



**Submission by
Free TV Australia**

Productivity Commission

*Intellectual Property Arrangements –
Productivity Commission Draft Report*

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EXECUTIVE SUMMARY

- An efficient IP system that strikes the right balance between incentives for innovation and investment on the one hand, and the interests of individuals and businesses in accessing ideas and products on the other, is critical for the economy and community welfare.
- Copyright is fundamental to creativity and innovation, and the Australian Copyright Act provides a critical framework which ensures that Australian creators and innovators are rewarded. Its finely balanced provisions facilitate access to copyright material on the one hand, and returns on investment on the other.
- For broadcasters it is critical that the *Copyright Act 1968 (Cth)* (Copyright Act):
 - provides appropriate protection of broadcasters' rights;
 - ensures that the regulatory environment provides legal certainty in relation to access of copyright material; and
 - does not impose unnecessary additional costs on broadcasters.
- Free TV agrees with Draft Recommendation 2.1 that intellectual property policy must be informed by a robust evidence base. However, Free TV is concerned that the analysis of copyright in the Draft Report fails this requirement, being based largely on a mixture of assertion, anecdotal evidence and flawed logic.
- The Draft Report does not appreciate the cultural importance and welfare enhancement of Australian content creation, or the fact that a robust and certain copyright framework is actually a key driver of innovation and investment in creative industries.
- A number of the Draft Report's Draft Recommendations would in fact have an extremely detrimental impact on the ability of broadcasters and other content producers to continue making and investing in Australian content.
- Free TV strongly opposes the following Draft Recommendations on this basis:
 - replacement of the current fair dealing exceptions with a broad exception for fair use (Draft Recommendation 5.3)
 - an expanded safe harbour scheme to cover a broader set of online service providers in the absence of any amendments to ensure that the authorisation infringement provisions are operating as intended in the online environment (Draft Recommendation 18.1)
 - amendments to the Copyright Act to support the circumvention of geoblocking technology (Draft Recommendation 5.1)
 - repeal s 51(3) of the *Competition and Consumer Act 2010 (Cth)* (Draft Recommendation 14.1)
- These Draft Recommendations are not supported by evidence and do not adequately address the concerns raised in a number of submissions in response to the Issues Paper to this review. They would inevitably lead to less efficiency in the IP system, increased regulatory costs and decreased business confidence. Critically, they would ultimately lead to less Australian content.

Introduction

Free TV welcomes the opportunity to provide the Productivity Commission with the views of its members in relation to the Draft Report "Intellectual Property Arrangements" (Draft Report). As Free TV members are content industry businesses, this submission is focussed on copyright.

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by more than 13 million Australians.

As major owners, licensors and licensees of copyright material. Free TV welcomes the comments of the Minister for Communications, the Hon Mitch Fifield that "copyright protection is an essential mechanism for ensuring the viability and success of creative industries by incentivising and rewarding creators."¹ Free TV strongly agrees with this sentiment. Australian copyright law provides the fundamental framework that incentivises the production of local content and enables broadcasters and other content industry businesses to invest in the industry.

Free TV members also frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production. Free TV is therefore able to comment on the Draft Report with a strong appreciation of the importance of striking the right balance between ensuring adequate protection of IP rights on the one hand and facilitating appropriate access on the other, in order to maximise incentives for innovation, investment and the production of creative works, and to ensure that competition is not impeded.

In formulating intellectual property policy, Free TV strongly agrees that the Government should be informed by a robust evidence base (Draft Recommendation 2.1). This is critical to ensuring the effectiveness and efficiency of the IP system. Free TV is concerned however that a number of the Draft Recommendations are not supported by evidence.

Free TV members are operating in a heavily regulated and an increasingly competitive multi-media environment. Increasing broadband speeds (both fixed and mobile), together with the development of sophisticated mobile devices, is changing the way that Australians consume television content and is bringing about permanent structural change in the broadcasting sector.

