

GETTY IMAGES

**Submissions in reply to the Productivity Commission Draft Report
into Intellectual Property Arrangements**

3 June 2016

Executive Summary

Getty Images welcomes the opportunity to provide comments on the Productivity Commission's draft report into Intellectual Property Arrangements (**Draft Report**). The Commission has acknowledged that as part of its review it will consider whether current intellectual property arrangements provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and production of creative works. We believe Getty Images is an important voice in this discussion.

Since we were founded, we have successfully championed the need to strike a balance between providing access to our multimedia content and protecting the content creator's intellectual property rights in that content.

We recognise the importance of the proliferation of ideas and products. Our imagery communicates every-day news, illustrates and maps trends and helps shape society through visual storytelling, thereby providing immeasurable public benefit. However, the creative and technical benefits of our content to the public are threatened if it can no longer generate revenue and thereby reward its creators and distributors. Any changes which adversely affect our ability to protect this copyright stymie creativity and innovation and threaten the existence of this content entirely, erasing the public benefits it provides. We are of the view that if some of the views expressed by the authors of the Draft Report are ultimately adopted they will do irreparable damage to rights-holders and creative industries in Australia. Primarily, these are:

- (a) Drafting finding 4.2 of the Draft Report, being that a reasonable estimate for the term of copyright would be closer to 15 to 25 years after creation. This finding demonstrates, in our submission, a misunderstanding of the commercial use of copyright material and the manner in which content creators and copyright holders could be exploited by others. In our view, there is no valid basis in policy for draft finding 4.2.
- (b) Draft recommendation 5.3 of the Draft Report, being to replace the current fair dealing exceptions with a broad exception for fair use. We consider that this would have the effect of perpetuating pre-existing problems experienced in the US with the fair use exception, including the uncertain application of the exception and its exploitation by certain market participants. In our view, there is no case for the adoption of draft recommendation 5.3.
- (c) Draft recommendation 18.1 of the Draft Report, being to expand the safe harbour scheme in Australia to cover other online service providers. We consider that this would have the effect of preventing rights-holders from protecting their copyright. We make specific reference to the experience in the United States with an expanded safe harbour scheme and note the devastating effects this has had on the market. Of specific concern to us is that fact that such a scheme gives way to opportunistic use of copyright material, such as the growing practice of "framing". This prejudices not only those who own the copyright, but also participants in the market who do the right thing. In our view, there is no case for the adoption of draft recommendation 18.1.

Our purpose of making a submission to the Commission is to explore these areas in more depth and express our concerns over the contents of the Draft Report.

1 Introduction to Getty Images

Getty Images is the world's most trusted and esteemed source of visual content. With an award-winning image and video collection of over 200 million assets, over 120 million of which are digitised, we have evolved from an analogue stock photography business to be the global leader in the digital visual content industry. We licence still images, music and short-form video clips all over the world.

1.1 *What is our product?*

Our multimedia library incorporates the world's leading commercial archive of visual content, including editorial global news, sports, celebrity, music and fashion multimedia coverage, as well as exclusive conceptual creative images.

Getty Images represents more than 200,000 individual contributors (photographers, illustrators, and videographers). Our award-winning imagery can be seen at www.gettyimages.com, as well as our other websites, including www.istockphoto.com, www.wireimage.com and www.thinkstock.com. Our content segments include:

- (a) creative content driven by industry-leading creative research/visual anthropology including:
 - i. iStock, crowd sourced royalty-free stock imagery, media and design elements, offering millions of hand-picked photos, illustrations, videos and audio tracks; and
 - ii. Prestige, representing imagery curated from the world's leading photographers, designers and videographers.
- (b) entertainment images from over 70,000 events per year, including award ceremonies, fashion weeks and film festivals;
- (c) global photo coverage of live action sport events and games, shot by the world's leading sport photographers;
- (d) newsworthy photos of national and international events, covering more than 30,000 news events annually; and
- (e) our archival collection, a global archival offering of defining cultural moments, places and iconic personalities - from the historical to the present-day.

