Response to the Productivity Commission Inquiry Report on Australia's IP Arrangements

Joint Submission from the Australian Film & TV Bodies

14 February 2017

Executive Summary

The Australian Film & TV Bodies[1] welcome the opportunity to respond to the Productivity Commission Inquiry Report on *Intellectual Property Arrangements* (the *Inquiry Report*).[2] As representatives of the creative content sector we are excited about the explosion of new services available in Australia and their rapid adoption by consumers.

We oppose the majority of the recommendations made by the Productivity Commission regarding copyright as they appear to be based on a flawed understanding of Australia's long established copyright law that would be harmful to creators, consumers and the economy. The recommendations do not take into account the ways in which copyright serves to contribute to Australia's economic development and Australian creators, while at the same time providing consumers with unprecedented viewing options at globally competitive prices.

We use this submission as an opportunity to provide further evidence relevant to evaluating the recommendations and any further changes to Australia's copyright law:

- State of the industry: The emergence of digital technologies, while providing a range of opportunities for new forms of distribution and exploitation, has also placed significant pressure on the copyright-based industries, largely as a result of increased online infringement. Contrary to the Commission's analysis, ABS data shows that there has been a significant slowdown of the contribution of the copyright industries to the Australian economy post 2000, contradicting the Commission's assertion that the copyright balance has been expanded too far in favour of rightsholders.

- Availability and affordability: The copyright-based industries, in particular the film and television sector(s), are constantly innovating to provide more options for consumers to access content at affordable prices.
  - Availability: There are now over 69 services across 12 formats through which consumers can enjoy Film & TV content (infographic provided on page 13).
  - Timing: While Australians once had to wait for filmed content, 51 of the top 100 films released in Australia in 2016 were available in Australia before they were even released in the US, with the average window for Top 100 releases between US and Australian release dates down from 47 days in 2002 to one week in 2016.
  - Affordability: The price of streaming, downloading or renting equivalent content is now often cheaper in Australia than in the US or the UK.

- Limiting Copyright Infringement: Despite these considerable efforts, piracy rates remain stubbornly high in Australia, fuelled in part by the same changes which are driving the digital transition. We provide evidence that copyright infringement is best limited through a range of measures related to effective enforcement, education and increased market access.

[1] Further details on members of the Australian Film & TV Bodies can be found in Appendix A.
[2] Australian Government Productivity Commission, Productivity Commission Inquiry Report, No. 78 (Sep. 23, 2016) <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>.

- Territorial licensing: Territorial copyright facilitates a huge proportion of the world's independent film financing and production. Notable Australian examples include the most recent Oscar-nominated films Lion and Hacksaw Ridge.

Given the fundamental flaws in understanding copyright from which the Commission's recommendations flow, we believe that the Inquiry Report has failed to set a proper stage for a constructive discussion between all stakeholders interested in copyright reform. There are reasonable concerns regarding maintaining or strengthening copyright protection raised by the creative sectors that deserve a balanced discussion, which the Commission's approach has not facilitated.

Where to next?

The Government has an important role to play in reinvigorating the goodwill of all stakeholders to create a platform in which copyright reform can be achieved in everyone's best interests.

We believe the Government would be better served by focusing on copyright reforms in the following areas for which there is broad support across a range of stakeholders:

Disability access: After Schedule 2 is removed, the meritorious proposals in the Copyright Amendment (Disability Access and Other Measures) Bill concerning disability access and Australia's accession to the Marrakesh Treaty[3] should be allowed to proceed without delay.

Educational statutory licensing scheme: We also support passage of the proposed amendments regarding the simplification of the educational statutory licensing scheme in the above Bill.

Orphan works: We would support the development of a scheme for making orphan works available based on a diligent search process resulting in a limited and specified scope for their use. The Australian Film & TV Bodies are interested in working with the Government and other interested parties on such a scheme.

Furthermore we believe the Government should continue to pursue ways to mitigate the effects of online infringement, thus removing market distortion and ensuring a fair market place for all stakeholders.

[3] WIPO, "Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind" <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019>.

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Introduction

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and the Independent Cinemas Association of Australia (ICA). These associations represent a large cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 full-time equivalent (FTE) workers in 2012-13.[4]

The Productivity Commission describes itself as "the Australian Government's independent research and advisory body" having the purpose to "help Governments make better policies, in the long term interests of the Australian community."[5] Further, the Productivity Commission Act 1998 gives it policy guidelines which include growing the economy to achieve higher living standards, growing Australian industries, recognising the interests of industries, employers, consumers in the community likely to be effected by proposed measures, increasing employment, and allowing Australia to meet its international obligations and commitments.

However, in the Inquiry Report the Commission has consistently failed to assess the interests of all stakeholders in the Australian community in a balanced way by neglecting to take into account the perspective of those who rely on copyright for their livelihoods. As such, the Inquiry Report fails to serve as the basis for a balanced and constructive discussion on copyright reforms.

A number of fundamental misunderstandings influence the copyright-related findings and recommendations in the Inquiry Report. These include misunderstandings of:

- The effects of the digital age to date on copyright-based industries;
- The importance of enforcement and enforceable laws for a well-functioning market for copyrighted goods;
- The dramatic increase in availability of filmed content that can be consumed in Australia today, leading to timely access through a variety of means and at a variety of price points;
- The vital role that the territoriality of copyright plays in the financing and production of filmed entertainment; and
- The positive role that copyright plays in innovation and economic development.

The absence of identifiable evidence to support the Commission's findings is striking. It leads the Commission to take a prejudiced approach towards the rights of creators and the enforcement of rights, as the following extract reveals:

[4] Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015), Access Economics Pty Limited, <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf>, p iv.
[5] Productivity Commission, *A Quick Guide to the Productivity Commission* (2014), <http://www.pc.gov.au/about/productivity-commission-quickguide-2014.pdf>, p 2.

> *"*Given the asymmetric nature of how policy can be changed*, **the Commission considers it is appropriate to 'err on the side of caution' where there is imperfect information, and consciously set weaker parameters in the way that rights are assigned, used or enforced…"*** [emphasis added][6]

Evidence we provide demonstrates that whilst digital technologies have enabled new business models and distribution methods abound in Australia, it is clear that digital technologies have also facilitated increased online infringement. Given the underlying purpose of copyright – to grant exclusive rights in a work to creators in order to provide them with an incentive to create – it follows that a more balanced approach is required to achieve effective copyright protection rather than, as the Commission has done, engage in a one-sided inquiry that appears to be focused primarily on consumer benefits.

The Commission begins by offering a definition of the purpose of copyright:

> *"The system should provide incentives for IP to be created at the lowest cost to society. This principle includes considering whether IP rights generate returns that are sufficient to encourage new ideas…"*[7]

Unfortunately, not once in the 766-page Report does the Commission make any effort to ascertain whether creators do in fact receive sufficient returns to encourage more creation. On the other hand, the Commission makes numerous recommendations that would, if implemented, clearly reduce a creator's returns, and/or increase the uncertainty for those investing in creative content.

Evidence shows that when sufficient incentives to create are not nurtured in Australia, future generations of Australians will pay the price through reduced opportunities for growth in creative industries, negatively affect contributions to GDP, diminished employment in the creative sectors, and lower capital investments in new creations, ultimately resulting in a less rich and less diverse creative community.

Application of the four principles (Recommendation 2.1)

Recommendation 2.1
In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and be guided by the principles of:

- *effectiveness*, which balances providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely
- *efficiency*, which balances returns to innovators and to the wider community
- *adaptability*, which balances providing policy certainty and having a system that is agile in response to change
- *accountability*, which balances the cost of collecting and analysing policy–relevant information against the benefits of having transparent and evidence–based policy that considers community wellbeing.

[6] Inquiry Report, p 73.
[7] Inquiry Report, p 6.

While effectiveness, efficiency, adaptability and accountability are laudable principles, we find that many of the recommendations offered by the Productivity Commission would not serve these principles and that these four factors, if considered, are applied inconsistently throughout the document. In particular, the Commission has not weighed "effectiveness" at all with respect to encouraging additional creation, since the Inquiry Report's recommendations contain essentially no measures to maintain or strengthen copyright for creators.

New Evidence for Consideration

How copyright enables innovation

For many digital businesses, strong protections for copyright are a prerequisite for their ability to attract investment for their business models and subsequent success. In fact, digital businesses relying on copyright have been some of the most innovative in Australia during the past 15 years. Here are some great examples of Australian digital companies relying on copyright protection for their success:

- Netflix's number one competitor in Australia is Stan, which was recently valued at $600 million, alongside other businesses such as Fetch TV.
- Pay TV incumbent Foxtel, meanwhile, is transforming itself into a digital streaming service, with additional online services for existing cable subscribers (Foxtel Go) as well as no-contract digital options such as Foxtel Play.
- Others are developing niche products, such as Madman Entertainment's streaming platforms DocPlay and AnimeLab which they hope to launch internationally, and the recently-launched Ozflix.
- Australia is punching above its weight in digital effects with companies such as Animal Logic, Rising Sun Pictures and Iloura all working on global projects and winning awards.
- And of course there are many successful filmmakers and producers who are succeeding in bringing superb Australian stories to Australians and the globe. Lion, Hacksaw Ridge and Mad Max: Fury Road are just some of the more recent examples of Australian films that have seen commercial success as well as critical acclaim including major awards and award nominations.

The new research we provide below offers further evidence of how copyright enables innovation.

State of the Industry: Creative Industries Under Pressure

The Productivity Commission's basis for many of its recommendations is the belief that the copyright balance has been expanded too far in favour of rights holders. To support this assertion the Commission cites examples of changes which benefited creators while failing to mention that exceptions which benefited users that were also implemented concurrently.[8] Furthermore the Commission asserts that the emergence of digital technologies has had almost exclusively positive effects on copyright industries and that digital technologies have enhanced the incentive to invest in creativity allowing copyright protection to be weakened without harm to the Australian economy. However, in analysing how copyright law and the evolution of digital technologies have changed the practical use of copyright, the

[8] The introduction of a 'making available online' right in 2000 (which the Commission acknowledged to be justified) was accompanied by exceptions and limitations for the education sector, libraries and online service providers. The extension of copyright terms in 2004 was followed, in 2006, by a package of exceptions, including for private use, education, libraries and people with disabilities.

