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Draft Report Intellectual Property Arrangements.*

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## **Creative Commons Australia Response to the Productivity Commission Draft Report Intellectual Property Arrangements**

**Prepared by Jessica Stevens and Nicolas Suzor**

Creative Commons Australia ('CCAU') welcomes the opportunity to comment on the Productivity Commission's Draft Report on Intellectual Property Arrangements ('Draft Report'). Creative Commons<sup>1</sup> is an international non-profit organisation that provides free licences and tools that copyright owners can use to allow others to share, reuse and remix their material, legally. Creative Commons provides proactive legal tools that successfully work within legal systems all over the world to help creators manage and license their rights. Creative Commons licences facilitate novel social, educational, technological, and business practices based on openness.<sup>2</sup> However, Creative Commons realises that its vision "universal access to research and education and full participation in culture — will not be realized through licensing alone" which is why Creative Commons "supports ongoing efforts to reform copyright law to strengthen users' rights and expand the public domain".<sup>3</sup>

CCAU supports the primary conclusion of the Draft Report that, 'Australia's IP system is out of kilter favouring rights holders over users and does not align with how people use IP in the modern era'.<sup>4</sup> Copyright exists to promote the production of new expression and 'public interest'.<sup>5</sup> Recent changes in international copyright law have tipped the balance too far in the direction of established producers and distributors. This poses significant risks to creativity, free expression and the flow of information, knowledge and culture.

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<sup>1</sup> CCAU is an affiliate that supports Creative Commons in Australia. The views expressed here are those of the Australian affiliate, and are not endorsed by Creative Commons Corporation in the US.

<sup>2</sup> See for example Stacey P What is an Open Business Model and How Can You Generate Revenue? Medium (March 2016)

<https://medium.com/made-with-creative-commons/what-is-an-open-business-model-and-how-can-you-generate-revenue-5854d2659b15>

<sup>3</sup> Creative Commons Policy Statement "Creative Commons and Copyright Reform" (2013) <https://creativecommons.org/about/reform/>

<sup>4</sup> Productivity Commission Draft Report, 'Intellectual Property Arrangements', April 2016, IP- infographic overview <http://www.pc.gov.au/inquiries/current/intellectual-property/draft/IP-infographics-overview.pdf>

<sup>5</sup> Australian Law Reform Commission, 'Copyright and the Digital Economy' Final Report, 2014, 100 ('ALRC').

CCAU aims to contribute to the discussion regarding copyright law and open access in Australia, with a focus on ensuring copyright achieves the optimal balance between providing protection and incentive for creators of work whilst encouraging innovation and competition through access to works.

The Draft Report makes important recommendations that, if implemented, would make critical improvements to ensuring that Australia's copyright laws are fit for purpose in a digital age. Copyright reform is long overdue. The Draft Report builds on and supports recommendations detailed in a number of previous reports.<sup>6</sup> To date, these recommendations have not been adequately implemented.

CCAU supports the draft recommendations, in particular those that relate to:

- Ensuring access to and use of content is not unnecessarily restricted and creation and innovation is encouraged; and
- Supporting peer scholarship through the use of open access initiatives and open licensing.

## **Copyright Term and Scope (Draft Findings 4.1, 4.2)**

The interests of creators and consumers have never been adequately represented at the forefront of copyright reform. This problem is exacerbated by the increasingly important role that copyright has come to play in the digital age. Over the last two decades, changes to Australian copyright law have predominantly focused on extending the protection afforded to rights holders. As a result, Australian law does not achieve an optimal balance between the rights of rightsholders and those of creators and consumers. The available economic evidence does not support any further expansion of the strength, duration, or penalties of copyright law.<sup>7</sup>

One of the core problems with copyright law is that international trade agreements limit Australia's ability to make changes that are appropriate for our national interest and circumstances. A primary example is the Australian-US Free Trade Agreement ('AUSFTA') which resulted in the extension of the copyright term (among other things) from life of the author plus 50 years, to life of the author plus 70- years.<sup>8</sup> The Commission noted that the extension of the copyright protection term is a 'striking example of inefficient levels of

