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Productivity Commission
Inquiry into Australia's Intellectual Property Arrangements

BY ONLINE SUBMISSION

Dear Sir/Madam,

**DRAFT REPORT OF THE INQUIRY INTO
AUSTRALIA'S INTELLECTUAL PROPERTY ARRANGEMENTS**

Viacom International Media Networks Australia (**VIMN**) is pleased to have the opportunity to respond to the Productivity Commission's Draft Report on *Intellectual Property Arrangements* (**Draft Report**).

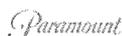
ABOUT VIMN

VIMN, a unit of Viacom Inc. (NASDAQ: VIAB, VIA), is comprised of many of the world's most popular multimedia entertainment brands, including MTV, Nickelodeon, Comedy Central, BET, Paramount Channel, VH1, VIVA, Channel 5, COLORS, Game One and Tr3s: MTV, Música y Más. Viacom brands are seen globally in more than 700 million households in approximately 170 territories and 37 languages via more than 200 locally programmed and operated television channels and over 550 digital media and mobile television properties. Accordingly, Viacom has a vital interest in a robust and effective protection of its copyright assets in Australia.

While there are a number of findings in the Draft Report, we have chosen to address those of particular concern to VIMN:

1. NEW SYSTEM OF USER RIGHTS - FAIR USE [Draft Recommendation 5.3]

VIMN does not support the recommendation to implement a new system of user rights, incorporating an open ended fair use exception.



The proposal of such a system is not only inconsistent with Australia's international obligations¹, but will undoubtedly introduce significant uncertainty into Australian copyright law. Such a flexible and indeterminate initiative will not be accompanied by the valid guidance of over a century of case law precedent and jurisprudential interpretation enjoyed by the United States of America, all of which provide fair use in its jurisdiction a level of predictability. Our view is that any introduction of a fair use system or a similar new user rights system, would necessitate litigation to determine the scope of qualifying infringements, which will undoubtedly be both time consuming and expensive.

The shared underlying theme of the fair dealing defences is that they apply to precise categories of activity recognized as unlikely to interfere with the legitimate interests of copyright owners, undermine the value of the work or to significantly deprive the copyright owner of compensation for creative expression. Since the fair dealing defences already allow exhaustive exceptions to using copyright material, the introduction of a fair use system will unreasonably shift the balance in favour of consumers at the expense of copyright creators, depriving such rights holders of deserved remuneration for their talents and efforts.

Further, the overarching economic case for introducing a fair use system is weak. The absence of a fair use system in Australia has not, thus far, impeded the development of a digital marketplace or distribution platforms, nor has it stifled innovation. A February 2016 published report by PricewaterhouseCoopers (PwC)² estimated introducing "fair use" in Australia could result in a loss of Gross Domestic Product (GDP) of more than \$1 billion. Additionally, under another April 2015 published report by PwC³ the copyright industry was already ranked fourth in terms of its contribution to the Australian economy, after financial services, mining and construction, generating an economic value of \$111.4 billion across 2013-2014.

2. CURTAILING COPYRIGHT DURATION [Draft Recommendation 4.2]

VIMN does not support the recommendation to curtail copyright duration.

Any implementation of a severely truncated protection term of 15-25 years after creation of works, is inconsistent with Australia's international obligations, particularly under the Berne Convention (1886), WIPO Copyright Treaty (WCT) (2002), the Australia-United States Free Trade Agreement (AUSFTA) (2005) and recent Trans Pacific Partnership (TPP) (2016). In addition, this recommendation is premised on outdated and discredited economic studies⁴ failing to address the current term of protection in encouraging investment in the distribution and trading of copyright works.

This recommendation alters the balance unreasonably towards consumers at the expense of copyright creators, as it diminishes the intrinsic value of the works, along with their financial worth, by reducing the length of their protection from entering the public domain for widespread unfettered use.

3. ACCESSIBILITY OF CONTENT & ONLINE ENFORCEMENT [Draft Recommendation 18.1]

VIMN does not support the recommendation that "timely and cost-effective access to copyright protected works" is the key to reducing online copyright infringement, as opposed to increasing enforcement efforts or penalties in Australia.

Consumers already have unparalleled and timely access to a greater volume of content today through more diverse channels at more affordable price points than historically.