Commission makes no attempt to ascertain the extent to which creators can or cannot continue to enjoy a fair return on their investments and contribute to the economy as a whole. Logically, the Commission's assertion implies that creators will have flourished as a result of these beneficial developments.

In this section, we summarise a study undertaken by Dr George Barker which examines this hypothesis in more detail, using readily available Australian Bureau of Statistics National Accounts data.[9] The study's key findings are:

- Copyright industries' value add[10] growth in Australia failed to keep up with economy-wide growth, amounting to a nearly $170 billion cumulative shortfall in value add for core copyright industries between 2000 and 2014; the estimated shortfall is even higher, $332 billion, when compared against earlier copyright industry value add growth rates;

- Copyright industries' employment growth in Australia also failed to maintain pre-2000 levels, resulting in a shortfall of around 260,000 industry jobs by 2011;

- The estimated shortfall in Film and Video Production and Post Production value add compared to GDP growth was $1.5 billion as of 2011-2012, the latest year available, with employment similarly failing to keep pace; and

- Gross fixed capital formation in artistic originals (i.e. the investment in original artistic works) as a percentage of GDP would have been 36% higher had it maintained its 1992-2001 growth rate.

The Government's own ABS data makes it clear that the growth of the creative industries has slowed down significantly since the early 2000s, with Australia missing out on job creation and further contributions to Australian's tax-base. Furthermore, the Commission itself states in *Appendix H Economic: Impact of Recommendations*, that it "is important to note that many of the benefits expected to flow from the Commission's proposed reforms – particularly those arising from changes to copyright laws – are private or non-market benefits." [11] In other words, the benefits which the Commission cites are not measurable in standard economic practice.

As such the Government should exercise extreme caution when responding to the Productivity Commission's Inquiry Report. Any balanced analysis should consider the full effects of digital disruption on creators and whether on balance they lead to a logical conclusion of strengthening or weakening copyright. The Commission fails to do so.

Dr Barker's paper suggests that any recommendations based on the assertion that the copyright balance is too far in favour of rights holders should be reconsidered, and that the Government should also consider ways in which copyright needs to be strengthened.

[9] George Barker, "Diminished Creative Industry Growth in Australia in the Digital Age" (February 2017), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915246>.
[10] Value add is the value of gross outputs of a particular industry less the value of inputs from other industries. The sum of all industries' value add is the nation's gross domestic product (GDP).
[11] Inquiry Report, p 691.

Improving availability and affordability is not enough to combat copyright infringement alone (Finding 19.1)

Finding 19.1
Timely and competitively-priced access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

In reaching this finding, the Commission has relied on a few consumer studies in which respondents claim they will stop pirating only if availability and affordability improve. After accepting these consumer claims, the Commission dismisses the necessity of updating enforcement measures, suggesting that the focus on improving timely and competitively-priced access should be sufficient to reduce piracy. We are concerned to think that such a significant finding, underpinning the reasoning of many recommendations made, would be made on the basis of claimed consumer behaviour, especially when there is a wealth of studies and surveys now available (many peer-reviewed), which examine actual behaviour as opposed to claimed behaviour.

There is a broad body of evidence demonstrating that no single measure can reduce copyright infringement by more than 30% alone. A holistic approach which combines timely and affordable access to content along with education and enforcement is required.

A paper published by Danaher et al. in 2013 entitled "Understanding Media Markets in the Digital Age: Economics and Methodology" [12] clarifies this point. Whilst we agree that availability and affordability do play a role in combating piracy, this paper shows that that there are many means to reducing piracy that are more effective than simply increasing availability and affordability.

[12] Brett Danaher et al., "Understanding Media Markets in the Digital Age: Economics and Methodology" (November 2013), <https://ssrn.com/abstract=2355640>.

Category	Description	Impact
LEGISLATION	Site-Blocking in the UK [13]	Increase of usage of paid streaming sites by 12% on average, a reduction of 30% in traffic to piracy websites
LEGISLATION	Graduated Response (HADOPI) in France	Causal increase in digital music sales by 22-25%
ENFORCEMENT	Shutdown of MEGAUPLOAD.COM	Causal increase in digital movie revenue 6 – 10%, and of course a 100% reduction in traffic to MEGAUPLOAD
AVAILABILITY	Removal of NBC content on iTunes as a result of commercial conflict	Increase in piracy rates of affected content of 11%
AVAILABILITY AND AFFORDABILITY	Making content available on catch-up TV (ABC US and Hulu) for free	Decrease in piracy of that content by 15-20%

This research illustrates that online infringement is a complex issue that cannot be addressed with a single response, such as greater access. In this sense it is similar to other social issues such as drink driving and smoking. It is well understood that such issues require a comprehensive approach in order to be successful, including enforcement measures where appropriate.

Research demonstrating that site blocking is an effective way to reduce piracy

The Productivity Commission relies on a submission from the Australian Communications Consumer Action Network which purports to show that site blocking is not effective. On review, the study cited for this conclusion[14] examined the impact of blocking just one website, the Pirate Bay, and concluded that doing so was ineffective. We identify below a number of studies that, while concurring with this immediate finding, demonstrate that blocking multiple sites is effective in reducing piracy. In other words, each of the below studies concludes that *blocking just one website* only has a minimal effect, but that *blocking multiple sites* is effective. Put another way, most users who access pirated materials have a second favourite pirate site, but not many have a 20th favourite pirate site.

[13] Brett Danaher et al., "The Effect of Piracy Website Blocking on Consumer Behaviour" (November 2015), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063>. We will review this paper in greater detail in the next section.
[14] J Poort et al., "Baywatch: Two Approaches to Measure the Effects of Blocking Access to The Pirate Bay" (August 22, 2013), available at <http://ssrn.com/abstract=2314297>.

Carnegie Mellon University

Researchers at Carnegie Mellon published a paper entitled "The Effect of Piracy Website Blocking on Consumer Behavior."[15] This paper studied how consumers changed their behaviour when ISPs were court-ordered to block access to major piracy websites in the UK. This study is based on two court orders: the blocking order directed at The Pirate Bay in May 2012, and blocking orders directed at 19 major piracy sites in October and November 2013. The paper concludes that when 19 sites were blocked access to pirated sites overall fell by 30%, while there was also a causal increase in traffic to legal sites.

As the authors note in their abstract:

> "Our results show that blocking The Pirate Bay only caused a small reduction in total piracy — instead, consumers seemed to turn to other piracy sites or Virtual Private Networks that allowed them to circumvent the block. We thus observed no increase in usage of legal sites. In contrast, *blocking 19 different major piracy sites caused a meaningful reduction in total piracy and subsequently led former users of the blocked sites to increase their usage of paid legal streaming sites such as Netflix by 12% on average.* The lightest users of the blocked sites (and thus the users least affected by the blocks, other than the control group) increased their clicks on paid streaming sites by 3.5% while the heaviest users of the blocked sites increased their paid streaming clicks by 23.6%, strengthening the causal interpretation of the results. Our results suggest that website blocking requires persistent blocking of a number of piracy sites in order to effectively migrate pirates to legal channels, but also that the increased availability of legal digital services can make antipiracy efforts more effective."

INCOPRO Research

The Motion Picture Association also commissioned research from INCOPRO to examine the efficacy of siteblocking in the UK. The key conclusions of this study, entitled 'Site Blocking Efficacy Study",[16] are:

1. Judicial site blocking resulted in a significant decline in traffic to all blocked piracy sites.
   a) In the UK, traffic to these blocked sites plunged 77.5% on average; and
   b) By comparison, outside of the UK traffic to these sites increased 20.9% in the same period.

2. Overall access to piracy sites also reduced – demonstrating that not all pirates simply migrate to other websites.
   a) In the UK, traffic to all piracy sites fell 22.9%; and
   b) By comparison, outside of the UK traffic to all piracy sites increased by 7.8% in the same period.

[15] Brett Danaher et al., "The Effect of Piracy Website Blocking on Consumer Behavior" (November 2015), <https://ssrn.com/abstract=2612063>.
[16] Incopro, "Site blocking efficacy study" (13 November 2014), <http://auscreenassociation.film/uploads/reports/Incopro_Site_Blocking_Efficacy_Study-UK.pdf>.

Other ways to effectively address online infringement

There are a variety of ways to effectively address online infringement. Most involve working with intermediaries that directly or indirectly facilitate the business models of piracy sites.

Working with advertising intermediaries to cut-off the revenue sources of infringing websites.

In the United Kingdom, the Police Intellectual Property Crime Unit (PIPCU), in partnership with the creative and advertising industries, launched Operation Creative in April 2014.[17] On their website PIPCU conveniently summarises the steps that this initiative involves:

> "This initiative was designed to disrupt and prevent websites from providing unauthorised access to copyrighted content. Rights holders in the creative industries identify and report copyright infringing websites to PIPCU, providing a detailed package of evidence indicating how the site is involved in illegal copyright infringement. Officers from PIPCU then evaluate the websites and verify whether they are infringing copyright. At the first instance of a website being confirmed as providing copyright infringing content, the site owner is contacted by officers at PIPCU and offered the opportunity to engage with the police, to correct their behaviour and to begin to operate legitimately. If a website fails to comply and engage with the police, then a variety of other tactical options may be used including; contacting the domain registrar to seek suspension of the site, advert replacement and disrupting advertising revenue through the use of an Infringing Website List (IWL)."

According to the City of London Police,

> "…the IWL, the first of its kind to be developed, is an online portal containing an up-to-date list of copyright infringing sites, identified and evidenced by the creative industries and verified by the City of London Police unit. It is available to the partners of Operation Creative and those involved in the sale and trading of digital advertising. The aim of the IWL is that advertisers, agencies and other intermediaries can voluntarily decide to cease advert placement on these illegal websites which in turn disrupts the sites advertising revenue."

Working with payment processor intermediaries to cut off the revenue of infringing websites

Many infringing websites accept subscription fees or payments to speed downloads, prevent interruptions to streaming, or otherwise improve the user experience. In the US, payment processors have created trusted notifier programs to terminate payment services to infringing websites.

