



Digital Rights Watch

Submission to the Productivity Commission's Intellectual Property Arrangements inquiry

Nicolas Suzor, Lizzie O'Shea, Christina Meyers, Tess Van Geelen, Melanie O'Sullivan

Executive Summary

Digital Rights Watch (DRW) strongly supports the development of evidence-based intellectual property law. In recent years, the strength of intellectual property regimes worldwide has been steadily ratcheted up through international policy laundering and a complex web of interlocking trade agreements. The result is that Australia is now locked into a set of international standards for intellectual property protection that are not in our national interest, and which have not been optimally implemented.

Australia's rigid intellectual protection regime lacks the flexibility and balance necessary for an efficient system. This has a number of consequences:

- Consumers face higher prices and less choice as competition in the market is decreased;
- Access and creative reuse of content is impeded by far reaching protection and inadequate exceptions, even for materials where no substantial market exists;
- Australia lags behind the systems of other countries that provide a better base for innovation; and
- Consumers find copyright "out of touch" and lose respect for intellectual property law.

DRW supports the Productivity Commission's draft recommendations to do what is possible, within the context of Australia's international obligations, to make our intellectual property laws fit for purpose in the digital age. DRW strongly supports the Commission's focus on user rights, whose diverse interests are often not well represented in intellectual property negotiations and policy development. DRW also appreciates the Commission's exploration of how the current intellectual property settings impact differently upon different types of rights holders, acknowledging that the experience and needs of small, amateur, and independent creators are very different to that of a large corporate rights holder.¹ A focus on user rights and broader economic benefits will go some way to improving the balance that is needed to create an effective and efficient intellectual property system.

Over the longer term, we suggest that Australia must do more to ensure that it has the sovereignty to determine the boundaries of intellectual property protection that are appropriate to our national context and further our national interest. This, we suggest, requires a fundamental rethinking of the way that Australia approaches international negotiations, and the beginnings of a long road to disentangle intellectual property obligations from trade agreements. A more democratic and transparent approach to these negotiations is critical, given the significant effects of the outcomes on so many Australians.

We offer the following feedback on issues addressed in the draft report:

1. Fair use should be introduced immediately
2. No new copyright enforcement mechanisms should be introduced unless and until the market is being effectively served
3. Safe Harbours should be extended
4. Website blocking laws should be scrapped
5. Circumventing geoblocks is legal and helps improve competition and consumer outcomes
6. User rights in IP should not be excludable by contract
7. The IP exemption should be removed from competition law
8. Intellectual property policy should be evidence-based and excluded from international trade negotiations

Who is Digital Rights Watch?

Digital Rights Watch (DRW) is a non-profit organisation that supports, fosters, promotes and highlights the work of Australians standing up for their digital rights. More information is available on our website, <http://digitalrightswatch.org.au>.

¹ We commend in particular the nuanced discussion at pages 100-112 of the draft report. While DRW understands that there is less rigorous industry information on some of these groups than is desirable, we hope that through submissions and further research the Commission may be able to explore these differences more directly in the final report.

1. Fair use should be introduced immediately

Current Australian copyright law is demonstrably not fair. Consumers face outdated restrictions on ordinary acts -- like format shifting and transformative expression -- that cause no harm to the legitimate markers of copyright owners.² Creators are unable to legally engage in routine acts of creativity without going through expensive and fraught processes to clear permissions. Often, these permissions are withheld in a way that stifles freedom of expression and critical commentary. Businesses are prevented from developing new technologies and value-added business models that help people find and use copyright materials. For example, the Google Books service was designed to make the world's books searchable online through the digitization of millions of books. This effort creates new revenue streams for authors and publishers, provides consumers with access to books not previously available, enables new scientific research on a massive corpus of literature, and provides unprecedented levels of access to books for people with disabilities. Google was only able to create a service of this kind in the United States because of their fair use exception.³ Australian copyright law is much more hostile to innovators. Not only does Australia lack a fair use exception, but we lack adequate safe harbours (addressed further below), and the Federal Court has adopted a narrow interpretation of Australian fair dealing defences. This is visible in cases like the *Optus TV Now* case,⁴ which has created a lasting disincentive for firms to develop new internet-based cloud computing services.⁵

