer has asked the Commission to consider whether current arrangements provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of creative works.

**The terms of reference requested, in recommending changes to the current system is to improve the overall wellbeing of Australian society.**

### **Box 4.3 – Does copyright provide a just reward for authors?**

**Evidence suggests much of the returns from copyright protected works are earned by intermediaries, rather than authors, musicians and the like.**

**Such [just rewards] arguments are highly effective because they appeal to our inclinations to reward authors for their creative contributions.**

**In practice however, relatively few of copyright's rewards find their way to those creators.**

**Most copyright policy discussion is founded on the myth that copyright is designed to meet the needs of authors.**

**Comments by the author of this submission :** Authors and Innovators, indisputably, ARE the people who in reality start the ball rolling – well BEFORE any intermediaries – as far as a projected increase in GDP is eventually added to the national economy !!

**NO ORIGINAL ARTISTIC WORK CREATED = equals = NO FUTURE ECONOMIC GROWTH** in GDP than can be effectively added to the national economy !!

## ABOUT THIS INQUIRY DRAFT REPORT 45

- Australia's international obligations
- **the relative contribution of IP to the Australian economy**
- the economy-wide and distributional **consequences of recommendations**, including their **impacts on trade**, investment and competition.

**Comments by the author of this submission :** Eliminating the means by which GDP could once upon a time be increased = equals = **Saying Good Bye to the lucrative Tourism and Film industries in Australia.**

### 18.1 - Enforcement policy and objectives

[Page 478]

- **engaging in alternative dispute resolution processes**
- Various state and territory courts, the Federal Court, Federal Circuit Court and High Court of Australia adjudicate IP disputes, including cases of alleged infringement.
- The Copyright Tribunal, a division of the Federal Court, hears disputes over terms and conditions (**including royalty rates**) under voluntary and statutory copyright licences.

[Page 478]

**Comment by the author of this submission :** In the year 2000, the Federal Government of the day introduced amendments to the ORIGINAL Australian Copyright Act, 1968. One of these amendments was the removal of **Section 219** from this particular piece of IP legislation which most importantly had been enacted by the Legislative Government (i.e. by Parliament) at that point in time.

By virtue of the Constitution of the Commonwealth of Australia, IP legislation has its own inherent legal rights due to the fact that statutory IP Law (like e.g. the Australian Copyright Act, 1968) is enacted by a popularly elected Legislative Government (i.e. by the Parliament).

**For this reason legal rights under IP Law CANNOT be said to be mere “creatures of municipal legal rules”. Rights under IP Copyright Law DO EXIST as legal rights.**

Section 219 was the most **EQUITABLE** method for the calculation of the **JUST** rate of royalty owing to an author/creator or innovator for his/her percipience.

The principle of that particular method of calculation was based at the time on the **LOGICAL** mode of thinking at work then (and now) that royalties should be **proportionate** to the gross amount earned (after production costs) by a cinematograph film at the box office.

How many of us have heard the key question asked by a car salesman whenever a prospective customer walks into a car yard? "... **How much do you want to spend ...?** ”.

Although car salesmen do not normally possess academic qualifications, they certainly have an acute sense of the **TRUE** value of the dollar. In other words, if you have saved enough money to buy a second hand “Kingswood” you **CANNOT** expect the salesman to sell you a “Bugatti” or a “Rolls Royce” in exchange for the funds that you have saved to buy the said second hand “Kingswood”.

Logic dictates that the gross amount earned by any film at the box office **has to be automatically proportionate** not only to the commercial (and potential) value of the original artistic work upon which the said future film is to be based — as can be measured by its expected future gross earnings at the box office, assessed in proportion with the artistic quality or ingenuity that exudes from it — **BEFORE** production begins, but also in terms of the additional benefit that can be gained from the projected film’s ability to generate (sometimes enormous) economic boosts to the national economy. The projected increase in GDP that is eventually added to the national economy after the film’s release for exhibition (sometimes) can be measured in billions, if not trillions of dollars.

