



INTELLECTUAL PROPERTY ARRANGEMENTS
FOXTEL RESPONSE TO PRODUCTIVITY COMMISSION ISSUES PAPER
DECEMBER 2015

INTRODUCTION

Foxtel welcomes the opportunity to make a submission in response to the Productivity Commission's Issues Paper *Intellectual Property Arrangements* (the **Issues Paper**), dated October 2015.

Foxtel is one of Australia's most progressive and dynamic media companies, directly employing around 2,800 people, and delivering a diverse subscription television (**STV**) service to both regional and metropolitan areas over cable, satellite and broadband distribution.

Foxtel offers a better entertainment experience every day to each one of its 2.8 million subscribing homes through delivery of new and inspiring programming across all genres, the world's most popular channel brands, and investment in high quality local content. As constant champions of innovation Foxtel has brought customers the iQ personal digital recorder, Australia's largest high definition offering, the Foxtel Go app for tablets and mobile devices, the internet TV service, Foxtel Play, and most recently, the online streaming service, Presto. Foxtel has also recently launched fixed-line broadband and telephony services, which can be bundled with Foxtel's television product.

Foxtel's ability to invest in content and technology is underpinned by Australia's intellectual property framework. In particular, the *Copyright Act 1968* (Cth) (the **Copyright Act**) is one of the fundamental pieces of legislation underpinning Australia's digital economy. It is critical to Foxtel's success that the Copyright Act operates effectively in a converged environment. As explained in this submission, strong copyright protections are central to Foxtel being able to offer excellent programming to its subscribers and, in so doing, support large numbers of Australian jobs and make a valuable contribution to Australia's digital economy.

Foxtel's submission is structured as follows:

- **Section 1** provides background on Foxtel, including details of our products and services, and the Australian jobs our business supports.
- **Section 2** details the contribution of the creative industries to the Australian economy, with specific information about the contribution of the subscription television industry, of which Foxtel is a key part. It also details the economic impacts of content piracy.
- **Section 3** explains the competitive landscape for entertainment services in Australia and addresses the Commission's question about the relationship between intellectual property rights and market power. It also deals briefing with transparency with respect to the inclusion of intellectual property provisions in international trade agreements.
- **Section 4** sets out Foxtel's response to key questions in the Issues Paper about the copyright framework, including the issue of appropriate exceptions to copyright infringement.
- **Section 5** deals with matters of enforcement and the Commission's question about the role of internet service providers (**ISPs**) in the intellectual property framework.

EXECUTIVE SUMMARY

- Economic evidence demonstrates that Australia's copyright industries make a very significant contribution to Australia's economy, which Foxtel hopes the Productivity Commission will recognise in its final report. There is also evidence that these contributions are under pressure—for example, the relative value of copyright exports has declined in relation to other sectors in recent years—and Foxtel is concerned that any move to lessen intellectual property protections may accelerate this trend.
- In relation to copyright, Foxtel is strongly opposed to the introduction of a broad fair use defence and to any reforms which would introduce unduly permissive copyright exceptions, which Foxtel believes would allow others to profit from Foxtel's investments. In particular, Foxtel does not believe that the so-called 'exceptions industries' should be given the opportunity to benefit at

rights holders' expense through the introduction of a broad fair use exception, which would require significant testing in Court—most likely at rights holders' expense.

- Foxtel's 20 year record of technological innovation demonstrates that there is no need to introduce broad and unclear exceptions to copyright in order to foster innovation. Foxtel has invested billions of dollars to deliver content to its subscribers when and how they want it and is an example of an Australian business that has successfully innovated under Australia's existing intellectual property laws.
- Foxtel strongly believes that in order for Foxtel to grow the contribution it makes to the digital economy through its investments in Australian content and technology, it must be able to rely on a copyright regime that provides appropriate protections and enables Foxtel to receive a fair reward for its investments.
- Premium programming can cost up to \$2 million per hour to produce and the creators and distributors of Australia content deserve to be appropriately rewarded for their investments. It is critical that Australia's intellectual property laws support Australian content businesses to monetise the content they create, so that more of it can be made, and so that Australia's copyright industries can continue to contribute strongly to Australia's economy and culture.

SECTION 1: ABOUT FOXTEL

To understand why Foxtel holds strong views about intellectual property, it is important to understand Foxtel's business model and the success it has achieved within Australia's existing intellectual property framework.

A snapshot of Foxtel and its partners

Who Foxtel employs

- Foxtel's staff work in three main centres in Queensland, New South Wales and Victoria, but it also has a number of smaller offices around Australia. It is a national company.
- Of the nearly 100 STV channels it broadcasts, Foxtel owns and operates 30 channels which provide five genres of programming—general entertainment (including scripted drama), factual, movies, music and lifestyle.
- Staff in Foxtel's television department work on everything from production and promo creation to scheduling and broadcasting across its many platforms.
- More than 800 Foxtel staff take calls in Foxtel's Australian customer centres—they are the face of Foxtel for its subscribers. They help new customers to get Foxtel and help existing customers to get the best from the Foxtel service. They are strong advocates for Foxtel's content, especially its Australian content.
- Foxtel's Technology teams—including IT, Broadcast Technology and Product Development—keep Foxtel on air 24x7 and help deliver great content on television, mobile devices and more.
- Foxtel's supporting cast includes teams from Legal, Finance, Marketing and People and Culture—they help bring its technology, service and entertainment together.
- These are the jobs Australians support when they purchase content legitimately from Foxtel.