¹ Berne Convention 1886 and WIPO Copyright Treaty (WCT) (2002)
http://www.wipo.int/treaties/en/ip/wct/summary_wct.html

² PwC, 'Understanding the costs and benefits of introducing 'fair use' exception' (Report, February 2016) Available: https://www.screenrights.org/sites/default/files/uploads/PwC_Fair_Dealing_CBA_Final.pdf. This Report was prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights

³ PwC, 'The Economic Contribution of Australia's Copyright Industries (2002-2014)' (Report, April 2015) Available: <http://copyright.com.au/wp-content/uploads/2015/08/PwCReport-EconomicContribution-AustraliaCopyright-Industries.pdf>. This Report was prepared for the Australian Copyright Council (ACC).

⁴ Landes and Posner (2002) and Pollock (2007)



According to research from CHOICE, an Australian consumer advocacy group, Australians accessed more film and television titles through legitimate, licensed services than via infringing sources in 2015⁵. In Australia alone, Viacom content reaches over 3 million subscribers each month on Fetch TV, Foxtel, STAN and Presto, not to mention the numerous consumers of our VOD titles digitally on iTunes and Telstra Bigpond Movies, amongst others. These services are accessible: easy and convenient to subscribe to and reasonably priced. VIMN's competitive prices range from \$2.99 for individual episode downloads, \$10 a month for a STAN subscription, to \$35 a month for a Foxtel full package subscription, including access to 5 Viacom channels (plus 40 other channels). Despite this, online infringement remains a serious threat to the registration of legitimate streaming services. The record levels of illegal downloading of *Game of Thrones* are well documented⁶. The Australian film *Mad Max: Fury Road* was downloaded 36.4 million times in Australia in 2015⁷.

An Australian Government 2015 report entitled "Online Copyright Infringement Research: A Marketing Research Report", revealed 55% of respondents download/stream infringing content "because it's free"⁸. Clearly, both access and enforcement are required to reduce the extent of infringement and address this challenge – it is not an either/or option. As evidenced herein, there are numerous avenues through which consumers can already legitimately access content, so enforcement must be strengthened to reduce the extent of infringement. There is an overwhelming need to not only improve the copyright system to comparative international standards of legal enforcement, but to invest more in educating the Australian community to respect copyright and the entitlement of creators and owners to derive returns.

4. EXPANSION OF 'SAFE HARBOUR' SCHEME [Draft Recommendation 18.1]

VIMN does not agree with the recommendation to expand the safe harbour scheme to cover the broader set of online service providers intended in the *Copyright Act 1968 (Cth)*.

If implemented, this recommendation will reduce the incentive for search engines and other internet players to cooperate against online infringement. Expansion of the scheme potentially offers protection to those who profit directly from infringing activity, without offering any equivalent clarification of their legal responsibilities. Moreover, there is insufficient evidence the current approach of limiting safe harbours to internet service providers has stifled authentic online trade in Australia.

5. CIRCUMVENTION OF GEOBLOCKING [Draft Recommendation 5.1]

VIMN does not support this recommendation that circumvention of geoblocking should be allowed, and that consumer rights to circumvent geoblocking should be enshrined in the *Copyright Act 1968 (Cth)*. It urges the Productivity Commission not to include this finding in its final report.

This recommendation is both naive and misguided, and once again, contrary to Australia's existing international obligations⁹. It fails to acknowledge there are legal restraints on this

⁵ CHOICE, 'Desperately Seeking Streaming: Research Update – CHOICE Digital Consumers Paying for Content Behaviour and Attitudes'. Available: <http://apo.org.au/resource/desperately-seeking-streaming-choice-digital-consumers-paying-content-behaviour-and> (Report, September 2015)

⁶ The Guardian, 'Game of Thrones season six: Australia tops world in illegal downloads'. Available: <https://www.theguardian.com/tv-and-radio/2016/apr/26/game-of-thrones-season-six-australia-tops-world-in-illegal-downloads> (Article, April 2016)

⁷ Annual research from Excipio (Piracy Tracking Firm) for 2015. Available: <http://www.abc.net.au/news/2015-12-29/interstellar-the-most-pirated-movie-of-2015/7057848> (Article, December 2015)

⁸ IF Magazine, 'Creative Content Australia slams draft report on copyright'. Available: <http://if.com.au/2016/05/02/article/Creative-Content-Australia-slams-draft-report-on-copyright/ZQXTPDRBVV.html> (Article, May 2016)

⁹ Online Copyright Infringement Research: A Marketing Research Report prepared for Department of Communications. Available: http://apo.org.au/files/Resource/deptcomms_online_copyright_infringement_report_final.pdf (Report, June 2015)

⁹ A failure to acknowledge and permit the territorial licensing model is a violation of the three step test under the WCT, positioning Australia in breach of its international obligations.



activity, other than under Australian copyright legislation. This proposition is likely to present serious problems for content licensing and enforcement of copyright, particularly given copyright is licensed territorially and driven by local market commercial imperatives.