As the Commission identified at page 2 of the draft report, the current imbalance in the copyright system will be most effectively addressed with a "new system of user rights, including the introduction of a broad, principles-based fair use exception." DRW strongly supports the draft finding 4.1 and draft recommendation 5.3 (echoing numerous previous recommendations)⁶ and the recognition that optimal IP settings will support growth, innovation and use as well as creation and distribution. The introduction of a fair use right will deliver essential flexibility into the marketplace, enabling consumers to make reasonable use of content, supporting innovative delivery mechanisms and creation.

² For example the format shifting exception for cinematograph film is specific to owning the film on VHS (s110A *Copyright Act 1968 (Cth)*)

³ Google Australia, Submission No 102 to The Productivity Commission, *Intellectual Property Arrangements Inquiry*, 15 December 2015, 19; *Authors Guild v. Google, Inc.* (2nd Cir, 16 October 2015), cert. denied April 18, 2016.

⁴ *NRL Investments Pty Ltd and Another v Singtel Optus Pty Ltd and Others* (2012) 289 ALR 27.

⁵ iiNet Limited, Submission No 186 to The Australian Law Reform Commission, *Copyright and the Digital Economy*, 2013, 5.

⁶ See Copyright Law Review Committee report on Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners (1998); Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement; Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004); House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT pricing and the Australia tax* (July 2013); ALRC Report 122 *Copyright and the Digital Economy* (2014).

Unlike the current approach of specific exceptions, fair use has the capacity to develop along with the market, in a way that is responsive to social needs.⁷ Fair use aligns with the goals of other consumer legislation, to enhance the welfare of Australians through the promotion of competition and fair trading.⁸ Fair use is also easier to understand than the current labyrinth of exceptions and licences.⁹ It will also deliver net benefits to Australian creators, consumers, schools, libraries, archives and cultural institutions, many of whom have submitted to this inquiry in support of the change.

The limitations and exceptions to copyright infringement are part of the fundamental balance of copyright law.¹⁰ Fair use in particular is the mechanism through which the law can adapt to unforeseen circumstances in a way that clearly furthers the public interest. Fair use provides a much needed safety valve to ensure that the rights and incentives of past creators do not stifle future creativity and learning. In the United States, it is crucial to the practices of creators, producers, and distributors of creative content.¹¹ Empirical studies of US law show that fair use is predictable and there are consistent patterns in judicial analysis within the fair use decisions.¹² There is no reason to suspect that this exception, which almost all US stakeholders agree is effective, would not also be in Australia's national interest. Over recent years, Australia has imported all the most restrictive portions of US copyright law, but has failed to import the necessary protections for user interests.

One of the most pressing reasons to introduce fair use is that individuals are losing faith in the copyright system. Individuals engage in routine acts of infringement every day -- like printing emails or recording a video that incidentally captures background music -- in ways that could never be efficiently enforced.¹³ These routine acts of technical infringement are never understood to be part of the copyright owners' legitimate market (or 'normal exploitation'¹⁴) or exclusive rights. Fair use is the tool that ensures that copyright *makes sense* - and without it, social norms around copyright will continue to diverge from the letter of the law. For anyone who cares about the copyright system, this is a bad result. We suggest that the best mechanism to ensure that copyright law is respected is to ensure that it is underpinned by fairness.

⁷ Australian Law Reform Commission, Summary, Copyright and the Digital Economy (2 December 2013) <https://www.alrc.gov.au/publications/summary-report/recommendations>.

⁸ See for example *Competition and Consumer Act 2010* (Cth) s 2.

⁹ Including exclusive licenses (s 10) and compulsory licenses (Parts VA, VB, VC) under the *Copyright Act 1968* (Cth), but also implied licenses developed by the common law: *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at [93].

¹⁰ Patterson, LR and SW Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Univ of Georgia Pr, 1991).

¹¹ Aufderheide, P., & Jaszi, P. (2011). *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press Chicago, IL.

