



# AUSTRALIA COUNCIL FOR THE ARTS

SUBMISSION IN RESPONSE TO THE  
PRODUCTIVITY COMMISSION'S DRAFT REPORT  
ON INTELLECTUAL PROPERTY ARRANGEMENTS

JUNE 2016

# TABLE OF CONTENTS

COVERING LETTER.....	3
<b>AUSTRALIA COUNCIL SUMMARY RECOMMENDATIONS ON INTELLECTUAL PROPERTY ARRANGEMENTS.....</b>	<b>5</b>
AUSTRALIAN CREATION AND CREATIVE CONSUMPTION.....	5
FAIR USE .....	5
REMOVAL OF PARALLEL IMPORT RESTRICTIONS .....	5
CHANGES TO COPYRIGHT DURATION .....	6
MORAL AND PERFORMERS' RIGHTS.....	6
INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY (ICIP).....	6
INTERNATIONAL OBLIGATIONS .....	6
<b>FAIR USE: PRODUCTIVITY COMMISSION DRAFT RECOMMENDATION 5.3.....</b>	<b>7</b>
AUSTRALIANS AS CREATORS AND NOT JUST CONSUMERS .....	7
IMPACT OF FAIR USE .....	7
<b>REPEAL OF PARALLEL IMPORTATION RESTRICTIONS: PRODUCTIVITY COMMISSION DRAFT RECOMMENDATION 5.2 .....</b>	<b>8</b>
PARALLEL IMPORT RESTRICTIONS IN OTHER JURISDICTIONS .....	9
FUNDING IMPLICATIONS OF REPEALING PARALLEL IMPORT RESTRICTIONS FOR BOOKS ..	10
<b>CHANGES TO COPYRIGHT DURATION: PRODUCTIVITY COMMISSION DRAFT FINDING 4.2 AND RECOMMENDATION 4.1 .....</b>	<b>11</b>
USE OF ABS DATA IN DRAFT REPORT.....	11
<b>ISSUES INSUFFICIENTLY ADDRESSED IN DRAFT REPORT .....</b>	<b>13</b>
MORAL AND PERFORMERS' RIGHTS .....	13
INDIGENOUS CULTURAL INTELLECTUAL PROPERTY .....	13
INTERNATIONAL OBLIGATIONS .....	15
<b>APPENDIX A: ABOUT THE AUSTRALIA COUNCIL FOR THE ARTS.....</b>	<b>16</b>
<b>APPENDIX B: THE VALUE OF AUSTRALIAN ARTS NATIONALLY AND INTERNATIONALLY .....</b>	<b>17</b>
<b>APPENDIX C: ARTISTS' INCOMES AND THE IMPORTANCE OF COPYRIGHT .....</b>	<b>19</b>

Intellectual Property Arrangements  
Productivity Commission  
GPO Box 1428  
Canberra City ACT 2601

Dear Commissioners,

The Australia Council (Council) is pleased to have this opportunity to respond to the Productivity Commission's Draft Report on Intellectual Property Arrangements. As the Australian Government's arts funding and advisory body and national advocate for the arts, Council plays a significant role in raising the interests of artists and arts organisations with government.

Arts and culture make a significant contribution to Australia's economic and cultural life through the copyright industries, which generate over \$111 billion in economic activity and employ almost 9 per cent of the nation's workforce.<sup>1</sup> As noted in the Australia Council's *Arts Nation* report, cultural activity makes up approximately 4 per cent of Australia's GDP.<sup>2</sup>

This submission builds on the principles relating to the importance of Australian arts and culture, and creation and access to Australian artistic works raised in our previous response to the Productivity Commission's Issues Paper on Intellectual Property Arrangements in December 2015.

We have engaged with Council's key stakeholders regarding intellectual property to compile this submission. Organisations such as the Australian Copyright Council, Arts Law Centre of Australia, Copyright Agency / Viscopy, APRA / AMCOS, Australian Society of Authors and the Australian Publishers Association provide additional evidence and perspectives from the arts sector in their submissions to the Commission.

Council's submission refers to relevant research and examples to address recommendations in the Draft Report that have potentially significant implications for Australian arts and artists. These include: fair use; the repeal of parallel import restrictions, and a reduction in the duration of copyright. Council's principal concern is the erosion of rights and protections provided by existing copyright law.

Council's submission also raises issues that have not been sufficiently addressed in the Draft Report, including moral rights, Indigenous Cultural and Intellectual Property rights and Australia's international obligations under the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

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

2 Australian Bureau of Statistics (2014), *Australian National Accounts: Cultural and Creative Activity Satellite Accounts, Experimental, 2008-09* (Cat. No. 5271.0).



