

Productivity Commission Draft Report Intellectual Property Arrangements

screenrights

Submission by Screenrights

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EXECUTIVE SUMMARY

- I. Screenrights is a copyright society representing rightsholders in film, television and radio. Screenrights has 3,944 members in 63 countries.
- II. Screenrights is concerned that the draft report develops a false rationale to justify its recommendations that reduce copyright protections.

The draft report claims that copyright term is too long, and proposes a radical reduction of copyright to 15-25 years contrary to Australia's many international treaty obligations.

The report accepts that the scope of copyright has not grown significantly in the past 32 years, but proposes to reduce the scope of copyright in order to offset the perceived problem with duration.

- III. Screenrights is concerned that the draft report demonstrates critical misunderstandings on the operation of copyright in Australia, in particular the operation of the exceptions to copyright which balance scope and duration.

A proper understanding of Australia's copyright arrangements must recognise the role of remunerated exceptions (statutory licences) as well as free exceptions (such as fair dealings). The draft report fails to recognise the balancing role of statutory licences, and fundamentally misunderstands their operation.

When the statutory licences are included in a comparison of Australian and US copyright exceptions it is apparent that Australia has a far wider range of exceptions than the US, especially for education.

- IV. Screenrights is concerned that the recommendations of the draft report would, if implemented by Parliament, undermine the Australian creative industries and negatively impact Australian society's ability to consume copyright material, particularly educators' and students' use of domestically produced content.

The report dismisses concerns about the impact on the Australian creative industries on the basis that Australia is a net importer and the overseas created copyright works will not be significantly impacted.

This understates the cultural importance of domestic content. In Screenrights' experience, locally produced documentaries are the most used television programs for education. These have no overseas market and no foreign substitute.

The proposed introduction of fair use would harm the production of these important works, and be a net harm to Australian society.

- V. Screenrights opposes the recommendation to introduce fair use.
- VI. Screenrights strongly endorses the consensus driven, consultative reform approach which led to the proposals to simplify the statutory licences and recommends that a similar approach be applied more generally.

SUMMARY OF RESPONSES TO DRAFT FINDINGS, RECOMMENDATIONS AND INFORMATION REQUESTS

DRAFT FINDING 4.1

Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.

Screenrights disagrees with the draft finding. The finding is at odds with the draft report's evidence and its discussion of the scope of copyright.

The evidence in the report is that the scope has barely increased other than the right of communication which the Commission recognises was a valid and necessary change.

DRAFT FINDING 4.2

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

Screenrights disagrees with the draft finding. The radical suggestion of a copyright term of 15-25 years is contrary to international norms and centuries of legal development.

Screenrights supports the submissions of the Australian Film/TV Bodies and the Australian Copyright Council.

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

The copyright societies currently operate transparently, efficiently and at best practice and the code of conduct (along with all the other governance measures applicable to copyright societies especially declared societies) contributes to ensures this is continues.

INFORMATION REQUEST 5.3

Will the Australian Government's proposed reforms to simplify and streamline education statutory licences result in an efficient and effective scheme? Should similar reforms be made to the operation of the government statutory licence scheme?

The educational statutory licences are already an efficient and effective scheme which provides world's best access to copyright material for educational purposes. The proposed reforms continue a process of continual improvement to the services.

Screenrights agrees that there is an opportunity to improve the government statutory licence in a similar manner.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the *Copyright Act 1968* (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

Screenrights rejects the draft recommendation of fair use. It is based on a flawed rationale for reform and a misunderstanding of the nature of Australia's system of copyright exceptions.

The purported benefits of fair use are not demonstrated in the report. The costs including uncertainty and increased litigation are significant. The costs are understated in the report and can not be mitigated or avoided through importing US jurisprudence. Fair use is a moving target, without clear benefits to society, particularly Australian educators and students, but with clear harm to local creative industries.

DRAFT RECOMMENDATION 18.1

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the *Copyright Act 1968* (Cth).

Screenrights disagrees with the draft recommendation. The safe harbour regime is intrinsically linked to copyright authorisation and amendment to the scheme should be tied to correcting the problems with authorisation demonstrated by the iiNet case.

Screenrights supports the submissions of the Australian Film/TV Bodies and the Australian Copyright Council.

DRAFT FINDING 18.1

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

Screenrights disagrees with the draft finding. While industry is doing its part in providing timely and cost-effective access, government must do its part to combat infringement through enforcement.

Screenrights supports the submissions of the Australian Film/TV Bodies and the Australian Copyright Council.

BACKGROUND

Screenrights appreciates the opportunity to respond to the Productivity Commission's draft report on Australia's Intellectual Property Arrangements.

Screenrights is a non-profit Australian copyright society representing rightsholders in film, television and radio. Screenrights has 3,944 members in 63 countries.

Screenrights administers statutory licences for educational copying and communication of broadcasts, retransmission of free to air broadcasts and government copying of audiovisual works. In addition, Screenrights offers voluntary educational licences in New Zealand, and provides voluntary services for members including international registrations of their rights and disbursements of income. Screenrights has unique experience in the administration of collective licences for audio visual works and particularly the Australian statutory licences.