¹² Michael Madison, 'A Pattern-Oriented Approach to Fair Use' (2004) 45 *William & Mary Law Review* 1525, 1666; Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005' (2008) 156(3) *University of Pennsylvania Law Review* 549; Pamela Samuelson, 'Unbundling Fair Uses' (2009) 77(5) *Fordham Law Review* 2537, 2537; Matthew Sag, 'Predicting Fair Use' (2012) 73(1) *Ohio State Law Journal* 47, 49.

¹³ See John Tehranian, 'Infringement Nation: Copyright Reform and the Law/Norm Gap' [2007] *Utah L. Rev.* 537.

¹⁴ Berne Convention for the Protection of Literary and Artistic Works, opened for signature 9 September 1886, [1978] ATS 5 (entered into force 5 December 1887) ('Berne Convention'), Art 9(2).

Concerns have also been raised about the viability of parts of Australia's creative sector. It is a mistake, in DRW's view, to link this to the introduction of fair use. This has not been the experience in other countries. For example, Singapore's fair use provisions came into force on the first of January 2005¹⁵ along with a number of other copyright reforms triggered by the conclusion of the free trade agreement with the United States. The number of changes applied in a short time period makes it almost impossible to isolate the impacts of fair use¹⁶ on any particular sector. However we can see from the data clear evidence that the introduction of fair use did not substantially or irreparably damaged the overall health of Singaporean creative industries, literary arts or publishing.

Using the official Singaporean Government data, in the first year¹⁷ fair use was in operation there was:

- 17% increase in titles published¹⁸
- 9.5% increase in operating revenues for the literary arts¹⁹
- 13.6% increase in the nominal value add for the literary arts.²⁰

While there has been some fluctuation in the figures the sector generally grew steadily until 2010, at which point both publication numbers and operating receipts declined. It seems highly unlikely that this is a result of the introduction of fair use five years previously and more likely to be in response to other external factors.

Flourishing creative industries and arts sectors are fundamentally important to Australian society. It is important, however, to be clear about the role of copyright in these areas.

¹⁵ [Copyright \(Amendment\) Act 2004](#) (Singapore) (No. 52 of 2004)

¹⁶ The main study is R Ghafele & B. Gilbert [The Economic Value of Fair Use Counterfactual Impact Analysis In Singapore](#) (2012) Oxfirst Ltd. Using a counterfactual methodology they cautioned that "While this method cannot be used to attribute a causal relationship, Differences-in-Differences can establish correlation between a policy and a given outcome" and with that caveat conclude the evidence points to a net gain to Singapore's economy from fair use "Singapore's fair use amendments are correlated with a 3.33% increase in value-added (as % of GDP) for private copying technology industries....For 2010, fair use policy was correlated with a -0.23% reduction in value-added (as % of GDP) for the copyright industries in Singapore. The amendment of fair use policy thus had a very limited negative impact on copyright industries in Singapore. However, copyright industries continued to enjoy a 6.68% average annual growth rate (value-added as % of GDP) after the fair use policy intervention (2005-2010)" (at 44-45). The PWC Report [Understanding the costs and benefits of introducing a 'fair use' exception](#) (February 2016) submission 122 calls into question the methodology of the study, however uses it as the base of the claim for the decline in growth rate of the copyright industries (quoting the raw figure, when adjusted against the control the treatment impact on copyright growth was -3.37%).

¹⁷ Based on the financial year that ran from 1 April 2005 – 30 March 2006. All pre-2009 statistics quoted from the government reports run on this financial year, after 2009 the measurements move to calendar years (1 January -30 December).

¹⁸ Based on the legal deposit figures for the National Library of Singapore. All titles published in Singapore are required to deposit copies with the National Library. See Ministry of Culture, Community and Youth [Singapore Cultural Statistics 2015](#).

¹⁹ Ibid. Literary arts defined as "Wholesale of books and magazines; retail sale of books, newspapers and stationery (including news vendors); publishing of books, brochures, musical books and other publications" at 74.

²⁰ Ibid.