The fact that no one can tell the future in relation to **HOW MUCH** a film will earn at the box office **BEFORE** it is produced and exhibited, any guess would be in most cases just aprioristic. For this reason, the re-introduction of **Section 219** of the **ORIGINAL** Copyright Act, 1968 would be seen by people without prejudice to be the most practical and **JUST** method for the calculation of an author’s royalties entitlement.

**Determining the impact of IP infringements on incentives to create and innovate are not straightforward.**

From an economic perspective, IP infringement has short – and long – term consequences.

**In the short term, infringement of IP reduces profits to rights holders, but increases the welfare of those who infringe.**

**Comment by the author of this submission :** In the year 2000, The Federal Government of the day had also changed the definition of the French word “**Auteur**” upon which the Australian Copyright Act, 1968 — like any other universal Copyright Law in force

anywhere in the world — essentially and unequivocally relied since the ratification of the **Berne Convention**.

According to this “NEW” definition of the French word “Auteur” brought in by the Federal Government of the day in 2000, it was the mid-wife and the obstetrician who from then on were considered to be the legitimate mother/s of a new born child.

**End result : no more commercially successful cinematograph films produced in Australia – Why ?** Because BOTH the mid-wife AND the obstetrician are BARREN.

**Importantly, the Commission is focused on those recommendations that would leave the Australian community better off overall, and profits foregone by IP rights holders are not lost to the economy overall.**

**Comment by the author of this submission :** This is another indication that this particular input originates from the same lawyers’ perspective on IP Copyright Law that was responsible for the removal of Section 219 from the ORIGINAL Australian Copyright Act, 1968 ... as well as the change in the definition of the French word “Auteur” that was brought in by the Federal Government of the day in the year 2000.

**Please refer to the relevant publication by clicking on the following URL link :**

**[http://works.bepress.com/matthew\\_rimmer/35/](http://works.bepress.com/matthew_rimmer/35/)**

**Please also refer to the attached PDF document titled : “002-PART IX – Moral rights of authors of artistic works”.**

## **Improvements to the Federal Court?**

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**Given cost is one of the biggest barriers to accessing court-based enforcement across all facets of the law, the Federal Court has broad discretion in taking steps to limit the costs faced by parties in a case.**

In particular, rule 40.51(1) of the Federal Court Rules **allows parties in a case to request an order from the Court on the maximum amount of costs each party can recover from the other, allowing parties to limit their liability in a case early in the proceedings.**

However, the Commission has no information on the frequency such orders are requested or granted by the Court. And, indeed, **it may be that neither party in a court case, both**

of whom believe they have a reasonable prospect of success, would seek to limit the amount of costs they could claim from the other party.

In October 2015, the Federal Court released further changes it intends to make to the conduct of IP cases. In particular, the Federal Court is proposing changes aimed at ‘identifying the genuine issues in dispute between the parties at the earliest possible stage’, with a view to parties agreeing to processes, **expert evidence** and all other matters that encourage speedy resolution of a dispute (Federal Court of Australia 2015a).

Such an approach is similar to the rules in operation in IPEC, which allows judges a much more active hand in determining the issues actually in dispute between the parties — a key element to avoid unnecessary expert evidence and testimony, shortening the length of trials and lowering their cost.

**Comment by the author of this submission :** The above is a clear reflection of the **Legal Profession finally making the recognition** that computer sciences and electronic technology can provide lawyers with a very efficient tool to identify the true identity of an author of an original artistic work which has been erroneously classified as an “**orphaned work**”.

The antiquated provision of the **ORIGINAL** Copyright Act, 1968 prescribing a “manuscript in hard copy written form” as the **ONLY** method — prescribed by the **narrow minded** legislators at work at that point in time when most people were not yet ready to think in more than one single dimension — by which **PROOF** of authorship could once upon a time be secured, can no longer be considered today to be the **ONLY valid method** in force in this 21<sup>st</sup> century.

After the recent (enormous) progress made in computer sciences and electronic technology, there are **several other methods** by which **PROOF** of authorship can be secured just the same.

