



3 June 2016

**Intellectual Property Arrangements**  
Productivity Commission  
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**SUBMISSION ON THE INTELLECTUAL PROPERTY ARRANGEMENTS – PRODUCTIVITY COMMISSION  
DRAFT REPORT (APRIL 2016)**

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the Productivity Commission Draft Report on Intellectual Property Arrangements.

**About the Arts Law Centre of Australia**

Arts Law is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Arts Law provides an Indigenous service - *Artists in the Black (AITB)*. The aim of AITB is to increase access to legal advice and information about legal issues for Aboriginal and Torres Strait Islander artists and communities.

In 2015, Arts Law provided 2733 legal advice services to Australia's artists and arts organisations, and provided legal education to 2045 people in the arts community. Approximately 43% of legal advice involved copyright issues.

The annexures to this submission are:

- Arts Law submission to the Australian Law Reform Commission's *Copyright and the Digital Economy Discussion Paper (DP79)*, dated 2 August 2012;

- Arts Law submission to the Australian Government’s *Online Copyright Infringement Discussion Paper 2014*, dated 5 September 2014;
- Arts Law submission to the Advisory Council on Intellectual Property’s *Review of the Designs System Options Paper*, dated 22 January 2015;
- Arts Law submission to the Productivity Commission on the *Intellectual Property Arrangements – Issues Paper*, dated 21 December 2015; and
- Arts Law letter to Department of Communications in relation to the *Copyright Amendment (Disability Access and Other Measures) Bill* Exposure Draft February 2016, dated 16 March 2016.

## CHAPTER 2: The analytical framework

### DRAFT RECOMMENDATION 2.1

*In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and have regard to the principles of:*

- *effectiveness, which addresses the balance between providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely*
- *efficiency, which addresses the balance between returns to innovators and to the wider community*
- *adaptability, which addresses the balance between providing policy certainty and having a system that is agile in response to change*
- *accountability, which balances the cost of collecting and analysing policy-relevant information against the benefits of having transparent and evidence-based policy that considers community wellbeing.*

Arts Law refers to its previous submissions to the Productivity Commission’s Issues Paper on the question of the principles that should be considered in the formulation of intellectual property policy. Arts Law is concerned that the framework of evaluation proposed by the Productivity Commission in its Draft Report undervalues artists’ contributions and discounts the interests of Australian creators in favour of consumers and other content-users.

Arts Law is especially concerned that the economic framework proposed by the Productivity Commission’s Draft Report does not explicitly consider any issues in relation to Indigenous Cultural and Intellectual Property (ICIP). As noted in Arts Law’s submissions to the Productivity Commission Issues Paper,<sup>1</sup> Australia has international obligations to consider the ICIP dimensions of any potential reforms as a party to the *UNESCO Convention and the Protection and Promotion of the Diversity of*

<sup>1</sup> Arts Law, Submission number 117 to the Productivity Commission, *Intellectual Property Arrangements*, 21 December 2015, 3.

*Cultural Expressions* (2005)<sup>2</sup> and the United Nations' *Declaration on the Rights of Indigenous People* (2007).<sup>3</sup>

The Productivity Commission's Draft Report also acknowledges that intellectual property rights sit within the broader intentional framework which includes the World Intellectual Property Organization (WIPO) as a key international institution. Arts Law notes that WIPO has recognised that "*Indigenous peoples and traditional communities have unique needs and expectations in relation to IP, which can be sensitive given their complex social, historical, political and cultural dimensions*" and that WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has paid particular attention to the protection of traditional knowledge, genetic resources and traditional cultural expressions.

It is Arts Law's submission that accordingly, Australian intellectual property policy must be developed consistently with international standards on ICIP, recognising the unique needs and expectations of its Aboriginal and Torres Strait Islander peoples in relation to the expression of their culture in their representations of their cultural heritage, as well as the special benefits enjoyed by both Indigenous and non-Indigenous peoples that result from these representations. Arts Law sets out its particular concerns in relation to the ICIP dimensions of the proposed reforms below.

#### CHAPTER 4: Copyright term and scope

##### 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.*

Arts Law disputes the Productivity Commission's suggestion that the "optimal" copyright term is between 15 to 25 years after creation.

Arts Law understands that Productivity Commission's view is that given that "*the vast majority of works do not make commercial returns beyond their first couple of years on the market*", "*providing financial incentives so far into the future has little influence on today's decision to produce*". Arts Law is concerned that this is a simplistic view of the creative and cultural industries that severely undervalues the creative effort that artists invest in their works.

