

2 June 2016



Productivity Commission

GPO Box 1428
CANBERRA CITY ACT 2601
Email: intellectual.property@pc.gov.au

Response to the Productivity Draft Report: 'Intellectual Property Arrangements'

Communications Alliance welcomes the opportunity to provide feedback on the Productivity Commission's Draft Report 'Intellectual Property Arrangements' (the Draft Report).

Communications Alliance is supportive of the Draft Report's key points and recommendations, particularly as they relate to copyright accessibility and compliance/enforcement.

Copyright Accessibility: licensing and exceptions

Communications Alliance notes Recommendation 5.1 of the Draft Report which states:

The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

Most – but not all - Communications Alliance members are strongly supportive of the above recommendation. Communications Alliance has consistently asserted that the most appropriate way to encourage consumers to access legitimate content is for rights holders to improve its affordability and accessibility.

In order to discourage online copyright infringement, and maximise the opportunity for legitimate sales and consumption, providers and distributors should release content in a timely and affordable manner. That is, content providers should strive to ensure, where possible, that Australian release dates coincide with international release dates and that pricing is competitive in an international context. Communications Alliance welcomes recent developments in the Australian context, such as the introduction of streaming video on demand (SVOD) services such as Stan, Presto and Netflix and efforts by Foxtel to narrow release windows.

Communications Alliance notes that some of these streaming services continue to prevent Australians from accessing overseas content via geoblocking technology. While this may be a commercial decision of content providers, Communications Alliance is supportive of the recommendation to ensure that it is not an infringement for consumers to circumvent this technology.

Communications Alliance is also supportive of Recommendation 5.3 which states:

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.

Communications Alliance strongly supports the ALRC's proposal to introduce a 'broad exception for fair use' into the Copyright Act 1968. Communications Alliance has previously argued that "the introduction of a fair use exception - which includes non-consumptive uses - will remedy the fact that, currently, the law is out of step with industry expectations and practices and that network related functions should be an exception to copyright infringement. A flexible fair use exception should focus on the purpose of the copying and not the technology platform facilitating the copying or the subject matter being copied. The question should be on whether the purpose of the copying is fair, not the way in which it was copied."

Communications Alliance has also previously noted that a broad exception for fair use will:

"recognise the ongoing evolution of network operations. It will allow the exception to be 'future-proof' and ensure that such an exception is not made obsolete by future innovations. ... a principles-based approach to the fair use exception will ensure it continues to be relevant and responds to changing conditions. This is essential in industries such as telecommunications, where there is rapid technological change and laws often struggle to maintain relevancy. The Fairness Factors proposed represent a reasonable way in which to consider the circumstance of use of copyright material. In particular, Communications Alliance supports the consideration of 'the purpose and character of the use', as well as 'the effect of the use upon the potential market for, or value of, the copyright material'. These factors ensure that consideration is given to why the material was copied, not simply the fact that it was."

Chapter 18 Compliance and Enforcement

Communications Alliance is supportive of Recommendation 18.1 in the Draft Report which states:

The Australian Government should expand the safe harbor scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth). The evidence suggests timely and cost effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

Communications Alliance has argued that safe harbour regimes act as an important protection for intermediaries, while balancing the legal rights of copyright owners.

"...safe harbours need not be used to protect 'internet service providers' from liability for caching and indexing activities that are not infringement because of fair use". However, while it is correct to suggest that these functions would be covered in a fair use exception, such an exception fails to provide immunity for online service providers for hosting a wide range of services - particularly user generated content - not covered by a fair use provision."

Communications Alliance also notes the Productivity Commission's findings that:

"Changes to the law to encourage Internet service providers to cooperate with rights holders, as well as litigation, have only had a modest impact in reducing infringement. Further legislative change is unlikely to improve compliance with the law.

Instead, evidence suggests infringement declines with better content availability and most consumers prefer paid, legal consumption. As such, an effective approach to reducing infringement is the timely release of content to Australian consumers. This requires action by rights holders and their intermediaries."

Communications Alliance supports the above findings. Our internet service providers (ISP) members certainly do not condone nor authorise online copyright infringement on their networks. The Productivity Commission's findings reinforce the premise that the obligation is on rights holders to make content available in a timely and cost effective manner. Communications Alliance contends that any additional Australian legislation to combat piracy will only result in an additional regulatory burden which is unlikely to be effective.

Yours sincerely,

John Stanton
Chief Executive Officer