Working with other infrastructure intermediaries to cut off services to infringing websites

Websites rely on a variety of service providers to operate – registries for domain names, hosting providers, and in some cases content delivery networks (CDNs). Each of these intermediaries typically has terms of service preventing their use for illegal purposes and therefore has the capacity, when facing evidence of obvious and widespread infringement, to cut off services to infringing websites.

[17] City of London Police, "Operation Creative and IWL", <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx>.

Study into the role that Search Engines can play in influencing media piracy

In 2014, Carnegie Mellon released a paper entitled "Do Search Engines Influence Media Piracy? Evidence from a Randomized Field Study."[18] The authors of this paper concluded that "reducing the prominence of piracy links in search results can have a significant impact on consumer behaviour." When classifying users' intentions based on their initial search terms, the study found that users who initially express an intent to consume legally are less likely to purchase legally if the infringing search results are elevated, and that users who initially express an intention to consume through pirate channels are more likely to consume legally when legal search results are elevated. To date, search engines have taken some steps to demote infringing websites, but search results and auto-complete recommendations for almost any content demonstrate that more needs to be done. PIPCU-style lists, other lists compiled by the advertising industry (including ad networks related to search engines) and lists of sites blocked under s115A can readily be used to identify sites devoted to piracy.

The above represents only a brief and non-exhaustive illustration of the many effective tools at the disposal of policy makers to correct market disruptions caused by widespread online infringement. Distilling the piracy issue as entirely solvable by improving availability and affordability is simplistic and flawed.

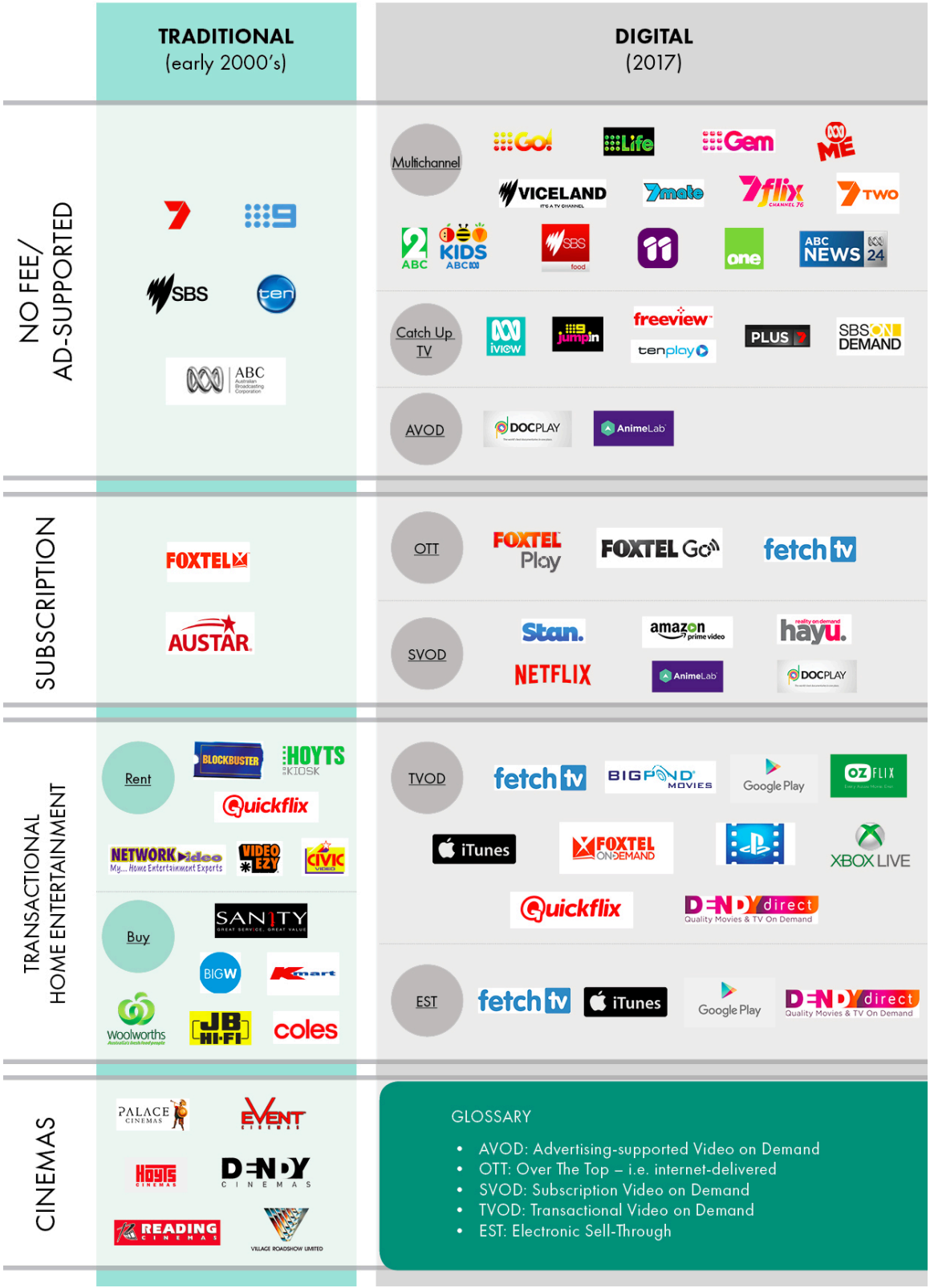
Nevertheless, availability and affordability of content do play an important role in the marketplace, but ironically, may not have the correlation to a reduction in piracy that one would intuitively presume (and that undergirds the Commission's thought process). In the next section we present the latest evidence demonstrating the great amount of work that has gone into ensuring that Australians have content available at an affordable price in a timely manner.

Improved Availability and Affordability of Content in Australia

As demonstrated in the table below, consumers have never had more choices to enjoy a vast array of entertainment in a variety of ways, ranging from free advertising-based content, to subscription models, to one-off transactions.

[18] Liron Sivan et al., "Do Search Engines Influence Media Piracy? Evidence from a Randomized Field Study" (September 2014) <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1394&context=heinzworks>.

THE EXPLOSION OF CONSUMER CHOICE IN THE DIGITAL AGE



51 of the top 100 films released in Australia in 2016 were available in Australia before they were released in the US, with the average window between US and Australian theatrical release date of Top 100 films down from 47 days in 2002 to just one week in 2016.

One 'availability' concern often mentioned is the perceived delay between US and the Australian release dates. Whilst there may be many valid reasons for differences in release dates,[19] the industry recognises that addressing piracy requires a comprehensive and multi-pronged approach which includes reducing windows[20] where commercially feasible. Over the past 15 years the industry has made a concerted effort to take such an approach, and in analysing the facts, it becomes readily apparent that the perception of delay is in fact just that.

We analysed the difference in theatrical release dates between Australia and the US using data from the Motion Pictures Distributors Association of Australia.[21] We looked at the top 100 films released for a number of years between 2002 and 2016 (see table below). Out of these we selected all films which were also released in the US and omitted the films released in Australia and New Zealand (as such films are usually released in Australia well before the US, making the theatrical window look artificially smaller than it actually is). This selection represented 85% of total box office revenue in the years reviewed. This analysis clearly shows that the windows between releases in the US and Australia have been reduced significantly over the years, from films being released 47 days earlier in the US than Australia in 2002, to just over one week in 2016. Additionally, of the 95 films in our selection in 2016, 51 were released in Australia before they were released in the US, a number that has been steadily climbing. By comparison, in 2002 only 6 out of the 92 films were released in Australia before the US.

Year	Difference in average window of release between US and Australia (in days)	Difference in weighted average window between US and Australia (in days and weighted by AU Box Office)	Number of top 100 films released in Australia prior to US
2002	-57.71	-47.53	6
2005	-42.19	-24.88	18
2007	-27.01	-18.82	25
2010	-21.69	-13.25	36
2012	-16.72	-10.62	37
2014	-17.24	-13.15	36
2016	-8.11	-7.19	51

[19] Reasons include:
- the opposing seasons between the Northern and Southern Hemisphere and the corresponding timing differences for school holidays;
- the finite capacity of screens and therefore the capacity to actually screen films at any given point in time (40,000 in the US versus 2,000 in Australia);
- the choice of a content owner to test a film in one market before committing to the significant marketing and distribution expenses required to release a film globally; or
- simply the competitive nature of the negotiations for those independent films where rights are not held by one entity across the world.

[20] Please note that distributors determine windows individually. The material submitted here is aggregated industry information.

[21] Data on file with the Motion Pictures Distributors Association of Australia.

We also analysed whether there were variances between the theatrical windows for movies that received different classification ratings, given that these classification ratings are considered to be a good proxy for the age groups to which films are targeted. This analysis showed that the weighted average window between US and Australia theatrical release dates for M- and MA-rated movies was just 3 days in 2016. There was a higher average window for G-rated (18.8 days) and PG-rated movies (11 days) given that these are often targeted at young children and as such are released during school holidays, when market demand is significantly higher. In our opinion, the fact that this market reality exists should not be a licence to steal content.

Virtually every major TV show is now fast-tracked from the US, meaning there is virtually no window and is considered a "same day as the US" release. While these shows are often behind Pay TV or SVOD paywalls,[22] this situation is no different from any other country in the world. Series such as Game of Thrones (HBO/Foxtel), House of Cards (Netflix) or The Grand Tour (Amazon) can only be found as part of a subscription bundle. These shows are similarly behind affordably-priced paywalls in the US, the UK and every other country in which they have been made available.

Increased Affordability of Content: Equivalent content is now often cheaper in Australia than in the US and UK

The concept of the 'Australia Tax' – meaning the premium paid by Australian consumers for digital content – gained popularity in the early 2010s. In response, in 2012 the Senate Inquiry into IT pricing was commissioned to determine "whether a difference in prices exists between IT hardware and software products, including computer games and consoles, e-books and music and videos sold in Australia over the internet or in retail outlets as compared to markets in the US, UK and economies in the Asia-Pacific."[23]

This inquiry, on which the Commission relies for its findings, uses outdated data for most creative industries, but even more pertinently for the Film & TV Bodies, ***did not cover audio-visual products at all***.

We have collated the most recent available data[24] and compared the prices for legal digital content platforms across Australia, the UK and the US. The data below clearly shows that there is no longer any affordability issue for movies on digital platforms in Australia. Movies in Video on Demand (VOD) formats, currently the most popular transactional model amongst consumers, are cheaper in Australia than in the US and UK.

