



Submission to Australian Productivity Commission Intellectual Property Arrangements June 2016

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CLNZ supports and commends the submissions of:

- Copyright Agency| Viscopy
- Australian Copyright Council
- International Publishers Association

Paula Browning
Chief Executive

Introduction

The terms of reference for the review this submission addresses ask for recommendations that would:

1. **encourage creativity**, investment and new innovation by individuals, businesses and through collaboration while not unduly restricting access to technologies and creative works
2. **allow access** to an increased range of quality and value goods and services
3. **provide greater certainty** to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others
4. **reduce the compliance** and administrative costs associated with intellectual property rules.

The “findings” as reported by the Commission, do not align with what it was charged to review. It is difficult to see how the recommendations – when viewed through the lens of how creative businesses actually work (as opposed to the Commission’s distorted view) - will encourage creativity or investment.

Submission

Fair Use

It is impossible to see how “certainty” will be achieved with a US-style Fair Use exception. Of the 188 WIPO Member States, only 4 have a fair use regime. By its nature, fair use is uncertain as it requires a case-by-case assessment of whether a use of someone else’s copyright work is fair. The assessment is unilateral i.e it is undertaken by the person wanting to use the copyright material with no input from the copyright owner. A simple human-nature understanding of this scenario would determine that the person wanting to use material will be more inclined to think their use is fair than the person whose work is being used. And once the work has been used, the copyright owner’s only recourse is legal action which itself, as readily demonstrated by the US legal system, is fraught with uncertainty.

Contrast this with the certainty provided by quantified fair dealing exceptions such as the New Zealand exception for education use. Education institutions know that they can use 3% or 3 pages from a work without either permission or a licence. There is no assessment to be made; they can simply get on with using that quantity of the work. The Australian statutory licenses work in the same way – they provide *certainty and access* while ensuring that the creators of the content being used are being *fairly remunerated* for their work.

Balance

Many commentaries on copyright refer to “balance”. Most of these suggest that the balance in copyright is weighted too far towards content creators and that content creators have not kept up with the development of new technologies. However, what is conveniently over-looked is that new technologies have made the ability to copy and disseminate works on a mass scale more easily than at any other time in history. In times when copying is so easy, limits on that copying need to be stronger – not weaker – to ensure that the creator of the content, the one who had the idea and invested in putting it into a tangible form, gets to manage how it is distributed, copied, sold or otherwise used. While copyright is, by its nature, about rights it is also about choice – it gives the creator of the content the *choice* as to how the work can be used. Copyright is what lets them give it away, licence it, or otherwise monetize it.

Licensing

The current framework of the Statutory License for the Australian education sector has been seen, by both New Zealand copyright owners and New Zealand schools, as delivering both a more equitable return and better access to copyright materials in education. The benefits of the license schemes operated by the collective management organisations in the Australian and New Zealand education markets are:

1. Certainty for teaching staff in what they can copy from and what quantity they can copy
2. Significantly reduced administration costs where rights clearance is given in advance via the license rather than being required for each piece of copying the institution / staff member wishes to complete
3. The ability to deliver copies in either paper or electronic formats to suit the needs of the institution and/or teacher and/or student
4. A reasonable return to the copyright owner that compensates for the revenue lost from a work being copied rather than purchased
5. An income stream for the copyright owner that enables investment into new works and new technologies

Licensing as a source of revenue is increasingly important for all publishers but especially for small publishers – many of whom will come from your local market. The New Zealand experience shows that licensing revenue is used to invest in developing new content. This ability for smaller publishers to reinvest ensures that teachers will have access in future to a wide range of materials for their teaching and not just the materials created by the larger, multinational publishers. The publication of content for the local market has significant educational benefits for Australian students as the majority of materials contain local content and local context – essential to providing students with cultural and social meaning that is relevant to their world.

Term of Copyright

Since the publication of its report the Commission will have come to appreciate how completely irrational the proposal for a 15 to 25 year copyright term is. Regardless of the fact that Australia is a signatory to international treaties that prevent this from being implemented, the notion that a content creator should not be able to earn from their work during their own life time, at least, defies belief. It seems that the Commission is unaware that writers and other creators must earn a living, that content creation is business and that creative businesses employ people and generate economic, cultural and social benefits – for all, not just the creators themselves. As New Zealand author Paul Thomas, former winner of the Australian Ned Kelly Award for Best Crime Novel, wrote recently¹:

“Property can remain in a family's possession indefinitely. The land was there before them and will be there after they've gone, but as long as they want it and can afford to keep it, it's theirs. However, under copyright law a work of the imagination, unique to its creator, is effectively confiscated from the creator's heirs 50 years after his or her death”

¹ http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11645654