This submission draws on that experience in its response to the draft report and what Screenrights identifies are fundamental flaws in the Commission's analysis of Australia's copyright arrangements.

GENERAL RESPONSE TO THE DRAFT REPORT

Screenrights is concerned that the draft report develops a false rationale to justify its recommendations that reduce copyright protections.

Screenrights is concerned that the draft report demonstrates critical misunderstandings on the operation of copyright in Australia, in particular the operation of the exceptions to copyright which balance scope and duration.

Screenrights is concerned that the recommendations of the draft report would, if implemented by Parliament, undermine the Australian creative industries and negatively impact Australian society's ability to consume copyright material, particularly educators' and students' use of domestically produced content.

The false rationale for reform

In its review of the copyright arrangements, the report considers the scope and duration of copyright. A valid rationale for reform might be if the Commission had identified unjustified expansion of the scope of copyright leading to negative societal consequences to recommend a reduction of the scope. Similarly, a valid rationale might be, if the Commission identified an unjustified expansion of the duration of copyright leading to negative societal consequences, a recommendation to reduce the term of copyright.

Such findings would need to be confirmed by empirical evidence of the negative consequences in order to support the recommendation.

But the Commission instead applies a flawed logic to justify its reform recommendations. The Commission finds that the scope of copyright has barely changed: the scope has expanded slightly in only one substantive area (the right of

communication) and the Commission accepts that the expansion was economically justified, stating that,¹

Australia's copyright system has expanded over time. New rights have been granted to cover more uses of copyright material. Some see this as highly problematic for consumers, however:

- *in some instances, the expansion of scope has been justified — as for much online material*
- *the digital age has probably helped more than hindered access to copyright material for consumers*
- *in other cases, such as the introduction of moral rights, while the expansion in scope has no rationale, the costs are likely to be low and are kept low by either existing laws or the lack of credible enforceability.*

On the other hand, the Commission finds that the duration of copyright has increased and is out of step with what it states is the economic life of creative works. The Commission recommends a radically reduced term in the range of 15 to 25 years.² However, the Commission notes that “Australia has no unilateral capacity to alter copyright terms,” as the duration is governed by international treaties.³

The Commission then departs from its rationale to conclude that, because the duration cannot be amended without international agreement, Australia should (in essence) identify areas in which the scope of copyright could be reduced by way of set-off against undue duration.

*Meanwhile, changes to copyright exceptions and parallel import restrictions are achievable without international agreement and have the potential to rebalance the copyright system.*⁴

Screenrights submits that this is illogical and invalidates the report's following recommendations for changes to copyright exceptions and other measures.

Reducing the scope of copyright during the economic life of the content would only serve to reduce the economic incentive to produce the creative works without solving the problem the Commission is purporting to resolve: the term of copyright.

The Commission's misunderstanding of Australia's exception regime

The misconceived rationale for reform is exacerbated by the draft report's misunderstanding of Australia's exceptions to copyright.

Exceptions are the key means by which the scope of copyright is balanced. For decades, Parliaments and Governments of all persuasions have sought to balance necessary increases in the scope of copyright with corresponding increases in copyright exceptions.

¹ Draft Report p93.

² Draft Report p117.

³ Draft Report p117.

⁴ Draft Report p119.

While the report quotes a few submissions which refer to the expansion of exceptions alongside the creation of new rights, the draft report states “*To the Commission’s knowledge, copyright exceptions have never been expanded to counterbalance the increase in the scope or duration of protection for rights holders....*”⁵

This is completely incorrect. There have been numerous expansions to exceptions including, for example:

- a flexible fair dealing provision (section 200AB; introduced 2006)
- a free exception for communication as part of educational performances (section 28; 2000)
- a new fair dealing for parody and satire (sections 103AA & 41A; 2006)
- safe harbour provisions (Part V, Division 2AA; 2004)
- proxy web caching by educational institutions (section 200AAA; 2006); and,
- temporary reproductions (sections 43A and 111A; 2000).

Moreover, the draft report’s consideration of Australia’s exceptions regime ignores the role of statutory licences in Australian copyright arrangements. While the report discusses statutory licences it does not recognize their true nature: as exceptions to copyright. Such provisions are better described as *remunerated exceptions*. They are exceptions similar in nature to (say) fair dealing exceptions, the difference being that they are compensated.

Any analysis of Australia’s exceptions which does not acknowledge the breadth of the role played by the remunerated exceptions is bound to be incomplete and lead to incorrect conclusions.

This is especially the case when comparing Australian copyright law with the United States as a key difference is that the US does not have a regime of statutory licences whereas Australia has a comprehensive statutory licence regime on top of its fair dealing system.

A fair comparison between Australia and the US of copyright exceptions would necessarily include the statutory licences. When statutory licences are included in the comparison it is clear that exceptions to copyright in Australia go far beyond those in the US.

