



# Response to the Productivity Commission Draft Report dated April 2016: Intellectual Property Arrangements

**Joint Submission from the Australian Film/TV Bodies**  
**3 June 2016**

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## 1 Introduction

1. 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**) (collectively, the **Australian Film/TV Bodies**), are pleased to make this submission in response to the Productivity Commission's Draft Report *Intellectual Property Arrangements* (the **Draft Report**).
2. 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:<sup>1</sup>
  - (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 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 Event Hospitality & Entertainment Limited, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as the prominent independent exhibitors Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis

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<sup>1</sup> Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Access Economics Pty

Cinemas, Palace 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).
  - (f) **ICAA** is a not for profit industry association that develops, supports and represents the interests of independent exhibitors and their affiliates across Australia. ICAA's members range from single screens in rural areas through to metropolitan multiplex circuits. ICAA's members are located in every state and territory in Australia representing over 650 screens across 160 cinema locations.
3. All of the Australian Film/TV Bodies and their members have a vital interest in a strong and effective protection of their copyright assets in Australia and the ability to enforce their copyright against threats of infringement, particularly online infringement. Online copyright infringement presents one of the biggest challenges to the film and television industry's participation in the Australian digital economy, and its contribution to the broader Australian economy. It also prevents legitimate online business models for the distribution of films and television programs from reaching their full potential.

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## 2 General comments

4. The Australian Film/TV Bodies are disappointed with the Draft Report and the results of the Commission's investigation. The 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".<sup>2</sup> However, having had the opportunity to thoroughly investigate the Australian IP system and to come up with positive and well-considered recommendations, the Draft Report fails to live up to that expectation.
5. Language used in the Draft Report (such as the use of the heading "Copy(not)right" on p16) appears to reflect a slanted, superficial and under-informed approach to the subject matter. Many of the problems with the report appear to stem from a misunderstanding, or at least inadequate understanding, of the nature of copyright and the industries, creators and consumers that rely on it to support the creation and dissemination of works. Contrary to repeated assertions made in the Draft Report, copyright neither prevents the dissemination of information nor restricts innovation. Claims in the Draft Report that copyright impedes innovation are exaggerated and hypothetical. Unfortunately, the Commission begins its analysis on the basis of a flawed and unbalanced conception of copyright that permeates through the analysis into its draft findings and recommendations. To undo the effect of this, we recommend that the drafters review the core purposes of copyright and revisit its draft findings and recommendations.
6. It is well established under Australian law that copyright's primary purpose is to reward creators, and (by reason of that reward) thereby encourage them to create.<sup>3</sup> The right to materially benefit flowed

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<sup>2</sup> Productivity Commission, *A Quick Guide to the Productivity Commission* (2014), p 2  
<<http://www.pc.gov.au/about/productivity-commission-quickguide-2014.pdf>>.

<sup>3</sup> The preamble to the *Statute of Anne 1710* (UK) 8 Anne, c. 19 begins "*Whereas printers, booksellers and other persons have of late frequently taken the liberty of printing, reproducing and publishing or causing to be printed, reprinted and published books and other writings without the consent of the authors of proprietors of such books and writings, to their great detriment and too often to the ruin of them and their families; for preventing such practices for the future and for the encouragement of learned men to compile and write useful books ...*"

from a creation being a form of property resulting from the “labour and invention” of an author.<sup>4</sup> The reward for creation of such property has been the consistent overriding rationale for copyright law for as long as copyright has been recognised in English and Australian law. This was definitively recognised by major Australian reports on Copyright, such as the 1959 Spicer Committee that described the “primary end” of copyright as *being to give to the author of a creative work his just reward for the benefit he has bestowed on the community*<sup>5</sup> and the Franki Committee, which agreed with this statement of the “purpose of copyright” in 1974.<sup>6</sup> In 2009 the High Court observed and confirmed the “longstanding theoretical underpinnings of copyright”:<sup>7</sup>

*“concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.”*

The observations in paragraph 6 above remain true today, perhaps even more pointedly in the digital age, and must undergird the copyright system if Australia wishes to promote itself as an innovative nation with a flourishing digital economy.

7. Other problems in the Draft Report appear to stem from a bias against copyright and a preparedness to uncritically accept the submissions of those who are critical of copyright and creative industries that depend on it. These critics all too frequently bring an entirely theoretical rather than practical perspective to the assessment of IP rights and are often in a position to financially and strategically benefit from diminished IP protection. Despite extolling the importance of evidence-based policy making, time and again the Draft Report acknowledges that there is either no evidence or little evidence that supports its findings and recommendations. This leaves the findings and recommendations resting on at best equivocal and at worst non-existent foundations. As they stand the findings and recommendations are unsafe for the Australian Government to rely on.
8. For example, there is *no* evidence that the rise of digital businesses or business models have been impeded by Australia’s IP laws. To the contrary, evidence indicates just the opposite: the list of innovative online platforms that have successfully launched in Australia is extensive and growing – as in other jurisdictions with comparable IP frameworks. Strong IP laws are a part of the framework that allows these businesses – which are dependent on strongly protected copyrighted assets – to flourish in Australia (and overseas). The technology sector is thriving in Australia under the current copyright framework. In fact, international digital media platforms and technology-driven companies<sup>8</sup> perform well in Australia precisely because we have robust copyright laws. A 2015 study employing the methodology endorsed by World Intellectual Property Organization (**WIPO**) experts/economists confirms that copyright (under the present copyright regime) contributes 7.1% to Australia’s gross domestic product (**GDP**).<sup>9</sup>
9. The Commission has a legislative mandate that it “must” have regard to the “need for Australia to meet its international obligations and commitments”.<sup>10</sup> The Terms of Reference for this inquiry specifically required the Commission to have regard to “Australia’s international arrangements, including

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<sup>4</sup> Walter Arthur Copinger, *The Law of Copyright in Works of Literature and Art: Including that of the Drama, Music, Engraving, Sculpture, Painting, Photography and Ornamental and Useful Designs* (Stevens and Haynes, 1<sup>st</sup> ed, 1870) ch 1.

<sup>5</sup> Report of the Copyright Law Review Committee, 1959 to “Consider what alterations are desirable in the Law of the Commonwealth” (‘*Spicer Committee*’) [13].

<sup>6</sup> Copyright Law Committee, Report on Reprographic Reproduction (1976) (‘*Franki Report*’) [1.05].

<sup>7</sup> *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, [24]–[25] (French CJ, Crennan and Kiefel JJ).

<sup>8</sup> See, e.g., John McDuling, ‘What Netflix’s meteoric rise means for Australia’, *The Sydney Morning Herald* (Online), 17 July 2015 <http://www.smh.com.au/business/what-netflixs-meteoric-rise-means-for-australia-20150717-giedtk.html>; Search Engine Market Share 2015 by Country – Infographic (May 6 2015) Jimmy Data <<https://jimmydata.com/blog/search-engine-market-share-country-infographic/>>.

<sup>9</sup> PricewaterhouseCoopers, *The Economic Contribution of Australia’s Copyright Industries 2002 – 2014* (2015) PricewaterhouseCoopers at the request of the Australian Copyright Council <[http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/pwc\\_report\\_2014\\_australia.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/pwc_report_2014_australia.pdf)>.

<sup>10</sup> *Productivity Commission Act 1998* (Cth) s 8(19j).

obligations accepted under bilateral, multilateral and regional trade agreements to which Australia is a party". It is disturbing that the Draft Report encourages the Australian Government to adopt a stance that will put the nation in breach of both the letter and the spirit of its treaty obligations. Adoption of the Draft Report's recommendations would also place the country well outside the mainstream of international copyright law developments and best practices. For example, recommending that Australia seek to reduce copyright term, knowing that this is inconsistent with well-established global norms, is both counterproductive and irresponsible, as such a move would erode incentives to create, diminish Australia's productivity, and permit countries outside Australia to discriminate against Australian creators at a time when Australia should be seeking to improve its trade balance in this area.<sup>11</sup>

10. The criticisms levelled by the Commission of the previous processes of development of copyright, that there has been "*no transparent evidence-based policy analysis demonstrating the need for, or quantum of, new rights*" (i.e., Finding 4.1), are wrong. Each time that the copyright regime was expanded materially in the last 15 years, it has been the result of careful, transparent and consultative policy-making, largely driven by the need for Australia to implement national laws that brought it into line with its international treaty obligations. These changes are wholly consistent with the underlying purpose of copyright – to incentivise content creation and encourage its dissemination in an evolving marketplace. This is borne out by the history of major amendments to the *Copyright Act*, including: the Digital Agenda reforms<sup>12</sup> (introducing the right of communication to the public in s101(1A), the s112E facilities defence, and anti-circumvention provisions) followed the Discussion Paper, *Copyright Reform and the Digital Agenda* (July 1997) and the recommendations of the Copyright Convergence Group (1994); The introduction of moral rights<sup>13</sup> followed the 1994 Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators* and relevant consultation,<sup>14</sup> while the introduction of the Div2AA "safe harbours" gave effect to the Australia-United States Free Trade Agreement (**AUSFTA**).<sup>15</sup> The consultative and policy driven approaches to enhancing copyright protections, where appropriate, cannot be dismissed simply because the Commission did not play a role in them.
11. The framework developed by the Commission for assessing the impact of copyright law and policy is also incompatible with any fair assessment of copyright law and its operation. It is erroneous for the Commission to claim that an effective IP system seeks to "rectify the inherent problems in the supply and use of ideas".<sup>16</sup> Ideas are not protected by the copyright system, only their expression. As Courts have repeatedly held, one expression of an idea does not preclude another expression of the same idea by a different creator. Similarly, framing the evaluation in terms of an "additional" requirement (whether additional work are created "but for" the IP system) has never been a feature of policy development in copyright law, nor should it be. Dissemination is not the only goal of copyright law.<sup>17</sup>
12. The notion of "overprotection" of IP referred to in the Draft Report reveals another failure of the Commission to understand the subject matter it was charged with reviewing, and is further evidence

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<sup>11</sup> For example, reducing term, even to the Berne minimum, would permit those countries applying the 'Rule of the Shorter Term' to discriminate against Australian works in those markets, denying much-needed equal treatment for our creative sector in an increasingly competitive environment.

<sup>12</sup> Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth) 1): 'The reforms are based largely on the proposals in the Discussion Paper, Copyright Reform and the Digital Agenda, which was released in July 1997. The proposals in the Discussion Paper built upon the recommendations made in the 1994 report of the Copyright Convergence Group, which, amongst other things, recommended the introduction of a broadly based right of transmission to the public'. See also Supplementary Explanatory Memorandum).

<sup>13</sup> Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth) 1): 'The Bill gives full and proper effect to Australia's obligations under article 6bis of the Berne Convention for the Protection of Literary and Artistic Works'.

<sup>14</sup> The consultation resulted in the withdrawal of the Copyright Amendment Bill 1997 (Cth), which was then amended in response to comments made about the exposure draft of the Bill.

<sup>15</sup> *Australia-US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) (**'AUSFTA'**).

<sup>16</sup> Cf Draft Report, 58.