Who Foxtel partners with to supply its services

- Foxtel acquires a wide range of programming from third party suppliers such as BBC Worldwide, HBO, Showtime, AETN, NBC Universal, Paramount, Disney, CBS, Sony, Village Roadshow, Warner Bros and 20th Century Fox. Many of those companies have offices in Australia, employing Australians and contributing to the Australian economy.
- Foxtel also partners with organisations such as Telstra and Optus to provide Foxtel entertainment services to their customers. Australians support jobs in these companies when they buy Foxtel services through its partners.

What Foxtel makes and who it works with to make and acquire great television

- The depth and diversity of Foxtel's programming remains the primary attraction for its viewers.
- Foxtel commissions a slate of Australian dramas to premiere on Australian screens (such as *Wentworth*, *A Place to Call Home*; and, to premiere in 2016, *The Kettering Incident* and *Secret City*), as well as very popular Australian programs in the lifestyle and reality genres (such as *Selling Houses Australia* and *The Real Housewives of Melbourne*).
- Foxtel works with a wide range of independent production companies to produce its Australian content, and in so doing supports creative experts who also work across the Australian free-to-air television and film sectors.
- Foxtel also broadcasts a wide range of dedicated sports channels offering customers the best in Australian and international sports coverage, news and programming.
- By buying rights to expansive sporting coverage Foxtel and its channel partners make a substantial financial commitment which flows through to the funding of grass-roots sports. This investment, together with the exposure of lesser-known events that only Foxtel's broadcasts helps to lift the profile and viability of niche sports in the Australian community.

Foxtel is an example of an Australian business that is successfully utilising digital technologies—within Australia's current intellectual property framework—to offer Australian consumers innovative products and services. Foxtel has invested billions of dollars to maximise the number of ways in which its subscribers can enjoy content by making it available on tablets, mobile phones and other popular devices—as well as through its leading set-top-boxes, the iQ and MyStar. Known for innovation, Foxtel is constantly looking for ways to enhance its customers' viewing experience, with a step change in functionality made available with the launch of Foxtel's iQ3 box.

The following sets out the ways in which Foxtel's customers can access content on Foxtel:

FOXTEL™ Anytime

Set-top-box viewing – linear, catch-up, Anytime (on-demand) and rental

With content delivered via cable and satellite, as well as over the internet (for internet-connected iQ boxes), subscribers to Foxtel's full service can, among other things:

- pause, rewind and replay live TV;
- set their box to record an entire season at the touch of a button; and
- record a program on their box when not at home, using their PC, tablet or mobile.

FOXTEL™ Play

Foxtel's internet TV service

Foxtel Play streams TV, news, sports and movies over the internet—both live and on-demand.

- It is available on PCs and Macs, Xbox 360, Xbox One, Sony PlayStation 3 and 4, a selection of Samsung Smart TVs and Blu-Ray players and select Sony and LG Smart TVs (subject to model compatibility).
- Users can register up to three devices and watch on two devices at the same time.
- Subscriptions are available on a month-to-month basis, with no lock-in contract.

FOXTEL™ Go

Complementary tablet and smart phone app

Foxtel Go is a companion app provided at no extra charge to residential (cable and satellite) and Foxtel Play (IPTV) account holders, providing both live and on-demand content.



- It is available on selected iPads, iPhones, PCs and Macs, and selected Android devices.
- Users can register up to three devices and watch on two devices at the same time.

On-demand access to movies via IP

Presto Movies is Foxtel's stand-alone on-demand movie streaming service, delivered across PC, Mac, iPad, iPhone, select Android tablets and smartphones, select Samsung smart TVs, via Google Chromecast and by using AirPlay on Apple TV. Presto Movies includes recent box office hits and unforgettable movie favourites, as well as critic reviews.

- Customers can bundle Presto Movies and Presto TV under one 'Presto Entertainment' service to receive the full movies and TV experience.
- Users can register up to four devices and watch on two devices at once.
- Subscriptions are month-to-month, with no lock-in contract.

Foxtel is also a 50% owner of the Presto TV on-demand service, which is a joint venture with the Seven Network.

SECTION 2: THE ECONOMIC CONTRIBUTION OF AUSTRALIA'S COPYRIGHT INDUSTRIES

Foxtel encourages the Productivity Commission to recognise in its final report the importance of the creative industries to the economy and society. The creators and distributors of content deserve to be appropriately rewarded for their efforts and to receive a fair return on their investment.

This section puts in perspective the contribution of copyright industries to the Australian economy and also explains the adverse economic impacts of piracy, which Foxtel submits provides persuasive evidence as to why strong intellectual property arrangements are critical to Australia's digital economy.

Legitimate consumption of content services strengthens the businesses that make and distribute both Australian and international content in Australia, and that export Australian productions to the world. Stronger Australian creative and distribution businesses will be better resourced to invest in the production and acquisition of content audiences want; including, importantly, Australian content that tells our stories and reflects our unique culture.