The professional production of this multimedia content is complex, sophisticated and expensive. In addition to the creative work of skilled photographers around the world, multimedia production and distribution requires a high degree of coordination, organisation and investment in order to provide our clients with the most sought after and relevant images, videos and audio in a timely and efficient manner. At the core of our business is our ability to licence the copyright in this content.

1.2 *Who are our customers?*

We have a diverse customer base, including creative and media professionals. Our content appears every day in the world's most influential newspapers, magazines, advertising campaigns, films, television programs, books and online media.

1.3 *Getty Images in Australia*

Getty Images has had a presence in Australia since 1998. We currently have over 40 full-time staff working in both Sydney and Melbourne, including our staff photographers who are creating new Australian-based content for our archive, in addition to over 9,500 skilled individual contributing photographers dispersed throughout Australia. As our fourth largest market, Australia is strategically important for Getty Images.

The strength of the Australian business is a testament to the calibre of our clients in this region and the innovative ways digital content is being used by creative agencies, media organisations and business all around the country to engage audiences. With clients such as Sky News, Fairfax Media and News Limited, the depth of our content has a significant impact on the Australian media landscape.

1.4 *Our Innovations in Digital Multimedia Licensing and Delivery*

There is significant work and technology investment undertaken by professional photographers and their licensing agencies in order to provide publishers with the most sought after and relevant images in a timely and efficient manner. This includes work and investment involved in the selection, editing, captioning and key-wording of images, as well as in developing search functionality and improving digital distribution.

We are among those leading the charge in respect of providing innovative content delivery, including 360° 'virtual reality' images.

One example of such innovation is our offering of an 'embed capability'. Our embedded content viewer, which we call very simply, Embed, gives everyone the ability to ask and receive permission to use select Getty Images content for editorial, non-commercial use (including in blogs, social media posts and sites), in a way that's frictionless, legal and free of charge. The embedded image is framed to credit the photographer and is linked back to Getty Images where others can license it for commercial use. In addition it demonstrates to others that the individual has permission to use the content and is doing the right thing by our photographers.

Aside from the exposure our content receives from our customers, Getty Images has significant capacity to connect directly with the wider audience. This includes a number of popular apps available on mobile phones, such as:

- (a) "Getty Images", where you can search, view and share our images and discover the story behind them;
- (b) iStock; and
- (c) Getty Images Moment, an app used by our global contributors to submit their content.

With so many avenues for content delivery, the need to retain and protect our intellectual property rights in our content is high. Without adequate protection of our copyright, we would not be able to continue to provide vital content to Australian consumers, uphold the integrity of legitimate licenses issued to clients, maintain the value of our content, or protect the livelihood of our photographers.

While these creative and technical innovations benefit the general public, they are threatened if imagery can no longer generate revenue.

2 General points about copyright

Getty Images considers that any consideration of the state of Australia's copyright arrangements must start with an acknowledgement of the fact that copyright is personal property (*Copyright Act* s196(1)). With that starting point in mind, it is axiomatic, in our submission, that recommendations for policy and legislative changes that will interfere with the scope of personal property rights must be carefully considered and based on evidence that there are real problems that need to be addressed and that the recommended changes will achieve a beneficial outcome without unduly affecting the property rights of creators and owners.

Getty Images respectfully submits that the Draft Report does not meet this standard. The reasons for this conclusion are described in the responses below to specific findings and recommendations set out in the Draft Report.

The overriding approach of the authors of the Draft Report treats copyright works as if they were widgets, or products of some finite "commons" that is "walled off" from the public domain and must not be left fallow. For instance, at one point the draft report comments that copyright law, unlike patent or trade marks law, does not have a "use it or lose it principle" (see page 170); in other words, there is no obligation on a copyright owner to circulate or exploit the work in order to retain copyright protection.