Copyright is largely about industries: it provides the legal infrastructure that is required for complex production to take place.²¹ The traditional cultural production industries support many creative professionals, and copyright plays some role in supporting these industries. However, a much greater number of creative professionals -- approximately four times as many -- are employed in industries that are not focused on the production of creative content.²² For these segments, where creative work is provided as a service, copyright does not play an unequivocally clear role.²³

In general terms, copyright policy is not an efficient mechanism for distributing revenues to creators. If we take the figures presented by the rightsholders, the economic value of the "copyright industries" in 2014 stood at \$111.4 billion,²⁴ equivalent of 7.1 per cent of gross domestic product (GDP) with an average industry wage of \$68,960. These industries are working well, and creative workers employed in both creative industries and in creative roles in other industries report strong employment prospects, good wages, and higher levels of job satisfaction than the societal average.²⁵ As a tool for supporting individual artists, however, copyright does a very poor job. The average writer's wage in Australia, for example, is only \$13,000 pa.²⁶ A recent paper by Flew et al explains the limited role that copyright royalties play in artist incomes:

Given the importance attached to copyright for the income of artists, it is a subject around which surprisingly little research has been undertaken, at least in Australia. A 2003 study for the Australia Council (Throsby and Hollister, 2003) attempted to calculate the actual contribution of royalties and other copyright-related revenue streams to the incomes of Australian artists. This study found that royalties, advances and other copyright earnings accounted for 6% of the creative income of the over 1,000 artists it surveyed, with the Public Lending Right and the Educational Lending Right accounting for a further 2%. These sources of creative income were particularly important for writers (27% of total creative income) and composers (23% of creative income): for all other categories of artistic and creative practice surveyed, they accounted for no more than 2% of total creative income.²⁷

²¹ Julie E Cohen, 'Copyright as Property in the Post-Industrial Economy: A Research Agenda' (2011) 2011 *Wisconsin Law Review* 141.

²² See Gregory N Hearn et al, 'Creative Work Beyond the Creative Industries: An Introduction' in Gregory N Hearn et al (eds), *Creative Work Beyond the Creative Industries: Innovation, Employment and Education* (Edward Elgar Publishing, 2014) 1.

²³ Terry Flew, Nicolas P Suzor and Bonnie Rui Liu, 'Copyrights and Copyfights: Copyright Law and the Digital Economy' (2013) 2 *International Journal of Technology Policy and Law* 297.

²⁴ PWC Economic Contribution of Australian Copyright Industries 2002-2014 (2015) p3

²⁵ See Bridgstock, R., and Cunningham, S., 2014. Graduate careers in journalism, media and communications within and outside the sector: Early career outcomes, trajectories and capabilities. In: G. Hearn, R. Bridgstock, B. Goldsmith, and J. Rodgers, eds. *Creative work beyond the creative industries: innovation, employment and education*. London: Edward Elgar, 226–234.

²⁶ Adler L (Australian Publishers Association) The evidence is in: copyright proposal won't mean cheaper books *Sydney Morning Herald* (June 2016)

²⁷ Terry Flew, Nicolas P Suzor and Bonnie Rui Liu, 'Copyrights and Copyfights: Copyright Law and the Digital Economy' (2013) 2 *International Journal of Technology Policy and Law* 297, 305.

Digital Rights Watch supports cultural policy that can encourage a flourishing independent arts sector. Well functioning public subsidy and grant schemes, calibrated tax incentives, and social recognition through prizes and awards all form part of the necessary infrastructure to support our cultural sectors. We should not, however, assume that copyright policy will be able to take the place of public and private subsidies for socially valuable cultural production that is or would be under-produced by the private market. There is little evidence that increasing the force of copyright law will lead to better outcomes for artists, and good reason to suspect that copyright often operates as a net barrier to creative expression.²⁸

DRW believes that fair use should be introduced into Australian law as a matter of urgency. It will help restore the legitimacy of a copyright law that is increasingly out of touch with social norms. It will provide a real, tangible benefit to creators who transform existing works to create new expression. It will remove some of the obstacles to innovation that businesses face in developing new technologies that underpin new markets and value-added services around copyright content. And in doing so, it is highly unlikely that fair use will lead to any significant loss of income for professional Australian artists.

