

**Australia Council for the Arts submission in response to the Productivity
Commission's Intellectual Property Arrangements Issues Paper**

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About the Australia Council for the Arts

The Australia Council is the Australian Government's arts funding and advisory body. The Council's purpose is to champion and invest in Australian arts, by supporting excellence across all art forms and leveraging investment to support and build a vibrant arts sector. The Australia Council is a national advocate for the arts and works to increase national and international access to Australian arts and culture.

The Australia Council was established as a Commonwealth statutory authority in 1975, and its functions were updated under the *Australia Council Act 2013*. The Council's functions are to:

- (a) support Australian arts practice that is recognised for excellence;
- (b) foster excellence in Australian arts practice by supporting a diverse range of activities;
 - (ba) support Aboriginal and Torres Strait Islander arts practice;
 - (bb) support Australian arts practice that reflects the diversity of Australia;
 - (bc) uphold and promote freedom of expression in the arts;
 - (bd) promote community participation in the arts;
- (c) recognise and reward significant contributions made by artists and other persons to the arts in Australia;
- (d) promote the appreciation, knowledge and understanding of the arts;
- (e) support and promote the development of markets and audiences for the arts;
- (f) provide information and advice to the Commonwealth Government on matters connected with the arts or the performance of the Council's functions;
- (g) conduct and commission research into, and publish information about, the arts;
- (h) evaluate, and publish information about, the impact of the support the Council provides;
- (i) undertake any other function conferred on it by the Act or any other law of the Commonwealth;
- (j) do anything incidental or conducive to the performance of any of the above functions.

The Australia Council is a Corporate Commonwealth entity under the *Public Governance Performance and Accountability Act 2013*.

The Australia Council's Strategic Plan 2014-19, *A Culturally Ambitious Nation*, guides the work of the Council, including the four strategic goals:

- Australian arts are without borders
- Australia is known for its great art and artists
- The arts enrich daily life for all
- Australians cherish Aboriginal and Torres Strait Islander arts and cultures.

Introduction

The Australia Council supports Australia's arts sector by investing in the work of Australian artists and arts organisations. It also helps build markets and audiences for Australian arts and culture nationally and internationally.

The Australia Council undertakes significant research and publishes information to develop a greater understanding of arts and culture across Australia. This includes research about the incomes and careers of artists, Aboriginal and Torres Strait Islander arts and cultures, and the role of arts and culture in Australian life and the cultural economy.

The Australia Council's submission draws on this research to highlight some overarching principles that the Productivity Commission's inquiry into intellectual property arrangements should consider in relation to the creation and production of artistic works and access to Australian arts and culture.

We have focused on copyright, moral rights, and parallel imports as key areas relevant to the work of the Australia Council in supporting a diverse and sustainable Australian arts sector. This includes considering the particular needs of Indigenous artists, custodians and communities with regard to copyright and moral rights.

The Australia Council has discussed copyright and moral rights previously in submissions to the Australian Law Reform Commission (ALRC) Issues Paper and Discussion Paper on Copyright and the Digital Economy. This submission draws on some key points from that work, and we refer the inquiry to the attached Australia Council submissions to the ALRC review for further detail.

We note that some of the Council's key stakeholders have provided comprehensive submissions to the inquiry, including the Australian Copyright Council and Arts Law Centre of Australia.

The Australia Council looks forward to providing further information in response to the Productivity Commission's draft report on intellectual property arrangements.

Executive Summary

The following key points are discussed in the submission:

- It is important to maintain incentives for the creation of new work and ensure appropriate remuneration for Australian artists to support a sustainable arts sector.
- Arts and culture contribute to the Australian economy through the creation of work, employment of artists and fostering innovation.
- Changes to intellectual property rights could lead to a decline in the creation of Australian work due to insufficient incentives and remuneration available for artists. This would reduce national and international audience access to Australian artistic works, including books, music, visual and performing artworks.

- Weakening protections for creators through changes to intellectual property arrangements would impact on the incomes and careers of artists, and could lead to the need for further government investment to ensure new Australian work continues to be created.
- Moral rights should be maintained and any copyright reform should consider the integrity of artists as paramount to a strong protective system of rights.
- Indigenous artists have particular needs in relation to intellectual property rights, and indigenous cultural protocols are required to ensure integrity and respect of Aboriginal and Torres Strait Islander arts and cultures.
- The establishment of a National Indigenous Cultural Authority would enable Aboriginal and Torres Strait Islander peoples to oversee and protect their cultural and intellectual property rights. Introduction of specific legislation to protect the intellectual property rights of Indigenous communities would also address gaps in the current framework.
- Changes to restrictions on parallel importation of books may lead to a decline in the creation of new Australian works, which would reduce reader access to a diverse range of Australian books. This could require additional government investment in Australian literature to ensure sustainability of the sector.