Table 5.2 in the draft report shows a list of “*Illustrative US fair uses of copyright works that require a licence in Australia*”.⁶ While many of the claims in the table itself are incorrect or controversial, its greater problem is that it omits consideration of the statutory licences.

When the statutory licences are included as part of the exceptions analysis, then the table shows a very different picture: that actions permissible in Australia, especially uses for educational purposes, far exceed what is allowable under US fair use.

⁵ Draft Report p148.

⁶ Draft Report p143.

The table below compares US and Australian exceptions for educational uses of broadcast content:

Table 5.2 Illustrative statutory licence exceptions uses of copyright works that are not covered by fair use in the US		
<i>Illustrative scenario</i>	<i>Australian statutory licence exception</i>	<i>US fair use</i>
A teacher wants to record a specific TV or radio news program for use in class ⁷	✓	This presumptively qualifies as fair use under the <i>Guidelines for Off-Air Recording of Broadcast Programming for educational Purposes</i> (which form part of US Congressional records) only if the source is a free-to-air broadcast and only for class room use during the first ten consecutive school days after the recording is made.
A school librarian wants to digitise the school's library of copies of television and radio and share it online with staff and students ⁸	✓	✗
A university wants to supply DVD copies of television programs to every student in a course ⁹	✓	✗
A teacher wants to access an online archive of 30,000 television programs available streamed on demand to students and teachers across the country ¹⁰	✓	✗
A school librarian wants to share copies of television over a peer-to-peer network allowing schools to upload copies of television and radio programs for download and use by other schools ¹¹	✓	✗
A university researcher wants to find television news stories from an online archive of copies of every television news item in the past nine years indexed by story subject matter and viewable on demand by staff and students ¹²	✓	✗

⁷ This is the most basic day to day operation of the Screenrights administered statutory licence

⁸ DigitalVideoCommander is an Australian designed and manufactured audiovisual server created to provide this functionality for schools with a Screenrights licence.

⁹ A university did precisely this in 2014, providing copies of television to thousands of students

¹⁰ EnhanceTV offers an archive of over 30,000 copies of television programs with over 100 hours added each week from free to air and pay television

¹¹ Clickview Exchange is a peer to peer system for librarians in schools and other institutions with a Screenrights licence

¹² InfoRMIT News Media is an archive of thousands of television news and current affairs stories indexed by subject matter and available streamed on demand to students and staff

Underlying economic stance in the report

The flaws in the rationale and understandings in the draft report are inflated by the short term, pessimistic economic stance in the report.

The starting point for the Commission's consideration of Australia's intellectual property arrangements is that Australia is a net importer of creative goods. The report fails to properly integrate the reality that in a free trade environment, in which minimum IP standards have since 1995 been part of the WTO system, Australia's comparative advantage is currently in exported goods tied to mining and primary industry and in exported services related to education and tourism.

IP dependent industries are not those in which Australia currently has a strong comparative advantage, but are surely industries in which Australia desires to develop capacity and advantage to safeguard long term living standards. That goal is only served by supporting IP standards in trade agreements to encourage dynamic growth in those industries, and not seeking to undermine those standards for comparatively short term goals of reducing a trade imbalance.

With no full consideration of the importance of IP as part of the wider trade negotiations, and the strategic economic goal of improving the value of Australia's exports from IP-dependent Australian industries, the starting point of the report is to undermine Australia's IP system including copyright.

The report's recommendations would harm Australian creative industries

Focusing on our net import position, the Commission dismisses the impacts of its recommendations on the Australian creative industries.

The key recommendation is that Australia introduce a US style fair use regime in place of existing fair dealing provisions. Many copyright owner stakeholders made submissions on the potential costs of such a radical change.

The Commission takes the view that the potential harm is not important as we are net importers:

Overall, given that most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's exceptions, adoption of a fair use provision in Australia is likely to deliver net benefits to the Australian community.¹³

In effect, the report is proposing that the negative impacts of fair use on Australian creators will not matter as the content will still be available from overseas producers.

