



FreeTV
Australia

**Submission by
Free TV Australia**

Productivity Commission

Intellectual Property Arrangements

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EXECUTIVE SUMMARY

- An efficient IP system that strikes the right balance between incentives for innovation and investment on the one hand, and the interests of individuals and businesses in accessing ideas and products on the other, is critical for the economy and community welfare.
- Broadcasters are major owners, licensors and licensees of copyright material. In 2013/14 commercial free-to-air broadcasters invested a record \$1.54 billion in Australian content, which underpins much of the Australian creative sector. Over the last 5 years, Free TV broadcasters have invested \$6.62 billion in Australian content.
- Broadcasters are also ‘users’ of copyright material. Broadcasters frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production.
- In order to encourage investment and innovation in Australia’s creative sectors, it is therefore critical that Australia’s IP system:
 - provides appropriate protection of broadcasters’ rights;
 - provides legal certainty in relation to access of copyright material; and
 - does not imposing unnecessary additional costs on broadcasters.
- While the current IP system is generally working well, Free TV considers the following reforms would lead to increased efficiency in the IP system:
 - Removal of the exception at s 212 of the *Broadcasting Services Act 1992* which allows retransmission of broadcasts for free, without consent;
 - Prohibition of contracting out of the copyright exceptions;
 - Supporting measures to combat piracy and clarifying the authorisation liability provisions in the Copyright Act.
- Free TV does not support the following reforms, which it considers would lead to less efficiency in the IP system, increased regulatory costs and decreased business confidence:
 - Introduction of fair use and/or removal of fair dealing;
 - Removal of the statutory licences.

Introduction

Free TV welcomes the opportunity to provide the Productivity Commission with the views of its members in relation to the Issues Paper "*Intellectual Property Arrangements*" (**Issues Paper**). As Free TV members are content industry businesses, this submission is focussed on copyright.

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by more than 13.5 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. Free TV is therefore able to comment on the Issues Paper with a strong appreciation of the importance of striking the right balance between ensuring adequate protection of IP rights on the one hand and facilitating appropriate access on the other, in order to maximise incentives for innovation, investment and the production of creative works, and to ensure that competition is not impeded.

Free TV members are operating in an increasingly competitive multi-media environment. Increasing broadband speeds (both fixed and mobile), together with the development of sophisticated mobile devices, is changing the way that Australians consume television content and is bringing about permanent structural change in the broadcasting sector.

In this context it is critical that Australia's IP arrangements allow broadcasters to compete effectively by providing appropriate protection of broadcasters' rights consistent with Australia's international obligations, and by ensuring that the regulatory environment continues to provide legal certainty and does not impose unnecessary additional costs on broadcasters.

Contribution of Commercial Free-to-air Television to the economy

The commercial free-to-air industry, a copyright industry, is a major contributor of value to the Australian economy and positive driver of economic welfare. Free-to-air television is the only platform that delivers high-quality Australian programmes, including news, current affairs, sports and culture to all Australians for free.

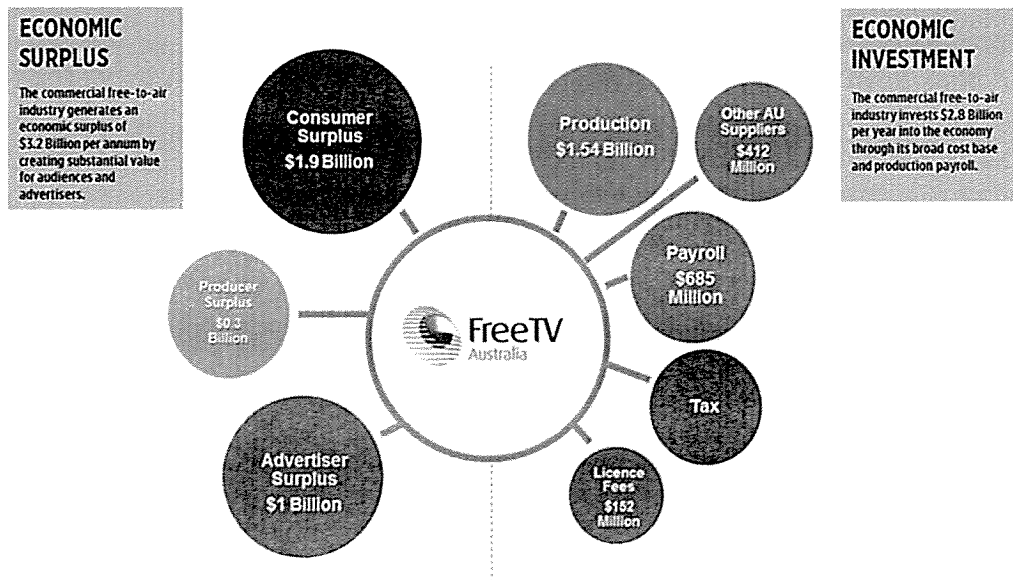
In 2013/14 commercial free-to-air broadcasters invested a record \$1.54 billion in Australian content and in the same year Australian content represented 79 percent of commercial free-to-air networks' total content spend. Over the last five years, Free TV broadcasters have invested \$6.62bn in Australian content. Free TV networks are the major underwriters of the Australian production sector, employing over 15,000 people both directly and indirectly.¹