Artists' income, careers and the cultural economy

Incentives for the creation and production of artistic works and protection of creators' rights are fundamental to maintaining a diverse and sustainable Australian arts sector. Copyright ensures that artists can derive income from creating work, build their career and contribute to the economy.

As noted in the Australia Council's *Arts Nation*¹ report, cultural activity makes up approximately 4 per cent of Australia's GDP.² Australia's copyright industries have arts and cultural activity at their core, generating over \$111 billion in economic activity and employing almost 9 per cent of the nation's workforce.³

Copyright protection ensures that artists own, control and are appropriately remunerated for their work. Copyright plays a particularly important role for creators within certain art forms, such as music and literature. For example, income from copyright represents approximately a fifth of the creative income for writers, who are some of the lowest paid artists in Australia.⁴

The table below illustrates the proportion of income that artists receive through copyright protections by art form, with composers and writers receiving the highest proportion of income from copyright protections.

	Writers	Visual artists	Craft practitioners	Actors	Dancers	Musicians	Composers	Community cultural develop. workers	All artists (b)
Salaries, wages, fees	34	23	22	94	84	94	59	78	64
Gross sales of works of art (including commissions)	15	64	71	2	2	3	10	9	22
Royalties and advances	21	2	*	3	2	*	20	*	5
Other copyright earnings	1	*	*	*	*	*	*	-	*
Grants, prizes, fellowships	11	10	4	1	12	1	10	13	6
Public Lending Right	8	*	*	-	-	-	-	-	1
Education Lending Right	8	*	-	-	-	-	-	-	1
Other	2	*	2	*	*	*	*	*	1
Total	100	100	100	100	100	100	100	100	100
N	105	143	62	145	64	131	70	24	750

(a) percentages are of artists who had some creative income in the financial year 07/08.
 (b) numbers for all artists are weighted to represent Australia's artist population.
 - indicates nil response in this sample. * indicates less than 1 %.

Figure 1: Throsby D and Zednik A, 2010, *Do You Really Expect to Get Paid? An Economic Study of Professional Artists in Australia.*

¹ The *Arts Nation* report aims to build understanding of Australian arts through a set of national indicators.

² ABS 2014, Australian National Accounts: Cultural and Creative Activity Satellite Accounts, Experimental, 2008-09 (cat. No. 5271.0).

³ PWC (2015), *The Economic Contribution of Australia's Copyright Industries, 2002-2014*, prepared for the Australian Copyright Council, 3.

⁴ Throsby D and Zednik A (2010), *Do you really expect to get paid? – An economic study of professional artists in Australia.*

In 2009 it was estimated there were approximately 44,000 professional practicing artists in Australia, and this number has remained relatively stable.⁵ The median income from their creative practice varies between \$7,000 and \$22,500 per annum depending on the amount of time they can dedicate to their practice.⁶ This level of income is markedly lower than other industries, and yet artists make an important contribution to the creative industries and economy more broadly. For example, artists foster innovation through the creation of new content and development of creative practices.

While income is not the only motivation for artists to create new work, having access to income through copyright plays an important role in ensuring artists can build a sustainable career. Our nation has a moral commitment to artists owning and being able to exploit their intellectual property. Moral rights are also important in ensuring the integrity of artists' work, and this is discussed in more detail below.

The work of artists also has wider benefits in building a creative and innovative Australia. The Australia Council's research has found that 9 out of 10 Australians agree that the arts enrich daily life and make their lives more meaningful to both creators and consumers;⁷ and that more international tourists engage with the arts in Australia than visit casinos or wineries, or attend organised sport.⁸ This in turn supports a vibrant cultural economy and a more creative society, which the Australia Council is committed to supporting under its Strategic Plan 2014-19, *A Culturally Ambitious Nation*.

Effectiveness of the copyright law framework

Encouraging the creativity of artists and other rights holders should be a key consideration in any copyright law framework.