In this context it is critical that Australia's IP arrangements allow broadcasters to compete effectively by providing appropriate protection of broadcasters' rights consistent with Australia's international obligations, and by ensuring that the regulatory environment continues to provide legal certainty and does not impose unnecessary additional costs on broadcasters.

Free TV's key concerns in relation to the Draft Recommendations, and the evidence supporting those recommendations, are set out below.

¹ Senator the Hon Mitch Fifield, Media Release "*Conjecture on Copyright Changes Unfounded*".

Key concerns with analysis in the Draft Report

Free TV has a number of overarching concerns in relation to the Draft Report, which we outline in this section.

1. Cultural importance and value of Australian content creation not recognised

The report notes in several places that, as a net importer of IP, Australia should have more liberal copyright laws. For example, the Draft Report states that:

“An overly generous system of IP rights is particularly costly for Australia – a significant net importer of IP, with a growing trade deficit in IP-intensive goods and services.”²

Similarly at page 19 the Draft Report states that:

“Further, most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia’s fair use exceptions.”

This analysis however is simplistic, completely disregards the cultural importance of Australian content creation, and misrepresents the value of local content to Australians.

Cheaper and/or more readily available foreign content cannot substitute for an entire local content industry, or the cultural value that that content holds. Local Australian creative industries enrich our society, reflect and contribute to our sense of identity as a nation, and also play an important role in attracting tourism, migration and business to Australia.

Australians highly value local content. Australian free-to-air TV programs are the most watched shows on television. In 2015, every one of the top 50 programs on Free TV was Australian.³

The value consumers place on Australian content is also reflected in Australians’ access of content online. Screen Australia in its recent report ‘*Online and on demand, trends in Australian online video use*’,⁴ found that:

“The appetite for Australian content is strong, with 96 per cent of VOD viewers watching it across various platforms and around half are watching it online. The survey results reaffirm the role of the broadcast television industry in bringing local content (including Australian films) to Australian audiences both as programmed television and the broadcasters’ own catch-up services.”⁵

² Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 2.

³ Source: OzTAM, 5 cap cities, RegionalTAM, 6 regional markets, 1 Jan to 31 Dec 2015, all people, 2am-2am, metro and regional figures are combined to form national average audience estimates, total people, all day, Free TV channels, consolidated data.

⁴ Screen Australia, *Online and on demand: Trends in Australian online video use*, 2014.

⁵ Ibid, 2.

Free TV networks are the major underwriters of the Australian production sector, employing over 15,000 people both directly and indirectly.⁶ Over the last five years, Free TV broadcasters have invested \$6.62 billion in Australian content.⁷ A report by Venture Consulting, *The Value of Free TV*, released in May 2015 found that the commercial free-to-air television industry contributes \$6 out of every \$10 spent on Australian content and directly employs 7,232 people across technical, operational, financial and management roles.⁸

Robust and certain copyright protections are fundamental to this creativity and investment, and the Australian Copyright Act provides a critical framework which ensures that Australian creativity and innovation are rewarded.

2. Current Australian copyright framework misrepresented and exceptions to infringement not recognised

Free TV is concerned that the Draft Report does not demonstrate a complete understanding of the existing exceptions to copyright infringement and therefore misrepresents how the copyright framework operates. In particular:

- In comparing fair use under US law with the position under Australian law in Table 5.2, it completely ignores existing statutory licences at Parts VA, VB and VC of the Act (i.e. the remunerated exceptions), other free exceptions (including in particular the flexible dealing exceptions at s 200AB), and market-based licensing options. This analysis does not accurately reflect either the position in relation to the types of uses that fit within existing exceptions under the law, or the potential impact of fair use on the existing framework of exceptions. The Australian fair dealing exceptions form only a part of the framework of exceptions and licensing options that make up the copyright regime.
- It does not deal with the fundamental principle that, where there are market based licensing options available, they should be utilised and that under international law, Australian copyright exceptions must comply with the three step test.⁹
- It proceeds on the basis of the assumption that the purpose of copyright is to prevent use by others, rather than appreciating that rights holders have an interest in commercialising the rights that they hold.
- It does not provide any analysis that demonstrates a widespread issue with the existing copyright regime and approach to copyright exceptions, instead pointing to isolated incidents in which undesirable outcomes have occurred as a basis for recommending widespread change. Free TV's view is that regardless of whether Australia retains fair dealing or implements fair use, there will always be examples to demonstrate that the system is not perfect.