As discussed in Arts Law's submission to the Productivity Commission's Issues Paper, it is Arts Law's submission that the cultural industries are "*hit-driven industries*", in the sense that annually, there are a small number of very profitable releases, a range of mildly profitable to mildly unprofitable releases, and a significant number of unprofitable releases. In the cultural industries, the less

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<sup>2</sup> See in particular Article 2, which makes specific reference to the recognition of respect for indigenous peoples and Article 7, which encourages cultural expressions, "*paying due attention to the special circumstances and needs of ... indigenous peoples*".

<sup>3</sup> See in particular Article 31, which provides that "*Indigenous peoples ... have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*"

profitable releases are buoyed by the ongoing financial return on successful works.<sup>4</sup> Similarly, on the individual creator scale, the ongoing commercial success of an individual title (for those who are fortunate enough to have one) acts as a balance to the lack of commercial return on other titles, playing a crucial role in providing a minimum standard of living for creators. It is Arts Law's position that limiting the copyright period to 15 to 25 years after creation will severely limit this important income stream and unjustifiably curtails artists' ability to recoup on their creative investment.

For example, as Adam Suckling, Chief Executive of the Copyright Agency has pointed out,<sup>5</sup> Tim Winton's modern classic, *Cloudstreet*, was published in 1991 but has had ongoing commercial success over the last 25 years. If a copyright period of 15 years from the date of publication had applied to *Cloudstreet*, *Cloudstreet* would have been out of copyright by 2006; Tim Winton's permission would not have been required and no compensation would have been required to be paid for Foxtel's TV miniseries adaption of *Cloudstreet* in 2011, or for George Palmer QC's opera adaption in 2016. Similarly, under the proposed reduced copyright period, Australian creative works such as Midnight Oil's song *Power and the Passion* (1982) and Emily Kame Kngwarreye's *Big Yam Dreaming* (1995) would already be out of copyright and free for use in the public domain.

Further, it should be noted that there are observed cycles in which a "hit" product is released by a creator, driving a "revival" of previously released but commercially unsuccessful works. Reducing the copyright period to 15 to 25 years would also limit an artist's ability to capitalise on this income stream. While it is true that at this point any royalties earned by creators are not necessarily a reward that has been consciously pursued or bargained for, these returns play a crucial role in providing a means of financial support for creators - "*a mechanism that preserves market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs and a maximum artistic autonomy during the creative process*"<sup>6</sup> - as well as for their families.

Arts Law regularly provides legal advice to Aboriginal and Torres Strait Islander families entitled to income because of the ongoing licensing of a family member's art; In 2015, as part of the Artists in the Black program, Arts Law prepared 115 wills in 2015 for Aboriginal and Torres Strait Islander artists across Australia. In the case of Aboriginal and Torres Strait Islander artists, these benefits are often spread among their communities as well. It is Arts Law's experience, therefore, that royalties are an important consideration for artists and their families and communities, not only in the initial years on the market, but many years into the future.

Ultimately, as noted by the Productivity Commission in its Draft Report, Australia's ability to reduce the term of copyright is limited by international agreements, namely the Agreement on Trade Related Aspects of Intellectual Property, which establishes a copyright term of 50 years (extended to

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<sup>4</sup> Arts Law, Submission number 117 to the Productivity Commission, *Intellectual Property Arrangements*, 21 December 2015, 6.

<sup>5</sup> Adam Suckling, *Good for lawyers, bad for creators* (23 May 2016), ArtsHub <<http://www.artshub.com.au/news-article/opinions-and-analysis/grants-and-funding/adam-suckling/good-for-lawyers-bad-for-creators-251347>>

<sup>6</sup> Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation* (2014) 38(4) Columbia Journal of Law and the Arts 467 at 473. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2633263](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633263); as cited in Arts Law, Submission number 117 to the Productivity Commission, *Intellectual Property Arrangements*, 21 December 2015, 6.

70 years under the Australia-United States Free Trade Agreement). It is Arts Law's position that any action by Australia to encourage a reduction of this copyright period in the international sphere is contrary to the interests of creators and unwarranted in light of the international consensus on the 50 year copyright period.

#### **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.*

Arts Law acknowledges the difficulties presented by unpublished works and the arguments for making these items accessible to the public.

