

Productivity Commission Report into Australia's 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 4,004 members in 63 countries.
- II. In its 27 year history in administering statutory licences in Australia, Screenrights has developed a particular experience and insight into the operations of the Australian regime of copyright exceptions.
- III. The Productivity Commission's recommendations for changes to the copyright system amount to a complete restructuring of the current arrangements. The recommendations are a radical attack on Australia's copyright system and the creative industries which it underpins.
- IV. The Report claims to be based on an approach with an economic framework at its heart, and yet fails to provide compelling economic evidence to support its recommendations for copyright reform. The Commission acknowledges that many of the purported benefits of its proposals do not provide benefits within standard economic measures. Where the Commission analyses potential benefits for its most radical proposal in favour of fair use, the Commission relies upon the Ernst&Young analysis with its finding of "a small positive effect on social welfare".
- V. Such recommendations would be expected to be accompanied by extensive economic evidence to support them. Yet the Productivity Commission does not make a reasonable economic case for the copyright reform.
- VI. Moreover, in its analysis of copyright exceptions, the Commission fundamentally misunderstands the operation of Australian copyright law, leading to incorrect comparisons with overseas jurisdictions. Australia's regime of fair dealings along with statutory licences provides far greater access to content than is possible under fair use.
- VII. The Productivity Commission was given the enormous task of reviewing all of Australia's Intellectual Property Arrangements in a year. Such an enormous review is bound to have limitations which are evident in the final report.
- VIII. Screenrights notes the success repeated over many years of stakeholder consultation and negotiation in leading to positive consensus driven reform proposals for government's consideration.
- IX. Screenrights respectfully submits that this consensus approach is a better vehicle for positive reform proposals and recommends that the government seek to apply such an approach to a range of copyright issues where agreement seems readily achievable including on orphan works and other matters.

BACKGROUND

Screenrights is a non-profit Australian copyright society representing rightsholders in film, television and radio. Screenrights has 4,004 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 outlines some overall concerns Screenrights has with the Productivity Commission's final report, before commenting very briefly on the specific recommendations. Per the request from the Department of Industry, this submission does not seek to rehearse the arguments made earlier in the course of this enquiry. More detail on particular proposals is in Screenrights' earlier submissions and further information is also available, if it would assist.

OVERALL CONCERNS

The Productivity Commission's recommendations for changes to the copyright system amount to a complete restructuring of the current arrangements. The recommendations are a radical attack on Australia's copyright system and the creative industries which it underpins.

Such recommendations would be expected to be accompanied by extensive economic evidence to support them. Yet the Productivity Commission does not make a reasonable economic case for the copyright reform.

Moreover, in its analysis of copyright exceptions, the Commission fundamentally misunderstands the operation of Australian copyright law, leading to incorrect comparisons with overseas jurisdictions.

The Productivity Commission was given the enormous task of reviewing all of Australia's Intellectual Property Arrangements in a year. Such an enormous review is bound to have limitations which are evident in the final report and which undermine its credibility.

No substantive economic case for copyright reform

The report commences with an outline of the approach taken by the Commission in its examination of the IP arrangements.

The Report states that the approach has “an economic framework at its heart”¹ which “puts the welfare of the *whole* community as the overarching objective and recognises that changes should only be made to the IP system so that those that gain could compensate those that lose, without being any worse off themselves.”²

Screenrights shares the concerns of groups representing artists and creators that such an approach may not adequately recognise the cultural value of creativity. Screenrights shares the concerns of stakeholders that such a severe economic framework has limitations from an Australian cultural perspective.

However, even if we accept the Commission’s framework as legitimate, Screenrights submits that the Productivity Commission fails to meet its own standard in its recommendations for radical reform of copyright.

Most strikingly, in *Appendix H Economic impact of recommendations*, the Commission states that it “is important to note that many of the benefits expected to flow from the Commission’s proposed reforms – particularly those arising from changes to copyright laws – are private or non-market benefits.”³ The Commission acknowledges that these benefits do not appear in standard measures of economic output or activity.

Economic impact of fair use

The Commission has a discussion of the impacts of two proposed reforms in Appendix E. Of particular relevance to Screenrights and our members is the discussion of the impact of fair use.

