



Independent Cinemas
Association of Australia

Response to the Productivity Commission Issues Paper: Intellectual Property Arrangements

Joint Submission
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1 Introduction

1. The Australian Screen Association (**ASA**), the Australian Home Entertainment Distributors Association (**AHEDA**), the Motion Picture Distributors Association of Australia (**MPDAA**), the National Association of Cinema Operators (**NACO**), the Australian Independent Distributors Association (**AIDA**), and the Independent Cinemas Association of Australia (**ICAA**) (collectively, the **Australian Film/TV Bodies**), are pleased to make this submission in response to the Productivity Commission's Issue Paper *Intellectual Property Arrangements* (the **Issues Paper**). The Australian Film/TV Bodies' submissions are primarily directed to the questions raised in the Issues Paper about copyright law in Australia.
2. These associations represent a large cross-section of the film and television industry that contributed \$6.1 billion to the Australian economy and supported an estimated 49,000 FTE workers in 2009-10:¹
 - (a) The **ASA** represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on protecting and promoting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.
 - (b) **AHEDA** represents the \$1.3 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 13 member and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment Associate Members include Foxtel and Telstra.
 - (c) The **MPDAA** is a non-profit organisation formed in 1926 by a number of film distribution companies in order to promote the motion picture industry in Australia. It represents the interests of motion picture distributors before government, media and relevant organisations, providing policy and strategy guidance on issues such as classification, accessible cinema, copyright piracy education and enforcement and industry code of conduct. The MPDAA also acts as a central medium of screen-related information for members and affiliates, collecting and distributing film exhibition information relating to box office, admissions and admission prices, theatres, release details and censorship classifications. The MPDAA represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros.
 - (d) **NACO** is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 66th year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as the prominent

¹ Access Economics, *Economic Contribution of the Film and Television Industry* (August 2011) Access Economics Pty Limited <www.afact.org.au/assets/research/AE_report_AUG.pdf>, 9.

independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.

- (e) **AIDA** is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S. film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).
 - (f) **ICAA** develops, supports and represents the interests of independent cinemas and their affiliates across Australia. ICAA's members range from single screens in rural areas through to metropolitan multiplex circuits. ICAA's members are located in every state and territory in Australia representing nearly 500 screens across 110 cinema locations.
3. All of the Australian Film/TV Bodies and their members have a vital interest in a strong and effective protection of their copyright assets in Australia and the ability to enforce their copyright against threats of infringement, particularly online infringement. Online copyright infringement presents one of the biggest challenges to the film and television industry's participation in the Australian digital economy, and its contribution to the broader Australian economy. It is also preventing legitimate online business models for the distribution of films and television programs from reaching their full potential.
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2 General comments

4. The Australian Film/TV Bodies welcome the enquiry by the Productivity Commission into the Australian IP system. While the principal area of concern for the Australian Film/TV Bodies is Australia's copyright law, they strongly endorse the need to review and strengthen IP protection as the best means of delivering economic outcomes that will contribute to wellbeing in Australia. There are many opportunities to boost the protection available to IP owners while ensuring that consumers and IP users have the opportunity to enjoy products and services protected by Australian IP laws.
5. The threats to the creative industries are greater than ever before. Australia, sadly, has a reputation for being one of the per capita leaders in internet infringement of films and TV shows. The Attorney General has publically recognised that Australia is the "*worst offender of any country in the world*" when it comes to internet piracy² and piracy data supports this. Recognising that there was a significant problem, Australia has taken a number of important steps in the last 12 months with the negotiation of the internet code between rights holders and ISPs and the introduction of site-blocking legislation (injunctive relief), to bring it into line with other countries that have taken the early initiative to tackle online infringement. While these developments have not been in place long enough to evaluate their effectiveness, they provide the best response so far to an issue that deprives the creative industries of the returns on their investment in content. Recent Australian research has confirmed that existence of legitimate streaming services alone is insufficient to reduce online infringement.³
6. Strong IP laws are consistent with innovation and economic prosperity. Over 10% of Australia's GDP, and about 8% of employment is in the copyright industries.⁴ IP laws that protect the value of investments in the creative industries have been fundamental to their ongoing development. There is a proliferation of new licensed content distribution platforms. A number of highly successful digital

² See Grubb, B (2014) "iiNet lashes out at online piracy crackdown" *Sydney Morning Herald* 10 June 2014. Available at <http://www.smh.com.au/digital-life/digital-life-news/iinet-lashes-out-at-online-piracy-crackdown-20140610-zs34a.html>.

³ IPAF Awareness Foundation *Australian Piracy Behaviours* 2015.

⁴ WIPO, *WIPO Studies on the Economic Contribution of the Copyright Industries* at 2 (2012), available at http://www.wipo.int/export/sites/www/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf

content management and distribution systems have developed relying on copyright law to protect their ecosystems.

7. There is no evidence that the rise of digital businesses or business models have been impeded by Australia's IP laws. The list of innovative online platforms that have successfully launched in Australia is extensive and growing. On the other hand, there is a compelling case that strong IP laws are at least in part responsible for the framework that allowed these businesses to flourish in Australia (and overseas). The technology sector is thriving in Australia under the current copyright framework. In fact, international digital media platforms like Netflix perform well in Australia precisely because we have robust copyright laws.⁵ Further, the strong IP regime provides content owners the confidence to launch \$100 million plus film productions in Australia first, even before the US and the UK.
8. In 2013 PricewaterhouseCoopers,⁶ examined "potential ways to accelerate the growth of the Australian technology start-up sector". It presented a positive picture of the Australian regulatory environment for start-ups, finding that "Australia already has one of the most favourable environments for entrepreneurship" (p 12). The report suggested some improvements in areas unrelated to copyright, such as tax incentives.⁷ The paper did not identify copyright law as being an inhibitor of innovation in Australia or necessitating copyright reform.
9. This is consistent with findings made by the Hargreaves Review in the UK, when it examined the causal relationship between IP laws and technological innovation.⁸ It found that "the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, and complex issues of economic geography, than it does to the shape of IP law".⁹ The evidence suggests that recent interest and investments in the Australian venture capital and tech start-up sector is because of the ability to protect entrepreneurial ideas and investment – and has not been hindered in the least by copyright.
10. Before any fundamental changes are considered to the system there would need to be compelling evidence that they will produce measurable benefits. The Issues Paper notes that there is little empirical evidence to guide policy developments in IP. While this may not be entirely accurate,¹⁰ the Commission should treat with extreme caution calls for fundamental changes to IP laws, especially when the change may reduce incentives to create and shift the material benefit of copyright away from authors. Testing IP laws, including copyright, principally by reference to an "additionally" requirement (whether the system encourages additional IP that would not have occurred otherwise), as the Issues Paper suggests, is in fact impossible in practice. Nor is questioning the role of IP laws on the premise that some works will be created in the absence of IP. Undoubtedly, some will. But, IP protection is necessary to justify the massive expense and risk of producing and distributing multi-million dollar movies.
11. It would be appropriate for the Commission to undertake the type of thorough investigation undertaken in the UK by the Hargreaves Review or in the US by the Copyright Office. In both cases the investigation involved interviews of relevant stakeholders, deep research and understanding of copyright laws and careful policy development. The Hargreaves Review conducted interviews in the United States to try to determine the real drivers of innovation and start-ups and the impact of

⁵ McDuling, J 2015 "What Netflix's meteoric rise means for Australia" *Sydney Morning Herald* 17 July 2015. Available from <http://www.smh.com.au/business/what-netflixs-meteoric-rise-means-for-australia-20150717-giedtk.html>.