The value of copyright industries to the Australian economy

Economy wide

PricewaterhouseCoopers (**PwC**) has quantified the contribution of Australia's copyright industries in a number of studies conducted over time for the Australian Copyright Council. In its most recent report, *The Economic Contribution of Australia's Copyright Industries 2002–2014* (the **PwC Report**), prepared in 2015, it was found that Australia's copyright industries:

- employ just over 1 million people—these employees represent around 8.7 per cent of the Australian workforce, which is a greater proportion than in both the United States (8.4 per cent) and Canada (5.6 per cent);
- contributed more than \$111 billion to the Australian economy in 2014, or the equivalent of 7.1 per cent of gross domestic product (**GDP**); and

- were responsible for nearly \$4.8 billion in exports in 2014 (1.8 per cent of total exports).¹

The PwC Report notes that the Australian economy is heavily reliant on the copyright industries. Of the countries covered by the report only the United States, Korea and Hungary place greater reliance, in terms of value added to the economy, on the copyright industries than Australia. The value added to the Australian economy by the copyright industries as a percentage of GDP is shown to be higher in Australia than in countries like China, Singapore, the Netherlands and Canada.²

The PwC study uses a classification model identified by the World Intellectual Property Organisation (**WIPO**) to ensure consistent analysis across countries. That model includes four classes of copyright industry—core, partial, interdependent and non-dedicated support industries.

Drilling down from headline figures to focus on ‘core copyright’ industries, which include those in which Foxtel principally operates—such as industries involved in the creation, manufacture, production, broadcast and distribution of copyrighted works—the results remain significant.³ For these core industries, the PwC Report notes that in 2014:

- more than 600,000 people were employed;⁴
- more than \$73 billion in value was added to the economy (the equivalent of 4.7 per cent of GDP);⁵ and
- the value of copyright exports was more than \$156 million.⁶

The PwC Report makes a number of important points about the context in which Australian copyright industries operated during the period studied. These include noting the impact on copyright industries of what was a high Australian dollar arising from the mining boom (imports became cheaper and there were declines in the Australian copyright industry’s manufacturing base), as well as the shift from physical to digital distribution of copyright material. The effects of digitisation included a reduction in physical outlets selling copyright materials and some staffing reductions arising from greater efficiency; and, importantly, increased opportunity for digital piracy—consumption of which undermines Australian creative industries.

These factors mean that while the contribution of the copyright industries to the Australian economy is very important, these industries have to some extent been under pressure and this is shown where the PwC report notes some declines over time in areas such as exports.⁷

Foxtel submits that this should be a very important consideration in the Commission’s review—because any move to reduce copyright owners’ ability to exploit their rights will only exacerbate these trends, and impact the ability of these industries to continue to contribute to Australia’s economic health.

¹ PricewaterhouseCoopers, *The Economic Contribution of Australia’s Copyright Industries 2002–2014*, 2015 (**PwC Report**), page 3 – available at <http://copyright.com.au/wp-content/uploads/2015/08/PWCReport-EconomicContribution-AustraliaCopyright-Industries.pdf>.

² PwC Report, page 13.

³ Foxtel’s operations touch more than one category of copyright industry. For example, in addition to the production of programming (clearly in the ‘core’ category), Foxtel participates in the ‘interdependent’ category where it purchases media equipment (including whole fleets of custom-built set top boxes) and ‘non-dedicated’ (including because Foxtel is now a telephony and internet company, as well as a content company; and, because the installation of Foxtel equipment in customer homes significantly involves contractors in the general transportation and installation industry).

⁴ PwC Report, page 17.

⁵ PwC Report, pages 11–12.

⁶ PwC Report, page 26.

⁷ The PwC Report notes that copyright exports have ebbed and flowed in real terms since 2002, with the overall trend being negative. Copyright exports now account for 1.8 per cent of total exports compared to 4.1 per cent 10 years ago – see pages 25 and 26.

The subscription television sector

The contribution to economy of the subscription media sector in which Foxtel operates has also been tracked over time in a series of assessments conducted by the Australian Subscription Television and Radio Association (**ASTRA**).

The most recent assessment released by ASTRA, and audited by PwC, indicated that:

- In 2014–15 the subscription television industry invested a record \$796 million in Australian screen content.
- This expenditure brought to \$6.5 billion the value of the sector's total investment in the Australian production sector in the past decade.
- The industry grew the economy by more than \$2 billion.⁸

The STV industry—comprised of over 30 organisations, including Foxtel—also exports an increasing amount of Australian programming internationally with programs like *Tim Winton's cloudstreet*, *Top of the Lake*, *Grand Designs Australia*, *Wentworth* and *Killing Time* being seen across the world. In this regard, ASTRA noted that in 2014–15 its members exported 13,119 hours of local content to overseas audiences, helping promote Australian stories to audiences throughout the world.

The strength of the STV industry's drama offering was also recently recognised in Screen Australia's annual *Drama Report*, where it was noted that in 2014–15 STV had its highest recorded contribution to the TV drama slate.⁹ The report noted that:

*Subscription television had a very strong year with The Kettering Incident, Open Slather and a third season of A Place to Call Home (licenced from the Seven Network last year).*¹⁰

For Foxtel's part, strong investment in Australian content is set to continue because our subscribers have a growing appetite for local content. Indeed, reflecting this appetite Foxtel recently announced plans to double its investment in new Australian scripted, factual, lifestyle and entertainment programming by 2018.¹¹

The investments Foxtel and its production partners make help develop Australian production, acting and writing talent—building capacity to tell Australian stories and developing skills and experience that attracts international production to Australia. When Australian media companies like Foxtel provide training and experience to Australian creatives, or commission productions from independent Australian production companies, they are helping build the sector to attract large international projects to Australia.

