

SUBMISSION TO THE PRODUCTIVITY COMMISSION INTELLECTUAL PROPERTY ARRANGEMENTS DRAFT REPORT

7 June 2016

News Corp Australia appreciates to opportunity to make this submission to the Productivity Commission's (the Commission) *Intellectual Property Arrangements* Draft Report (Draft Report).

In short, we do not support the copyright recommendations made in the Draft Report.

Sound public-policy making principles require that the problem to be solved is well understood and evidenced, and that the proposed response is proportionate. However, neither of these elements is met in the Draft Report, making the recommendations unjustified.

The Draft Report overlooks the importance of the commercial framework to the primary creation of a work and the continued investment in such. Without justification the Draft report erroneously claims that:

- The Copyright Act (the Act) is tipped in favour of rights holders and licensees;
- The Act is insufficiently flexible and therefore stifles innovation; and
- Price and availability is the silver bullet for wide-scale copyright infringement.

Disappointingly the Draft Report makes these statements without a solid foundation of evidence. It also fails to consider the issues associated with wide-scale copyright infringement on investment and content creation under the current framework let alone under the proposed broad fair-use exception; and incorrectly characterises the role of international agreements as constraining domestic copyright policy.

The Draft Report states that a well-functioning copyright laws needs to adapt to the evolving technology environment and user behaviour. We agree that a well-functioning copyright regime needs to be adaptable. As we have stated in numerous submissions regarding copyright, we believe that the current fair dealing framework is sufficiently flexible to adapt so as to continue to be fit for purpose.

A well-functioning copyright regime must also be effective and efficient. News Corp Australia and other rights holders have consistently submitted detailed evidence to various formal consultations specific elements of the Act that applied in an analogue web 1.0 world, but are out of date for a web 2.0 digital environment. We have recommended that these specific evidence issues be addressed appropriately to ensure the effective and efficient operation by ensuring a level-playing field for commercial negotiations. Unfortunately the Draft Report does nothing to address these issues and the important role they play in a well-functioning marketplace. In fact, it exacerbates the issues by failing to understand the commercial landscape of copyright, and making recommendations that will incentivise the wrong commercial behaviour and therefore undermine investment in creativity.

Therefore we hold serious concerns regarding the copyright recommendations contained in the Draft Report, on an individual basis and in aggregate.

Below we address in brief a number of recommendations included in the Draft Report.

The recommendations in the Draft Report illustrate a preference for unjustified changes to the legal, and therefore commercial framework of copyright, including: wholesale change of the copyright regime in the shape of a broad fair-use exception in addition to other unwarranted measures such as the recommendation for the extension of safe harbour to online service providers without considering – in fact, dismissing – the authorisation element of the safe harbour eco-system; the removal of section 51(3) of the Competition and Consumer Act; the ‘clarification’ regarding technological protection measures and geo-blocking; and the removal of parallel importation restrictions on books.

A broad fair use exception

News Corp Australia has made extensive representations to consultations regarding a proposed broad fair use exception, including to the Australian Law Reform Commission.

It continues to be the case that there is insufficient evidence to require significant reform of the copyright regime, and that such reform should take the shape of wholesale change to the regime that in effect would weaken copyright and erode the foundations for commercial negotiations.

Extension of safe harbour (limitation of liability) to online service providers

The Draft Report supports the extension of safe harbour to online service providers. The Department of Communications undertook a consultation on an exposure draft of the *Copyright Amendment (Disability and Other Measures) Bill 2015* that included a schedule regarding a proposed safe harbour amendment. News Corp Australia made a submission to this consultation.

We recommend that the safe harbour provision in that Bill, Schedule 2, be removed from the Bill and afforded proper consultation. As we have stated previously, we are not against safe harbour applying to online service providers. However it is important that this be achieved by looking at the provision including the definition and the regulations as a whole, and at the safe harbour eco-system in its entirety, to ensure an effective outcome. In doing so the reviews of similar provisions in the US, EU and UK should also inform Australia’s position. This will help to ensure that Australia considers provisions that that function effectively and efficiently in the digital world and are free of unintended consequences.

We continue to hold that the safe harbour and authorisation provisions of the Act operate as an eco-system. Updating one element of the eco-system to accommodate for web 2.0 digital evolution requires the same attention to be applied to the other element/s of the eco-system. To put it another way, for the liability limitation (safe harbour) to apply, it must have a liability that would otherwise apply (secondary liability/authorisation) both must be able to apply to web 2.0 services for the eco-system to function as intended.

To not do so, as recommended in the Draft Report, will provide anything but a level-playing field for commercial development of services – by providing incentives for bad actors to undermine the scheme, and use it as an offensive strategy to build scale commercial businesses, that could otherwise be infringing, under cover of safe harbour. This is not what was intended for safe harbour in Australia or any other jurisdiction. Rather safe harbour was intended as a defence, a method of limiting liability in the face of potential secondary liability (authorisation).

Section 51(3) of the Competition and Consumer Act

It continues to be the case that there is a lack of evidence to substantiate the proposed amendment of section 51(3) of the Competition and Consumer Act contained in the Draft Report. On this sound policy-

making basis we do not support the removal of the provision nor the provision of guidance on the application of Part IV of the Competition and Consumer Act in this regard.

Section 51(3) of the Competition and Consumer Act provides an appropriate balance between rights holders and users.

Territorial licensing and geoblocking

We believe that territorial licensing, and the use of geoblocking to support territorial licensing, has a legitimate role to play in the marketplace. We refer here to the comments and analysis in the Foxtel submission to the Draft Report, which demonstrates that territorial licensing allows Australian content producers to maximise their returns when they export content, as well as underpinning the viability of local distribution models (including by allowing Australian platforms to acquire overseas content efficiently in order to subsidise production of Australian content).

Parallel importation restrictions

The principle of parallel importation protections, or territorial copyright, is the international book commerce standard upon which the publishing industry is based. It ensures creators are able to trade their proprietary rights, like any other proprietary right, and to receive fair return on their investment.

This principle has proven effective in maintaining and developing Australian literature while ensuring that consumers have access to any book published anywhere. Removing the restrictions would make Australian publishing a far less viable business and would not achieve the Government's intended outcomes and, ultimately, would not be in the best interests of Australian consumers.

We refer here to the comments and analysis in the HarperCollins Publishers Australia submission to the Draft Report.

Online copyright infringement

We also note that the Draft Report erroneously opines that price and availability are the silver bullets for addressing mass-scale online copyright infringement. The Draft Report appears to overlook current market analysis in making this recommendation. In spite of the lack of level-playing field for negotiating, we note that innovative business models are developing to meet consumer needs. Specifically we draw attention to the music industry where consumers can access music across a range of devices and access services, to music released simultaneously around the world, at a range of price points – including \$0 – and still the there's rampant online infringement. The Draft Report's silver bullet for online infringement is proven not to be so.

In addition to developments in the market and and business models to bring content to consumers, we have also urged the Government to take action on a range of undertake a review of secondary liability/authorisation provisions (particularly associated with proposals to extend safe harbour to online service providers). We also note that the recent introduction of section 115A of the Act, a no fault provision for injunctive relief, is limited in its application to carriage service providers. Such limitation does not exist in other jurisdictions where the provision has been well utilised and has resulted in positive outcomes for dealing with the mass supply of infringing content online. We encourage the Government to consider amending the provision such that it applies to online service providers and is aligned with international jurisdictions.

We are disappointed that the Draft Report does not apply itself to the important role of copyright protections, and not just exceptions, when considering the contribution of creativity and the role of investment in the continuation of creative endeavour in Australia.