

14 February 2017

Screen Producers Australia's submission to the Productivity Commission, Intellectual Property Arrangements, Inquiry Report

Screen Producers Australia was formed by the screen industry to represent large and small enterprises across a diverse production slate of feature film, television and interactive content.

As the peak industry and trade body, we consult with a membership of more than 400 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Working Group representatives. Our members employ hundreds of producers, thousands of related practitioners and drive more than \$1.7 billion worth of annual production activity from the independent sector.

On behalf of these businesses we are focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes the opportunity to provide a submission on the additional recommendations in the Productivity Commission's Intellectual Property Arrangements Final Report.

General Comments

Screen Producers Australia maintains its opposition to fair use, the Productivity Commission's "finding" that the term of protection is too long, and the recommendation to make circumvention of geo-blocking technology not an infringement of copyright as set out in our submission to the Productivity Commission's Draft Report.

Put simply, if the Commission's recommendations on copyright were implemented, the Australian film and television sector would go from an internationally renowned industry producing films like *Lion* and *Hacksaw Ridge* and television programs like *The Kettering Incident* and *Glitch*, to a cottage industry overnight. The recommendations relating to fair use, safe harbour and geo-blocking¹ would undermine the international financing and distribution of films and television content and reduce the capacity for content owners in films and television to protect their work online. All this change for what benefit? The Productivity Commission says the benefits derived from these radical changes are "private and non-market".²

Even after dismissing content owner's evidence and accepting uncritically evidence from those groups that seek to undermine copyright protection for their own commercial interests, the Productivity Commission notes that many of the benefits expected to flow from its recommendations on copyright are "private or non-market benefits". These private and non-market benefits are expected to be enjoyed by consumers, large multinational technology companies, educational institutions and libraries at the expense of creators and content owners. Effectively, the Productivity Commission proposes that those who create and invest in content should subsidise those "private and non-market" benefits.

The Productivity Commission makes a startling admission, buried deep in Appendix H:

"While such reforms enhance the welfare of the Australian community overall, non-market benefits do not appear in standard measures of economic output or activity. This does not, however, diminish their importance or value to the community."

We would also like to make some general comments on the conduct of the inquiry.

The Productivity Commission had just twelve months to enquire into all species of intellectual property (copyright, designs, patents, trade marks, plant breeder's rights and circuit layouts). By way of comparison, the Australian Law Reform Commission was afforded 18 months to examine just the exceptions in the Copyright Act. From this perspective of tight timeframes and limited resources, it is perhaps unsurprising that the Productivity Commission cherry picked recommendations from previous reports without new analysis or substantive supporting evidence.

Indeed, the Productivity Commission's approach to evidence tendered by content owners left a lot to be desired. Overall, the Productivity Commission rejected the

¹ <https://www.screenproducers.org.au/assets/Policy-Docs/SPA-Geo-Blocking-FINAL-DEC16.pdf>

² Appendix H, p 691.

evidence and the arguments put forward by content owners, including evidence from PwC, and approved uncritically and unquestioningly the arguments and evidence put forward by big multinational technology companies whose interests align in many ways with the education and library sectors.

The dismissive and needlessly provocative inclusion of the “finding” that the optimal term of copyright protection should be “considerably less” than life + 70 years shows the bias the Productivity Commission maintains against the current regulatory environment. This finding, together with the continued use of the term “user’s rights” demonstrates the Productivity Commission’s attack on the beneficiaries of the property rights afforded by status quo – content owners.

Screen Producers Australia has read the submission from the Australian Copyright Council and generally supports that submission.

Final Recommendation 5.1

The Productivity Commission has proposed amendments to the *Copyright Act 1968* to prohibit contracting out of copyright exceptions and permitting circumvention of technological protection measures for legitimate uses of copyright material.

Contracting out

First, some general comments about contracts and licensing film and television content. Contracts allow consumers and institutional users better access and more certainty than the default provisions of the Copyright Act. Contracts also facilitate international trade across jurisdictions that have different national inflections in their copyright laws.

The Productivity Commission’s recommendations on copyright and contract are inconsistent with Australian Government policy

In 2012, the Attorney-General’s Department conducted a review of contract law. Among other desired outcomes from there review, there was a view to harmonising and internationalising Australian contract law with a view to promoting Australia as the preferred regional forum for settling disputes and international commercial arbitration. The Productivity Commission’s recommendations would result in Australian contract law that is inconsistent with our major trading partners.

