

Productivity Commission
Locked Bag 2, Collins St East
Melbourne VIC 8003

Via email to intellectual.property@pc.gov.au

17th December 2015

Dear Productivity Commission,

Re: *Inquiry into Australia's Intellectual Property Arrangements*

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this inquiry. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Jon Lawrence - Executive Officer
On behalf of EFA's Policy and Research Standing Committee

Submission

1. To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'? Does the 'one size fits all' approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?

The basis for Copyright law is to provide a limited monopoly to support investment by those seeking to secure such rights and to provide a fair return to material creators. The rationale behind the monopoly granted by copyright protection is essentially an assertion that absent of an incentive to create people would be disinclined to produce creative works. EFA submits that this rationale is difficult to support with evidence and it is therefore fundamental that copyright laws strike a balance between the interests of rights holders, public institution uses of content and consumer ability to freely engage with works for personal enjoyment, education and creation.

EFA believes that these principles have been substantially undermined over recent decades by increases to the periods of copyright protection and by onerous enforcement mechanisms imposed by well-resourced rights holders to aggressively protect their rights. These increased enforcement and protection measures have been favoured over the evolution of content business practices to cater for changing technological and market circumstances. The inherent inflexibility within Australia's copyright regime, coupled with increased enforcement and protection measures, has meant other industries, particularly within the IT, education and cultural sectors, are confined to practices lagging well behind current technological developments.

Furthermore, the continual extensions to copyright periods (such as the extension from 50 years after the death of the author to 70 years for certain works as a result of the 2006 Australia-US Free Trade Agreement) ensure that these periods now bear no resemblance to the original objectives of copyright to provide protection for a limited period before returning materials to the public domain.

Aggressive enforcement actions and inflexibility in the face of changing technological and market conditions, particularly within the music and movie industries, have led to the discrediting of the entire copyright regime in the eyes of many Australians, particularly younger people. The complexity of the present regime, and references to out-dated technologies, increases disregard for copyright law as being "out of touch" with current realities. The implications of the discrediting of this area of law should not be underestimated as it feeds into a wider disenchantment with the legal system and a general lack of political engagement that has the potential for negative effects on the operation of Australian democracy.

EFA also rejects the assertion that unauthorised copying of copyrighted content represents a serious threat to the continued profitability of content creators and owners, thereby threatening the ongoing investment in new content creation and distribution. On the contrary, there is strong evidence that the content industries remain strongly profitable, despite the significant changes in technological and market conditions over the last 10-15 years, and EFA believes that promoting greater legitimate access to content will lead to increased revenue for the content industries. Furthermore, EFA believes that a core issue relating to the profitable dissemination of copyright material has been price differentiation between jurisdictions that produce content (such as the United States) and Australia as a large consumer of electronic media. It is also important to note that

this price inequity is exacerbated by the relative inaccessibility of foreign content within Australia which has fuelled the younger generation to view content via (potentially) infringing channels (such as streaming and/or downloading copyright protected material).

Additionally, these novel technologies cause issues with the traditional intention of the application of copyright law. For example, a strict copyright regime applying to computer software impedes the software's very functionality by restricting the number of skilled, independent programmers who can analyse and correct the source code. This in return impedes further innovation and creativity in the relevant field and negatively impacts the product the consumer receives. Another example is copyrighted scientific literature. Scientific literature was intended to disseminate knowledge and information and thereby promote further innovation. Restricting access to and copying scientific literature only further impedes innovation and progress.

EFA believes that there is clear evidence that the vast bulk of Australian consumers are very willing to consume content legally, where it is available at a fair price, and in a convenient and timely manner. EFA therefore believes that the balance of Australia's copyright regime should be adjusted significantly to ensure that the rights of consumers and other content users to access content according to the principles of fairness, convenience and timeliness are greatly enhanced. EFA believes that this approach will, in the long run, be of benefit to all parties, including content owners.

EFA therefore believes that a broad, flexible, technology-neutral Fair Use exception needs to be introduced into Australian copyright law, and that this will be of great benefit to Australian, consumers, educators, creators and content owners.

Continued failure to address these issues will continue to negatively impact the creation of culture and innovation in that it restricts consumers and potential creators from interacting with copyrighted works.

2. Are the protections afforded under copyright proportional to the efforts of creators? Are there options for a 'graduated' approach to copyright that better targets the creation of additional works?

As already outlined in 1, EFA believes that continually increasing length of copyright protection and increasingly aggressive enforcement actions available to copyright owners tip the scale heavily towards content owners at the expense of consumers.

EFA also believes that the exclusive right to copy content in truth not only disadvantages consumers but also content owners because it effectively discourages legitimate, non-commercial interaction with copyrighted works.

EFA submits that a broad, technology neutral fair use exception is the most viable means to achieving a balance between the interests of content owners and consumers.

3. Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

EFA believes that due to the complexity of copyright law, less resourceful creators are at a significant disadvantage in exploiting their works and licensing them appropriately. EFA therefore heavily encourages the use and legitimisation of services such as Copyright Hub or Creative Commons as they reduce the cost burden of our copyright system and thereby reduce any impediments to creativity created thereby.