¹ Australian content expenditure figures are compiled by Free TV, figure for 2012-13 is adjusted (up from the previously reported figure of \$1.36 Billion). ACMA "Commercial TV licensees met Australian content quotas in 2013", July 2014.

A report by Venture Consulting, *The Value of Free TV*, released in May 2015 found that the commercial free-to-air television industry:

- generates \$3.2bn per annum of economic surplus;
- pumps \$2.8bn per annum of economic investment back into the Australian economy;
- contributes \$6 out of every \$10 spent on Australian content;
- directly employs 7,232 people across technical, operational, financial and management roles; and
- pays significant taxes in Australia.²

Exhibit 2 of the report shows the direct investment that the industry makes in the Australian economy:³



An efficient IP system that strikes the right balance for copyright industries, including broadcasters, therefore has a positive impact on the economy as a whole.

Reforms that would lead to increased efficiency of the IP system

While the copyright system is generally working well, Free TV considers that certain reforms, identified below, are necessary to achieve a fairer and more efficient copyright system.

² Venture Consulting, *The Value of Free TV, the contribution of commercial free-to-air television to the Australian economy*, May 2015.

³ *Ibid*, at 4.

A number of these reforms have been recommended in previous government inquiries, including the ALRC's inquiry '*Copyright and the Digital Economy*', which the Commission has been specifically asked to consider in this inquiry.

Free TV is of the view that these reforms would lead to increased efficiency of the copyright system and greater business confidence.

1. Retransmission consent

Free TV supports the recognition of copyright in broadcasts by repealing s 212(2) of the Broadcasting Services Act 1992 ("BSA").

Copyright in broadcasts

Since the Rome Convention of 1961, a broadcast has been widely recognised as subject matter in which copyright subsists. Section 91 of the *Copyright Act 1968* ("the Copyright Act") recognises copyright in broadcasts in Australia and section 87 provides that the maker of a broadcast has the exclusive right to authorise the re-broadcast and communication of that broadcast to the public.⁴

These exclusive rights acknowledge the creative and economic value of broadcasts. They recognise the endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment.

Anomalous exception in the BSA

Despite this protection for broadcasts in the Copyright Act however, broadcasters are currently unable to control the retransmission of their broadcasts by their competitors, because section 212 of the BSA effectively provides an exemption to the copyright protection provided by the Copyright Act.

The effect of s 212 is that it allows third parties to retransmit copyright in broadcasts, for any purposes, including commercial purposes, without the permission of the owner or the broadcast. Broadcasters have no say in whether or how their signals are retransmitted and as they cannot give permission they have no leverage upon which to negotiate fair and reasonable terms with third party businesses, who directly profit from their exploitation.

This is inequitable and inconsistent with the intention to recognise broadcast copyright in the Copyright Act. No similar exception exists in relation to any other form of copyright material, creating an asymmetrical market distortion. It is inconsistent with the position in other jurisdictions including the US where the retransmission right for free-to-air broadcasters has long been recognised and not only generates revenue for network operators but also allows them to negotiate the terms upon which their IP is used, including exchanges of value other than remuneration (for example, carriage of a new channel).

