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Collaboration and Intellectual Property Policy
Department of Industry, Innovation and Science
Industry House
10 Binara Street
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By email: IP.PCInquiry@industry.gov.au

To whom it may concern,

Productivity Commission Inquiry into IP Arrangements

Free TV welcomes the opportunity to provide the Department with the views of its members in relation to the Final Report of the Productivity Commission, "*Intellectual Property Arrangements*" (**the Report**).

Background

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by more than 13 million Australians.

As major owners, licensors and licensees of copyright material, Free TV strongly agrees with the comments of the Minister for Communications, the Hon Mitch Fifield that "copyright protection is an essential mechanism for ensuring the viability and success of creative industries by incentivising and rewarding creators."¹ Australian copyright law provides the fundamental framework that incentivises the production of local content and enables broadcasters and other content industry businesses to invest in the industry.

Free TV members also frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production. Free TV therefore has a strong appreciation of the importance of striking the right balance between ensuring adequate protection of IP rights on the one hand and facilitating appropriate access on the other, in order to maximise incentives for innovation, investment and the production of creative works, and to ensure that competition is not impeded.

As the Department has indicated that stakeholders are not required to resubmit information contained in previous submissions, Free TV does not restate the concerns it previously raised in its submission to the Productivity Commission's Issues Paper²

¹ Senator the Hon Mitch Fifield, Media Release "*Conjecture on Copyright Changes Unfounded*".

² Productivity Commission, Intellectual Property Arrangements Issues Paper, October 2015. Free TV's submission is available here: http://www.pc.gov.au/data/assets/pdf_file/0006/195693/sub129-intellectual-property.pdf

or in its submission to the Productivity Commission's Draft Report³. Our comments below are confined to the Final Recommendations of the Report which the Department has sought comment on.

Final Recommendations 17.1, 17.2, 18.1 and 18.2

The Productivity Commission has proposed changes to the Australian Government's approach to IP policy, both domestically and internationally

Free TV is concerned that the Report's proposed approach to domestic and international IP policy as well as a number of its specific recommendations completely undermine the value of Australian local content and the framework that exists to support local content production.

The Report notes in several places that, as a net importer of IP, Australia should have more liberal copyright laws.⁴ However by focusing on consumer welfare from a short term economic perspective, the Report overlooks the significant welfare enhancement arising from Australian content creation. This approach completely disregards the cultural value of Australian content and the importance of local content creation and the local production sector to all Australians.

A robust and certain copyright framework is actually a key driver of innovation and investment in creative industries. Cheaper and/or more readily available foreign content cannot substitute for an entire local content industry, or the cultural value that that content holds. Local Australian creative industries enrich our society, reflect and contribute to our sense of identity as a nation, and also play an important role in attracting tourism, migration and business to Australia.

From the perspective of Free TV members, broadcasters are operating in a heavily regulated and an increasingly competitive multi-media environment. Increasing broadband speeds (both fixed and mobile), together with the development of sophisticated mobile devices, is changing the way that Australians consume television content and is bringing about permanent structural change in the broadcasting sector.

In this context it is critical that Australia's IP arrangements allow broadcasters to compete effectively by providing appropriate protection of broadcasters' rights consistent with Australia's international obligations, and by ensuring that the regulatory environment continues to provide legal certainty and does not impose unnecessary additional costs on broadcasters.

A number of the Report's Recommendations would have an extremely detrimental impact on the ability of broadcasters and other content producers to continue making and investing in Australian content, including in particular:

- replacement of the current fair dealing exceptions with a broad exception for fair use (Recommendation 6.1)
- an expanded safe harbour scheme to cover a broader set of online service providers in the absence of any amendments to ensure that the authorisation infringement provisions are operating as intended in the online environment (Recommendation 19.1)
- amendments to the Copyright Act to support the circumvention of geoblocking technology (Recommendation 5.2)

³ Productivity Commission, Intellectual Property Arrangements, Draft Report, April 2016. Free TV's submission is available here: http://www.pc.gov.au/data/assets/pdf_file/0017/201653/subdr570-intellectual-property.pdf

⁴ Productivity Commission, Intellectual Property Arrangements, Final Report, 4, 64, 77-78, 98-102, 104, 107, 179, 214.

