

**Submission by the
Media, Entertainment and Arts Alliance**

**To the
Productivity Commission**

June 2016



The MEAA is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Introduction

MEAA believe that amendments to Australia's copyright laws should be modest and limited to situations where compelling evidence suggests a misfit between the law and community needs and expectations.

The Productivity Commission's (the Commission) draft report on Intellectual Property Arrangements seems to rely on supposition to propose radical amendments to copyright and other intellectual property laws. In part, the report also denigrates existing copyright protections and principles.

MEAA believes that the Commission's recommendations, if adopted, would facilitate a perverse transfer of wealth away from quite small beneficiaries of copyright laws, like performers and journalists, to a marketplace with no enforceable rules, but in which rapidly growing organisations like Google can harvest and repurpose information and reap massive sums of advertising expenditure in the process.

We do not support an unbalanced copyright regime where creators' right might only be protected at the mercy of a court and the expense that this would involve.

In MEAA's experience, the current system of copyright is not an impediment to competition, certainly not in the sense posited by the Productivity Commission; nor has MEAA found that copyright laws have curbed the efficiency of the sectors we represent.

It is a regrettable characteristic of the report that its recommendations seek to address copyright as an impediment to public and private good rather than a right that ought to be modified over time.

The issues covered in this document concern the proposals to: reduce **copyright's term and scope** (draft finding 4.2); repeal **parallel import restrictions** for books (draft finding 5.2); and introduce **fair use** copyright laws (draft finding 5.3).

Copyrights Term and Scope

MEAA does not support the Commission's proposal to limit copyright protection to 15 to 25 years after creation. (We also note Minister Fifield's May 2016 statement advising that the federal government has not endorsed this position.)

MEAA note and support the Copyright Agency's (CA) view that the Commission's recommendation fails to account for the 'incubation period' between creation and dissemination of the initial form of release. As CA further note, the period between creation and commercialisation can be decades and the duration of copyright protection for many products is a few years, especially in technology-based products.

Although agreement on an 'optimal' term of copyright protection is unlikely, the duration of Australia's copyright protections has been informed by decades' worth of terms drawn from international and domestic treaty and laws. This is a much preferred methodology to arbitrary limitations.

Actors/Performers

It is often the case that producers and the entities they are engaged by own the rights to an overall product, such as a feature film. Actor's earnings are subordinate to these interests but are a critical factor in keeping our performance sector producing valuable and diverse content for Australian and international audiences.

Australian professional actors receive substantially less average income than other occupational groups.¹ Their earnings stand in stark contrast to the years spent training and developing their craft and working principally for a short contracted run of acting spanning several weeks.

For performers, residuals are a vitally important supplementary income stream. Without the income derived from copyright, many actors would be forced to discontinue their chosen professional work and seek support from elsewhere.

¹ The most recent study conducted by Entertainment Assist and Victoria University, *Working in the Australian Entertainment Industry, August 2015* reported the results of a comprehensive survey conducted between January and May 2015, with 2407 respondents covering three groups:

1. Performing artists and music composers
2. Performing arts support workers – directors, stage managers, film editors
3. Film and TV equipment operators – camera operators, sound technicians, roadies

The majority of the respondents had worked in the entertainment industry for six to ten years. 35.3% of overall respondents earned less than \$20,000 per year and 72.5% earned less than \$60,000 per year. The highest proportion of respondents earning less than \$20,000 per annum was group 1, performing artists and music composers, at 51.1%.

These findings are consistent with other significant studies of the sector, including the *Australia Council* commissioned study of professional artists in Australia, entitled '*Do you really expect to get Paid?*' which tracked artist incomes and working patterns from 1983 to 2009.

Every financial quarter, MEAA disburses about \$2m in residual payments to performers for their work on (mostly) screen productions. The amount of residuals paid to performers is calculated on the number of times the content is licenced, sold and/or legally viewed. Most quarterly payments are under \$300.

If performers were denied access to these funds because usage of their creative work was unremunerated, the artistic sector would further decline. Actors would reluctantly seek other employment because their marginal acting income would be further reduced. This will in turn have an impact on local content and the representation of distinctively Australian issues.

Journalists

The default setting for employed journalists is that their employer (the publisher) owns the copyright. Although freelance or contracted journalists have historically been better placed to maintain copyright ownership, power imbalances in these contractual relationships have seen increasing numbers of freelancers assign copyright to the contractor.

The media sector is suffering an ongoing downturn, with editorial jobs continuing to be shed at an alarming rate and journalists' pay moving at historically low levels. MEAA believes that about 4000 journalist and photographer positions have been lost over the past five to seven years.