<sup>17</sup> Cf Draft Report, 59.

that the report is infused with an underlying anti-copyright bias. Nowhere does the Draft Report acknowledge the problem of free-riding that would occur if creators were unable to protect their copyright works from immediate uncompensated infringement by competitors. A system of that type – that copyright law expressly prevents – would completely disincentivise creators from creating any works with the expectation of financial return.

13. The Draft Report is also out of touch with the direction of international protection of IP. International IP law (including copyright law) has developed over the years through international consensus that results in obligations agreed in international treaties entered into by signatories, such as Australia, that are then reflected in domestic law. This is a highly legitimate and valid process for policy development based on an open international process involving the sharing of ideas between many countries with varying interests, which ensures an extremely high degree of negotiations, scrutiny and examination of the impact that treaty provisions may have when reflected in national laws. Before countries become signatories to these treaties, they contribute to the treaty text and decide based on their circumstances whether to become parties by evaluating the impact of the laws on them. To suggest that the “protections afforded to such innovations may not be economically sound” and that “an ideal IP system would consider the scope of protection more broadly in other jurisdictions between granting further protections here” reveals that the Commission has either misunderstood or ignored the sources of and processes for the development of international arrangements on IP or of domestic IP laws.<sup>18</sup>
14. The Commission's views on the measurement of valuation of copyright to the economy are also concerning. The Commission appears to reject market value as a measure of the value of copyright, thereby ignoring the value of sales of copyright products and services and seeking to define market value in terms of efficiency of the allocation of resources. This is the wrong way to conduct any economic measure of IP asset value. So too is relying for direction on the writings of academics (such as Rufus Pollock) whose highly controversial and extreme views, such as those on copyright term reduction, have been rejected throughout the world.<sup>19</sup> The contributions copyright-based industries make to Australia's economy are well documented through the 2015 WIPO-endorsed Australian Copyright Council (**ACC**) report, *The Economic Contribution of Australia's Copyright Industries 2002 – 2014*. This important study demonstrates the following:
  - i) In 2014, the total copyright industries in Australia contributed \$111.4 billion to the Australian economy, or 7.1% of GDP, exceeding the manufacturing and health care sectors.
  - ii) In 2014, the total copyright industries in Australia employed just over 1 million people, which constituted 8.7 per cent of the Australian workforce, with real average wages for people employed in the copyright industries being \$68,960 in 2013-14 per employee, higher than average wages in the rest of the economy.

For the motion picture and television sectors alone, the 'ASA Economic Contribution Report' (attached) demonstrates the important contribution of just these sectors, employing over 46,000 people and contributing \$5.8 billion to the GDP. These contributions result in a strong creative industry in Australia which reflects our culture. The recommendations of the PC have the potential to damage that industry and, ironically, could result in homogenisation of creative product received by Australian consumers.

15. The following are submissions by the Australian Film/TV Bodies addressed to a range of specific issues in the Draft Report, against the background of the general criticisms referred to above.

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<sup>18</sup> Draft Report, 60.

<sup>19</sup> Draft Report, 38.



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### 3 Copyright term: Draft Finding 4.2

*“[S]cope exists to collaborate with other countries to seek mutual amendment to institute more consumer-favourable copyright laws, including shorter protection terms of between 15-25 years after creation of new works.”*

16. The Australian Film/TV Bodies disagree with this draft finding 4.2.

#### 3.1 Australia’s international obligations

17. The Draft Report states that.<sup>20</sup>

*“While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation, considerably less than 70 years after death”.*

18. It is difficult to understand that statement given existing global norms, and Australia’s existing international obligations regarding term of copyright protection. As the Draft Report acknowledges, the “minimum coverage and duration of protection has long been governed by international treaties”, including the **Berne Convention**<sup>21</sup> that was signed in 1886 and that “increasingly IP standards are governed by bilateral and regional trade agreements.”<sup>22</sup> These acknowledgements are incontestable and important.
19. Given that the Commission has a legislative mandate that it “must” have regard to the “need for Australia to meet its international obligations and commitments”<sup>23</sup> and was subject to Terms of Reference specifically requiring the Commission to have regard to “Australia’s international arrangements, including obligations accepted under bilateral, multilateral and regional trade agreements to which Australia is a party”, the Commission should have recognised that seeking to challenge or undermine those international obligations was never within its brief.
20. However this is exactly what the Commission appears to have done. As the Commission is aware, the Berne Convention, to which Australia has adhered for almost a century, mandates a copyright term of at least 50 years for cinematograph works.<sup>24</sup> This minimum standard is reflected in a number of other international instruments to which Australia has acceded, including the WIPO Copyright Treaty (**WCT**)<sup>25</sup> (a Special Agreement under Article 20 of the Berne Convention, which expressly shall not “derogate from existing obligations that Contracting Parties have to each other under the Berne Convention”), which incorporates the Berne Convention minimum term.<sup>26</sup> Australia’s obligations as a member of the World Trade Organisation (**WTO**) under the TRIPS Agreement (**TRIPS**)<sup>27</sup> also require a term of at least 50 years, and this obligation is enforceable through dispute settlement (which, if Australia was found not to have met its obligations, could result in trade remedies being imposed against it by a complaining WTO member).<sup>28</sup> Australia is required to adopt measures necessary to ensure application of all these treaties under domestic law. So long as these agreements remain

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<sup>20</sup> Draft Report, 117.

<sup>21</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature on 9 September 1886, 1161 UNTS 30 (entered into force 5 September 1887) (**‘Berne Convention’**).

<sup>22</sup> Draft Report, 95.

<sup>23</sup> *Productivity Commission Act 1998*, s 8(19j).

<sup>24</sup> *Berne Convention*, art 7(2).

<sup>25</sup> *World Intellectual Property Organisation Copyright Treaty*, opened for signature 20 December 1996, 36 ILM 65 (entered into force 6 March 2002) (**‘WCT’**).

<sup>26</sup> *WCT*, art 1(4).

<sup>27</sup> Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation, opened for signature 15 May 1994, 1869 UNTS 299 (entered into force 1 January 1995) Annex 1C (*‘Agreement on Trade Related Aspects of Intellectual Property’*) (**‘TRIPS’**).

<sup>28</sup> See, e.g., *TRIPS* art 12 and Marrakesh Agreement establishing the World Trade Organisation, opened for signature 15 May 1994, 1869 UNTS 299 (entered into force 1 January 1995) Annex 2 (**‘Dispute Settlement Understanding’**).

binding on Australia, it cannot enact a shorter term of protection and remain in compliance with its international obligations. Even more, Australia entered into a bilateral free trade agreement with the United States in 2004 that obligates it to adopt a 70-year term of protection for cinematograph works, an obligation it fulfilled by adopting a 70-year term with effect from 1 January 2005 when amendments were made to the *Copyright Act* to give effect to Australia's obligations under the AUSFTA. The AUSFTA epitomises the global trend toward increased terms of protection. By now almost 90 countries, including all developed economies within the OECD, have extended the terms for some or all copyright works beyond the minimum set out in the Berne Convention. The Draft Report's recommendation to drastically shorten the term of protection is swimming against an unstoppable tide. Most lately, a number of other Pacific Rim countries were persuaded, in the recently concluded Trans Pacific Partnership (**TPP**)<sup>29</sup>, to join Australia in extending copyright terms to the evolving global standard of 70 years (or life of the author plus 70 years where applicable). Given the sound public policy to protect authors/creators in the enjoyment of material benefits of their creations for their lives and the lives of their heirs (or the equivalent in the case of films or sound recordings for which a multitude of creators participate in the production of a single work, usually under a corporate entity), inviting policymakers in Australia, as the PC does, to return to 19<sup>th</sup> or even pre-19<sup>th</sup> century terms of protection, defies credulity.<sup>30</sup> Furthermore, a term shorter than 50 years is simply not feasible under existing international obligations and would expose Australia to serious repercussions for violation of its WTO commitments.

### 3.2 Consequences of shortening term

21. There are no countries that have adopted a copyright term of between 15 and 25 years, the duration suggested by the Commission. Given the international norms on copyright terms are far in excess of and moving in the opposite direction from the term proposed by the Commission, the Commission's proposal is deeply flawed and speculative. This outlying recommendation is evidence that the Commission stands considerably outside the mainstream, but also, importantly, that it has fallen significantly short of carrying out its legislative mandate and complying with the TOR. It is also irresponsible for the Commission (particularly as an advisory body to the Australian Government) to recommend that Australia move against its international obligations and global norms, thereby exposing the Australian Government not only to the risk of serious criticism but also to trade enforcement actions. Its position, simply put, undermines its credibility on copyright issues.
22. Were Australia to adopt such a short term it would put itself in breach of its international obligations under the Berne Convention, the WCT, WTO/TRIPS, AUSFTA, and the TPP. The Draft Report contains no analysis of the consequences or costs to its international standing and trade relationships (including the costs of having to defend a dispute at the WTO, plus possible sanctions and retaliation measures being imposed on Australia) in the event that Australia took that step. Even pursuing diplomatic activities to try to advocate a 15-25 year copyright term would damage Australia's international standing on IP matters, not to mention its credibility.
23. Mutually enforced copyright terms throughout the world provide a level playing field for all creators in countries to license and protect their copyright works. Australian creators benefit from this international regime. For example, recent research by Eurodata TV indicated that Australia is now the fifth highest TV programming exporter in the world.<sup>31</sup> Reliance on the relative difference between importation of

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<sup>29</sup> Trans-Pacific Partnership Agreement, signed 4 February 2016, Auckland, New Zealand (not in force) '**TPP**').

<sup>30</sup> Indeed, Minister of Communications and the Arts, Mitch Fifield, indicated that the Australian government has no intention of adopting the PC's recommendation to reduce term of protection. See Senator the Hon Mitch Fifield, Minister for Communications, Minister for the Arts (Cth), 'Conjecture On Copyright Changes Unfounded' (Media Release, 24 May 2016)

<<http://www.mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>>.

<sup>31</sup> Eurodata TV, *February 2016 Newsletter* (2016)<<http://www.mediametrie.com/eurodatatv/pages/february-2016-newsletter.php?p=126&page=224>>; See also Steve Clarke, *US, UK Are World's Top TV Exporters, Australia Shows*

copyright works and export of copyright works – as the Commission appears to have done<sup>32</sup> - is a short-sighted approach that is out of step with the international norms of copyright. Such an approach is a form of trade protectionism. This would be the real effect of trying to shorten the copyright term in Australia in the face of substantially longer terms in our trading partners. In a world in which the Commission acknowledges trade in physical goods is giving way to trade in digital products, it would be unfortunate if Australia was first mover not in IP policy but in trade protection of digital products.

