

Australian Copyright Council

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Submission to the Intellectual Property & Competition Review Committee (IPCRC)

Effects on competition of Australia's intellectual property laws

17 December 1999

Australian Copyright Council

1. The Australian Copyright Council is a non-profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council's functions include giving information and free legal advice about copyright, research, and advocating changes to copyright law and practice which will benefit creators and other copyright owners. Further information about the Council is contained on the Council's web site – www.copyright.org.au.
2. A number of organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee.
3. Our submission is confined to issues relating to copyright law, and we have addressed the main issues in the Issues Paper relating to copyright.

Analytical framework

4. We endorse the comments in the Issues Paper that the mere grant of IP rights is not inconsistent with competition, and that the effects of competition on the exercise of IP rights “needs to be analysed with care”. We note that there now appears to be wide recognition that IP laws and competition law have the same ultimate objective of enhancing social welfare. For example, in its recent report on s51(3) of the Trade Practices Act, the National Competition Council (NCC) said (at p159):

The [NCC] considers that, properly understood, intellectual property rights and competition laws are compatible and consistent. They share the same overall objective of enhancing community welfare. The Trade Practices Act seeks to enhance community welfare by creating an environment in which businesses compete by introducing new and improved goods and services and by offering existing goods and services at lower cost to consumers. Intellectual property laws seek to enhance community welfare by encouraging innovation and invention through the grant of valuable exclusive property rights.
5. In our submissions to the NCC, we said that the means by which intellectual property laws seek to achieve this ultimate objective is different to the means by which competition laws seek to achieve it; intellectual property laws take a dynamic or *ex ante* approach, whereas competition law takes a static or *ex post* approach. We also argued that intellectual property should be treated differently to other property; intellectual property laws are granted by the State as an incentive encourage creative and innovative activity, whereas there are no such considerations in the granting of other types of property rights.
6. We maintain these views, and would be happy to provide copies of these submissions to the IPCRC.

Contribution to the economy of copyright-based industries

7. In a study we published in 1994, it was estimated that:
 - copyright-based industries grew at an annual rate of 4.3% over the seven years to 1990-91 (compared with 2.7% for the total GDP); and
 - the net contribution of copyright-based industries to the total economy in 1992-93 was an estimated \$11 billion in constant prices, or 2.9% of the total GDP.¹
8. The findings were similar to the findings in similar studies done overseas.² The economic contribution of copyright-based industries has also been discussed more recently in a paper published by the Productivity Commission.³
9. We are in the process of commissioning a new study of the economic value of copyright-based industries, and would be happy to provide the results of this study to the IPCRC.

Objectives of copyright law not purely economic

10. In relation to copyright law, we submit that social welfare – from the perspective of both creators and consumers – should be assessed in non-economic as well as economic terms.
11. As one commentator has said:

Figures [in economic studies] relate to the “copyright industry”. They cannot measure in terms of economics the importance of the rights for the intellectual or cultural status of a country, their effects on the development of art forms, learning, and the choice of preferences for media contents etc...⁴
12. From a consumer’s point of view, we submit that social welfare should not be assessed by reference only to the price of access to copyright material, but also by reference to non-economic benefits such as being part of a community in which creative activity is encouraged and fostered. For example, in the debate preceding the amendment of the Copyright Act to allow parallel importation of CDs, one of the major issues was the effect on the local music industry of the proposed amendments. There appeared to be an assumption in the debate that the only relevant issue for consumers was price, whereas we submit that a flourishing local music industry benefits consumers (as well as those involved in creating and producing the music).

¹ Hans Guldberg, “Copyright: an economic perspective”, Australian Copyright Council, Sydney, 1994

² A recent US study, commissioned by the International Intellectual Property Alliance, shows that copyright industries accounted for 3.65% of GDP in 1996: Maria Strong, “The Growing Importance of the Copyright Industries to the United States Economy”, (1998) 81 Copyright World 18.

