australian screen association

HARPER REVIEW DRAFT REPORT

SUBMISSION BY THE AUSTRALIAN SCREEN ASSOCIATION

November 2014

Executive summary

1. The Australian Screen Association (**ASA**) provides this submission in response to the Draft Report released by the Harper Panel on 22 September 2014 (the **Draft Report**) as part of the Competition Policy Review.

2. The ASA was established in January 2004 by the Motion Picture Association (**MPA**[1]) to advance the business and art of filmmaking and to protect the film industry in Australia from the adverse effects of audio-visual copyright theft. One of the ASA's principal objectives is to work closely with industry, government, law enforcement and educational institutions in Australia to address copyright theft and protect the interests of the film and television industry and Australian movie fans. The ASA is affiliated with MPA offices around the world and is charged with the monitoring, investigation and reporting of incidents of movie counterfeiting and unauthorized copying of copyright and trademark films, often referred to by the generic term 'movie piracy'. The members of the ASA are Australian subsidiaries the international producers and distributors of filmed entertainment represented by MPA as well as Village Roadshow Australia.

3. The ASA and its members strongly support the central premise of the Draft Report that enhancing competition in the Australian economy is an important objective. For its part, the film industry has undergone rapid changes in response to the challenges and opportunities of new technologies and the online ecosystem. The ASA's overarching submission is that the current intellectual property framework in Australia is pro-competition and has been able to embrace the opportunities and challenges of an increasingly digital market. The available evidence – the development of numerous sources of legitimate content online[2] - is overwhelmingly in support of this conclusion.

4. In light of this, ASA makes this limited submission in response to Recommendations 8 and 9 of the Draft Report. The ASA submits to the Harper

[1] MPA represents the interests of six international producers and distributors of filmed entertainment including Walt Disney Studio Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros Entertainment Inc.

[2] http://digitalcontentguide.com.au/

Panel that Section 51(3) of the Competition and Consumer Act (**CCA**) should not be repealed and that the restrictions on parallel imports should not be removed.

Draft recommendation 8 – s 51(3)

5. The Draft Report contains a recommendation that subsection 51(3) of the CCA be repealed. It is unfortunate that there is no empirical analysis or research identified in the Draft Report relied on to support the need for repeal. Instead, reference is made to a submission by the ACCC in relation to the impact of the digital environment on the interaction of competition law and intellectual property rights.[3] The Draft Report appears to rely on this submission as indicating that "copyright materials are increasingly used as intermediate inputs and this increases the potential for copyright to have anti-competitive effects". No examples are given nor any research or empirical basis identified. The Draft Report appears to base its recommendation on nothing more than the observation that "IP rights, like all property rights, *can potentially* be used in a manner that harms competition" (emphasis added).[4]

6. However, this observation is completely opaque. Although the evolving digital environment has altered the way that intellectual property rights are distributed, by increasing the channels through which they can be exercised, there is no evidence to suggest that this is having anti-competitive effects. Persistent references to the "potential" for these effects, highlights that the case for repeal is weak. Any concern about the potential for anti-competitive effects is already accommodated in Section 51(3) of the CCA. The section provides a limited exemption for *licences and assignments* that 'relate to' copyright and other forms of intellectual property from a number of the prohibitions under the CCA. It does not extend to or excuse a misuse of market power based on the exercise of IP rights. Misuse of market power in relation to IP rights remains subject to the operation of s46 of the CCA.

7. Indeed, while the digital environment provides new opportunities for copyright owners and licensees to commercialise their copyright, it also provides increased challenges for copyright owners attempting to compete in a digital market where copyright infringers are able to make available, electronically transmit and copy copyright works and other subject matter online for free. In that environment, the protection of intellectual property rights becomes more, not less important, and the need to be able to structure the licensing and assignment of intellectual property is vital to effective enforcement and protection online.

[3] Draft Report at p 84.
[4] Draft Report at p 86.

8. Intellectual property exploitation necessarily operates through the granting of licences. In the online environment, audio-visual services rely on licences to establish the boundaries for permissible use of content by consumers. They enable options to download, stream or "rent" content at different price points appealing to different parts of the market. It is difficult to see how, and the Draft Report does not explain how, these forms of licensing mechanisms could be anti-competitive. They are pro-competitive, by providing different competing services to consumers which benefit consumers, intellectual property owners and third party suppliers of these services.

