

Australian Copyright Council's comments Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020 and the Designs Amendment (Advisory Council on Intellectual Property Response) Regulations 2020

28 August 2020

Thank you for sharing the [Designs Amendment \(Advisory Council on Intellectual Property Response\) Bill 2020](#), [Designs Amendment \(Advisory Council on Intellectual Property Response\) Regulations 2020](#) ('draft legislation'), [draft Explanatory Memorandum](#) and [draft Explanatory Statement](#) ('explanatory material'). We thank IP Australia for including the Australian Copyright Council ('ACC') as part of their design reform initiatives.

1. About the Australian Copyright Council

The ACC is an independent, not-for-profit organisation representing the peak bodies for professional artists and content creators working in Australia's creative industries including the National Association for the Visual Arts, the Authentic Design Alliance and the Design Institute of Australia with whom we have had discussions in the lead up to this submission.¹

The ACC believes that balancing the interests of creators, consumers and service providers promotes a sustainable economy of the arts, a critical strand of Australia's cultural fabric. We value creative Australia and are dedicated to the protection of our unique cultural landscape, where copyright protection is a reliable constant which allows for proper remuneration to creators.

2. Draft legislation and explanatory material

IP Australia is seeking feedback on the draft legislation and explanatory material. The ACC notes the consultation questions but comments generally only to the extent that the draft legislation and explanatory material deal with copyright and confines its comments to the items covered in them.

3. Background – the copyright/designs overlap²

As outlined in our 20 December 2019 comments on the Implementation of accepted

¹ See the Schedule for a full list of the ACC's affiliates.

² See the [ACC Design & Copyright](#) information sheet at www.copyright.org.au.

recommendations from ACIP's Review of the Designs System³, there are some products that fall into 'the copyright/design overlap'; i.e. a product can be:

- (i) protected under copyright as an artistic work ⁴; *or*
- (ii) it can be protected under designs law as a design.

A product generally cannot be protected by *both* copyright law and designs law at the same time. This is because the *Copyright Act 1968* (Cth) (Copyright Act) contains provisions which are intended to prevent dual protection for objects intended to be protected under the *Designs Act 2003* (Cth) (Designs Act): ss 74-77A of the Copyright Act and s 18 of the Designs Act.

The ACC understands that the draft legislation reflects the ACIP Report's focus on the Designs Act⁵. The ACC however, continues to encourage reform that includes the:

- removing or modifying the consequential loss of copyright protection following the registration of a design, (section 75 of the Copyright Act); and
- removing or modifying the mutual exclusivity of copyright protection and the application of artistic works as industrial designs, (section 77 of the Copyright Act).

4. Consultation question: Does subsection 17(1C) satisfactorily address the relationship between section 17 and section 18?

The ACC supports the introduction of the grace period in the draft legislation.

Whilst the addition of section 17(1C) and the note at the end of section 18(2), clarifies the relationship between ss 17 and 18 of the Designs Act, they do not clarify the relationship between section 18 and the copyright overlap provisions of the Copyright Act.

The Government's response to the ACIP recommendation⁶ that steps should be taken to make section 18 of the Designs Act consistent with the overlap provisions of the Copyright Act seems to have been overlooked at this stage.

5. Conclusion

The ACC supports the introduction of the grace period as an important protection to benefit designers wishing to register their designs. There is more work to be done however, to remove the inconsistencies between the Copyright Act and the Designs Act to support increased simplicity and clarity of the designs system including the removal or modification of:

- the consequential loss of copyright protection following the registration of a design; and
- the mutual exclusivity of copyright protection and the application of artistic works as

³ Available on the IP Australia website at <https://consultation.ipaustralia.gov.au/policy/design-reforms-implement-acip-recs/>. The ACC also made submissions in 2013 and 2015.

⁴ Note that s 77 of the Copyright Act excludes works of artistic craftsmanship and buildings or models of buildings from the overlap provisions.

⁵ p33 at 2.6.

⁶ Recommendation 15.

industrial designs.

The ACC welcomes continued discussions with IP Australia on these and any related issues. If you have any queries or require further information, please let us know.

Eileen Camilleri
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Australian Copyright Council

SCHEDULE - ACC Affiliates

As at the date of this response, the Australian Copyright Council members are:

1. Aboriginal Artists Agency
2. APRA|AMCOS
3. Ausdance National
4. Australia New Zealand Screen Association
5. Australasian Music Publishers Association Ltd
6. Australian Cinematographers Association
7. Australian Directors Guild
8. Australian Guild of Screen Composers
9. Australian Institute of Architects
10. Australian Institute of Professional Photography
11. Australian Music Centre
12. Australian Photographic Judges Association
13. Australian Publishers Association
14. Australian Recording Industry Association
15. Australian Screen Directors Authorship Collecting Society Limited
16. Australian Society of Authors
17. Australian Society of Travel Writers
18. Australian Writers' Guild
19. Authentic Design Alliance
20. Christian Copyright Licensing International
21. Copyright Agency
22. Design Institute of Australia
23. Media Entertainment & Arts Alliance
24. Musicians Union of Australia
25. National Association for the Visual Arts
26. National Tertiary Education Union
27. Phonographic Performance Company of Australia
28. Illustrators Australia
29. Screen Producers Australia
30. Screenrights