While the Productivity Commission has argued that demands for works that have been created but are not being supplied reduces consumer welfare and the profits of intermediaries and original rights holders, there is an outstanding question as to whether consumer demand should take priority over an author's deliberate decision not to publish a work.

In particular, Arts Law submits that unpublished works by Aboriginal and Torres Strait Islander creators would need to be considered apart from this proposed scheme, given that these works may include specific secret or sacred cultural material.

While a decision not to publish may mean that an author misses out on a potential income stream, as Arts Law has previously submitted to the Issues Paper, an author's decision not to publish a work may be based on the desire to maintain quality control over their work or concern about the impact on their reputation if the work is to be published. Allowing the publication of works despite the author's opposition sits uneasily with the right of the author to control the exploitation of their work, as well as the moral rights regime in the *Copyright Act 1968 (Cth)* (**Copyright Act**), which is aimed at securing and protecting the reputation of the author of copyright works

In light of this, Arts Law offers qualified support for the proposal to amend the Copyright Act so that the current terms of copyright protection also apply to unpublished works, subject to the author's right to specify that they do not wish a particular work to be published.

#### **CHAPTER 5: Copyright accessibility: licensing and exceptions**

##### **DRAFT RECOMMENDATION 5.2**

*The Australian Government should repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.*

Arts Law opposes the Productivity Commission's recommendation that the parallel import restrictions on books be repealed.

As the Productivity Commission has identified, the interests of consumers are already protected by provisions which allow individuals to parallel import books for personal consumption. While as the Productivity Commission has noted, there may remain search, transaction and delay costs under the

current exemptions for personal importation, these must be balanced against the impact that the removal of the parallel importation provisions will have upon Australian publishers and authors.

The Productivity Commission's Draft Report considered previous reviews of parallel import restrictions on the price of books, including, relevantly, a 2012 study by Deloitte Access Economics that showed a NZ \$3.06 price difference in a 100 book title-for-title comparison between New Zealand and Australia following the removal of parallel import restrictions in New Zealand in 1998. Arts Law notes that this study was based on a comparison of the price of books from the online retailers Fishpond in New Zealand and Dymocks in Australia. Arts Law questions whether these were the correct comparators – Fishpond is an exclusively online retailer, whereas Dymocks manages its online store in addition to 65 “brick and mortar” stores across Australia. A comparison with Dymocks may also be inaccurate for the purpose of determining the ultimate difference in price paid by customers, given that, as writers such as Nick Earls have noted,<sup>7</sup> Dymocks is often undercut by discount outlets such as Big W and Kmart.

Even if the proposed repeal of parallel import restrictions does have the overall effect of providing cheaper books to the Australian market, as various publishers, authors, the Australian Copyright Council and Susan Hawthorne<sup>8</sup> have argued, it will come at the expense of the Australian publishing industry, reduced authors' royalties from overseas rights sales, and the eventual reduction of diversity in Australian bookstores.

As Arts Law has previously submitted in its submissions to the Productivity Commission's Issues Paper, the copyright policy employed to guide the assessment of intellectual property arrangements must also take into account not only economic imperatives, but cultural and social welfare benefits that accrue to the broader Australian community.<sup>9</sup> It is Arts Law's submission that this includes the considerable and unique benefit that accrues to the Australian community of access to Australian stories by Australian authors.

The Productivity Commission's suggestion that any detriment to local writing could be addressed by direct subsidies and funding aimed at encouraging Australian writing is unlikely to be sufficient to make up for the loss of long-term incentives for Australian authors through the removal of the parallel import restrictions. The Productivity Commission's reliance on direct subsidies and funding is especially unrealistic in light of the Government's current approach of cuts to direct funding and subsidies to the arts: the two 2015/2016 Australia Council for the Arts' funding rounds represented a fall of 70% for individual artists and 72% for individual projects, an approach which particularly impacts authors, who mainly work alone.

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<sup>7</sup> See Nick Earls, *Cheaper Books? Don't Count on it* (30 September 2009), Arts Law Centre of Australia <<http://www.artslaw.com.au/art-law/entry/cheaper-books-dont-count-on-it/>>

<sup>8</sup> Susan Hawthorne, *The looming threat to our book industry is bad for authors, publishers ... but mostly for you* (4 May 2016), The Guardian <<http://www.theguardian.com/commentisfree/2016/may/04/the-looming-threat-to-our-book-industry-is-bad-for-authors-publishers-but-mostly-for-you>>

<sup>9</sup> Arts Law, Submission no 117 to the Productivity Commission, *Intellectual Property Arrangements Discussion Paper*, 21 December 2015, 3.