The Commission's Draft Report demonstrates an incomplete understanding of Australian arts and culture and the need for copyright protection for Australian artists to continue creating new work. Proposed changes to intellectual property arrangements will likely lead to a decline in the creation and availability of Australian work due to insufficient remuneration for artists. Weakening protections for creators through changes to intellectual property arrangements will directly impact the incomes and careers of artists. Further government funding would likely be required to ensure the creation of new Australian work.

These are some of the key considerations which we encourage the Commission to take into account in preparing its Final Report. Ultimately arts and culture play an integral role in Australian society and intellectual property arrangements should enable artists to create new work for audiences through appropriate recognition and remuneration.



Tony Grybowski  
Chief Executive Officer  
Australia Council for the Arts

# AUSTRALIA COUNCIL SUMMARY RECOMMENDATIONS ON INTELLECTUAL PROPERTY ARRANGEMENTS

## AUSTRALIAN CREATION AND CREATIVE CONSUMPTION

1. Any changes to intellectual property arrangements need to consider the implications for creators' income from their creative work over time, and for audiences' continued access to Australian works in Australia and beyond.
2. Due consideration needs to be given to ensuring the framework for rights supports a regime that is workable for individual creators and small and medium enterprises.

## FAIR USE

In response to the Productivity Commission's Draft Recommendation 5.3 on Fair Use:

*Draft Recommendation 5.3: The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use...*

3. While acknowledging there are multiple views on this issue, Council does not support the introduction of a fair use regime and refers the Productivity Commission to its previous submissions on fair use and its impact.
4. The impact of changes to the *Copyright Act* on domestic production need to be considered, including loss of professional creative output in jurisdictions where fair use has been implemented, such as Canada and Singapore.
5. Effectiveness of a fair use regime needs to be reconsidered in the Australian context, particularly if simultaneously recommending a reduction in duration of copyright. Together, these changes would likely have an impact to the detriment of artists and the arts sector.
6. Current exceptions in the *Copyright Act* provide a sufficient balance for public access and use of copyright materials without infringement in priority areas such as research, entertainment and education. These exceptions should be maintained.

## REMOVAL OF PARALLEL IMPORT RESTRICTIONS

In response to the Productivity Commission's Draft Recommendation 5.2 on removal of parallel import restrictions:

*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.*

7. Existing parallel import restrictions should be maintained for books to ensure public access to new Australian literature, to maintain the domestic publishing sector, and to avoid unintended impacts on broader Australian culture.
8. If there are changes to parallel import restrictions for books, these should only be made with extreme caution and consultation with the sector given the long term impacts this would have on Australian literature.

9. There needs to be consideration of additional, ongoing funding mechanisms for writers, publishers, and stimulation of the literature sector to ensure continued creation and access to Australian works.
10. If parallel import restrictions are repealed from 2017, a transition package similar to that allocated to the music industry in 1997 should be considered.

## CHANGES TO COPYRIGHT DURATION

In response to the Productivity Commission's Draft Finding 4.2 and Draft Recommendation 4.1 on terms of copyright:

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

*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.*

11. Protection of copyrighted works needs to be maintained for a suitable length of time to ensure artists can derive income from their work over the course of their lifetime.
12. The PwC report, *The Economic Contribution of Australia's Copyright Industries 2002-2014* should continue to be used as the key source of data on the economic contribution of copyright industries due to its frequency and coverage.

## MORAL AND PERFORMERS' RIGHTS

13. Intellectual property arrangements continue to protect moral and performers' rights. Council also supports further protections in this area.

## INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY (ICIP)

14. Specific legislation should be introduced to protect the cultural and intellectual property rights of Indigenous communities to address gaps in the current framework and comply with the UN Declaration on the Rights of Indigenous Peoples.
15. Members of the sector and legal community continue to raise the need for a national body to be established to support Aboriginal and Torres Strait Islander peoples to oversee and protect their ICIP rights. This should be considered in any reform to intellectual property arrangements.

## INTERNATIONAL OBLIGATIONS

16. Australia's commitment to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions should be given effect in any articulation of policy objectives on intellectual property in Australia.

## FAIR USE: PRODUCTIVITY COMMISSION DRAFT RECOMMENDATION 5.3

*The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.*

*The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.*

*The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:*

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

*The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.*

## AUSTRALIANS AS CREATORS AND NOT JUST CONSUMERS

The Draft Report argues that Australians are largely consumers of creative work from overseas.<sup>3</sup> The claim that most new works consumed in Australia are sourced from overseas, and therefore introduction of a fair use exception will not impact creation of new works, is not correct.

Rather than merely being consumers of culture, Australians are prolific creators and exporters of culture. The value of visual arts exported from Australia was in excess of \$77 million in 2013-14. The books of 28 bestselling Australian authors generated \$25.8 million in domestic sales in 2013 alone.<sup>4</sup> (See further information on the value of Australian arts nationally and internationally at Appendix B).