The economic consequences of piracy and the cost to the Australian economy

Foxtel submits that strong intellectual property laws must be maintained, given the prevalence of online copyright infringement in Australia which is a very significant problem. There are many examples of the Australian rates of unauthorised access to television programmes and movies

⁸ ASTRA, *Local screen investment reaches \$796 million*, Press Release, 9 September 2015 – available at http://www.astra.org.au/pdf/news/ASTRA_Conference_2015_-_Local_investment_reaches_796_million_9.9.15.pdf.

⁹ Screen Australia, *Drama Report Production of feature films and TV drama in Australia 2014/15 (Screen Australia Drama Report)*, page 14 – available at <http://www.screenaustralia.gov.au/getmedia/751abb13-3e15-4772-863f-5bf27f4760a3/dramareport.pdf>.

¹⁰ Screen Australia Drama Report, page 12.

¹¹ Foxtel, *Foxtel boosts commitment to Australian content*, Press Release, 16 June 2015 – available at <https://www.foxtel.com.au/about/media-centre/press-releases/2015/foxtel-boosts-commitment-to-australian-content.html>.

exceeding the rates of unauthorised access in much larger overseas countries, including the US and the UK.¹²

A range of studies have shown the significant impact of piracy on the Australian economy. When Australians download or stream unauthorised content instead of obtaining it from legitimate sources they are adversely impacting Australian jobs. Forgone consumer spending impacts content creators and distributors and 'ripple effects' are felt across the economy. Taxes are also forgone, impacting the Government's ability to invest in services for Australians.

A January 2011 report by Ipsos and Oxford Economics for the Australian Screen Association (the **Ipsos/Oxford Report**), which assessed the scale of harm caused by *movie* piracy alone, provides a good demonstration of the broad economic impact of piracy on the Australian economy.¹³ Drafted to offer a conservative view, it found that in the 12 months up to the third quarter of 2010:

- 6,100 Full Time Equivalent jobs were forgone across the entire economy as a result of movie piracy;
- allowing for effects on other industries, some \$1.37 billion in Gross Output (Sales)—equal to over \$63 for every man, woman and child in Australia at that time—was lost across the entire Australian economy (equivalent to a loss of GDP of \$551 million across the Australian economy); and
- tax losses of \$193 million were suffered as a result of movie piracy.

As the Ipsos/Oxford report was prepared a number of years ago, and given the widely acknowledged acceleration of online copyright infringement in Australia in recent years, it is reasonable to assume that this study now significantly underplays the adverse impact of movie piracy on the Australian economy, let alone the impact of unauthorised downloading of other types of audio-visual content.

Nonetheless, the study helps in understanding the types and breadth of losses that stem from unauthorised downloading. It refers to both:

- direct consumer spending losses to the movie industry and retailers—this includes losses in relation to cinema exhibitors' revenue, film and video production and distribution, DVD/Blu-ray rentals and sales, TV Video on Demand, downloads and streaming video; and
- the 'ripple effects' of the consumer spending loss, which occur as losses flow through from the film industry to other industries (for example, the film industry's reduced use of Australian accountancy, legal and banking services).

The report also notes that both employment and taxes will also fall as film industry revenues decline. As employment falls, workers' own consumption of goods and services falls with impacts on the wider economy; and, as taxes are forgone, the Government has reduced capacity to spend on social services and infrastructure.

While the analysis above is focused on the film industry, the same impacts can also be attributed to the STV sector in which Foxtel operates. In the STV environment, the monetisation of more popular 'blockbuster' content helps to fund the development of niche documentary and drama programming that makes an important Australian cultural contribution.

¹² For example, the final episode of *Breaking Bad* (ABC News online, *Breaking Bad finale draws record ratings as Australia tops illegal downloads*, 1 October 2013 – available at <http://www.abc.net.au/news/2013-10-01/breaking-bad-finale-draws-record-ratings-as-australia-tops-ille/4990252>.) and the premiere episode of season 4 of *Game of Thrones* (TorrentFreak, *Game of Thrones Premiere triggers Piracy Craze*, 7 April 2014 – available at <http://torrentfreak.com/game-of-thrones-premiere-triggers-piracy-craze-140407/>).

¹³ Ipsos and Oxford Economics, *Economic consequences of movie piracy – Australia*, January 2011 – available at http://www.screenassociation.com.au/uploads/reports/IPSOS_Economic_Consequences_of_Movie_Piracy_-_Australia.pdf.

Strong copyright protection is needed in Australia

Foxtel has for some time made the point that online infringement is not just an issue for businesses; it affects the livelihoods of actors, writers, directors, set designers, carpenters, caterers and everyone else involved in the production of these programs.

It is widely known that Australians have set records in relation to unauthorised access to key programs, such as *Game of Thrones*, despite Foxtel legitimately offering them as soon as they have been broadcast overseas and at discounted prices. However, Foxtel's own programs are also the subject of significant unauthorised downloading. Monitoring conducted for Foxtel shows that some of Foxtel's most popular locally-produced programs, such as Foxtel's *Wentworth*, are downloaded on an unauthorised basis at alarming rates—with this theft having a direct impact on the livelihoods of Australians creators.

