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EXECUTIVE VICE PRESIDENT

To the Executive Director:

The Motion Picture Association of America (MPAA) appreciates this opportunity to comment on the ALRC Discussion Paper on “Copyright and the Digital Economy” (Discussion Paper). Although the Discussion Paper addresses a host of important copyright policy issues of concern to our industry, this submission does not attempt a comprehensive critique, but instead focuses on a few issues of overarching concern.

At the outset, MPAA notes its disappointment that the Discussion Paper largely fails to take into account the impact of its recommendations on the serious and growing problem of online copyright infringement in Australia. As we noted in our November 2012 submission on the ALRC’s initial Issues Paper, every proposal to create new copyright exceptions, or to expand existing ones substantially, needs to be evaluated in terms of its likely impact on widespread infringement in the digital networked environment. The Discussion Paper contains plenty of proposed new exceptions, but scant consideration about how they could make the online infringement problem worse. To give just one example: to enact a provision defining “private and domestic use” of copyright materials as fair dealing, or to define such use as one “illustrative” of a new fair use exception, will undoubtedly register in the public mind as a policy conclusion that infringements are excused if they take place at home or in a domestic environment. In that context, businesses that cater to facilitating such infringements will be normalized in the public eye. This is precisely what occurred with illicit file sharing services in the recent past. Giving incentives (even if inadvertently) for the development and growth of such parasitic business models, which prosper by misappropriating the creativity of others, is exactly the opposite of what the Copyright Act should seek to accomplish. MPAA urges that the Discussion Paper recommendations be reconsidered with their likely impact on widespread online infringement in mind.

I. Chapter 4 – Fair Use

In its comments on ALRC’s initial Issues Paper, MPAA noted that its member companies operate successfully both in the United States, the leading jurisdiction applying the fair use doctrine, and in the many other markets which do not. Both types of systems are capable of providing balanced, workable and practical approaches to the issue of exceptions and limitations to copyright, and both can provide supportive environments for creators and for legitimate users of copyright material alike. However, MPAA did flag several significant challenges Australia would face if it chose to move now to adopt fair use as the main rubric under which the exceptions and limitations to exclusive rights would be delineated.

In its Discussion Paper, ALRC recommends precisely that move: to substitute for many of the existing exceptions and statutory licenses in the *Copyright Act 1968* (Cth), including those for fair dealing, a single fair use provision. This provision would incorporate almost verbatim from U.S. law the “fairness factors” that courts would be directed to take into account, and would include a list of illustrative examples – much more extensive than those provided either in the U.S. statute or in settled U.S. case law – of activities that, while not conclusively or even presumptively constituting fair uses, would be deemed “more likely to be fair than a use which does not fall into ... any ... illustrative purpose category.” Discussion Paper, Para. 13.60.¹ Having reviewed this recommendation, as well as the Discussion Paper’s analysis of the comments of MPAA and others on these points, we do not believe that the concerns identified have been satisfactorily addressed.

The Discussion Paper summarizes four benefits that at least some stakeholders believe would accrue to Australian society were it to abandon its long-standing legal traditions and switch instead to the fair use model: flexibility of the law; encouragement of innovation; restoring balance to the copyright system; and meeting consumer expectations. Paras. 4.34-4.56. As a threshold matter, other than creating “flexibility,” the case for these asserted benefits is weak at best. Notably, with regard to encouraging innovation, the arguments for fair use as summarized in the Discussion Paper seem almost wholly speculative. For example, a leading study apparently identifies a problem with “fear of failure” for start-ups in Australia, and contrasts it unfavorably with the environment for innovation in two other economies: one whose law incorporates fair use (the U.S.) and one which does not (Canada). Para. 4.30. This study “did not suggest any particular changes to copyright law” to remedy this problem. *Id.*, fn. 28. This is certainly weak evidence of the asserted power of fair use to cure “fear of failure” and promote innovation. Furthermore, all these arguments seem to view “innovation” through a very narrow lens, concentrating exclusively on businesses built on new ways of exploiting the creative works of others, without authorization. There is no clear reason why this small subset of the broad range of start-up business models should be privileged over the innovation which logically flows from providing strong incentives, through well-defined exclusive rights, for the creation and dissemination of new creative works of all kinds. On the whole, the ALRC’s conclusion that “the enactment of fair use would foster an entrepreneurial culture” in Australia, para. 4.97, seems unsupported at best.