Further, the World Intellectual Property Organization is examining the relationship between copyright and contract as it relates to libraries. At the 26th session of the Standing Committee on Copyright and Related Rights in December 2013, the Australian Government said it did not support any treaty that provides for voiding contractual terms:

“While in Australia we have actually concerns raised by our libraries about their ability to negotiate arrangements with publishers, we still do not think that having an international norm in this area is really the appropriate way to approach this issue and as with some other challenging issues we are facing at the moment, we do think this one may be best addressed by the publishing industry, and the libraries coming together to negotiate a practical solution to this particular problem.”³

The Government should not prejudge the outcome of those negotiations, to which the Australian Government is a party.

The Productivity Commission’s recommendations are more expansive compared to previous reports

The Productivity Commission sites the ALRC, the Copyright Law Review Committee and the UK Hargraves Report in support of its recommendations. However, there are significant differences between the recommendations in those reports and the expansive approach adopted by the Productivity Commission in relation to this issue.

For example, the CLRC recommended a graduated approach to contract and copyright where their recommendations only related to some of the exceptions in Copyright Act. The Productivity Commission on the other hand recommends an absolutist approach and wants to extend this contractual prohibition to [all exceptions in the Copyright Act](#). It is important to observe that the CLRC delivered its report in 2002, before Google’s IPO, before Facebook and before the major amendments to the exceptions in the Copyright Act in 2005 and 2006. The CLRC report is a product of its time and does not properly countenance the emergence of digital marketplaces for content and licensing frameworks.

³ Document SCCR/26/3 at para 149. at:

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_26/sccr_26_3.pdf

Also reported at SCCR/23/10 at para 331.

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_10.pdf

The Australian Law Reform Commission in its 2013 report on copyright law exceptions said:

“Generally, removing freedom to contract risks reducing the flexibility of the copyright regime, and the scope to develop new business models for distributing copyright materials.”⁴

Specific technical issues with the recommendation relating to copyright and contract is set out below.

PC does not understand the relationship between contract and copyright law

If a contractual provision purports to “override” an exception in the copyright act and the licensee uses the material within the scope of that exception, the licensee will not infringe copyright, but will breach contract. The situation becomes more complicated when the licensor is not the copyright owner, which is often the case in the distribution of film and television content. This means that the source of the problem is not the Copyright Act. The source of this problem is contract law, for which there is already remedies available under contract law, equity and the Australian Consumer Law.

PC conflates institutional users with individual users

Individual consumers and institutional users (for example educational institutions, libraries and government) have different levels of bargaining power, influence and needs.

For individual consumers, most films and television programs are consumed privately, with an intermediary (for example a broadcaster or SVOD service or a distributor such as iTunes) ultimately providing the film to the consumer, standing between the producer and the consumer. Sometimes a producer will licence directly to the consumer.

In these licences, the consumer is provided a licence to use for their own private use. To the extent that the issue raised by the Productivity Commission relates to any uneven bargaining power between the copyright owner of a film or television program and a consumer, existing law already regulates that relationship. Laws already exist to regulate unfair contract terms in consumer law, these laws are aimed

⁴ Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)*, p 436.

at regulating variable levels of bargaining power between contracting parties. There is no need for further regulation specific to copyright licences.

The effect of the proposal will be an unfair increase in the bargaining position for institutional users of copyright material in negotiating licence fees for access to and use of film and television content. If the Government adopts fair use and includes an illustrative purpose for education, then this, combined with any provision voiding a contractual provision that purports to override an exception, would obviate any need for educational institutions to directly licence with copyright owners. This is unacceptable. This would eliminate an important source of revenue for producers from distribution arrangements, which would expose the independent production sector to great risk.

PC does not understand modern licensing of audiovisual content

The relationship between the owner of copyright in a film or television program and the user may be contractual (in the case of SVOD services) or non-contractual (in the case of linear television). Where the use is contractual, increasingly licences are multi-jurisdictional and more frequently, global. The Productivity Commission's underlying rationale for minimising the level of copyright protection in this country is that Australia is a net importer of content. Where that content is imported into Australia, the choice of law and choice of forum governing the contract will invariably be in the exporting country, not Australia, the importing country.

On this point, the CLRC concluded:

“The Committee observes that agreements the subject of this reference are increasingly likely to be governed by foreign law (as well as subject to the jurisdiction of foreign courts). The Committee notes, in particular, that where the laws of a foreign country govern these agreements, remedies available under Australian law may be of limited relevance.”⁵

The Productivity Commission does not set out how it proposes to deal with contracts for which the choice of applicable law is not Australian.