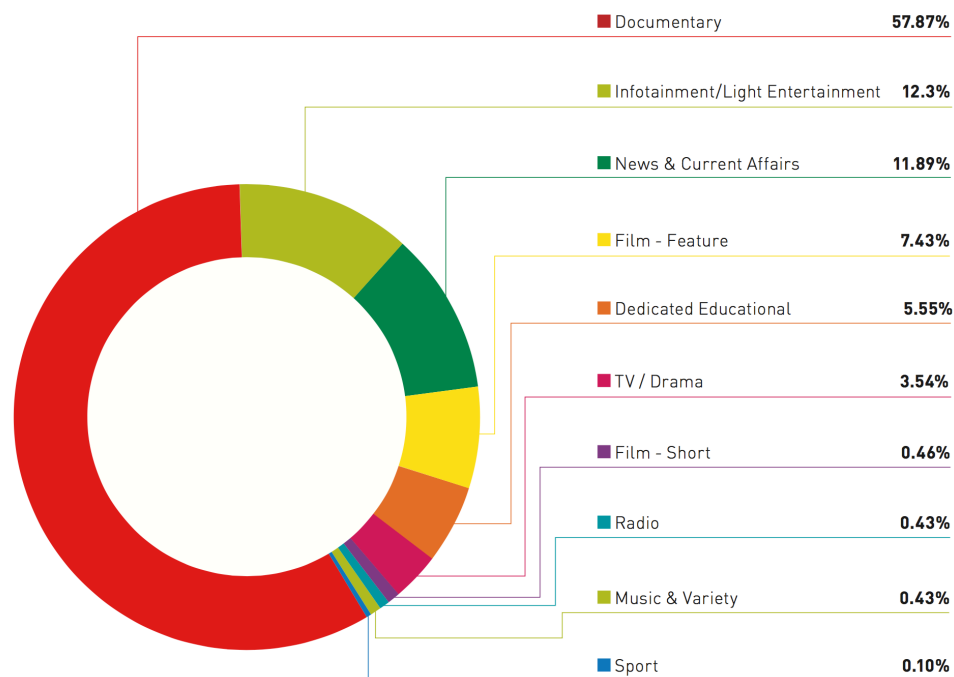
This approach ignores the unique importance of domestically produced content which cannot be substituted with overseas content and which is solely dependent on the Australian market for its survival.

¹³ Draft Report p152.

Applying Screenrights' usage data to the Commission's conclusion

In Screenrights' case, it is Australian content entirely dependent on an Australian audience which is most consumed by educational institutions under the statutory licence and most important to educators.

The graphic below shows the breakdown in types of audiovisual material copied by Australian educational institutions in 2014/15.



Documentary is by far the most important genre. Of that, the majority is Australian documentary. In 2014/15, 36% of Screenrights' distributions were paid to Australian documentaries.

These programs are dependent on Australian audiences and Australian markets only. They do not have access to overseas income, as their subject matter is only relevant to local audiences. Nor do they have substitutes from overseas.

In this light, to restate the conclusion of the draft report: given that most new broadcast works consumed in Australian for educational purposes under the Screenrights licence are sourced locally with no foreign substitutes and their creation is responsive to Australia's exceptions, adoption of a fair use provision in Australia is likely to deliver net harm to the Australian production and education community.

More simply, the outcome of the draft report's recommendations would be economic harm to Australian documentary producers, less content for Australian society and less content of relevance for the classroom.

Conclusion

The draft report's recommendation for copyright reform, particularly the introduction of fair use, should be reconsidered.

The draft report is misconceived in its consideration of copyright. The draft report starts from a short term position on Australia's trade position on IP goods and services; deems copyright scope to be reasonable but duration to be too long; and then proposes to undermine the scope because it can not change the duration.

The report's analysis of Australia's copyright exceptions fails to recognize the role of statutory licences as remunerated exceptions. Any analysis which properly included the full suite of Australia's exceptions (both unremunerated and remunerated) would conclude that access to copyright for users in Australia far exceeds that of the US.

This draft report is very ambitious in its aims and coverage. By adopting a broad-brush, big picture approach the report is necessarily laden with idiosyncratic and contestable value judgments.

By contrast, Screenrights' experience with an alternative model of reform has been significantly more productive. On several occasions Screenrights, on behalf of its members, has negotiated with diverse user groups to develop consensus reform proposals which all parties support. These have included significant widening of Australia's exceptions including the introduction of the retransmission scheme and the expansion of the educational statutory licence to include communication.

Similarly, with the Government's support, Screenrights and other stakeholders recently negotiated significant reforms to the educational statutory licences. These reforms will hopefully be enacted in the next term of Parliament with the support of all parties.

Screenrights submits that such a consensus model of reform is far more fit for purpose. It delivers real reform that is achievable and important. The reform can be very significant. It generally only requires the encouragement of Government for the parties to reach compromise position on practical matters.

RESPONSES TO DRAFT FINDINGS, RECOMMENDATIONS AND CALLS FOR MORE INFORMATION

DRAFT FINDING 4.1

Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.

Screenrights disagrees with the draft finding. The finding is at odds with the draft report's evidence and its discussion of the scope of copyright.

The evidence in the report is that the scope has barely increased other than the right of communication which the Commission recognises was a valid and necessary change.

Table 4.1 of the draft report documents the "*expansion of Australia's copyright system*": five changes in 111 years.¹⁴

Table 4.1 The expansion of Australia's copyright system

Year	Coverage
1905	Copyright including translation rights recognised in books.
1912	Introduction of import controls on books. Copyright over mechanical reproductions recognised.
1968	Subject matter other than works (broadcasts, recordings and mechanical performances) granted copyright.
1984	Copyright in computer programs recognised.
2000	Moral rights and right to communicate to the public introduced.
2004	Performers' rights introduced.