⁶ PricewaterhouseCoopers, *The Start Up Economy: How to Support Start-Ups and Accelerate Australian Innovation* (2013), available at <http://www.digitalpulse.pwc.com.au/wp-content/uploads/2013/04/PwC-Google-The-startup-economy-2013.pdf>.

⁷ *Ibid*, p 29-31 and Discussion Paper at p 64, note 28.

⁸ Professor Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011 (**Hargreaves Review**).

⁹ Hargreaves Review, p 45.

¹⁰ See *supra* note 3; see also economic contribution studies demonstrating that countries with stronger copyright laws generally perform well in terms of contribution to GDP, employment, and taxes.

copyright laws. The US Copyright Office currently has studies in progress on the “making available right”, visual works and mass digitisation. These are approaches the Commission could examine.

12. The Australian Film/TV Bodies are concerned about the reference to “fair use” in the Issues Paper, an issue discussed in more detail below. It is a set of *sui generis* factors describing a defence to copyright infringement adopted in the United States. Fair use encompasses more than a century of jurisprudential interpretation, and its proposed adoption has been controversial and recognised to introduce unnecessary uncertainties in other jurisdictions. Australia would put itself in the company of a minority (5) Berne Convention countries (plus 1) if it introduced an open ended fair use into copyright law. The United Kingdom, Canada and New Zealand have each rejected such a proposal, in some cases raising concerns about whether such a provision would be compliant with international obligations. There is no consensus in support for a broad new fair use exception in Australia and there is substantial opposition to it. There is also no evidence that it would either serve the core functions of copyright, to incentivize creation and dissemination of works, or assist in fostering innovation or participation in the digital economy. Australia has considered it a number of times in the past and rejected its introduction.
13. Any evaluation of Australia’s IP laws is necessarily against the backdrop of Australia’s international obligations to protect IP. Australia has a wide range of obligations under international law by reason of it being a signatory to international treaties and instruments. Australia’s trading partners are signatories to these treaties and together they provide an agreed structure for IP protection that ensure a level playing field. Australian companies enjoy the benefits of IP protections overseas that are reciprocated for foreign companies in Australia. Reducing IP protection in Australia is likely to undermine investment by foreign companies in Australia.
14. The Australian Film/TV Bodies consider that Australia would benefit from more government investment in IP education and enforcement. Models for how this could be done are available in the UK and in the US. The UK has had an Intellectual Property Office (IPO) since 1852 and has a Minister responsible for IP. The US has had a Copyright Office since 1897 and well established infrastructure for promoting and advocating for the IP law system. Currently Australia lacks this focus on copyright law within its public institutions. Funding for public enforcement of IP law has fallen away in the last decade and does not compare favourably with the funding of comparable activities in countries such as the UK, France, Germany and the US.¹¹ Strengthening the capacity of Australian public institutions to promote and enforce IP laws, particularly copyright laws, is likely to support industry delivering economic benefits in Australia, particularly in the emerging digital economy.

3 A framework for assessing IP arrangements

The Commission welcomes feedback on the framework it proposes employing to guide its assessment of IP arrangements and for recommending welfare-enhancing reforms

15. The Australian Film/TV Bodies recognise the importance of the Commission having a clear and coherent framework for carrying out its inquiry into IP laws. They are, however, concerned about the framework proposed by the Commission given the following statement of “the goals of the IP system” in the Issues Paper¹²:

“that the intellectual property system provides appropriate incentives for innovation, investment and the production of creative works while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services.”

¹¹ Global Intellectual Property Center, US Chamber of Commerce, 2015 “Unlimited Potential: GIPC International IP Index”, Third Edition, February 2015 at Chapter 5.7, Category 5: Enforcement, pages 30 and 31. Available at <http://www.theglobalipcenter.com/gipcindex/>.

¹² Issues Paper 3, p 7.

16. There are well established statements of the purpose of copyright law to be to reward creators and owners of certain types of property, thereby encouraging them to create.¹³ The right to rewards flowed from the creations being a form of property resulting from the “labour and invention” of an author.¹⁴ The reward for creation of such property has been the consistent overriding rationale for copyright law for as long as copyright has been recognised in English and Australian law.
17. In 1959 the Spicer Committee described the “primary end” of copyright as being:¹⁵
- “to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.”* (Emphasis added)
18. The Franki Committee agreed with this statement of the “purpose of copyright” in 1974.¹⁶
19. In 2009 the High Court observed the “longstanding theoretical underpinnings of copyright”:¹⁷
- “concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.”* (Emphasis added)
20. These well-established statements of principle should guide the Commission’s enquiry and its recommendations. This is all the more important given that the Issues Paper acknowledges that “it can be very difficult to determine a set of prescriptive rules that satisfy all of those that are affected by the system – especially when their incentives do not align.”¹⁸ The Australian Film/TV Bodies agree that the search for a set of prescriptive rules is the wrong approach to assessing the effectiveness and operation of IP laws. The notion of “property” and the entitlement of the creators and owners of property is fundamental to understanding intellectual property, such as copyright, and evaluating its effectiveness in practice. Considerations of broader public wellbeing – which may include the desire by a minority of members of the community to access content and creative works without paying for them - should not be allowed to erode the proprietary interests of creators and owners of copyright.
21. The Australian Film/TV Bodies do not agree with the Commission’s proposed approach based on the principle that “an IP system is effective if it promotes the creation of genuinely new and valuable IP that in the absence of such a system would not have occurred.” This statement blurs the concepts of protection of IP with the causes of its creation. This apparent “additionally” requirement (whether additional work are created “but for” the IP system) has never been a feature of policy development in copyright law. It is obviously impossible in practice, in any event - perhaps an academic could create a theoretical “additionally measurement,” but it would inevitably be based on assumptions and dubious calculations in the real world. As with other types of property-based incentives copyright rewards creations per se that meet the legal requirements. Reducing it to an assessment of overall wellbeing also too general a principle. Assessment of overall wellbeing confuses an analysis of the operation of the system with the benefits enjoyed by participants. The existence of IP rights gives benefits to creators that are not shared with other members of the community. This is not a failing of the IP system in doing so.