¹ All paragraph citations are to the Discussion Paper.

Nor is the evidence compelling that there is a need to “restore balance to the copyright system.” As the World Intellectual Property Organization has noted, the 10.3% contribution of Australian copyright industries to the national economy is among the highest such proportions in the world, and its 8% contribution to the national workforce is also significant and comparable to the U.S. figure.² Moreover, Australians today have more access to more creative works, at more price points, accessible via more devices, than at any time in history. At the same time, Australians enjoy the benefits of an open and vibrant Internet ecosystem, including extensive use of social media and online user-generated video content platforms. This is hardly evidence of imbalance.

But even if all the positive results listed in the Discussion Paper could somehow be causally linked to a switch to a new fair use standard, it would not be the codification in the law of certain “magic words” copied from the law of another country that would achieve these results. MPAA noted in its earlier comments the critical importance of the specific U.S. judicial precedents that have evolved over nearly two centuries of common law development. It is only on the basis of this body of judicial precedents that the fair use doctrine can be said to have had any impact on the U.S. economy and society; and the same would be true in Australia. But the ALRC proposal does not include that body of fair use law.

Certainly in the United States, the dramatic changes in fair use jurisprudence that have taken place just in the past 35 years, from the time that a statutory provision on the subject first took effect in 1978, have not been due to any changes in the statute, which has remained virtually unchanged since that time. In the early years after codification of the U.S. fair use doctrine, a copyright practitioner in the United States would have felt comfortable advising his client, for example, that uses that involve copying an entire work were unlikely to be considered fair use, or that commercial uses of copyrighted materials were presumptively unfair. Both these “rules of thumb” were later obliterated, not by any change in the words of the statute, but by decisions of the U.S. Supreme Court, which have been elaborated upon by numerous subsequent decisions that interpret the statute and apply it to specific factual situations. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) (time-shifting of broadcast television program is fair use although complete work copied); *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (parodic copying fair use though commercial). Furthermore, the concept of “transformative use,” which has come to play a dominant role in judicial decisions about fair use in the past two decades, is not even mentioned in the U.S. statute. Thus the role of evolving U.S. jurisprudence on the fair use doctrine as it would be applied in Australia is an inescapable question.

To its credit, the Discussion Paper does not avoid this question; but its analysis of it is ultimately unpersuasive. It notes that “US fair use and English and Australian fair dealing share the same common legal sources.” Para. 4.133. It notes that the “proposed fairness factors derive from the same body of case law upon which the US doctrine developed.” Para. 4.134. It refers to positive statements made by the Australian government about “the harmonization of Australian intellectual property law with that of the US in the context of the AUSFTA.” Para. 4.135. It states that “Australian courts would be able to have regard to extensive US jurisprudence” in

² See WIPO, WIPO Studies on the Economic Contribution of the Copyright Industries (2012), available via http://www.wipo.int/ip-development/en/creative_industry/economic_contribution.html.

applying the “fairness factors” that would be lifted verbatim from the U.S. Copyright Act. Para. 4.155. Many proponents of importing fair use into Australia seem to think that this would include drawing on U.S. jurisprudence. Para. 4.179-80.

Based on all these arguments, the Discussion Paper seems to be taking the path of recommending that Australian courts take on board wholesale, and accept to be bound by, the judicial precedents that have been developed in the U.S. courts, and that really constitute the fair use doctrine as we know it. But at the last moment, the Discussion Paper veers off this course, opining that “an express statement about the extent to which US or other countries’ jurisprudence should be taken into account by Australia courts is unnecessary,” and that U.S. case law would be merely “one source of interpretative guidance.” Para. 4.182.

Proponents of moving fair use into Australian law simply cannot have it both ways. If they are persuaded that the fair use doctrine has delivered to U.S. society and economy the enormous benefits that some ascribe to it, then it seems implausible that these benefits could successfully cross the Pacific unless Australia agreed to substitute for its prior copyright jurisprudence on limitations and exceptions (most of which derive from statutory provisions that the Discussion Paper recommends be repealed) the precedents established by U.S. courts. Conversely, if Australia treats U.S. precedents as just “one source of interpretative guidance,” then even if it changed the words of its statute, it would not be importing the fair use system that has assertedly been so successful in promoting innovation in the U.S. It would be discarding its law in favor of something new, unpredictable, and uncertain.