### DRAFT RECOMMENDATION 5.3

*The Australian Government should amend the Copyright Act 1968 (Cth) 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.*

#### *Fair use*

Arts Law has previously expressed its opposition to the introduction of any broad fair use exception to copyright infringement in its submission to the Australian Law Reform Commission's Copyright and the Digital Economy Discussion Paper dated 2 August 2012.<sup>10</sup>

#### *Why have exceptions for fair dealing/use?*

Arts Law notes that in its Draft Report, the Productivity Commission states that "*the key policy for Government should not be how to design exceptions that do not negatively affect rights holders at all, but rather how to design exceptions that result in a net benefit to the community overall.*"

Arts Law is concerned that the fair use provisions proposed by the Productivity Commission have been designed primarily with the interests of consumers in mind and that insufficient consideration has been given to whether the introduction of fair use in Australia would comply with Australia's international obligations under Article 9 of the *Berne Convention* to limit copyright exceptions to

<sup>10</sup> See Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 2 August 2012, 36 – 53.

special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Arts Law notes the Productivity Commission's criticism that "*moral rights and performer's rights were developed despite little evidence of a policy problem*" and the Copyright Law Reform Committee's (CLRC) recommendation against the introduction of moral rights legislation in 1987.<sup>11</sup> However, Arts Law points out that following the CLRC report, the issue was revisited again in 1994 with the release of the Attorney General's Discussion Paper,<sup>12</sup> which noted various policy reasons that supported the introduction of moral rights, including the numerous examples of moral rights abuses cited in submissions to the Discussion Paper, the additional redress that moral rights would provide to Aboriginal and Torres Strait Islander artists, international trends towards the recognition of moral rights and the need to balance the rights of copyright creators and users in a society in which new technology provided the community with heightened ability to access, reproduce and manipulate copyright works. The introduction of a moral rights scheme was regarded by the Discussion Paper as '*a workable compromise between the rights of copyright creators, the rights of industries and organisations that rely on copyright materials and the rights of the community generally in having access to copyright materials*'<sup>13</sup> – in other words, a considered response to an identified policy issue.

Arts Law submits that Australia's enactment of moral rights protections in Part IX of the Copyright Act means that Australia must take into account moral rights as an important element of the "legitimate interests of the author" in determining compliance with Article 9 of the *Berne Convention*.<sup>14</sup> Having implemented a moral rights regime consistent with its treaty obligations, Australia cannot adopt a broad fair use exception. An open-ended fair use exception that allows the appropriation of existing work would conflict with both the existing obligation of third-party users to attribute the author of the work and the author's right to protection against derogatory treatment of the work. This is of particular concern as in the experience of Arts Law, artists highly value the moral rights that acknowledge their authorship and preserve the integrity of their work - in 2015, 226 of 2569 Arts Law legal advice requests involved some aspect of moral rights.

Arts Law also notes that a broad fair use exception and the corresponding increased scope for appropriation and non-attribution may raise issues in relation to the use of culturally sensitive ICIP.

It is Arts Law's submission that the appropriate balance between the rights of the creators and consumers cannot be achieved by a broad fair use exception but should be instead should be struck through exceptions to copyright infringement based on social, political and cultural purposes. It is the position of Arts Law that the current fair dealing exceptions for parody and satire, criticism and review and reporting the news, strike that balance.

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<sup>11</sup> Copyright Law Review Committee, *Report on Moral Rights*, Report (1998).

<sup>12</sup> Attorney-General and Department of Communication and the Arts, *Proposed Moral Rights Legislation for Copyright Creators*, Discussion Paper (1994).

<sup>13</sup> Above n 12, 53.

<sup>14</sup> For detailed discussion, see Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 2 August 2012, 50 – 51.



*'Fair use removes impediments to industry development'*

In Arts Law's submission, to the extent that the current copyright provisions impede innovation in the digital economy by prohibiting critical technologies and innovative activities from being conducted in Australia, this can be addressed through targeted reforms.

The Productivity Commission's Draft Report also states that the movement to a fair use exception will pave the way to allow the greater creation of transformative works, such as mashups. However, it is the experience of Arts Law that while there is significant interest within the Australian artistic community in understanding the limits of transformative works, there is no serious demand for an expansion of those limits; most artists value their own creative work and understand the importance of valuing and respecting that of others. Arts Law has observed that to the extent that there is a demand for a fair use exception for transformative works, this is driven by the social media sector using these works for communicative purposes, rather than by the creative community which relies financially on copyright.