For example, season 3 of Foxtel's critically acclaimed drama *Wentworth* premiered in April 2015. During the period in which season 3 aired, the following unauthorised downloading via peer-to-peer networks was detected of complete episodes of *Wentworth* season 3:

- April 2015 (3 episodes monitored) – 23,713 downloads in Australia and 50,013 downloads internationally;
- May 2015 (5 episodes monitored) – 65,048 downloads in Australia and 141,289 downloads internationally; and
- June 2015 (5 episodes monitored) – 30,837 downloads in Australia and 68,091 downloads internationally.

It is worth emphasising the above numbers are only for the third season of *Wentworth* which was airing during this time, and the monitoring was only conducted for a limited period following each episode airing. If *Wentworth* season 1 and season 2 were also included and/or the monitoring was conducted for a longer period following each episode going to air, the number of unauthorised downloads would obviously increase dramatically. The numbers also do not include the number of times *Wentworth* was streamed via an illegal streaming service.

Screen Australia statistics show that in 2013–14 premium programs such as telemovies cost, on average, \$2.04 million *per hour* of broadcast material to make.¹⁴ As noted earlier, when Australian-produced programming—in particular, premium drama such as *Wentworth*—is pirated this undermines large investments in the Australian production industry. It also denies those who fund Australian productions a fair return on their investment.

The creative sector is an interdependent ecosystem. If one part of it is damaged there will be flow on effects to others. For example, if there is insufficient money to invest in Australian feature films there will be less work for, and skills development among writers, directors, editors and special effects creators. This will have an impact on television production. Similarly, if the STV industry is adversely affected, this will reduce the talent pool available to free-to-air television or the feature film industry.

SECTION 3: RESPONSE TO QUESTIONS IN CHAPTER 3 OF THE ISSUES PAPER

In this section, Foxtel sets out its response to questions of particular interest to Foxtel in chapter 3 of the Issues Paper, A framework for assessing IP arrangements.

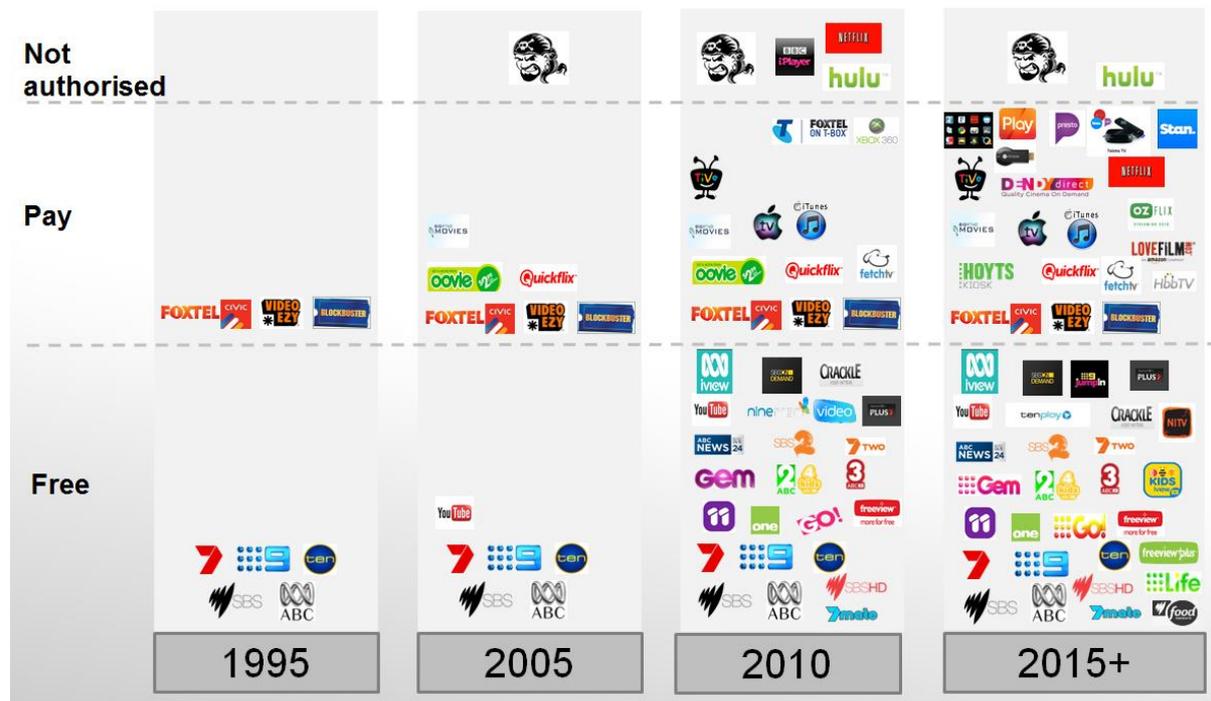
¹⁴ Screen Australia reports the average cost per hour of Australian productions in different genres on its website at <https://www.screenaustralia.gov.au/research/statistics/dramatvdramahoursxformat.aspx>. Different genres have different average hourly costs, with shorter-run productions having higher production costs (longer-run productions can have lower hourly costs because, for example, sets can be re-used and the cast is employed over a longer period). In 2013–14, the average hourly cost by genre was: a) telemovies: \$2.04 million; b) mini-series: \$1.28 million; c) children's TV drama production: \$0.66 million; and, d) series and serials: \$0.36 million.

Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power?

The Competition Policy Review Final Report dated March 2015 recommended that the Productivity Commission conduct a 12 month overarching review of intellectual property, focussing on ‘*competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements*’¹⁵. This appears to be the genesis for the Productivity Commission’s question regarding market power.

In relation to copyright, Foxtel does not agree with the premise of the question, that IP rights lead to unduly restrictive market power. Foxtel’s experience as a participant in the Australian markets for the acquisition and supply of audiovisual content has been that the relevant markets are highly competitive and are operating effectively. Indeed, Australians have never had more choice and flexibility with respect to content services, which is a significant win for Australian consumers.

As illustrated by the indicative chart below, the range of sources of legitimate content—providing content both for a fee and using advertiser-funded models—has grown massively in Australia, especially over the last five years. Australian operators have seen noticeable competition from very strong multi-national brands such as Netflix and Apple’s iTunes. This trend is set to continue, particularly in relation to online services.



How transparent have decisions to change the IP system been, including when it comes to legislation and international agreements? Is a stronger evidence base and greater transparency in the public interest, and if so, how should this be accomplished?

With respect to Australia’s entry into international trade agreements that incorporate IP provisions, such as the US Free Trade Agreement (**AUSFTA**) and the Trans-Pacific Partnership Agreement (**TPP**) that was recently signed by Australia, Foxtel considers that there has been very little transparency with respect to Australia’s entry into such agreements.

¹⁵ Competition Policy Review Final Report, page 41.

Foxtel agrees with the Competition Policy Review's observation that '*trade negotiations must be based on an understanding of the costs and benefits to Australia of proposed IP provisions*'¹⁶. Foxtel believes that the development of clear and transparent principles and processes for the Australian Government when establishing negotiating mandates, including an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions, would be in the public interest and would be a welcome development for affected Australian businesses.

SECTION 4: RESPONSE TO QUESTIONS IN CHAPTER 4 OF THE ISSUES PAPER

In this section, Foxtel sets out its response to questions of particular interest to Foxtel regarding copyright in chapter 4 of the Issues Paper, improving arrangements for specific forms of IP.

Is licensing copyright-protected works too difficult and/or costly? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

Foxtel understands that the United Kingdom's Copyright Hub has not yet commenced operation and is due to commence in 2016. It is therefore clearly too early to assess its effectiveness in enabling value realisation for rights holders.

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

As a general comment, Foxtel supports the monitoring and evaluation of the recent changes to Australia's copyright regime and any new measures that are introduced, to ensure that they are effective.

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

Foxtel's view is that there needs to be clear and indisputable evidence that demonstrates both the need for, and the benefits of, introducing significant changes to Australian copyright law, before making any radical changes to Australia's current copyright laws.

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

Foxtel does not agree that Australian copyright law needs to strike a "better" balance between creators and consumers in the digital era. In Foxtel's view, Australian copyright law currently sets a fair and finely struck balance between the interests of rights holders and those of end users. To ensure ongoing investment, the existing balance must not be disrupted unless there is clear evidence of the benefits offered by any proposed amendments.

Foxtel was disappointed that the ALRC recommended in its 'Copyright and the Digital Economy' inquiry (the **ALRC Inquiry**) the introduction of a US-style fair use defence in Australia. As Foxtel consistently submitted throughout the ALRC Inquiry, Foxtel is strongly opposed to the introduction of a broad fair use defence. For the benefit of the Productivity Commission, Foxtel sets out below the concerns that Foxtel outlined to the ALRC Inquiry regarding fair use.

Foxtel's main concerns in respect of a fair use defence are that:

- Fair use will introduce significant and unnecessary uncertainty into Australian law. A fair use exception would be wide, vague and uncertain, while at the same time it would significantly erode the scope of copyright protection which is so critical in protecting investment in Australia's cultural

¹⁶ Competition Policy Review Final Report, page 112.

industries. Foxtel notes that the uncertainty of introducing fair use is accepted by many supporters of its introduction.¹⁷

- The parameters of fair use will need to be tested through the Courts, which will be expensive and will result in the Courts making policy decisions rather than the Parliament. It will take many years to develop new precedents and the scope of fair use in Australia will need to be developed through the Courts, at rights holders' expense. Copyright owners should not have to incur significant litigation costs to protect their investments and to set the boundaries of new and uncertain law.
- The introduction of fair use will weaken copyright protections and allow unlicensed third parties to benefit at the expense of rights holders, at a time when there is clear evidence of unauthorised use of copyright materials by a significant proportion of the Australian population.
- Fair use will have negative economic consequences and have a significant impact on creative output due to the associated uncertainties. Foxtel strongly believes that this type of reform will have a significant impact on creative outputs due to the uncertainties it will create.

The fostering of innovation is often cited as an argument in favour of fair use. However, Foxtel has not seen compelling evidence that suggests that the absence of a fair use defence is stifling Australian would-be innovators. As outlined in section 1 of this submission, Foxtel itself is an example of an Australian business that has successfully innovated within the bounds of the current regime. When Foxtel launched its cable subscription television service in 1995, it offered just 20 linear channels. Today, and following a significant investment in time and resources, Foxtel distributes its services by cable, satellite, mobile networks and via the internet, to a range of devices including set top boxes, mobile phones and tablets, internet connected televisions and games consoles. All of this has been achieved without a fair use exception. Foxtel has sought and acquired the appropriate permissions and licences from its content partners and, where required, the current exceptions have provided sufficient flexibility to allow Foxtel to innovate within the bounds of a more certain legal framework.