While s 212 was introduced to allow retransmission by self-help providers in areas where viewers were unable to receive terrestrial reception or suffered poor reception, the exception is currently being used for commercial purposes by direct competitors of free-to-air television providers.

⁴ *Copyright Act 1968*, s 87.

The Explanatory Memorandum to s 212 makes clear that it was never intended to allow commercial services to retransmit FTA signals without authorisation.⁵ It provides:

“It is recognised that there are small communities, or pockets within licence areas which, because of distance from main transmitters or for reasons relating to the topography of their areas, are unable to receive adequate broadcast signals. It is intended that arrangements be permitted between such communities and broadcasters for broadcasting services to be re-transmitted, unaltered, to those communities.”

Section 212 has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law.⁶ For example, The Copyright Convergence Group in its 1994 report *Highways to Change: Copyright in the New Communications Environment* found that the retransmission of FTA signals for commercial purposes should be subject to the ordinary principles of copyright law. It recommended that retransmission without authorisation should only be permitted where it was required to address inadequate signal quality.⁷

The exception appears to be inconsistent with Australia’s international obligations under the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, and out of step with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the three-step test for assessing the permissibility of copyright exceptions.⁸

Anti-competitive nature of exception

In spite of this recognition however, s 212 continues to be used by subscription TV platforms to retransmit FTA channels without having to obtain consent from, or negotiate a commercial fee with, FTA broadcasters. As well as being inconsistent with general copyright principles, this distorts the market for video content and distribution in Australia by compelling free-to-air broadcasters to supply content to their competitors on an unremunerated basis.

In the case of existing Pay TV providers, their business has been built around carriage of the commercial free-to-air television services, which account for over 50% of total prime time viewing in Pay TV homes.⁹ Subscription television is a highly profitable business in Australia with Foxtel’s reported operating income after depreciation and amortization of \$554 million in 2013/14, and average revenue per subscriber amongst the highest in the world. Yet free to air broadcasters receive no compensation for the exploitation of their broadcast signal.

⁵ Explanatory Memorandum, Broadcasting Services Bill 1992.

⁶ 1996 Federal Government Election Policy, *Arts Online*, Broadcasting Services Amendment Bill 1998 Explanatory Memorandum, Communications Law Bulletin *Retransmission Rights: The Free to Air Broadcasters View*, Volume 17, No 3, 1998

⁷ Copyright Convergence Group, *‘Highways to Change – Copyright in the New Communications Environment’*, August 1994, 47–48 and 57-58

⁸ TRIPs; Rome convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; Berne Convention for the Protection of Literary and Artistic Works.

⁹ Source: OzTAM, National Pay TV database, based on consolidated data, 1 January 2013 to 30 June 2013. Commercial free-to-air television includes SBS One and SBS 2.

Financial compensation is not the only, or even the most important issue. In addition to the lack of remuneration, it means that free-to-air broadcasters are unable to control the means of delivery of their service and associated issues such as quality of services and placement. For example:

- The Pay TV provider determines the location and placement of EPG information of the free-to-air channels as well as the technical quality of the service received by the viewer. This can result in highly discriminatory positioning for free-to-air channels, particularly the secondary channels, which can be 'buried' in the EPG. It could also result in picture quality which is less than competing pay TV channels on the same service.
- On its satellite service Foxtel currently only retransmits the primary commercial free-to-air channel and one standard definition channel of each broadcaster. Viewers must pay for a premium HD service to access the free-to-air high definition channels (such as 7Mate, One HD, GEM, ABC News 24) on their Foxtel equipment.

The retransmission regime is inconsistent with general copyright principles and denies free-to-air broadcasters the ability to control and manage their primary commercial asset when dealing with competing platforms. Broadcasters should have the ability to negotiate with subscription providers and emerging IPTV service providers in relation to the commercial exploitation of their signals by third parties.

Economic benefits of requiring retransmission consent

Free TV commissioned independent research in partnership with ITV in the UK and German commercial broadcasters in relation to the economic impact of retransmission consent schemes on audio-visual content markets, using the US scheme as an example.

The report, "*Delivering for Television Viewers: Retransmission Consent and the US Market for Video Content*," by NERA Economic Consulting (attached at Annexure A), found the US scheme has contributed significantly to the overall health of the US broadcasting industry and has played a significant role in creating the current "golden age of US television".