It should also be noted that to the extent that there is a desire by artists to engage in appropriation art, the permission of the rights holder can always be sought as a means of avoiding moral rights infringement. In addition, the "substantiality" threshold for copyright infringement also provides a measure of flexibility to allow a certain level of appropriation. Beyond this, the specific fair dealing exceptions for parody and satire,<sup>15</sup> and criticism and review<sup>16</sup> may also protect artists using appropriation techniques.

*'Fair use is inherently uncertain'*

Arts Law acknowledges the Productivity Commission's argument that "*legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself.*" However, the lack of certainty inherent in a fair use exception is of particular concern when viewed in terms of the rights of creators. Arts Law is concerned that the uncertainty inherent under a broad fair use exemption will lead users to assume that their use of copyright material is fair; artists who wish to challenge such a use will be required to obtain legal advice and prove through litigation that each use of their work is not fair.

While illustrative examples of fair use may be of assistance by providing guidance to parties, Arts Law notes that outside of these specific examples, the scope of uncertainty will remain and ultimately, what is fair use will need to be determined on a case-by-case basis by the courts. While US case law could be a source of some guidance, the US case law is notoriously difficult to interpret and may in any case be of limited use, given that it developed in an environment absent moral rights legislation.<sup>17</sup> In addition, while the US and Canada have developed guidelines on fair use as part of efforts to reduce potential uncertainty, these guidelines themselves are complex, difficult to interpret and are ultimately of questionable utility. In the context of an environment in which the majority of Australian creators already do not have the time, financial resources or expertise to

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<sup>15</sup> Under section 41A of the Copyright Act.

<sup>16</sup> Under section 41 of the Copyright Act.

<sup>17</sup> Apart from the protection granted to visual artists under the *Visual Artists Rights Act of 1990*.

pursue litigation to enforce their copyright, a fair use exemption will therefore create further difficulties for creators struggling to control unlicensed use of their work.

Arts Law also opposes the introduction of “quotation”, “education”, “non-commercial private use” or “library or archive use” as illustrative examples of fair use purposes. Arts Law refers to its previous submissions to the ALRC Copyright and the Digital Economy Discussion Paper on this matter.<sup>18</sup> In relation to the proposed exception for access for people with disability, Arts Law refers to the letter sent by Arts Law to the Department of Communications and the Arts in regards to the *Copyright Amendment (Disability Access and Other Measures) Bill* Exposure Draft dated 16 March 2016.

### *Orphan works*

While Arts Law recognises the particular difficulties presented by orphan works, it is Arts Law’s view that the orphan work problem can be addressed without the need to resort to any broad fair use exceptions.<sup>19</sup>

Arts Law maintains its support for reforms to the Copyright Act to allow licencing of orphan works through an up-front payment of a licence fee to a collecting society, similar to the system introduced in Canada. As outlined in the Arts Law submission to the ALRC Copyright and the Digital Economy Discussion Paper, it is Arts Law’s position that the reforms should:

- provide a definition of orphan works that covers copyright owners or relevant performers who cannot be identified or located;
- provide a clear description of the necessary steps that a person must take to attempt to locate and identify the copyright owner;
- provide for the payment of a licence fee to the appropriate collecting society or government body;
- provide that the copyright owner would receive compensation for the use when identified or located; and
- include a mechanism to compensate for moral rights infringements.<sup>20</sup>

Arts Law also submits that any model for the management of orphan works needs to take account of the special circumstances of Aboriginal and Torres Strait Islander artists, communities and rights holders in Australia, given that these works may include sensitive, secret or sacred cultural material. In particular, Arts Law would support the management of Indigenous orphan works through a body such as Terri Janke’s proposed National Indigenous Cultural Authority, such that Indigenous orphan

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<sup>18</sup> In particular, see Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 2 August 2012 at 67 (non-commercial private or domestic use), 73 (quotation), 74 (library and archive use), and 80 (education).

<sup>19</sup> Arts Law notes that educational and other institutions and Commonwealth and State governments are already able to make use of existing licences and exceptions under the Copyright Act, regardless of whether or not a work is orphaned. See, for example, Part VA and VB Copyright Act in relation to educational and other institutions and Part VII Div 2 Copyright Act in relation to the Commonwealth and State governments.