Artists are at the core of many creative industries, creating product, content and developing creative practices. Artists must therefore be permitted to own and exploit their intellectual property on both an economic and moral level.

## IMPACT OF FAIR USE

Council does not support the introduction of a fair use regime and refers the Productivity Commission to its previous submissions on fair use and its impact, including in response to the Commission's Issues Paper on Intellectual Property Arrangements and the Australian Law Reform Commission's inquiry into Copyright and the Digital Economy.

<sup>3</sup> Productivity Commission (2016), *Intellectual Property Arrangements Draft Report*, 19.

<sup>4</sup> Australia Council (2015), *Arts Nation: An Overview of Australian Arts*, 26. The Arts Nation report aims to build understanding of Australian arts through a set of national indicators.

Whilst we acknowledge that new global business models have encouraged new consumer behaviours, it does not follow that the appropriate response is to erode the exclusive rights of copyright owners via broad exemptions.

Council emphasises that a fair use regime is likely to lead to a decline in Australian professional creative output. This has been demonstrated in jurisdictions where fair use has been implemented, including Canada and Singapore. The fair use regime in these countries has significantly reduced artist incomes as a result of the lower cost of consuming artistic products.<sup>5</sup>

The Productivity Commission argues the potential for short term economic benefits to individual consumers, however it is Council's view that the long term detrimental impact to Australian culture and artistic product must also be considered. A decline in artistic production will ultimately disadvantage consumers who will be unable to access a diverse range of Australian works of art, even though 'access' and 'flexibility' are ostensibly the reason for introducing fair use. Council repeats that the existing exceptions in the *Copyright Act* sufficiently provide for public access and relevant use of copyright materials without infringement in priority areas such as research and education, as well as in the entertainment industries.

Council is concerned that a likely impact of the Commission's recommendations is an increase in litigation, which would further disadvantage the arts sector. This has been the experience in the United States generally because fair use has a wide, unclear meaning. The definition of 'fair' as proposed in the Draft Report is broad; the fairness principles outlined in the Draft Report are, as acknowledged by the Productivity Commission, "open-ended". Council does not agree with the proposition that legal uncertainty is a necessity of legislative change, preferring certainty as a key pillar of a democratic legal system. To introduce a wide and unclear test of fairness would, in our view, undermine the intent of the *Copyright Act*, being to protect works. Evidence from jurisdictions outside Australia demonstrates that the uncertainty in determining fair use has long-term ramifications.

It is indeed rare that artists at all points in their career, and in particular young and emerging artists, have the resources to pursue litigation. Many members of the Australian arts sector do not support a fair use regime, including prominent authors such as Thomas Keneally,<sup>6</sup> Richard Flanagan,<sup>7</sup> and organisations such as the Australian Copyright Council, Copyright Agency / Viscopy and Arts Law Centre of Australia. We refer you to submissions from these stakeholders for further information.

## REPEAL OF PARALLEL IMPORTATION RESTRICTIONS: PRODUCTIVITY COMMISSION 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.*

The Australia Council believes that a likely impact of the repeal of parallel import restrictions would be a decline in the number and range of new Australian books available for readers. Removing territorial copyright protection for Australian books may lead to lower cost imported books dominating the market, making the current range and diversity of work by many Australian writers and publishers unviable. A negative impact on Australian culture and cultural identity is a likely long-term outcome.

5 PricewaterhouseCoopers Australia (2016), *Understanding the costs and benefits of introducing a 'fair use' exception*, prepared for APRA / AMCOS, PPCA, Copyright Agency, Foxtel, News Corp and Screenrights.

6 Keneally, T (2016), "Productivity Commission recommendation threatens livelihood of book industry", *Australian Financial Review*, 29 April 2016, Available at: <http://www.afr.com/business/media-and-marketing/publishing/productivity-commission-recommendation-threatens-livelihood-of-book-industry-20160429-goi2zq>.

7 Flanagan, R (2016), "Books are too important to be left to economists", *Sydney Morning Herald*, 2 June 2016, Available at: <http://www.smh.com.au/comment/books-are-too-important-to-be-left-to-economists-20160602-gp9ycc.html>.

As noted in our previous submission (and here in Appendix C), writers are among the lowest paid artists and income from copyright represents approximately a fifth of their creative income.<sup>8</sup> According to a Macquarie University survey, in 2013-14 the annual average income derived from practising as an author was \$12,900.<sup>9</sup>

Without a reasonable prospect of income, many new Australian literary works would not be created, and this inevitably leads to a scarcity of Australian stories and experiences reaching audiences of all kinds. This would ultimately weaken the competitiveness of Australian writers at home and overseas and lead to degradation of Australian literary culture.

