

30 August 2013

Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Environment and Communications
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Ms Dunstone,

Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013

Free TV welcomes the opportunity to make a submission to the Senate Environment and Communication Committee's inquiry into the *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013* (the Bill).

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. Our members provide nine channels of content across a broad range of genres, as well as rich online and mobile offerings. These services are free to view. The value of commercial free-to-air television to all Australians remains high. On any given day, free-to-air television is watched by more than 14 million Australians.

Free TV members are major owners, licensors and licensees of copyright material. Our members also frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production.

The Bill should not proceed while ALRC Review is ongoing

The Australian Law Reform Commission (ALRC) is currently conducting an Inquiry into *Copyright and the Digital Economy*. This Inquiry is considering a range of issues, including those that are dealt with in the Bill, and is due to report in November 2013. The ALRC is engaging with a broad range of stakeholders as part of its Inquiry.

The ALRC process should be finalised and its recommendations fully considered by Government before any changes to the existing copyright regime are proposed. The ALRC Inquiry should not be circumvented by the Bill.

Fair use provisions should not be introduced

Free TV opposes any move to amend the *Copyright Act 1968* to include of a broad right of "fair use". The uncertainty created by a new test would inevitably lead to increased litigation, cost, unintended consequences and ongoing legislative amendment, which is not in the public interest.

We note that the Explanatory Memorandum to the Bill indicates that the new "fair use" provision is intended to shift Australian law to the US model. It is not clear the extent to which US jurisprudence might be used to assist in interpreting fair use. Many fair use cases in US law judge fairness having regard to the US Constitution. In particular, US courts have regard to the right of free speech and find fair use where the use benefits free speech under the US Constitution¹.

¹ See for example *Nordstorm, Inc v PARAN* 1992 US Dist. LEXIS 9162

In practice, the change proposed will create uncertainty for stakeholders until the scope of the application are litigated in court in Australia. It will take a number of cases to re-establish a high degree of certainty and it is very likely that it will take a considerable period of time before the uncertainty is resolved. Litigation costs in seeking clarity will be imposed on copyright owners and copyright users seeking to rely on the fair use exemption. In the interim, the lack of certainty will have an impact on the ability of both owners and users to confidently invest in the production of content and/or the development of new services.

Any changes to the existing copyright regime that might be required to update existing exceptions to accommodate new technologies should be dealt with on a case-by-case basis, so that the scope and consequences are subject to careful consideration.

Yours sincerely



Julie Flynn
CEO