### 3.3 What is the case to shorten copyright term?

24. Leaving aside the irreconcilable international consequences were Australia to shorten its copyright term, or seek to undermine existing international treaties and norms that provide for a substantially longer copyright term, the case made for shortening term in the Draft Report is very weak.
25. The Draft Report explains its reasoning for choosing a term between 15 and 25 years, noting, in its view, that it is “not possible to define terms specific to each given work.” The Commission proposes 15 to 25 years arbitrarily, claiming it is a “period that, on average, created reasonable incentives for creation.” The concept of an “average” term has been explored in the past, for example, in the United States when considering a fixed term of years as opposed to a “life plus” term. The outcome of actuarial analyses found that, in order to properly reward all creators equally, and to meet the public policy objective of providing for the author’s heirs, the “life plus 50” term found its actuarial equivalent in 76 years (this was eventually rounded to “75” years in the 1976 U.S. Copyright Act).<sup>33</sup> The Commission’s proposal, by contrast, has no basis in research or fact. Attempts to calculate the costs of existing longer copyright terms to the Australian economy, by contrast, are neither robust<sup>34</sup> nor easy to quantify.<sup>35</sup> In addition, there is no evidence in the Draft Report of any attempt by the Commission to assess the loss of value to Australian creators and loss of value to overall GDP, were the terms of copyright works reduced in Australia, and, by virtue of application of the Rule of the Shorter Term, in overseas markets (i.e., of the current 7.1% GDP that represents the total copyright industries, analysis should properly focus on how much of that would be lost due to calibrations downward in term of protection). Without an assessment of lost value to the economy, and a true (not speculative) accounting of the cost in terms of trade balance of providing longer terms, the Commission’s proposal cannot be taken seriously. Any credible cost calculation should also estimate the costs of abrogating Australia’s current international obligations, whether under the AUSFTA, TRIPS, or otherwise, including impacts on sectors far removed from those reliant upon copyright.
26. The economic studies relied on by the PC to justify a shorter term are long out of date (e.g. Landes and Posner (2002)), have been discredited (e.g., Pollock (2007)<sup>36</sup>) or have universally been rejected by the international community when considering the term of copyright protection (including in the recent negotiations leading to adoption of the TPP). There is no international support in the accepted research and policy sphere for a shorter term of the form proposed by the Commission.
27. More than 80 countries have protection of 70 years or more for at least some works, including Australia, the U.K., Germany, France, Italy, Belgium, Ireland, Singapore, Mexico, and the United States. In 1993, a European Union (EU) directive instructed EU members to extend their baseline term of copyright for authors by 20 years, to 70 years subsequent to an author's death, and, by application

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*Improvement* (February 24 2016) Variety <<http://variety.com/2016/tv/global/u-s-u-k-tv-exporters-australia-1201713741/>>.

<sup>32</sup> Draft Report, 114.

<sup>33</sup> Abraham Kaminstein, *Supplementary Report of the Register of Copyrights on the General Revision of the US Copyright Law: 1965 Revision Bill* (1965).

*Revision Bill*> pt 6.

<sup>34</sup> Draft Report, 114.

<sup>35</sup> Draft Report, 116.

<sup>36</sup> The methodology used by Pollock based on the US copyright register cannot provide any useful information to guide the copyright regime in Australia that does not have a registration process.

of the Rule of the Shorter Term, EU nations may deny the longer term of copyright to nations that do not provide at least that term. The Canadian Government recently amended its *Copyright Act* to extend the term of protection for performers and makers of sound recordings from its current 50 years to 70 years, and has committed, through the TPP, to extend terms for authors to life plus 70.

28. There is strong evidence and research that supports a 70 year term. Research has identified incentives to harmonise Canada's copyright term to that of its major EU and US trading partners, including cost savings and the avoidance of a likely chilling effect on innovation in Canada given the longer terms of copyright in other nation-states.<sup>37</sup> Dr George Barker of the Australian National University recently published a research paper that reviewed the evidence cited in support of the major arguments against extension of term and identified a number of errors undermining the studies which oppose term extension using accepted economic methodology and current economic thinking.<sup>38</sup> Dr Barker concludes that term extension is likely to have a net positive economic effect first by helping to restore revenues and the incentive to invest in new copyright goods; and second by enhancing incentives to invest in, market, maintain and enhance existing copyright goods. Dr Barker also points out that in the UK and EU debates on extension of term, and in the 2005 Australian debate, the studies cited in opposition of extending term of protection for copyright were considered and rejected by policy makers.

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## 4 Copyright accessibility (geoblocking): Draft Recommendation 5.1

*“The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.”*

29. The Australian Film/TV Bodies oppose Draft recommendation 5.1 and its underlying findings.

### 4.1 Copyright is licensed territorially

30. Film and audio-visual content production is a high risk, yet vital market, enabling production of culturally and linguistically varied works that reflect the diversity of different countries and markets. In practice, the production of film and audio-visual content requires substantial upfront investments – more so than other forms of content; this carries with it significant financial risks. The “outputs” of audiovisual production are essentially prototypes: a film or a TV series whose prospects for success are fraught with uncertainty before consumers have the ability to experience them. There is no sure-fire return on investment: even in a best-case scenario, it can take many years to recoup costs for a successful production. The losses incurred by those that fail to capture market attention can sometimes prove insurmountable. In order to assume and deal with these risks, the financing and distribution of copyright content is routinely done on a territorial basis.

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<sup>37</sup> Kamil Gérard Ahmed, 'A Case For A Longer Term Of Copyright In Canada - Implications Of Eldred V. Ashcroft', (2006) 37 *The Journal of Law of the University of Sherbrooke* 185  
<[https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume\\_37/37-1-ahmed.pdf](https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_37/37-1-ahmed.pdf)>.

<sup>38</sup> George Barker, 'Debunking Common Myths About The Economic Effect of Copyright Term Extensions for Sound Recordings' (Australian National University, 29 April 2015)  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2600769](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600769)>; George Barker, *Debunking Common Myths About Copyright Term Extension for Sound Recordings and Performances: Why Longer is Better* (30 April 2015) IP Osgoode: Intellectual Property Law and Technology Program <<http://www.iposgoode.ca/2015/04/debunking-common-myths-about-copyright-term-extension-for-sound-recordings-and-performances-why-longer-is-better/>>. Errors identified in studies opposing term extension include ignoring the cost of digital piracy; ignoring the free rider problem; assuming that copyright creates a monopoly; assuming deadweight costs due to non-rivalry; modelling errors; and ignoring evidence of effects on consumer prices.

31. Copyright subsists, is licensed and is enforced on a territorial basis. This is a fundamental feature of copyright that distinguishes it from other forms of property and the supply of goods and services. It is a matter of choice for a platform or content provider to acquire or not acquire the licence for a particular work in a given territory. Copyright does not drive these decisions. They are driven by commercial imperatives around catering to different local tastes and preferences and different business models, which copyright facilitates. Freedom to contract is an important consideration when copyright owners are looking to licence their content in different markets.
32. Content owners, including the Australian film/TV bodies, seek to ensure that their works are made available to their distributors and, in turn, their consumers in a way that is most responsive to market needs and capacities, and secure this through the use of geo-filtering. At present, this tends to take place both on a territorial and multi-territorial basis, taking into account cultural/language, regulatory and structural realities. The current legal framework also enables content owners and distributors to respect important market factors such as demands of localization and cultural diversity.
33. Exclusive access to particular content in a market is a valid and legally legitimate business choice. It does not have any anti-competitive impact because a single product or element of content does not constitute a market – there is always competitive content. On the other hand, permitting only worldwide based licensing is likely to be anti-competitive because only large operators with global capital resources are able to acquire the worldwide rights to copyright content. Smaller platforms and newer market entrants would be disadvantaged if they were unable to acquire territory-specific rights, or any other subset of rights for licensing within a limited territory. Such businesses are then required to take steps to protect the limited territorial licenses by use of technical measures to limit out of territory access. Undermining the ability to licence and enforce territorial distribution would also impact the financing of production of works which rely on the pre-sale of distribution rights for particular territories. If a producer cannot guarantee exclusivity for a particular territory, the value of those rights would be greatly diminished and, as a result, many productions would simply never get made.

#### **4.2 The evidence supports the need for territorial differentiation**

34. The majority of independent films are financed by pre-selling territorial rights in exchange for advances, which allow film production to commence. This requires significant risk by Australian distributors who invest millions of dollars on the basis of a script and the talent attached to the film. In this way, territorial rights directly contribute to the diversity and variety of entertainment content we enjoy. It is therefore fair and appropriate that Australian distributors are able to make a return on their significant investment.
35. There is strong evidence from other markets that territorial based licensing practices are required to support the financing of audio visual works. Europe provides an important guide.
  - i) An October 2013 report by Bomsel and Rosay, stated: *“[B]oth the mediatization investment and the patterns of each Member State industry oblige the right holders to design their licensing agreements on a territorial basis. Any other approach would decrease the average revenue per product, and therefore harm producers’ ability to compete on the international market or to finance creation.”*<sup>39</sup>

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<sup>39</sup> Oliver Bomsel and Camille Rosay, *Why territories matter — Vertical restraints and portability in audiovisual media services* (16 May 2013) MINES ParisTech, 5  
<[https://www.letsgoconnected.eu/fileadmin/Events/Brussels\\_2013/Studys/Letsgo2013OB.pdf](https://www.letsgoconnected.eu/fileadmin/Events/Brussels_2013/Studys/Letsgo2013OB.pdf)>.

- ii) An October 2013 Report by Enders Analysis, found that “*territorial licensing of content rights is the bedrock of the European audiovisual sector*”, and “*the prevailing outcome of the arms-length negotiations between rightsholders and licensees*.”<sup>40</sup>
  - iii) A March 2014 CRA Report prepared by DG MARKT, found that “*country-by-country exploitation of audiovisual works (whereby exclusive licences are typically granted to one local distributor per Member State) is mostly deemed to be more profitable*”.<sup>41</sup> It concluded that “*policy changes which reduce the effectiveness of territorial licensing entail a risk of undermining the associated efficiencies which do not appear to be justified by the possibility to reduce the risk of harm*.”
  - iv) A May 2016 Report by Oxera and Oliver & Ohlbaum Report,<sup>42</sup> found that removing territorial restrictions could result in up to 48% less local TV content in certain genres, and 37% less local film production.
36. When the European Commission carried out a public consultation on “Geo-blocking and other Geographically based Restrictions When Shopping and Accessing Information the EU”, it acknowledged that geo-blocking “related to copyright and content licensing practices” was out of scope and in a different category.<sup>43</sup> A recent report submitted to the EU Commission demonstrates that EU copyright producers and consumers would suffer substantially if the European Commission presses ahead with plans for a unified digital market across Europe.<sup>44</sup> The new study says that borderless access to online content throughout the EU’s 28 member states would expose the industry to producer revenue losses up to €8.2 billion (US \$9.3 billion); a drop in content of up to 48% for TV content and 37% for films; and consumer welfare losses of up to €9.3 billion (US \$10.5 billion), with “consumer welfare” defined as a measure of individual benefits derived by people consuming particular goods or services.
37. The commercial freedom to organize the financing and future distribution of each film and TV programme on a territorial basis is indispensable to the financing of films and other forms of audiovisual content, to ensure their best possible promotion and distribution and to secure the recoupment of investments and revenue to help fund the creation of new works and the ability for local distributors to continue investing in film releases in the future. The European Parliament,<sup>45</sup> the

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<sup>40</sup> Alice Enders, *The Value of Territorial Licensing to the EU* (8 October 2013) Enders Analysis, 2–3 <[https://www.letsgoconnected.eu/fileadmin/Studies/Alice\\_Enders\\_-\\_The\\_value\\_of\\_territorial\\_licensing\\_-\\_FINAL\\_11\\_OCT\\_2013.pdf](https://www.letsgoconnected.eu/fileadmin/Studies/Alice_Enders_-_The_value_of_territorial_licensing_-_FINAL_11_OCT_2013.pdf)>.