If adopted this recommendation was implemented, there will be increased uncertainty and increased transaction costs for licensing internationally. As such, it is difficult to understand how effective this proposal is in addressing the problem, which, as outlined above, is the relative bargaining power of the parties.

⁵ CLRC, *Copyright and Contract*, at para 2.07.

Fair use and contracting out

The fourth fair use factor is “the effect of the use upon the potential market for, or value of, the copyright material”. If the provision voiding contracts that seek to limit the applicability of fair use were adopted, this fourth limb of the fair use consideration would be useless. If a copyright owner cannot establish a market for their work through licensing because of the provision that voids the potential for that licence, then this limb is theoretically redundant. If the limb is redundant, then this makes the productivity commission’s proposed fair use even more inconsistent with the three-step test.

Technological Protection Measures (TPMs)

Specific technical issues with the recommendation relating to TPMs is set out below.

The PC does not understand what a TPM is

The PC accepted the very brief submissions of the ADA on TPMs uncontested. With respect, the ADA’s submissions do not set out the entire framework of TPMs in the Copyright Act.

A TPM provides legal protection only if it is used in the exercise of copyright, that is, in the exercise of one of the rights of the copyright owner. A TPM will not provide legal protection where the thing is not protected by copyright (e.g. a pair of shoes) or if the proposed use is not a right of the copyright owner (e.g. using a credit card to purchase a film) or if the work had been protected but is not now because it is too old. Further, region coding on DVDs is not a TPM. The prohibition on the circumvention of TPMs is not absolute.

Moreover, there are many exceptions to this prohibition on the circumvention of TPMs, the most obvious one is permission – the copyright owner may provide permission to a user to circumvent the TPM. It is open to a user to seek permission (and presumably, the tools to unlock the TPM) from the copyright owner.

TPMs are hugely important in the digital environment to give effect to licensing conditions. For example, a SVOD service might licence a film from a producer. Part of that licence between the streaming service and the copyright owner will contain obligations on the streaming service that it will adopt measures to limit the potential for unauthorised use of the content by subscribers and third parties or prevent downloads. The streaming service will give effect to this obligation by using a TPM. If a consumer could then circumvent the TPM for an ill-defined “legitimate purpose”

then it would undermine the value of the licence between the SVOD service and the producer.

The PC recommendation conflates individual users with institutional users

The PC proposes to permit consumers to circumvent TPMs for legitimate uses of copyright material. It is not clear what the PC deems to be “legitimate” uses of copyright material nor why the PC limited its recommendation to consumers when the preceding discussion was predicated on a submission from the Australian Digital Alliance which represents large multinational technology companies and large institutional users of copyright material.

The PC does not countenance the international framework that protects TPMs

Australia has international obligations under the WIPO Copyright Treaty, The WIPO Performances and Phonograms Treaty and the Australia-United States Free Trade Agreement to provide effective protection for TPMs. Under the Australia-United States Free Trade Agreement, to vary, remove or create additional exceptions to the prohibition on the circumvention of TPMs, Australia must undertake an administrative review and provide interested stakeholders with the opportunity to propose variations or removal of existing TPM exceptions or to propose new exceptions. The Attorney-General’s Department sought submissions in 2012 to give effect to this process.

Australia would be in breach of its international obligations and its obligations to the United States Government if it were to permit consumers to circumvent TPMs for “legitimate” uses of copyright material.

Final Recommendation 5.5

The Productivity Commission has proposed the Australian Competition and Consumer Commission review the voluntary Code of Conduct for Copyright Collecting Societies.

We have read the submission from Screenrights and support that submission with regard to recommendation 5.4.

Final Recommendation 6.1

The Productivity Commission has endorsed the Australian Law Reform Commission's recommendation to limit the liability for the use of orphan works, rather than include this as an element of any fair use exception.

We have read the submission from the Australian Copyright Council and support that submission with regard to recommendation 6.1.

Final Recommendations 17.1, 17.2, 18.1, 18.2

The Productivity Commission has proposed changes to the Australian Government's approach to IP policy, both domestically and internationally.

We have read the submission from the Australian Copyright Council and support that submission with regard to recommendations 17.1, 17.2, 18.1, 18.2.

Final Recommendation 19.2

The Productivity Commission has proposed changes to the Federal Circuit Court, to improve access to enforcement.

We have read the submission from the Australian Copyright Council and support that submission with regard to recommendation 19.2.