Form of the fair use right

DRW supports the Productivity Commission's draft recommendation 5.3 which includes an objects clause, coupled with a non-exhaustive list of illustrative examples and the potential for rights holders and users to develop regulatory guidance and best practice information. This is the best model to reduce residual uncertainty from adopting fair use in Australia. An objects clause creates legal certainty as it assists the court in interpreting legislation as it can be used to resolve uncertainty or ambiguity.²⁹ The "modern approach to statutory interpretation"³⁰ is that a construction of a statute which promotes the object is to be preferred to a construction that would not.³¹

The existing Australian case law on fair dealing would translate to the new exception. It is an established part of Australian law that the court can draw on foreign jurisprudence where it assists judicial decision making and is persuasive.³² The US courts have developed considerable case law on the scope of fair uses of copyright-protected material, and a range of guidance tools to assist rights holders and users to determine what uses of copyright material the courts might consider fair. These (non-binding) decisions can help Australian courts navigate the appropriate balances between user and owner interests that furthers the public good.

There are other additional ways to reduce uncertainty that the Productivity Commission may want to consider including in its recommendations. In the US, for example, guidelines about

²⁸ See Hunter, Dan and Nicolas P Suzor, 'Claiming the Moral High Ground in the Copyright Wars' in Phillipa McGuinness (ed), *Copyfight : Firing Up Conversation about Copyright* (University of New South Wales Press, 2015) 131.

²⁹ *Acts Interpretation Act 1901* (Cth) s 15AA(1).

³⁰ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

³¹ *Acts Interpretation Act 1901* (Cth) s 15AA(1); *Thomas v Mowbray* (2007) 233 CLR 307, 348.

³² *Tabet v Gett* (2010) 240 CLR 537.

best practices have informed industry standards and greatly improved the certainty of the system, to the mutual benefit of past and future creators.³³

2. No new copyright enforcement mechanisms should be introduced unless and until the market is being effectively served

DRW notes the Productivity Commission's draft finding 18.1 and its comment at page 493 that "the case for further policy change or Government action on copyright infringement is weak." We agree, and suggest that no further enforcement mechanisms should be introduced unless there is a demonstrated need and they are based on evidence that they are efficient, necessary, and proportionate.

The fact that Australian media markets are not being adequately served suggests strongly that Australia should not take any further steps to increase the strength of copyright law at this time. The interests of the public and those of rightsholders align better when there is effective competition in distribution channels and consumers can legitimately get access to content. While foreign rightsholders are seeking enhanced protection for their interests, increasing enforcement is likely to increase their ability to engage in lucrative geographical price discrimination, particularly for premium content. This strategy currently leads either to substantial deadweight loss or substantial rates of infringement. It is also likely to increase the degree to which Australian consumers feel that their interests are not being met and, consequently, to further undermine the legitimacy of copyright law.³⁴ If consumers are to respect copyright law, and the aim is for better compliance, increasing sanctions for infringement without enhancing access and competition in legitimate distribution channels could be dangerously counterproductive.

We suggest that rightsholders' best strategy for addressing infringement in Australia at this time is to ensure that Australians can access copyright goods in a timely, affordable, convenient, and fair lawful manner. We support the Commission's draft finding 18.1 that "timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement."

In line with this general position, we recommend that the Government adopt a clear policy not to further increase the force of copyright enforcement mechanisms in the medium term. We suggest that the Productivity Commission consider recommending that the stalled copyright notice code should be officially abandoned and no further negotiations for a similar scheme should be supported by the Australian Government.

³³ See, for example, Documentary Filmmakers' Statement of Best Practices in Fair Use (2005) <http://cmsimpact.org/code/documentary-filmmakers-statement-of-best-practices-in-fair-use/>.

³⁴ Paula Dootson and Nicolas Suzor, 'Game of Clones and the Australia Tax: Divergent Views about Copyright Business Models and the Willingness of Australian Consumers to Infringe, The' (2015) 38 *University of New South Wales Law Journal* 206.