The Draft Report continues:

The lack of any requirement for rights holders to actively supply the Australian market reduces the efficiency of Australia's copyright regime. Demand for works that have been created, but are not being supplied, reduces consumer welfare and the profits of intermediaries and original rights holders. Where a rights holder has made a choice not to supply their works to the market (or refuses to supply a market), granting consumers access to that work, such as through a fair use exception, improves consumer wellbeing without reducing incentives to create copyright works.

No evidence is cited for the suggestion that a failure to exploit a copyright work "reduces consumer welfare". And even exploitation by the author in one "channel" is not enough for the proponents of change to the current regime (see the comments below in relation to the recommendation to introduce fair use).

In a recent speech, Professor Michael Fraser of the Faculty of Law at the University of Technology, Sydney, called out this utilitarian view of copyright, saying:

Copyright works are not a creative commons. Commons, such as the air and the sea, exist in nature. The question in respect of the commons in nature is how to share the benefits. Copyright works do not exist in nature; they are not a commons. They are created and produced by people who invest their time, talent and capital and who are thereby entitled to earn a return for their work and

*investment if they choose. It is the author and publisher's choice to decide if they want to be paid for their work; it is not the consumer's choice. [Emphasis added]*¹

3 Term of copyright **Submissions in reply to Draft Finding 4.2**

DRAFT FINDING 4.2

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.

This is a "draft finding" rather than a recommendation, as many commentators have pointed out since the draft report was released. The Commission recognises that Australia's international treaty obligations preclude any immediate change to the term of copyright. Getty Images also notes that Senator Fifield, the Commonwealth Government Minister with responsibility for copyright, has publicly stated that the Australian government has no intention of legislating to reduce the term of copyright.

As many commentators have pointed out, and the Commission itself conceded in the draft report, the government's ability to change the term of copyright is constrained by Australia's international treaty obligations.

Against this background, this draft finding merits comment notwithstanding the Minister's disavowal of it. In our view, this draft finding does not recognise how copyright works are exploited in the "real world" or acknowledge or appreciate the commercial realities of the industries that will be directly affected.

The following examples highlight the real problems and substantial injustices that would follow if the term of copyright was reduced to 25 years after the creation of a literary or musical work or a photograph:

- (a) An Australian photographer (whom we have chosen not to identify) is renowned for the many photographs of local and international music superstars that he has taken over a career spanning more than 35 years. In one year in the 1980s alone, he was the official photographer for Australian tours by a number of US and UK rock music legends. He attained this status as a result of years of training and hard work in Australia and Europe. He still sells prints of some of the photos from those tours (and many taken before and since) online via his website and licenses the images for a range of other purposes. Under the Commission's draft finding he would have lost any right to control the use of his photographs and receive any remuneration for them somewhere between 5 and 15 years ago.
- (b) The song writer Chris Bailey was a member of the Australian punk band The Saints. The band was influential in the punk scene in the UK and the US, as well as in Australia, in the second half of the 1970s and in the subsequent post-punk scene. The band's influence was not matched by commercial success. In 1986, Bailey wrote a song called Like Fire Would. In 2014, the song was recorded by

¹ Michael Fraser, *Charles Clarke Memorial Lecture What Are Publishers For?* (13 April 2016, accessed 31 May 2016) <<http://www.pls.org.uk/media/216096/What-are-publishers-for-Charles-Clark-Lecture-2016docx.pdf>>

Bruce Springsteen and released on his High Hopes album. Under the Commission's finding, Bailey would not have received a cent from this exploitation of his song.

- (c) The Australian author Tim Winton published his novel *Cloud Street* in 1991, which means that it is at the outer limit of the Commission's ideal term. The book has been very successful in Australia; it has also been adapted for the stage and for a television series. If the Commission's proposal were enacted, a film maker could adapt the novel for the screen without needing to seek Winton's permission, and would not need to pay him anything for the right to use the novel as the basis for the film.

