

Australian Broadcasting Corporation
submission to the
Productivity Commission

Intellectual Property Arrangements:
Draft Report

June 2016





ABC submission in response to the Productivity Commission draft report on Intellectual Property Arrangements

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Introduction

The ABC acknowledges the work of the Productivity Commission in the development of the draft report on Intellectual Property Arrangements and welcomes the opportunity to respond to certain recommendations, findings and information requests contained in the report.

Elements of the draft report relate to matters on which the Corporation has previously commented. The ABC refers the Commission in particular to the following past submissions:

- November 2012- ABC response to the Australian Law Reform Commission (**ALRC**) Issues Paper on Copyright and the Digital Economy;
- August 2013- ABC response to the ALRC's Discussion Paper on Copyright and the Digital Economy; and
- February 2016- ABC submission on the Copyright Amendment (Disability Access and Other Measures) Bill 2016 (Cth).

The Corporation refers to its prior submissions and notes that it does not intend to comment at length on the Commission's draft report, only to provide comment on the following matters:

1. Assessing the IP system – an analytical framework (Chapter 2)

1.1 Draft recommendation 2.1

The Corporation broadly supports the principles listed.

As both a creator and user of copyright, the ABC has developed a broad, informed perspective on Australia's intellectual property laws. The Corporation acknowledges the difficulties in determining where the balance in competing principles should lie. Care should always be taken to acknowledge the interests and needs of a wide range of participants in the digital economy, including producers and creators, members of the audience and other users of copyright works.

2. Copyright term and scope (Chapter 4)

2.1 Draft recommendation 4.1

As both a creator and a user of copyright material, the ABC supports the proposed introduction of amendments that harmonise the copyright term for published and unpublished works. The ABC believes it would be consistent and appropriate to enact similar amendments for unpublished cinematograph films and sound recordings.

To the extent that Draft Recommendation 4.1 canvasses concerns with regard to orphan works, the ABC refers the Productivity Commission to the ABC's submission on the ALRC Discussion Paper on Copyright and the Digital Economy.

3. Copyright licensing and exceptions (Chapter 5)

3.1 Draft recommendation 5.1

The ABC notes the Productivity Commission's intent in clarifying current law. As with all content providers in the industry, the Corporation relies upon geographical limitations to both acquire materials and to sell its own content throughout the world. Given the content industry's historic and ongoing reliance on these demarcations, the ABC would advise careful consideration before any legislative change is implemented that might impact upon the existing economic model.

3.2 Draft recommendation 5.3

The ABC strongly rejects the Productivity Commission's proposal to replace the current fair dealing exceptions with a broad exception for fair use, and refers the Commission to its prior submissions to the ALRC on fair use.

Conceptually, fair use might be an appealing approach if Australia were developing its copyright laws in a vacuum. However, the reality is that there are over one hundred years of established precedent and practice based on fair dealing and related exceptions. Removal of that system would likely result in an extended period of significant and potentially costly uncertainty for both owners and users of copyright.

In the Corporation's experience, the current law is generally well understood and allows copyright owners and users alike to make day-to-day decisions with considerable certainty. There is no evidence that the sum of the uncertainties in current copyright law is so great that the best solution is to dismantle the entire system, rather than seeking means of addressing specific issues directly.

The ABC believes that the best means of delivering flexibility to deal with changing technologies is to adopt a hybrid model, under which existing fair dealing exceptions are complemented by a residual open-ended exception for developing uses of copyright material that do not conflict with its normal exploitation. Such an approach would allow new fair dealing and free-use exceptions to develop in the future.

4. Trade marks and geographical indications (Chapter 11)

4.1 Draft recommendation 11.1

The ABC supports an effective trade mark system in Australia, and acknowledges the issue of trade mark cluttering. However it recommends careful review before any changes to trade mark regulation in Australia.

The ABC has an extensive, expanding suite of registered trade marks that are relied upon to protect the Corporation's branding across its broadcast and commercial divisions. The Corporation does encounter irresponsible users from time to time, and this can result in difficulties registering trade marks. However, the ABC considers itself a responsible user, and does not engage in speculative registration.

The ABC suggests that many of the recommended changes would benefit from further detailed consideration given their effect would be to increase regulation, most likely resulting in an increase in the timeframes and costs involved in the trade mark registration process. The Corporation recommends caution before implementing measures that might be detrimental to responsible trade mark users from either a financial or an administrative perspective.

5. Compliance and enforcement (Chapter 18)

5.1 Draft finding 18.1

The ABC supports timely and cost-effective access to copyright-protected works, and prides itself as an innovator in its program delivery.

In recognition of the challenges presented in a digital, global media environment, the ABC has developed responsive programming strategies to move with its audience and the changing times and places they view content. The ABC recognises that audiences are increasingly demanding access outside the traditional broadcast and home entertainment windows. Some examples follow:

- ABC News 24 has been streaming online in simulcast since its launch in July 2010. The ABC's main television channel is now also available as a live stream via the ABC's internet television service, iview, with plans to extend the service to other channels later this year.
- Premiere episodes of the last three series of *Doctor Who* have been made available to watch on iview concurrently to their television premiere in the UK, usually around 4.30am on a Sunday. Each episode is then broadcast on the ABC main television channel at 7.30pm that Sunday evening. This approach has allowed Australian fans to legally watch the show without any disadvantage to their UK counterparts.

- In 2014, the ABC made the entire series of Chris Lilley's *Jonah from Tonga* available on iView for a weekend prior to television broadcast. The series was subsequently broadcast on the ABC main channel over six weeks.
- ABC Commercial has introduced "day and date" release for the digital download of programs, enabling audiences to purchase and view their favourite shows from midnight on the day of broadcast. Audiences are also offered season passes, allowing viewers to pre-purchase and access an entire season of a program from its midnight release date.
- Viewers can also purchase and view program episodes instantly once they are no longer available through iView utilising the links-to-buy service. This allows any viewer to acquire a copy of the episode through their preferred electronic vendor and continue watching.
- ABC Radio live streams 35 stations via its websites and apps. A variety of ABC Radio programs are available for time-shifted listening via the radio website and app.
- ABC Radio continues to be the country's leading provider of podcast programs, with an ever-expanding suite of new shows being made available to a wide Australian audience, including programs made for digital-only delivery.

6. Requests for further information

6.1 Information request 5.1

The ABC acknowledges ongoing challenges with regard to copyright licensing restrictions that impact upon the Corporation's ability to engage in fair dealing, and refers the Productivity Commission to its prior submissions to the ALRC on the issue.

While licences rarely expressly exclude fair dealing, prescriptive terms of use often create uncertainty, and leave the ABC at a disadvantage to its competitors when wishing to fair deal in the content of a contracted rights holder. The ABC supports any amendment to the *Copyright Act* which would provide that an agreement that excludes or limits the operation of copyright exceptions should have no effect.

To the extent that the request regarding the preservation of exceptions for digital materials concerns libraries and archives, the ABC confirms its prior support for the retention of the current statutory exceptions.

6.2 Information Request 5.3

In its February 2016 submission on *the Copyright Amendment (Disability Access and Other Measures) Bill 2016 (Cth)*, the ABC supported proposed amendments that would consolidate and simplify the existing statutory licences for the use of copyright materials by the educational sector. The ABC would support reforms that would work to streamline the operation of the government statutory licensing scheme for the use of copyright materials by the educational sector.