Notably, the Commission does not itself reach any conclusion about the economic impact of fair use. Appendix E discusses three third party studies of fair use: a report of a cost benefit analysis by Ernst&Young, a report by Pricewaterhouse Coopers, and (briefly) a report by Lateral Economics.

Overall, the Commission appears to rest its claim for an economic case on the Ernst&Young report which the Commission states concluded “that implementing fair dealing reforms would have a small positive effect on social welfare.”⁴

Yet, the Commission is not entirely persuaded by the Ernst&Young report, noting three weaknesses including that the report understates the costs of legislative uncertainty arising from a switch from defined purposes in fair dealing to a standard

¹ Productivity Commission Inquiry Report No. 78, 23 September 2016, p56.

² *Ibid.*, p57

³ *Ibid.*, p291

⁴ *Ibid.*, p660

based fair use system.⁵ Screenrights strongly agrees with this concern. It is the fundamental disadvantage of fair use compared with fair dealing.

The uncertainty from fair use was reviewed by Columbia University Law School in 2013 for the purposes of the ALRC enquiry. The authors, June Besek, Jane Ginsberg, et al, concluded that “*While fair use is not entirely unpredictable, in some cases even copyright attorneys have difficulty determining in advance whether a use will be deemed a fair use. There are fair use cases that have been reversed at every level in the courts, in litigations that have lasted for several years,*” and that fair use was in effect “a moving target”.⁶

Screenrights has separately reviewed the Ernst&Young report with a particular focus on the cost benefit analysis of the impact of fair use on the educational provisions including the statutory licence administered by Screenrights.⁷ The review notes that the Ernst&Young cost benefit analysis does not adhere to the government’s best practice approach as outlined in the *February 2016 Guidance Note of the Commonwealth Office of Best Practice Regulation on the conduct of Cost-Benefit Analysis*. The Ernst&Young report effectively assumes that the uncertainty of fair use compared with the current system can be assumed away. This is plainly incorrect on first principles, and as confirmed by the Besek, Ginsberg analysis.

Screenrights submits that the Ernst&Young report upon which the Commission seemingly relies to make the economic case for fair use does not quality as being well executed within the terms of the Commonwealth guidance note.

Australia as a net importer of copyright goods

Much of the Commission’s critique of copyright appears based on the conclusion that Australia is a significant net importer of intellectual property goods and services.

Significantly, in the assessment of the economic impact of fair use, they state that given copyright works are often owned by overseas interests, this “means that many of the costs of a more permissive copyright system that are born by copyright owners would not flow on to effect Australian social welfare....”⁸

The reverse of this effect is also true, and far greater. The largest financial beneficiaries of a more permissive copyright system would not be Australian consumers but rather would be multinational technology companies. If fair use was introduced, these companies would seek to substantially reduce their licence fees paid for copyright in Australia, including to Australian copyright owners. There would be a net loss to Australian social welfare. Furthermore, as these companies

⁵ *ibid.*, p661

⁶ Besek, J.M., Ginsberg J.C., Loengard, P., and Lev-Aretz, Y., *Copyright exceptions in the United States for educational uses of copyright works*. Executive Summary provided as Appendix A.

⁷ A copy of the review is attached as Appendix B.

⁸ PC Report, p661.

notoriously pay very little Australian company tax as a proportion of their revenue, the loss would be exacerbated.

Conclusion

Overall, the Commission's conclusion on copyright reforms generally is that there are non-market benefits with no accompanying economic impact in the report.

In regard to its most radical recommendation, for fair use, at best the Commission notes "a small positive effect". Even this mild conclusion is tempered by the concern that the cost benefit analysis is incomplete. On the Commission's own terms this does not amount to anything like a compelling economic case for reform.