This was the second concern raised by MPAA in its comments on the initial Issues Paper: whether implanting fair use into the Australian copyright law would create a deleterious level of unpredictability for copyright owners, copyright users, and the public. The Discussion Paper asserts that it would not, but the strength of this conclusion is undercut by its dubious premise: that the law in Australia and in the U.S. would be “substantially the same” after enactment of the changes the ALRC recommends, so that the fair use factors would be “easily understood,” at least by users of copyright material, and by “academics and students.” Para. 4.155. As discussed above, in fact the fair use doctrines of the two countries would not be “substantially the same” even if the words of their statutes were identical. The relative confidence with which copyright owners and users can function within the fair use environment in the United States is because of the way that the courts, over nearly two centuries, have developed and (after codification) elaborated on the main factors to be considered, how they are to be balanced and weighed in particular cases, what presumptions ought to apply, and so forth. In the absence of this anchor of case precedent, Australian importation of fair use into its statute could set investors adrift on a sea of legal uncertainty, slowing the pace of innovation for start-ups involved in the creation, dissemination and use of copyright works.

The third concern which MPAA urged the ALRC to take into account is the impact on existing licensing practices. As MPAA noted in its comments on the initial Issues Paper, the ALRC’s approach to copyright law reform ought to reflect the paramount importance of voluntary licensing in the exploitation of copyright works. More broadly, one important aspect of evaluating a proposed change to copyright law should be its impact on incentives to enter into

voluntary licensing arrangements, on the development of market-based best practices, and on other means of letting markets – rather than government agencies, courts, or similar bodies – dictate the terms on which those who have not created or published original works are empowered to exploit them.

We agree with the Discussion Paper that “guidelines developed by peak bodies, industry protocols, and internal procedures and documentation” can all play a positive role in promoting the goals of the copyright law. Para. 4.129. We also agree that “the capacity for business to influence the terms on which licensing can take place,” and “allow[ing] room for industry practice,” can make significant contributions to those goals. Para. 4.115. However, we fail to see any evidence that, in order for these desirable market developments to occur, Australia must abandon its current approach and switch to a broad new fair use exception. To the contrary, and especially to the extent that the change is viewed by its proponents as a means of expanding the scope of free-use exceptions, we see a significant risk that licensees would, in effect, turn their back on the market. Instead of negotiating the boundaries of permissible use and enshrining these rules in licenses, they would have strong incentives simply to make the uses they believe conform to the new “principles-based” fair use provisions, forcing right holders to resort to expensive litigation in order to achieve a definitive resolution that today can and does result from licensing.

In short, we urge the ALRC to consider further whether its proposal to implant a broad version of fair use into Australian law would encourage users of copyright materials to flee from markets to courts as the practical adjudicator of whether their activities are authorized. The resulting disruption of Australian markets would, we submit, be a step in the wrong direction.

II. Chapter 9 – Private and Domestic Use

While this brief submission cannot address each of the uses for which ALRC recommends inclusion as an “illustrative use” for purposes of fair use analysis – or, alternatively, as a new free-standing fair dealing exception – MPAA wishes to offer specific comments on the proposal for such treatment for “private and domestic uses” of copyright works. See generally Chapter 9 of the Discussion Paper.

The stated purpose of this exception is to replace the current time shifting exception. However, the proposed private and domestic use exception not only goes much further than time-shifting, it would detract from legitimate and valuable proprietary rights of content owners.

Private and domestic use is a very broad and ill-defined concept. Many dealings with copyright works now take place in a domestic setting, and the business models of MPAA member companies and many other copyright-dependent industries are increasingly focused on licensing consumers to make those uses. Indeed, for many sectors, licensing in-home entertainment uses is a core element of the business. The concept of a private and domestic use exception to the exclusive rights on which such business models are based creates significant uncertainty and a high likelihood of erosion of important proprietary rights.

It is also likely that the introduction of a private and domestic use exception will be misinterpreted by members of the public who have already proven susceptible to misreadings of the law that justify infringing activities. The distinction that only some types of private uses are allowed and only under certain conditions (i.e., uses that meet the fairness factors and under the conditions in the statute) is unlikely to be appreciated by the everyday consumer. Certainly, an individual consumer is likely to misunderstand the limits placed by the impact on the market factor, since an individual consumer is likely to consider the impact of his individual use, not the cumulative impact on the market if every consumer were to do the same. Indeed, it is easy to imagine that someone knowingly downloading pirated content in her own home would assume that a newly-created “private use” exception would apply to that activity, as incorrect as this may be. This eminently foreseeable communication problem would contribute to an already problematic culture of piracy.