These examples are far from atypical across all art forms. We fail to see the rationale for a term of copyright that would have these consequences.

As a general point, it must be noted that the Commission proposes that the shorter term of copyright should commence on creation of the work. The lag time between creation and publication (or other commercial exploitation, depending on the nature of the work) of much copyright work can be a matter of years, so the real term of copyright would be significantly shorter than the recommended range.

It is routine in the open market for catalogues of very old artistic works, literary works and recordings of musical works to change hands for very large sums of money long after they have ceased to be protected by copyright. This fact belies the Commission's view that the commercial life of copyright works is inherently short.

4 Fair use

Submissions in reply to Draft Recommendation 5.3

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the *Copyright Act 1968* (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- the effect of the use on the market for the copyright protected work at the time of the use
- the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work
- the commercial availability of the work at the time of the infringement

- the purpose and character of the use, including whether the use is commercial or private use.

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

The Commission has endorsed the recommendation of the 2014 Australian Law Reform Commission (**ALRC**) inquiry into *Copyright and the Digital Economy* and recommended the adoption in Australia of a broad-based US-style defence of Fair Use.

Most discussions of "fair use" and, in fact, of perceived problems with the current Australian copyright system, are based on an assumption that copyright provides authors with privileged rights over a "commons" that needs to be jealously guarded. On this view, rights granted to authors (using the term in its general sense) and other owners of copyright works derogate from the commons and need to be carefully policed and treated with suspicion. As discussed above, this view of copyright is false and nowhere is this more obvious than in the case of the copyright in a photograph.

The fact that one photographer has taken a photograph of an individual or a public building or landscape has no effect on the ability of any other person to take a photograph of the same person or scene. The concept of fair use rests on the suggestion that there is some detriment to consumer welfare if the first photographer wishes to control uses of the photograph by exercising her copyright in the work. As discussed above, we do not consider that the existence, or at least the extent, of any detriment of that nature has been adequately demonstrated in the Draft Report.

All forms of property in Australia are only as robust as the legal framework (in most cases legislation) that recognises or establishes the property right and provides owners with rights to exclude or include others from the benefit of the property and to transfer the property on acceptable terms. Despite this, it appears that it is only the law recognising and protecting intellectual property rights that attracts this sort of attention.

The inherent problems that arise from the application of fair use in the context of artistic works are encapsulated in the relatively recent US case concerning the artistic photographer Patrick Cariou and the appropriation artist Richard Prince². Prince appropriated artistic photographs of members of a Rastafarian community taken by the photographer Patrick Cariou. Prince altered 30 of the photographs by drawing on them and then exhibited the altered works as entirely his own. He did not seek Cariou's consent or pay him for using the photographs. At first instance, Prince's treatment of the works was found to have infringed the copyright in Cariou's photographs. On appeal, the court found that Prince had not infringed Cariou's copyright in 25 of the 30 photographs because his treatment of them constituted fair use. The appeal Court returned the matter to the trial judge for consideration of the position in relation to the other 5 photographs. The dispute was settled out of court in 2014.

² See the decision of the United States Court of Appeals for the Second Circuit at 714 F. 3d 694 (2d Cir. 2013).

A key factor in the appeal court's decision was that, even though Cariou had exploited the photographs by publishing them in a book and exhibiting them in public, he had not licensed them for other uses. This entitled Prince to exploit them instead, even though he did so a mere 8 years after they were first published by Cariou.

In our submission, this case is highly problematic and epitomises the negative consequences that the principle of fair use has for the owners and licensors of copyright in artistic works for the following reasons.