<sup>41</sup> Charles River Associates, *Economic Analysis of the Territoriality of the Making Available Right in the EU* (March 2014) [173] [http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study1\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf) (‘CRA Report’).

<sup>42</sup> Oxera and Oliver & Ohlbaum, (2016) *The impact of cross-border access to audio-visual content on EU consumers*, 16 May 2016, < <http://www.oxera.com/Latest-Thinking/Publications/Reports/2016/The-impact-of-cross-border-access-to-audiovisual-c.aspx>>.

<sup>43</sup> European Commission, Press release, ‘Have your say on geo-blocking and the role of platforms in the online economy’, Brussels, 24 September 2015, < [http://europa.eu/rapid/press-release\\_IP-15-5704\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5704_en.htm)>; In addition the European Commission Inception Impact Assessment (IIA) on ‘Proposals to address unjustified geoblocking and other discrimination based on consumers’ place of residence or nationality’ states that “the initiatives discussed in this IIA only address those practices not based on copyright or licensing agreements (including in sports)”, <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_cnect\\_002\\_geo-blocking\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_002_geo-blocking_en.pdf)>.

<sup>44</sup> Oxera and Oliver & Ohlbaum, (2016) *The impact of cross-border access to audio-visual content on EU consumers*, 16 May 2016< <http://www.oxera.com/Latest-Thinking/Publications/Reports/2016/The-impact-of-cross-border-access-to-audiovisual-c.aspx>>.

<sup>45</sup> European Parliament resolution of 9 July 2015 on harmonisation of certain aspects of copyright and related rights, paragraph 13: *Points out that the financing, production and co-production of films and television content depend to a great extent on exclusive territorial licences granted to local distributors on a range of platforms reflecting the cultural specificities of the various markets in Europe; that being so, emphasises that the ability, under the principle of freedom of contract, to select the extent of territorial coverage and the type of distribution platform encourages investment in films and television content and promotes cultural diversity; calls on the Commission to ensure that any initiative to modernise copyright is preceded by a wide-ranging study of its likely impact on the production, financing and distribution of films and television content, and also on cultural diversity.*

European Audiovisual Observatory<sup>46</sup> and the Charles River Associates<sup>47</sup> (commissioned by the European Commission) have all confirmed that licensing on a territory-by-territory basis is essential to raising financing for films and audiovisual productions, which require large upfront investments.

38. As well-known international copyright commentator, Hugh Stephens has observed:<sup>48</sup>

*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 in Australia, undercutting essential distribution channels for the dissemination of Australian culture.*

*Creation of uncertainty is the exact opposite of what the Commission was charged to do by the government in its terms of reference, which was to “provide greater certainty to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others...”*

39. Territorial licensing permits localisation to demand, including through marketing, pricing, bundling products and windowing of audiovisual content. The windowing system permits inter-temporal price differentiation, and is an important means for producers to effectively commercialize their content and recoup high initial production costs. Release window schedules vary across territories taking into account local factors such as public and school holidays. Given the mismatch in windowing schedules, the system can only function properly within a territorial licensing regime.

### 4.3 Circumvention of geo-blocking may implicate Australia’s international obligations

40. Encouraging consumers to attempt to circumvent geoblocks is likely to present serious problems for licensing and enforcement of copyright. It will mean the loss of point of collection for exploitation in the Australian market that is proximate to the Australian market and in compliance with local laws (including tax collections, classification). It would also make it more difficult to prevent online infringement because the mechanisms used to circumvent the geoblock are the same mechanisms used by infringers to access illegal content.

41. Failing to recognise and give effect to territorial licensing models could implicate Australia’s international obligations, including under the WCT, the AUSFTA, and the Trans-Pacific Partnership (‘TPP’).<sup>49</sup> It is irresponsible for the Commission to question the territorial basis for copyright licensing and actively encourage breaches of those licences and circumvent measures designed to support the territorial licensing model.

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<sup>46</sup> IRIS Plus 2015-2, *Territoriality and its impact on the financing of audiovisual works*, European Audiovisual Observatory, Strasbourg, 2015, <<http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e>>.

<sup>47</sup> *CRA Report*.

<sup>48</sup> 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-geose/>>.

<sup>49</sup> *AUSFTA, TPP*; 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” (cf. *TPP*, Chapter 18, 18.68(4)(c)). 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).

42. Although the reception by streaming of content outside a licensed territory is unlikely to amount to an infringement of copyright by the receiver, if this is done with the involvement of the service provider, then the receiver may be an accessory for breach of the copyright licence by the service provider. As noted, circumvention of access controls on online services amounts to a circumvention of a technological protection measure, and would currently give rise to claims under the *Copyright Act* and consequences for those involved.
43. The Commission's recommendation that copyright law be amended to ensure that circumventing geo-blocking is not an infringement of copyright is misguided, given that, as noted, there are legal restraints on this activity other than under the *Copyright Act*. 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 Report.

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## 5 US style fair use exception: Draft Finding 5.3.

*“A new system of user rights, including the introduction of a broad, principles-based fair use exception, is needed to help address this imbalance”; “[R]eplace the current fair dealing exceptions with a broad exception for fair use.”*

44. The Australian Film/TV Bodies oppose this finding and any recommendation based on it.

### 5.1 Weak case to introduce fair use

45. The Draft Report puts a very weak case for Australia to replace its current scheme of copyright exceptions based around “fair dealings” with a US- style open-ended “fair use” exception. The Commission has paid insufficient regard to the submissions in response to the Issues Paper by parties such as the Australian Film/TV Bodies who oppose the introduction of “fair use” exceptions.
46. As the Australian Film/TV Bodies identified in their earlier submission, Australia has an established and well-known scheme of copyright exceptions for fair dealing,<sup>50</sup> like the UK, Canada and New Zealand.<sup>51</sup> Use of copyright material in Australia is subject to those clear exceptions, which provide certainty to users in relation to the way they deal with copyright material. The common underlying theme of the fair dealing defences is that they apply to specific categories of activity that are recognised as not likely to interfere with the copyright owners' legitimate interests or to deprive the copyright owner of rewards – not because of some evaluation of relative entitlement of the owners compared to some subsequent user. The application of fair dealing defences usually involves an evaluation on a case-by-case basis, as market conditions and innovative business models emerge. Australian Courts have demonstrated their capacity to adjudicate on these issues when required.<sup>52</sup>

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<sup>50</sup> Including ss 40 (research or study), 41 (criticism or review), 41A (parody or satire), 42 (news), 43 (legal purposes), 43A (temporary reproductions in communications), 43B (temporary reproductions in technical process of use).

<sup>51</sup> UK: *Copyright Designs and Patents Act 1988* (UK) ss 29(1), (30); Canada: *Copyright Act*, RSC 1985, c C-42, s 29; New Zealand: *Copyright Act 1994* (NZ) ss 42, 43.

<sup>52</sup> Compare the appeal decision in *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 with the decision of the trial judge at *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34.



47. The Draft Report fails to explain how an attempt to import US fair use, which encompasses more than a century of jurisprudential interpretation, and its proposed adoption, will not introduce uncertainties into Australian copyright law. In the US, fair use has been described by a court as “*the most troublesome in the whole law of copyright*”.<sup>53</sup> Another US court characterised fair use as “*so flexible as virtually to defy definition*”.<sup>54</sup> A leading scholar has observed that the “*facial emptiness of the statutory language means that ... it is entirely useless analytically, except to the extent that it structures the collection of evidence*”.<sup>55</sup> Another scholar commented that the idea that the statutory test determines the outcome of fair use cases is “*largely a fairy tale*”.<sup>56</sup> Yet other scholars describe the statutory test as “*unpredictable and uncertain in many settings*”.<sup>57</sup> Others have concluded that fair use “*is too indeterminate... to provide a reliable touchstone for future conduct*”.<sup>58</sup> Judge Leval, a leading US authority on intellectual property, has noted that US judges themselves “*do not share a consensus on the meaning of fair use*”.<sup>59</sup>
48. The economic impact of the US fair use exception is disputed, with some US commentators arguing that the vagueness of the fair use defence “*prevent[s] actors from precisely determining the optimal level of investment*”.<sup>60</sup> There is a growing recognition on Capitol Hill that the US doctrine might have become “*the great white whale of American Copyright Law*”.<sup>61</sup> In June 2013, the White House established a task force to develop and publish an index of major fair use decisions to “*ease confusion about permissible uses*”.<sup>62</sup> The Copyright Office has published a preliminary list, but it appears to be a work in progress, underscoring the complexity of the effort.<sup>63</sup> Indeed, the US Copyright Office advises people to consult an attorney before assuming that a work constitutes fair use since application of the doctrine is so fact specific.<sup>64</sup>

## 5.2 A minority of countries have fair use due to its significant costs

49. The Draft Report fails to acknowledge that only 5 Berne Convention countries (the US, the Philippines, Israel, South Korea, and Singapore) plus Taiwan have adopted fair use factors, but only the US has decades of nuanced jurisprudence interpreting those factors; in the other jurisdictions, the factors have largely sat dormant in the law. In the countries having fair use factors, each of their approaches differ. There is no reason to expect a different result if fair use was brought to Australia.
- i) There are limitations to its operation in some of those countries (in Korea it applies only where the use “*does not conflict with a normal exploitation of [the] copyright work and does not unreasonably prejudice the legitimate interests of the copyright holder*”<sup>65</sup>).
  - ii) In all of these countries except the US, the factors sit as relatively “dead letter,” since courts have not generally been asked to opine on or apply them.

<sup>53</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939).

<sup>54</sup> *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968).

<sup>55</sup> Michael J Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *Wm. & Mary L Rev* 1525, 1564 (2004).

<sup>56</sup> David Nimmer, ‘Fairness of them All’ and Other Fairy Tales of Fair Use, 66 *Law and Contemporary Problems* 263, 282 (2003).

<sup>57</sup> Thomas F. Cotter, Fair Use and Copyright Overenforcement, 93 *Iowa Law Review* 1271, 1284 (2008).

<sup>58</sup> James Gibson, Once and Future Copyright, 81 *Notre Dame L. Rev.* 167, 192 (2005).

<sup>59</sup> Pierre N. Leval, Toward a Fair Use Standard, 103 *Harv. L Rev* 1105, 1106 (1990). See e.g. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939); *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968).

<sup>60</sup> Gideon Parchomovsky, Kevin A. Goldman, Fair Use Harbors, 93 *V(2007) Virginia Law Review* 1483, 1498.

<sup>61</sup> Paul Goldstein, ‘Fair Use in Context’, 31 *Columbia Journal Law & Arts* 433, 433 (2008).

<sup>62</sup> 2013 Joint Strategic Plan on IP Enforcement, 18 <<http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>>.

<sup>63</sup> United States Copyright Office, *U.S. Copyright Office Fair Use Index* (March 2016), <<http://www.copyright.gov/fair-use/>>.