- repeal s 51(3) of the Competition and Consumer Act 2010 (Cth) (Recommendation 15.1)

These Recommendations are not supported by evidence and do not adequately address the concerns raised in a number of submissions to the review. They would inevitably lead to less efficiency in the IP system, increased regulatory costs and decreased business confidence. Critically, they would ultimately lead to less Australian content.

Final Recommendation 5.1

Recommendation 5.1 provides:

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

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

Prohibition on contracting out of the fair dealing exceptions

Free TV supports amendment of the Copyright Act 1968 to include a provision expressly prohibiting contracting out of the statutory exceptions associated with:

- library and archives;
- research or study;
- criticism and review;
- parody or satire;
- reporting of the news; and
- quotation.

These exceptions serve an important social purpose in promoting freedom of expression and information. Contractual relationships should not be able to interfere with rights that are essential in order to better protect the public interest.

We note that other jurisdictions have displayed considerable support in limiting parties' ability to contract out of fair dealing exceptions. In the United Kingdom, the *Digital Opportunity: Review of Intellectual Property and Growth* (May 2011) (**Hargreaves Review**) argued in favour of copyright exceptions being "protected from contractual override". The Hargreaves Review outlined the significant risks associated with contracting out, to the extent it grants rights holders the ability to "rewrite the limits the law has set on the extent of the right conferred by copyright".⁵ One of the key arguments centred on the legal uncertainty created by contracting out. It states the following:⁶

"Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted."

⁵ Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), at 5.40.

⁶ *Ibid*

This legal uncertainty is further reinforced by the issue of “contractual override”.⁷

“Even if unused, the possibility of contractual override is harmful because it replaces clarity (“I have the right to make a private copy”) with uncertainty (“I must check my licence to confirm that I have the right to make a private copy”). The Government should change the law to make it clear no exception to copyright can be overridden by contract.”

In echoing these sentiments, Free TV believes that any ability to contract out of the prescriptive and limited fair dealing exceptions, in particular criticism and review or parody, risks undermining the “central objective of copyright”.⁸ We agree with various submissions that any attempt to restrict these exceptions would unduly fetter the “free flow of information and freedom of expression”.⁹

Free TV notes that the retention of the fair dealing exceptions is critical to Free TV’s support of this recommendation. As detailed in Free TV’s submissions to both the Productivity Commission’s Issues Paper and its Draft Report, Free TV does not support fair use.

The limited nature of the fair dealing exceptions means that prohibiting contracting out only interferes with the freedom to contract in a limited and defined way; the prohibition relates only to specific legal uses of copyright material. Fair use is by nature undefined and uncertain until such time as a court determines the use to be fair. A provision in the copyright act prohibiting contracting out of fair use would be extremely uncertain; and in Free TV’s view, unworkable.

Permitting consumers to circumvent technological protection measures for ‘legitimate uses of copyright material’

Free TV’s strongly opposes this recommendation. Exemptions that allow the circumvention of technological protection measures have been granted in accordance with the process set out in the Copyright Act and Free TV’s view is that any proposals for additional exemptions should follow this process.

Allowing blanket exceptions for ‘legitimate uses of copyright material’ would send a very concerning message to users and would be contrary to the requirement in the AUSFTA that any exceptions to liability for circumventing TPMs must, amongst other things:¹⁰

- be limited to activities where the prohibition on circumvention has a credibly demonstrated likely or actual adverse impact on non-infringing uses of copyright material;
- relate only to a particular class of copyright material; and
- not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures.

⁷ Ibid

⁸ Ibid

⁹ ALRC, Copyright and the Digital Economy (DP 79), 2013 at 17.50.