Another foreseeable result of a new private and domestic use exception would be the encouragement of new businesses built around trying to exploit the exception. U.S. copyright industries are familiar with many examples of parasitic businesses seeking to exploit copyright works without authorization, relying in great part on sometimes specious claims that the exploitation is carried out by their customers, not by the business, and that the customer’s activities are sheltered by fair use. Even a slim chance of success in litigation justifies such businesses to take the risk of relying on such perceived loopholes, since business models that involve the distribution of content without the inconvenience of having to pay for it are highly lucrative. Again, to open wide the door to this scenario in Australia would erode legitimate proprietary rights, foster uncertainty throughout the market, and impose heavy litigation costs to set things right

Finally, it is worth noting that in the U.S. “fair use” regime that has been so influential to the Discussion Paper, there is no general “private use” or “private copying” exception, because courts have recognized that such a broad exception would not be consistent in many cases with the “fair use” analysis.

The movie and television industry has developed business models to meet and exceed consumer demands, and it continues to innovate. There is already heavy investment in a variety of services that provide content wherever and whenever consumers wish, at a variety of price points. As stated by the Australian Copyright Council and in other submissions to the Issues Paper,³ such business models, and the rapidity of innovation in this space, call into question any rationale for a new private and domestic use exception.

III. Chapter 12: Orphan Works

In general, MPAA supports the Discussion Paper’s approach to orphan works and its proposals for reform. In particular, MPAA applauds ALRC’s proposal of a limitation on remedies rather than creating a new exception to copyright, and its recognition that the definition of a reasonably diligent search will naturally evolve over time. These comments are not intended as a comprehensive discussion of MPAA’s views on orphan works, but rather will focus on a

³ As cited at paragraph 9.52 of the Discussion Paper.

few broad themes that we believe should be central to any further discussion regarding amendment to the *Copyright Act 1968* (Cth) on this topic. MPAA would welcome the chance to participate in stakeholder discussions and to submit further comments if and when such an orphan works amendment is developed.

A. Scope of the Orphan Works Problem

The Discussion Paper describes orphan works as “copyright material where an owner cannot be identified or located by someone wishing to obtain rights to use the work.” Para. 12.5. MPAA recommends that any definition of orphan works clarify that a work is only an “orphan” if the rights holder cannot be identified or located after the person seeking to use the material has made at least a “reasonably diligent search.”⁴ A true inability to locate the author or copyright owner is the critical issue in defining an orphan work.

MPAA strongly suggests that the primary focus of any solution to the orphan works problem should be to reduce the population of the copyright “orphanage.” Making it easier to identify and locate copyright owners will reduce the number of works that can properly be defined as “orphans” for which special treatment may be needed. Many resources are currently available to help prospective users to identify and locate copyright owners, and they are becoming more prevalent and more robust. The priority should be to encourage the use of these tools, and the creation of new resources to link copyright owners and potential users so that they can license desired uses of works. The goal should be to reduce the frequency of situations in which copyright owners cannot be identified or located, as well as to facilitate uses in situations where the copyright owners legitimately cannot be found.

Many tools and databases exist to help identify and locate copyright owners, and these resources are increasingly online and searchable. MPAA would like to take this opportunity to highlight the records of the U.S. Copyright Office. As a result of the unique way in which the United States’ copyright system developed, the U.S. Copyright Office maintains rich databases of records for copyrighted works from around the world. These include records of initial copyright authorship, ownership, title of works, date and country of creation and/or publication, and, where undertaken, recorded assignments, transfers, new corporate (owner) names and other related materials. The records are accessible to the general public, for free, and are by no means limited to U.S. works.⁵ Indeed, there were 58,452 foreign (non-U.S.) authors who registered

⁴ MPA notes that if an owner can be identified and located, but chooses not to respond to a request for a license, the work is not an orphan work. To the extent such works were included in the National Library of Australia’s estimate of the number of orphan works in its collection, MPA disagrees with the numbers arrived at by that survey. *See* Para. 12.7, fn. 3.