<sup>20</sup> See Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 76.

works could only be licenced subject to the consent of the relevant Indigenous community or custodian.<sup>21</sup>

## Chapter 10: Registered designs

### DRAFT RECOMMENDATION 10.1

*Australia should not join the Hague Agreement until an evidence-based case is made, informed by a cost–benefit analysis.*

The Productivity Commission’s Draft Report notes that the copyright/design overlap limits copyright protection, such that a person who wants exclusive rights to make and sell three-dimensional products cannot rely on copyright in any underlying artistic work (such as drawings or models), but must register a design. However, this was not identified by the Productivity Commission as a particular issue in need of reform.

Arts Law’s position is that there is a need for reform in relation to the copyright/design overlap provisions. Arts Law submits that the provisions in sections 74-77A of the Copyright Act and section 18 of the *Designs Act 2003* (Cth) (**Designs Act**) may unfairly burden artists. As noted in the Arts Law submission to the ACIP Review of the Designs System Options Paper in 2015:

*“Under section 77 of the Copyright Act, an unauthorised person making a product embodying an artist’s work does not infringe that artist’s copyright in their artistic work where a corresponding design of the artistic work has been applied industrially by the artist themselves. This means that although an artist may freely make unlimited two-dimensional reproductions and have those reproductions protected under copyright law, if that artist makes a small number of three-dimensional reproductions that copyright is lost. This results in an environment where artists are unable to fully commercially exploit their interest in their own work, and if they do, they run the risk of having their work freely copied and reproduced by others.”<sup>22</sup>*

Arts Law takes the opportunity to reiterate its support for reform to the copyright/design overlap provisions that do not exclude artistic works from the copyright system upon industrial application, but instead allow such works to retain copyright protection for a period equivalent to that under the registered designs system (i.e. 10 years). This would alleviate the current design/copyright confusion while providing protection to artists who wish to industrially apply their design but cannot afford formal registration under the *Designs Act*.

Arts Law also reiterates its recommendation that Australia enter into the Hague Agreement Concerning the International Registration of Industrial Designs (**Hague Agreement**) and that accordingly, the term of protection of designs be extended from 10 years to 15 years. Arts Law

<sup>21</sup> See National Congress of Australia’s First Peoples, *The Call for a National Indigenous Cultural Authority*, June 2013, < <http://nationalcongress.com.au/wp-content/uploads/2013/07/201306NationalIndigenousCulturalAuthority.pdf> >

<sup>22</sup> Arts Law, Submission to the Advisory Council on Intellectual Property, *Review of the Designs System Options Paper*, 22 January 2015, 2.

notes that the United States has now joined the Hague system and that the long-term benefits of entering into the Hague Agreement are in the interests of Australian artists and designers. Given the priority given to consumer interests by the Productivity Commission report, it is Arts Law's view that the long-term benefits that would accrue to Australian creators upon joining the Hague Convention outweigh the "wait-and-see" approach recommended.

## Chapter 18: Compliance and enforcement

### DRAFT RECOMMENDATION 18.1

*The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).*

Arts Law provides qualified agreement with the Productivity Commission's recommendation that the safe harbour scheme be expanded to cover the broader set of online service providers intended in the Copyright Act. Arts Law submits that before the safe harbour scheme is expanded, however, the take-down notice mechanism should be improved so that the mechanism better balances the burden of enforcement between service providers and artists.

Arts Law notes that the current safe harbour scheme puts the onus on artists, often of little means, to rely on notice and takedown procedures. However, Arts Law reiterates its previous submission that because Internet Service Providers (ISPs), search engines and social networking platforms reap significant financial rewards from the storage and transmission of the creative content that they distribute, they also have the responsibility to ensure that effective action is taken in response to take-down notices provided by copyright holders and to implement the licensing and payment mechanisms that allow artists and rights holders to receive remuneration for the use of their work online.<sup>23</sup>

Arts Law submits that the takedown notice scheme may be limited use to rights holders. Even if rights holders are successful in having a specific URL link to copyright infringing material taken down, this does not change the fact that there may be multiple other links to, or copies of, the same infringing material. Furthermore, links or content, once removed, are often simply re-posted.<sup>24</sup>

It is the position of Arts Law that the safe harbour scheme needs to be amended to better balance the burden of enforcement for artists so that, for example, it addresses the problem of "relentless reposting" of infringing files so that the obligation on the recipient notice is to take down the infringing content or link to the content as soon as it is notified of its infringing character by the rights holder, with a continuing obligation to ensure that it does not reappear.<sup>25</sup>

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<sup>23</sup> See Arts Law, Submission to the Australian Government, *Online Copyright Infringement Discussion Paper*, 5 September 2015, 5.