⁶ Venture Consulting, *The Value of Free TV, the contribution of commercial free-to-air television to the Australian economy*, May 2015.

⁷ Australian content expenditure figures are compiled by Free TV, figure for 2012-13 is adjusted (up from the previously reported figure of \$1.36 Billion).

⁸ Venture Consulting, *The Value of Free TV, the contribution of commercial free-to-air television to the Australian economy*, May 2015.

⁹ Berne Convention for the Protection of Literary and Artistic works, Article 9.

- The Draft Recommendations appear to largely stem from a view that that the term of copyright is too long.¹⁰ While no evidence is presented to support this view, it appears to be used to justify making reductions to the scope of copyright protections in other ways, that currently apply throughout the life of the rights. Free TV's view is that these are clearly separate issues and a perceived view that the term of copyright is too long does not justify reduction of other rights granted by copyright.

3. Costs of fundamental change to existing copyright system not recognised

The Draft Report does not quantify the costs of the wide-ranging changes that it recommends, disregarding legal uncertainty and increased legal costs as matters of concern without giving consideration to the impacts of uncertainty on investment decisions.

For example, in relation to the introduction of a fair use exception, it states that:

In the Commission's view, legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself. Courts interpret the application of legislative principles to new cases all the time, updating case law when the circumstances warrant it. To say otherwise would be to argue that all laws should be prescriptive — a doctrine that is inconsistent with many laws across all social and economic arenas, and completely inimical to the common law. In addition, even under a fair use regime it is possible to specify a non-exhaustive list of illustrative purposes which provides strong guidance to parties.

Free TV does not consider that this adequately addresses the concerns expressed by many stakeholders that such a fundamental change to the existing legal framework will create significant uncertainty and that this will in turn significantly and permanently increase legal costs for Australian creative industries, as outlined in the analysis by PWC.

4. Harmful impacts of piracy not recognised

The Draft Report seeks to downplay copyright infringement as a matter of concern. For example, at page 493 it states that:

"Little evidence exists on the economic harm caused by online infringement, and Australia's position as a net importer of copyright –protected works does not favour stronger enforcement mechanisms."

Similarly, the Draft Report provides:

Some infringement – up to the level expected by rights holders (and factored into their decision to invest) – will have a limited impact on incentives."¹¹

It also states that:

¹⁰ For example, see Draft Report, 83.

¹¹ Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 479.

“..at least a portion of infringing consumption is unlikely to be displacing a sale, with infringers consuming material only because it is free.”¹²

While drawing a causal link between copyright infringement and economic impacts is by no means straightforward, the analysis in the Draft Report suggests that enforcement action against piracy at its current levels is unnecessary, and current levels of piracy are simply assumed to have a neutral impact. However, the Draft Report does not present any evidence to support the assumption that the current level of infringement is not detrimental.

Clearly piracy does harm rights holders, and a range of research has been done in relation to the proliferation of piracy and the impacts that it has on creative industries.¹³ The research to date suggests that non-infringing consumers will also be harmed by:

- potentially paying higher prices for some content because there is a smaller pool of paying customers to recoup costs from; and
- missing out on access to some content because it either won't be created, or because the relevant rights won't be acquired by legitimate distribution platforms because high levels of piracy mean that the likely viewing audience is assessed as too small to be economically viable.

Fair use

5. Draft Recommendation 5.3

Draft recommendation 5.3 provides:

The Australian Government should amend the Copyright Act to replace the current fair dealing exceptions with a broad exception for fair use.