The NERA report found that retransmission consent:

- has led to higher levels of investment in content, better quality content, and greater diversity of content;
- has allowed broadcasters to compete more effectively with pay TV networks for high quality programming, including widely viewed sporting events;
- has resulted in a significant increase in spending on news and other public interest programming;
- accounts for less than 3% of pay TV's revenues and has little or no impact on pay TV prices; and,
- generates benefits for the entire digital video ecosystem.

Significantly, the report observes that the retransmission consent scheme in the US has seen consumers reap the benefits of competition and innovation in the video marketplace, including through the upgrade of facilities, improved quality of signals as a result of

investment in digital multi-casting, and an increase in the quantity and quality of programming.

Requiring retransmission consent would assist broadcasters' capacity to continue to invest in Australian television production industry and would not be likely to adversely impact on pay TV providers or subscribers.

Part VC Statutory Licence

Free TV supports the continuation of the Part VC statutory licence in the Copyright Act, in respect of the underlying rights in free-to-air broadcasts. Removal of Part VC would mean that retransmitters would have to clear underlying rights in content for broadcast individually, which would be very impractical, complex, and would significantly increase the administrative burden.

Part VC provides an effective and efficient way of making broadcast content available to users and caters to the various interests of stakeholders. Free TV believes that there is little justification for repealing the compulsory licence scheme.

2. Prohibit contracting out

Free TV supports the ALRC recommendation that the Act be amended to include a provision expressly prohibiting contracting out of the statutory exceptions associated with:

- library and archives;
- research or study;
- criticism and review;
- parody or satire;
- reporting of the news; and
- quotation.

These exceptions serve an important social purpose in promoting freedom of expression and information. Contractual relationships should not be able to interfere with rights that are essential in order to better protect the public interest.

We note that other jurisdictions have displayed considerable support in limiting parties' ability to contract out of fair dealing exceptions. In the United Kingdom, the *Digital Opportunity: Review of Intellectual Property and Growth* (May 2011) (**Hargreaves Review**) argued in favour of copyright exceptions being "protected from contractual override". The Hargreaves Review outlined the significant risks associated with contracting out, to the extent it grants rights holders the ability to "rewrite the limits the law has set on the extent of the right conferred by copyright"¹⁰. One of the key arguments centred around the legal uncertainty created by contracting out. It states the following¹¹:

¹⁰ Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), at 5.40.

¹¹ *Ibid.*

"Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted."

This legal uncertainty is further reinforced by the issue of "contractual override"¹²:

"Even if unused, the possibility of contractual override is harmful because it replaces clarity ("I have the right to make a private copy") with uncertainty ("I must check my licence to confirm that I have the right to make a private copy"). The Government should change the law to make it clear no exception to copyright can be overridden by contract."

In echoing these sentiments, Free TV believes that any ability to contract out of fair dealing exceptions, specifically criticism and review or parody, risks undermining the "central objective of copyright".¹³ We agree with various submissions that any attempt to restrict these exceptions would unduly fetter the "free flow of information and freedom of expression".¹⁴

3. Measures to combat piracy

Recent measures which will increase efficiency of the system

Recent amendments to the Copyright Act address the issue of online piracy. Section 115 A of the Copyright Act now enables rights holders to request a court to issue an injunction whereby ISPs are required to block access to infringing overseas websites. While this is an important development in the legal framework and the procedure has been effective overseas, it is yet to be tested in Australia.

Free TV also notes the importance of development of innovative business models to satisfy consumer demand. Free TV members put significant time and resources into making their products and services available legitimately to viewers for free. This has involved significant investment in a range of new and innovative delivery mechanisms to meet consumer demand. For example:

- Catch-up services Plus7, 9Jump-in and TENplay, which are available across a range of platforms and devices;
- Making available advance previews of television shows such as X Factor and premiering episodes of first run drama such as Puberty Blues and Love Child online before broadcast; and
- Fast-tracking content from overseas so it is made available to viewers here at the same time as or only a few hours after airing in the original market.

¹² Ibid.

¹³ Ibid.

¹⁴ ALRC, *Copyright and the Digital Economy (DP 79)*, 2013 at 17.50.