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[22] Subscription Video on Demand (SVOD) offers consumers a large selection of content, which they can watch at their convenience for a small monthly fee.

[23] Australian House of Representatives Standing Committee on Infrastructure and Communications, "Inquiry into IT Pricing" (July 2012) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm>.

[24] The Australian Home Entertainment Distributors Association commissions IHS Screen Digest each year to measure VOD and EST pricing across both the Standard Definition and High Definition formats. For those services where an automated price check is supported (approximately one third of services), this analysis includes the pricing of the entire catalogue of such a service – usually exceeding thousands of titles. For the services where automatic price-checking is not facilitated (approximately two thirds of services covered) a manual review is performed on the basis of a sample of the Top 50 new release titles in each format at the time (these typically represent approximately 60% of sales in any given period)

- All pricing data is cleared from GST/VAT/Sales Tax.
- VOD includes both internet VOD and VOD delivered within a Pay-TV environment.
- Exchange rate forecasts are fixed to those of the last complete calendar year.

VOD (US$)	2012	2013	2014	2015	2016
Australia SD	4.63	4.42	4.30	3.85	3.96
UK SD	4.97	4.63	4.99	4.26	4.34
US SD	3.84	3.71	3.95	4.29	4.43
Australia HD	5.35	5.27	5.12	4.54	4.57
UK HD	6.48	6.41	6.76	5.56	5.49
US HD	5.26	5.20	5.40	5.61	5.61

Four years ago movies in Electronic Sell-Through (EST, also known as Download-To-Own) format were indeed more expensive in Australia than they were in the US and UK (mainly as a result of the then very strong Australian dollar). Today, Australian pricing is virtually on par with UK pricing and below US pricing.

EST (US$)	2012	2013	2014	2015	2016
Australia SD	17.03	15.66	15.07	12.39	12.50
UK SD	14.24	13.90	14.72	11.50	11.77
US SD	14.46	14.18	14.59	14.65	14.34
Australia HD	24.19	21.34	19.94	15.39	15.12
UK HD	18.54	17.79	19.35	15.00	14.76
US HD	18.54	18.03	17.36	17.14	16.58

Australia is also well-served with world-class Subscription Video on Demand (SVOD) offerings. These services offer unlimited viewing for a small monthly fee. Contrary to the Commission's conclusions, these services are not more expensive than those overseas.

	Australia	US	FX Rate	US (in AU$)
Netflix	8.99	7.99	0.76	10.51
Amazon Prime	4.00	5.99	0.76	7.88
Foxtel Play	10.00	n/a		n/a
Stan	10.00	n/a		n/a
(*) Amazon Prime is US$2.99 (or AU$4) for the first 6 months; after that, it increases to AU$8				

The real reasons users pirate? 54% of users of piracy admit they never even check pricing of legal alternatives before pirating

A recent study by BSG highlights the issue facing the Film and TV industries: 54% of users of piracy admitted they never even check pricing before pirating.[25] This explains why The Grand Tour, Amazon Prime's flagship show, was one of the most pirated shows ever when it was first released in Australia, despite it being available as part of Prime's entire catalogue for AU$4.00 – less than the price of a flat white coffee in Sydney, Melbourne or Canberra.

It also shows the argument of price for what it is, an excuse used by users to avoid paying for content even when they know it is wrong. The real reason that users pirate content is because it is free. This is shown time and time again in piracy research, including the research recently conducted by the Department of Communications and Arts.[26]

What is a "fair price"?

Cinema tickets are available at a variety of price points around the country. Right now in February 2017, one can buy a ticket to a movie for AU$10 (Reading Cinemas, Auburn NSW), $20.50 (Palace, Fremantle WA), $11 (Village, Geelong VIC), $13 (United, Eldorado QLD), $40 (Hoyts LUX, Entertainment Quarter NSW) or $10 (Event Drive-in, Blacktown NSW).[27] New release movie downloads are usually $5.99 to rent and around $20 to buy on iTunes, or one can get SVOD subscriptions for as little as $4 a month for the introductory offer of Amazon Prime to $10 for Stan.

With around 83 million cinema visits in 2016 and over AU$1bn in physical/digital sales for home entertainment, the market is clearly telling us that the prices set are accepted by the vast majority of consumers. This is also backed-up by BSG research which shows that far more people are satisfied or neutral on pricing for audio-visual content (71%) than are dissatisfied (29%).[28]

Are those accessing unlawful online content simply unable to pay?

Recently concluded research by BSG shows that piracy actually increases with income.

	Australian Population[29]		Pirates[30]
Income	Number ('000)	Share of Total Population (%)	Share within each Income Group (%)
<$40k	9,085	41%	18%
$40k-$75k	9,980	45%	21%
> $75k	3,123	14%	54%
Total	22,188	100%	

[25] BSG, Copyright and Content Protection Research Australia and New Zealand (February 2017), <http://www.creativecontentaustralia.org.au/LiteratureRetrieve.aspx?ID=204084> (hereafter BSG Research).
[26] TNS (prepared for Department of Communications and the Arts, "Consumer survey on Online Copyright Infringement 2016: A market research report June 2016", <https://www.communications.gov.au/sites/g/files/net301/f/online-copyright-infringement-2016-final_report-accessible.pdf>. This research shows that 36% of respondents admit that they pirate because it's free, with 48% claiming they pirate because it's cheaper.
[27] Prices are determined individually by cinemas. The material provided here is aggregated industry information.
[28] BSG Research.
[29] Australian Bureau of Statistics, '6523.0 - Household Income and Income Distribution, Australia, 2011-12' <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6523.02011-12?>.
[30] BSG Research.

If people were accessing piracy because they could not afford to pay, one would expect to see rates of illegal downloaders rise as income levels dropped. However, the opposite is true, suggesting that those with higher annual household incomes, e.g., over AU$70k, access piracy because they feel they can get away with it, not because they have no other choice.

Australian research confirms that availability and affordability do not materially reduce film and TV piracy

The correctness of the Commission's hypothesis can be tested by examining the impact of improvements made over the past 5 years in availability and affordability on film piracy in Australia.

Creative Content Australia conducts statistically reliable research on a yearly basis.[31] The results of this research about changes in the rates of online piracy in Australia since 2011 are summarised in the table below:

Year	Adults who actively pirate[32]	Teens who actively pirate (ages 12-17)
2011	30% [33]	N.A.
2012	27%	N.A.
2013	25%	24%
2014	29%	26%
2015	25%	N.A.
2016	21%	26%

One can see that while there may be some correlations to be made between availability and piracy particularly among adults, the majority of piracy activity in Australia has continued unabated. Of greater concern is that the improvements made in availability and affordability have had no discernible effect on the behaviour of our younger generations. It highlights the flaw in the Commission's hypothesis that changes to availability and affordability will be sufficiently effective in reducing online piracy. This data provides yet another reason for abandoning that hypothesis.

A comprehensive approach to tackling online infringement, particularly amongst the users most likely to be infringing (teenagers), is critical to achieving measurable outcomes. Enforcement is a necessary and proven effective element of such a comprehensive approach in all aspects of IP protection, including online copyright protection.

[31] Creative Content Australia, "Australian Piracy Behaviours 2015: Wave 7 Adults" (2015) <http://www.creativecontentaustralia.org.au/research/2015>.
[32] Adults and teens who pirate actively are defined as those who admit to pirating in the past month.
[33] NB: The 2011 study did not make a distinction between pirating physical and digital files, therefore it cannot be directly compared to subsequent years where the focus in the research was solely on digital piracy.

Responses to Specific Findings and Recommendations

Copyright term (Finding 4.1)

Finding 4.1
The scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favour of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death.

Response

The Australia Film & TV Bodies note that that since the release of the Productivity Commission's Draft Report, the Australian Government publicly stated that it does not intend to reduce the copyright term.[34] This is a positive step in relation to a flawed recommendation from the Commission. As identified in our earlier submission to the Draft Report, reducing term to considerably less than 70 years after death would place Australian creators at a disadvantage compared to their counterparts around the world, would be out of step with Australia's international obligations, and is dismissive of the Inquiry Report's specific terms of reference.[35]

The Commission should now unequivocally abandon any recommendations which expressly or implicitly seek to wind back the copyright system and its protections for rights holders based on the suggestion that copyright term and scope are excessively skewed in favour of rights holders.

Technological Protection Measures (TPMs) and Contracting Out (Recommendation 5.1)

Recommendation 5.1
The Australian Government should amend the *Copyright Act 1968* (Cth) to:

- make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception
- permit consumers to circumvent technological protection measures for legitimate uses of copyright material.

Response

The Australian Film & TV Bodies strongly oppose both of the proposed amendments stated in Recommendation 5.1 for substantially the same reasons—they are overbroad, harmful and unwarranted. These amendments would eviscerate existing protections, and place Australia out of step

[34] Mitch Fifield, 'Conjecture on Copyright Changes Unfounded' (24 May 2016), <http://www.mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>. Minister Fifield noted that "…the Productivity Commission notes in its Draft Report that Australia is a party to a range of free trade agreements and has no unilateral capacity to alter copyright terms and that to even attempt to do so would require international negotiations and the reversal of international standards."

[35] Inquiry Report, p v.

with international norms, falling far short of the obligation to provide adequate legal protection and effective remedies against circumvention. The proffered amendments propose sweeping new rules to be added to the Copyright Act that essentially prohibit the use of contracts to govern certain matters between parties as well as curtail the ability to rely on TPMs to protect copyrighted works. Both legal (whether by statute or contract) and technological measures are necessary and appropriate for the protection of copyrighted works and any interference with their use should be the exception rather than the rule.

Rationale and Impact

In a networked digital environment, the damage that can be done to the value of a copyrighted work by its unauthorized online dissemination is enormous. Once TPM protections have been circumvented for a particular work, the work is left exposed and unprotected against any further acts of exploitation, ranging from copying to mass distribution. The market for such a work is instantly undermined and the effect is worldwide. This is why copyrighted works, more than any other type of property, are reliant on law and on technological protection measures for their protection. This is precisely why the Internet Treaties explicitly provided for protection against the circumvention of TPMs.[36] TPMs form an important component of the laws of other countries with equivalent copyright protection to the protections under the Australian Copyright Act.