¹³ The preamble to the Statute of Anne begins “Whereas printers, booksellers and other persons have of late frequently taken the liberty of printing, reproducing and publishing or causing to be printed, reprinted and published books and other writings without the consent of the authors or proprietors of such books and writings, to their great detriment and too often to the ruin of them and their families; for preventing such practices for the future and for the encouragement of learned men to compile and write useful books ...”

¹⁴ Copinger, *The Law of Copyright in Works of Literature and Art: Including that of the Drama, Music, Engraving, Sculpture, painting, Photography and Ornamental and Useful designs*. 1st Edn, 1870, Chapter 1.

¹⁵ Report of the Copyright Law Review Committee, 1959 to “Consider what alterations are desirable in the Law of the Commonwealth” (known as the “Spicer Committee”), para 13.

¹⁶ Franki Committee Report, para 1.05.

¹⁷ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, per French CJ, Crennan and Kiefel JJ at [24]-[25].

¹⁸ Issues Paper at p 7.

22. The Australian Film/TV Bodies urge the Commission to be cautious when making generalisations about the impact of IP laws on competition. Statements such as *“The exclusive nature of IP rights can also lead to undesirable outcomes”* and *“there is a risk that rights allow parties to exercise market power or engage in other anticompetitive behaviour”* are concerning, as they are not supported by references and do not reflect the experience of participants in the copyright industries in the Australian economy.
 23. There is no evidence that the rights recognised by copyright, or their licensing and exploitation in Australia, produce anti-competitor behaviour. This claim shows a basic misunderstanding of what is protected by copyright law - specific creative works, not ideas or information. While copyright law ensures that the creator of a specific movie controls the distribution of that movies, it does not give the rights holder any control over other movies, other types of audio-visual works, other types of leisure entertainment, or even other movies covering the exact same topic, but themselves embodying original works. Copyright law does not prevent the dissemination of information or the reuse of information by other market participants. It does not restrict competition in the content markets or in derivative markets for distribution of content through innovative platforms. It enables new entrants to compete with established market participants. It is central to the establishment of the new digital markets and new platforms. The Commission should ensure that it does not prejudge these issues and that it remains objective in its investigations. The reality of copyright law in the entertainment industries is that it provides the platform for increased offerings and increased competition to the benefit of consumers.
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4 Fitness for purpose

To what extent does copyright encourage additional creative works, and does the current law remain ‘fit for purpose’?

24. The Australian Film/TV Bodies believe that a way to assess the “fitness for purpose” of the copyright law regime in Australia is to examine the way it is operating in practice in industries such as the film and TV industry. Measured in this way it is clear that the copyright regime is working well.
25. Australian audiences enjoy the widest variety of choice of content in terms of access and price, ranging from special edition collectors’ box-sets to a continually growing number of digital services and free catch-up television or ad-funded online video services. New business models are enabling new ways for consumers to format-shift accessed content through direct licensing without undermining the returns of creators and owners of copyright. Indeed, it is fair to say that Australian consumers now benefit from more content choices, more distribution choices, at more price point choices for movies and television than ever before in history.
26. Two initiatives, Triple Play and UltraViolet in particular, illustrate the flexible and consumer focussed way in which content is delivered today. Triple Play is a form of home entertainment optical disc distribution which provides the buyer with a film or TV series in three different formats in a single keep case. The formats are Blu-ray Disc, DVD, and a digital copy. In some cases, an Ultraviolet copy will be included in place of a DVD. UltraViolet is a digital rights authentication and cloud-based licensing system that allows users of digital home entertainment content to stream and download purchased content to multiple platforms and devices. Ultraviolet licences offer potentially the broadest flexibility in that they allow purchasers to watch films and television programs on multiple devices, with up to five copies in some cases, and a possibility to share the license with up to five other family members. All major film studios release motion pictures in Double or Triple Play format which enables consumers to enter a code contained on the packaging of the purchased DVD or Blu-ray disk, and download the movie to their PC, tablet, smartphone, set-top box or other UV-enabled device.

27. The need for additional private copying exceptions has already been largely supplanted by contract, as modern licensing models ensure that private copying that is not covered by the existing exceptions is licensed.¹⁹ The potential for market driven licensing solutions to address many of the challenges the digital economy poses for copyright law is likely to be a more effective and efficient response than attempts to legislate wider or different forms of user entitlements. There is an increasing international recognition of the capacity of licensing models to address many of the challenges for copyright in the digital economy by providing “an interface between exclusive rights and exemptions or limitations”.²⁰
28. Modern licensing models ensure that consumers have flexible access to content. Overriding these arrangements would be unfair to the economic and other interests of copyright owners, as well as to the many parties that have already entered into relevant licenses, because it would damage the market for additional copying rights and the competitive advantage they provide to content owners and licensed distribution services.²¹
29. Digital disruption and the internet of everything is impacting the creative copyright sectors as much as anyone else. The industry continues to embrace new technology and aims to give consumers choice of which platform and device they wish to view the content and over different price points the value chain of the product (film) which is done through windowing starting with the theatrical release and then digital and home entertainment then free and subscription TV models.
30. Optical discs (DVD and Blu-ray) have been and remain the preferred method by Australians of watching filmed content (and TV box sets). But habits are changing driven by technology and so business models are evolving rapidly. Copyright enables business models to be developed and platforms rolled out with relative comfort. As Australians migrate from DVD to digital consumption, the industry is making content available exclusively for digital consumption as has built cloud storage and any device (OS) compatible content.
31. The industry also has responded to consumer demand to get content virtually simultaneously (time zones notwithstanding) globally. Prices continue to come down for both physical discs and digital content. In the past 10 months, subscription video on demand (SVoD) services like Foxtel’s and Ch7’s Presto, Fairfax and Ch 9’s Stan and global player Netflix have all launched \$10 unlimited consumption subscription services in Australia. There are also new services from Telstra (Telstra TV) and FOXTEL (FOXTEL internet).
32. With such a wide variety of content, on a range of platforms from a range of service providers at different price points, there is no legitimate excuse for consumers to access content illegally. Research conducted in Australia continues to confirm that most members of the public understand that access to content illegally is wrong.²² This includes research into the attitudes of young adults. Illegal access to content frequently involves circumvention of technological protection measures, in breach of other rights under the Copyright Act. Rather than seeking to try to excuse illegal access to conduct, or attempting to normalise this conduct and then expect to adjust the copyright regime around it, there is a need to strengthen the copyright system and educate the community to respect copyright and the entitlement of creators and owners to derive returns.

Does the ‘one size fits all’ approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?

¹⁹ Australian Film/TV Bodies Submission at e.g. [86], [90] and [156].