<sup>24</sup> As observed by Music Rights Australia. See Music Rights Australia, Submission to the Department of Communications and the Arts, *Copyright Amendment (Disability Access and Other Measures) Bill 2016 Exposure Draft*, February 2016, 8.

<sup>25</sup> Above n 22, 15.

Arts Law also notes recent developments in case law in the US in relation to the take-down notices, in particular *Lentz v Universal Music Corp. et. al* No. 13-16106, 13-16107, 2015 WL 5315388 (9th Cir. Sept. 14, 2015) (*Lentz*). In *Lentz*, the Court of Appeals for the Ninth Circuit held that under section 512 of the Digital Millennium Copyright Act, before a copyright holder issues a DMCA notice to remove alleged infringing content, the holder must make a good faith review of whether the content concerned is authorised by fair use.

Arts Law is concerned that if similar provisions were enacted in Australia requiring artists to, for example, swear a statement that no reasonable prospect of a defence exists as a prerequisite to issuing a take-down request, this would place an additional burden on artists, who are already required to invest significant time and resources in tracking the use of their work online. Coupled with the introduction of an uncertain fair use exemption to copyright infringement, such a provision may further restrict the ability of artists to robustly pursue copyright infringers.

Arts Law also submits that the extension of the safe harbour scheme to educational institutions should not have the effect of undermining the operation of the licences for educational institutions and other uses, as set out in Parts VA, VB and VII Division 2 of the Copyright Act.

#### **DRAFT FINDING 18.1**

*The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.*

The Productivity Commission's Draft Report states that *"little evidence exists on the economic harm caused by online infringement, and Australia's position as a net importer of copyright-protected works does not favour stronger enforcement mechanisms"*.

Arts Law is concerned that the focus on Australia's position as a net importer of copyright-protected works is a consumer-centred one that overlooks the harm that is suffered by Australian content producers.

Arts Law's client data in 2015 established that out of a total of 175 requests for advice as to copyright infringement, 70 queries related to online infringement; that is, 40% of queries related to online infringement of copyright. Other surveys of professional artists (2003 & 2010) identified copyright infringement as a significant problem with 25% of artists saying that they have experienced copyright infringement. The Arts Law client data provides an indication of the significant impact on artists of copyright infringement occurring in the online environment.

The evidence drawn from Arts Law's client records suggest that artists are being harmed by online infringement, leading to commercial (and creative) losses which can be difficult to quantify. The following are some examples from the Arts Law client records:

- Indigenous and non-Indigenous artists who find their online promotional artwork images are reproduced and available for sale on websites;
- Indigenous artists/communities who find inappropriate use of their expressions of culture uploaded to the web (without prior and informed consent);

- images and photographs copied and published or distributed by individuals, businesses and the news media without the permission of the owner and without attribution of authorship;
- the digital dissemination of literary works without the consent of the author or publisher;
- audiovisual material available online in breach of agreements describing how the material can be exploited; and
- copying of music from CDs onto a computer and the digital dissemination of songs to mobile phones without the consent of the creators.<sup>26</sup>

Arts Law agrees that one of the key ways through which online copyright infringement can be reduced is through the adoption of distribution strategies by artists, creators and copyright owners that counter the demand for infringing copyright material by being responsive to consumer demand for copyright material (including the timing of availability and pricing the material at levels that encourage consumers to deal with licensed providers of the material).

However, Arts Law submits that managing the implications of online copyright infringement requires a range of measures, including providing information and education to consumers engaging in online copyright infringement, such as a “graduated response” scheme implemented by ISPs in response to information as to online copyright infringement that is provided by the owners and managers of copyright. Arts Law envisages that this would operate in conjunction with improvements to the current “take-down notice” provisions in the *Copyright Regulations* (as outlined above) and the adoption of business models making content available in Australia that lessen the incentive for unlicensed downloading or viewing.

## INFORMATION REQUEST 5.2

*Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?*

It is Arts Law’s submission that Australia’s current arrangements (involving a collecting society Code of Conduct (**Code**)), annual independent report on compliance with the Code and triannual review of the Code itself) are satisfactorily ensuring that copyright collecting societies operate transparently, effectively and at best practice.