<sup>64</sup> United States Copyright Office, *U.S. Copyright Office Fair Use Index* (March 2016), <<http://www.copyright.gov/fair-use/>>, noting, “Fair use is a judge-created doctrine dating back to the nineteenth century and codified in the 1976 Copyright Act. Both the fact patterns and the legal application have evolved over time, and you should seek legal assistance as necessary and appropriate.”

<sup>65</sup> Republic of Korea, *Copyright Act 1957*, Art. 1-3.

50. While a *sui generis* approach like fair use may fit in the US, international scholars have questioned its portability to other jurisdictions (e.g., Dr. Mihály J. Ficsor<sup>66</sup>), or even whether fair use factors, without nuanced US interpretation, might be subject to normative challenges when compared with current international disciplines (e.g., Ruth Okediji, Herman Jehoram<sup>67</sup>). While understood as consistent with Berne Convention/TRIPS, one leading Australian copyright scholar, Professor Sam Ricketson, has even opined that an open fair use exception, without the nuance of US case law, may operate in a manner which conflicts with 'normal exploitation' of copyright works in existing or emerging markets or 'unreasonably prejudice' rights' holders interests, which would implicate Berne Convention /TRIPS obligations under the well-worn three-step test.<sup>68</sup> Canadian copyright experts have raised similar concerns.<sup>69</sup> The Draft Report never explains how the transposition of US-style *sui generis* fair use factors to Australia, without the US Constitutional basis for the exception, and its extensive and highly-nuanced case law, would work in practice.
51. In the UK, the Hargreaves Review examined the relative merits of open and closed standards in digital environments and concluded that the UK should stay with its fair dealing exceptions because "*there would be 'significant difficulties' in attempting to transpose US-style fair use into European law.*" This followed the earlier *Gower Review of Intellectual Property: Proposed Changes to Copyright Exceptions* which also rejected moving to a fair use model for various reasons, including its uncertainty and the fact that, in the UK legal environment, it would be prone to interpretations that would result in the UK not meeting its international obligations. The Hargreaves Review also found that the real barrier to innovation in the UK was the culture of investment and risk-taking – this was even recognised in meetings held in Silicon Valley. Google's own survey in support of its advocacy on the Hargreaves review identified 7% of UK digital SMEs found copyright as a barrier to their activities while 22% said copyright laws should be strengthened and 66% said that they were balanced.<sup>70</sup> New Zealand considered and rejected a fair use regime, concluding that no compelling reasons had been presented for an open-ended fair use model and describing its existing fair dealing system as "*technologically neutral and adaptable for the digital environment*".<sup>71</sup> Canada also rejected the introduction of a fair use exception in favour of fair dealing provisions for the purposes of parody, satire and education.<sup>72</sup>
52. The long term effects of a fair use exception have also been called into question. Canadian academics have concluded that fair use is likely to reduce overall consumer welfare, and, more generally, social welfare.<sup>73</sup> In the short- to medium-term, there would be uncertainty. Whereas the open-ended language of the US provision has been the subject of decades of US jurisprudence, Australia will not have the benefit of judicial interpretations were the law to be enacted. There would be little guidance as to the scope of the exception in Australia. US case law cannot be transplanted into Australian law given the different Constitutional framework, just as it was not successfully transplanted into Canada.<sup>74</sup> Litigation would be required to determine the scope and application of an open-ended fair use

<sup>66</sup> Mihály J. Ficsor, 'Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright' 19 November 2012, <[www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc](http://www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc)>, 4-5.

<sup>67</sup> Herman C. Jehoram, 'Restrictions on Copyright and their Abuse' (2005) 27 *European Intellectual Property Review*, 359, 360.

<sup>68</sup> Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 ("**Ricketson 2003**"), 67.

<sup>69</sup> Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>>, 157-159.

<sup>70</sup> IFF Research, (2011) *Research Report: Impact of UK Copyright Laws on Digital Technology SMEs*, February 2011 (prepared for Google and the Coalition for Digital Economy).

<sup>71</sup> 'Digital Technology and the Copyright Act' 1994 Position Paper, [160-61].

<sup>72</sup> Canada, *Copyright Modernization Act*.

<sup>73</sup> Brett Danaher, Michael D. Smith, Rahul Telang, 'Piracy and Copyright Enforcement Mechanisms' (2013), <<http://www.nber.org/chapters/c12945.pdf>>, Barker 2013 at 19.

<sup>74</sup> See Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>>, 157-59.

defence, raising compliance costs for business, government and government-funded organisations. Increased litigation would be disruptive for established and emerging businesses, and quite costly. It is also likely to be outpaced by market forces. Reliance by copyright owners and users on “regulatory guidance” or self-help measures for determining whether a use is “fair use” is also flawed – exemplified by the only example provided by the Commission, an internal document from a Columbia University library pilot project,<sup>75</sup> which, according to the website, is designed to “help educators, librarians, and others to focus on factual circumstances that are important to the evaluation of a contemplated fair use of copyrighted works,” and to record their “decision-making process”. We believe this example highlights the uncertainty that comes with an open-ended fair use standard.

### 5.3 Fair use has been considered (and rejected) before

53. Fair use has been examined a number of times in Australia over the last decade and each time the Government decided not to introduce it into Australian law. In September 2000 the *Intellectual Property and Competition Review Committee* (the **Ergas Committee**) found that the “transaction costs of changing the Copyright Act [to an open-ended fair dealing exception] could outweigh the benefits.”<sup>76</sup>
54. In 2006 the Government considered and rejected the introduction of fair use into Australian law because “no significant interest supported fully adopting the US approach” and because of concerns about it failing to meet Australia’s international legal obligations.<sup>77</sup> It noted that “*the present system of exceptions and statutory licences ... has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright*”.<sup>78</sup> An open fair use model was less desirable, because the Government concluded that:

*“this approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.”*<sup>79</sup>

All of these significant concerns continue to exist and have not been displaced by the Draft Report.

55. In 2014, under a reference by the former Government, the ALRC examined whether Australia should adopt fair use. In response to the ALRC enquiry into whether Australia should adopt fair use under copyright law, the majority of submissions were opposed to its adoption in Australia. The ultimate recommendations of the ALRC were equivocal, with the committee proposing a series of alternatives which ranged from introduction of a modified US-style fair use system to a modification of the existing scheme. The Commission has now come up with its own set of factors.<sup>80</sup> The level of uncertainty around the recommendations and lack of widespread support are illustrative of the difficulties involved in implementing a US-style fair use scheme in Australia.

### 5.4 Impact on technical and innovative activities

56. The Australian Film/TV Bodies reject the suggestion made by one party that the existing fair dealing system of exceptions “arguably prohibits critical technology and innovative activities from being conducted in Australia”.<sup>81</sup> There is not a single example of any innovation that was materially impacted by the absence of a general fairness exception in Australia. Caching was addressed by legislative

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<sup>75</sup> Draft Report, 161.

<sup>76</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

<sup>77</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10. The second reason was concerns about compliance of a new Australian fair use exception with the three-step test: see also Discussion Paper, [4.27].

<sup>78</sup> Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth), 6.

<sup>79</sup> Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth), 10.

<sup>80</sup> Draft Recommendation 5.3, Draft Report, 162.

<sup>81</sup> Draft Report, 148, 149.

response when it became an issue. There is no evidence that cloud computing has been hindered by current copyright laws – Australia has some of the strongest take-up of cloud computing per capita in the world.

57. The Commission has correctly acknowledged that the attempts by some to estimate economic benefits of adopting fair use in Australia are questionable and that overseas studies have been subject to significant criticisms by Dr George Barker.<sup>82</sup>
58. The comparison between the impact of fair dealing exceptions and fair use in Table 5.2 of the Draft Report is also inaccurate, as each case will depend on a range of factors. The examples in the table could be more accurately represented as follows:

<b>Example</b>	<b>Likely outcome under Australian copyright law</b>
Thumbnail images on search engine for websites searched	Only infringing if a substantial part of the full image was reproduced or communicated to the public. There is no Australian case to confirm that return of thumbnail images amounts to infringement by the search engine or whether it would amount to a fair dealing (e.g. for the purposes of reporting).
Collage of images from photography book	Only infringing if a substantial part of earlier images are reproduced and if no fair dealing purpose exists (e.g., for the purposes of research or study).
Database of TV clips to search broadcast clips to watch	A database of still images from TV clips would not infringe copyright in the TV clips themselves (because of <i>Panel</i> ruling). Fair dealing defence may be engaged.
Scenes from film used in film biographic	Only infringing if a substantial part of the first film was reproduced in the second, and if no fair dealing purpose exists.
Use of a song from a first election advertisement in an opponent's advertisement	Only infringing if a substantial part of the song was reproduced in the second, and if no fair dealing purpose exists (e.g., for the purposes of research or study), for example, in an election campaign.
Rap song uses another song in its opening lyrics	Only infringing if a substantial part of the first song was reproduced in the second. May not be a fair dealing because it trades off the success of the first song.
Researches access database for text and data mining	Only infringing if a substantial part of the works are reproduced (as opposed to accessed), and no fair dealing purpose applies (e.g., for purposes of research or study).
Last 4 educational examples	Do not warrant any comment because it is not clear that they would even attract a fair use defence under US law. These examples cited are ones in which there are existing generous educational licences that may apply to permit the educational institution to make the use it seeks to make with very modest

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<sup>82</sup> Draft Report, 146.

59. Even if there was a risk of infringement, many of the examples are trivial (e.g., use of a song in an election advertisement) and provide little justification for destabilising Australia’s copyright regime by providing an uncertain four-factor “fairness” based exception to infringement. In others (e.g., artist reproducing photographs, or rap artist using lyrics from earlier song) there is a weak case for allowing use without compensation because this necessarily involves trading off the success of the first song and generally compensation should be paid. These examples could not justify a widespread change to fair dealing exceptions.
60. The economic case for adopting a US style fair use exception is weak. The absence of a fair use exception in Australia has not impeded the development of digital businesses or distribution platforms. When the economic impact of a fair use exception was examined in the UK by the Hargreaves Committee it concluded that there was no evidence that the adoption of fair use would quickly stimulate innovation. Attitudes towards business risk and investor culture were found to be more significant.<sup>83</sup> There is no evidence that the investor culture in Australia is any less important to the decisions whether to invest in innovations in Australia.