EFA believes that corporations may remain capable of bearing the increased cost of our copyright system, in part because they have ways to recoup those costs through an ability to effectively exploit markets. Individuals, increasingly in the possession of tools that facilitate the use and reuse of existing materials, cannot as easily shoulder the burden on creativity that copyright creates.¹

4. Are moral rights necessary, or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)? What is the economic impact of providing moral rights?

EFA believes that the existence of moral rights encourages the generation of culture by ensuring that content creators are given due credit for their creations and have their integrity of authorship protected.

EFA submits that moral rights provide the author recognition which is fundamental to the basic principle of remunerating the author for their creative endeavours. EFA notes that there is limited case law² regarding the economic compensation for moral rights infringement and submits that the scope of moral right protection does not create a duplicate protection for authors.

EFA does not believe that doctrines such as defamation or misleading and deceptive conduct are able to replace ss193, 195AI and 195AJ of the *Copyright Act 1968* (Cth). Defamation is far narrower than the moral right for integrity of authorship as it, for example, does not penalise mere abuse. The integrity of authorship however protects authors against any form of derogatory treatment and anything that is prejudicial to the author's honour and reputation. This seems to indicate that the integrity of authorship would protect against mere abuse as opposed to defamation, which does not.

EFA submits that moral rights are necessary and remain a fundamental aspect of copyright law.

5. What have been the impacts of recent changes to Australia's copyright regime? Is there evidence to suggest Australia's copyright system is now efficient and effective?

EFA believes that recent evidence suggesting a decrease in the prevalence of online copyright infringement³ cannot to be attributed to the success of the current copyright scheme but rather are a direct result of the increasing range of services providing timely and reasonably-priced access to

¹ Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 Geo. Mason L. Rev. 271, 273.

² Cf. *Perez v Fernandez* [2012] FMCA 2.

³ <https://torrentfreak.com/spotify-music-piracy-down-australia-140910/> and <http://mashable.com/2015/09/04/piracy-levels-australia/>

quality content. Reports by both Spotify and consumer advocacy group Choice have shown that following the introduction of new streaming services, such as Spotify, Netflix and Stan, rates of infringement may have dropped by as much as 20%.

This further underlines EFA's view that the current copyright regime and enforcement regimes are alienating the Australian public instead of creating incentives to comply with the regime. EFA believes the above figures also show that the Australian public is willing to comply with copyright laws as long as this does not negatively impact user cost and access or any rights a consumer feels they should have in regards to copyrighted work.

EFA therefore asserts that heavy penalties and onerous enforcement mechanisms will only amplify the gap between consumers and content owners instead of striking an effective balance between the interests of both groups. EFA instead suggests that copyright compliance be thought about in terms of providing incentives and the means to comply with copyright laws cheaply and simply.

Furthermore, the recent Federal Court Decision in *Dallas Buyers Club LLC*⁴ demonstrates that content owners are likely to abuse onerous enforcement mechanisms in order to maximise their economic return.⁵

EFA also believes that Google's recent announcement to fund its YouTube US vloggers' fight against take down notices shows that the playing field between consumers and content owners is disproportionately advantageous to content owners. EFA therefore submits that a broad, technology neutral fair use exception is required and that avenues be explored to better protect consumers' rights under fair use. This may include penalties against rights holders that pursue frivolous take down notices and options for consumers to defend themselves against take down notices without having to resort to legal action.

6. What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

EFA submits that the above data on piracy and Google's pledge to defend its creators should be considered as evidence that current copyright laws require significant changes in the areas of enforcement, compliance and exceptions as described in 5.

The experience of other jurisdictions that have implemented a broad flexible fair use exception, such as the United States, Israel and Singapore, should also be considered.

7. How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?

As already discussed, EFA does not believe that unauthorised copying presents a threat to content owners and believes that a broad, technology neutral fair use exception should be instated to even the playing field between consumers and content owners.

⁴ *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317.

⁵ <http://www.zdnet.com/article/dallas-buyers-club-decision-federal-court-mans-sluice-gates-to-hold-back-excessive-damages/>

8. Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?

EFA believes due to the complexity of the current copyright regime that consumers are mostly uninformed about copyright law specifics such as fair use exceptions. EFA believes a broad, technology neutral fair use exception would help resolve this issue and create more economic certainty.

9. Do existing restriction on parallel imports still fulfil their intended goals in the digital era?

EFA believes that restrictions on parallel imports no longer fulfil their intended goals in the digital era. Such restrictions, although earlier argued to be necessary to protect, inter alia, Australian publishers from the competition posed by cheaper versions of books printed in other countries, can no longer be justified today, in view of the global marketplace.

In this respect, any Australian consumer with an internet connection can choose to purchase books from online suppliers such as Bookdepository.com, Amazon.com and others. Therefore, these restrictions are practically imposed on less internet-savvy consumers, or consumers with no or limited access to the internet – most of whom can least afford to pay the higher prices for the books.

As greater competition in the form of increased access to a wide range of books and lower prices of these books is more beneficial than the protectionism rendered ineffective in the digital era, EFA submits that these restrictions should be dismantled.

10. To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?

Overall, EFA submits the following are required:

1. Shorter protection periods;
2. Less onerous enforcement mechanisms and instead a focus on incentivising compliance;
3. A broad, flexible, technology-neutral fair use exception;
4. Cheap and easy licensing and copyright information for less resourceful content owners; and
5. Means to defend copyright infringement claims without the requirement to resort to legal action.