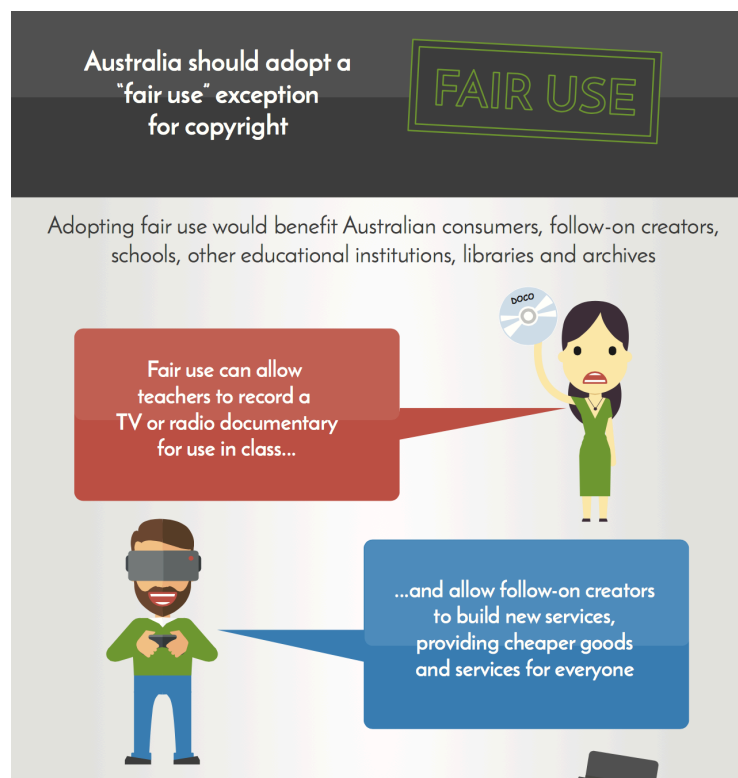
It is extraordinary that the Commission proposes a complete overhaul of Australia's copyright law on such thin economic grounds.

Fundamental misunderstandings of Australian copyright law

Screenrights is concerned that many of the recommendations of the Productivity Commission in regard to copyright are based on fundamental misunderstandings of the Australian system. As a consequence, the comparison with overseas jurisdictions are often wrong. This has been particularly the case in regard to Australia's exceptions to copyright and has been evident from very early in the process of enquiry.

In April 2016, alongside the draft report, the Commission published an infographic entitled "copy(not)right".⁹ Under the heading "*Australia should adopt a 'fair use' exception for copyright*" the infographic shows a distressed teacher with the note that fair use would allow her to copy a documentary from television or radio to use in class.

The relevant extract from the infographic is copied below for convenience:



The Commission's infographic and its justification for fair use are so far from the truth as to be almost laughable.

⁹ <http://www.pc.gov.au/inquiries/completed/intellectual-property/draft/IP-infographics-copynotright.pdf>

Australian educational institutions have had the right to copy television and radio broadcasts for educational purposes since 1990. Part VA of the Copyright Act, which is administered by Screenrights, specifically provides for this use. Schools, universities, colleges and others do exactly this and much more every day.

Despite Screenrights' submissions pointing out the basic misunderstanding, the infographic remains on the Commission's website.

This strange incident illustrates a general flaw in the Commission's consideration of Australia's regime of copyright exceptions, and in particular, the comparison with fair use. The fundamental misunderstanding is that Australia's exceptions regime is not limited to fair dealing. Rather, it is a combination of fair dealings with extraordinarily wide ranging remunerated exceptions to copyright commonly called statutory licences.

When the statutory licences are taken into consideration, the Australian regime of exceptions provides for uses that are far in excess of that available to educational institutions in the United States.

The table below provides examples of uses of broadcast content for educational purposes under Screenrights licence, and compares that with fair use in the United States.

As the table demonstrates, the range of uses available to educational institutions in Australia under our exceptions regime far exceed those available to their counterparts in the United States.

Claims that the Australian exceptions regime for education is narrower are invalid, and can only be the result of fundamental misunderstandings of the operation of the Australian system.

Comparison of fair use with the Screenrights statutory licence for teaching

The Australian statutory licence system provides greater access to content for education, with fair payment to copyright owners, as shown by the table below.