²⁰ Paper presented by prominent intellectual property law academic Daniel Gervais, *Licensing the Cloud*, at ALAI Congress in Kyoto in October 2012, at: [http://www.alai.jp/ALAI2012/program/paper/Licensing%20the%20Cloud%20\(P professor%20Daniel%20Gervais\).pdf](http://www.alai.jp/ALAI2012/program/paper/Licensing%20the%20Cloud%20(P professor%20Daniel%20Gervais).pdf)

²¹ Australian Film/TV Bodies Submission at [15], [86], supported by submissions from the Australian Copyright Council, ARIA, APRA, Copyright Agency/Viscopy, the Software Alliance and the Arts Law Centre.

²² IPAF Awareness Foundation *Australian Piracy Behaviours* 2015.

33. The Australian Film/TV Bodies consider that the question posed in the Issues Paper based on the premise that the copyright system is a “one-size-fits-all” system, is misdirected. This is not an accurate characterisation of the copyright system. The system as a whole recognizes different copyright property (Works in Part III and Subject Matter of than Works in Part IV), arising in different circumstances or based on different forms of creation (authorship, making, performance), with different ownership (by authors, assignments of future copyright, successors in title), different durations (referable to the death of the author, or the making or first publication) and a myriad of exceptions to infringement of copyright. Additionally, the property right created by copyright has allowed an endless variety of licenses and distribution agreements. The idea of one size fits all is simply inaccurate.
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5 Protections under copyright law

Are the protections afforded under copyright proportional to the efforts of creators?

34. In the digital era, copyright is more important, rather than less important. This is reflected in the fact that major developments in Australian copyright law since 2000 have been directed to updating copyright laws to ensure that they respond appropriately to the challenges and opportunities brought by internet technology. These developments recognised that the efforts of creators deserved enhanced protection in view of the particular threats posed by the internet and online dissemination.
35. The current scheme began with the Digital Agenda reforms in 2000. The reforms were the result of an extensive and exhaustive review of copyright law in Australia, which involved consultation with industries and the public, Parliamentary committee investigation and bi-partisan support for the eventual package of reforms.²³ The reforms radically changed the nature of the protection afforded to copyright owners in the digital environment in Australia.²⁴
36. The Attorney-General (Darryl Williams) noted in his second reading speech that:
- “The amendments provided by this bill are at the cutting edge of online copyright reform and clearly place Australia among the leaders in international developments in the area.... This bill will update Australian copyright law for the 21st century and its passage will be a key milestone in the successful development of our information economy.”*
37. The centrepiece of the Bill was a new “technologically-neutral right of communication to the public”, which would replace the technology-specific broadcasting right and the limited diffusion right. The right of communication to the public would also encompass the “making available of copyright material online.”²⁵ The role of carriers and carriage service providers (including ISPs) was also central to the scheme provided for by the Digital Agenda reforms. The Government also introduced a broad based unconditional defence to infringement for the benefit of service providers (s112E) to implement Australia’s international obligations under the WIPO Diplomatic Conference.²⁶
38. The introduction of the right of communication to the public has assisted copyright owners in the enforcement of their rights online. Prior to the recognition of that right, copyright owners were left with remedies tied to the creation of copies of works when they were downloaded. Acts of posting online (such as streaming) and transmission (such as peer-to-peer communications) were excluded and their

²³ As to the process involved in developing the policy see Hansard 26.6.2000, p18341: “There has been detailed advice by committees of experts. This process was started under the Labor government but, in fairness to this government, carried through ongoing public consultation procedures. Ultimately after the bill itself has been tabled, there has been further consideration by a parliamentary committee. When you have the procedures rights, you are more likely to get the policy right”.

²⁴ The Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (EM) observed that “The development of new communications technologies has exposed gaps in the protection afforded by the Copyright Act 1968” and that “owners of copyright do not have fully effective rights in relation to the internet, thus making it difficult for them to obtain appropriate redress or remuneration for use of their material on the Internet.” EM p 5

²⁵ EM, p 3.

²⁶ EM, p12. 57 countries had ratified the treaties including USA, EU countries, Japan and Canada.

legality uncertain. The right of communication to the public, and in particular the right of “making available” has been deployed by copyright owners in Australia in commercial arrangements and in court proceedings to protect their copyright. In recognition of the importance of the act of “making available” within the right of communication to the public, the US Copyright Office is currently studying whether the United States has fully implemented the same right under US copyright.

39. In January 2005 “safe harbour provisions” for intermediaries were introduced into the *Copyright Act* with effect from 1 January 2005.²⁷ They followed the successful conclusion of the AUSFTA, article 17.11.29 of which required each party to include legal incentives in their respective domestic legislation that would encourage service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyright protected materials. In exchange for this cooperation, service providers receive the benefit of limitations in relation to the scope of remedies available against them for copyright infringements that they do not “control, initiate, or direct”, that take place through systems or networks controlled or operated by them or on their behalf.²⁸ The scheme was applied to ISPs, “to limit the remedies that are available against carriage service providers for infringement of copyright that relate to the carrying out of certain online activities by carriage service providers,” subject to certain conditions.²⁹
40. More recently, the Government has taken a leading role in enhancing the protections for creators and owners of copyright with two important initiatives. The first initiative involved the development and negotiation of the Copyright Notice Scheme Code between ISPs and rightsholders and lodged with ACMA, following a similar approach undertaken in the United States. The second initiative involved the passing of the *Copyright Amendment (Online Infringement) Bill 2015* introducing a new s 115A to enable copyright owners to approach the Federal Court seeking an order that an ISP block access to a site with the primary purpose of infringing or facilitating the infringement of copyright. The latter initiative brought Australia into line with the United Kingdom and European countries where site blocking orders have been successfully in force for a number of years.
41. The history of copyright law developments in Australia since 2000 is not consistent with a view that protection should be weakened in the digital age or that the copyright system provides excessive protection for creators and copyright owners. All major stakeholder groups, including rightsholders, intermediaries and Government were participants in these developments and supportive of the incremental enhancements in protection over time. There is no justification, economic or otherwise, for winding back these protections that have been in place under Australian copyright law for 15 years and which have indeed provided the framework for the growth of the digital economy in Australia.

Are there options for a ‘graduated’ approach to copyright that better targets the creation of additional works?

42. The Issues Paper refers to a “graduated system” without defining what is meant by that terminology. The Australian Film/TV Bodies will address the issue once it is clarified.

6 Licensing practices

Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs?

43. The Australian Film/TV Bodies do not agree that licensing of the copyright property they control is either too difficult or costly. The number and variety of different content delivery platforms that have emerged in the Australian market is strong evidence that copyright licensing is working effectively in

²⁷ Part V Division 2AA of the *Copyright Act 1968* (Cth).

²⁸ For the full text of Article 17.29: http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html

²⁹ Under s116AG of the *Copyright Act*.

the market without the need for legislative or other intervention. Competition between content resellers in pricing and terms would not be possible without flexible and cost-effective license practices.