## PARALLEL IMPORT RESTRICTIONS IN OTHER JURISDICTIONS

Other nations such as the U.K. and the U.S. maintain parallel import restrictions to ensure that incentives and protections are in place for British and American writers.

New Zealand is a comparable, albeit smaller, publishing industry to Australia. Parallel importation restrictions were lifted in New Zealand in 1999. A 2009 study of the impacts on publishing in New Zealand had three main findings:

- Fluctuations in book prices between New Zealand, the United States and Australia over the decade were mainly caused by variations in the exchange rate and consumers did not receive any material benefits in terms of book price;<sup>10</sup>
- The number of New Zealand titles published by the top five publishers increased by less than one per cent annually over the decade, compared with a rate of 2.47% for Australia in the same period. The publication of children's titles decreased very significantly;<sup>11</sup> and
- Some publishers rolled back their infrastructure.<sup>12</sup> Two of the five largest publishing houses in New Zealand – Hachette and Penguin – withdrew their domestic distribution operations five years after the legislative changes.<sup>13</sup>

The New Zealand experience suggests that the removal of parallel importation restrictions and consequent reduction in the ability to publish and distribute books led to a reduction in financial incentive for domestic authors, as it became harder to have their books published.<sup>14</sup>

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8 Throsby, D and Zednik, A (2010), *Do you really expect to get paid? – An economic study of professional artists in Australia*, 127.

9 Zwar, J, Throsby, D and Longden, T (2015), *The Australian book industry: Authors, publishers and readers in a time of change*, Available at: <http://goto.mq.edu.au/book-industry>

10 Castalia Strategic Advisors (2009), *The Impact of Parallel Importing on Publishing in New Zealand: Report to Australian Publishers Association*, 10.

11 Castalia Strategic Advisors, *The Impact of Parallel Importing on Publishing in New Zealand*, 9.

12 Castalia Strategic Advisors, *The Impact of Parallel Importing on Publishing in New Zealand*, 12

13 Castalia Strategic Advisors, *The Impact of Parallel Importing on Publishing in New Zealand*, 10

14 Castalia Strategic Advisors, *The Impact of Parallel Importing on Publishing in New Zealand*, 11.

## FUNDING IMPLICATIONS OF REPEALING PARALLEL IMPORT RESTRICTIONS FOR BOOKS

The Draft Report suggests that the concerns of the literature sector might be addressed through direct subsidies, including Australia Council support for Australian literature.<sup>15</sup> Council is one of the few government agencies in Australia that provides these direct subsidies through grants to writers. It is important to note however that Council's funds are limited by annual appropriations, and the viability of this recommendation depends on additional government funding.

Recent reductions in Council's budget specifically impacted grants to artists and arts organisations, and this has resulted in less grants available for writers, along with organisations that support writer development, publishing, literary magazines and journals. Programs that promote the work of Australian writers nationally and internationally, including at writers' festivals and book fairs, have also been significantly reduced by these measures.

The New Zealand Government provided increased funding to the creative industries for a ten-year period following the lifting of parallel import restrictions to offset market development.

In Australia, parallel import restrictions were removed in 1997 for sound recordings, in line with Australian Competition and Consumer Commission recommendations. The full impact of this change is difficult to assess given the changes in technology, business and distribution models at the same time. However it should be noted that subsequent to the removal of the restrictions the federal government created a package of initiatives to assist the music industry through the transitional phase, investing in programs that consolidated local markets through radio airplay and live performance support, as well as significant resourcing to develop international markets.

Royalties and other copyright earnings account for over 20% of earnings for writers and composers.<sup>16</sup> Nearly two thirds of respondents to Macquarie University's 2015 survey of authors noted they received income from royalties in 2013-14, and nearly a third received copyright payments in 2013-14. Conversely, less than 10% of respondents' received income from a grant or commission to produce creative work in 2013-14.<sup>17</sup> Removing one of the means by which writers receive remuneration by repealing parallel import restrictions has the potential to diminish incomes and opportunities for writers. This leads to fewer Australian stories and content with which Australian and international readers can engage.

Council acknowledges the Productivity Commission's (and other) arguments in support of removal of parallel importation restrictions on books and in the area of trade marks. On one hand, parallel importation restrictions, along with other factors such as the size of the Australian market, currently increase the cost of Australian and overseas content. Rights holders currently have territorial protection to determine prices, and removal of parallel importation restrictions would allow access to cheaper content by the consumer and book stores. This is a relevant consideration. However, the argument does not take into account the very real impact on the income of writers and the literature industry and the inevitability of reduced Australian content as a result.