From this table, since computer programs were recognised thirty two years ago the only significant expansion of economic rights has been the right to communicate (which replaced the previous broadcast and cable rights). The right to communicate is novel only in that it covers making available on the internet.

The Commission accepts that the extension of rights to the digital world is "*economically sound and, were it not present, would provide creators with weak incentives to produce and publish works online to the detriment of consumers.*"¹⁵

The Commission notes that digital technologies have decreased the costs of dissemination of works leading to an explosion of material with increased available of substitutes to the benefit of consumers.¹⁶

¹⁴ Draft Report p106.

¹⁵ Draft Report p108.

All this evidence cited in the draft report and the commentary in the draft report run counter to the draft finding. Taking into account the increase in copyright exceptions a very different conclusion is reached.

Contrary to the draft finding, there has in fact been only one significant expansion in copyright in the past three decades – the communication to the public right – and that new right is well justified. Furthermore, it has been offset by significant widening of exceptions as well as massive increases in the availability of content, and reductions in the cost of content to the net benefit of Australian society.

DRAFT FINDING 4.2

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

Screenrights disagrees with the draft finding. The radical suggestion of a copyright term of 15-25 years is contrary to international norms and centuries of legal development.

Screenrights supports the submissions of the Australian Film/TV Bodies and the Australian Copyright Council.

The *Statute of Anne* 1709 provided for an initial term of 14 years from publication for subsequently published books, followed by an additional term of 14 years if at the expiry of the first term the author was alive. Draft Finding 4.2 proposes a return to the 18th century.

By suggesting copyright terms that resemble those from 1709, and then acknowledging the impossibility of making such reform because of international treaty obligations – in particular the life plus 70 years obligation in the US-Australia Free Trade Agreement – the draft report leads a reader to the conclusion that its reforms are explained on the basis that Australia should attempt to redress term concerns by denying rights holders of expected benefits in other areas. This is a dangerous path to recommend that the Australian government takes.

There exists the possibility of non-violation complaints under the US-Australia Free Trade Agreement. Chapter 21 of the US-Australia Free Trade Agreement includes that the dispute settlement regime applies when a Party considers that a benefit the Party could reasonably have expected to accrue to it under [various chapters including Chapter 17 – Intellectual Property Rights] is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.’ The Productivity Commission is providing good evidence that reform based on its approach is contrary to the spirit of the US-Australia Free Trade Agreement.

¹⁶ Draft Report p109.

It can be said that the recommendations are directed to nullifying or impairing copyright in an arguably impermissible way; hollowing-out the rights in retaliation for the term extension included in the US-Australia Free Trade Agreement.

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

The copyright societies currently operate transparently, efficiently and at best practice and the code of conduct (along with all the other governance measures applicable to copyright societies especially declared societies) contributes to ensures this is continues.

The copyright societies operate in closely defined areas of the economy where there is market failure. The draft report acknowledges the importance of collecting societies in providing efficient access to copyright goods, quoting the submission of the ACCC that collective licensing, *“provides a particularly efficient way to overcome the high transaction costs of licensing copyright in markets where the value of individual rights may be low relative to transaction costs and it may be difficult or impossible to predict in advance precisely which rights may be required.”*¹⁷

The information request seems based on the submissions of the NSW Department of Justice’s (“DoJ”) and the schools Copyright Advisory Group (“CAG”) in regard to the transparency of the declared societies.

The draft report quotes NSW Department of Justice’s (“DoJ”) claim that the, *“copyright collecting societies exercise substantial power in a monopoly situation with little oversight.”*¹⁸

Contrary to DoJ’s claim, the declared collecting societies which administer statutory licences exercise very little power; are not monopolies in any true sense; and, are subject to many layers of oversight.

The copyright societies exercise very limited power

The power of the declared collecting societies such as Screenrights, is fundamentally limited by their inability to refuse a licence.

Unlike an ordinary copyright owner, or indeed the owners of other property rights, Screenrights is never able to withhold its service. To use broadcasts for the purposes prescribed in the statutory licences, the licensees merely send

¹⁷ Submission of the Australian Competition and Consumer Commission quoted in the Draft Report, p128.

¹⁸ NSW Department of Justice submission quoted in the Draft Report, p134.

Screenrights a notice. From the date of the notice they are able to use the copyright material, even absent agreement as to how much they must pay.

The copyright societies do not exert monopoly power

The supposed monopoly status of the collecting societies is based on a basic misunderstanding of the nature of the statutory licences. The monopoly assumes that the licensee has no choice but to obtain a licence from the collecting society.

This is incorrect. The licences are compulsory on the copyright owners and not the copyright users. By contrast, copyright owners can not exclude their content from the statutory licence.

Copyright users are entitled to seek direct licences separate to the statutory licences and to obtain substitute goods outside the statutory licences. As the draft report makes clear, an effect of the digitization of the production and dissemination of creative works has led to a massive increase in the availability of substitute works.

The licensees deal jointly with the copyright societies to maximise their bargaining power

To the very limited extent that the collecting societies operate as monopolies (ie that they are declared to cover all works within a class), then they are dealing with monopsonies (ie single buyers) with equal or greater bargaining power.