Authorisation liability provisions

The decision in *Roadshow Films v iiNet*,¹⁵ highlighted the inability of the existing legal framework to deal with copyright infringement in the online environment.

It found that the ISP iiNet had no direct technical power to prevent its customers from using the BitTorrent system and that it could not be inferred from iiNet's inactivity after receiving AFACT notices that iiNet had authorised copyright infringement infringements of its subscribers.¹⁶

Free TV's view is that authorisation liability under the Copyright Act should operate in a manner that ensures that ISPs and other service providers are required to take reasonable steps to ensure that their online services are not being used for the purposes of copyright infringement.

This is consistent with the purpose of ss 36 and 101 of the Copyright Act.¹⁷ Free TV therefore supports any necessary amendments to achieve technologically neutral authorisation liability provisions which operate effectively in the online environment, consistently with the purpose of those provisions and with Australia's international obligations.¹⁸

Free TV notes that in the absence of such amendments to the authorisation liability provisions it does not support any expansion of the safe harbour scheme to cover other service providers. This would simply lead to the safe harbour scheme being used as a mechanism to circumvent the authorisation provisions.

The purpose of the safe harbour scheme is to provide carriage service providers with protection from liability for hosting or communicating infringing material **that they have no control over**. Where it is within the power of a service provider to take reasonable steps to prevent an infringement, the service provider should not be able to use the safe harbour to avoid taking those steps.

Free TV is therefore of the view that the authorisation liability provisions should be amended so that it is clear that authorisation liability also applies in the online environment. The safe harbour should not be expanded until such amendments have been made.

Reforms that would lead to decreased efficiency of the IP system

Free TV does not support the reforms identified below, which it considers would lead to less efficiency in the IP system, increased regulatory costs and decreased business confidence.

4. Introduction of fair use and/or removal of fair dealing

Free TV strongly opposes an open ended fair use style exception such as the one recommended by the ALRC. The existing copyright regime strikes a fine balance between

¹⁵ *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16.

¹⁶ *Ibid.*

¹⁷ Revised Explanatory Memorandum, *Copyright Amendment (Digital Agenda) Act 2000*, at 57.

¹⁸ For example, see Australia US Free Trade Agreement Article 17.4.

rights holders and users and Free TV does not see any justification for disrupting this balance by removing the existing certainty provided by fair dealing.

Fair dealing and exceptions relating to broadcasting

The fair dealing exceptions set out at sections 40, 41, 41A and 42 of the Act (**fair dealing exceptions**) and the exceptions at ss 45 and 67 in particular are well established, effective and should be retained in their entirety.

Members of Free TV rely upon fair dealing for criticism and review, parody and satire and most importantly, reporting of news, on a daily basis in compiling programming. These exceptions provide clarity and certainty for broadcasters around the uses of copyright material that can be made for free and should not be removed.

Temporary copying exceptions

Similarly, the exceptions in relation to temporary copies in sections 43A, 111A, 43B, 111B and 200AAA should be retained so that these provisions remain certain. These provisions should not be deleted in favour of a fair use exception which deals with these issues by introducing an illustrative purpose of “non-consumptive use”.

The ALRC noted that these provisions may not exempt all forms of caching, indexing and data and text mining.¹⁹ However, Free TV is not convinced that copyright owners should not be able to prohibit persistent caching of their content or that owners of a database should not be able to use copyright to restrict data mining of the information that is held, depending on the circumstances in which such caching or data mining is taking place.

Costs vs benefits of fair use

We are not persuaded by arguments that there are significant benefits associated with moving to a fair use regime that would justify the disruption, uncertainty and additional costs of such a change.

Practical implications

In practice, the changes proposed will create uncertainty for stakeholders until the scope of the application for the fairness factors and illustrative purposes 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.

Legal costs for litigation, legal advice and renegotiation of agreements will be imposed on copyright owners and copyright users seeking to rely on the fair use exemption or to clarify existing legal arrangements. This would be the case even if the existing exceptions are incorporated in a fair use style exception, for example as ‘illustrative purposes’.

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.

¹⁹ ALRC, *Copyright and the Digital Economy* (DP 79), 2013 at 8.46-8.47.