As indicated in Free TV's submission to the Issues Paper, Free TV strongly opposes an open ended fair use style exception.

The existing copyright regime strikes a fine balance between rights holders and users and Free TV does not see any justification for disrupting this balance by removing the existing certainty provided by fair dealing.

Free TV is concerned that the Draft Report does not present any new evidence or arguments to support the introduction of a fair use style provision in Australia.

Fair dealing exceptions critical to Free TV

As outlined in the Issues Paper to this review, Free TV's view is that:

- The fair dealing exceptions set out at sections 40, 41, 41A and 42 of the Act (fair dealing exceptions) and the exceptions at ss 45 and 67 are well established, effective and should be retained in their entirety; and

¹² Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 479.

¹³ See for example, Danaher, B. et al, *Converting pirates without cannibalizing purchasers: The impact of digital distribution on physical sales and internet piracy*, Marketing Science Vol 29 No 6, November – December 2010, 138-1151.

- The exceptions in relation to temporary copies in sections 43A, 111A, 43B, 111B and 200AAA should be retained so that these provisions remain certain.

Members of Free TV rely upon fair dealing for criticism and review, parody and satire and most importantly, reporting of news, on a daily basis in compiling programming. These exceptions provide clarity and certainty for broadcasters around the uses of copyright material that can be made for free and should not be removed in favour of a fair use exception which deals with these issues by introducing an illustrative purpose of “non-consumptive use”.

Costs vs benefits of fair use not addressed

The Draft Report does not address what the benefits or costs of introducing a fair use exception in Australia would be. As such, Free TV remains unpersuaded by arguments that there are significant benefits associated with moving to a fair use regime that would justify the disruption, uncertainty and additional costs of such a change to the status quo.

Practical implications not acknowledged

As indicated in our submission to the Issues Paper, in practice, the changes proposed will create uncertainty for stakeholders until the scope of the application for the fairness factors and illustrative purposes are litigated in court in Australia. It will take a number of cases to re-establish a high degree of certainty and it is very likely that it will take a considerable period of time before the uncertainty is resolved.

Furthermore, the Draft Report states that, ‘While US court decisions would not be binding on Australian courts, the Commission sees no reason why Australian courts would not draw on the principles laid out in US decisions as a starting point’.¹⁴

Free TV is not convinced that this would be the case. Whether or not a particular use is ‘fair’ under US law is dependent on the facts of the individual case and approaches between courts (within the US) vary. In addition, the US legal framework is significantly different to the Australian legal framework and the interpretation of the provision will vary in response to the different frameworks. Many fair use cases in US law judge fairness having regard to the US Constitution. In particular, US courts have regard to the right of free speech and find fair use where the use benefits free speech under the US Constitution.¹⁵ This will particularly be the case if the drafting of the exception is different to that in the US.

Impact of uncertainty not acknowledged

The Draft Report notes that “In the Commission’s view, legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself”.¹⁶ The Draft Report however fails to recognize that legal uncertainty translates to significant costs for industry and will have an impact on the ability of both owners and users to confidently invest in the production of content and/or the development of new services.

¹⁴ Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 160.

¹⁵ See for example *Nordstrom, Inc v PARAN* 1992 US Dist. LEXIS 162.

¹⁶ Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 147.

As indicated in our submission to the Issues Paper, legal costs for litigation, legal advice and renegotiation of agreements will be imposed on copyright owners and copyright users seeking to rely on the fair use exemption or to clarify existing legal arrangements. This would be the case even if the existing exceptions are incorporated in a fair use style exception, for example as 'illustrative purposes'.

Operation and effectiveness of existing Australian open-ended exception not considered or acknowledged

Free TV notes that there is currently a flexible exception in the Copyright Act, s 200AB, which was introduced into the Act in 2006. Although the provision is limited to educational and cultural institutions and person (and institutions assisting persons) with a disability, this provision is effectively a 'fair use style exception' in that it is open-ended and allows a broad range of uses which are not specifically prescribed by the provision. The Draft Report has not considered the operation or effectiveness of this provision in recommending 'fair use'.