³ John Revesz, Trade-Related Aspects of Intellectual Property Rights, Productivity Commission Staff Research Paper, AGPS, Canberra, 1999 at 72ff

⁴ Gunnar Karnell, “Authors’ Rights and Copyright Economics”, (1995) 26 International Review of Industrial Property and Copyright Law (IIC) 193 at 195

13. From a creator's point of view, it is widely recognised that there are non-economic as well as economic objectives behind copyright law.⁵ For example, a recent paper on TRIPS published by the Productivity Commission notes:

While IPR protection is in large part an economic issue, moral arguments couched in terms of "equity" and "fairness" still play an important role in IPR policy formulation and the judicial process.⁶

14. That copyright is concerned with non-economic as well as economic benefits is evident from the Berne Convention, which requires parties to it to grant authors "moral rights" (the right to be attributed, and the right to ensure the integrity of a work).⁷ As the Committee is aware, the Government has recently introduced the Copyright Amendment (Moral Rights) Bill 1999. In his Second Reading Speech, the Attorney-General said that the Bill "is about acknowledging the great importance of respect for the integrity of creative endeavour" and "is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and those who create them".

TRIPS

15. In relation to copyright, the advantage of TRIPS to Australia is the improvement of standards and enforcement procedures in other countries, particularly those to which Australian producers export. In particular, inadequate protection for copyright in countries which manufacture CDs is now of heightened concern given that the importation of pirate CDs is more difficult to intercept following the amendments to the Copyright Act to allow parallel importation of CDs.
16. The changes made to the Copyright Act to comply with the TRIPS Agreement were relatively minor. Thus we submit that Australia's position as an exporter is more relevant than its position as an importer to its negotiating position on TRIPS.
17. We support the incorporation into TRIPS of new standards and enforcement procedures relating to the online environment, but accept that this should follow a more widespread implementation of the obligations in the 1996 WIPO Treaties (including in Australia).

⁵ See McKeough & Stewart, *Intellectual Property in Australia* (2nd ed), Butterworths, Sydney, 1997 at 16ff; SM Stewart, *International Copyright and Neighbouring Rights* (2nd ed), Butterworths, London, 1989 at 3ff; JAL Sterling, *World Copyright Law*, Sweet & Maxwell, London, 1998 at 55ff; Gillian Davies, *Copyright and the Public Interest*, Max Planck Institute, Munich, 1994 at 7ff

⁶ John Revesz, Trade-Related Aspects of Intellectual Property Rights, Productivity Commission Staff Research Paper, AGPS, Canberra, 1999 at 15

⁷ Moral rights may, of course, have economic implications – the attribution of an author may lead to further work, or the derogatory treatment of a work may prejudicially affect an author's opportunities to receive future commissions. The main objectives of moral rights, however, relate to respect for the author's relationship to his or her work.

Digital Agenda Bill

18. A number of provisions in the Digital Agenda Bill – the new right of communication to the public, protection of technological measures and protection of rights management information – are intended to encourage the online dissemination of copyright material, and would thus promote competition in the online environment.⁸
19. On the other hand, we submit that some of the proposed exceptions in the Bill give an unfair competitive advantage to certain interests. The operation of some of the proposed exceptions for libraries, for example, would allow libraries to compile and disseminate databases of material (for example, journal articles) without getting copyright clearances, paying royalties, or applying technological protection measures. They may thus unfairly compete with database publishers, who must obtain copyright clearances, establish mechanisms for the payment of royalties, and establish systems for technological protection measures and rights management information. In addition, the owners of copyright in the material included in databases compiled by libraries receive no royalties.
20. We submitted a joint proposal to the House of Representatives Standing Committee on Legal and Constitutional Affairs in relation to copying by libraries, which we would be happy to make available to the IPCRC.⁹ We also made a more detailed submission on a range of issues in the Bill.
21. Some, but not all, of our concerns would be met by the recommendations in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Bill. We will be responding to the Committee's report early next year, and would be happy to provide a copy to the IPCRC.
22. We were asked by the Committee to comment on who would pay the equitable remuneration which would be payable if a statutory licence were introduced for copying by libraries. As for copying by educational institutions, equitable remuneration would be payable by the body administering the library. Under the current provisions, libraries are entitled to charge their clients for the supply of copies, provided the charge does not exceed the cost of making and supplying the copy. It appears that the cost of paying equitable remuneration to the copyright owner may be included in the charge.
23. We submit that the payment of equitable remuneration to copyright owners must be considered in the context of developments in library activities relating to acquisition and supply of material, such as a national distributed collection policy.