In 2011 and 2013, Arts Law raised concerns with various collecting societies about the lack of transparency in the information provided to licensors in relation to the collection of statutory royalties. These concerns were subsequently addressed and resolved through review processes to Arts Law’s satisfaction.

It is the experience of Arts Law, therefore, that the Code has been a useful standard and an effective mechanism through which Arts Law has been able to bring issues to the attention of copyright collecting societies.

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<sup>26</sup> For more detail, see Arts Law, Submission to the Australian Government, *Online Copyright Infringement Discussion Paper*, 5 September 2015, 6-7.

## INFORMATION REQUEST 16.1

*What institutional and governance settings would best ensure that IP policy benefits from a policy champion and is guided by an overarching policy objective and an economywide perspective? Would vesting IP policy responsibility in a single department further these goals, and if so, which department would be best placed to balance the interests of rights holders and users, including follow-on innovators? Are there any complementary or alternative measures that would help facilitate more integrated and evidence-based IP policy-making?*

Arts Law agrees with the Productivity Commission's observation that intellectual property policy development would benefit from expert independent input and external scrutiny and agrees with the submission of Professor Andrew Christie<sup>27</sup> that expert advice can best be delivered by a standing body consisting of a broad cross-section of opinions, similar to the disbanded Advisory Council on Intellectual Property (ACIP).

It is the submission of Arts Law that the establishment of a standing advisory body is preferable to the ad hoc establishment of expert panels on an as-needs basis. While an expert panel would give the Australian Government the flexibility of selecting members of expert panels as needed for their particular experience, there is also a risk that members may be viewed by the public as having been selected for their particular opinions or stances on the issues in question. Any advisory body billed as "independent" must maintain both the appearance and actuality of impartiality.

Arts Law acknowledges the Productivity Commission's concerns that a standing committee would require an ongoing commitment of public resources but would submit that this is necessary in order to maintain a coherent, long-term overview of intellectual property issues. In addition, Arts Law submits that it is possible to minimise the level of resources required by a standing committee, for example, in the style of the Australian Tax Office (ATO) Consultation Groups. The ATO Not-for-profit Stewardship Group, for example, meets three times a year to (among other things) identify opportunities to improve the tax and superannuation system, gain insights into issues faced by not-for-profit organisations and to identify and discuss emerging issues or developments relevant to not-for-profit organisations. Members are not paid a sitting fee, or the costs of attending meetings. Rather, members participate in order to contribute to strong policy development by Government.

## 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? 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?*

*Are there resourcing impediments to the proposed reforms to the Federal Circuit Court? Can greater use be made of cost orders in the Federal Court, including for discovery, to reduce costs further?*

<sup>27</sup> Andrew Christie, Submission 29 to the Productivity Commission, *Intellectual Property Arrangements*, 30 November 2015, 2.

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

Arts Law does not have sufficient experience in the Federal Circuit Court and Federal Court to provide an in-depth comment on these specific questions. However, consistent with the Productivity Commission's observations in its Draft Report, it is the experience of Arts Law that the considerable complexity, time, cost and uncertainty involved in litigation means that Australian artists struggle to make full use of Australia's courts as an intellectual property enforcement mechanism.

Arts Law understands that the introduction of caps on costs claimable from an unsuccessful party could, in theory, encourage rights holders to pursue litigation by providing a limit to liability. However, this incentive would have to be balanced against the fact that a successful party would still be required to pay any costs above the cap. Practically speaking, this amount would be subtracted from the amount of damages recovered by the successful party and therefore decrease the economic reward for pursuing litigation. In addition, as the Productivity Commission has observed, the fact remains that given the time and cost demanded by litigation, rights holders would generally only consider commencing litigation if they are confident of the outcome, which would decrease the likelihood that a party would seek to limit the amount of costs they could claim from an unsuccessful party.

Arts Law would support an increased focus towards low-cost, accessible alternative dispute resolution mechanisms, potentially through the development of a specific Intellectual property tribunal similar to the New South Wales Civil and Administrative Tribunal. Arts Law envisages that this would be a largely unrepresented jurisdiction presided over by intellectual property specialists which could access regional areas and process matters quickly.

Arts Law would welcome further exploration of this possibility.

#### **FURTHER INFORMATION**

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at [artslaw@artslaw.com.au](mailto:artslaw@artslaw.com.au) or on (02) 9356 2566.

Yours faithfully,

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