There are of course multiple causes for this downturn, not least the digital revolution and movement of news, information and advertising dollars to the internet. In this regard, one of the most telling changes has been the shift of revenues and profit away from content creators such as newspapers and television networks to organisations like Google, who do not pay for content, but reproduce the work of others.

A key means of off-setting the financial pressures faced by journalists and those forced to leave the industry is the availability of copyright payments and royalties to journalists. The latest indicative information from the Copyright Agency is that journalists have been paid approximately \$9.4m between FY11/12 and the present date.

In this context, the Commission ought to confront two questions:

1. if content creators cannot secure reward for their efforts, why would they persist in their chosen professions?
2. If creators refuse to produce further content, where will content be drawn from?

Fair Use

For the above and following reasons, MEAA does not support the adoption of a 'fair use' regime. In a market the size of Australia, the adoption of fair use will be a job killer in the already challenged sectors our union represents.

The Australian fair dealing system is neither perfect nor broken, yet we have now witnessed several review processes that embrace the open-ended US-model of fair use where it is easier to plunder original works and cause individual creators to take court action to preserve their rights.

Australia has a system of statutory protections that limit fair dealings in copyrighted works, whereas the US system does not prescribe these limitations and sets out criteria to help a court determine whether the use has been fair.

The existing fair dealing regime simply spells out limitations on copyright's uses; it quite properly does not reflect a 'use the copyright and ask questions later approach'.

The current fair dealing regime may be susceptible to modification but the Commission and others seem devoted to untested radical reforms that will likely have the effect of diluting copyright's value. MEAA would encourage any future body charged with reviewing this area to contemplate reforms that genuinely balance the parties' interests rather than articles of faith like fair use.

As CA's submission to the Commission also points out, there is also a lack of consistency in the United States about the limits of fair use. CA cites Stanford University's Fair Use guide to illustrate this point:

"Unfortunately, the only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in federal court. ... In other words, a judge has a great deal of freedom when making a fair use determination, so the outcome in any given case can be hard to predict."²

Replacing reasonable clarity with significant uncertainty is a questionable public policy principle.

² Page 12 of CA's submission

MEAA does not support arrangements where individual performers and journalists have to pursue litigation to maintain their rights. Fair use would represent a reverse onus to the existing legal framework that our members can well do without.

Parallel Book Importation Restrictions (PIR)

MEAA does not support the proposal to end parallel import restrictions for the book industry. We are familiar with domestic publishers' practice to invest gains secured by the current rules into new works that would otherwise struggle to secure funding. It is a key means of enabling emerging talent to take the next step in their creative careers.

Like actors and journalists, authors are generally not well-remunerated, with the Australian Publishers Association stating that the average author income is \$13,000.

MEAA also believe that too much is made of this single issue and note that parallel restrictions on feature films and other large-scale works are not cornered for abolition.

PIR applies only to commercial quantities of books and individual consumers can purchase a book from any location in the world. Nor does PIR apply to e-books. On the other hand, the costs of ending PIR are apparent: fewer manuscripts competing for increasingly scarce investment and significant job losses. Of equal importance is the probability that the treatment and discussion of distinctively Australian events and figures will be curtailed. There is also no guarantee that the abolition of PIR will see the cost of books fall in the Australian marketplace.

Further Reform

Copyright needs to be underpinned by a system that is easy to comprehend and links creators and users more efficiently. That is why MEAA favoured replicating the *Copyright Hub* in its submission to the Inquiry.³ It is this type of 'efficiency' that is supported by MEAA.

MEAA believe that more effort must be invested in establishing or partnering bodies such as the UK's Copyright Hub, where copyrighted materials can be registered and the use of those materials negotiated in a low-cost and administratively simplified manner. This approach would assist resolving

³ The hub connects potential users with rights holders.

the genuine issue of transactional uncertainty – where potential users seek to identify copyright owners – that are sometimes confounding.

The Copyright Hub facilitates connections prospective users of copyrighted materials with the owners of the material, principally through using identifiers for copyrighted works. The Hub's core objective is to make licensing simpler by 'making it easy for creators to exercise their right to decide what happens to their work, and easy for those who want to use it to seek to get the permission they need.

If creators cannot enjoy material and other benefits of their work, there is truly little incentive to invest their human capital in producing new works.

A better approach than that advanced by the Commission would be to harness our ever-increasing digital capacity to enable capture and identification of works in which copyright will vest and facilitate usage agreements between copyright owners and prospective users on reasonable terms.

Conclusion

Copyright, like all areas of law and policy, requires ongoing modernisation; however, blunt propositions such as those promoted by the Commission, will not earn the support of reasonable people and organisations.

It is difficult to see how innovation and creativity will be fostered by alienating existing innovators and creators from their right to exploit their ownership of a work.

If creators cannot enjoy material and other benefits of their work, there is truly little incentive to invest their human capital in producing ongoing works.