- (a) The case demonstrates the contempt for personal property rights that underpins Richard Prince's art practice and that, we submit, is inherent in the concept of fair use generally. Prince did not ask Cariou for consent and did not credit him as the originating author on which he based his work.
- (b) There is no economic rationale that we can identify for permitting Prince to do what he did without remunerating Cariou – his purposes could just as easily have been served if he had "appropriated" and altered public domain works.
- (c) It is a fundamental aspect of property rights that the owner has the right to control how the subject property is used and alienated as long as no demonstrable detriment to other members of society is caused. This includes the right not to use, or allow others to use, the property. As commented above, the authors of the draft report have offered no evidence to support their assertion that there is a detriment to consumer welfare if a copyright owner chooses not to publish or distribute a particular work.
- (d) Further, it is notable that the photographs that Prince appropriated had been published less than 10 years previously, and yet this was enough for the court to form a view that he had forgone his right to prevent Prince from using them, or be remunerated, because he had not licensed them in that period.
- (e) Finally, as noted above, there were 30 works in suit, and yet the appeal Court was only able to determine that 25 of them were protected by fair use. This demonstrates the lack of certainty with which the fair use principle is applied from case to case and the lack of guidance that it provides to creators as to what will be permissible.

4.1 *Fair use and Google*

While the Cariou case demonstrates the inherent problems that the fair use principle causes in the context of photographs and other artistic works, the real "elephant in the room" with fair use is the manner in which Google exploits the principle as part of its business model. This is especially true following the conclusion of the "Google Books" fair use litigation in the United States, which endorsed Google's mass digitisation of millions of books on the basis that it was a fair use of the underlying literary works.

The implications of the Google Books decision for organisations such as Getty Images are obvious. It appears that it would be permissible for Google (or another organisation) to appropriate every image in our library and the onus would then be on us to litigate, on a case by case basis, every subsequent use that Google decided it wished to make of the appropriated images. Apart from the fact that this is objectionable in principle, the sheer size of Google and its apparently inexhaustible ability to fund litigation to defend or

advance its business model makes this a daunting prospect for a business such as ours. As one of our executives recently commented, when asked about Google's practices in Europe:

Are there copyright issues? Yes. But the problem is not just copyright. It's their market dominance and their position in search where they can circumvent any of the copyright protections that legislatures or courts may provide. I'll use Germany and Spain as examples of why this is not just a copyright issue. They enacted specific legislation to protect publishers in those countries, where they said under copyright, use of news snippets would require compensation. So you get copyright protections in place but Google, what they were able to do is say, "Fine, if you've got this copyright remedy we're just going to exclude you from search." Nobody can really afford to erase themselves off the web, so they were forced to opt back into the Google scraping scheme, with no compensation. This is not just a copyright issue; we're really focused on the impacts and those business practices from a competitive standpoint.³

4.2 *The current fair dealing and educational use arrangements*

Given the Commission's brief to undertake a root and branch review of Australia's intellectual property arrangements, we consider that it is necessary that the authors of the Draft Report undertake an analysis of the rationale for the existence of the current "fair dealing" exceptions in the Copyright Act. We can see no evidence that they have done so. The Draft Report concludes that the existing fair dealing scheme is not working and should be replaced by fair use, but this is not the same as examining why exceptions of any kind are required.

The Commission recommends that educational use should be included in a "non-exhaustive list of illustrative uses, which [would] provide[s] strong guidance to rights holders and users." The current Copyright Act provides educational institutions with the right to use most categories of copyright works without consent provided that the use is educational and remuneration is paid to users via collecting societies. A number of commentators have noted that these arrangements have developed on an *ad hoc* basis and need reform for consistency.

However, we are unaware of any serious examination as to why the owners of copyright should be required to subsidise educational institutions (including those that are run as private business that charge students very high fees) when, as far as we are aware, no other industry is required to do so.

In our view, unless there has been a detailed examination of the underlying public policy rationale and sound evidence that the subsidy provided by fair use to the endeavours of downstream users is warranted, fair use should not be introduced and nominated uses should not be permitted without the consent of the content owners and payment of equitable remuneration to them.