## 5.5 Commission’s proposal is naïve and wrong

61. The justification for introducing a US-style fair use exception based on the erection of a concept of “user rights”<sup>84</sup> should be rejected by the Commission in its Final Report. To speak of exceptions to IP rights as “rights” of users is not consistent with the law of copyright or its purpose or history. Nor is the Commission’s proposal for fair use, which travels beyond any proposal previously made in Australia and sweeps much more broadly than even US fair use.<sup>85</sup>
62. In an apparent acknowledgment of the difficulties of importing US fair use into Australia, the PC indicates an intent to go beyond the ALRC’s recommendations and institute “a more expansive and enduring reform.”<sup>86</sup> According to the PC, “[a]t its heart, Australia’s exception for fair use should allow all uses of copyright material that do not materially reduce a rights holder’s commercial exploitation of their [sic] work at the time of use.”<sup>87</sup> This language, while appearing on first glance as similar to the fourth factor listed in the US fair use statute, actually turns fair use on its head, making it indeed a right of a user to “use” freely unless the rights holder is actually exploiting the work *at the time* of the unauthorised use. Such a change would in effect radically alter and expand exceptions far beyond what is permissible under current global norms, and further reveals the Commission’s bias and true intent to undermine copyright. To take just one example, it is possible that such an exception would permit as fair use, unauthorised “adaptations, arrangements and other alterations” so long as the rights holder is not commercially exploiting the work in Australia at the time of the use. This would undermine fundamental exclusive rights that are longstanding international norms required by the Berne Convention, to which Australia has adhered for almost a century.<sup>88</sup>
63. To assess whether “infringement would undermine the ordinary exploitation of the work at the time of the infringement” (thereby determining whether the infringement is a fair use), the Commission provides four “rebuttable presumptions.” While some of the presumptions resemble the traditional fair use factors found in US law, in this context these “rebuttable presumptions” would serve to significantly advantage unauthorised users at the expense of right holders. For example, the Commission suggests a presumption that if the work is not being commercially exploited by the right

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<sup>83</sup> Hargreaves Review, 53.

<sup>84</sup> Draft Report, 159.

<sup>85</sup> Draft Report, 159.

<sup>86</sup> Draft Report, 160.

<sup>87</sup> Draft Report, 160.

<sup>88</sup> See Berne Convention, Article 12.

holder at the time of the unauthorised use, then use of the work is “more likely to be fair.” This presumption would ironically appear to benefit infringers who pirate copyrighted works that are time sensitive, such as films that have yet to be released in Australia. One would hope the Commission would not intend such an outcome, but given their bias, it is difficult to know this with certainty. While it is hoped that this presumption could be rebutted in this sort of a pre-release piracy case, it is unclear why forcing a right holder to rebut a presumption that would appear to primarily benefit infringers is in the public interest.

64. The Draft Report says that:

*“The objective of the new fair use exception would be to ensure that the copyright system applies only to those works where infringement would undermine the ability of a rights holder to commercially exploit their work at the time of the infringement.”*

65. This proposal would radically change the nature of copyright protection in Australia, effectively reversing the onus in a copyright case and requiring a copyright owner to prove impact of infringement. It is a naïve and irresponsible position for the Commission to advocate. Regardless of the status of US-style fair use, what the Draft Report proposes here is almost certainly non-compliant with the Berne Convention, TRIPS, the WCT, the AUSFTA, and the recently concluded TPP, all of which require that limitations and exceptions to copyright be limited by the three-step test.<sup>89</sup> Thus, adoption of the Commission’s recommendation would implicate Australia’s international obligations. Further, by reversing the onus in a copyright case, creators would face a much higher burden and be disincentivised to continue to create in this market.

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## 6 Repeal s. 51(3) CCA: Draft Recommendation 14.1

*“The Australian Government should repeal s. 51(3) of the Competition and Consumer Act 2010 (CCA)”*

66. The Australian Film/TV Bodies oppose this recommendation and do not agree with the analysis by the Commission of the interaction between IP law and competition law that informed this recommendation.

### 6.1 Relationship between copyright and innovation

67. There is evidence within the Draft Report that the Commission has failed to understand or appreciate the nature of copyright law and its relationship with innovation. This, in part appears to be the result of an assumption that all IP laws can be categorised together as having an equal potential impact on innovation and that copyright can be treated in the same way as patents for the analysis. However they are fundamentally different. Copyright protects only specific expressions, not ideas, concepts, methods or processes, which are all the exclusive domain of patent law. No copyright work operates as a monopoly over the concept behind it. It does not matter how many films or sound recordings are produced, there is no restriction on the production of a potentially infinite number of further films or sound recordings even if they concern the same ideas, concepts or subjects.

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<sup>89</sup> See Berne Convention, Art. 9.2: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”; TRIPS Art. 13: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”; WCT Art. 10(1): “Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”; and WCT Art. 10(2): “Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

68. It is fundamental to economic theory and to competition law and policy that no individual product, even a copyright work, constitutes a market in its own right. Economics and competition law recognise that there are inevitably substitutes for a product. The concept of a sole product market was rejected decades ago in Australia. The Draft Report appears to acknowledge this when it states that “Where substitutes [of copyright works] exist in the relevant market, such [licensing] practices are unlikely to be anti-competitive”. However the Draft Report then uncritically cites conclusions of the Harper review,<sup>90</sup> concerning “anti-competitive restrictions on knowledge dissemination” and “knock-on effects for innovation” despite the fact that these conclusions cannot apply to copyright because copyright does not restrict the flow of information or restrict innovation.

## 6.2 The purpose of s51(3)

69. Against this background, the debate about the impact of s51(3) of the Competition and Consumer Act (CCA) becomes very theoretical. S51(3) of the CCA is designed to ensure that competition law would not undermine the licensing terms in exclusive licence arrangements which are given particular status under IP laws. The unique statutory rights of an exclusive licensee of copyright or patents enable the licensees to bring enforcement action of those IP rights,<sup>91</sup> which finds no parallel in any other form of contractual arrangements. The Draft Report makes no mention of these special licence qualities.
70. 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 licence. The Law Council of Australia, Copyright Council of Australia and the Business Council of Australia provide a compelling case that this is valuable.<sup>92</sup> There are inevitably transaction costs associated with having to consider whether competition law provisions apply, as the earlier NCC Review accepted.<sup>93</sup>

## 6.3 Who stands to benefit from the repeal of s51(3)?

71. The only body that appears to be cited in the Draft Report as being against the retention of the provision is the competition regulator, the ACCC. It is necessary to examine the ACCC’s position more closely. As the Draft Report notes, the ACCC relies “on identifying instances where anti-competitive conduct *might occur* rather than instances where such conduct *has occurred*.”<sup>94</sup> In reality there is no evidence of any kind that copyright owners have used licensing to anti-competitive ends. If there was such evidence, no doubt the ACCC would have been able to uncover it, considering the ACCC’s enormous resources and preparedness to bring companies before the Courts where anti-competitive conduct is suspected. Conversely, this lack of evidence is strong evidence in favour of the status quo.
72. This puts the following statement from the ACCC about reliance on s51(3) into perspective:<sup>95</sup>
- “... the extent of the exception in section 51(3) is highly uncertain, given limited jurisprudence, but potentially very narrow. As a result, rights holders face significant uncertainty if they rely on section 51(3) to protect them from competition law claims being brought against them.”*
73. This statement is both factually inaccurate (because there are no authorities to confirm the uncertainty or narrowness of the provision) and highly inappropriate for a regulator to make. As the ACCC knows, s51(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. There have

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<sup>90</sup> Draft Report, 386.

<sup>91</sup> E.g. s119 of the Copyright Act.

<sup>92</sup> Draft Report, 392.

<sup>93</sup> Draft Report, 391.

<sup>94</sup> Draft Report, 390.

<sup>95</sup> Draft Report, 490.

been no cases involving successful prosecutions of copyright owners under s46, which leads to the conclusion that copyright owners are not misusing any market power.

74. The ACCC is the only beneficiary of the repeal of the section. It would have the effect of expanding its influence over copyright owners, even though it cannot identify any real (as opposed to hypothetical) competition law problem in this domain. The ACCC already has extraordinary powers and funding and this should not be the pretext for further expansion – particularly where there is no government ministry or minister charged with ensuring the protections of IP law. The proposal that the “ACCC could issue guidance on the application of Part IV of the CCA to IP” is totally unsatisfactory and contradictory. It provides no boundaries for any proposed role of the ACCC in relation to a field in which it has no experience. It would be uncertain and leave far too much power to the regulator to impact copyright owners and licensing arrangements without government mandate. This would risk impinging on Australia’s obligations under the US/Australia Free Trade Agreement and Australia’s commitments in the TPP, each of which require Australia to provide contractual freedom for copyright holders to transfer their rights.<sup>96</sup> It is not surprising that the Australian Government has resisted on multiple occasions in the past enabling the ACCC to intervene in IP licensing. The repeal of s51(3) is a poor policy response that should not be pursued.

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## 7 Global cooperation on IP policy: Draft Recommendation 17.1

*“Australia should revive its role in supporting opportunities to promote global cooperation on intellectual property policy among intellectual property offices through the World Intellectual Property Organization and the World Trade Organization to avoid duplication and reduce transaction costs”*

75. The Australian Film/TV Bodies support global cooperation on intellectual property policy, but for the reasons set out below, disagree with this recommendation.
76. The recommendation appears to be based on a criticism of bilateral treaties such as the Australia-United States Free Trade Agreement and multi-lateral treaties such as the recent *Trans-Pacific Partnership*. Both of these treaties have led to a strengthening of the Australian IP system and opportunities for Australian businesses to benefit from raised standards of IP protection amongst Australia’s trading partners in markets in which they will export goods and services. Enhanced protections increase the incentives for Australian businesses to operate in those markets with the confidence that their copyright will be protected and enable Australia’s consumers to enjoy increased access to legitimate creative content.
77. The suggestion by the Commission that Australia should avoid bilateral treaties such as the AUSFTA tends to contradict other recommendations made by the Commission, such as the recommendation to extend the safe harbour defences under Div 2AA (see next section). The Australian safe harbour regime was introduced only as a result of the bilateral AUSFTA and not as a result of other multilateral treaties such as the Berne Convention or the WCT. Australia needs to keep open the opportunities to benefit from all forms of treaties that can materially benefit trade and IP protection and enforcement for Australian business and increase access to legitimate creative content for Australia’s consumers.

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## 8 Expansion of “safe harbours”: Draft Recommendation 18.1

*“The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth)”*

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<sup>96</sup> AUSFTA, Article 17.4.6.a and TPP, Article 18.67.



78. The Australian Film/TV Bodies oppose this Draft Recommendation 18.1.

### 8.1 Misunderstanding of safe harbour scheme

79. The Draft Report reflects a fundamental misunderstanding by the Commission of the purpose and operation of the safe harbour scheme. It is not a system that ‘indemnifies ISPs from being held liable for alleged copyright infringements occurring over their network, if they comply with certain requirements’ (cf DR p 486). The safe harbour provisions of Div 2AA of the *Copyright Act* provide a limited defence to *monetary claims* and *non-monetary relief* against an ISP *following a finding of authorisation of copyright infringement*. A proper understanding of the safe harbour scheme necessarily operates in combination with authorisation liability under ss 38 and 101 of the *Copyright Act*.

80. The following statement appears in the Draft Report that:<sup>97</sup>

*“In the Commission’s view, the operation of authorisation liability and the coverage of Australia’s safe harbours regime are separate issues”*

81. This statement reveals an error by the Commission in believing that the two can be considered in isolation. If the safe harbour provisions are only capable of being engaged where a finding of authorisation has been made, it inevitably follows that if authorisation is not operating as intended, then the safe harbours are never engaged. As the *Roadshow v iiNet* decision demonstrates, it is irrelevant whether an ISP has the benefit of the safe harbours if it is not liable for authorisation.<sup>98</sup> The same will be true of any non-ISPs brought into a wider definition of service provider under Div 2AA. Unless there is a realistic prospect that they would be liable for authorisation of infringements of copyright by other parties (such as internet users), expansion of the application of the safe harbours will serve no purpose. No case is made in the Draft Report for an expansion of the safe harbours to non-ISPs based on any identifiable liability for authorisation of copyright infringement.