Consistency with international legal obligations not considered

The Draft Report recommends a list of factors which should be incorporated into an Australian 'fair use' exception however no consideration has been given to whether or how the formulation proposed complies with Australia's international legal obligations, and in particular the Berne Convention and TRIPS which require copyright exceptions to comply with the '3 step test'.¹⁷

Innovation

Free TV is not aware of any evidence that suggests that the introduction of fair use in Australia would promote innovation or economic growth and the Draft Report does not assist in this regard.

As noted in Free TV's submission to the Issues Paper, Free TV is not convinced by arguments that fair use facilitates innovation. Innovation requires a balanced copyright regime; not free use of copyright material. This is because the creators of the original copyright work are themselves innovators, and will be incentivized to create works only if they are entitled to the fruits of their labour.

To promote innovation and creativity it is fundamental that copyright law strikes the right balance between allowing access to copyright material to build upon existing works on the one hand and providing adequate incentives for copyright creators to continue to innovate.

In addition, as noted in our submission to the Issues Paper, and by the joint submission of the Australian Film/TV Bodies in response to the ALRC's Discussion Paper, there is economic evidence that suggests that the introduction of fair use would have a harmful impact on content producing industries, and that the economic effects of more flexible

¹⁷ Berne Convention for the Protection of Literary and Artistic Works, Article 9; TRIPS

copyright exceptions on content industries are ‘at best very difficult to measure’.¹⁸ This evidence has not been acknowledged or addressed in the Draft Report.

Managing rapidly evolving technologies

Given the rapid technological changes taking place in broadcasting and media generally, we recognise that there is some disconnect between the current copyright law framework and the technological practices essential to broadcast television.

However, Free TV is of the view that the best way to ensure that the IP system is efficient, effective and robust through time is to introduce additional prescriptive exceptions on a case-by-case basis as they are required.

Free TV is in favour of a well-considered and iterative approach to considering new technological developments. As each technological development will necessarily impact upon rights holders in a different manner, an all-encompassing illustrative purpose provision runs the risk of ultimately being detrimental, weighing too far in favour of end users. The introduction of new exceptions, or any amendments to existing exceptions, should be the subject of a measured process of review and consultation, submission and report.

Free TV notes that an example of such an approach is the *Copyright Amendment (Disability Access & Other Measures) Bill*, which proposed to introduce a range of specific exceptions for libraries, archives, key cultural institutions, educational institutions and persons with a disability.

Safe Harbour scheme

6. Draft Recommendation 18.1

Draft Recommendation 18.1 provides:

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1986 (Cth).

This recommendation would allow ISPs and other service providers and intermediaries to fall within the safe harbour provisions for the first time.

The Draft Report provides that, “In the Commission’s view, the operation of authorisation liability and the coverage of Australia’s safe harbour regime are separate issues”.¹⁹ However, it does not explain how it has come to form this view.

Free TV strongly disagrees with this Draft Recommendation. Free TV’s view is that the safe harbour provisions are only appropriate or indeed necessary where liability also exists. It is not logical to propose a practical response to the threat of litigation if no

¹⁸ Submission 205, Copyright and the digital economy, 142; citing George Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, (November 2012), Centre for law and Economics.

¹⁹ Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 490.

liability exists. Those who benefit from the protection of a safe harbour must similarly also be responsible under the expanded authorisation test. It is not reasonable to afford legal protections to persons who do not also have legal responsibilities.

Free TV's view therefore is that the safe harbour scheme and authorisation liability provisions in the Act are inextricably linked. As indicated in its submission to the Issues Paper, Free TV is concerned that, without effective authorisation provisions, the expansion of the safe harbour scheme to cover all online service providers will lead to the scheme being used as a mechanism to circumvent the authorisation infringement provisions in the Act.