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<sup>6</sup> Copyright Law Review Committee ('CLRC') Simplification of the Copyright Act Part 1 (1998); Intellectual Property and Competition Review Committee ('IPCRRC'): IP and Competition (2000); CLRC: Copyright and Contract (2002); Senate Committee review of AUSFTA (2004); Australian Government Attorney-General's Department (AGD) Fair Use Review (2005); House Standing Committee on Legal and Constitutional Affairs ('LACA') Inquiry into technological protection measures (TPM) exceptions (2006); Productivity Commission: parallel importation of books (2009); Productivity Commission: Bilateral and Regional Trade Agreements (2010); ALRC, above n 3; House of Representatives Committee report At What Cost? IT pricing and the Australia tax (2013)).

<sup>7</sup> See Ruth Towse, 'What We Know, What We Don't Know and What Policy-Makers Would like Us to Know about the Economics of Copyright' (2011) 8 Review of Economic Research on Copyright Issues 101; Christian Handke, 'Economic Effects of Copyright: The Empirical Evidence So Far' (2011) .

<sup>8</sup> Australian-US Free Trade Agreement Implementation Act 2004, schedule 9.

protection'.<sup>9</sup> The term is considered 'too long in terms of providing an incentive for the creation, development or marketing of works'.<sup>10</sup> We think that this point is correct, but note that unfortunately, Australia has effectively signed away the sovereignty to determine the appropriate extents of our national copyright laws.

**CCAU suggest that a key priority for Australia is to commence the difficult work of disentangling the overlapping and interlocking web of international agreements that make up international intellectual property law.** First, and most pressingly, CCAU does not believe it is in Australia's best interest to ratify and implement the Trans-Pacific Partnership Agreement (TPPA).<sup>11</sup> This Agreement further entrenches TRIPS+ standards across the Pacific Rim, and the evidence indicates that there are few expected trade benefits for Australia.<sup>12</sup> We advocate for an evidence-based approach to trade agreements to carefully evaluate the expected costs and benefits of further restrictions on Australian intellectual property law. In the longer term, Australia should advocate for the national interest when negotiating international trade agreements and should actively resist further entrenching intellectual property clauses within international trade agreements.

**CCAU recommends fundamental reform to ensure that international intellectual property negotiations are evidence-based and represent the national interest. We suggest, ultimately, that international intellectual property negotiations should be decoupled from international trade agreements.**

## Unpublished works (Draft Recommendation 4.1)

CCAU supports this recommendation and agrees with the Commission's justification, that '[t]here is no case for unlimited copyright protection for unpublished works and the appropriate term is most certainly less than the current term of protection of published works'.<sup>13</sup> A significant amount of Australian cultural heritage remains unjustifiably locked up in unpublished work. This content cannot be digitised, archived, preserved or reused.

CCAU advocates for the access to unpublished works, as well as greater access to public domain works in our cultural institutions. Harnessing technological advances and the power of networks, platforms such as Australia's Trove or the EU's Europeana provide a vast

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<sup>9</sup> Productivity Commission 'Intellectual Property Arrangements' Draft Report April 2016, 83 ('PC Report').

<sup>10</sup> Law Council of Australia Submission 64, Part A, 8.

<sup>11</sup> Trans-Pacific Partnership Agreement (TPPA),

<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>.