### 8.2 Illusory benefits of expanded definition

82. The Draft Report claims that there will be three benefits from an expanded definition:<sup>99</sup>

*“Expanding the coverage of Australia’s safe harbour regime to other online service providers will improve the system’s adaptability as new services are developed, is consistent with Australia’s international obligations; and is an important balance to the expanded protections for rights holders Australia accepted as part its international agreements.”*

83. Each of these benefits is illusory. First, there is no evidence that the existing scheme hinders legitimate online commerce or activity in Australia by service providers that are not currently able to invoke the safe harbour scheme.<sup>100</sup> Arguments to the contrary (including from entities that currently have the benefit of the existing definition of safe harbours<sup>101</sup>) are theoretical and unpersuasive when compared with available evidence. An example is the submission from Google Australia,<sup>102</sup> which cannot identify any tangible or measurable disadvantage or cost of the existing regime.<sup>103</sup>

84. Secondly, Australia was not, and is not, required to expand the definition of service provider to comply with the AUSFTA. There is no suggestion that the current definition of service provider puts Australia in breach of its obligations under the AUSFTA. Implementing a wider definition of service provider will

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<sup>97</sup> Draft Report, 490.

<sup>98</sup> *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23.

<sup>99</sup> Draft Report, 490.

<sup>100</sup> Support for the change *from ISPs* does not provide any evidence to this effect.

<sup>101</sup> Draft Report, 489.

<sup>102</sup> Extracted at Draft Report, 488.

<sup>103</sup> Assertions around “high risk legal environment”, “uneven playing field” and “commercial disadvantage when compared to commercial ISPs and global competition ” are hollow and unsubstantiated.

do nothing to affect Australia's compliance with its international obligations – most of the obligations have nothing to do with US style safe harbours.

85. Thirdly, the safe harbours were introduced as part of a package of provisions to give effect to Australia's obligations under the AUSFTA,<sup>104</sup> not because they were a “balance to the expanded protections for rights holders” (such expanded protections being unidentified by the Draft Report). At the time that they were introduced, the Australian Government determined that it would be appropriate to limit the availability of the safe harbours to ISPs. The term “carriage service provider”<sup>105</sup> 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’” dated October 2011 acknowledged. This was a considered position, following widespread consultation. It reflected an appropriate assessment of the types of entities that would appropriately be given the benefit of the safe harbours under Australian copyright law. These entities were subject to regulation under Australian law and were required to submit to the jurisdiction in various ways.<sup>106</sup>

### 8.3 Comparing safe harbour schemes

86. The Draft Report uncritically repeats the following claims made by some parties:<sup>107</sup>

*In particular, during inquiry consultations the Commission heard that many online service providers already operated under foreign safe harbour schemes were broader than Australia's such as in the United States, and that as part of their global operations they already provided mechanisms for rights holders to “take down” infringing content. They argued that because Australian rights holders were gaining the benefit of overseas countries' broader safe harbour regime, Australian should offer the same limited liability provisions.*

87. These claims are wrong. Had the Commission undertaken any detailed comparison between safe harbour schemes operating in Australia and the United States it would have identified that the Australian *Copyright Act* offers a much broader defence to authorisation than the United States Act, in the form of s112E of the *Copyright Act*. Unlike the safe harbours of either Div 2AA or the DMCA, s112E is available to any provider that does no more than provide facilities (including physical facilities, software and services) on which infringement occurs, and provides a *complete defence to liability for infringement* by authorisation and is not tied to any obligations on the part of the provider to take steps to assist in enforcement. Australian Courts have confirmed that the defence is *not limited to carriage service providers*.<sup>108</sup>

### 8.4 Weak case to expand safe harbours

88. The Draft Report fails to acknowledge that the Australian Government has already conducted 3 *previous reviews* of the safe harbour scheme – in 2009, 2011<sup>109</sup> and 2014 – and each time has not identified any specific need for change to the definition of service provider in Div 2AA. There has been

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<sup>104</sup> 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.

<sup>105</sup> Defined in s10 of the *Copyright Act* 1968 adopts “the same meaning as in the *Telecommunications Act* 1997”, and applies to ISPs.

<sup>106</sup> 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 (‘*TIO*’) scheme that is published and searchable by members of the public.

<sup>107</sup> Draft Report, 489.

<sup>108</sup> In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at 395 Wilcox J held that the “qualifying elements” of s112E applied to Sharman, the operator of the Kazaa P2P file sharing platform, although his Honour subsequently found that there were other factors that disqualified Sharman from reliance on the section.

<sup>109</sup> This is the only consultation cited in the Draft Report, 488.

no change in circumstances since the earlier reviews that would provide a justification for changing the definition of service provider at this time.

89. It would be contrary to the Australian Government's policy of providing a robust and effective system of copyright protection in Australia to allow other online service providers that are not subject to the same regulatory supervision as ISPs to have the benefit of the safe harbours. To do so would create an *uneven playing field*, disadvantaging regulated entities in favour of the unregulated.<sup>110</sup> There is no suggestion that these other entities will submit themselves to equivalent regulation in Australia.<sup>111</sup> The business models of online services providers are diverse and this diversity requires analysis before embarking on blanket changes to the legal framework. No attempt has been made by the Commission to map that ecosystem or the participants who would benefit from the change.
90. There is no discussion in the Draft Report of how a wider definition of service provider would operate in practice. The application of the safe harbours to non-ISPs is likely to be problematic under Australian law and potentially even ineffective. This is because the safe harbour scheme assumes that all of the entities invoking it have and are prepared to exercise some control over the infringing activities. A non-ISP service provider that invokes the safe harbours would become subject to the requirement to "adopt and implement a policy of terminating the accounts of repeat infringers, in appropriate circumstances" (s116AH, Item 1); the take down regime that applies in respect of Category D activities (if applicable to their service); and the ability of a court to order termination of the subscriber account or disabling of access to the linked content even if the safe harbour applied. In this way any non-ISP service provider seeking to rely on safe harbours (if the definition is expanded) necessarily has to be ready and willing to exercise some control over what its users are doing. At the other end of the spectrum, there is a serious risk of abuse of the expanded defence by such entities (assuming that they have failed to qualify for the s112E defence referred to above), because they have no intention of exercising any real control over their users' infringements.
91. It is inappropriate to embark on change of one aspect of the safe harbours - the definition of "service provider" - without examining, and amending, other aspects of the scheme. Amendments would need to include revisions to authorisation law (because of the symbiotic relationship between the two), submission of non-ISP service providers to Australian regulatory supervision and updating the conditions required to be satisfied for safe harbour protection (from a pre-qualification of terminating the accounts of repeat infringers to exercising some other technical step that would reduce infringement or minimise its effects e.g. suspension or throttling of service).

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## 9 Access to copyright protected works: Draft Finding 18.1

*"The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient way to reduce online copyright infringement"*

92. The Australian Film/TV Bodies disagree with this finding.

### 9.1 Access not the issue

93. Lack of access to legitimate content is not an issue in Australia and it is not driving online infringement in Australia. Australian audiences enjoy a wide variety of choice of content in terms of access and price, with a continually growing number of digital services and free catch-up television or ad-funded online video services. New business models are enabling new ways for consumers to format-shift accessed content through direct licensing without undermining the returns of creators and owners of

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<sup>110</sup> cf Google Submission extracted at Draft Report, 488.

<sup>111</sup> It is notorious that the Australian Government has embarked on a round of measures to regulate these entities, including through tax collections currently to reflect the extent of operations in Australia.

copyright. Indeed, it is fair to say that Australian consumers now benefit from more content choices, more distribution choices, at more price point choices for movies and television than ever before in history.

94. The Draft Report fails to acknowledge the extent of access to available content and the nature of the initiatives that illustrate the flexible and consumer focussed way in which content is delivered today. The industry has responded to consumer demand to get content virtually simultaneously (time zones notwithstanding) globally. Prices continue to come down for both physical discs and digital content.<sup>112</sup> In the past 10 months, subscription video on demand (SVoD) services like Foxtel's and Ch7's Presto, Fairfax and Ch 9's Stan and global player Netflix have all launched unlimited consumption subscription services in Australia for approximately \$10 per month. There are also new services from Telstra (Telstra TV) and FOXTEL (FOXTEL internet). This is in line with the increasing international recognition of the capacity of licensing models to address many of the challenges for copyright in the digital economy by providing "an interface between exclusive rights and exemptions or limitations".<sup>113</sup> Modern licensing models ensure that consumers have flexible access to content.
95. With such a wide variety of content, on a range of platforms from a range of service providers at different price points, there is no legitimate excuse for consumers to access content illegally. This is particularly the case given that many major films are now released simultaneously in cinemas across the world, and given the rise of subscription on-demand services such as Netflix.
96. Research conducted in Australia continues to confirm that most members of the public (73% of respondents surveyed) understand that accessing content illegally is theft.<sup>114</sup> This includes research into the attitudes of young adults. Illegal access to content frequently involves circumvention of technological protection measures, in breach of other rights under the *Copyright Act*. Rather than seeking to try to excuse illegal access to conduct, or attempting to normalise this conduct and then expect to adjust the copyright regime around it, there is a need to strengthen the copyright system and educate the community to respect copyright and the entitlement of creators and owners to derive returns.
97. In 2015, for the first time, Australians accessed more movie and TV titles through legitimate online licensed services (such as subscription on demand services) than via infringing sources services. However, online infringement remains a serious threat to the take up of legitimate streaming services. Recently, Australia had the highest per capita number of illegal downloads of *Game of Thrones* on the day the first episode of the new season was released, even though it was simultaneously available through legitimate sources.<sup>115</sup> International examples verify the threat of piracy to legitimate streaming services. The US is the second highest infringing territory for popular television show 'House of Cards', despite that program being available on the leading US streaming service Netflix.<sup>116</sup> In addition, GfK's Consumerscope survey showed a lift in pirated titles viewed in quarter 4 of 2015 and quarter 1 of

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<sup>112</sup> DVD and Blu-ray combined sales are declining year on year in Australia (peak of 83m sales at a value of AUD 1.4bn in 2008 declining to 76m at a value of AUD 1.29bn in 2010 and a further fall of 8% in 2011) (AHEDA statistics). This is in line with the global downward trend in DVD and Blu-ray sales (e.g. British Video Association report a 5-6% annual decline in sales); AHEDA Submission to the Australian House of Representatives Standing Committee on Infrastructure and Communications – *Inquiry into IT Pricing*, July 2012.

<sup>113</sup> Paper presented by prominent intellectual property law academic Daniel Gervais, *Licensing the Cloud*, at ALAI Congress in Kyoto in October 2012  
<[http://www.alai.jp/ALAI2012/program/paper/Licensing%20the%20Cloud%20\(Professor%20Daniel%20Gervais\).pdf](http://www.alai.jp/ALAI2012/program/paper/Licensing%20the%20Cloud%20(Professor%20Daniel%20Gervais).pdf)>.

<sup>114</sup> Creative Content Australia, "Australian Piracy Behaviours", May 2016.