The purpose of the safe harbour scheme is to provide carriage service providers with protection from liability for hosting or communicating infringing material *that they have no control over*.²⁰ However, where a service provider is aware of an infringement and it is within the power of a service provider to take reasonable steps to prevent that infringement, the service provider should be required to take those steps. This is consistent with the purpose of the authorisation infringement provisions at ss 36 and 101 of the Act.²¹

The authorisation liability provisions as they are currently operating do not adequately achieve this purpose in the online environment. The decision in *Roadshow Films v iiNet* highlighted this.²² It found that iiNet had no direct technical power to prevent its customers from using the BitTorrent system and that it could not be inferred from iiNet's inactivity after receiving AFACT notices that iiNet had authorised copyright infringement infringements of its subscribers. This was despite the fact that iiNet had the technical power to prevent infringing activities by suspending or terminating user accounts, as well as a contractual relationship with users whereby they agreed not to use iiNet's service to infringe copyright.²³

The Government has previously recognised this issue in its discussion paper, '*Online Copyright Infringement*',⁷ which proposed to amend the authorisation liability provisions of the Act so that it is clear that they are intended to function the same way in the online environment as they did in the analogue environment.

This issue must be addressed prior to any extension of the safe harbour scheme. In the absence of such amendments, service providers will have no incentives to ensure that their customers do not use their services for piracy. The broadening of the safe harbour scheme will undermine the incentives for service providers to work with rights holders to minimise copyright infringement, and in turn the broader IP Policy framework.

For this reason, the implications of an expanded safe harbour scheme should not be considered in isolation but rather concurrently with amendments to the authorisation liability provisions.

²⁰ Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Act 2000, at 57.

²¹ *Ibid.*

²² *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16

²³ *Ibid.*

7. Draft Finding 18.1

Draft Finding 18.1 provides:

The evidence suggests timely and cost effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

Free TV members put significant time and resources into making their products and services available legitimately to viewers for free. This has involved significant investment in a range of new and innovative delivery mechanisms to meet consumer demand. For example:

- Catch-up services Plus7, 9Now and TENplay, which are available across a range of platforms and devices;
- Making available advance previews of television shows such as X Factor and premiering episodes of first run drama such as Puberty Blues and Love Child online before broadcast; and
- Fast-tracking content from overseas so it is made available to viewers here at the same time as or only a few hours after airing in the original market.

However, while Free TV acknowledges the importance of the development of innovative business models to satisfy consumer demand, Free TV does not agree with the draft finding that “timely and cost effective access to content is the most efficient and effective way to reduce online copyright infringement”.

It is clear from a number of studies that the actual relationship between access and availability of legitimate content and piracy is much more complex,²⁴ and a number of recent studies directly contradict this finding.

For example, a survey conducted by the Intellectual Property Awareness Foundation in 2015, found that while the frequency and incidence of piracy have reduced following the introduction of new streaming services, 40 per cent of persistent pirates were downloading more illegal content than they were in the 12 months prior.²⁵

Similarly, research released by the Department of Communications in July of 2015, in relation to online copyright infringement in Australia and the UK, highlighted that copyright infringement is a significant issue in Australia compared to the UK, with 43 per cent of online consumers surveyed saying they have consumed at least some illegal content and 33 per cent of TV content consumers having accessed TV shows illegally, compared to only 21 per cent in the UK.²⁶

²⁴ For example see: Danaher, B. et al, *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy*, Marketing Science Vol. 29, No. 6, November – December 2010.

²⁵ IPAF, 2015 Research – Australian Piracy Behaviors 2015, released 13 October 2015.

²⁶ Online Copyright Infringement Research, *A marketing research report prepared for the Department of Communications*, 24 June 2015.

In Free TV's view, this confirms that a multi-pronged approach to addressing piracy, including ensuring that legitimate content is readily available, consumer education and appropriate legislative and regulatory intervention, is most effective.

Use and licensing of copyright material - Geoblocking

8. Draft Recommendation 5.1

Draft Recommendation 5.1 provides:

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.