3. Safe Harbours should be extended

DRW supports the Productivity Commission's draft recommendation 18.1. Effective limitations of secondary copyright liability are crucial to encourage investment in the digital economy. The experience from the United States clearly shows that the copyright safe harbours play an extremely important role in allowing technology and telecommunications companies to develop and deliver the services that underpin an innovation economy. Australian law, through legislative oversight, creates a massive disincentive for firms to invest in digital technologies within Australia. For those firms that do operate within the reach of Australian law, the lack of clear safe harbours results in risk-mitigation policies that are likely to systematically over-protect copyright to the detriment of Australian consumers.

DRW strongly supports the immediate passage of the draft Copyright Amendment (Disabilities and Other Measures) Bill to remedy the drafting error in the copyright safe harbours. The draft Bill has been carefully negotiated in consultation with relevant stakeholders; we therefore suggest that the Productivity Commission modify Recommendation 18.1 to directly endorse its immediate passage.

4. Website blocking laws should be scrapped

At pages 490-491 of the draft report, the Productivity Commission addresses changes to the *Copyright Act 1968* that introduced processes for blocking websites involved with online copyright infringement. The draft report rightly notes that there are serious problems with the effectiveness of this regime, given alternative methods are available to users to access blocked websites, and goes on to recommend that better pricing is the most efficient and effective way to reduce online copyright infringement. DRW is of the view that, for the reasons identified by the Productivity Commission, the website blocking regime should be repealed. The regime is currently too broad, with the potential for websites to be blocked inappropriately and with very few scrutiny measures to guard against this. It is worth noting that the United Kingdom have enacted a similar website blocking regime, resulting in over 121 websites being blocked by ISP's.³⁵ The costs of the regime have been left to the ISP and, resultantly, its users to bear. Australian citizens should not have to wait until this regime is used inappropriately or increases internet service costs before its repeal is considered. The Productivity Commission should consider recommending its repeal.

5. Circumventing geoblocks is legal and helps improve competition and consumer outcomes

DRW strongly supports draft recommendation 5.1 that consumers rights to circumvent geoblocks should be enshrined in the *Copyright Act 1968*. The Australian Government should clarify this ambiguity and make it clear that circumvention of geoblocking technology does not constitute circumvention of either Access Control Technological Protection

³⁵ Leanne O'Donnell, 'Controversial copyright website-blocking law passed' (2015) 40(3) *Alternative Law Journal* 210.

Measures (ACTPMs) or Technological Protection Measures (TPMs). The current definition of ACTPMs and TPMs in s 10(1) of the *Copyright Act 1968* should be amended to clearly carve out all devices that have the effect of controlling geographic market segmentation.

The highly visible demand for technologies that can circumvent geoblocks, like VPNs, amongst Australian consumers is indicative of a market that is not functioning effectively. Research suggests that Australian consumers may circumvent geoblocks for reasons including inaccessibility of content, delay in accessing content and lack of affordable content online.³⁶ Australian consumers are becoming increasingly frustrated with the lack of accessible legal copyright material online and have termed themselves "second-class" media citizens.³⁷ Australians have less access to digital goods than consumers in other countries,³⁸ and face substantial delays in accessing content.³⁹

The lack of competition in Australian media markets is driving infringement. Consumers are aware they are being overcharged for digital goods⁴⁰ and have less choice in distribution options. Enabling parallel importation by clearly permitting circumvention of geoblocking is likely to encourage rights holders to adopt distribution models that adequately serve the Australian market. Left unchecked, rightsholders are likely to continue with current profit maximisation strategies that restrict competition in distribution channels.