⁸ See Section 3 ("Objects of the Act") of the Copyright Amendment (Digital Agenda) Bill.

⁹ The proposal was made with Australian Society of Authors, Australian Publishers Association, Copyright Agency Limited and Screenrights. We also made a more detailed submission on the Bill.

Parallel importation

24. The Copyright Council opposes parallel importation. The purpose of the parallel importation provisions is to ensure the effective exercise by Australian copyright owners of the exclusive rights granted to them under the Copyright Act. The exclusive right to reproduce a work in Australia is effectively undermined if articles containing the work can be imported by others, such as people seeking to take advantage of the copyright owner's investment in creating or expanding a market for the work. The effect of imported copies on the Australian rights owner is similar to the effect of unauthorised reproductions made in Australia – other people unfairly benefit from the copyright owner's investment in the work, and the copyright owner's return from that investment is reduced.
25. In our submission to the Senate Legal and Constitutional Legislation Committee in connection with its inquiry into the Copyright Amendment Bill (No 2) 1997, we opposed amendments to the Copyright Act to allow parallel importation of CDs for reasons including the following:
- the assumptions about the effect on prices of allowing parallel importation were open to question;
 - there may be good reasons for different prices for the same sound recording in different territories – for example, a copyright owner may elect to sell legitimate recordings at a low price in a country where piracy is rife, and/or where disposable income is low, as part of a strategy to establish a legitimate market;
 - recording artists and composers may get lower royalties for records first sold overseas;
 - royalties for records made overseas may be harder to monitor and take longer to obtain;
 - there may be a disincentive to export, if this would adversely affect the local market; and
 - piracy is more difficult to detect.
26. We understand from discussions with people involved in the music industry and from the evidence in current court proceedings that CDs are being imported from countries such as Indonesia. We understand that the royalties payable in countries such as Indonesia to the recording artists and composers whose works are included in these recordings are lower than those payable on the Australian versions.

The impact of the Internet

27. The implications of online ordering and online delivery for other means of ordering and delivery are not clear. It is not clear, for example, for how long other means of ordering and distribution will continue, nor to what extent online ordering and delivery may complement rather than replace other means of ordering and delivery.

Indigenous intellectual property

28. We support the introduction of *sui generis* legislation for the protection of Indigenous intellectual property, rather than amendments to the Copyright Act. We made a submission in response to the discussion paper "Our Culture, Our Future: Proposals for Recognition and Protection of Indigenous Cultural and Intellectual Property". We have also published a discussion paper on the protection of indigenous intellectual property. We would be happy to provide these to the Committee.

Term of protection

29. In principle, the Council supports the extension of the term of protection from 50 to 70 years. Extension of the term of protection in the European Union was partly based on increased life expectancy,¹⁰ but the main justifications related to harmonisation, and we submit that the main argument in favour of extending the term of protection in Australia is harmonisation of standards with Australia's major trading partners. Australian rights owners would then benefit from the extended period of protection in the EU and the US.
30. We have not yet developed a detailed proposal dealing with issues such as transitional provisions, but we would be happy to provide such a proposal to the Committee when completed.