The Australia Council recognises there is a need to balance the intellectual property rights of artists with access to creative works for audiences and artists seeking to re-use and re-purpose work to explore emerging and experimental arts practice.

Current intellectual property arrangements provide remuneration and uphold the rights of artists, leading to a diverse range of Australian creative work being available for audiences to enjoy nationally and internationally. Emerging and experimental artists continue to innovate and create new work through the existing framework.

The *Copyright Act 1968* (Copyright Act) is primarily designed to protect the economic rights of creators, through the original expression of creativity rather than an idea.⁹

The current framework operates effectively as artists can derive income to continue creating new work and contribute to a stronger cultural economy.

Any changes to creators' intellectual property rights could lead to a decline in the creation of Australian work due to insufficient incentives and remuneration available for artists.

⁵ Australia Council (2015), *Arts Nation: An Overview of Australian Arts*, 17.

⁶ Australia Council, *Arts Nation*, 17.

⁷ Australia Council, *Arts Nation*, 10.

⁸ Australia Council, *Arts Nation*, 25.

⁹ Stewart A, Griffith P, Bannister J, Liberman A, *Intellectual Property in Australia* (5th ed), 131.

This would reduce national and international audience access to Australian artistic works, including books, music, visual and performing artworks.

Weakening protections for creators through changes to intellectual property arrangements would impact on the incomes and careers of artists, and could lead to the need for further government investment to ensure new Australian work continues to be created.

Copyright and digital technology

The Australia Council refers the Productivity Commission to its submissions made to the ALRC review on Copyright and the Digital Economy.

Technology develops and affects the creation of new artistic works across various art forms; from literature and music through to visual and performing arts.

Artists have embraced the possibilities of new digital tools and platforms for both the creation of work and engagement with audiences in direct and immediate ways.

However, while artists can benefit from using digital technology in their work, it is important to note that the digital era has also changed and threatened income streams for artists. This is particularly the case for artists who create work that is easily shared illegally through means such as streaming or downloading.

2014 saw a global milestone of parity achieved between digital and physical music revenues, and digital sales through streaming services are growing in Australia.¹⁰ However a recent international study found that even authorised streaming services are built on an exploitative value chain that undervalues music, with only 6% of revenues shared among songwriters and music publishers on average.¹¹

While the current framework is operating effectively by providing a means for artists to receive income from their work, the efficiency of the copyright framework is impacted by the practical realities of copyright enforcement and digital technologies. Copyright law should be responsive to the ability of artists to both protect work and share it with broader audiences. It is the Australia Council's view that, notwithstanding efficiencies that could be improved in response to the use of digital technology and the arts, the current copyright system strikes a sufficient balance between enabling artists to create and consumers to access creative work, and this should be maintained.

'Fair use' and copyright in Australia

The Australia Council does not support the expansion of fair dealing categories or the introduction of a United States style 'fair use' regime. The 'fair use' regime has been shown to negatively impact artists and arts organisations through unnecessary or inaccessible litigation.¹²

¹⁰ IFPI (2015), *Recording Industry in Numbers: The Recorded Music Market in 2014*, 5, 100.

¹¹ Lalonde P (2014), *Study Concerning Fair Compensation for Music Creators in the Digital Age*, International Council for Creators of Music, 2.

¹² Sheffler S (2011), *Museums and Web 2.0: Mission-Driven Approaches, Legal Challenges and New Opportunities*, BCommsLawB16, 14.

The current narrow fair dealing categories in the Australian copyright system discourage unlimited use of artists' work, and are sufficiently fair to both artists and consumers or other creators.

As noted in Council's submission in response to the ALRC Discussion Paper on Copyright and the Digital Economy, there are concerns that introduction of a 'fair use' model in Australia would create uncertainty for artists and copyright users. Extensive litigation would be required to clarify the new parameters of copyright under the common law. The onus would be on artists to protect their copyright, and given the limited resources available for them to pursue litigation, it is the Australia Council's view that this would leave the artistic community at a disadvantage. As outlined above, median income from artists' creative practice varies between \$7,000 and \$22,500 per annum.¹³

If a 'fair use' model were introduced, there would be a need for increased operational funding for organisations such as the Arts Law Centre of Australia and the Australian Copyright Council, which the Australia Council currently provides with operational program funding. These organisations assist artists in protecting their intellectual property rights. A 'fair use' model could, in effect, require additional public resourcing for the arts, to support individual creators to clarify and protect their copyright.