<sup>12</sup> The World Bank analysis suggested an increase in GDP of 0.7% by 2030 (Lakatos, Maliszewska, Ohnsorge, Petri & Plummer Potential Macroeconomic Implications of the Trans-Pacific Partnership *Global Economic Perspectives* (January 2016)) and the Peterson Institute modelled an increase of 0.6% on real income (Petri, Plummer *The Economic Effects of the Trans-Pacific Partnership: New Estimates* (January 2016))

<http://www.smh.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html> citing World Bank, *Global Economic Prospects* January 2016, 'Implications Trans-Pacific Partnership Agreement,

<http://pubdocs.worldbank.org/pubdocs/publicdoc/2016/1/847071452034669879/Global-Economic-Prospects-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf>

<sup>13</sup> PC Report above n 7, 119.

amount of valuable content, free of charge, to the general population, researchers, creators and businesses. Recent research on the value of Europeana “shows that in the base case scenario, the benefits outweigh the cost by €21.5 million (or 37%) in terms of net present value, exclusive of any benefits for the creative industries, education and research”.<sup>14</sup> Removing the perpetual copyright protection for unpublished works is one of the issues addressed in the Copyright Amendment (Disability and Other Measures) Bill. **CCAU supports the immediate passage of this Bill.**

## **Copyright Accessibility Licensing and Exceptions (Draft Recommendation 5.1)**

**CCAU believes that regional segmentation -- accompanied by high prices, low consumer choice, and long delays -- has led many Australian consumers to lose respect for copyright law.**<sup>15</sup> As noted by the Commission, when offered the choice, Australian consumers readily purchased digital versions of copyright material.<sup>16</sup> The restrictions placed on consumers through the process of segmenting by location have significant negative repercussions on the content that is made available. Consumers are either unable to access the content, or are required to pay a higher premium to access the content. This disadvantage to Australian consumers and businesses is known as the ‘Australian Tax’, the ‘...international price discrimination that leads to higher prices for a variety of goods and services in Australia...’<sup>17</sup>

**CCAU believes that a competitive market is vital to a flourishing digital economy.** Access to copyright work and the ability to reuse, adapt and modify existing content is a fundamental part of innovation. The Australian market is not a competitive market; it is a small market which is not adequately served by overseas distributors. The price-maximising strategy of international rightsholders has been to focus on the high-end of the Australian copyright market, with subsequent high levels of deadweight loss and low consumer choice.

CCAU supports the recommendation that was made in the IT Pricing enquiry ‘that the Australian Government amend the Copyright Act’s section 10(1) anti-circumvention provisions to clarify and secure consumers’ rights to circumvent technological protection measures that control geographic market segmentation’.<sup>18</sup>

The current Definition of ‘technological protection measure’ and ‘Access Control Technical Protection Measure’ in s 10(1) of the Copyright Act explicitly excludes digital locks designed

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<sup>14</sup> Europeana Strategy 2015-2020, Impact p 8 available at: <http://pro.europeana.eu/publication/europeana-strategy-2015-2020-impact>

<sup>15</sup> See Paula Dootson and Nicolas Suzor. (2015) [The game of clones and the Australia tax: divergent views about copyright business models and the willingness of Australian consumers to infringe.](#) *University of New South Wales Law Journal*, 38(1), pp. 206-239.

<sup>16</sup> Productivity Commission ‘Intellectual Property Arrangements’ Draft Report April 2016, 126-127.

<sup>17</sup> *PC Report*, above n 7, 127 citing CHOICE Submission, 17.

<sup>18</sup> House of Representatives Committee Report, ‘At What Cost? IT pricing and the Australia tax’, 29 July 2013 <[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=ic/itpricing/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm)>, Recommendation 5.

