



AUSTRALIAN
COPYRIGHT
COUNCIL



***Response to Report of Review of the National
Innovation System, 'Venturous Australia'***

November 2008

About the Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Commonwealth Government's arts funding and advisory body. The Copyright Council provides information about copyright via its website, publications and training, provides free legal advice about copyright (principally to creators and arts organisations), conducts research, and represents the interests of creators and other copyright owners in relation to policy issues.
2. There are 23 organisations affiliated with the Copyright Council, each of which has members who are creators and/or owners of copyright material. Some of these affiliated organisations have responded individually to the report of the Review of the National Innovation System, *Venturous Australia* (the Report).
3. Our response relates principally to statements and recommendations in the Report relating to copyright.

Government policies on intellectual property

4. In its policies, the government has made a number of statements about the importance of intellectual property protection. These include:

In light of rapidly concentrating trends towards foreign takeovers of local companies, it is important to support companies who seek to retain intellectual property (IP) in Australian hands, and to renew investment strategies for the industry and ensure that the unique mix of creative, technological and business skills required in this dynamic global industry are developed on best practice bases here in Australia.

ALP arts policy New Directions for the Arts

Labor will support the legal framework of copyright as a necessary part of a program to ensure that the income generated by arts, culture and heritage is fairly distributed between the creators and the institutions and entrepreneurs who make it available.

2007 ALP National Platform 2007, para 33

Labor recognises that, in the information age, the key to fostering sustained growth is the protection and careful management of intellectual property. Online commerce and communication will only flourish if data is secure, ownership identified with certainty and privacy guaranteed.

Investment in technology and information based industries requires the development and enforcement of domestic law, supported by international treaties and agreements, for the protection of intellectual property and the regulation of electronic commerce."

2007 ALP National Platform 2007, paras 123 and 124

The key elements of Labor's plan for a revitalised, invigorated cultural sector pervaded by excellence are:

- a new wave of arts education;
- the promotion and protection of Indigenous arts;
- a national strategy for creative industry development;
- fostering cultural entrepreneurs;
- technological and businesses skills development; and
- the protection of Australian content and intellectual property.

2007 ALP National Platform 2007, page 277

Report of the 2020 summit

5. The report of the 2020 Summit included a number of statements and recommendations relating to intellectual property. These included:

Intellectual Property laws to keep pace with technology to ensure that information can be shared without infringing the rights of others.

Workforce and innovation ambitions, at page 19

The next paradigm shift for research involves ongoing leverage of Australian research in a global commercial environment, with a view to capitalising on intellectual property developed in Australia.

Key Goals for health research, research translation and research training, at page 155

The beneficiaries of copyright

6. Copyright enables creators such as songwriters, photographers, writers and film makers to make a living from their craft. In most cases they are dependent on intermediaries such as publishers and broadcasters to disseminate their work, and copyright underpins the operation of businesses such as these.
7. Copyright also contributes to many other types of businesses – for example, those that are partially dependent on copyright (such as textiles) or that produce equipment used to disseminate or consume copyright content.
8. Finally – but importantly – the objective of copyright is to encourage innovation and creativity for the benefit of society as a whole. New copyright products enhance every aspect of our lives – from the functional (computer programs), to the informational (news reports), to the artistic (novels, songs and art).

The contribution of copyright based industries to the economy

9. A study commissioned by the Australian Copyright Council from PricewaterhouseCoopers shows that in 2006/2007 Australia's copyright industries:

- employed more than 837,000 people (8 percent of the nation's workforce) – up 21 percent since 1996;
 - generated \$97.7 billion in economic activity (10.3 percent of GDP) – up 66 percent since 1996; and
 - accounted for \$6.8 billion in exports (4.1 percent of all exports) – up 6.3 percent since 1996.
10. A copy of the report is available at www.copyright.org.au/economy.

Copyright and access to information

11. Copyright does not protect information or ideas. It protects the way information is expressed or described – for example, in a document, a diagram or a film. Anyone can use another person's information or ideas without infringing copyright, and anyone can produce something new based on another person's information or ideas. Copyright only comes into play if you want to copy or disseminate another person's document, diagram, film etc.
12. People who produce new works want them to be read, seen and heard. They may, however, be dependent upon payment from those who consume the works to recoup their investment in the production, distribution and marketing of them.
13. The Copyright Act includes many provisions aimed at ensuring access to copyright material for students and researchers, including through libraries and educational institutions. These provisions are more extensive than those in any other developed country – including the US, the UK and Canada – partly because they expressly allow the copying and communication of digital material.
14. In addition, copyright owners have developed licensing practices, including through copyright collecting societies, aimed at facilitating and streamlining access to copyright material. Copyright collecting societies – non-profit organisations that collect copyright fees for distribution to their members – include APRA (Australasian Performing Right Association), CAL (Copyright Agency Limited) and Viscopy. Terms of licences administered by copyright collecting agencies – including payment – can be determined by the Copyright Tribunal if not agreed between the collecting society and licensee.

