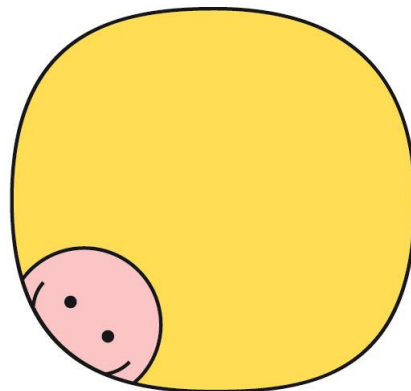


Intellectual Property Arrangements

**Productivity Commission Draft Report – April
2016**

**Australia Children’s Television Foundation
Submission**



**AUSTRALIAN CHILDREN'S
TELEVISION FOUNDATION**

1. Introduction

We welcome the opportunity to comment on the Productivity Commission's Draft Report into Intellectual property arrangements in Australia

The ACTF is a national children's media production and policy hub and performs a wide range of functions in children's media: as a voice in policy matters; as a distributor of and investor in Australian children's television series; as an instigator of new, innovative and entertaining children's media and as a developer of valuable screen resources for the education sector.

We are pleased to share our insights into the business of screen content creation. As it stands, the Draft Report does not appear to take the role of Australian content creators seriously. In our view, the Draft Report has made several recommendations that may enhance the rights of users of copyright material, but without fully considering the detrimental effects such recommendations will have on the incentives that drive creators of content.

We hope our submission will provide a more accurate understanding of the business of content creation, and the impact certain changes to copyright may have on the creation of screen content in Australia.

2. A reduction in the term of Copyright Term

DRAFT FINDING 4.2 While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death

The justification for reducing the term of copyright to 15 to 25 years seems to be summarised below:

"The evidence (and indeed logic) suggests that the duration of copyright protection is far more than is needed. Few, if any, creators are motivated by the promise of financial returns long after death, particularly when the commercial life of most works is less than 5 years"¹

The Draft Report notes that a copyright term that is too short may inhibit the ability of creators to recoup their costs and diminish incentives to create work. While we agree with this finding, the Draft Report continues by noting that an excessively long period of protection has the potential to harm consumers for reasons including: *"after a relatively short period of time, further returns make little or no difference to the incentives to create"²*

This assertion reveals a fundamental lack of understanding of the way content creators earn incomes, the long life of certain projects, and the time it can take to recoup investments. The basis from which the authors of the report have made this assertion is not set out, and is contrary to the business of screen content creation.

¹ Page 17, Draft Report.

² "If the term is too short, creators and rights holders will have difficulties recouping their development costs and may lose an incentive to create their works. However, an excessively long period of protection has the potential to harm consumers because:

- after a relatively short period of time, further returns make little or no difference to the incentives to create
- the marginal costs of reproducing the content are zero (or close to it)
- even many years into the future, some consumers value the output above zero value. (page 112, Draft report)

2.1 The commercial life of screen content

The creation of film and television content is a long and uncertain process, an often risky endeavour with uncertain reward. Many investors in screen content unfortunately do not recoup their initial investment. And when they do, it often takes a long time.

Generating a return from screen content would traditionally involve several release windows: for film a theatrical release would be followed by a DVD, and then a television run. For television series, a broadcaster might licence a show for a number of runs over a period of years. Subscription television licence and DVD releases may augment this initial broadcast window, as well as international sales where possible. The emergence of online platforms such as iTunes and Netflix have dramatically extended the 'long tail' of screen content, with many projects continuing to generate revenue long after their initial release.

As it can take a long time to recoup an investment in a television series, let alone make a profit, ensuring there is sufficient time to exclusively exploit these works is a critical incentive to create and invest in screen content. Our many years of experience in developing, producing and the international marketing of children's television series shows that it can many years to recoup a project's initial investment – and completely contradicts the notion that the commercial life of a work expires after a short period of time

Round the Twist

Round the Twist is one of the most successful children's drama television series on Australian television, and was sold into 92 territories worldwide. The first series premiered on the Seven Network in 1989 and was followed by three further series in 1992, 2000 and 2001.

The first series took 8 years for investors in the series to recoup their investment (in June 1997)³. The second series, which has been equally successful with audiences, has at the date of this submission, approximately \$13,000 of the original investment left to be recouped – 24 years after its premiere.

It's important to note that *Round the Twist* is an enormously successful show that is part of the cultural landscape for a generation of Australians – even shows that are this popular can take a long time to recoup. *Round the Twist* has been licenced to free-to-air broadcasters and subscription channels around the world, marketed to home audiences via VHS tapes, DVDs, iTunes and to the educational markets in Australia. 27 years after it was first broadcast the series continues to sell; most recently to the US online platform Netflix and the series is currently on free-to-air television in Australia via ABC3.

³ The recoupment by investors of their original investment is in nominal terms, and does not take into account the impact of inflation, which has reduced the real return. Once investors have recouped their initial investment a project is considered to be 'in profit'. However the time it takes investors to recoup their returns suggest that despite this term, investors have not necessarily made a return on their investment in real terms.

Mortified

Mortified is a 26 episode live action children's drama series first broadcast on the Nine Network in 2006. The series is a favourite with child audiences having been broadcast in over 70 territories.

Ten years after its initial broadcast it still currently airs on ABC3, and it has been broadcast in 70 territories around the world. However as at the date of this submission, the investors to the series have recouped 69.94% of their initial investment.

Acting as the international distributor of *Mortified*, we still consider the show to have viable commercial prospects both here in Australia and around the world ten years after its premiere, and are hopeful of recouping the remaining 30% of the initial investment

2.2 The average commercial life...

The Report states that the average commercial life of a film is 3.3 to 6 years⁴. The 'average' commercial life of a film may be short, as the majority of films are not successful – this is a reality of the screen industry.