to limit consumer sovereignty by restricting parallel importation. The High Court's decision in *Stevens v Sony*<sup>19</sup> serves as a strong recognition of the rights of consumers to enjoy material legitimately purchased from other jurisdictions. Justice Kirby in that case warned against an interpretation of anti-circumvention law that would provide rightsholders 'a de facto control over access to copyrighted works or materials that would permit the achievement of economic ends additional to, but different from, those ordinarily protected by copyright law.'<sup>20</sup> The Senate Legislative and Constitutional Affairs enquiry into the Australia US Free Trade Agreement also warned that the fundamental balance between rightsholders and users of copyright material must be retained in any changes to Australia's TPM regime.<sup>21</sup> While the Committee's recommendations to exclude region controls from the scope of anti-circumvention were accepted by the Legislature, unfortunately, only films and computer programs (including games) were carved out of the definitions of Technological Protection Measures and Access Control Technological Protection Measures. We suggest that this narrow approach reads down the High Court's concerns in *Stevens v Sony* in a way that is no longer appropriate. The key pressing issue at the time was the playback of region-locked DVDs; region locked CDs or Books simply did not exist in any commercially significant sense. Now, however, hindsight reveals this narrow approach to be inadequate -- for the same reasons that allowing parallel importation of Books, CDs, and DVDs are in the interests of the Australian public, so too is the lawful parallel acquisition of digitally delivered literature, music, and art.

We suggest that the narrow carve-out is remedied immediately by an exception for all devices that have the effect of segmenting geographic markets. The current exceptions read, relevantly:

A TPM or ACTPM "does not include such a device, product, technology or component to the extent that it: [...]

(iii) if the work or other subject-matter is a cinematograph film or computer program (including a computer game)--controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia; [...]

We recommend that the wording of the exclusions in s 10(1) be amended to apply to all media.

## **Parallel importation restrictions (Draft Recommendation 5.2)**

**CCAU continues to support the recommendation that there is no place for parallel import restrictions in modern Australia.** The recommendation to repeal the parallel

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<sup>19</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

<sup>20</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58, [204].

<sup>21</sup> LACA, Review of Technological Protection Measures Exceptions, 14

import restrictions is not new or novel in Australian copyright discussions. Previous recommendations have been made by other review bodies such as the Australian Competition and Consumer Commission in 1999 and 2001, Intellectual Property and Competition Review Committee in 2000, the Senate Legal and Constitutional Legislation Committee in 2001, the Productivity Commission in 2009, and the Australian Government's 2015 Competition Policy Review (Harper Review).<sup>22</sup> The evidence obtained from a number of previous reports suggests that the removal of parallel importation restrictions is likely to improve innovation.<sup>23</sup>

## Fair Use (Draft Recommendation 5.3)

**CCAU supports voluntary licensing** and has been very successful at providing voluntary options for creators who wish to share their material on more open terms than current copyright systems allow providing the tools to enable creators from all backgrounds to licence their works in a way that works for them. This has led to some misconceptions:

'it has been suggested that the very success of CC licenses means that copyright reform is unnecessary — that the licenses solve any problems for users that might otherwise exist. This is certainly not the case. CC licenses are a patch, not a fix, for the problems of the copyright system.'<sup>24</sup>

Universal access to research and education and full participation in culture are core values for CC, and CC recognises that they cannot be addressed solely through licensing. Legal reform is also necessary.

Fair use is the most significant proposal to fix the copyright system to enable valuable uses of copyright content. **CCAU strongly supports the Productivity Commission's recommendation to replace the current fair dealing exceptions with a broad exception for fair use.**

The limitations in Australia's current copyright arrangements have a negative effect on individuals and creators. The objective of copyright is to encourage and support the production of new expression. The creation of new expression necessarily builds upon existing knowledge, culture, and expression. The fair dealing exceptions contained in the *Copyright Act 1968* (Cth) offer a narrow set of situations where works can be legitimately used.<sup>25</sup> These exceptions are prescriptive, stagnant, and too narrowly restrict the ways in which copyright material can be accessed and used.

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<sup>22</sup> *PC Report* above n 7, 131; Australian Competition and Consumer Commission in 1999; Australian Competition and Consumer Commission in 2001; Senate Legal and Constitutional Legislation Committee in 2001; Productivity Commission in 2009; Australian Government's 2015 Competition Policy Review (Harper Review).