TPMs are often applied in a way that restricts consumers' ability to get the full value from their investments. Because circumventing a TPM raises civil liability and potential criminal sanctions unless it is for a specifically excluded reason,⁴¹ TPMs prevent consumers using content in ways permitted under the *Copyright Act 1968*. For example a consumer who has a TPM protected ebook on their kindle could not bypass the TPM in order to extract a chapter for their study or research, or a graph for the purposes of criticism or review. Because the prohibition on circumventing TPMs is disconnected from any actual or threatened copyright infringement, TPMs may be used to give quasi-copyright protection to works that should be in the public domain. DRW urges the Commission to recommend that all consumer copyright exceptions are added to the list of permitted exceptions for bypassing TPMs.

³⁶ Paula Dootson and Nicolas Suzor, 'Game of Clones and the Australia Tax: Divergent Views about Copyright Business Models and the Willingness of Australian Consumers to Infringe, The' (2015) 38 *University of New South Wales Law Journal* 206, 214; Lobato and Meese, above n 1, 120; Tama Leaver, 'Watching Battlestar Galactica in Australia and the Tyranny of Digital Distance' (2008) 126 *Media International Australia* 145, 153; Jordi McKenzie and David Walls, 'File-Sharing and Film Revenues: An Empirical Analysis' [2013] *The University of Sydney Economic Working Paper Series 2013 - 2014*; Standing Committee on Infrastructure and Communications, 'At What Cost? IT Pricing and the Australian Tax' (Parliament of Australia, July 2013) 100–101.

³⁷ Standing Committee on Infrastructure and Communications, 'At What Cost? IT Pricing and the Australian Tax' (Parliament of Australia, July 2013) 120.

³⁸ Tama Leaver, 'Watching Battlestar Galactica in Australia and the Tyranny of Digital Distance' (2008) 126 *Media International Australia* 145, 153.

³⁹ Jordi McKenzie and David Walls, 'File Sharing and Film Revenues: Estimates of Sales Displacement at the Box Office' (2016) 16 *The BE Journal of Economic Analysis & Policy* 25.

⁴⁰ *Ibid* 100-101.

⁴¹ *Copyright Act 1968* (Cth) ss 116AN, 132APC and see schedule 10A of *Copyright Regulations 1969* for permitted exceptions.

6. User rights in IP should not be excludable by contract

The Commission has requested information as to what extent copyright licence conditions are being used by rights holders to override the exceptions in the *Copyright Act 1968*. With the move to digital delivery the default “purchase” option for most content is an ongoing licenced governed by contractual terms. For example, when somebody “buys” a book for their kindle, they are actually agreeing to terms for “Use of Kindle Content”:

Upon your download of Kindle Content and payment of any applicable fees (including applicable taxes), the Content Provider **grants you a non-exclusive right to view, use, and display** such Kindle Content an unlimited number of times, solely through a Reading Application or as otherwise permitted as part of the Service, solely on the number of Supported Devices specified in the Kindle Store, and solely for your personal, non-commercial use. **Kindle Content is licensed, not sold**, to you by the Content Provider.⁴² (emphasis added)

These terms are generally presented on a “take or leave it” basis with no negotiating power for consumers to alter the conditions,⁴³ and generally contain blanket clauses which restrict consumers’ user rights.

The End User Licence Agreements that accompany digital content are often more restrictive than the rights that consumers would have under general copyright law. This type of wording prevents consumers from using short excerpts in reviews or parodies. It also restricts the rights of people with disabilities⁴⁴ to modify content into an accessible format or add accessibility aids (such as subtitles or text-to-speech).

Consumers have very limited bargaining power in markets for digital goods. While there are few litigated cases in Australia, a recent example of how End User Licence Agreements restrict consumer rights other than copyright interests can found in the online distribution of computer games. The Federal Court recently ruled that Valve’s ‘Steam’ service had engaged in misleading and deceptive conduct by making representations in the terms and conditions of their subscription agreements and refund policies that were in contravention to the consumer guarantees of the *Australian Consumer Law*.⁴⁵ This judgment is evidence toward the proposition that legislative rights must be maintained to ensure an appropriate power balance between suppliers and consumers in online markets.

We agree with the Productivity Commission that user rights are a necessary balance in the copyright system. We think that restrictions of these rights in non-negotiated contracts

⁴² Kindle Store Terms of Use accessed 01/06/2016 available at:

<http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>.