¹⁰ Australia US Free Trade Agreement, Article 17.4.7(e)(viii) and (f)

Geoblocking technology effectively restricts a consumer's access to websites and digital goods and services to within a particular territory or 'home market'. This allows rights holders to charge different prices to consumers in different markets.

Market-based mechanisms are the best means of addressing issues in relation to international price discrimination. There are legitimate public policy reasons for territorial price discrimination. Copyright is usually owned and managed territorially, for example, overseas suppliers may not have the rights to trade in Australia, or vice versa. This in turn means that different royalty arrangements (and therefore pricing) apply in different geographical regions. This is often as a result of domestic arrangements (for example, as a result of royalty rates set by the Copyright Tribunal).

These arrangements underpin the Australian market for digital goods and services. They enable Australian content providers to reinvest royalties from Australian content services back into the local industry. Green lighting circumvention of geo-filtering sends a signal that it is acceptable for Australians to seek content from services based outside of Australia. Any message that encourages Australians to access any type of content service which is located outside of Australia, ultimately results in Australians spending their income outside of the Australian economy, rather than supporting existing local services.

Therefore, in Free TV's view, the Commission's recommendation risks jeopardising new business models and investment in the local market. This is because, as recognised in the Report, price differentiation is often a business strategy for the efficient recovery of fixed costs. The Report's analysis that 'most suppliers of commercial content to Australia are foreign and Australia is a small country with little impact on the decision to produce content', fails to recognise that for the Australian content industry; price differentiation may facilitate both the acquisition of content from overseas as well as the sale of content to other markets.

In addition, as acknowledged in the Report, prohibition on circumvention of geoblocks are often standard terms of contracts.¹¹ In these circumstances, circumventing a geoblock is likely to amount to a breach of contract if the effect of circumvention is that the content that is licensed in a particular territory is in fact being made available in a different territory.

If the content is then reproduced or communicated without the permission of the copyright owner it is also likely to be an infringement of copyright. In this way, services accessed by circumventing geoblocks may offer content which is not licensed for use in Australia and there is a risk that facilitating use of offshore services will simply encourage content licence breaches.

Furthermore, international legal agreements, including the Australia-US Free Trade Agreement, require Australia to ensure that our laws prohibit using devices which unlock TPMs.¹² Implementation of this recommendation would therefore appear to require renegotiation of any trade agreements which contain these provisions.

In these circumstances, Free TV is concerned that the Commission's Recommendation not only undermines business models that support local content production, but that it is simply not feasible from a practical or policy perspective.

¹¹ Productivity Commission, Intellectual Property Arrangements, Final Report, 142-144.

¹² For example, see Article 17.4.7(b) of the AUSFTA

Final Recommendation 6.1 and 6.2

The Productivity Commission has endorsed the Australian Law Reform Commission's recommendation to limit the liability for the use of orphan works, rather than include this as an element of any fair use exception.

As indicated above and elaborated on in Free TV's submissions to the Productivity Commission, Free TV strongly opposes the introduction of a fair use exception in Australia.

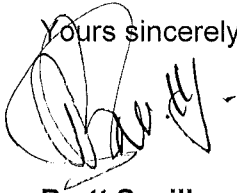
In relation to Recommendation 6.2 regarding limiting liability for the use of orphan works where a user has undertaken a diligent search to locate the relevant rights holder, Free TV supports this recommendation. As suggested by the ALRC, the Copyright Act should be amended so that, where it is established that a user has conducted a reasonably diligent search and the owner could not be found prior to the infringing use, that the remedies available for copyright infringement be limited.¹³ Free TV's view is that damages should be capped so that they represent a reasonable licence fee.

Contact

If you have any queries or wish to discuss any of the matters raised in this letter, please contact me on (02) 8968 7100.

We look forward to engaging with you further on these issues.

Yours sincerely

A handwritten signature in black ink, appearing to read "Brett Savill", written over a circular stamp or seal.

Brett Savill
Chief Executive Officer

¹³ ALRC, Copyright and the Digital Economy (ALRC Report 122), 13.81