Design and copyright

Visual artists, designers and other artists who require protection for their designs may find the current overlapping system uncertain. The Australia Council notes the recent review into the efficacy of protections under the *Design Act 2003* and other mechanisms by the Advisory Council on Intellectual Property's (ACIP) Review of the Designs System, which released its final report this year.

The Australia Council generally supports increased protection for designers which ensures certainty, and also which provides for the ability of artists to mass produce designs. This is in line with our view that artists should have the opportunity to generate income from their artistic work as outlined above.

Importance of moral rights

The Australia Council believes recognition of the integrity of artists and artists' work is essential to any robust copyright system. Moral rights are integral to protecting and ensuring the reputations of artists and their works, and provide economic benefits to artists. Such protection encourages additional creative works, increasing access for audiences and benefiting society and the economy through a greater range of creative works available.

Introduction of moral rights into the copyright framework has had a positive impact. There was a substantial reduction in the incidences of moral rights infringement experienced by artists after moral rights were incorporated into the *Copyright Act* in 2000 in line with the *Berne Convention*.

¹³ Australia Council, *Arts Nation*, 17.

When the legislation was amended in 2000, 55% of artists reported that they were not always acknowledged as the creators of their work.¹⁴ Nearly a decade later only 9% of artists reported this.¹⁵

The *Berne Convention* introduced international obligations to protect moral rights, however they have only been introduced in Australian copyright law relatively recently. As the evidence base for the efficacy of moral rights continues to grow, moral rights must be maintained.

Some moral rights cases have been brought under the *Copyright Act* since 2000,¹⁶ and applicants in these cases were successful in claiming loss of income, reputational impact and damages on the basis of infringement of moral rights. It would therefore be pre-emptive to conclude that moral rights are not important or have no positive economic impact for artists. The Australia Council supports the development of a strong evidence base when considering any changes to the copyright framework in Australia.

Moral rights are important from an economic perspective in that they enhance confidence and encourage creation of new works. For example, if artists are able to claim moral rights in relation to false attribution, this enables an artist to recoup lost profit or reputational damage. The artist can then maintain their creative practice and continue contributing to the economy. Moral rights also have an impact by increasing the ability of artists to advocate or bargain in negotiations for use of their works.¹⁷

The Australia Council does not believe there is double-handling or duplicate protections by copyright law and other areas, such as misleading and deceptive conduct in the *Competition and Consumer Act 2010*. This is because the latter does not provide sufficient protection for artists who may not be engaged in trade or commerce.

Prohibitions on misleading and deceptive conduct are usually the subject of costly litigation. As noted above, artists and arts organisations often do not have the financial means to undertake substantive and expensive litigation to enforce misleading and deceptive conduct prohibitions.

Misleading and deceptive conduct tends to be considered in commercial or trade arrangements, and does not take into account the way the arts sector operates and creates work. The arts sector often undertakes its activities and presents artistic works less formally, for example, through impromptu performances or spontaneous artistic acts that contribute to public life and enjoyment of the arts. Misleading and deceptive conduct provisions also do not apply to all art forms.

Ultimately moral rights should be maintained and any copyright reform should consider the integrity of artists as paramount to a strong protective system of rights.

¹⁴ Throsby D and Hollister V (2003), *Don't give up your day job – An economic study of professional artists in Australia*.

¹⁵ Throsby and Zednik, *Do You Really Expect to Get Paid?*

¹⁶ *Meskenas v ACP Publishing Pty Ltd* (2006), FMCA 1136; *Perez & Ors v Fernandez* [2012] FMCA 2.

¹⁷ Stewart, Griffith, Bannister, Liberman, *Intellectual Property in Australia*, 273.

Indigenous artists

Indigenous artists and their communities have particular needs in relation to intellectual property rights, and Indigenous cultural protocols are required to ensure integrity and respect of Aboriginal and Torres Strait Islander arts and cultures. Moral rights and the provision of economic incentives for the creation of work are particularly important in protecting the intellectual property of Indigenous artists, custodians and communities. This section looks at how these rights and incentives can be upheld and delivered, consistent with the UN Declaration on the Rights of Indigenous Peoples. This includes considering establishment of a National Indigenous Cultural Authority and introduction of specific legislation to protect Indigenous Cultural and Intellectual Property (ICIP).

