

PRODUCTIVITY COMMISSION
DRAFT REPORT INTO INTELLECTUAL PROPERTY ARRANGEMENTS
SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes this opportunity to respond to the Productivity Commission's draft report (**Report**) regarding Australia's intellectual property arrangements.

In relation to the issues covered by the Report, CRA maintains the positions outlined in its submission lodged on 15 December 2015. CRA does not propose to revisit those issues in this submission.

However, there are three issues on which CRA wishes to make further comment.

A. Copyright exceptions – fair use proposal

1. The Commission proposes that 'a new system of user rights, including the introduction of a broad, principles based fair use exception' is introduced.¹ CRA maintains its opposition to the introduction of a fair use exception.
2. The existing fair dealing provisions strike an appropriate balance between right holders and users. The introduction of a fair use exception would remove the certainty currently provided by the existing categories of fair dealing.² Radio broadcasters regularly use the existing exceptions, particularly criticism and review, news reporting and parody and satire. These work with certainty and predictability, which is essential in the fast moving world of radio journalism.
3. We do not agree with the Commission's conclusion that the current fair dealing regime is 'weighted too heavily in favour of copyright owners, to the detriment of the long term interests of users'.³ The lack of certainty is likely to have a negative impact on both rights holders and users, with litigation a real possibility. This is likely to inhibit the use of copyright material and the development of new content and services, which ultimately places consumers at a disadvantage.

¹ Page 2, Report.

³ Page 159, Report.

4. CRA is concerned by the Commission's recommendation that 'Australia's exception for fair use should allow all uses of copyright material that do not materially reduce a rights holder's commercial exploitation of their work at the time of use'.⁴ This would lead to a fair use exception that is significantly wider than the ALRC's proposal in its 2013 report.
5. Rather than encouraging innovation, CRA considers that such a proposal would hinder innovation. Radio broadcasters would have fewer incentives to create innovative content and services in circumstances where they may not be permitted to recoup their investment through copyright licences. A reduction in the production of creative content – as a result of decreasing commercial incentives to creators – would be detrimental to consumers.
6. Furthermore, CRA is not persuaded that such a broad approach to the question of copyright exceptions is consistent with the three step test set out in the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁵ This test requires that exceptions to exclusive rights must be confined to:
 - i. certain 'special cases';
 - ii. which do 'not conflict with a normal exploitation' of the copyright material; and
 - iii. do 'not unreasonably prejudice the legitimate interests' of the rights holder.
7. CRA submits that the Commission's starting point that 'all uses of copyright material that do not materially reduce a rights holder's commercial exploitation of their work at the time of their use' is not consistent with the above test. In particular, it is a broad approach that does not identify 'special cases', as well as being an approach that we consider would unreasonably prejudice the legitimate interests of rights holders.

B. Collecting Societies

8. CRA notes the Commission's finding that '[d]espite some concern with the potential market power collecting societies may exercise, it is likely that they increase efficiency'.⁶ While CRA agrees that, on balance, collecting societies do provide a means of reducing the otherwise high transaction costs of copyright licensing, it does not believe that the issue of market power should be dismissed lightly.
9. In particular, the lack of transparency as to the repertoire of PCCA is particularly problematic for the commercial radio industry. Licensees pay a substantial amount of money for a licence, the scope of which they are unable to ascertain.
10. Not all sound recordings played in Australia are copyright protected for the purpose of the broadcast of those recordings. The copyright protection for a particular sound recording in Australia will depend on several factors, including the nationality of the artists performing on the track, the country of incorporation of the company making the recording and the location of the recording studio at which the track was recorded.

⁴ Page 160, Report.

⁵ Section 9(2) Berne Convention. Incorporated into TRIPS in 1994.

⁶ Page 121, Report.

11. The most significant example of sound recordings that are excluded from the PPCA repertoire are those made in the United States. This comprises a significant portion of music played by commercial radio broadcasters.
12. The absence of a list setting out PPCA repertoire means that licensees cannot find out with certainty which sound recordings a licence with PPCA will cover. Accordingly, licensees are poorly positioned when trying to negotiate a fair price.
13. CRA submits that a solution would be for PPCA to produce a regularly updated list that sets out, as far as possible, sound recordings that are within the PPCA repertoire. CRA urges the Commission to look more closely at this issue, as it heavily impacts on radio broadcasters and their audiences.

C. Geo-blocking

14. CRA is not convinced by the Commission's suggestion that 'consumer rights to circumvent geo-blocks should be enshrined in the Copyright Act'⁷. The commercial radio industry is concerned that this may have unintended consequences, to the detriment of broadcasters and consumers. We urge the Commission to look at the long term implications of a licence to circumvent geo-blocking.
15. The commercial radio industry is structured on licence areas across Australia. Currently, geo-blocking in the commercial radio industry within Australia is neither common practice nor technically feasible. However, the existence of radio licence areas means that the right to geo-block, without circumvention, should be preserved for the future.
16. The value of rights held by broadcasters may decrease if consumers were permitted to circumvent geo-blocking of international feeds, therefore gaining access to coverage from other countries, such as the US and the UK. This could result in decreased investment in such programming by Australian radio broadcasters, leading to lower quality Australian coverage of international events. This would place the majority of consumers – who do not choose to circumvent geo-blocks – at a disadvantage.

We would welcome the opportunity to discuss these issues further. Please contact Joan Warner if you would like to do so.

2 June 2016

⁷ Page 121, Report.