If there are changes to parallel import restrictions for books, these should only be made with extreme caution and consultation with the sector given the long term impacts this would have on Australian literature. Blunt removal of parallel import restrictions would be unnecessarily disruptive and would immediately reduce the incentives for business investment in local books and literature. If removal of parallel importation restrictions is to be considered, a managed implementation providing support for industry transition would be required to maintain a functioning cultural economy for local literature.

<sup>15</sup> Productivity Commission, *Intellectual Property Arrangements Draft Report*, 132.

<sup>16</sup> Throsby and Zednik, *Do you really expect to get paid?*, 127.

<sup>17</sup> Zwar, Throsby and Longden, *The Australian book industry*, Available at: <http://goto.mq.edu.au/book-industry>

## CHANGES TO COPYRIGHT DURATION: PRODUCTIVITY COMMISSION DRAFT FINDING 4.2 AND RECOMMENDATION 4.1

*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.*

*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.*

The Draft Report does not appropriately consider the work of artists, including the creative process and timelines involved in content production. This is evidenced in the Draft Report's recommendation to reduce the duration of copyright protection. If the Commission recommends reducing the time that works are protected under copyright from 70 years after death of the artist to 15-25 years from the creation of the work, the impact on artists would be keenly felt.

Along with the proposed repeal of parallel import restrictions for books, this recommendation would have a significant impact on income for Australian writers and composers. A creative work can take a lengthy period to come to fruition, for example, bringing a play through the writing, commissioning and production process and presenting it to an audience. Artists' careers develop through their lifetimes; it is often the case that an artist's work is only recognised at the end of their career. Many artistic works increase in value over the course of several decades. Writers' back lists often become popular years after publication and are necessary sources of income throughout a writer's life.

The current duration of copyright protection for creative works ensures that artists can derive income from their artistic material while it is being used and enjoyed by audiences into the future. Writers and composers are some of the lowest paid artists in Australia, with median incomes between \$7,000 and \$22,500 per annum.<sup>18</sup> Income from copyright represents approximately a fifth of their creative income.<sup>19</sup>

The Australia Council strongly urges the Productivity Commission to reconsider this recommendation and ensure the protection of copyrighted works for a suitable length of time to ensure artists can derive income from their work over the course of their lifetime.

## USE OF ABS DATA IN DRAFT REPORT

Council also questions the validity of the evidence presented by the Commission regarding the average commercial life cycles of music, literary works, visual art and films. There are various problems with both the sources of the ABS data cited on page 114 of the Draft Report, and the way the Commission has used the data out of context. The ABS calculated 'mean asset lives' of intellectual property products in years, for the purpose of modelling one of the many data items used in the *Australian System of National Accounts*.<sup>20</sup>

The ABS sources are not indicative of a complete or current picture of the industry:

- For literature, information was obtained from the Australian Publishers Association's booklet, *Introduction to Book Publishing*, which was published in 1997; and from enquiries to large publishers, which may have also occurred in that time period given the statement that: "the increasing availability of new print technology such as 'print on demand' could redistribute the author's income, and therefore the life of book titles, over a longer period in the future."<sup>21</sup> There is no mention of online forms of distribution and the impact of these on the length of time an author might receive returns for their work.

<sup>18</sup> Australia Council, *Arts Nation*, 17.

<sup>19</sup> Throsby and Zednik, *Do you really expect to get paid?*, 127.

<sup>20</sup> ABS (2015), *Australian System of National Accounts*, 2014-15 (cat. no. 5204.0).

<sup>21</sup> ABS (2015), *Australian System of National Accounts: Concepts, Sources and Methods 2015* (cat. no. 5216.0), 374.

The Commission's use of the term 'out of print' shows the dated nature of the evidence presented; this is becoming a defunct term in the industry as books are increasingly made for digital formats.

- For music, the ABS sourced information from the Australian Record Industry Association (ARIA), without a time period given, and included the caveat that "detailed information is not obtained from ARIA's membership to verify the accuracy of these indications."<sup>22</sup> Further, music royalties and returns to the music creators are managed by APRA / AMCOS rather than ARIA, or PPCA for performance rights. APRA / AMCOS and PPCA would be more appropriate data sources to inform discussion of the life cycle of music in a copyright context.
- For film, the information is sourced from the Australian Film Commission, which has not operated since 2008; and Martin Dale's book *The Movie Game - the film business in Britain, Europe and America*,<sup>23</sup> published in 1997.

Visual arts are not included in the category of 'artistic originals' used in the National Accounts. The income life attributed to visual arts by the Commission on page 114 of the Draft Report misrepresents a statement by the ABS about the 'retirement distribution' of 'artistic originals'. In the National Accounts, artistic originals include film and television, music and literary works. Their retirement distributions:

"reflect the distribution of the number of years for which artistic originals yield an income or royalty...[and] are heavily skewed to the left because the vast majority of artistic originals receive an income over a relatively short period (often one or two years). *However, a small percentage receive an income over a much longer period, and represent the majority of income received*"<sup>24</sup> (emphasis added).