Moreover, companies like Google and Facebook have very successfully established their Australian operations within the bounds of the existing regime. Notwithstanding this, the technology sector submitted to the ALRC Inquiry that a broad fair use exception will assist innovation and facilitate start-ups. However, assessment of the economic effects of fair use by Dr George Barker, a Director at ANU's Centre for Law and Economics, suggests that the scope for fair use to contribute to innovation and economic growth is if anything reduced as the digital economy develops and the costs of transacting on the internet fall.¹⁸ Dr Barker refers to Singapore which adopted the US fair use system to replace the Australian or European style laws in force. Research illustrates that prior to the introduction of the fair use laws, Singaporean copyright industries had an average growth rate of 14.16%; however, this slowed to 6.68% for the period after the amendments were introduced.¹⁹ Dr Barker's view is that a weakening of the copyright law via the introduction of ill-defined exceptions and safe harbours would have significant negative economic costs and little or no benefit to the digital economy.²⁰

Foxtel also believes that the ALRC Inquiry did not give sufficient weight to the conclusions with respect to fair use and innovation that were reached by the UK Hargreaves Review of Intellection

¹⁷ See For example Burrell & others, *Copyright and the Digital Economy ARLC Enquiry Submission 278*, at page 7; '...any reform will lead to a measure of uncertainly in the short to medium term...'

¹⁸ Barker, Dr George R (9 July 2013): *Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions* (the **2013 Barker Paper**), page 3 – available at <http://www.serci.org/2013/Barker.pdf>. Dr Barker notes that '[t]ransactions costs provide the basic rationale and define the economic scope for fair use exceptions. To the extent transactions costs are falling, the benefits of fair use also fall. The scope for fair use to contribute to innovation and economic growth is thus reduced. This necessitates a reduction in the extent of fair use laws rather than an extension'.

¹⁹ R Ghafele and B. Gilbert (2012): *The Economic Value of Fair Use Counterfactual Impact Analysis In Singapore* (**Ghafele and Gilbert**), Oxfirst at page 6 – available at: http://works.bepress.com/rova_ghafele/12.

²⁰ Barker, Dr George R (26 November 2012): *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* (the **2012 Barker Paper**), page 26 – available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180769.

Property (the **Hargreaves Inquiry**). As part of its investigation into whether fair use should be introduced into the UK, members the Hargreaves Inquiry visited Silicon Valley and met with companies such as Google, Facebook, Yahoo and Yelp. Their conclusion was that *'the economic benefits imputed to the availability of Fair Use in the US have sometimes been overstated'*.²¹

*Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.*²²

The Hargreaves Inquiry ultimately reached the decision not to recommend fair use based on *'the economic benefits of a more adaptive copyright regime....and because there are genuine legal doubts about the viability of a US case law based legal mechanism in a European context'*.²³ Foxtel submits that these conclusions are equally applicable in the Australian context.

Another reason often given in favour of fair use is flexibility. While those in favour of fair use argue that it is more flexible than the limited fair dealing purposes, it is important to understand that the nature of the defence means that the supposed flexibility of fair use to respond to changing conditions can actually only be established through testing through the Courts.

The fast pace of change in the digital economy and the typical period of time the Courts will take to resolve matters of this nature means that Court rulings will constantly struggle to keep up with technological changes. By the time a dispute in respect of a new technology has crystallised, litigation has been instituted, evidence has been prepared and the Courts have heard and determined the matter (and all of this at a very significant cost), it is very likely that the technology in question has already been superseded and the Court's decision is irrelevant.

For these reasons, Foxtel is strongly opposed the ALRC's recommendation 5 for the introduction of fair use in Australia. The ALRC's recommendation 6 relating to fair dealing is considered below.

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

The Australian fair dealing defences are supported by many years of Australian precedent and jurisprudence and, in Foxtel's opinion, are well understood. Dr Barker has previously noted that the current Australian exceptions to copyright are limited to areas where there may be associated public benefits, for example in research or study, criticism or review.²⁴

The ALRC's alternative recommendation to fair use was to amend the Copyright Act to provide an expanded fair dealing regime, which would include a number of new purposes such as quotation, non-commercial private use, and incidental or technical use. Foxtel has significant concerns in respect of this proposal, and believes that broadening the exceptions beyond uses for purposes which deliver specific public benefits would imply imposing costs in areas without commensurate public benefits.²⁵ Foxtel also notes that article 18.66 of the TPP that was recently signed by Australia refers to the need for 'legitimate purposes' in the creation of copyright exceptions, and specifically refers to *'criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print*

²¹ | Hargreaves (2011), *Digital Opportunity: A Review of Intellectual Property and Growth* (the **2011 Hargreaves Paper**), page 45.

²² The 2011 Hargreaves Paper, page 45,

²³ Ghafele and Gilbert, page 52.

²⁴ 2012 Barker Paper, page 10.

²⁵ 2012 Barker Paper, page 10.

disabled. There is no reference to quotation, non-commercial private use, or incidental or technical use, as proposed by the ALRC prior to Australia entering into the TPP.