³ Conor Risch, *Too Big to Sue: Why Getty Images Isn't Pursuing a Copyright Case Against Google in the US* (17 May 2016, accessed 1 June 2016) < http://www.pdnonline.com/news/legal/copyright/Too-Big-to-Sue-Why-Getty-Images-Isn-t-Pursuing-a-Copyright-Case-Against-Google-in-the-U-S-16515.shtml?utm_source=SilverpopMailing&utm_medium=email&utm_campaign=PDN%20Newswire%20Newsletter%20Template%2005192016%20%281%29&utm_content#sthash.baXN53pX.dpuf >.

4.3 *The commission's response to concerns of key rights holders*

As the Draft Report notes, a group of significant rights holder organisations commissioned the consulting firm PwC to prepare an economic assessment of the potential costs and benefits of introducing a fair use provision in Australia. At the request of the rights holders, the PwC report was based on its assessment of the impact in Canada of the relatively recent introduction of measures approximating fair use for educational uses of copyright material in that country. The Commission's response to the conclusions of the PwC report is summarised at page 151 of the Draft Report.

Getty Images was not one of the organisations that commissioned the PwC report. However, we consider that the Commission's critique of it is flawed and that these flaws are significant in assessing the recommendation to introduce fair use, such as:

- (a) the authors of the Draft Report point to the fact that there are "significant contextual differences" between the Australian and Canadian publishing industries. Getty Images considers that the Commission's initial focus should be on the undoubted similarities between the industries, given the importance and magnitude of what is being proposed.
- (b) further, the authors of the Draft Report expressly acknowledge that litigation will ensue from the introduction of fair use and that "Australian courts will make judgements based on the facts of each case". This is a statement of the obvious. We consider that the cost and lack of certainty that would follow if fair use were introduced has not been adequately considered in the draft report or in the ALRC report on which it relies.

4.4 *Transformative uses*

The extent to which the derivative work "transforms" the original is one of the key factors that US courts take into account in determining whether the derivative work is protected by fair use. This would also be the case under the model for fair use that the Commission recommends should be introduced in Australia.

At page 110 of the Draft Report, the authors comment:

The key question is whether transformative works have any appreciative impact on the demand for, and creation of, the original material. If they do not, then there are few grounds for regarding the use of the original material as an infringement.

With respect, we submit that one of those "few" grounds, is the most important one – the lack of any requirement for the consent of the property owner. We are not aware of any other species of private property right in Australia (outside other intellectual property rights) where the consent, express or implied, of the owner would not be required for any use or exploitation of the subject property.

4.5 *Potential impact on Getty Images and its contributing photographers*

The expansion of fair use in the US, and the manner in which the principle is being exploited by Google and other intermediaries, has the potential to significantly undermine the business model of organisations like Getty Images and to severely impact the income of the photographer community.

Getty Images has developed a sophisticated system that provides copyright users with efficient access to a vast range of copyright material at a range of price points.

This licensing model is accompanied by an efficient system of remunerating copyright owners who authorise us to distribute their works. The current model also provides us with real incentives to produce our own material. The encroachment of fair use and the accompanying litigation cost and uncertainty that will result, coupled with Google's dominance of the search market and the way in which it is misusing its market position, represents a real threat to our business model. We urge the Commission to reconsider its recommendation to introduce fair use.

5 **Safe harbour regime and authorised liability** ***Submissions in reply to Draft Recommendation 18.1***

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).

The safe harbour scheme in the *Copyright Act 1968* (**the Act**) provides Carriage Service Providers (**CSPs**) with limited liability for authorising alleged copyright infringement occurring over their networks if they comply with Part V Division 2AA of the Act. This regime was introduced to the Act via changes to the laws required by Australia's commitments under the Australia United States Free Trade Agreement (AUSFTA).

Draft recommendation 18.1 of the Commission's report is to expand the safe harbour regime in Australia to cover other online service providers. Our submission is that this draft recommendation should not be adopted.