It is an important caveat that the majority of income received for creators is over a much longer period, and such context should be applied to estimates of the average asset lives of artistic products.

On page 97, the Commission's Draft Report also contrasts the ABS estimates for gross fixed capital expenditure on 'artistic originals' (0.16 percent of GDP) with the PwC figure reported in the Australian Copyright Council submission,<sup>25</sup> which the Commission describes as 'misleading'. The ABS figure for 'artistic originals' is based on a narrow group of works, as articulated above. It does not include visual arts, design, or other intellectual property products that are counted separately in the National Accounts such as computer software. Data sources for this figure include a music publishing survey conducted in 1996-97 and book publisher surveys conducted in 2003-04.<sup>26</sup> The comparison of this figure with the 7.1 percent of GDP reported in the PwC report<sup>27</sup> is incorrect; it compares the market value of a narrow group of intellectual property products with the economic value of a fuller set of intellectual property industries, including indirect impacts such as employment and using an internationally agreed framework.

Council supports the continued use of the PwC report as the key source of data on the economic contribution of copyright industries due to its frequency and coverage.

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22 ABS (2015), *Australian System of National Accounts: Concepts, Sources and Methods 2015* (cat. no. 5216.0), 374.

23 ABS (2015), *Australian System of National Accounts: Concepts, Sources and Methods 2015* (cat. no. 5216.0), 374.

24 ABS (2015), *Australian System of National Accounts: Concepts, Sources and Methods 2015* (cat. no. 5216.0), 376.

25 Australian Copyright Council (2015), *Submission in response to Productivity Commission Issues Paper on Intellectual Property Arrangements*, 3.

26 ABS (2015), *Australian System of National Accounts: Concepts, Sources and Methods 2015* (cat. no. 5216.0), 257.

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

## ISSUES INSUFFICIENTLY ADDRESSED IN DRAFT REPORT

### PRODUCTIVITY COMMISSION DRAFT FINDING 4.1

*Australia's copyright system has expanded over time, often with no transparent, evidence based policy analysis demonstrating the need for, or quantum of, new rights.*

### MORAL AND PERFORMERS' RIGHTS

Council refers the Commission to our previous submissions on the importance of moral rights, including in response to the Issues Paper and the ALRC's inquiry into Copyright and the Digital Economy. Council notes the lack of prominence given to moral rights in the Draft Report and encourages the Commission to consider complementing any copyright protection amendments with a robust moral rights scheme that honours the integrity of artists' work.

Council agrees with the Commission's view on page 107 of the Draft Report that moral and performers' rights are not having an adverse effect on the copyright system. Council encourages the continued protection of moral and performers' rights and supports further protections in this area.

### INDIGENOUS CULTURAL INTELLECTUAL PROPERTY

Council has previously raised the importance of addressing the particular intellectual and cultural property needs of Indigenous artists and their communities in submissions to the Commission and the ALRC. Indigenous Cultural and Intellectual Property (ICIP) was not however addressed in the Commission's Draft Report.

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.

The fundamental need for Indigenous artists and peoples to control and maintain their intellectual and cultural property is outlined in a 2006 report:<sup>28</sup>

*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.<sup>29</sup>*

While copyright laws provide rights to individual Indigenous artists, the communal rights of Indigenous clans and groups to their ICIP needs further attention.<sup>30</sup> 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.

<sup>28</sup> Janke, T and Quiggin, R (2006), Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006. Available at: <http://www.australiacouncil.gov.au/workspace/uploads/files/indigenous-cultural-and-intellectual-property.pdf>

<sup>29</sup> Janke and Quiggin, Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006, 9. Available at: <http://www.australiacouncil.gov.au/workspace/uploads/files/indigenous-cultural-and-intellectual-property.pdf>

<sup>30</sup> Janke, T and Dawson, P (2012), *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, 13.

This is discussed in Terri Janke's 2009 work, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*. 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.<sup>31</sup>

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 body would enable Aboriginal and Torres Strait Islander peoples to oversee and protect their ICIP rights.<sup>32</sup> Such a body could also support 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 describe 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.<sup>33</sup>

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."<sup>34</sup> Such legislation 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."<sup>35</sup> The term resources encompasses Indigenous arts and culture.

The Commission 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.

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.<sup>36</sup>

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

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

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

34 United Nations (2007), *UN Declaration on the Rights of Indigenous Peoples*, 11.

35 United Nations, *UN Declaration on the Rights of Indigenous Peoples*, 12.

36 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/>

## INTERNATIONAL OBLIGATIONS

Australia has obligations under international law to protect and promote a diversity of cultural expressions, which is built and fostered through the work of artists engaging with communities across Australia and around the world.