While Foxtel believes that the current fair dealing defences are clear and well understood, at the same time Foxtel believes that simplification of the Copyright Act, where possible without upsetting the balance struck under the Copyright Act, is in the best interests of industry and consumers. Accordingly, Foxtel would be supportive of the rationalisation of the various fair dealing defences for different categories of works into overarching exceptions based on the established principles, provided the exceptions are carefully drafted so as not to further expand the scope of the exceptions.

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

While Foxtel is generally supportive of the goal of making Australia's intellectual property laws technology neutral, any loosening of the intellectual property protections that are so vital to the viability of Foxtel's business would be of significant concern to Foxtel. In order for Foxtel to grow the contribution it makes to the digital economy, both through its investments in Australian content and technology, it must be able to rely on a copyright regime that provides appropriate protections and enables Foxtel to receive a fair reward for its investments.

In Foxtel's view the most important factor that will determine whether Australian companies will continue to innovate and make such investments is the strength of the Australian copyright protection framework. This view is supported by Dr Barker's conclusion that, rather than expanding exceptions:

...the development of the digital economy requires the opposite response – namely the strengthening of copyright and the limiting of exceptions.²⁶

As Foxtel submitted to the ALRC Inquiry, social norms which condone illegitimate use of copyright material should not be allowed to outweigh rights holders' legitimate interests in protecting their intellectual property. To do this would undermine rights holders' ability to make valuable contributions to the digital economy.

SECTION 5: RESPONSE TO QUESTIONS IN CHAPTER 5 OF THE ISSUES PAPER

Foxtel sets out below its response to questions of particular interest to Foxtel in chapter 5 of the Issues Paper, the broader intellectual property landscape.

Are IP rights too easy or hard to enforce in Australia, and if so, why?

In relation to online copyright infringement, it is widely recognised that it has been difficult and expensive for rights holders to enforce their rights, particularly in circumstances where many infringing torrent and streaming sites are hosted overseas. This has led to the introduction of Australia's new "site blocking" power under section 115A of the Copyright Act, which is a welcome development for Australia. Foxtel expects that the section 115A power will make a significant contribution to the fight against online piracy in Australia.

Is the role expected of ISPs a practical option?

It is not clear to Foxtel what "role" expected of ISPs the Productivity Commission is referring to in asking this question. However, as the Issues Paper notes that '[o]ther groups argue safe harbour regimes make ISPs into "copyright police"²⁷, Foxtel assumes that the Productivity Commission is particularly interested in ISPs' obligations under the safe harbour provisions in the Copyright Act.

²⁶ 2013 Barker Paper, page 3 – Dr Barker notes that '...moves to extend copyright exceptions in response to the development of the digital economy are mistaken in that it will only serve to reduce incentives for the development of new creative works, which in turn is likely to reduce overall social welfare'.

²⁷ Issues Paper, page 27.

In Foxtel's submission, the safe harbour regime in Part V of the Copyright Act in no way makes Australian ISPs into "copyright police". The regime merely sets out the conditions that an ISP must satisfy should it wish to avail itself of the limitation on remedies that is available. These conditions do not require an ISP to monitor or police its services; on the contrary, section 116AH(2) expressly provides that nothing in the safe harbour conditions should be taken to require a carriage service provider to monitor its services.²⁸ Australia's safe harbour regime is a requirement of AUSFTA and a safe harbour regime is also required under the very recent TPP²⁹.

In any event, as Australian law currently stands following the High Court's decision in *Roadshow Films Pty Ltd & Ors v iiNet Ltd*³⁰ (the **iiNet case**) it is questionable whether the limitations that are available under the safe harbour provisions are currently of any utility for Australian ISPs. As is well known, in the iiNet case the High Court found that iiNet was not liable for authorising the infringement of its users, for reasons including that there were no reasonable steps that could have been taken by iiNet.

It is worth noting however that the current authorisation liability provisions were in fact intended to apply to ISPs—these provisions were introduced via the *Copyright Amendment (Digital Agenda) Bill 1999* (the **Bill**) and the Explanatory Memorandum to the Bill noted that one of the objectives of the Bill was to '*ensure that copyright law provides carriers and carriage service providers (including ISPs) with reasonable certainty about liability for infringements that occur on their facilities or infrastructure*'.³¹

While Foxtel believes that everybody, including rights holders, ISPs and consumers, has a role to play in reducing the rate of online piracy in Australia and increasing the use of legitimate domestic content services that return value to the Australian economy and creative industries, Foxtel believes that ISPs are the only ones who can efficiently enforce measures to curb online piracy. ISPs cannot be seen as innocent bystanders when their networks and carriage services are being used for economically harmful illegitimate downloading.

CONCLUSION

As a producer and distributor of premium entertainment content, a provider of broadband services and an Australian business that has successfully championed innovation within Australia's existing intellectual property framework, Foxtel believes that it is uniquely placed to contribute to the Productivity Commission's inquiry. Foxtel looks forward to constructively engaging in discussions with the Productivity Commission in regards to its inquiry into Intellectual Property.

²⁸ Copyright Act, section 116AH(2).

²⁹ Foxtel acknowledges that the TPP is less prescriptive with respect to the conditions for ISP liability than AUSFTA.

³⁰ [2012] HCA 16 (20 April 2012).

³¹ Explanatory Memorandum to Bill, page 7.