Disrupting territorial licensing will undoubtedly have a serious and harmful impact on Australians' ability to see themselves and their cultural identity resonate through locally produced screen content. The Government should not act to exacerbate these damaging outcomes through an ill-considered interference in the market. Territorial licensing (and the resulting protection of those licences through geoblocking technology) permits the best investment environment for sustainable local production. It also offers a framework for importing international content which assists in the revenue needed for such investment in local production. It is a critical foundation in the market structures which allow a superior blend of local and international content to be available and accessible to Australians at affordable prices.

Territorial licensing also supports Australian content businesses, including local subscription video on demand services and subscription television, in their acquisition of content from international providers (such as American studios). This is critical as it allows service providers to offer an affordable and thorough content catalogue and assists to generate sufficient revenue to invest in Australian content, which is a costly venture.

As expressed above, there is a clear connection between the geographic licensing framework and recognition of significant cultural policy goals. Unwarranted interference with existing licensing arrangements would have notable consequences for Australia's cultural industry and its consumers.

Further, a licensee of copyright works with territorial restrictions will invariably have contractual limitations on access built into its customer contracts. Such limitations will be enforceable where a customer takes steps to register to receive a service outside permitted territories. Breach of these limitations will likely entitle the service provider to withdraw the service to the customer, leaving the consumer liable for breach of contract (noting online contracts are enforceable in numerous countries).

Additionally, encouraging consumers to attempt to circumvent geoblocking will mean a loss of a point of collection for exploitation in the Australian market and compliance with Australian Government laws, for example, taxation and classification of content across platforms, which seems inconsistent with Government objectives.

6. IP LICENCES AND COMPETITION LAW [Draft Recommendation 14.1]

VIMN does not support the recommendation to repeal Section 51(3) of the *Competition and Consumer Act 2010 (Cth)*, which allows for intellectual property licences in some circumstances to be exempt from certain competition law requirements. Such a move would serve to destabilize licensing markets in Australia by subjecting associated agreements to more invasive regulation on a competition law basis.

There is no concrete evidence any harm has resulted from the present, enduring and limited competition law exemption for copyright licences. Also, flexible licensing of copyright works is pro-consumer, and enables the introduction of innovative products and services. Repeal would create uncertainty in the Australian marketplace, would restrict copyright licensing, and is against the spirit of the TPP and AUSFTA, both of which require contractual liberty for copyright holders to transfer their rights.

7. GLOBAL COOPERATION ON IP POLICY [Draft Recommendation 17.1]

VIMN does not support the recommendation that Australia 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.



This finding appears critical of bilateral treaties including the AUSFTA and TPP, both of which have served to fortify Australia's intellectual property system and allowed Australian businesses elevated intellectual property protection amongst Australia's trading partners in markets they export goods and services into.

The recommendation derives from an ill-considered basis that adopting these developing international standards is not to Australia's advantage. However, the reverse is true, as when Australia, like many of its trading partners, improves standards beyond those in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and similar multilateral agreements, Australian rights holders enjoy better incentives to develop and share their works, and consumers benefit from higher legitimate access to content. Australia should not jeopardise these important benefits "to avoid duplication and reduce transaction costs".

CONCLUSION

Our current copyright laws serve a critical function to ensure the advancement of the Australian creative industry, which consequently stimulates the economy, fosters progress and inspires local culture.

At a time when Australia should be focusing on robust implementation of the TPP Agreement, the Draft Report instead calls on the Australian Government to sacrifice key international commitments and to digress from evolving global trends, by weakening, rather than consolidating, copyright law protections and enforcement practices.

In closing, VIMN's view is that the Productivity Commission needs to reconsider a number of its recommendations, including those mentioned above, and to subsequently provide a more suitable proposal for the future of copyright in Australia.

VIMN is available for further consultation to assist the Productivity Commission achieve an appropriate final report.

Yours sincerely,

Ben Richardson
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VIMN Australia Pty Ltd