In 2009, Australia became a signatory to the 2005 UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions (the Convention). The Convention was adopted recognising the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning (Article 1 (g)).<sup>37</sup> The Convention reaffirms the right of states “to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory” (Article 1(h)).<sup>38</sup> The Convention also recognises the integral role that arts and cultural goods, services and activities have in sustainable cultural and economic development.

Council has commissioned research on arts projects that promote a diversity of cultural expressions, and we refer the Commission to this report for further evidence of the benefits that arts and cultural activity can have in harnessing creative activity to achieve the aims of the Convention and benefit society in a range of ways.<sup>39</sup>

Council notes the Draft Report’s recommendation on page 54 to articulate a set of policy objectives. Council recommends that Australia’s commitment to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions should be given effect in any articulation of policy objectives on intellectual property in Australia.

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<sup>37</sup> UNESCO (2015), *Basic Texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 5.

<sup>38</sup> UNESCO, *Basic Texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 5.

<sup>39</sup> Mar, P and Ang, I (2015), *Promoting Diversity of Cultural Expression in Arts in Australia: A Case Study Report*, University of Western Sydney Institute for Culture and Society, Available at:

<http://www.australiacouncil.gov.au/research/research-news/promoting-diversity-of-cultural-expression-in-arts-in-australia/>

## APPENDIX A: 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*. They 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.

## APPENDIX B: THE VALUE OF AUSTRALIAN ARTS NATIONALLY AND INTERNATIONALLY

Australia has an exceptional arts and culture sector that engages with, and improves the lives of creators and audiences nationally and internationally. The Australia Council's research found 9 out of 10 Australians agree the arts enrich daily life and make their lives more meaningful.<sup>40</sup> The bedrock of creative content forged by our nation's artists and arts organisations provides a basis for the creative industries, fostering innovation and new ideas that have economic and social benefits across Australia.

Cultural activity makes up approximately 4 per cent of Australia's GDP.<sup>41</sup> Arts and culture make a significant contribution to Australia's copyright industries, which generate over \$111 billion in economic activity and employ almost 9 per cent of the nation's workforce.<sup>42</sup> The arts have wide influence - more international tourists engage with the arts in Australia than visit casinos or wineries, or attend organised sport.<sup>43</sup>

Council notes the economic framework of the Commission's inquiry into Intellectual Property Arrangements includes maximising the wellbeing of the Australian community as a whole. The Draft Report does not fully discuss or acknowledge the importance of arts and culture to the community, and the role that creators play in harnessing their artistic work to improve society and build the economy.

Ultimately the value of arts and culture and income for artists to continue this work needs to be considered in any proposals to change the intellectual property framework. Proposed changes to intellectual property would impact on the ability of creators to produce new work for the Australian community to access and benefit from.

The Draft Report argues on page 19 that Australians are largely consumers of creative work from overseas, however there is a vast range of Australian content that audiences enjoy nationally and internationally. While the Draft Report claims most new works consumed in Australia are sourced from overseas, and therefore introduction of a 'fair use' exception will not impact creation of new works, this is certainly not the case.

Rather than just being consumers of culture, Australians are strong creators and exporters of culture, as established in the Australia Council's research into international arts activity. International engagement with Australian arts is an important source of revenue through sales, royalties and copyright. The value of visual arts exported from Australia was at least \$77 million in 2013-14.<sup>44</sup>

Australian writers create new works that perform well in both Australia and overseas. For example, according to Nielsen Bookscan data, the books of 28 bestselling Australian writers generated \$25.8 million in Australian sales and \$3.6 million in annual physical retail sales in the U.K. in 2013.<sup>45</sup>

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40 Australia Council, *Arts Nation*, 10.

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

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

43 Australia Council, *Arts Nation*, 25.

44 Australia Council, *Arts Nation*, 26.

45 Australia Council, *Arts Nation*, 26.

Australian artists are featured at international arts events and nominated for major international awards in line with OECD population benchmarks.<sup>46</sup> From 2010-11 to 2013-14, the Australia Council invested more than \$44.4 million in grants for international activity, supporting 1,830 artists and organisations and reaching 93 different countries.<sup>47</sup>

The majority of Australian artists create or tour work overseas, with 81% of respondents to the Australia Council's International Arts Activity survey recently engaging in some form of international activity.<sup>48</sup> This work promotes Australian culture and society on the world stage, which has flow on effects and benefits for many industries. A breakdown of types of international arts activity is below.