Educational institutions, government jurisdictions and even private company retransmitters routinely negotiate collective agreements in order to maximize their buying power. As the code reviewer, former Federal Court Justice and Copyright Tribunal President, Dr Lindgren reported, *“it is rather one-sided to say that declared collecting societies occupy a privileged position. They do so but so do the statutory licensees.”*¹⁹

The copyright societies are subject to very high levels of oversight

The collecting societies, particularly declared societies such as Screenrights, are subject to a very high level of scrutiny.

- Societies provide Annual Reports to the responsible Commonwealth minister, currently the Minister of Communications, who then lays the Reports before Parliament.
- Licence agreements are subject to determination by the Copyright Tribunal to ensure that they are equitable.
- The societies are trustees and subject to the particular duties of a trustee.
- The societies are companies and are answerable to their membership.

¹⁹ Supplementary Report of the Code Review, pp15-16, paragraph 59.

https://www.screenrights.org/sites/default/files/uploads/Triennial_Supplementary_Report_-_Oct_15.pdf

- The societies operate within guidelines published by the Commonwealth.
- The statutory licences are frequently the subject of parliamentary and independent government review such as this current enquiry.

In addition to all of the above, the societies including Screenrights subscribe to the voluntary industry code of conduct.

History of the code of conduct

The code of conduct was the result of extensive consultation and consideration of national and international models.

The copyright societies industry code of conduct was developed following recommendations from the 1998 House of Representatives Standing Committee on Legal and Constitutional Affairs report “*Don’t Stop The Music*”. The recommendation for a voluntary code of conduct was supported at the time by the Government.

The draft code of conduct was developing with regard to examples from other industries especially the telecommunications sector where such codes are commonplace, as well as government guidelines for the development of codes and related policies. Stakeholders were given the opportunity to comment on the draft code following which changes were made before the code was agreed and implemented.

Review of the code

The code is subject to regular review, most recently in 2014 and 2015 by a former Federal Court judge and President of the Copyright Tribunal, Dr Kevin Lindgren. Dr Lindgren specifically considered requests for changes to the code made by the NSW Department of Justice (“NSW”) and the schools Copyright Advisory Group (“CAG”).

In its discussion of the code, the Commission’s draft report misstates the issue raised by the DoJ and CAG.

NSW and the Copyright Advisory Group (CAG) raised concerns with the transparency requirements in the code about how funds paid to rights holders under the statutory licensing scheme are calculated.²⁰

The issue was not how funds paid to rights holders are calculated. The method of calculation of payments is a transparent process fully documented in the relevant Distribution Policy available on the collecting societies’ websites.²¹

NSW and CAG were proposing a new clause 2.9 be inserted into the code to require declared societies to publish additional information in their Annual Reports. In practice, the information requested was mainly already published in the Annual Reports and where it was not available, Screenrights has voluntarily undertaken to

²⁰Draft Report p135.

²¹https://www.screenrights.org/sites/default/files/uploads/Dist_Policy_23092015.pdf

include it in future. Indeed, Screenrights and Copyright Agency offered to provide all the requested information with one important exception.

The exception is that NSW and CAG requested that Screenrights and Copyright Agency inform them on request which rightsholders were paid, how much and for what programs. This information is the confidential information of the copyright owners, and Screenrights did not and does not agree to provide this information. Screenrights notes that this information is not disclosed by Screenrights to anyone other than the rightsholder, not even to Screenrights' Board. In his review of the request, Dr Lindgren properly rejected the suggestion by NSW and CAG that they could resolve the rights holders concerns via a confidentiality undertaking.²²

Other than this single issue, the matter was resolved.

This matter demonstrates the success of the code. The code served its purpose well to allow stakeholders to raise matters, to allow the societies to respond, to facilitate independent review of the issue, and ultimately to ensure that transparency is maintained and all appropriate information is publicly available.

INFORMATION REQUEST 5.3

Will the Australian Government's proposed reforms to simplify and streamline education statutory licences result in an efficient and effective scheme? Should similar reforms be made to the operation of the government statutory licence scheme?

The educational statutory licences are already an efficient and effective scheme which provides world's best access to copyright material for educational purposes. The proposed reforms continue a process of continual improvement to the services.

Screenrights agrees that there is an opportunity to improve the government statutory licence in a similar manner.

Criticisms of the statutory licences are attempts to reduce licence fees

The criticisms of the statutory licences by educational institution stakeholders are not really criticisms of the operation of the licences, but rather are attempts to reduce the payment of fees.

This is evident from the draft report's summation of CAG's submission on the statutory licences. As the report notes, CAG set out the payments made by schools and then "...list a range of concerns with the operation of Australia's education statutory licence scheme...."²³

²² Supplementary Report of the Code Review, op cit., p17, paragraph 64.

²³ Draft Report p138.

These complaints have no basis in Screenrights' experience of the educational licence for broadcasts.