We note that it is not clear the extent to which US jurisprudence might be used to assist in interpreting and Australian fair use style exception. 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 Constitution.²⁰

Innovation

Free TV is not convinced by arguments that fair use facilitates innovation. Innovation requires a balanced copyright regime; not free use of copyright material. This is because the creators of the original copyright work are themselves innovators, and will be incentivised to create works only if they are entitled to the fruits of their labour. Therefore, to promote innovation and creativity it is fundamental that copyright law strikes the right balance between allowing access to copyright material to build upon existing works on the one hand and providing adequate incentives for copyright creators to continue to innovate.

As noted in the discussion paper, IP Rights “generate monopoly positions that reduce *current* consumer welfare in return for providing adequate payoffs to innovation, which then raises *future* consumer welfare”. Free TV considers that a fair use exception would be detrimental to consumer welfare in the long run by creating inadequate and/or uncertain returns for investment in creative industries.

A balanced copyright system is essential to promote long term creativity and innovation across all areas of creative endeavour, including areas such as film, television, art and software. For this reason, Free TV does not see any public policy reason why users should not be required to pay a market rate for copyright material.

As noted above, exceptions to copyright infringement are required to comply with Australia’s international obligations and in particular, the three-step-test which is set out in international agreements to which Australia is a party, including both the Berne Convention and TRIPS. It is unclear how a fair use style exception would be consistent with these obligations.

Furthermore, Free TV is not aware of any evidence that suggests that the introduction of fair use in Australia would promote innovation or economic growth. As noted by the joint submission of the Australian Film/TV Bodies in response to the ALRC’s Discussion Paper, that ‘economic evidence suggests that the introduction of fair use has a harmful impact on content producing industries’,²¹ and that the economic effects of more flexible copyright exceptions on content industries are at best very difficult to measure.²²

²⁰ See for example *Nordstorm, Inc v PARAN* 1992 US Dist. LEXIS 9162.

²¹ Submission 205, *Copyright and the digital economy*, 142; citing George Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, (November 2012), Centre for law and Economics <http://ssrn.com/abstract=2180769>.

²² George Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, (November 2012), Centre for law and Economics <http://ssrn.com/abstract=2180769>. The Australian Film/TV Bodies comprise of the Australian Federal Against Copyright Theft (AFACT), the Australian Home Entertainment Distributions Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators (NACO), The Australian Independent Distributors Association (AIDA), the Independent Cinemas Association of Australia (ICAA), and the Media Entertainment and Arts Alliance (MEAA).

Managing rapidly evolving technologies

Given the rapid technological changes taking place in broadcasting and media generally, we recognise that there is some disconnect between the current copyright law framework and the technological practices essential to broadcast television.

However, Free TV is of the view that the best way to ensure that the IP system is efficient, effective and robust through time is to introduce additional prescriptive exceptions on a case-by-case basis as they are required. Free TV is in favour of a well-considered and iterative approach to considering new technological developments. As each technological development will necessarily impact upon rights holders in a different manner, an all-encompassing illustrative purpose provision runs the risk of ultimately being detrimental, weighing too far in favour of end users. The introduction of new exceptions, or any amendments to existing exceptions, should be the subject of a measured process of review and consultation, submission and report.

5. Statutory licences

Free TV notes that while the ALRC did not recommend abolition of the statutory licences in its final report, this course of action was flagged in its discussion paper, on the basis that voluntary licensing is more suitable in the digital environment.²³

Free TV does not support the abolition of statutory licence schemes applicable to educational institutions, government and institutions assisting persons with a print disability that are set out in Parts VA and VB of the Act.

The current regime is an effective way of making broadcast content available to the relevant users and caters to the various interests of stakeholders. The ALRC's proposal may lead to a more complicated approach to the licensing of rights and a more complex relationship with users and collecting societies. This is likely to result in broadcasters having to deal with a greater administrative burden without any increase in relevant licensing revenue.

On the basis that the current regime is effective, Free TV believes that there is little justification for repealing the compulsory licence scheme.

Conclusion

Free TV welcomes the Productivity Commission's Issues Paper in relation to Australia's Intellectual Property Arrangements and looks forward to engaging with the Government further on these issues.

²³ ALRC, *Copyright and the Digital Economy* (DP 79), 2013, Chapter 6.