Contract override and freedom of contract

It is disappointing that the Inquiry Report asserts that:

> "[t]he use of contracts and TPMs to prevent access to works has the potential to restrict uses that have been expressly permitted by parliament, *reduce competition and efficiency and increases the return to creators over and above what is necessary to incentivize their creation*" [emphasis added][37]

This statement profoundly misunderstands the manner in which the creation of works is incentivized and how works are commercialized by creators, rights holders and investors. The use of TPMs and contracts is not anti-competitive: they are instead needed to safeguard copyrighted works from unauthorized and infringing uses. In fact, providing effective protection for TPMs is an essential component for enabling digital business models and multiple forms of access and distribution.

The terms and conditions (and rights and responsibilities) between parties concerning the use of copyrighted works are effectuated by contracts. Some of these contracts are between corporations (e.g., between a film producer and a distributor or broadcaster) and can involve substantial negotiation. Others are standard end-user agreements between a business and its many customers/users. Such end-user agreements are generally not subject to negotiation aside from a few opt-out clauses. They are basically "agree to enter" or "click to agree" contracts.

However, as a result of privity of contract between the parties, the relationship, rights and responsibilities can vary from default statutory rules that would apply between these same parties in the absence of such privity. There is nothing anti-competitive or contrary to commercial practice to have a contract provision which states that a party foregoes his/her right to litigate in court and must,

[36] WIPO Copyright Treaty, Art 11; WIPO Performances and Phonograms Treaty, Art 18; codified in Australia in *Copyright Act 1968* (Cth), s116AN.
[37] Inquiry Report, p 140.

instead, turn to arbitration—even though, absent the agreement, that same party would have the right to take an action to court. The same holds true with copyright provisions, including exceptions to contract law. They can be, and should be, subject to modification by contract in most cases.

The freedom of contract that businesses should be afforded in crafting licenses and business models should, as a rule, be free from government interference. Market forces and business concerns should be permitted to govern the terms of a relationship unless there is an identifiable problem that justifies a regulatory response. The law, of course, is replete with examples of legal prohibitions directed against unfair, dishonest or abusive practices. However, before any contract terms or conditions are treated as unenforceable there should be, as a matter of public policy, a proper fact-finding and a clear identification of a problem before a legislative fix is imposed. Assertions about the operation of such provisions by the Commission, made in the absence of evidence, are an unsafe basis for the recommended change.

In the event that there were any unconscionable terms or clauses, these are better addressed under existing contract law and consumer protection legislation, rather than through amendments to copyright law. The Commission's recommendation does not offer examples of provisions that are problematic in particular contracts.

The Commission's Inquiry Report does not reference any industry practices or licensing models, nor does it make an effort to ascertain the reasons underpinning contractual provisions it seeks to make unenforceable by this new blanket rule. Instead Recommendation 5.1 seems to be based on the notion that if there is an exception in the Copyright Act, say for reporting or for personal use, that any contractual language between the parties that touches upon that exception cannot be modified or restricted in any way as a condition of an agreement.

Nullification of existing contract terms that touch upon exceptions will be enormously disruptive to long-established business and commercial arrangements. Many contractual limitations on uses of a work that are subject to an agreement are required because the limitation or restriction flows down from an upstream agreement, including conditions imposed by creators.

The Commission's recommendation that a prohibition against contracting out should apply under a fair use exception (in the event that fair use were to be adopted in Australia), would create more commercial uncertainty. Contracts, among other things, assign and manage risk, and they are a reflection of what the market will accept and embrace. If a contract cannot specify the parameters of the allowable use in a work with respect to content on a site as part of its terms and conditions due to statutory prohibition, there will be added cost that will take into account the added risk. If data mining is thought to constitute fair use but the party has a practice of licensing the use of its contents, under the Commission's recommendation the enforceability of such a license could immediately be in doubt, including any renewals of such licences. A robust marketplace which is replete with various options for consumers to access and enjoy content on a rich variety of platforms – all enabled by some form of TPM protection, and girded by contractual arrangements – is evidence that the current system is not in need of fixing.

TPMs

The second amendment proposed in Recommendation 5.1 would amount to a blanket rule that any TPM can be legally circumvented if the purpose for the circumvention is to enable a "legitimate" use of a protected work. **The Productivity Commission does not seem to understand that its proposal would effectively undercut any protections for TPMs.** The potential for harm which flows from permitting circumvention for any such use is enormous. Practically, TPMs enable far more uses than they might theoretically inhibit.

TPMs are impossible to separate from distribution platforms and business models. For instance – a consumer might have the option to access a specific movie via a free ad-supported platform, pay $5.99 to rent it for a defined period, $19.50 for a permanent EST version, or $10.00 for a subscription to an SVOD platform that includes the movie in its catalogue. These different business models and price points are implemented through TPMs. If circumvention tools are freely available – as they would be under the Commission's recommendation, and consumers have an expectation that circumvention is permissible – as they inevitably would under the Commission's recommendations, all of these different business models and consumer options collapse into a singular uniform one. It would be impossible to sustain them as separate models. ***An attack on TPMs is an attack on innovation and choice in digital distribution***. Blessing circumvention amounts to permission to hack and so as an exception, must be carefully applied.

In addition to the market-place implications, the Productivity Commission's proposal would eliminate the effective legal protection of TPMs in Australia, putting Australia in violation of its international obligations.

As with the discussion of contracting out, any further exceptions allowing for circumvention of TPMs should be carefully considered and narrowly tailored. The current Copyright Act has nine such exceptions.[38] Each of these exceptions was carefully reviewed and limited to ensure compliance with Australia's bilateral and international obligations. Australia should continue to abide by its international obligations concerning TPMs, and not take steps which would eviscerate protections for TPMs, undermining digital business models. The marketplace requires TPM protections in order to attract investment for new business models and platforms.

Territoriality and Geoblocking (Recommendation 5.2)

Recommendation 5.2
The Australian Government should:

- amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology, as recommended in the House of Representatives Standing Committee on Infrastructure and Communications' report *At What Cost? IT pricing and the Australia tax*
- avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

[38] *Copyright Act 1968* (Cth), ss116AN(2)-(9).

Response

The Australian Film & TV Bodies strongly oppose this recommendation as it is based on a lack of understanding of the role that territorial copyright plays in creating more consumer choice. The Commission appears to substantially rely on outdated and irrelevant data (it does not even include audio-visual content), to reach its recommendation.

Rationale and Impact

There are strong arguments against implementation of the Commission's recommendation are as follows:

On average, Australians no longer pay higher prices for legal digital content. According to the Commission,[39] Recommendation 5.2 stems from the belief that Australians pay higher prices than consumers overseas so they should be able to access content, anywhere, at any time, on an overseas based platform to encourage Australian rights holders to be more competitively priced. As demonstrated on pages 15 and 16, this assumption is not correct; Australians on average pay less for VOD and EST services in Australia than they do in the US.

Territoriality supports the creation of culturally and linguistically varied works. Audio-visual works require substantial upfront investments, and are particularly high risk. Creators deal with this risk by arranging distribution on a territorial basis. A recent report by Oxera and Oliver & Ohlbaum, "*The impact of cross-border access to audio-visual content on EU consumers*"[40] (May 2016) found that removing territorial restrictions could result in up to 48% less local TV content in certain genres, and 37% less local film production.

Undermining territorial copyright puts local creative industries at an unfair disadvantage. Geographic licensing is not anti-competitive as a single product which contains one expression of an idea does not amount to a market. However, forcing global licensing could actually produce anticompetitive effects since only large Internet operators with global capital resources would be able to acquire global rights. These Internet giants could then dominate the markets in Australia with a free rein, grow even larger, and potentially severely damage local businesses that had previously been able to offer content tailored for a geographically specific audience on a geographic basis. These Internet giants, with few local employees and limited tax obligations, might contribute very little to the economy in contrast to existing production houses.

As Hugh Stephens observes:

> *"In countries such as Australia and Canada, to name two examples, where domestic broadcasters are expected or required to contribute to local production, geographic segmentation allows them to sustain their business model by obtaining the distribution rights to popular US programs, and building a subscription base. This in turn allows them to contribute funding to the creation of local programming. Removal of geo-filters to allow consumers unfettered access to content hosted abroad could drive a stake through the heart of the domestic broadcasting platforms*

[39] Inquiry Report, p 135.
[40] Oxera and O&O, "The impact of cross-border access to audiovisual content on EU consumers" (May 2016) <http://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-(final).pdf.aspx >

in Australia, undercutting essential distribution channels for the dissemination of Australian culture."[41]

Territoriality enables internet based services to be tailored to the rules and culture of a particular country. For example, it allows a distributor to comply with local laws by ensuring that appropriate content review classifications are added that reflect local standards.

There are now more ways for Australians to enjoy content sooner than ever before. The Commission itself suggests that the market is responding changes in consumer demand:[42]

> "*The Internet has led to the development of new business models such as online music and television streaming services. Consumers can easily and inexpensively access a vast amount of copyright material with more choice in how they do so. They can purchase physical copies, obtain licenses for digital goods, or subscribe to streaming services. Digital distribution allows for easier unbundling of goods — for example, consumers can purchase individual songs instead of an entire album. Cloud and subscription services allow consumers to pay an annual or monthly fee to access a vast catalogue of works, rather than purchase individual works.*"

Consequently, there has been a virtual explosion of audio-visual services made available to Australian consumers in the past 15 years, with more consumer offers enabling anything from free access models (such as catch-up TV, digital multi-channels and AVOD platforms) to subscription-based models (Pay TV, OTT, SVOD) as well as transactional models (VOD, EST).

Circumvention of geo-blocking and territorial licensing models may implicate Australia's international obligations, including under the WCT and the AUSFTA.[43] The Australian Film & TV Bodies have consistently identified that it is irresponsible for the Commission to question the territorial basis for copyright licensing and actively encourage breaches of those licenses and circumvent measures designed to support the territorial licensing model. The Commission should not ignore this issue.