CAG: [the licence] "results in schools paying for content that is made freely available online"

Educational institutions only pay for material they copy.

In the case of the Screenrights licence, where schools stream a program then there is no payment. If material is copied (as opposed to streamed) from a website, then it is payable. The remuneration paid is compensation for the content being taken from the licensed website.

CAG: [the licence] "does not allow scope for educational institutions to rely on the general copyright exceptions, or use exceptions on behalf of students"

The statutory licences are separate from the student exceptions to copyright. That is because the Copyright Act properly acknowledges as a matter of principle the difference between an individual doing something for their own research or study purposes compared with an institution doing something for its purposes.

It is not the responsibility of the creative sector to subsidise education any more than it is the responsibility of teachers or manufacturers of chalk.

CAG: [the licence] "is not technologically neutral nor fit-for-purpose in the digital age"

The Screenrights licence is an excellent example of a well drafted, technologically neutral provision in the Copyright Act.

The licence has seamlessly adapted to changes in technology over the past 26 years moving from video recorders to DVDs and now online video on demand. The operation of the resource centres under the Screenrights as outlined in Table 5.2 above, demonstrates the adaptability of the statutory licence and its continuing relevance and suitability in the digital age.

The key remaining technological constraint is that the licence has only limited applicability to material on the internet. However, Screenrights understands that the education sector, contrary to its stated concerns, opposes making the licence technology neutral to this end.

The report misconstrues the proposed reforms

The draft report notes that *"the proposed reforms may be a reasonable approach to simplifying the administrative arrangements under which the education statutory licence operates."*²⁴ Screenrights agrees that the reforms will provide benefits to all parties in simplifying the administrative arrangements largely leaving them to the agreement of the parties. Screenrights notes that the administrative burden for the

²⁴ Draft Report p139.

licence is already negligible as Screenrights has been able to eliminate any reporting of usage by teachers.

However, the draft report then states that *“Importantly, the amendments to the Act make it clear that the statutory licence regime is compulsory for rights holders and not users, with voluntary licensing permissible if such an approach is more efficient and effective for rights holders and users.”*²⁵ This is not a change to the statutory licences.

It is already the case that that statutory licence regime is only compulsory for rights holders and not for copyright users. This is explicitly stated in the Copyright Act, for example, in relation to the Screenrights licence at section 135Z “Relevant right holder may authorize copying etc.”

The proposed reforms do not change this situation. They merely preserve the current position. The educational institutions have always had the choice not to use the statutory licence and / or to seek a licence from the rights holders and they routinely do so.

The true state of the statutory licences

The true state of the educational statutory licences in Australia is that they provide world leading access to copyright material for educational purposes. Indeed, Australia has been a model for international reform and best practice.

An example from the Screenrights educational licence is resource centres: a particular class of educational institution in the Australian Copyright Act whose purpose is to provide copies to other institutions such as schools and universities.

Operating under the Screenrights administered statutory licence, various resource centres such as Clickview, TV4Education and InfoRMIT have developed vast online archives of copies of broadcasts which they stream on demand to schools, universities and other institutions participating in the statutory licence. This level of access is unparalleled internationally and is a model for reform.

The New Zealand Parliament amended its provisions to provide for resource centre services such as have operated under Screenrights’ Australian educational licence since 1990. Similarly the educational institutions and the relevant collecting society in the United Kingdom have combined to develop resource centre services under their provisions based on the Australian licence.

Critically, no equivalent services exist in the United States as they are not permitted by fair use. The access to broadcast content for educational purposes in the US is far inferior to that enjoyed by Australian schools and universities.

²⁵ Draft Report p139.

Simplification reforms

As the draft report notes, the proposed reforms to the educational statutory licences were developed jointly by Copyright Agency, Screenrights, CAG and Universities Australia.

The reforms are the latest in a string of progressive reforms to the statutory licensing exceptions including the expansion to for profit educational institutions; the simplification of the educational institution declaration process; the inclusion of copies made available online by free to air broadcasters; and, the extension to the communication of copies.

Each of these reforms has been achieved through a process of consultation leading to consensus. Each of these reforms has built upon the efficiency and effectiveness of the statutory licences.

The reforms and the improvements that they created were achieved by government encouraging the parties to compromise and reach consensus. This process has led to sensible, achievable reform to the benefit of all. It stands in strong contrast to the wide ranging enquiry such as the ALRC enquiry and this current enquiry which merely seem to encourage parties to adopt divisive and opportunistic positions which do not assist in achieving the balance the Copyright Act is supposed to achieve.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the *Copyright Act 1968* (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

Screenrights rejects the recommendation of fair use. It is based on a flawed rationale for reform and a misunderstanding of the nature of Australia's system of copyright exceptions.

The purported benefits of fair use are not demonstrated in the report. The costs including uncertainty and increased litigation are significant. The costs are understated in the report and can not be mitigated or avoided through importing US jurisprudence. Fair use is a moving target, without clear benefits to society, particularly Australian educators and students, but with clear harm to local creative industries.