Copyright in the international context

15. Most countries, including Australia, are parties to one or more international treaties covering copyright. These include the Berne Convention, administered by the World Intellectual Property Organization, and the Agreement on Trade Related Aspects of Intellectual Property (TRIPs), which forms part of the General Agreement on Tariffs and Trade (GATT) administered by the World Trade Organization. These treaties require parties to implement the standards of protection set out in the treaties, and to provide that protection to nationals of other participating countries.
16. As a result of the international treaties, Australian copyrights are protected in nearly all other countries, and nearly all foreign copyrights are protected in Australia.
17. Since the conclusion of TRIPs in 1994, IP has been regarded as a trade issue. As a consequence, most free trade agreements (FTAs) include IP provisions. These include the FTAs Australia has concluded with Singapore, the US and Chile, and is likely to

be the case with FTAs it is currently negotiating, including those with Japan, China and Malaysia. The IP provisions in most FTAs require, at least, that contracting parties are party to the major international copyright treaties. As a result, divergence from international standards of copyright protection can result in trade sanctions.

Response to statements and recommendations in report relating to copyright

General comments on statements and recommendations in report

18. Responding to recommendations in the report relating to copyright is difficult because in many cases the recommendations are not preceded by any explanation. Apart from having to try and discern what is meant by these recommendations, there is no opportunity to address the reasons for them, because they are not stated.
19. Some of the statements and recommendations relating to all forms of intellectual property seem to stem from a concern about one particular form of intellectual property – patents in particular. The justification for extrapolating the response to a concern about patents to all forms of intellectual property is not stated.

Statements in Overview to Report

20. The Overview to the Report (at page xii) says:

Intellectual property is also critical to the creation and successful use of new knowledge – particularly the ‘cumulative’ use of knowledge as an input to further, better knowledge. In this regard, particularly in new areas of patenting such as software and business methods, there is strong evidence that existing intellectual property arrangements are hampering innovation. To address this, the central design aspects of all intellectual property needs to be managed as an aspect of economic policy.

21. The Report goes on to refer to a particular issue relating to patent protection.
22. We do not know if the Expert Panel received “strong evidence” that existing copyright arrangements are “hampering innovation”. As far as we can ascertain, none is referred to in the Report. We do not know, then, what the justification would be for managing copyright as an aspect of economic policy. As we discuss below, good copyright policy requires consideration of a range of other policy issues, including international trade policies and cultural policies.

Recommendation 7.3

Professional practitioners and beneficiaries of the IP system should be closely involved in IP policy making. However, IP policy is economic policy. It should make the same transition as competition policy did in the 1980s and 90s to be managed as such.

Government management of copyright policy to date

23. The report says, at page 85, that “the consideration of policy with regard to [copyright and patents] is dominated by IP practitioners and by the beneficiaries of the IP system.”
24. The statement does not reflect experience in relation to copyright policy over the last 30 years, if “beneficiaries” refers to copyright owners. It is more accurate if “beneficiaries” refers to both owners and consumers of copyright material – as the ultimate aim of copyright is to produce new works for the benefit of society as whole.
25. As was demonstrated in a recent presentation by the former Assistant Secretary of the Copyright Branch of the Attorney-General’s Department, changes to the Copyright Act over the last 30 years have equally benefited owners and users of copyright material (and, of course, many people are both).¹
26. Government responsiveness to the views of users and consumers of copyright material, and intermediaries such as educational institutions and libraries, is most recently demonstrated by the inquiry into fair use conducted by the Attorney-General’s Department in 2005, and amendments to the Copyright Act, resulting from the inquiry, in 2006.
27. As in other areas of the Report, the Expert Panel appears to have been concerned about an issue raised in relation to another area of IP – in this case, a submission by Hazel Moir in relation to patents – and to have extrapolated its response to copyright.

The role of economic considerations

28. Economic considerations are, of course, an important factor in development of government policy in relation to copyright. There are, however, other important considerations.
29. One is the role of copyright in international trade agreements. The inclusion of copyright standards in the Agreement on Trade Related Aspects of Intellectual Property (TRIPs) and in most free trade agreements negotiated by Australia since then, including with the US, is an important consideration in domestic copyright policy. Australia’s interest in including standards for copyright protection in the free trade agreements it is currently negotiating, including those with China, Japan and Malaysia, reflects the export potential of Australian copyright-based products, which is increased if a country has a world-standard copyright regime. Australia’s negotiating position requires it to be seen as itself being committed to implementing a world-standard regime domestically.
30. Finally, copyright involves cultural considerations that are not part of other areas of IP. In 2000, Australia – implementing its obligations under the Berne Convention – introduced legal obligations to attribute creators and to refrain from changing works to the detriment of the creator’s reputation. These obligations have economic implications, but principally address the ongoing relationship between creators and their work.

“Second best solution”

31. The Report, at page 83, refers to copyright as a “second-best” solution to the problem of free-riding, but does not say what it regards as a best solution. We would need

¹ Chris Creswell, former Assistant Secretary, Copyright Branch, Attorney-General’s Department, speaking at ‘Copyright and the Government’s Innovation Agenda’ in Sydney on 10 November 2008. The powerpoint presentation can be viewed at www.copyright.org.au/t08n01.

information about what the Expert Panel regards as the best solution, and how it sees such a solution working in practice, in order to respond to it.