How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

44. The "Copyright Hub" launched in the United Kingdom is supported by the film and TV industry as a useful initiative to assist with licensing practices. It provides an efficient process for enabling internet users to identify the author, origin and cost of licensing a particular copyright work or subject matter through an internet search and serves as a link between licensees and internet users. It also allows supports a flexible approach to licensing, where copyright owners are able to choose the kind of licences they will offer (for example, commercial website, non-commercial use, personal use, or social media use) and the cost of those licences.

7 Moral rights

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?

45. Australia has recognised moral rights of authors under the Copyright Act since 2000. It is amongst the majority of countries that recognise these rights in accordance with the Berne Convention, including the United Kingdom, New Zealand and Canada. Moral rights are non-economic personal rights in copyright subject matter exercisable only by their individual author.
46. Individual authors in Australia have three types of moral rights under the Act:
- (g) the right of attribution (eg. to be identified as the author of the work);³⁰
 - (h) the right not to have authorship falsely attributed (eg. not to have another person attributed);³¹ and
 - (i) the right of integrity of authorship (eg. not to have the work subjected to derogatory treatment).³²
47. The duration of an author's (or a performer's) moral rights varies depending upon the right involved.³³
48. The recognition of moral rights ensures that authors are consulted before derogatory or destructive actions are taken in relation to their works. There have been few legal cases to consider the extent and operation of the moral rights provisions. The leading case is *Perez v Fernandez*,³⁴ in which the well-known hip-hop recording artist "Pitbull" succeeded in claiming interference with his moral rights when a DJ modified one of his songs and streamed it from his website to promote his DJ business.³⁵
49. There is no evidence that the moral rights scheme has impeded any legitimate commercial activity or innovation in the Australian market. Moral rights do not duplicate other provisions under Australian law. They address derogatory treatment of works and would offend the author rather than representations made to the public about the works, except in relation to authorship. Even then, misleading and deceptive conduct provisions depends on a threshold of conduct occurring in "trade or commerce", which is frequently absent in online activity and posting. Prohibitions of misleading or

³⁰ Section 193.

³¹ Section 195AC.

³² Section 195AI.

³³ Sections 195AM, 195ANA.

³⁴ *Perez & Ors v Fernandez* [2012] FMCA 2 (10 February 2012).

³⁵ The Court found that the DJ had intended to cause Mr Perez "artistic, reputational and commercial harm as an act of retribution for the grievances he has."

deceptive conduct do not provide equivalent or adequate protection to the monetary and non-monetary remedies available under the moral rights scheme in Australia.

8 Recent changes to copyright

What have been the impacts of the recent changes to Australia's copyright regime?

50. Whether or not the Issues Paper's reference to "recent changes" is intended to refer to amendments to copyright law in the last 5 years or the last 15 (since the Digital Agenda Act, that introduced the right of communication to the public³⁶), the answer would be the same. Each of the changes were made in response to multi-lateral treaty obligations (right of communication, moral rights), bilateral treaty obligations (safe-harbours), or other perceived needs (temporary copying in internet browsing) and have become part of the Australian copyright system without any serious opposition or complaint.
51. Each of these changes were carefully considered and debated at the time, were the subject of broad consultation and review by Australian Parliamentary committees before they were passed into law. It is difficult to conceive of the Australian copyright system without those changes having been made. The changes have enhanced the protections for copyright owners and introduced a range of new exceptions to balance the interests with those of copyright users. The thriving market for supply of entertainment content via different platforms in Australia suggests that the impact has been positive.
52. The introduction of the right of communication and its role in ensuring that suppliers of infringing content,³⁷ or systems designed for copyright infringement,³⁸ not operate in Australia is an example of the strong impact that considered changes to copyright laws can make. Another likely example will be the site blocking scheme that has only recently been implemented and should soon be tested in the Courts.³⁹ The relief provided for by s115A to enable copyright owners to approach the Federal Court seeking an order that an ISP block access to a site with the primary purpose of infringing or facilitating the infringement of copyright was not available to copyright owners under pre-existing copyright law.
53. The role of legislative changes to the copyright law in responding to new circumstances and competing economic and social interests, has also been recognised by the Courts⁴⁰ and considered by some to be the preferred method of policy development.⁴¹

Is there evidence to suggest Australia's copyright system is now efficient and effective?

54. Although there is no empirical evidence of the operation of the copyright system in Australia, measured against observed market activity, key signals indicate that the system is operating efficiently and effectively as a whole (subject to the comments made in the final section below).
55. As indicated above, there is a proliferation of new licensed content distribution platforms and highly successful digital content management and distribution systems have developed relying on copyright law to protect their walled ecosystems. There is a long list of innovative online platforms that have successfully launched in Australia, with different offerings and at different price points, thereby

³⁶ Not the US Australia Free Trade Agreement, as the Issues Paper suggests at page 23.

³⁷ *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 ("Cooper").

³⁸ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242; (2005) 220 ALR 1.

³⁹ Similar provisions overseas have proven very effective in reducing copyright infringement (in the UK a report by Incopro in 2014 found that traffic to blocked piracy sites plunged 77.5% on average, compared to an increase of 20.9% for the same piracy sites outside the UK where no court imposed site blocking orders were in place: Incopro 2014, Site Blocking Efficacy Study: United Kingdom, Incopro, <http://www.incopro.co.uk>).

⁴⁰ *Stevens v Sony Computer Entertainment* (2005) 224 CLR 193 at [2]: *Over a long period amendments to copyright law have comprised legislative solutions to problems created by competing economic and social pressures associated with the development of new technologies*

⁴¹ *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [79] and [120]: "The history of the Act since 1968 shows that the Parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those pressures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions".

benefitting consumers of copyright works and subject matter. There is no evidence that the rise of digital businesses or business models have been impeded by Australia's IP laws.

9 Striking the balance in copyright

How should the balance be struck between creators and consumers in the digital era?

56. The Copyright Act already strikes a balance between the interests of creators and consumers, including in the digital era. When the act was revised in 2000 as part of the Digital Agenda amendments, the introduction of the new "right of communication to the public" for copyright owners was balanced by the introduction of exceptions available to users who provided facilities for communications (under 39B and 112E). The scope of the exceptions has been confirmed by the Courts.⁴² There is no evidence that this balance has impeded the ability of consumers to access legitimate copyright material or that business have been unable to develop new models of distribution and exploitation in Australia. Quite to the contrary, there has been an explosion in availability of copyright-protected content, distribution models, and price points for consumers.

What role can fair dealing and/or fair use provisions play in striking a better balance?