Illustrative scenario (Based on the Productivity Commission Report Table 6.1)	Australian statutory licence (paid) exception	US fair use
A teacher wants to record a specific TV or radio news program for use in class ¹⁰	✓	Possibly. This qualifies as fair use <u>only</u> 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. ¹¹
A school librarian wants to digitise the school’s library of copies of television and radio and share it online with staff and students ¹²	✓	✗
A university wants to supply DVD copies of television programs to every student in a course ¹³	✓	✗
A teacher wants to access an online archive of 30,000 television programs available streamed on demand to students and teachers across the country ¹⁴	✓	✗
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 ¹⁵	✓	✗
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 ¹⁶	✓	✗

¹⁰ This is the most basic day to day operation of the Screenrights administered statutory licence

¹¹ Qualifies for fair use under the *Guidelines for Off-Air Recording of Broadcast Programming for educational Purposes* (which form part of US Congressional records)

¹² DigitalVideoCommander is an Australian designed and manufactured audiovisual server created to provide this functionality for schools with a Screenrights licence.

¹³ An Australian university did precisely this in 2014, providing copies of television to thousands of students under the Screenrights licence

¹⁴ 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

¹⁵ Clickview Exchange is a peer to peer system for librarians in schools and other institutions with a Screenrights licence

¹⁶ 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

Inherent difficulties in the enquiry

Screenrights acknowledges that the Productivity Commission was faced with an enormous task in a short time frame.

Exacerbating the challenge, wide ranging enquiries such as this have encouraged parties to adopt extreme positions in advocating for copyright reform, in Screenrights' experience. In our view, while it is not desirable it is difficult to avoid such an outcome in this context as parties are motivated by what they perceive to be a rare opportunity to fundamentally change the system.

These two factors mean that the report was conducted in a heightened environment with limited time for dispassionate consideration of the issues.

In contrast with this approach, Australia has a long standing tradition of efficient and timely copyright reform achieved through negotiation and compromise by stakeholders leading to consensus positions being available for consideration by government. Screenrights itself is a consequence of this approach. Screenrights was formed to administer the statutory licence in Part VA, which arose out of a compromise between the education sector and copyright owners who jointly proposed the provision. Since that (formative) experience, Screenrights has regularly participated in and seen the outcome of consensus driven reform which has improved and extended Australia's regime of exceptions.

Most recently, Screenrights participated in a four way discussion including Copyright Agency, the schools and TAFE National Copyright Unit, and Universities Australia concerning the simplification of the educational statutory licences. From these discussions, we were able to agree a wide ranging reform of the provisions to everyone's interests. These were jointly presented to government, and formed the basis for the provision in Division 4 of the Exposure Draft published in December 2015.¹⁷

Although the provisions have not yet been enacted, all parties remain in support of the proposed changes.

Critically, the discussions proceeded at the instigation of the government who encouraged the parties to find consensus on this issue. In this positive environment agreement was quickly achieved.

Screenrights strongly endorses this approach for copyright reform. While enquiries such as the Productivity Commission can expose the range of views around a matter, they do not in our experience often lead to recommendations that translate to good policy.

Screenrights submits that the government's parallel approach of seeking consensus across the stakeholders has been more productive.

¹⁷ Copyright Amendment (Disability Access and Other Measures) Bill 2016, Exposure Draft

Conclusion

Screenrights does not contend that Australia's copyright regime is perfect or in no need of reform. For example, as previously stated, we continue to support the simplification of the statutory licences.

In addition, we believe that sensible compromise positions are achievable on a range of areas such as in relation to orphan works, public libraries and cultural institutions.

We respectfully encourage the Government to explore these issues further to identify common ground with stakeholders.

COMMENTS ON SPECIFIC RECOMMENDATIONS AND FINDINGS

FINDING 4.1

The scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favour of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death.

Screenrights disagrees with this finding. It is based on a misunderstanding of the history of copyright law development.

The Commission's discussion of the scope of copyright protection ignores the expansion of exceptions to copyright over the past thirty years. Maintaining the balance in the Copyright Act has been the concern of every government and Parliament, and no reform has gone through without corresponding consideration of the scope of exceptions.

RECOMMENDATION 5.1

The Australian Government should amend the *Copyright Act 1968* (Cth) to:

- make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception
- permit consumers to circumvent technological protection measures for legitimate uses of copyright material.