Non-copyright concerns for consumers in Australia: A licensee of copyright with territorial restrictions will invariably have contractual limitations on access built into the consumer contract. These limitations will be enforceable, such as where a consumer takes steps to sign up or receive the service outside the permitted territories. Breach of these limitations will likely entitle the service provider to withdraw service to the consumer (and even leave the consumer liable for breach of contract). Online contracts are enforceable in many countries. Similarly, the act of a consumer using technical means to disguise their true origin and identity may not only breach the contract for service; it may amount to misleading or deceptive conduct that contravenes the Australian Competition and Consumer Act. No account has been taken of these issues in the Draft or Inquiry Reports.

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[41] Hugh Stephens, "The Australian Productivity Commission's Copyright Recommendations: Using a Sledgehammer to Kill a Fly (or Killing the Golden Goose)" (15 May 2016) <https://hughstephensblog.net/2016/05/15/the-australian-productivity-commissions-copyright-recommendations-using-a-sledgehammer-to-kill-a-fly-or-killing-the-golden-goose/>.

[42] Inquiry Report, pp 136-137.

[43] AUSFTA; In particular, we note that geoblocks are technological protection measures designed to control access to a work, namely, by restricting the location from which a user can access a work; accessing a work from a different location would be without authorization of the rights holder. Geoblocks may also protect against the unauthorized exercise of rights, namely, the communication to the public of works, including across borders. In either case, allowing circumvention would most certainly undermine the adequacy of that Party's legal system for the protection of effective technological measures (AUSFTA, Art 17.3.7). To the extent circumvention of a geoblock also results in a conflict with the normal exploitation of a work in a given market (for example, interfering with the exercise of rights in one market by allowing a user to access a work in that market from Australia without permission or payment in Australia, may also implicate Australia's obligations under the well-worn three-step test).

Governing of Collecting Societies (Recommendation 5.4)

Recommendation 5.4
The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

The Film & TV Bodies support the submission made by Screenrights. We commend the intention of the Commission to increase transparency concerning governing of collecting societies, but note that this review function is already undertaken by the Department of Communications and the Arts and is this is the appropriate vehicle for such a review.

Fair Use (Recommendation 6.1)

Recommendation 6.1
The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia.

Response

The Australian Film & TV Bodies strongly oppose this recommendation. We believe that Australia's system of fair dealing and statutory licensing is fundamentally fit for purpose in the digital age and should be maintained. We support the submission from Screenrights in response to the EY Report on Fair Use and their comments regarding the PwC Report on Fair Use.

Rationale and Impact

The Australian Film & TV Bodies' previous submissions to the ALRC and in response to the Commission's Draft Report identified the harm to Australia if it were to accept US-style fair use. The harm is identified again in the summary below:

Australia's fair dealing system already offers extensive exception relative to world standards, and thus shown that this system has been fit for purpose and adaptable. The Commission fundamentally fails to understand that Australia's exceptions regime is not limited simply to fair dealing, but is rather comprised of both fair dealing and a set of broad statutory licenses. A recent World Intellectual Property Organisation (WIPO) study[44] found that Australia has more exceptions and limitations for education than any of the other 188 countries surveyed**.** Other WIPO studies have shown that Australia's

[44] WIPO Standing Committee on Copyright and Related Rights, *Study on Copyright Limitations And Exceptions For Educational Activities,* (Geneva, November 14 to 18, 2016) <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_6.pdf>

exceptions regime is also extensive for libraries and archives, people with disabilities, and the digital environment.[45]

If the Government were to recommend adopting fair use, it would disadvantage local creators and users by injecting unreasonable uncertainty and unpredictability into the law. The Commission acknowledges that fair use would introduce a level of uncertainty into the Australian copyright system that would necessarily need to be resolved in the courts.[46] Unlike the United States, Australian law does not have the advantage of the substantial body of legal precedent which informs the interpretation and application of fair use principles, which by their nature will always rely on a case-by-case analysis. The US system reflects over one hundred years of precedent applying the concept in real life situations. In fact, there is a treatise that helps elucidate the concepts from those cases – and it is only 1124 pages long.[47] Assuming the sovereignty of Australia's legal system, it would take years and years for the Australian fair use rules to be fully flushed out. In the meantime, existing commercial arrangements might be called into question and future commercial dealings would be undercut by uncertainty over the scope of the exception. Adopting fair use would add immense uncertainty to existing and future commercial arrangements. Parliamentarians should uphold their responsibility for making clear, enforceable and predictable laws that can be relied on by creators and users alike, instead of legislating broad principles which would have to be given meaning by courts, without the aid of local interpretive precedent, at the expense of the litigants. It is plain that many online intermediaries see themselves as a major beneficiary of a fair use exception. It can hardly be seen as fair to local creators to require them to attempt to match the resources of tech companies in their quest to expand fair use.

Permitting third parties to commercialise practices and then rely on a copyright exception designed for individual use is should never be permitted to fall under any fair use/fair dealing exception.[48] To allow a third party, such as a tech or online business, to promote a process for collating and monetising materials for the use of private individuals would necessarily impact on the usual market of the copyright owner to commercially exploit their own works. The distinction between the reliance on a fair dealing exception by individuals and commercial bodies was illustrated in the "TV Now" decision.[49] The Commission should not lightly repeal distinctions that are so crucial to maintaining the balance under copyright laws.

There is a strong case that exceptions and limitations should be narrowing in the digital age, not expanding. When EY finished its report into fair use, it did not have access to an appropriate economic model to frame its discussion. A paper discussing such a framework was not published until September 19, 2016 when the Phoenix Center for Advanced Legal & Economic Public Policy Studies, a widely respected think tank for advanced legal and economic public policy studies, released its paper 'Fair Use in the Digital Age'.[50] That paper concludes that some characteristics often cited by advocates for expanding exceptions and limitations to copyright actually suggest these exceptions and limitations should be contracting. Copyright exceptions should be stricter when:

- The cost of the original work is high.

[45] WIPO, Limitations and Exceptions, <http://www.wipo.int/copyright/en/limitations>.
[46] Inquiry Report, p 181.
[47] William Patry, "Patry on Fair Use" (Thomson West, 2016 edn.)
[48] Inquiry Report, p 191.
[49] *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.
[50] George Ford et al., "Fair Use in the Digital Age" (September 2016) <http://www.phoenix-center.org/pcpp/PCPP51Final.pdf>.

- The size of the market for the original work is small.
- Piracy and other forms of leakages reduce the market potential for the original work.
- The cost of distributing secondary works is lower.
- Small amounts of transformation matter a lot to consumers.
- The fixed cost of producing secondary works is smaller.

Other concerns explained in further detail in our response to the Draft Report and previously in our submission to the ALRC Inquiry[51] include:

- There is no international consensus in support for a fair use exception – the overwhelming majority of countries have not adopted a fair use exception of the kind recommended by the Commission.
- The case for a broad open-ended fair use exception has not been established in the inquiry process run by the Commission.
- There is no evidence (referenced in the Inquiry Report, or otherwise) that a fair use exception will assist with innovation or participation in the digital economy.
- A broad open-ended standard is not more effective or more suitable than the current specific fair dealing rules, for the reasons advanced by the Australian Film & TV Bodies in their earlier submissions.
- Fair use is not suitable for the Australian environment.

The Productivity Commission provides a few specific examples which they believe show that copyright can be too restrictive in some instances, yet fails to acknowledge that these issues can equally be addressed within the current fair dealing regime. We would welcome any balanced discussion on whether additional fair dealing exceptions are warranted.

Orphan works and unavailable works (Recommendation 6.2)

Recommendation 6.2
The Australian Government should enact the Australian Law Reform Commission recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.

Response

The Australian Film & TV Bodies would support a well-designed system that would address the issue of true orphan works to facilitate obtaining clearances for their use. Importantly, such a system would need to narrowly define permissible uses, and would not apply to "out-of-commerce" works or works that rightsholders choose not to make available.

[51] Film & TV Bodies Submission to Draft Report, p 17; Film & TV Bodies Submission to Final Report of ALRC Inquiry Into Copyright and the Digital Economy, p 2.

Rationale and Impact

An effective orphan works system would enable relevant works to be accessed after a reasonably diligent search for the rights holder had been conducted, the rights holder had not been found, and as far as reasonably possible, the work was clearly attributed to the author. The Australian Film & TV Bodies would support engagement with relevant stakeholders including libraries and archives to develop such a scheme.

IP exception to competition law in s51(3) (Recommendation 15.1)

Recommendation 15.1
The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) at the same time as giving effect to recommendations of the (Harper) Competition Policy Review on the per se prohibitions.
The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

Response

The Australian Film & TV Bodies oppose this recommendation on the basis that no evidence has been provided to suggest there is a problem that needs to be solved.

Rationale and Impact

There is no evidence that the existence of section 51(3) harms consumers. The Commission has failed to identify any evidence supporting the need to remove section 51(3). The only asserted reasons given by the Commission are that 'the benefits to removing the exception could rise as the level of licensing and cross licensing increases',[52] and allow the ACCC greater power over the copyright sector. These presumptive assertions are no substitute for evidence.

Section 51(3) works well by ensuring that competition law does not undermine the licensing terms in exclusive license arrangements. Exclusive licensing arrangements for an individual copyrighted work by their very definition cannot be anti-competitive, given that copyright law only protects that specific expression of an idea rather than the idea itself and exclusively confers rights on the copyright owner. Exclusive licenses, and the rights of an exclusive licensee, are given special recognition and status under the Copyright Act.[53] Moreover, exclusive licensing plays a vital role in commercial practice to ensure that investors in exploitation by exclusive licensees are protected from infringement, which would undermine the value of the assets in which the investments have been made. Section 51(3) ensures that copyright owners have certainty when licensing their works and subject matter, without having to determine whether there is the potential for "substantial lessening of competition" by virtue of the copyright license. The Law Council of Australia, the Copyright Council of Australia and the Business Council of Australia provide a compelling case to support the maintenance of s51(3).[54] There are

[52] Inquiry Report, p 443.
[53] *Copyright Act 1968* (Cth), ss 119 and 120.
[54] Draft Report, p 392.

inevitably transaction costs associated with having to consider whether competition law provisions apply, as the earlier NCC Review recognised and accepted.[55]

Copyright owners are still subject to competition law. Section 51(3) does not exempt IP arrangements from misuse of market power claims under s46 of the CCA. A copyright owner that seeks to misuse its market power will be exposed to the full effects of the CCA, whether or not s51(3) exists, which ensures that IP rights are not used inappropriately. Section 46 has recently been amended to broaden its reach to conduct that has the "likely effect" of lessening competition (beyond the former provision that required proof of actual "effect." There have been no cases involving successful prosecutions of copyright owners under s46, which strongly suggests that copyright owners have not been identified to be misusing any market power they have.