57. Australia has an established and well-known scheme of copyright exceptions for fair dealing.⁴³ By contrast, "fair use" refers to a set of factors to be considered in determining whether a particular use constitutes a defence to exception to infringement under US Copyright law, as embodied in s107 of the US Copyright Act. The attempt to export America's fair use encompasses more than a century of jurisprudential interpretation, and its proposed adoption has been controversial and recognised to introduce unnecessary uncertainties in other jurisdictions. Even in the US, fair use has been described by a court as "*the most troublesome in the whole law of copyright*".⁴⁴ Another US court characterised fair use as "*so flexible as virtually to defy definition*".⁴⁵ A leading scholar has observed that the "*facial emptiness of the statutory language means that ... it is entirely useless analytically, except to the extent that it structures the collection of evidence*".⁴⁶ Another scholar commented that the idea that the statutory test determines the outcome of fair use cases is "*largely a fairy tale*".⁴⁷ Yet other scholars describe the statutory test as "*unpredictable and uncertain in many settings*".⁴⁸ Others have concluded that fair use "*is too indeterminate... to provide a reliable touchstone for future conduct*".⁴⁹ Judge Leval, a leading US authority on intellectual property, has noted that US judges themselves "*do not share a consensus on the meaning of fair use*".⁵⁰
58. The economic impact of the US fair use exception is disputed, with some US commentators arguing that the vagueness of the fair use defence "*prevent[s] actors from precisely determining the optimal level of investment*".⁵¹ There is a growing recognition in Capitol Hill that the US doctrine might have become "*the great white whale of American Copyright Law*".⁵² In June 2013, the White House took

⁴² *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [113].

⁴³ Including ss 40 (research or study), 41 (criticism or review), 41A (parody or satire), 42 (news), 43 (legal purposes), 43A (temporary reproductions in communications), 43B (temporary reproductions in technical process of use).

⁴⁴ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939).

⁴⁵ *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968).

⁴⁶ Michael J Madison, "A Pattern-Oriented Approach to Fair Use", 45 *Wm. & Mary L Rev* 1525, 1564 (2004).

⁴⁷ David Nimmer, "Fairest of them All" and Other Fairy Tales of Fair Use", 66 *Law and Comtemp. Probs* 263, 282 (2003).

⁴⁸ Thomas F. Cotter, "Fair Use and Copyright Overenforcement", 93 *Iowa L. Rev.* 1271, 1284 (2008).

⁴⁹ James Gibson, "Once and Future Copyright", 81 *Notre Dame L. Rev.* 167, 192 (2005).

⁵⁰ Pierre N. Leval, "Toward a Fair Use Standard", 103 *Harv. L Rev* 1105, 1106 (1990). See eg *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir 1939); *Time, Inc. v. Bernard Geis Assocs*, 293 F Supp 130, 144 (SDNY 1968).

⁵¹ Gideon Parchomovsky & Kevin A. Goldman, "Fair Use Harbors", 93 V(2007) *Virginia Law Review* 1483, 1498.

⁵² Paul Goldstein, "Fair Use in Context", 31 *Colum. J.L. & Arts* 433, 433 (2008).

the step of establishing a task force to develop and publish an index of major fair use decisions to “ease confusion about permissible uses”⁵³ – a document that has not yet seen the light of day.

59. Only 5 Berne Convention countries (the US, the Philippines, Israel, South Korea, and Singapore) plus Taiwan have adopted fair use factors, but only the United States has decades of nuanced jurisprudence interpreting those factors; in the other jurisdictions, the factors have largely sat dormant in the law. In the countries having fair use factors, each of their approaches differ. There are limitations to its operation in some of those countries (in Korea it applies only where the use “does not conflict with a normal exploitation of [the] copyright work and does not unreasonably prejudice the legitimate interests of the copyright holder”⁵⁴ and s185 of the *Philippines Intellectual Property Code* limits “fair use” to the specified purposes of criticism, comment, news reporting, teaching and “similar purposes”). In all of these countries except the US, the factors sit as relatively “dead letter,” since courts have not generally been asked to opine on or apply them. Further, Korea and the Philippines are civil law countries, in which it is not clear how a body of U.S. common law precedent could be adopted or how interpretative judgments could develop like in the U.S. Furthermore, as noted, the US has undertaken to publish an index of major fair use cases, but in no other country having adopted the factors has the extensive and highly-nuanced US case law on fair use been taken into account.
60. While a *sui generis* approach like fair use may fit in the US, international scholars have questioned its portability to other jurisdictions (e.g., Mihály J. Ficsor⁵⁵), or even whether fair use factors, without nuanced US interpretation, might be subject to normative challenges when compared with current international disciplines (e.g., Ruth Okediji, Herman Jehoram⁵⁶). A leading Australian copyright scholar, Professor Sam Ricketson, has concluded that an open fair use exception is likely to operate in a manner which conflict with ‘normal exploitation’ of copyright works in existing or emerging markets or ‘unreasonably prejudice’ rights’ holders interests, in violation of the second and third steps of the Berne/TRIPS “three-step test.”⁵⁷ Canadian copyright experts have reached the same conclusion.⁵⁸ The Australian Film/TV Bodies strongly believe that transposition of US-style *sui generis* fair use factors to other jurisdictions, including Australia, without the extensive and highly-nuanced case law, would lead to significant difficulties, including the high likelihood that specific consideration of the factors in their bald state could lead to overbroad interpretations.
61. Indeed, in the UK, the Hargreaves Review examined the relative merits of open and closed standards in digital environments and concluded that the UK should stay with its fair dealing exceptions because “there would be ‘significant difficulties’ in attempting to transpose US-style fair use into European law.” This followed the earlier *Gower Review of Intellectual Property: Proposed Changes to Copyright Exceptions* which also rejected moving to a fair use model for reasons including its uncertainty and the fact that, in the UK legal environment, it would not comply with the UK’s international obligations. New Zealand considered and rejected a fair use regime, concluding that no compelling reasons had been presented for an open model and describing its existing closed fair dealing system as “technologically

⁵³ 2013 *Joint Strategic Plan on IP Enforcement*, 18 available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf>.

⁵⁴ Republic of Korea, *Copyright Act 1957*, Art. 1-3.

⁵⁵ Mihály J. Ficsor, “Short Paper on the Three-Step Test For the Application of Exceptions and Limitations in the Field of Copyright”, November 19, 2012 available at www.copyrightseesaw.net/.../0eb32b716fcaa400dd4cf398256e3fa8.doc, p 4-5.

⁵⁶ Herman C. Jehoram, “Restrictions on Copyright and their Abuse” (2005) 27 *European Intellectual Property Review*. 359, at 360.

⁵⁷ Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, (2003) World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO Doc. SCCR/9/7 at 22 (**Ricketson 2003**), 67.