<sup>23</sup> *PC Report* above n 7, 131; Australian Competition and Consumer Commission in 1999; Australian Competition and Consumer Commission in 2001; Senate Legal and Constitutional Legislation Committee in 2001; Productivity Commission in 2009; Australian Government's 2015 Competition Policy Review (Harper Review).

<sup>24</sup> Creative Commons Policy Statement "Creative Commons and Copyright Reform" (2013)

<https://creativecommons.org/about/reform/>.

<sup>25</sup> *Copyright Act 1968* (Cth).

Fair dealing is 'less flexible and less suited to the digital age than an open-ended fair use exception'.<sup>26</sup> As noted by the ALRC in their Final report pursuant to fair dealing,

...many uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use. For such uses, the question of fairness is never asked.<sup>27</sup>

To date, the arguments against introducing fair use in Australia have been unconvincing. This is evidenced by the continual recommendation from other review bodies, including the recent Australian Law Reform Commission ('ALRC') Final Report. Such an exception is essential 'to cure inefficiencies in the system, ensure adaptability, maximise the benefits to innovation, and support the dissemination of knowledge'.<sup>28</sup>

The Australian Law Reform Commission made a strong case for reform of the fair dealing exceptions to make way for a broader fair use provision. The ALRC stated in the *Copyright and the Digital Economy* Final Report that fair use:<sup>29</sup>

...aligns better with consumer expectations. The public is more likely to understand fair use than the existing collection of complex specific exceptions; the exception will seem more reasonable; and this may even increase respect for and compliance with copyright laws more broadly.<sup>30</sup>

The ALRC's review of the case for the introduction of fair use is thoughtful, evidence-based, and comprehensive. For the reasons detailed in the ALRC Final Report, pages 1129-141, CCAU believes that the four factors construct, as defined by the ALRC is the most appropriate approach.<sup>31</sup> **We support the Productivity Commission's endorsement of fair use, and urge the next Government to immediately introduce fair use in the form recommended by act upon the recommendations of the ALRC.**

Fair use provides creators a legal exception to legitimately make use of the work for situations outside the limited scope of the fair dealing exceptions. Ultimately, fair use encourages the use of content for innovative purposes and supports the primary objective of copyright, to promote public interest and innovation. CCAU believes that the implementation of a broad exception for fair use would assist in striking the optimal balance between rights holders, consumers, and future creators.

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<sup>26</sup> ALRC above n 4, 164, [6.19].

<sup>27</sup> ALRC above n 4, 164, [6.19].

<sup>28</sup> Australian Digital Alliance Submission to the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements December 2015, 1.

<sup>29</sup> ALRC above n 4, 22

<sup>30</sup> ALRC above n 3, 108 citing Choice Submission 745, IP Australia Submission 681, ACCAN Submission 673, Cyberspace Law and Policy Centre Submission 640, and Google Submission 217.

<sup>31</sup> ALRC above n 3, 129-141.



## Open Access and Open Licensing (Draft Recommendation 15.1)

CCAU supports the movement towards open scholarship including open access to articles, research, data, and the creation of Open Education Resources (OERs). CCAU acknowledges that free distribution is not enough. For information to be useful, re-use rights need to be clearly detailed through the use of open licensing. Open scholarship creates a wider audience, promotes collaborative work and transparency in findings. Open licenses allow others to access and reuse the scholarship. This is particularly important where publically funded research is not openly accessible and often maintained behind expensive paywalls.

**We recommend that obligations to release publicly funded information be implemented in a way that requires a grant of clear legal permissions for the use and reuse of that information.** To this end, we suggest that such an obligation is coupled with a requirement to release scholarly materials, educational resources, and data under an appropriate open licence. The Creative Commons licence suite provides a clear, easy to understand, effective, and globally recognised set of licences to remove legal barriers to the reuse of information goods. The AusGOAL framework provides a clear and comprehensive guide to help public agencies and institutions effectively and efficiently make information and data accessible.