However it does not follow that because the 'average' commercial life of a film is short, that the exclusive rights that creators and investors have to commercially exploit a show, rights arising from their copyright interest, should therefore be curtailed.

If that was the case, then those creators and investors in films that did happen to strike a chord with audiences, would be prevented from exploiting the extended commercial life of their projects – the very creators and investors that public policy should seek to reward!

2.3 A reduction in copyright term = a reduction in capacity to recoup and reduction in incentive to create

A significant reduction in the term of copyright proposed by the Draft Report will have severe consequences for the film and television industry. For reasons set out above, this is because a copyright term of a reasonable duration is necessary for the Producers and investors in screen content to not only recoup their costs, but as an incentive to make a reasonable return on their initial investment.

The Terms of Reference expressly refer to the importance of retaining appropriate incentives for the production of creative works:

Terms of Reference

3. *in undertaking the inquiry and proposing changes, the Commission is to have regard to:*

⁴ Draft Report, page 114. The Report does not include examples relating to television programs, however for the purposes of this submission we presume that the authors have assumed that television shows have a commercial life of a similar duration.

- (d) *the Government's desire to retain appropriate incentives for innovation and investment, including innovation that builds on existing work, and production of creative works*

The commercial success of *Round The Twist* has enabled the ACTF to continue to develop, produce, invest in and distribute a range of programs since then. This would be a similar experience for other producers of content.

2.4 Copyright Term - Community as a whole

Copyright protection, of a sufficient duration, for creators of screen content to be able to recoup their investments ultimately benefits the community as a whole.

The Draft Report emphasises the importance of prioritising the Australian community when considering changes to intellectual property arrangements:

The Commission's draft recommendations have been made on the grounds that collectively they advance the balance of interests needed in Australia's IP arrangements and thereby the wellbeing of the Australian community. As with many other reforms, those who seek to gain from IP protections are concentrated and have actively sought to shape policy for their benefit, while those who stand to lose are dispersed and less aware of what is at stake, and so are less vocal and influential in policy debates. The Commission's recommendations have sought to redress this imbalance. Improving Australia's IP arrangements will primarily benefit consumers by improving access to new and cheaper goods and services and reducing unintentional or accidental infringement.⁵

Individual creators are generally not resourced to fund the development and production of high quality film and television projects. The internet has seen the emergence of innovative 'user generated content' which has reduced the barriers to entry to allow individual creators to reach audiences. However, high quality film and television projects are a capital intensive collective enterprise that is far beyond the means of individual content creators.

Although ownership of copyright tends to therefore be concentrated in the hands of those entities that fund investment in screen content, the community is the ultimate beneficiary of this arrangement, having access to a source of high quality screen content.

2.5 Copyright Term – International obligations

As the Draft Report acknowledges, Australia's intellectual property arrangements reflect the evolution of international treaties entered into and ratified by the Commonwealth government over decades of international co-operation.

The Draft Report notes that:

Australia has no unilateral capacity to alter copyright terms, but can negotiate internationally to lower the copyright term⁶.

⁵ Draft Report, page 27

⁶ Draft Report, 117.

While we welcome consideration of the intellectual property arrangements in Australia, we do not believe sufficient weight has been given by the authors of the report of the difficulty and practicality involved in re-negotiating these terms, which are the result of many years of multi-lateral international negotiations.

3. Geoblocking

DRAFT RECOMMENDATION 5.1

The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

We note that the Draft Report is seeking to clarify that circumvention of geoblocking technology is not an infringement of Copyright, as opposed to restricting the ability of content creators/owners from utilising geoblocking technology.

By focusing on ‘user rights’ in relation to consumer’s access material subject to territorial geoblocking, the Draft Report misses a critical issue for Australian content creators that export to international markets. Doing away with restrictions on geoblocking for Australian consumers may allow Australian viewers to bypass domestic distribution platforms to see content previously restricted (restrictions imposed for valid commercial reasons) or for a lower price.

But doing away with the ability for content owners to discriminate on pricing based on territories when licensing their content could have potentially devastating effects on the Australian export of screen content to other territories. The media landscape is a global marketplace. However the varying exchange rates and differing economies of scale inherent in various territories mean that restricting the ability of content owners to determining pricing that is sensitive to local economic conditions will result in a race to the bottom, with diminishing returns to content owners that will impact on their ability to continue to create content tailored to specific local markets.

The ACTF’s experience as an international distributor of Australian children’s television may provide some insight. The ACTF sells Australian content into a range of territories throughout the world. Each country or territory is a unique market to which the ACTF tailors its approach in order to maximise returns from each show. If geoblocking restrictions are dismantled in their entirety, and Australian exporters of screen content are unable to discriminate via territory then that will ultimately undermine the businesses and profitability of local businesses, and jeopardise the ability of Australian screen content creators to create content relevant to local audiences.

4. Fair Use

The Draft Report proposes an extensive 'fair use' scheme that would significantly overhaul the existing copyright arrangements in respect of the current fair dealing exceptions. However, we do not believe that a convincing case has been mounted that these existing arrangements are manifestly inadequate or unworkable.

A range of exceptions to copyright infringement are set out under the Copyright Act, via fair dealing and flexible dealing exceptions. And these exceptions are capable of further development and refinement via legislative change, such as the relatively recent addition of the fair dealing exception for parody and satire.

The existing fair dealing exceptions, accompanied by flexible dealing exceptions and a complementary statutory licence scheme governing the widespread use of copyright materials by a range of educational users, has operated successfully for decades, balancing the needs of users and providing a fair and transparent remuneration scheme for copyright creators.