⁵⁸ Barry Sookman and Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations* (15 September 2009) <<http://www.barrysookman.com/2009/11/22/why-canada-should-not-adopt-a-fair-use-regime/>> (**Sookman**) at 157-59.

neutral and adaptable for the digital environment".⁵⁹ Canada also rejected the introduction of a fair use exception in favour of fair dealing provisions for the purposes of parody, satire and education.⁶⁰

62. Fair use has been examined a number of times in Australia over the last decade and each time the Government decided not to introduce it into Australian law. In September 2000 the *Intellectual Property and Competition Review Committee* (the **Ergas Committee**) found that the "transaction costs of changing the Copyright Act [to an open-ended fair dealing exception] could outweigh the benefits."⁶¹
63. In 2006 the Government considered and rejected the introduction of fair use into Australian law because "no significant interest supported fully adopting the US approach" and because of concerns about it failing to meet Australia's international legal obligations.⁶² It noted that "*the present system of exceptions and statutory licences ...has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright*".⁶³ An open fair use model was less desirable, because the Government concluded that:

*"this approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation."*⁶⁴

All of these significant concerns continue to exist.

64. In 2014, under a reference by the former Government, the ALRC examined whether Australia should adopt fair use. In response to the ALRC enquiry into whether Australia should adopt fair use under copyright law, the majority of submissions were opposed to its adoption in Australia. The ultimate recommendations of the ALRC were equivocal, with the committee proposing a series of alternatives which ranged from introduction of a modified US style fair use system to a modification of the existing scheme. The level of uncertainty around the recommendations and lack of widespread support are illustrative of the difficulties involved in implementing a US-style fair use scheme in Australia.
65. The economic case for adopting a US style fair use exception is weak. The absence of a fair use exception in Australia has not impeded the development of digital businesses or distribution platforms. When the economic impact of a fair use exception was examined in the UK by the Hargreaves Committee it concluded that there was no evidence that the adoption of fair use would quickly stimulate innovation. Attitudes towards business risk and investor culture were found to be more significant.⁶⁵
66. The long term effects of a fair use exception, rather than increasing consumer access to copyright material, would likely lead to a reduction in the amount of copyright material available to consumers. Canadian academics have concluded that fair use is likely to reduce overall consumer welfare, and, more generally, social welfare.⁶⁶ In the short to medium term there would be uncertainty. Whereas the open-ended language of the US provision has been the subject of decades of US jurisprudence, Australia will not have the benefit of judicial interpretations were the law to be enacted. There would

⁵⁹ *Digital Technology and the Copyright Act 1994 Position Paper*, at [160-61].

⁶⁰ *Copyright Modernization Act 2013*.

⁶¹ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

⁶² Explanatory Memorandum, *Copyright Amendment Bill 2006* (Cth), p 10. The second reason was concerns about compliance of a new Australian fair use exception with the three-step test: see also Discussion Paper at [4.27].

⁶³ Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth), p 6.

⁶⁴ *Ibid*, p 10.

⁶⁵ Hargreaves Review at 53.

⁶⁶ Brett Danaher, Michael D. Smith, Rahul Telang, "Piracy and Copyright Enforcement Mechanisms" (2013), available at <http://www.nber.org/chapters/c12945.pdf>; Dr George Barker, *Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions* (July 2013) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298618 at 19.

be little guidance as to the scope of the exception in Australia. US case law cannot be transplanted into Australian law given the different constitutional framework, just as it was not successfully transplanted into Canada.⁶⁷ Litigation would be required to determine the scope and application of an open ended fair use defence, raising compliance costs for business, government and government-funded organisations. Increased litigation would be disruptive for established and emerging businesses. It is also likely to be outpaced by market forces.

67. Australian copyright legislation has long provided for a closed list of permitted purpose exceptions and miscellaneous exceptions which apply in prescribed circumstances (like the UK, Canada and New Zealand).⁶⁸ It is a measure of the success of the existing framework that Australia has implemented specific provisions in almost every major policy area resolved by fair use litigation in the United States. Leaving policy development to individual litigants and the Courts is a less effective and less principled way to approach copyright reform. A fair use system would not permit policy decisions to be made in advance with appropriate consultation, instead creating guidelines only after individual issues are tried. Given the length of time it would take to achieve a body of law that is specific enough to guide the decisions of users and right holders, it is questionable how useful it would be.

10 Clarity around copyright exceptions

Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators?

68. Australian copyright legislation has long provided for a closed list of permitted purposes exceptions and miscellaneous exceptions which apply in prescribed circumstances (like the UK, Canada and New Zealand).⁶⁹ Use of copyright material in Australia is subject to those clear exceptions which provide certainty to users in relation to the way they deal with copyright material. Given that certainty, there is no need to introduce changes which are inclined to introduce uncertainty. Under Australian law, most exceptions to infringement are specifically enumerated, for example:

Issue	Copyright Act
Fair dealing for the purpose of criticism and review	ss 41, 103A
Fair dealing for the purpose of parody and satire	ss 41A, 103AA
Fair dealing for the purpose of reporting the news	ss 42, 103B
Making a time-shifted copy of television program on an analogue tape	s 110AA
Copying a document for litigation	s 43(1), 104
Reverse engineering a computer program to get access to interface information	s 47D

69. These enumerated examples are relatively easy for users to follow. In Australia, copyright exceptions under fair dealing define the kind of uses that are permitted, such as research and study (s40), criticism and review (s41), reporting news (s42).⁷⁰ Courts have greater discretion with respect to fair dealing, but typically commercial users of copyright are denied the ability to rely on exceptions because they would interfere with the copyright owners' legitimate interests. Copyright exceptions under fair dealing are generally permitted only where they are unlikely to deprive the copyright owner

⁶⁷ See Sookman at 157-59.

⁶⁸ UK: *Copyright Designs and Patents Act 1988* (UK) ss 29(1), (30); Canada: *Copyright Act*, RSC 1985, c C-42, s 29; New Zealand: *Copyright Act 1994* (NZ) ss 42, 43.

⁶⁹ UK: *Copyright Designs and Patents Act 1988* (UK) ss 29(1), (30); Canada: *Copyright Act*, RSC 1985, c C-42, s 29; New Zealand: *Copyright Act 1994* (NZ) ss 42, 43.

⁷⁰ See, by way of example, *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109; *Copyright Agency Ltd v University of Adelaide* [2000] FCA 1894;

of rewards – not because of some mechanical evaluation of relative entitlement. This usually involves an evaluation on a case-by-case basis, as market conditions and innovative business models emerge. The Courts have demonstrated their capacity to adjudicate on these issues when required.⁷¹

70. For most average users of the Internet, the issue of exceptions applicability to a particular act is irrelevant, since most of what they are doing is uploading, without much thought of exceptions at all. Questions such as whether the uploaded content was obtained from an illegal source, is supplanting legitimate market channels, and whether the service is licensed or not, will largely determine whether infringement has occurred. Where the whole of a work has been exploited (such as through reproduction or communication), it is much more likely that an infringement has occurred, and this may be so even when less than a “substantial part” of the work has been exploited.⁷² While there is a body of case law to provide guidance, which confirms that the inquiry includes both the quantity and the quality of what was copied,⁷³ the evaluation cannot be reduced to a set of universally applicable rules.⁷⁴ This is not a defect in the copyright system.