5.1 *Issues with the current safe harbour regime in Australia*

The authors of the Draft Report acknowledge that online copyright infringement is a prominent issue and that enforcement is difficult for rights holders. This difficulty is complicated by safe harbour schemes and authorisation liability rules. The safe harbour scheme was intended to strike a balance between rights holders, online service providers and information users to foster continued growth of the economy. The expansion of the safe harbour scheme would not assist in these aims.

In February 2016, CSPs and rights-holders failed to reach agreement on a "three strikes" copyright notice scheme because of unexpected costs and differing views on who should be liable for the costs associated with the scheme. This evidences the inability of the beneficiaries of the exception, the CSPs, to make sensible arrangements with rights-holders. There is no incentive for cooperation under the current regime. In our submission, it is illogical to broaden the scope of a scheme which currently has inefficient checks and balances between copyright holders, CSPs and information users.

5.2 *The exacerbation of the problem of online infringement in the US*

Safe harbour schemes operate in other parts of the world, including in the United States. The US law was the impetus for a safe harbour scheme requirement in AUSFTA. The

safe harbour scheme in the US covers the expanded providers proposed by the Commission. It operates very similarly to how the expanded safe harbour scheme proposed by the Commission's draft recommendations will operate. Therefore, our submission on the Commission's proposed recommendations for changes to the safe harbour scheme in Australia is informed by its experiences under the US regime.

The US Copyright Office is currently conducting a review into the US safe harbour regime contained in section 512 of the US Copyright Act. We have been an active participant in that review process. Google's Transparency Report notes that it has handled over 80 million copyright removal requests in the past month.⁴ At that rate, Google will receive close to 1 billion copyright removal notices in the US in the course of 2016. Each of those reports represents an instance where copyright holders were not compensated for use of their works. These numbers are increasing every year.

The US safe harbour scheme does include a notice and take down process for addressing online infringement. This is similar to what is proposed by the Commission. The numbers provided by Google demonstrate the lack of respect for copyright, which we submit has been fuelled in large part by such an expansive safe harbour scheme. Copyright holders will spend more and more time trying to remove infringing online uses of their works, and in the meantime their works will be less and less valued. This diminution in value will discourage content creation in the future.

The safe harbour scheme in the US has devastated the licensing market for photography in that region. Copyright holders have no cost-effective recourse against the millions of individuals copying, pasting, framing, embedding and sharing unlicensed images, so there is little deterrent for users to stop their infringing behaviour. Additionally, the safe harbour scheme limits the liability of companies and platforms that benefit financially and would be in the best position to prevent or discourage such activity, but for the fact that there is no requirement or incentive for them to do so.

Furthermore, because copyrighted works are so readily available on platforms protected by the safe harbour scheme, there is no incentive for other companies and platforms to license those works. In fact, websites trying to do the right thing to support creativity and the development of high-quality content are at a competitive disadvantage of bearing costs when the sites and platforms hiding behind the safe harbour regime do not. This cycle is vicious.

The US safe harbour laws do not make it clear that "framing" of copyrighted works is not permitted. Section 512(d) of the US Copyright Act (**Section 512(d)**) says that it is not infringement for a service provider to refer or link users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.

"Framing" incorporates an image into a website so that a website visitor perceives the image as appearing on that website, even though the image is technically hosted on a third party website. Behind the scenes, "framing" works via hypertext transfer protocol instructions. So, while one could argue that "framing" is merely a kind of hypertext link and therefore ought to be covered by Section 512(d), in fact it is quite a different animal.

⁴ Google, *Transparency Report* (accessed 2 June 2016), < <https://www.google.com/transparencyreport/removals/copyright/?hl=en>>.

Section 512(d) is meant to protect the ability of search engines to direct users to information located elsewhere on the Internet. Instead of directing users elsewhere as is the case with a directory, index, reference, pointer or standard hypertext link, “framing” obviates the need for the user to go elsewhere because the copyrighted work is presented in full on the search engine’s platform.