Restricting contractual freedom to issue exclusive licenses is likely to undermine Australia's international obligations. This would risk impinging on Australia's obligations under the Australia-US Free Trade Agreement and Australia's potential commitments in the TPP (to the extent that they will be pursued in the face of the withdrawal of the US from the TPP), each of which require Australia to provide contractual freedom for copyright holders to transfer their rights. It is not surprising that the Australian Government has on multiple previous occasions resisted enabling the ACCC to intervene in IP licensing. The repeal of s51(3) is a poor policy response that should not be pursued.

A coherent and integrated cross Government approach to IP Policy (Recommendation 17.1)

Recommendation 17.1
The Australian Government should promote a coherent and integrated approach to IP policy by:

- establishing and maintaining greater IP policy expertise in the Department of Industry, Innovation and Science
- ensuring the allocation of functions to IP Australia has regard to conflicts arising from IP Australia's role as IP rights administrator and involvement in policy development and advice
- establishing a standing (interdepartmental) IP Policy Group and formal working arrangements to ensure agencies work together within the policy framework outlined in this report. The Group would comprise those departments with responsibility for industrial and creative IP rights, the Treasury, and others as needed, including IP Australia.

Response

The Australian Film & TV Bodies support the permanent coordination of IP policy suggested across Government departments, and suggest that any such coordinating group should necessarily develop a coordinated copyright policy.

[55] National Competition Council, "Competition Policy Review - National Competition Council submission on the issues paper" (May 2014) <http://competitionpolicyreview.gov.au/files/2014/06/NCC.pdf>.

Rationale and Impact

There is currently no coordinated copyright policy amongst Australian Government departments, leading to declining prioritisation of copyright protection, reduced funding for enforcement and no place currently for copyright in the Government's innovation agenda. A permanent coordination of IP law policy is required to champion IP as a critical element of the Australian policy framework and to coordinate responses from departments and agencies. This could include the appointment of a special advisor on intellectual property matters (as has already occurred for cyber security). These steps would significantly improve the enforcement of copyright in Australia.

Guidelines for DFAT in negotiating IP provisions in international treaties (Recommendation 17.2)

Recommendation 17.2
The Australian Government should charge the interdepartmental IP Policy Group (recommendation 17.1) and the Department of Foreign Affairs and Trade with the task of developing guidance for IP provisions in international treaties. This guidance should incorporate the following principles:

- avoiding the inclusion of IP provisions in bilateral and regional trade agreements and leaving negotiations on IP standards to multilateral fora
- protecting flexibility to achieve policy goals, such as by reserving the right to draft exceptions and limitations
- explicitly considering the long-term consequences for the public interest and the domestic IP system in cases where IP demands of other countries are accepted in exchange for obtaining other benefits
- identifying no go areas that are likely to be seldom or never in Australia's interests, such as retrospective extensions of IP rights
- conducting negotiations, as far as their nature makes it possible, in an open and transparent manner and ensuring that rights holders and industry groups do not enjoy preferential treatment over other stakeholders.

Response

The Australian Film & TV Bodies oppose the recommendation of such guidelines to a coordinating group that has not yet been formed. This step is premature. Many of these principles are based on the Commission's misunderstanding of the nature and intended operation of copyright as identified throughout this submission, and the imposition of such principles on DFAT would substantially limit Australia's ability to negotiate in international fora.

Any new centrally coordinated group should provide guidance on a list of copyright principles in consultation with stakeholders, as noted directly above, before any recommendations covering all of IP should be developed.

We would support the Australian Government's position in response to the Senate hearing.[56] As the Commission observes, the Australian Government chose not to accept any of the Senate Report recommendations on consultation and transparency and instead identified that:

> *"Australia's existing treaty making system is working well and is sufficiently flexible to accommodate the different approaches needed for the wide variety of treaties to which Australia becomes a party. The existing system allows for extensive consultations and enables briefing of stakeholders where appropriate."* (Australian Government 2016a, p. 1).

Advocating internationally for review of the TRIPS Agreement and rebalancing copyright scope and term (Recommendations 18.1 and 18.2)

Recommendation 18.1
The Australian Government should:

- pursue international collaborative efforts to streamline IP administrative and licensing processes separately from efforts to align standards of IP protection. In so doing, it should consider a range of cooperative mechanisms, such as mutual recognition
- use multilateral forums when seeking to align standards of protection.

Recommendation 18.2
The Australian Government should play a more active role in international forums on intellectual property policy — areas to pursue include:

- calling for a review of the TRIPS Agreement (under Article 71.1) by the WTO
- exploring opportunities to further raise the threshold for inventive step for patents
- pursuing the steps needed to explicitly allow the manufacture for export of pharmaceuticals in their patent extension period
- working towards a system of eventual publication of clinical trial data for pharmaceuticals in exchange for statutory data protection
- identifying and progressing reforms that would strike a better balance in respect of copyright scope and term.

Response

The Australian Film & TV Bodies oppose these recommendations.

Rationale and Impact

The Commission's recommendation to 'streamline IP administrative and licensing processes separately from efforts to align standards of IP protection' is likely to conflict with the Commission's recommendation in the previous chapter to develop a centralised IP policy and would, in effect, amount

[56] Inquiry Report, pp 520-523.

to policy that would isolate Australia from like-minded countries seeking to enter into 21st century trade agreements. This would place Australia's creators at a serious disadvantage in comparison to their overseas counterparts.

Although the Commission appears to have recognised the force in criticisms made regarding its suggestion in its Draft Report that Australia seek to renegotiate and walk back from its international commitments,[57] it has not disposed of its recommendations based on these flawed attacks. The Commission should abandon any recommendation that would involve Australia conducting itself in a way that is not compliant with its international obligations, let alone seeking to step away from those obligations.

Safe harbour scheme (Recommendation 19.1)

Recommendation 19.1
The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.

Response

In adopting this recommendation the Productivity Commission has essentially advocated for the draft amendment to safe harbours set out in Schedule 2 from the Copyright Amendment (Disability Access and Other Measures) Bill.

The Australian Film & TV Bodies oppose this recommendation on the basis that it does not address issues in Australia's current safe harbour law and fails to set out the responsibilities that this expanded group of online service providers would need to comply with in order to obtain safe harbours. Accordingly, the Australian Film & TV Bodies recommend that the Australian Government remove Schedule 2 from the Copyright Amendment (Disability Access and Other Measures) Bill altogether. The safe harbour sections are unrelated to the other meritorious proposals in the Bill concerning disability access (including ratification of the Marrakesh Treaty) and simplification of the educational statutory license scheme. The policy justifications for those other proposals should allow them to proceed without delay.

In addition, the Australian Film & TV Bodies recommend that there be a focused and timely review of Australia's safe harbour scheme, which addresses key questions set out below, to ensure it can be effective and relevant in the 21st century.

Background

Australia's safe harbour scheme came into effect in 2005, in compliance with the AUSFTA.[58] In cases in which ISPs could be found liable in court for authorising copyright infringement on their services, the

[57] Film & TV Bodies Submission to the Draft Report, p 24.
[58] Part V Division 2AA of the *Copyright Act 1968* (Cth). *Australia-US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('*AUSFTA*').

safe harbour scheme limits the remedies available against them, in particular ensuring they will not be liable for monetary damages.[59] **ISPs enjoy the benefit of safe harbours on the condition that they take certain steps to minimise copyright infringement**, including having their own policy for taking down infringing content once informed about it, and complying with any relevant industry codes (although no relevant codes are currently in place).[60]

Rationale and Impact

Australia's current safe harbour scheme fulfils Australia's international obligations under the AUSFTA.

The Commission seeks to justify the expansion of the copyright safe harbours on the basis that it would be "consistent with Australia's international obligations." This is not correct. The AUSFTA allows for a degree of variation in the safe harbour schemes between the two countries. When the Australian Government introduced the package of reforms to fulfill Australia's obligations under the AUSFTA,[61] rather than importing the uncertain concept of "service providers" from the US, the Australian Government determined it would be appropriate to limit the availability of safe harbours to "carriage service providers", a term clearly defined and subject to regulations under Australian law.[62] "Carriage service provider"[63] was considered to be a "suitable and technologically neutral term", as the Attorney-General's Consultation Paper titled *"Revising the Scope of the Copyright 'Safe Harbour Scheme'"* (October 2011) acknowledged. Further, the US Government has never raised this subject as an AUSFTA issue in the last 11 years, despite numerous platforms available through which they could do so.[64]

The Australian Government has already conducted three previous reviews of the safe harbour scheme – in 2009, 2011 and 2014, and following each review the definition of carriage service provider was not amended. Accordingly, compelling new grounds, supported by evidence, would be needed justify any statutory change at this point. No new grounds or evidence have been advanced to justify the proposal to expand the safe harbours.

The proposal does not solve existing problems with the legislation, especially concerning the scope of authorization

The need for safe harbour protections only arises if a CSP is found liable for having authorised infringements of copyright by others, such as infringements by users of an internet service.[65] However, the prevailing legal authorities (including the *Roadshow vs iiNet* case)[66] leave great uncertainty about the criteria for finding liability for authorising copyright infringement through the provision of an

[59] Section 116AG of the *Copyright Act 1968* (Cth).
[60] Section 116AA(1) of the *Copyright Act 1968* (Cth) provides that 'The purpose of this Division is to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers. A carriage service provider must satisfy certain conditions to take advantage of the limitations."
[61] There is no other Australian treaty obligation relevant to the safe harbours. Safe harbours do not form part of the WCT or any other treaty to which Australia is a party. They do not form part of any other global norm.
[62] Section 87 of the *Telecommunications Act* defines CSPs as entities that satisfy a range of requirements including under s128 of the *Telecommunications (Consumer Protection and Service Standards) Act* 1999, that a CSP must enter into a Telecommunications Industry Ombudsman scheme that is published and searchable by members of the public.
[63] Defined in s10 of the *Copyright Act 1968* (Cth) adopts "the same meaning as in the *Telecommunications Act* 1997", and applies to ISPs.
[64] For example, the US Trade Representative has never raised any concerns in its Special 301 Report, an annual report identifying concerns about aspects of foreign intellectual property laws which create trade barriers for US companies, even though there is precedent for it doing so in relation to internet service provider liability (Chile was watchlisted for this reason in the 2009 Special 301 Report, and this issue was listed as one basis for the watchlisting of the Ukraine in the 2015 Special 301 Report).
[65] *Copyright Act 1968* (Cth), ss 101, 101(1A
[66] *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23.

internet service. This uncertainty undermines the policy objective behind the scheme to ensure that CSPs do their part to minimise copyright infringement on their services. Any attempt to make Australia's safe harbours scheme effective for the 21st century should therefore consider the extent to which authorisation law also needs to be amended.