Most people nowadays record whatever they create in electronic form using a computer keyboard and subsequently save their (artistic) work on a **USB flash drive**. This method is now considered to be a valid method for securing **PROOF of authorship** for an original artistic work, because the said work can be reduced to writing by means of a printer connected to a PC, Laptop ... or even by Wi-Fi to a Smart Phone ...

The same can be said for an **audio magnetic tape recording** of an original artistic work that can be reduced to writing by means of an **amanuensis** process.

The Australian Copyright Agency has even published information on its website that copyright material can now be presented, not only **in electronic form** but also in the form of **a magnetic audio tape recording**.

During the early days when search engines were first introduced for use on the Internet, an analytical method using a stochastic model interacting with a deterministic model was used by search engines every time a user conducted an arboreal search by clicking on the search button. Today, this analytical method has been improved even further to produce even more accurate results since the introduction of: “interpolation of polynomials from their values”.

By replacing the **symbolic** algorithm values of computer algebra with **numeric** values, a 100 % success rate – as far as accuracy is concerned – can be achieved whenever an arboreal search is conducted by using search engines on the Internet. In brief, when using this improved search method, the on-line search engines are provided with a much more efficient method for the segregation of data through an elimination process right through to the isolation of **ONLY ONE SINGLE PROBABILITY** among an unlimited number of probabilities.

This means that the true identity of the author of an **alleged “orphaned” work** can be isolated with a 100% success rate (as far as accuracy is concerned) by simply making a computer assessment of an author’s pertinent points of reckoning by means of a stochastic/deterministic analytical method that is identical to that of an on-line search engine.

- **courts should incorporate the use of appropriate ADR in their processes, where they are not already doing so, and provide clear guidance to parties about alternative dispute resolution options** (recommendations 8.1 and 12.2)

## Summing up

While Australia has all of the necessary features of an efficient and effective IP enforcement system — a system of IP laws and courts — **current practices mean that at least a segment of IP rights holders are unable to pursue IP infringement cases to the degree they would like.**

**While lower-cost ADR mechanisms have served Australians well in other areas of the law, no such avenues are currently available for Australia’s IP arrangements.**

**Establishing a dedicated IP court is superficially attractive, but the case for doing so in Australia is weak.** [WHY??]

**Comment by the author of this submission : >>** (Please refer to 18.1 – “Enforcement policy and objectives” [Page 478] above, re “The Copyright Tribunal, a division of the Federal Court, hears disputes over terms and conditions (\*\*including royalty rates\*\*) under voluntary and statutory copyright licences in the context of the abrogation of **Section 219** from the **ORIGINAL** Australian Copyright Act, 1968.

In the Commission's view, **more should be made of Australia's lower tier federal court, the Federal Circuit Court.** Established to hear cases more quickly and at lower cost, including through the use of ADR and mediation, evidence suggests the court is being under-utilized when it comes to IP disputes.

The Commission welcomes additional information on improvements to the existing court system that would facilitate greater access to IP dispute resolution, including by SMEs.

*INFORMATION REQUEST 18.1*

*Would changes to the jurisdiction of the Federal Circuit Court improve access to dispute resolution by small- and medium-sized enterprises?*

**Comments by the author of this submission :** Proposed changes to the jurisdiction of the Federal Circuit Court **MUST NOT** in any way **VIOLATE** (or impede on) the **NATURAL** rights of authors, creators and innovators !!

*Should additional rules be introduced, such as caps on the amount of costs claimable in a case?*

***\*\*What is the upper limit on damages claims the court should hear\*\*?***

**Comments by the author of this submission :** ... Another indication of a proposal that is in line with the same lawyer's perspective on IP Copyright Law that was responsible for the removal of Section 219 from the **ORIGINAL** Australian Copyright Act, 1968 ... as well as the change brought in by the Federal Government of the day in the year 2000 to the definition of the French word "**Auteur**" upon which the Australian Copyright Act, 1968 unequivocally relied since the ratification of the Berne Convention.

**Please refer to the relevant publications by clicking on the following URL links :**

**<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1119&context=blr>**

**<https://www.youtube.com/watch?v=U63SXHv8W0k>**

**Robert J. Bouvet**

**Dated this 31<sup>st</sup> day of May 2016.**