We do not object to search engines functioning as search engines, directing users to information located elsewhere on the Internet. But, when search engines step into the content display and distribution business – as is the case when they “frame” copyrighted works – they should not be entitled to immunity. However, emboldened by what is permitted elsewhere, unfettered dominant intermediaries such as Google engage in framing in the Australian marketplace.

As these dominant intermediaries account for 90% of both the general search market and the image search market, there is no viable choice for a photo library to opt-out of having its images indexed by Google. To do so would be equivalent to opting-out of the Internet. In our submission, the adoption of the Commission's draft recommendations would exacerbate this huge problem for content providers. For the reasons detailed earlier in this report, this could have a devastating effect on the Australian market as a whole.

5.3 *Direct response to the Commission's draft recommendation*

The Commission asserts that adopting its recommendation to expand the safe harbour scheme to cover other online service providers will:

1. improve the system's adaptability as new services are developed;
2. be consistent with Australia's international obligations; and
3. be an important balance to the expanded protections for rights holders Australia accepted as part of its international agreements.

We have adopted the position of Robert Ashcroft and Dr George Barker that, while “the economic rationale for copyright exceptions then is that they may release value otherwise locked up by transaction costs”⁵, the existing system has matured to the point where:

“[c]opyright owners have clear incentives to grant consent to create value from their work and therefore clear incentives to find ways of lowering transaction costs to the point where this value may be released. For example ... on the demand side, one sees intermediaries emerge who minimise transaction costs and aggregate value (e.g. libraries) where there is only low value use at stake for certain uses and users.”⁶

The minimisation of transaction costs and the release of value in our intellectual property is a core component of our business.

It is asserted by the authors of the Draft Report that the proposed expanded regime will facilitate the development of new services. It is our submission that it is content that drives the value in an internet business. The diminution of the value of copyright will result in a corresponding diminution in the value of business relying on the protection afforded by that copyright. As has been demonstrated by the experience in the US, an expanded safe harbour regime means that the economic activity of licensing is discouraged.

⁵ Robert Ashcroft and Dr George Barker, *Is copyright law fit for purpose in the Internet era? An economic and legal perspective* (2015, accessed 2 June 2016), page 15 <<http://ec.europa.eu/futurium/comntent/copyright-law-fit-purpose-internet-era>>.

⁶ *Ibid*, page 15-16.

We agree with the view of Ashcroft and Barker that "[c]opyright exceptions increase the costs of operating a market and they encourage opportunism in the form of parasitic behaviour, or free riding and market bypass"⁷. This is evidenced by new businesses which are being driven by the display of content without the authority of the rights holders. Why isn't this type of business model viewed with the same negativity as a business driven by the misuse of personal information? Why should there be a different societal approach to infringement of copyright? In our view, the Draft Report provides no explanation as to why businesses that rely on the value of their intellectual property rights should be prejudiced.

Furthermore, it has been asserted by the authors of the Draft Report that expanding the safe harbour scheme to other online service providers would balance the unwarranted protections for rights holders in Australia. We submit that the authors have not identified any unwarranted protection in the Draft Report. If there is unwarranted protection then this is a matter that should be addressed explicitly by the Draft Report.

The authors of the Draft Report assert as their final reason for making draft recommendation 18.1 that expanding the number of online service providers which benefit from the safe harbour scheme is consistent with Australia's international obligations. We refer the Commission to our informed perspective on how an expanded safe harbour scheme in the US has had devastating effects on the market as a whole. In our submission, the Commission must consider how an expanded safe harbour regime has worked in practice internationally before adopting draft recommendation 18.1

Australia should take guidance from the experience in the US, where the safe harbour regime has severely damaged businesses like ours that provide a return to the rights holder and support the continued development of quality content.

⁷ Ibid, page 16.