Copyright collecting societies

31. We have made submissions in response to the Review of Australian Copyright Collecting Societies, to the House of Representatives Standing Committee on Legal and Constitutional Affairs in connection with its inquiry into the public performance of music, and to the Copyright Law Review Committee in connection with its inquiry into the Copyright Tribunal. We are happy to make these available to the IPCRC.
32. In relation to assignments of copyright to collecting societies we note:
- an assignment to APRA of performing rights by a composer who does not have a publishing contract can benefit the composer, as he or she cannot later be pressured into assigning those rights to a publisher,

¹⁰ For example, paragraph 5 of the preamble to the EC Directive on Harmonising the Term of Protection of Copyright and Related Rights (Directive 93/98/EEC):

Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations...

- a collecting society which acquires rights by assignment can sue in its own right.
33. In relation to statutory licences we note:
- such licences should comply with the “three-step test” in the international treaties, and should only allow uses justified by public policy, such as education (but not, for example, the creation of commercial multimedia products),¹¹
 - voluntary licensing may not be a practical option for a new area of licensing where the collecting society has insufficient repertoire to offer “blanket” licences (this was the case, for example, when Screenrights – the Audio-Visual Copyright Society – was first established),
 - the Copyright Tribunal provisions applying to the voluntary licensing of public performance, broadcasting and transmission of music by APRA have a similar effect in practice to a statutory licence.

Overlap between copyright and design protection

34. Our concern with the overlap between copyright and design protection is that provisions intended to limit the application of copyright law to industrial products do not also limit the application of copyright law to “artistic” products. This was the case with the relevant provisions in the Copyright Act before the Copyright Amendment Act 1989.
35. The 1989 amendments to the Copyright Act largely remedied the problems for artists, such as fabric designers, under the previous law. In our submission to the Australian Law Reform Commission (ALRC) in connection with its 1992 inquiry into designs, we supported amendments to “fine-tune” the current provisions, and opposed the proposal to replace the current provisions with an “adaptation right” for artistic works (as that proposal would deprive artists of the opportunity to control the first “industrialisation” – the making of three-dimensional articles – based on their work). We understand that the Government has rejected the proposal regarding an adaptation right, and intends to introduce amendments to fine-tune the existing provisions once amendments are made to Designs Act to implement the other recommendations of the ALRC.
36. We are happy to provide the Committee with previous submissions in relation to this issue.

¹¹ Under the “three-step test”, set out in Article 13 of TRIPS and Article 9(2) of the Berne Convention, any exceptions to the exclusive rights of copyright owners:

- must be limited to certain special cases
- must not conflict with a normal exploitation of the work; and
- must not unreasonably prejudice the legitimate interests of the rights owner.

NCC report on s51(3) of the TPA

37. In our submissions to the NCC, we proposed that s51(3) be retained, with some minor amendments in relation to trade marks. Our arguments in favour of the retention of s51(3) included:
- intellectual property is different in nature from other types of property as intellectual property rights are granted to encourage creativity and innovation that benefits society as a whole, and should thus be treated differently to other types of property;
 - while intellectual property laws and competition laws have the same ultimate objective, intellectual property laws take a different approach (dynamic or ex ante) to that of competition laws (static or ex post);
 - repealing s 51(3) would indicate to courts a change of policy regarding the application of the Trade Practices Act to intellectual property; and
 - there would be significant compliance costs in the authorisation and notification applications which would be required if s51(3) were repealed.
38. We note that the NCC has not indicated how its recommendations for amendments to s51(3) would be implemented. We would be particularly concerned if the activities referred to by the NCC were to be assessed on a per se basis, without regard to whether they resulted in a substantial lessening of competition.