**Table 2: International activity in last 2 years, International Arts Activity Survey 2015**

Outbound Activity	All Respondents %
Travelled overseas to develop networks (including to meet agents and managers)	69
Tours, exhibitions, presentations or international publications	64
Undertaken collaborations, partnerships or reciprocal programs with international artists or arts organisations	59
Travelled overseas to see work	53
Travelled overseas for cultural learning or exchange	46
Created new work overseas	45
Travelled overseas to undertake professional development or training	42
International artist or arts worker residency/ies	38
Exhibited or presented at international art fairs or markets	31
Undertaken international market research	26
Sold work or rights while overseas	25

Given the significance and contribution of Australia's arts and cultural industries nationally and internationally, it is crucial that creators' rights to own and use their intellectual property are maintained, on both an economic and moral level.

Policy measures that impact on the relationships and capacity to create cultural value, and in particular the capacity of creators to sustain a livelihood from the rights invested in their work, need careful, nuanced and evidence-based consideration.

<sup>46</sup> Australia Council, *Arts Nation*, 26.

<sup>47</sup> Australia Council (2015), *International Arts Activity - Australian Arts Sector Summary Report*, 3. Available at: <http://www.australiacouncil.gov.au/research/international-arts-activity-australian-arts-sector/>

<sup>48</sup> Australia Council, *International Arts Activity - Australian Arts Sector Summary Report*, 9. Available at: <http://www.australiacouncil.gov.au/research/international-arts-activity-australian-arts-sector/>

## APPENDIX C: ARTISTS' INCOMES AND THE IMPORTANCE OF COPYRIGHT

A robust approach to copyright protection needs to be maintained to ensure this work continues to be created and offered to audiences in Australia and around the world.

The Draft Report says, “much of the returns from copyright protected works are earned by intermediaries, rather than authors, musicians and the like. The stereotype of the ‘struggling artist’ has some degree of truth to it, and evidence suggests many involved in creative endeavours work multiple jobs and receive financial support from their families.”<sup>49</sup>

This overlooks the importance of copyright to artists to build their livelihood and continue creating new work for audiences to engage with and enjoy. Copyright is an important source of income for artists, in particular writers and composers, where copyright represents around one fifth of their creative income.<sup>50</sup> In 2009 it was estimated there were approximately 44,000 professional practicing artists in Australia, and this number has remained relatively stable.<sup>51</sup> The median income from artists’ creative practice varies between \$7,000 and \$22,500 per annum.<sup>52</sup>

**Appendix II Table 36: Sources of creative income (a) (percent)**

	Writers	Visual artists	Craft practioners	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
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>
<b>N</b>	<b>105</b>	<b>143</b>	<b>62</b>	<b>145</b>	<b>64</b>	<b>131</b>	<b>70</b>	<b>24</b>	<b>750</b>

(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 %

49 Productivity Commission, *Intellectual Property Arrangements Draft Report*, 102.

50 Throsby and Zednik, *Do you really expect to get paid?*, 127.

51 Australia Council, *Arts Nation*, 17.

52 Australia Council, *Arts Nation*, 17.

Over half of professional artists surveyed in 2009 believed the current provision for copyright protection was adequate, an increase from 42% in 2002.<sup>53</sup> Across all art forms, writers and composers had the strongest support for copyright protection, with almost two thirds of writers and three quarters of composers stating that current copyright provisions were at least adequate. This also included one in ten writers and one in five composers who believed that copyright protection was either very effective or adequate.<sup>54</sup>

A third of artists belong to a copyright collecting society, and half of artists believe that current copyright provisions are adequate to ensure income and protection of the integrity of their creative work.<sup>55</sup>

The table below outlines responses regarding protection of artists' copyright and moral rights based on the 2009 survey. A further survey is planned for 2017.

**Table 39: Protection of artists' copyright and moral rights (percent)**

	Writers	Visual artists	Craft practioners	Actors	Dancers	Musicians	Composers	Community Cultural develop. workers	All artists (a)
Are members of one or more copyright collecting societies	43	28	16	14	17	44	88	25	33
Had copyright infringed	26	30	38	22	22	19	24	22	25
Had moral rights infringed	21	29	24	18	11	12	19	19	19
Believe current provision for copyright protection is adequate	63	50	40	41	36	55	72	47	51
Believe current provision for moral rights infringements is adequate	35	32	24	35	28	36	49	25	33

(a) numbers for all artists are weighted to represent Australia's artist poulation.

Given the importance of copyright protection to artists' incomes and careers, any proposed changes to intellectual property arrangements need to make consideration based on firm evidence about the potential impact for artists' incomes derived from their creative work.

53 Throsby and Zednik, *Do you really expect to get paid?*, 61.

54 Throsby and Zednik, *Do you really expect to get paid?*, 135.

55 Throsby and Zednik, *Do you really expect to get paid?*, 135.