As the Draft Report indicates, geoblocking technology effectively restricts a consumer's access to websites and digital goods and services to within a particular territory or 'home market'. This effectively allows rights holders to charge different prices to consumers in different markets.

Free TV's view is that market-based mechanisms are the best means of addressing issues in relation to international price discrimination. There are legitimate public policy reasons for territorial price discrimination. Copyright is usually owned and managed territorially, for example, overseas suppliers may not have the rights to trade in Australia, or vice versa. This in turn means that different royalty arrangements (and therefore pricing) apply in different geographical regions. This is often as a result of domestic arrangements (for example, as a result of royalty rates set by the Copyright Tribunal). These arrangements underpin the Australian market for digital goods and services. They enable Australian content providers to reinvest royalties from Australian content services back into the local industry.

Therefore, in Free TV's view, the Commission's recommendation risks jeopardising new business models and investment in the local market. This is because, as recognised in the Draft Report, price differentiation is often a business strategy for the efficient recovery of fixed costs. The Draft Report's analysis that 'most suppliers of commercial content to Australia are foreign and Australia is a small country with little impact on the decision to produce content', fails to recognise that for the Australian content industry; price differentiation may facilitate both the acquisition of content from overseas as well as the sale of content to other markets.

In addition, as indicated in the Draft Report, it is unclear whether consumer actions to circumvent geoblocks risk breaching the Copyright Act's provisions in relation to technological protection measures.²⁷ Regardless however, as acknowledged in the

²⁷ Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 128. This will depend on whether the geo-block is preventing either access to copyright material or whether

Draft Report, prohibition on circumvention of geoblocks are often standard terms of contracts.²⁸ In these circumstances, circumventing a geoblock is likely to amount to a breach of contract if the effect of circumvention is that the content that is licensed in a particular territory is in fact being made available in a different territory. If the content is then reproduced or communicated without the permission of the copyright owner it is also likely to be an infringement of copyright.

In these circumstances, Free TV is concerned that the Draft Recommendation is not feasible from a practical, legal or policy perspective.

Competition and Consumer Act exemption for licensing or assignment of IP

9. Draft Recommendation 14.1

Draft Recommendation 14.1 provides that:

The Australian Government should repeal s 51(3) of the Competition and Consumer Act 2010 (Cth)

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

Section 51(3) of the CCA provides an exemption from part IV for conditions in licences and assignments of intellectual property rights.

Free TV's view is that a case has not been made out for abolition of s 51(3). As indicated by the Draft Report, "Many of the arguments put in favour of dispensing with the exemption under s 51(3) rely on identifying instances where anticompetitive conduct might occur rather than instances where such conduct has occurred."²⁹ Similarly, the report states "while there is little evidence to suggest that the costs of retaining the exemption are significant, at least at this time, there is also little to suggest that the exemption gives rise to much in the way of benefits."³⁰

In circumstances where the abolition of the exception in s 51(3) would risk creating additional uncertainty for rights holders investing in new business models and licensing solutions, Free TV's view is that the exception should remain until such time as there is evidence that substantiates the removal of the exception. Free TV agrees that fears about uncertainty in relation to part IV (including s 51(3)) could be addressed by guidance on its application to intellectual property.

it is connected to the exercise of an exclusive right of the copyright owner; Part V, Division 2A of the Copyright Act.

²⁸ Ibid, 127-128.

²⁹ Ibid, 390.

³⁰Productivity Commission, *Intellectual Property Arrangements*, Draft Report, 390.

Copyright term**10. Draft Findings 4.2**

Draft finding 4.2 provides:

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.

Free TV notes that Australia is a party to the Berne Convention and to TRIPS, both of which provide for a minimum term of copyright protection. Furthermore, Australia negotiated the AUSFTA with the US as an economy-wide trade agreement. As part of that agreement, Australia agreed to a copyright term of 70 years. A consideration of the economic impact of the copyright term agreed to in isolation is artificial. As noted by the Minister and in the Draft Report, any such reduction would require international negotiations and the reversal of international standards.