“Property rights can obstruct the development of cumulative intellectual property”

32. The Report says, at page 83:

Because new knowledge always builds on old knowledge, the property rights we have erected to encourage innovation can actually obstruct it.

33. The Report goes on to refer to some issues relating to patents.

34. As with the statement in the Overview to the Report that intellectual property arrangements are hampering innovation, we do not know what (if any) evidence the Expert Panel received to justify this assertion in relation to copyright. We would be happy to respond to any evidence on which the Panel has relied.

Recommendation 7.7

Australia should establish a National Information Strategy to optimise the flow of information in the Australian economy.

The fundamental aim of a National Information Strategy should be to:

- ***utilise the principles of targeted transparency and the development of auditable standards to maximise the flow of information in private markets about product quality; and***
- ***maximise the flow of government generated information, research, and content for the benefit of users (including private sector resellers of information).***

“Government generated information, research, and content”

35. There is, of course, an enormous diversity of content that is funded directly and indirectly by Australian governments, including research papers and reports, architectural plans, films funded through Screen Australia, and music, plays and art funded through the Australia Council for the Arts.

36. One of the issues raised by this recommendation is that the Commonwealth, State and Territory governments are in a privileged position in relation to ownership of copyright. Copyright in anything made under the direction or control of, or first published by, a Commonwealth or State government department or entity is owned by the government unless an agreement to the contrary has been negotiated.

37. Reports from two inquiries have recommended that the provisions that give preferential treatment to governments in relation to ownership of copyright be repealed: *Review of Intellectual Property Legislation under the Competition Principles Agreement* in 2000, and the Copyright Law Review Committee (CLRC) report on *Crown Copyright* in 2005.

38. The CLRC report also recommended that there be no copyright in certain types of government documents, including legislation, judgments and reports of statutory inquiries. The CLRC recognised that there were many different types of material in which governments may own copyright, and many different types of uses that may be made of it. The CLRC recommended that copyright be centrally managed by each government, and that the management of copyright be uniform.

39. To date, there has not been a government response to the CLRC report.

“The benefit of users (including private sector resellers of information)”

40. We are unclear about what is meant by the reference to private resellers of information; they are not referred to in the text preceding the recommendation. If the proposal is that private resellers can acquire government-generated content for free and then resell it, it is not clear how this results in innovation. This may be case if the resellers are required, in return for the free acquisition, to make significant enhancements to the material.
41. This recommendation also raises questions about the extent to which governments themselves should be making certain types of information accessible.

“Substantial commercial revenue from the sale of the content”

42. In the text of the Report preceding Recommendation 7.7, the Expert Panel says:

The presumption against free availability might be overcome where it would involve the foregoing of substantial commercial revenue from the sale of the content ...

43. It gives the ABC as an example:

... the ABC should err on the side of making its content available over the internet unless this has large opportunity costs.

44. One of the issues raised by Recommendation 7.7 is whether the government could or should use copyright revenue in order to invest in the production of new content. If the copyright revenue is forgone, then either the new content is not funded, or an alternative source of funding needs to be found.

Recommendation 7.8

Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a creative commons licence.

Creative Commons licences

45. We assume that “creative commons licence” refers to one of the six licences developed by Creative Commons for Australia. There is no explanation in the text of what is intended, and we do not know if the recommendation is to use a particular Creative Commons licence, or to use different Creative Commons licences depending on the circumstances.
46. Creative Commons licences were originally developed out of Stanford University in the US, and have since been adapted for many other countries, including Australia. As is acknowledged by Creative Commons itself, the licences are not suitable for every situation. One feature of Creative Commons licences that makes them unsuitable for some is that they are irrevocable – once a licence is applied to a work, it cannot be removed or retracted. Another is that the licences for “non-commercial” uses includes some ambiguities.

Does free use of copyright material promote innovation?

47. The recommendation appears to be based on an assumption that releasing government-funded content under Creative Commons licences will necessarily promote innovation. The reasons for this assumption are not explained in the text preceding the recommendation.
48. None of the Creative Commons licences *requires* users of licensed content to use it for innovative purposes. Some of the licences *allow* users to make derivative works, and two of those *require* the user to make the derivative work available under a Creative Commons licence, so that it is available to others. Otherwise, the licences allow passive or consumptive uses that produce nothing new.

Recommendation 7.14

To the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons. This should be done whilst the Australian Government encourages other countries to reciprocate by making their own contributions to the global digital public commons.

We refer to our comments above in relation to government-funded content.

National collections

49. We are not sure what is meant by “national collections”. If it refers to collections of artefacts such as paintings and books (or even digital files), then the content is not government-funded at all; a government-funded agency has just acquired a copy of a work which has been funded by someone else.
50. The digitisation of national collections is a separate issue, which has been the subject of consideration in a number of fora including the 2020 Summit and the Cultural Ministers’ Council. One of the reasons that content owners are understandably reluctant to allow their content to be freely available on the internet to anyone in the world is that it creates enormous opportunities for unauthorised use. Another is that it may supplant, or compete with, commercial licensing opportunities for the work.

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November 2008