Does the degree of certainty vary for businesses relative to individual users?

71. There is no evidence that the current exceptions in Australia’s law are either difficult to understand or unworkable in practice. Had this been the case, it would have been expected to feature in decisions of the Courts. In practice there are very few cases in which copyright exceptions have been tested. Where they have been tested, the user has frequently succeeded in relying on the exceptions. Absent empirical evidence to suggest that the system is not working, the evidence points to the system operating efficiently and with sufficient clarity for copyright owners and users. Business is likely to be better informed about copyright exceptions than individual users, because it has the benefit of legal advice when making the judgement about when they could apply. However this is likely to be balanced out by the fact that more of the copyright exceptions are available to users rather than business.

11 Parallel Imports

Do existing restrictions on parallel imports still fulfil their intended goals in the digital era?

72. The restrictions on parallel importation of physical goods exist in the Copyright Act because they serve the geographical licensing arrangements that must exist in order to enforce the exclusive rights of copyright holders under national copyright laws. Copyright has a different character to other commodities. Copyright has territorial properties that set it apart from other goods and services, which are not characterised by reference to geographical recognition and enforcement. Territorial considerations also apply to digital content that belongs to copyright owners as licenses are exclusive within each territory under a national copyright system. The policy objectives served by the existing copyright regime and its limitations on parallel importation would be frustrated if the restrictions were removed, particularly for audio visual content.

12 What changes should be made?

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

⁷¹ Compare the appeal decision in *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 with the decision of the trial judge at *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34.

⁷² See for example, *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 at [22] and [37].

⁷³ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 (22 April 2009) at [30]: “In order to assess whether material copied is a substantial part of an original literary work, it is necessary to consider not only the extent of what is copied: the quality of what is copied is critical.”

⁷⁴ *Ibid* and at [32]: “a factor critical to the assessment of the quality of what is copied is the “originality” of the part which is copied.”

73. Private industry is already investing substantial resources in copyright enforcement in Australia. The Australian Film/TV Bodies believe that the most important changes that can, and should, be made to Australia's copyright regime are to improve coordination of IP policy within Government and improve the processes of enforcement of the rights through civil and criminal law mechanisms.
74. Australia currently trails behind major trading partners in having no centralised support for copyright law, relatively low funding for, and no comprehensive plan for IP in the Australian economy. The policy initiative taken in relation to online infringement was a welcome development and was efficiently managed by the Government. However, there is no IP Minister or IP office to champion IP as a critical element of the Australian legal and policy framework and to coordinate responses from various different departments and arms of government.
75. The United Kingdom has long prioritised intellectual property rights and law, and has stayed proactive in examining the efficacy of the law in both protecting and encouraging creative endeavour and ensuring that intellectual property rights benefit the economy. The UK Intellectual Property Office (formerly the Patents Office that was established in 1852) is the official government body responsible for managing the intellectual property system in the UK. It is an executive agency sponsored by the Department for Business, Innovation and Skills. In addition to being responsible for administering registered IP assets it is also involved in copyright and IP enforcement, including IP crime policy and work with the Police Intellectual Property Crime Unit. The UK Prime Minister also had an adviser on IP matters, Mike Weatherly MP, who was able to drive significant IP policy in the UK government.
76. The US also has a well-established and sophisticated system of copyright stewardship. In the US the Copyright Office, founded in 1897, plays a pivotal and non-partisan role in critical law and policy functions relating to copyright law. In addition to its functions as register of copyrights, it provides domestic and international policy analysis, provides legislative support for the US Congress and participates in litigation (as *amicus curiae*) involving important copyright law issues before the US Courts. Criminal copyright offences involving digital infringements are prosecuted by the Computer Crime and Intellectual Property Section of the Criminal Division of the US Department of Justice, while other complaints about criminal infringement of copyright are lodged directly with the Intellectual Property Program of the Federal Bureau of Investigation (FBI), and U.S. Immigration and Customs Enforcement (ICE) under the U.S. Department of Homeland Security (DHS), coordinated by the National IPR Center.⁷⁵
77. Improvement to IP enforcement should also be a key objective for the Commission's recommendations. As the Issues Paper acknowledges, the value of IP rights to creators depends on their ability to enforce their rights.⁷⁶ The Hargreaves Review reached a similar conclusion that "IPRs cannot succeed in their core economic function of incentivising innovation if rights are disregarded or are too expensive to enforce" and dedicating one of its ten recommendations to enforcement.⁷⁷ The UK Government's response to the Hargreaves Review emphasised that "being able to enforce copyright is also a necessity for a healthy copyright system", pointing to various UK Government initiatives in this regard.⁷⁸ Similarly, the US copyright review has been described as "a wide review of our nation's copyright laws *and related enforcement mechanisms*" (emphasis added).⁷⁹
78. The Issues Paper suggests that consideration of enforcement issues should apply to "users' rights." The Australian Film/TV Bodies strongly disagree with this suggestion.⁸⁰ To speak of exceptions to IP

⁷⁵ For more information see *Prosecuting Intellectual Property Crimes*: DOJ, Intellectual Property CCIPS Criminal Division.

⁷⁶ Issues Paper p27.

⁷⁷ Hargreaves Review at e.g. p 5 and 9.

⁷⁸ UK Government Response at e.g. p 3. and 31.

⁷⁹ United States House of Representatives Committee on the Judiciary, Press release, *Chairman Goodlatte Announces Comprehensive Review of Copyright Law*, 24 April 2013, available at http://judiciary.house.gov/news/2013/04242013_2.html (emphasis added).

⁸⁰ Also referred to in the Issues Paper p27.

rights as “rights” of users is not consistent with the law of copyright or its history. This would be a permitted use, and it is inaccurate to describe such uses as the exercise of a right. Nor does “enforcement” of IP rights (p27) encompass actions by users to challenge their existence.

79. Overall, the institutional response to public IP enforcement in Australia is weak, with no public organisations given the explicit role of enforcing IP rights and those with the purview over IP having little or no resources directed towards IP enforcement and system of prioritising IP. Public enforcement requires clear identification of responsibilities and tasking between law enforcement agencies, direction from the executive on prioritisation of IP enforcement and the development of skills and knowledge within law enforcement agencies that enables them to carry out the enforcement work with greater efficiency and achieve better outcomes. Specialised courts (or Court lists) could create benefits through accumulated experience and potentially reduce costs for stakeholders involved in legal proceedings.
80. Australia already has a lower cost Court (the Federal Circuit Court) that has equivalent functions in copyright and trade mark matters to the UK Intellectual Property Enterprise Court. More could be made of this Court to take on a range of civil and criminal enforcement matters with more streamlined processes and more realistic cost recovery for IP owners choosing that pathway.
81. The Australia Film/TV Bodies appreciate the opportunity to provide the above comments and are available to provide further clarification and/or information if necessary.

30 November 2015