⁴³ Indeed there is evidence that suggests on 8% of consumers attempt to read the terms and conditions (Sauro, J., (2011), Do Users Read License Agreements?) which is understandable when if all the licences were read properly it would take 201 hours per year (Crano, L.F., McDonald, A.M., (2008), “The Cost of Reading Privacy Policies”, *A Journal of Law and Policy for the Information Society*).

⁴⁴ See definition in s200AB of *The Copyright Act 1968*.

⁴⁵ *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196; *Competition and Consumer Act 2010* (Cth) sch 2 (‘Australian Consumer Law’).

impermissibly change this public-interest balance. We strongly support making contractual terms that override copyright exceptions unenforceable, consumer exception, including those for consumers with disabilities.

7. The IP exemption should be removed from competition law

Commercial transactions involving IP rights should be subject to review under competition law. Successive reviews have called for the current exemption under the *Competition and Consumer Act 2010* to be repealed.⁴⁶ DRW strongly supports the draft recommendation to repeal Section 51(3) of the *Competition and Consumer Act 2010* in order to ensure that exclusive licensing deals do not stifle competition.

8. Intellectual property policy should be evidence-based and excluded from international trade negotiations

DRW strongly supports the Productivity Commission's attempts to prioritise evidence-based intellectual property policy-making.

In order to ensure that Australian intellectual property reflects the national interest, we suggest that starting immediately, Australia should reject the inclusion of intellectual property standards in international trade agreements. As a net importer of intellectual property, it is highly unlikely that intellectual property protection promulgated by these agreements are in Australia's national interest. This is especially evident in copyright, when for example just the term extension agreed to in the AUSFTA saw an estimated \$88 million yearly in intellectual property revenue generated flowing overseas instead of supporting the domestic cultural economy.⁴⁷ The net result is harm to Australian consumers and creators as the system fails to support the creation and distribution of socially valuable works.

The steady ratcheting up of international intellectual property standards through bilateral, multilateral, and plurilateral agreements has been specifically designed to prevent countries like Australia from ensuring that intellectual property rules are adequately balanced. Most recently, the negotiation of intellectual property clauses in secretive trade agreements has ensured that the public interest is not adequately examined or represented during the negotiations. Australians have very little say in these negotiations and more can and should be done to provide greater transparency, including for example, making use of parliamentary processes.

⁴⁶ ACCC, Submission No 165 to the ALRC, *Copyright and the Digital Economy Issues Paper*, 16 November 2012; ACCC, Submission No 658 to the ALRC, *Copyright and the Digital Economy Discussion Paper*, 31 July 2013.

⁴⁷ Dee, Dr Phillipa The Australia – Us Free Trade Agreement An Assessment [2004] Canberra at 22 also see similar research from New Zealand analysing the impact of the Trans-Pacific Partnership: Ministry of Foreign Affairs and Trade Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy (2015).

As a first step, Australia should take no steps towards ratification of the Trans-Pacific Partnership Agreement which brings few domestic trade benefits and further entrenches TRIPS+ intellectual property laws. The TPP agreement only comes into force once at least six original signatories have ratified the agreement, representing 85 percent of the total GDP of the twelve original signatories. Given that Australia already has a Free Trade Agreement with the United States, the TPP is likely to bring little additional benefit. Australia should not take the lead in taking affirmative steps to help the TPP reach its ratification threshold. Over the longer term, Australia should utilise foreign diplomacy to reexamine the benefits of existing international intellectual property agreements and ensure that further problems are not created through participating in the ongoing proliferation of overlapping IP obligations.

Domestically, Australia should exercise the flexibility we do have in ways that ensure that intellectual property law is tailored for our local needs. To this end, we support the concentration of copyright policy firmly within the Department of Communications and the Arts, which is best placed to ensure that Australian law is focused on promoting innovation. Any work on copyright that is carried out by Australia's trade representatives or by the Attorney-General's Department should be informed and consistent with evidence-based policy priorities set and reviewed by the Department of Communications and the Arts with extensive transparent consultation with the public and the non-profit sector.