CLRC reports

39. We made a number of submissions to the CLRC in connection with its inquiry into the simplification of the Copyright Act, and we have responded to Part 1 of the report. We oppose the CLRC's recommendations in relation to fair dealing, and its recommendations in relation to libraries, particularly as they apply to the digital environment. In our view, the Committee had insufficient regard for the differences between the print environment and the digital environment, and as a result many of its recommendations would not comply with the "three-step test" set out in the international treaties. In addition, we think the recommendations would create greater uncertainty rather than simplifying the Act.
40. We have not yet responded to Part 2 of the report. In our submissions to the Committee, we submitted that the protection given by the Copyright Act to compilations and artistic works required review, as the Act may not adequately protect new forms of expression such as multimedia products and digital images.
41. We are happy to provide any of these submissions to the IPCRC, and to provide a copy of our response to Part 2 of the report when it is finalised.

Enforcement

42. We made a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs in connection with its inquiry into enforcement. We are happy to provide a copy of the submission to the IPCRC.

Libby Baulch
Executive Officer
17 December 1999

Encl.

Copyright – an economic perspective (2nd ed)

Appendix: List of earlier submissions

The following are previous submissions from the Copyright Council addressing issues raised in the Issues Paper. We would be happy to provide copies of any of these submissions to the Committee.

X9208ALRC	Submission to the Australian Law Reform Commission in relation to its Inquiry into Intellectual Property Protection for Industrial Designs	23.12.1992
X9301ALRC	Response to the Australian Law Reform Commission's Issues paper No. 11: designs	1.10.1993
X9406ALRC	Response to ALRC Discussion Paper No. 58: Designs	16.11.1994
X9501PSA	Submission to Price Surveillance Authority in relation to its Inquiry into the Impact of 1991 Amendments to the Copyright Act 1968, Allowing Parallel Importation of Books in Certain Circumstances	24.2.1995
X9504CLRC	Preliminary submission to the Copyright Law Review Committee on protectible subject matter	1.9.1995
X9601ACCC	Submission to the Australian Competition & Consumer Commission regarding applications for authorisation notification by Australasian Performing Right Association	3.3.1996
X9603DOCA	Response to recommendations to Government in Review of Australian Collecting Societies	10.9.1996
X9604IDC	Submission to Inter-Departmental Committee on CD prices	17.10.1996
X9701CLRC	Submission to the Copyright Law Review Committee in response to the Committee's issues paper on fair dealing	7.4.1997
X9702CLRC	Submission to the Copyright Law Review Committee responding to the Committee's four issues papers on exceptions for educational institutions, libraries and people with disabilities	5.6.1997
X9706FGOV	Response to Our Culture, Our Future: Proposals for Recognition and Protection of Indigenous Cultural and Intellectual Property	31.10.1997
X9707CLRC	Response to the Copyright Law Review Committee about reliance on special exceptions in the Copyright Act	2.12.1997
X9801SNTE	Submission to Senate Legal and Constitutional Legislation Committee on CD prices	29.1.1998
X9802SNTE	Second submission to Senate Legal and Constitutional Legislation Committee in relation to the Copyright Amendment Bill (No 2)	10.2.1998
X9805CLRC	Submission to the Copyright Law Review Committee about categorisation of rights and categorisation of subject matter	17.7.1998
X9808NCC	Submission in response to National Competition Council Review of sections 51(2) and 51(3) of the Trade Practices Act 1974, Issues Paper June 1998	20.8.1998
X9901NCC	Response to National Competition Council draft report on s51(3) of the Trade Practices Act	21.1.1999
X9902CLRC	Response by Copyright Council to CLRC report "Simplification of the Copyright Act 1968: Exceptions to the Exclusive Rights of Copyright Owners"	1.3.1999
X9907HREP	Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into enforcement of copyright	22.7.1999
X9908CLRC	Submission to Copyright Law Review Committee on the Issues Paper, "Jurisdiction and Procedures of the Copyright Tribunal"	23.8.1999
X9909HREP	Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Digital Agenda Bill 1999	6.10.1999
X9910HREP	Joint Submission – Copyright Amendment (Digital Agenda) Bill 1999 – Further submission addressing issues raised during the Round Table Forum on 14 October 1999	22.10.1999