The Australia Council has published free protocol guides for working with Indigenous Australian artists, including for Indigenous Australian music, writing, visual arts, media and performing arts. The protocols are a leading model for promoting ICIP by outlining appropriate ways of using Indigenous cultural material and engaging with Indigenous artists and communities.¹⁸

The Australia Council refers to a report it commissioned in 2006 by Terri Janke and Robynne Quiggin, *Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006*:

One foundational principle underlies development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways. In order to positively contribute to the integrity of Indigenous cultural life, arts infrastructure must support Indigenous control of ICIP management. An essential part of this support is acknowledgement of local community authority, communal rights over cultural heritage material, and engagement of Indigenous people through consultation and prior informed consent mechanisms. This must be balanced with acknowledgement of the authority of individual artists and encouragement of creativity and innovation.¹⁹

Whilst copyright laws provide rights to individual Indigenous artists, the communal rights of Indigenous clans and groups to their ICIP needs further consideration.²⁰ These issues have been explored by *Milpurruru v Indofurn* and *Bulun Bulun v R & T Textiles*. Indigenous artists have obligations to their communities through the customary law to deal with ICIP, however this obligation is not sufficiently recognised through the broader intellectual property framework.

¹⁸ The Australia Council's protocol guides for working with Indigenous Australian artists are available at the following link: <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>

¹⁹ Janke T and Quiggin R (2006), *Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006*, 9. Available: <http://www.australiacouncil.gov.au/workspace/uploads/files/indigenous-cultural-and-intellectual-property.pdf>

²⁰ Janke T and Dawson P (2012), *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*.

Terri Janke's 2009 work, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*, discusses how Australia's intellectual property arrangements do not effectively protect Indigenous cultural and intellectual property rights. Currently there is no legal right for Indigenous communities to control, maintain and protect their traditional cultural expression, which is primarily communal. This includes songs, stories, dances and cultural knowledge, which is passed down through the generations, but may fall outside the current intellectual property framework as it is not in material form, and may be considered to be in the public domain.²¹

Indigenous artists and communities need their cultural and intellectual property rights to be upheld so they can continue and maintain the integrity of their culture and protect it from misappropriation. A system for collective cultural consent and consultation could address this. The establishment of a National Indigenous Cultural Authority would enable Aboriginal and Torres Strait Islander peoples to oversee and protect their ICIP rights.²² This could also enable Indigenous people to negotiate agreed terms, including sharing of benefits. With recognition of ICIP rights, there would be incentive for Indigenous people to collaborate and share their traditional cultural expression, contributing to a culturally strong and innovative Australia.

Introduction of specific legislation to protect the cultural and intellectual property rights of Indigenous communities would address gaps in the current framework. Janke and Dawson outline the form that such legislation could take in *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, which was developed in response to consultation undertaken by IP Australia in 2012.²³

The introduction of specific legislation to protect the intellectual property rights of Indigenous communities would be in line with the UN Declaration on the Rights of Indigenous Peoples, which Australia announced support for in 2009. Article 31 of the Declaration states 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." This is also in line with Article 32 of the Declaration: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."²⁴ The term resources encompasses Indigenous arts and culture.

The inquiry may wish to consider the work of the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in developing an intellectual property rights-based approach for the protection of Indigenous cultural material.

²¹ Janke, T (2009), *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*.

²² Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*.

²³ Janke and Dawson, *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, 25.

²⁴ United Nations (2007), *UN Declaration on the Rights of Indigenous Peoples*.

Parallel import restrictions

The Australia Council notes that the inquiry's terms of reference includes consideration of the Harper Competition Policy Review recommendations relating to parallel import restrictions.

As noted above, writers are among the lowest paid artists and income from copyright represents approximately a fifth of their creative income.²⁵

Changes to restrictions on parallel importation of books may lead to a decline in the creation of new Australian works and impact the sustainability of the Australian literature sector. This would reduce access to a diverse range of Australian books and limit options for readers through lower cost imported books dominating the market. Such a shift would affect the whole supply chain, from publishers and booksellers through to writers. This would weaken literary culture in Australia, including the ability of readers to access the work of Australian writers.

As a result, additional government investment may be required to ensure Australian writers continue creating new works and to ensure sustainability of the Australian literature sector.

For example, the *Copyright Amendment Bill (No. 2) 1997* removed parallel import restrictions for music. In order to address the impact this would have on the music industry, the government introduced a \$10 million music industry package to support distribution and access to Australian music.

²⁵ Throsby and Zednik, *Do you really expect to get paid?*