<sup>115</sup> As reported in major Australian news media sources on 26 April 2016, see Fairfax Media's Sydney Morning Herald <<http://www.smh.com.au/technology/gadgets-on-the-go/game-of-thrones-piracy-boom-shows-aussies-arent-afraid-of-the-copyright-police-20160427-gofwp5.html>>, and the Guardian Australia edition <<https://www.theguardian.com/tv-and-radio/2016/apr/26/game-of-thrones-season-six-australia-tops-world-in-illegal-downloads>>.

<sup>116</sup> Todd Spangler, "'House of Cards' Season 3 Pirated, With China Top Country for Downloaders", Variety.com, 1 March 2015, <<http://variety.com/2015/digital/news/house-of-cards-season-3-pirated-with-china-top-country-for-downloaders-1201444023/>>.

2016.<sup>117</sup> A recent study by ABC/HULU showed that when ABC content was made available on Hulu the day after broadcast (for free), piracy was reduced by only approximately 20 to 25%.<sup>118</sup>

98. In the UK, in light of the ongoing damage to copyright industries caused by piracy, the Intellectual Property Office is reportedly considering targeting companies like Google that “facilitate copyright infringement”. Ros Lynch, director of copyright and enforcement at the IPO, told The Times that the government is first going to push for “voluntary initiatives” before considering additional measures. She said:<sup>119</sup>

*“A number of companies do have procedures in place and they are taking some action. I’m not saying they’ve been wholly effective. Some are not doing as much as they could ... there are still some issues with the Google advertising service not doing as much to stop ads going on infringing sites.”*

99. Clearly, both access and enforcement are required to reduce the extent of infringement. The responses to consumer surveys cited in the Draft Report<sup>120</sup> need to be treated carefully, but despite the pricing, access and releases of content, Australian consumers are infringing copyright in massive numbers.

## 9.2 Inadequate support for copyright

100. Critically, Australia’s infrastructure for enforcing copyright is falling behind many of its trading partners. Australia currently has no centralised support for copyright law, relatively low funding for, and no comprehensive plan for IP in the Australian economy – and the proposals in the Draft Report would put Australia further behind if they were adopted. There is still no IP Minister or IP office to champion IP as a critical element of the Australian legal and policy framework and to coordinate responses from various different departments and arms of government. Attempting to build a framework for IP protection and policy development under the umbrella of economy theory – as attempted by the Commission – is wrong and has not been emulated in other countries.
101. The United Kingdom has long prioritised intellectual property rights and law, and has stayed proactive in examining the efficacy of the law in both protecting and encouraging creative endeavour and ensuring that intellectual property rights benefit the economy. The UK Intellectual Property Office (formerly the Patents Office that was established in 1852) is the official government body responsible for managing the intellectual property system in the UK. It is an executive agency sponsored by the Department for Business, Innovation and Skills. In addition to being responsible for administering registered IP assets it is also involved in copyright and IP enforcement, including IP crime policy and work with the Police Intellectual Property Crime Unit. The UK Prime Minister also had an adviser on IP matters, Mike Weatherly MP, who was able to drive significant IP policy in the UK government. These instruments and structures should have been identified in the Draft Report as providing a foundation for the development of IP policy in Australia. Regrettably they were ignored by the Commission. The latest policy indications from the United Kingdom indicate a strong direction towards protection of IP.<sup>121</sup>
102. The US also has a well-established and sophisticated system of copyright stewardship. In the US the Copyright Office, founded in 1897, plays a pivotal and non-partisan role in critical law and policy

<sup>117</sup> GfK, “Consumerscope”, May 2016.

<sup>118</sup> Brett Danaher et al, ‘Understanding Media Markets in the Digital Age: Economics and Methodology’ in Goldfarb et al *Economic Analysis of the Digital Economy*, Chicago University Press, 2015, p 385; see also Michael D Smith, Rahul Telang, ‘Why Digital Media Requires a Strategic Rethink’ Harvard Business Review, October 2012, <<https://hbr.org/2012/10/why-digital-media-require-a-strategic-rethink>>.

<sup>119</sup> James Dean, ‘Web giants must stamp out piracy or face legal action’, The Times, 16 May 2016, <<http://www.thetimes.co.uk/article/web-giants-must-stamp-out-piracy-or-face-legal-action-sk76mxgtd>>.

<sup>120</sup> Draft Report, 492.

<sup>121</sup> James Dean, ‘Web giants must stamp out piracy or face legal action’, The Times, 16 May 2016, <<http://www.thetimes.co.uk/article/web-giants-must-stamp-out-piracy-or-face-legal-action-sk76mxgtd>>.

functions relating to copyright law. In addition to its functions as register of copyrights, it provides domestic and international policy analysis, provides legislative support for the US Congress and participates in litigation (as *amicus curiae*) involving important copyright law issues before the US Courts. The US Patent and Trademark Office advises the Administration on domestic and international copyright legal and policy issues. The Federal Government's intellectual property (including copyright) enforcement efforts are coordinated by the US Intellectual Property Enforcement Coordinator, who is a senior level official appointed by the President and confirmed by the US Senate. Criminal copyright offences involving digital infringements are prosecuted by the Computer Crime and Intellectual Property Section of the Criminal Division of the US Department of Justice, while other complaints about criminal infringement of copyright are lodged directly with the Intellectual Property Program of the Federal Bureau of Investigation (FBI), and US Immigration and Customs Enforcement (ICE) under the US Department of Homeland Security (DHS), coordinated by the National IPR Center.<sup>122</sup> Again, there is no discussion of this in the Draft Report, despite the fact that in one specific area – fair use – the Commission recommends that Australia closely follow the US copyright model. In this context, adopting one element without regard for the whole framework is a flawed approach.

103. Improvement to IP enforcement should be a key objective for the Commission's recommendations in place of the draft recommendation to rely on a wrongly asserted absence of access to content as an excuse for not improving enforcement. As the Draft Report acknowledges, "the ability (or inability) to enforce rights granted by IP laws *materially impacts the value of rights*."<sup>123</sup> The Hargreaves Review reached a similar conclusion that "IPRs cannot succeed in their core economic function of incentivising innovation if rights are disregarded or are too expensive to enforce" and dedicating one of its ten recommendations to enforcement.<sup>124</sup> The UK Government's response to the Hargreaves Review emphasised that "being able to enforce copyright is also a necessity for a healthy copyright system", pointing to various UK Government initiatives in this regard.<sup>125</sup> Similarly, the US copyright review has been described as "a wide review of our nation's copyright laws *and related enforcement mechanisms*" (emphasis added).<sup>126</sup> Improvement of the enforcement to IP rights should have been a central plank in the Draft Report. Accepting the spurious claims that availability and access would end piracy involves an error in process and leads to an erroneous conclusion.
104. The failure of the Commission to properly acknowledge and understand the importance of IP enforcement in the Draft Report is symptomatic of the weak over all institutional response to public IP enforcement that was identified in the Australian Film/TV Bodies first submission. There are no public organisations given the explicit role of enforcing IP rights and those with the purview over IP having little or no resources directed towards IP enforcement and systems of prioritising IP. Public enforcement requires clear identification of responsibilities and tasking between law enforcement agencies, direction from the executive on prioritisation of IP enforcement and the development of skills and knowledge within law enforcement agencies that enables them to carry out the enforcement work with greater efficiency and achieve better outcomes. Specialised courts<sup>127</sup> (or Court lists) could create

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<sup>122</sup> For more information see *Prosecuting Intellectual Property Crimes*, 4<sup>th</sup> Edition, Office of Legal Education Executive Office for United States Attorneys, US Department of Justice, (2013) Intellectual Property CCIPS Criminal Division.

<sup>123</sup> Draft Report, 477.

<sup>124</sup> Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 5 and 9.

<sup>125</sup> UK Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011) e.g. p 3 and 31.

<sup>126</sup> United States House of Representatives Committee on the Judiciary, Press release, *Chairman Goodlatte Announces Comprehensive Review of Copyright Law*, 24 April 2013, <[http://judiciary.house.gov/news/2013/04242013\\_2.html](http://judiciary.house.gov/news/2013/04242013_2.html)> (emphasis added).

<sup>127</sup> In the ASA submission in response to the Issues Paper the Australian Film/TV Bodies identified that Australia already has a lower cost Court (the Federal Circuit Court) that has equivalent functions in copyright and trademark matters to the UK Intellectual Property Enterprise Court. More could be made of this Court to take on a range of civil and criminal enforcement matters with more streamlined processes and more realistic cost recovery for IP owners choosing that pathway.

benefits through accumulated experience and reduce costs for stakeholders involved in legal proceedings. The Commission should address these issues in its Final Report.

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## 10 Federal Circuit Court: Information Request 18.1

*“Would changes to the jurisdiction of the Federal Circuit Court improve access to dispute resolution by small- and medium-sized enterprises? Should additional rule be introduced such as caps on the amounts of costs claimable in a case? What is the upper limit on damages claims the court should hear”*

105. The Australian Film/TV Bodies make the following submission in response to this Information Request.
106. As the Draft Report noted, in their submission in response to the Issues Paper, the Australian Film/TV Bodies identified that with respect to the Federal Circuit Court, “more could be made of the Court to take on a range of civil and criminal enforcement matters with more streamlined processes and more realistic cost recovery for IP owners choosing that pathway.”<sup>128</sup>
107. The Commission may have misunderstood the Australian Film/TV Bodies’ submission. It was not intended to encourage the Commission to consider whether the costs in that jurisdiction were too high or that the damages available should be capped. The Australian Film/TV Bodies were identifying the opposite need – for the processes of the Court to ensure that IP owners who brought their claims in that Court were not at a material disadvantage to those who brought their claims in the Federal Court.
108. Currently the default cost recovery available to a successful party in the FCC is a set scale of fees and an award of costs equivalent to an award in the Federal Court is discretionary. On practice this makes copyright owners cautious about using the Federal Circuit Court because they run a serious risk that they will recover costs at a scale that bears no relationship to the complexity of an IP case. As the Commission has acknowledged, the costs of enforcement of IP include the need to prove the existence of the relevant rights. The current scale fees provide no allowance for these costs.
109. There is no evidence that the unlimited cap on damages that may be awarded produces negative or unwarranted outcomes. And there are good reasons for not capping such costs. It can be difficult to predict in any IP enforcement case, particularly copyright, what the ultimate level of damages awarded will be. One of the reasons for this is the availability of “additional” damages, that the Court is entitled to award in an appropriate case to punish an infringer and deter similar infringements by others.<sup>129</sup> As the authorities demonstrate, these damages are entirely discretionary and the size of the award is difficult to predict. Mediation and alternative dispute resolution are already available and widely used in the Court. However, 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.

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<sup>128</sup> ASA submission in response to the Issues Paper, 20.

<sup>129</sup> s 115(4) of the Copyright Act.

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## Conclusion

110. The Commission needs to rethink its approach to copyright, to reconsider a number of its findings and recommendations – including those identified above – and to provide a more balanced, appropriate and evidence-based proposal for protection and enforcement of copyright.
111. The Australian Film/TV Bodies remain willing to assist the Commission in this process to achieve an appropriate final report, and they are available for further consultation.

3 June 2016