Screenrights does not support this recommendation.

Contracting out

Screenrights supports the submissions of the Australian Film & TV Bodies in rejecting the recommendation noting the Report's failure to recognise licensing models.¹⁸ In addition, Screenrights notes that the recommendation goes beyond the US model upon which the fair use recommendation is supposedly based. In the US, contracting out of exceptions including fair use is the norm.

¹⁸ The Australian Film & TV Bodies includes the Australian Screen Association, The Australian Home Entertainment Distributors Association, the Motion Picture Distributors Association of Australia, the National Association of Cinema Operators - Australasia the Australian Independent Distributors Association (AIDA) and the Independent Cinemas Association of Australia (ICAA). These associations represent a large cross-section of the film and television industry that contributed \$5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.

Circumvention of TPMs

Screenrights notes that there are prescribed exceptions to the TPM provision, and that there is the ability to extend the exceptions to new purposes including as has been recommended in the past, for the purposes of Part VA.

RECOMMENDATION 5.2

The Australian Government should:

- amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology, as recommended in the House of Representatives Standing Committee on Infrastructure and Communications' report *At What Cost? IT pricing and the Australia tax*
- avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

Screenrights supports the submissions of the Australian Film & TV Bodies in opposing this recommendation.

Screenrights notes particularly the analysis of pricing included in the Australian Film & TV Bodies submission which significantly updates the conclusions from the House of Representatives Standing Committee inquiry which is now several years old and no longer applies.

RECOMMENDATION 5.3

The Australian Government should proceed to repeal parallel import restrictions for books to take effect no later than the end of 2017.

Screenrights supports the submissions of the Australian Copyright Council, Copyright Agency Limited and the Australian Publishers Association.

RECOMMENDATION 5.4

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

Screenrights constantly strives to improve its governance and transparency. As a declared collecting society, Screenrights is subject to an extensive range of reporting requirements. In addition, Screenrights is party to the voluntary industry code of conduct against which it reports annually and which is frequently reviewed. The code was drafted based on international best practice and with extensive consultation with stakeholders.

The recommendation demonstrates the Reports limited understanding of the code. It is not merely aimed to meet the interests of copyright collecting societies and licensees, but also members.

Notwithstanding the high level of transparency, if in the Government's view a review of the code would be desirable, then Screenrights would recommend that it be conducted by the Department of Communications and the Arts because they have the greatest expertise and understanding within government on copyright and collecting societies.

RECOMMENDATION 6.1

The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia.

Screenrights rejects this recommendation.

RECOMMENDATION 6.2

The Australian Government should enact the Australian Law Reform Commission recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.

Screenrights supports, in principle, the introduction of a practical working solution for orphan works with two key provisos.

Firstly, the solution should not be open to commercial organisations seeking to exploit works, and secondly, that the provision must be carefully drafted to distinguish between genuinely orphaned works, and works where the copyright owner is no known, but who does not wish to grant a licence.

Screenrights does not necessarily agree that the particular approach in recommendation 6.2 is the best, and proposes that this is a matter on which the Government could usefully seek stakeholder discussions outside the environment of a large enquiry.

RECOMMENDATION 17.1

The Australian Government should promote a coherent and integrated approach to IP policy by:

- establishing and maintaining greater IP policy expertise in the Department of Industry, Innovation and Science
- ensuring the allocation of functions to IP Australia has regard to conflicts arising from IP Australia's role as IP rights administrator and involvement in policy development and advice
- establishing a standing (interdepartmental) IP Policy Group and formal working arrangements to ensure agencies work together within the policy framework outlined in this report. The Group would comprise those departments with responsibility for industrial and creative IP rights, the Treasury, and others as needed, including IP Australia.

Screenrights supports the existing role of the Department of Communications and the Arts in supervising and administering Australian copyright law and policy.

RECOMMENDATION 19.1

The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.

Screenrights supports the submissions of the Australian Film & TV Bodies in opposing this recommendation and calling for a focused and timely review of the safe harbour and related questions.

MORE INFORMATION

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