The proposal addresses only one aspect of the safe harbour scheme, and as such will not "improve the system's adaptability as new services are developed."[67]

When an Exposure Draft containing the proposal recommended by the Commission was released on December 23, 2015, it was accompanied by a press release which stated: "The Bill seeks to…ensure that search engines, universities and libraries have 'safe harbour' protection if they *comply with conditions aimed at reducing online copyright infringement*."[68] [emphasis added]

Despite this, the proposal in the Exposure Draft does not mention what "*conditions aimed at reducing online copyright infringement*" the new class of "service providers" would need to comply with. Because the proposal would expand the safe harbour to certain parties that have significant control over online infringement, *any amendments to the safe harbour law should clearly set out what responsibilities these additional intermediaries have to limit online piracy on their platforms and through their services in order to be eligible for the safe harbour*.

Questions for a focused and timely review

There is an urgent need for a proper policy review process regarding the existing safe harbour framework. Specific questions that should be addressed include:

1. What types of entities should or should not be able to rely on the safe harbours, and why?
2. Beyond considering whether the definition of those eligible for safe harbours should be expanded, what other or associated aspects of copyright law – including to the safe harbour scheme – would need to be amended to make the safe harbour scheme effective in 2017?
3. If the class of entities able to rely on safe harbours were to be expanded, what conditions should those entities covered have to meet to qualify for safe harbours, and why? What reasonable steps would these entities be required take to limit infringement in order to gain the benefit of the safe harbours?
4. Is there evidence about the functioning of the safe harbour scheme in Australia or elsewhere, including any relevant schemes currently under review, that Australia should take into consideration in its review of the Australian safe harbour scheme?

[67] Inquiry Report, p 567.
[68] Australian Copyright Council, "Government releases exposure draft of Copyright Act amendment bill" <https://www.copyright.org.au/acc_prod/ACC/News_items/2015/Government_releases_exposure_draft_of_Copyright_Act_amendment_bill.aspx>.

Federal Circuit Court Reform (Recommendation 19.2)

Recommendation 19.2
The Australian Government should introduce a specialist IP list in the Federal Circuit Court, encompassing features similar to those of the United Kingdom Intellectual Property Enterprise Court, including limiting trials to two days, caps on costs and damages, and a small claims procedure.
The jurisdiction of the Federal Circuit Court should be expanded so it can hear all IP matters. This would complement current reforms by the Federal Court for management of IP cases within the National Court Framework, which are likely to benefit parties involved in high value IP disputes.
The Federal Circuit Court should be adequately resourced to ensure that any increase in its workload arising from these reforms does not result in longer resolution times.
The Australian Government should assess the costs and benefits of these reforms five years after implementation, also taking into account the progress of the Federal Court's proposed reforms to IP case management.

Response

Having advocated for such reforms in our previous submissions, the Australian Film & TV Bodies strongly support the Commission's recommendation that additional resources be provided to the Federal Circuit Court (FCC) to expand its role in copyright enforcement and access to it by rightsholders. However, the default scale for costs applied to IP matters in the FCC, which currently discourages rightsholders from bringing cases in the FCC, should be amended to presume the application of the Federal Court's more generous cost recovery regime (as already occurs for bankruptcy and insolvency matters brought before the FCC).

The Australian Film & TV Bodies propose that directions be given to the court to ensure that the FCC has procedures and processes to efficiently deal with copyright cases brought in the FCC. This could include a direction that the FCC have a list of judges with expertise and interest in IP matters (as has now occurred in the Federal Court under its new procedures adopted in 2016).[69]

Rationale and Impact

How does the FCC currently function?

The FCC is already a preferred jurisdiction that has streamlined steps which enable it to reach a hearing in a case more quickly and at a lower cost.[70] There is a default scale limiting recoverable costs for matters brought in the FCC.[71] In practice this disincentivises copyright owners (including small creators) from filing applications in the FCC because they run a serious risk that they will only recover costs at a scale that is inappropriate for copyright matters. The current default scale bears no relationship to the costs of bringing a copyright case given the complexity of the subject matter and the minimum steps required to prove copyright subsistence, ownership and infringement. As the Commission has

[69] Federal Court of Australia Rules 2011, r 34.3.
[70] Federal Circuit Court Rules 2001, r 1.03.
[71] Federal Circuit Court Rules 2001, r 21.10.

acknowledged, the costs of enforcement of IP include the need to prove the existence of the relevant rights. The current FCC scale fees provide no allowance for the costs of these steps (even taking advantage of provisions of the Copyright Act that assist in proof of subsistence and ownership). This has been a disincentive for rightsholders seeking to bring cases in the FCC, and encourages them to turn to the Federal Court and Supreme Courts where a more generous recovery of costs is permitted.[72]

There is no evidence that the current unlimited cap on damages that may be awarded by the FCC produces negative or unwarranted outcomes, and there are compelling reasons for not capping such costs. It can be difficult to predict the recoverable damages in any copyright enforcement case before discovery and disclosures are made by the alleged infringer.

There are also non-compensatory components to a damages award, such as "additional" damages under s115(4), that are entirely within the discretion of the Court and difficult to pre-estimate. Such damages also involve an evaluation of factors including the Court's perception of the need to punish an infringer and to deter similar infringements by others in view of the nature of the conduct of the infringer (including their conduct since the infringement took place and in defence of the case).[73]

Mediation and alternative dispute resolution are already available and widely used in the Court. The simplification of Court documents would improve the processes and timeliness of hearings. Currently there is a tendency for parties to resort to a form of "pleading" even in the case of a small claim.

What should be amended?

Successful litigants should be able to recover a fair proportion of costs as if they had filed in the Federal Court or a Supreme Court, to reflect the nature of the work involved in bringing copyright cases. This is already the case with bankruptcy and insolvency matters that come before the FCC.

A direction should be given within the FCC concerning the conduct of copyright matters, including priority given to them, resourcing to facilitate these cases and the development of a list of judges with expertise and interest in IP matters.

[72] *Copyright Act 1968*, s 115(4).
[73] *Tylor v Sevin* [2014] FCCA 445.

Conclusion: Where to next?

The fundamental flaws in the Commission's understanding of copyright law, as well as the actual facts of how copyright operates in practice (availability, affordability, impact of the digital age to date on the growth of creative industries), have resulted in a set of recommendations that unfortunately encourage the polarisation of various stakeholders' positions. We believe the Government has an important role to play in reinvigorating the goodwill of all stakeholders to create a platform in which copyright reform can be achieved in the best interest of all stakeholders.

In doing so the Commission has failed to set the scene for a constructive discussion between all stakeholders interested in copyright reform. In the least, there are reasonable concerns to maintain or strengthen copyright protection raised by the creative sectors that deserve a balanced discussion, which the Productivity Commission's approach has not facilitated. Such a discussion has to be rooted in a real, practical understanding of how the copyright industries actually function.

Where to next?

Rather than continuing to debate unfounded claims raised by the Productivity Commission, we believe the Government would be better served by focusing on copyright reforms in the following areas for which there is broad support across stakeholders:

- **Disability access:** After Schedule 2 is removed, the meritorious proposals in the Copyright Amendment (Disability Access and Other Measures) Bill concerning disability access and Australia's accession to the Marrakesh treaty should be allowed to proceed without delay.
- **Educational statutory licensing scheme:** Amendments related to the simplification of the educational statutory licensing scheme in the above Bill.
- **Orphan works:** The development of a scheme for making orphan works available based on a diligent search process followed by a limited and specified scope for use. The Australian Film & TV Bodies would be interested in participating in the development of an appropriately framed orphan works scheme.

It is vital that the Government take steps to ensure that markets for copyrighted materials can function without the severe market distortion caused by online infringement.

The Australian Film & TV Bodies appreciate this opportunity to provide our views in response to the Inquiry Report. We would also welcome the chance to participate in any future consultations, roundtables or formal hearings that are convened.

Appendices

Appendix A: Full Descriptions of members of the Australian Film & TV bodies

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and the Independent Cinemas Association of Australia (ICAA). These associations represent a large cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[74]

a) The **ASA** represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on protecting and promoting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

b) **AHEDA** represents the $1.1 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 13 members and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel and Telstra.

c) The **MPDAA** is a non-profit organisation formed in 1926 by a number of film distribution companies in order to promote the motion picture industry in Australia. It represents the interests of motion picture distributors before Government, media and relevant organisations, providing policy and strategy guidance on issues such as classification, accessible cinema, copyright piracy education and enforcement, and industry codes of conduct. The MPDAA also acts as a central medium of screen-related information for members and affiliates, collecting and distributing film exhibition information relating to box office, admissions and admission prices, theatres, release details and censorship classifications. The MPDAA represents Fox Film

[74] Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Access Economics Pty Limited <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf>, p iv.

Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros. Entertainment Australia.

d) **NACO** is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 71st year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as the prominent independent exhibitors Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners which together represent over 1400 cinema screens.

e) **AIDA** is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S. film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

a) **ICA** develops, supports and represents the interests of independent cinemas and their affiliates across Australia. ICA's members range from single screens in rural areas through to metropolitan multiplex circuits including Reading, Palace and iconic cinemas such as the Hayden Orpheum and Cinema Nova. ICAA's members are located in every state and territory in Australia, representing over 650 screens across 159 cinema locations.