Such an open licensing mandate would ensure that publicly funded research is made openly available. Some other funding bodies have already implemented an open licensing requirement; the Gates Foundation<sup>32</sup> has implemented a CC BY open licensing policy for the research they fund, as has the Research Council UK.<sup>33</sup> Australia is lagging with respect to considering the benefits of open licensing legislation. In the U.S. draft legislation like the Fair Access to Science and Technology Research Act ('FASTR') contemplates open licensing for research articles 'in formats and under terms that enable productive reuse of the research and computational analysis by state-of-the-art technologies'.<sup>34</sup>

CCAU notes that internationally, there are significant moves in public policy in this direction. In the EU, the Horizon 2020 Open Access Policy and the United States the Directives of the White House Office of Science and Technology Policy. Public policy on open access to scholarship and data improves research efficiency, provides assurance of greater scientific integrity, and reduces the overall costs of research infrastructure.

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<sup>32</sup> Bill and Melinda Gates Foundation, Open Access Policy, <http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy/>.

<sup>33</sup> Research Council UK, open Licence Policy, <http://www.rcuk.ac.uk/documents/documents/rcukopenaccesspolicy-pdf/>.

<sup>34</sup> *Fair Access to Science and Technology Research Act (FASTR)* (draft Bill).

The Australian Government is due to finalise its membership in the Open Government Partnership (OGP) with the National Action Plan (NAP)<sup>35</sup> action plan due for submission in July 2016. The OGP is a voluntary, multi-stakeholder international initiative created to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.<sup>36</sup> OGP currently has 69 participating countries in which government and civil society are working together to develop and implement ambitious open government reforms, including working with open government data.<sup>37</sup> CCAU supports Australia's membership in the OGP and recommends that Australia makes a renewed and well-resourced commitment to actively participating in the network.

## Safe Harbours (Draft Recommendation 18.1; Draft Finding 18.1)

**CCAU supports this finding and submits that enacting laws which promote legal access and broader use of copyright content is the *most* effective way to reduce infringing activity.**

Without adequate protection for online intermediaries, creators suffer. It is essential for creators relying on the fair dealing exceptions to be able to have a platform to host their content. In the US, the DMCA safe harbours are widely considered to be invaluable to enable intermediaries to invest in the provision of new services, and to limit the costs of monitoring content for potential infringements.<sup>38</sup> The US Safe Harbours provide the legal certainty that online intermediaries require to create and deliver services that promote innovation, creativity, and expression.<sup>39</sup> Sites like YouTube, which provide a massive potential audience and new business opportunities for an unprecedentedly large number of creators, simply could not exist without the protection afforded by the Safe Harbours. Australian firms are at a major competitive disadvantage because of the legislative oversight in our safe harbour scheme. Australian creators, too, suffer for a lack of local platforms to distribute their work.

The recommendation is also consistent with the proposed changes contained in the recent Copyright Amendment (Disability and Other Measures) Bill. **CCAU supports the immediate passage of the Bill.**

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<sup>35</sup> The Draft Text of the NAP is available - as a living document it will change over time. See: <http://ogpau.wikispaces.com/Draft+text+of+the+National+Action+Plan+-+5+April+2016>

<sup>36</sup> See Open Government Partnership - Australia website: <https://ogpau.govspace.gov.au/introduction/>

<sup>37</sup> See Open Government Partnership: <http://www.opengovpartnership.org/>

<sup>38</sup> See Urban, Jennifer M, Joe Karaganis and Brianna L Schofield, 'Notice and Takedown in Everyday Practice' (2016) <<http://papers.ssrn.com/abstract=2755628>>.

<sup>39</sup> See Michael A. Carrier, 'Copyright and Innovation: The Untold Story' (2012) Wisconsin Law Review 891, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2099876](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2099876) (reporting empirical research on investment in innovative services in the United States that clearly reveals an association between uncertain liability and innovation).