9. Sitting behind these offerings are frequently a range of other licenses, some of which are exclusive. The Copyright Act regulates such mechanisms. It also provides particular advantages to the recipients of exclusive licences, both in terms of enforcement and remedies.[5] None of these are referred to in the Draft Report or appear to have been brought to the attention of the Harper Panel. It would be counter-productive to the existing regime of commercialisation of intellectual property rights to remove s 51(3), which allows rights holders to exercise their rights without the fear of those licences being subjected to a competition test.

10. It is also difficult to reconcile the position taken by the Draft Report with Australian and international experience. Australia's strong intellectual property market and digital economy has developed with the exemption in place and its presence has not hindered the emergence of the Australian market. Even the ACCC acknowledges that in the vast majority of cases the granting of an IP right will not raise significant competition concerns.[6] There are many more global and domestic factors that have a greater impact on Australia's competitiveness in the intellectual property space.

11. The ASA notes that is not the first time that the future of s 51(3) has been considered. As identified in Box 8.4 in the Draft Report, the interaction of intellectual property and competition law has been the focus of reform across a host of reviews. The history of attempted reform is relevant to the discussion here, not to support the case for repeal of s 51(3), but the case for maintaining it.

12. In 1999 the National Competition Council (**NCC**) conducted a detailed review of s 51(2) and s 51(3) of the *Trade Practices Act 1974* (Cth) (as it then was), and recommended amendments to s 51(3) to remove price and quantity restrictions and horizontal arrangements from the exemption. It recommended that the ACCC

[5] Eg. Div 3, Copyright Act under which exclusive licensees have rights to bring actions in their name.
[6] http://www.accc.gov.au/system/files/Harper%20Review%20-%20Issues%20Paper%20%20ACCC%20Submission%20-%20FINAL%20%28for%20website%29%20-%2025%20June%202014%20%282%29.pdf

formulate guidelines to assist industry to understand s 51(3), rather than repeal. In 2000, the Ergas Committee acknowledged that intellectual property falls into a different category from other rights and should have special treatment under the competition law. Amendments were recommended rather than repeal of s 51(3).

Draft recommendation 9 – parallel imports

13. In response to Recommendation 9, the remaining restrictions on parallel importation exist because they are supported by sound policy objectives. Importantly, the restriction on parallel importation of copyright material exists to serve the geographical licensing arrangements that must exist in order to enforce exclusive rights of copyright holders. The significance of this and the geographic role of exploitation and enforcement of copyright receives no serious analysis in the Draft Report. It is fundamental to the system of copyright law in Australia.

14. As submitted by APRA and AMCOS,[7] copyright has a fundamentally different character to other commodities. It is a property right not merely a product; failing to appreciate the distinction obscures the fundamental difference between legitimate exploitation of a property right and control of product distribution. Copyright has territorial properties that set it apart from other goods and services, which are not characterised by reference to geography. These territorial considerations must also apply to digital content that belongs to copyright owners as licenses are exclusive. The policy objectives served by the existing copyright regime and its limitations on permissible parallel importation would be frustrated if the recommendation was accepted.

15. It is unfortunate that draft Recommendation 9 seeks to reverse the onus of justifying the existing copyright regime by suggesting that the remaining restrictions on parallel importation are to be removed unless they are in the public interest *and* the objectives of the restrictions can only be achieved by restricting competition.[8] This avoids facing the difficult issue of trying to identify the empirical basis for removing all parallel importation restrictions. It is not a sound or compelling basis for calling for law reform, particularly where the evidence of deficiencies in the current regime cannot be identified.

16. The ASA otherwise refers to and supports the submissions of the Australian Copyright Council, Australian Publishers' Association, Book Industry Strategy

[7] http://competitionpolicyreview.gov.au/files/2014/06/APRAL_AMCOS.pdf
[8] http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf

Group and the Book Industry Collaborative Council to the Harper Review Issues Paper in relation to the proposed amendments to the parallel import restrictions.[9]

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[9] See, for example;
http://competitionpolicyreview.gov.au/files/2014/06/ACC.pdf
http://www.industry.gov.au/industry/booksandprinting/BookIndustryStrategyGroup/Pages/Library%20Card/BISGFinal
Report.aspx and
http://www.industry.gov.au/industry/booksandprinting/BookIndustryCollaborativeCouncil/Pages/default.aspx