Flawed rationale for reform

As stated earlier in this submission, it is clear from the draft report that the Commission's principal concern in regard to Australia's copyright arrangements is the duration of copyright. Although the Commissioner stated²⁶ that the "unbalance" began with the 20-year term extension within the US-Australia Free Trade Agreement, in practice the report's radical proposal for a 'back to the *Statute of Anne*' 15-25 year term seeks to return the copyright term to the 18th Century.

The Commission's rationale to introduce fair use, is that the duration is fixed by treaty and can not be amended unilaterally, so Australia should undermine the scope. This is despite the Commission finding that the scope of copyright is appropriate.

Misunderstanding of Australia's system of exceptions

The Commission's understanding of how exceptions operate in Australia is incomplete and incorrect. This is amply demonstrated by Table 5.2 which compares the US and Australian regimes without taking into account the statutory licences.

As outlined earlier in this submission, when the statutory licences are included in the analysis, it is clear that Australia has a much wider system of copyright exceptions than exists in the US, especially for education.

²⁶ ABC AM interview with Commissioner Karen Chester, <http://www.abc.net.au/am/content/2016/s4452475.htm>

The case for reform does not demonstrate the benefits of fair use

The Commission's analytical framework for assessing the intellectual property system is defined in Chapter 2 of the draft report:²⁷

The Commission has adopted an economic framework to assess the different dimensions of the IP system. An economic approach is appropriate as it considers the effects on all parties of current arrangements and potential reforms, and only seeks change where total benefits to the Australian community are likely to exceed total costs.

In recommending fair use, the Commission seemingly abandons this framework; the benefits of fair use are nowhere demonstrated in the report. The Commission notes a number of studies attempt to estimate the benefits of fair use, but that they are subject to criticism which brings their findings into considerable doubt. Ultimately, the best the Commission can say is that *"the fact the numbers are likely to be exaggerated does not mean fair use is without benefits."*²⁸ This is in no sense evidence of benefits, but is merely vague assumption.

No submission has supplied credible evidence of a country that has introduced fair use (such as the Philippines which made the reform in 1997) and which is now generating new productive industry founded upon the possibilities unleashed by fair use.

The Commission's recommendation for fair use fails the test that the Commission established in its framework.

The Commission dismisses the costs of fair use

The draft report's response to the potential costs of fair use is similarly one sided.

The Commission notes that, *"Not surprisingly, submissions to this inquiry from individuals and industries currently benefiting from copyright protection universally argued against the adoption of fair use in Australia."*²⁹ This pejorative dismissal of concerns is reserved for the creative industries without any concurrent recognition of the self-interested positions of copyright user groups that promote fair use including notably the multinational internet companies that hope to obtain licence fee discounts if fair use is enacted.

The key potential costs are increased uncertainty and increased litigation expenses. The Commission's response to the inherent uncertainty of fair use is to claim that legal certainty is not necessarily desirable in of itself.³⁰ Legal certainty is seen universally as a hallmark of any well-functioning market economy. Clear property rights and clear contract rules are essential for market provision.

²⁷ Draft Report p51.

²⁸ Draft Report p146.

²⁹ Draft Report p146.

³⁰ Draft Report p147.

The Commission seeks to mitigate the legal uncertainty and increased cost of litigation by proposing that Australia effectively import US precedent on fair use.³¹ This ignores the very different legal, cultural, historical and economic circumstances of the two countries which make such an outcome impossible. It glosses over the reality that US fair use law rests on a bed rock of First Amendment jurisprudence, and exists in a Constitutional environment fundamentally distinct from Australia's.

Furthermore, the report ignores the history of US fair use rulings which have notoriously switched on appeal from court to court. This is described in detail in the report of the The Kernochan Center for Law, Media and the Arts of Columbia University School of Law which Screenrights appended to its submission in December 2014.

The report's authors, Dr Besek, Prof Ginsberg and co, note the different circumstances between Australia and the US and the history of fair use in the US as a moving target.³²

We again submit a copy of this important report and commend it to the Commission's attention.

³¹ Draft Report p160.

³² Kernochan Center for Law, Media and the Arts, Columbia University School of Law, "Copyright Exceptions in the United States for Educational Uses of Copyrighted Works", p5.

DRAFT RECOMMENDATION 18.1

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the *Copyright Act 1968* (Cth).

Screenrights disagrees with the draft recommendation. The safe harbour regime is intrinsically linked to copyright authorisation and amendment to the scheme should be tied to correcting the problems with authorisation as demonstrated by the iiNet case.

Screenrights supports the submissions of the Australian Film/TV Bodies and the Australian Copyright Council.

DRAFT FINDING 18.1

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

Screenrights disagrees with the draft finding. While industry is doing its part in providing timely and cost-effective access, government must do its part to combat infringement through enforcement.

Screenrights supports the submissions of the Australian Film/TV Bodies and the Australian Copyright Council.

MORE INFORMATION

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