⁵ Although, since the U.S. joined the Berne Convention in 1989, non-U.S. copyright owners have not been required to register with the Copyright Office in order to enforce their rights, U.S. law retains strong incentives for them to do so, including the requirement of timely registration in order to claim the important remedies for infringement of statutory damages and attorneys’ fees. 17 U.S.C. 412.

works at the Copyright Office in Fiscal Year 2011 (the last year of complete statistics).⁶ Further, most of these records are available online, and the Copyright Office is in the process of digitizing its historical records and improving the accuracy and searchability of all its public databases. Indeed, MPAA believes that few commercially released motion pictures could qualify as orphan works, because use of the Copyright Office's registration and recordation systems has long been routine in the motion picture industry; all major motion pictures are registered with the U.S. Copyright Office, regardless of their country of authorship.⁷ MPAA advises that nearly any diligent search by an Australian user for a copyright owner would likely include consultation of the U.S. Copyright Office registration records.

Considerable progress has been made over the past few years in the development of other publicly accessible registries and databases consisting of information about works, authors, copyright owners and related data that could make it significantly faster, cheaper, and easier to identify copyright owners in a wide range of works. For example, in the motion picture sector alone such resources include CINEFILES, provided online by the UC Berkeley Art Museum and Pacific Film Archive and consulted over 100,000 times a year (<http://www/mip/berkeley.edu/cinefiles>); the Media History Digital Library, which makes available classic media periodicals that include considerable information about film titles, producers, and copyright owners (<http://mediahistoryproject.org/>); and the *Field Guide to Sponsored Films*, which is now available online and contains detailed descriptive entries with production credits for hundreds of films made prior to 1980 to sell products, train employees, and argue social causes, and which is very useful for documentary film makers. Other initiatives that may help shrink the population of the copyright orphanage include the Global Repertoire Database (www.globalrepertoire.com) for musical works; ARROW (Accessible Registries of Rights Information and Orphan Works, www.arrow-net.eu), which includes tools for discovering rightsholders and facilitating rights clearance for out-of-print works; PLUS Registry (www.plusregistry.org) for images; and Linked Content Coalition (www.linkedcontentcoalition.org), which aims to provide standardized communications protocols so that registries such as those listed above can be interoperable.

We expect that any diligent search would include these tools, in addition to resources for locating and contacting the individuals or companies identified as copyright owners, such as public records, genealogical records, and commercial databases. Such records are likewise increasingly online and digitized, making them dramatically more accessible than they were in the past. As the Discussion Paper notes, search technology and the availability of databases may continue to change rapidly. Para. 12.72. Encouraging copyright owners and potential licensees to use these resources, and promoting the development of increasingly accessible and comprehensive databases, will likely do much to reduce the scope of works identified as "orphans."

⁶ Official Copyright Office statistics obtained in a teleconference with the Public Information Office, July 15, 2013.

⁷ With regard to films, the copyright orphanage might still include some non-commercial independent titles, avant garde or experimental films, and home movies, for example.

B. Reasonably Diligent Search

MPAA shares ALRC's view that "what amounts to a diligent search in 2013 may not be sufficiently diligent in 2023." Para. 12.73. Because what constitutes a reasonably diligent search will necessarily change over time as new resources and new technologies become available, MPAA supports ALRC's proposal that orphan works legislation should not set forth exhaustive requirements for a diligent search.

MPAA generally supports inclusion in the legislation of factors for consideration to guide courts, and potential users, in what constitutes a reasonably diligent search. The factors proposed by ALRC – (a) how and by whom⁸ the search was conducted; (b) the search technologies, databases and registers available at the time; and (c) any guidelines or industry practices about conducting diligent searches available at the time – provide a good starting point for evaluating a search. Para. 12.3. MPAA believes the emphasis must be on the actual search performed, and agrees that it would be reasonable to require a user who has conducted a reasonably diligent search to retain records of the search. *See* Para. 12.69. The diligent search requirement should provide an incentive for potential users of work to utilize existing search tools to find copyright owners in order to negotiate for a license.

MPAA disagrees with the suggestion that "in some instances it may not be possible to do a 'diligent search.'" Para. 12.75.⁹ The scale of a mass digitization project should not serve as justification for a less diligent search requirement. This would mean that a copyright owner's rights were diminished simply because a potential user of the work included it in a large group with other works. For large commercial companies that seek to engage in mass digitization, the interest in deriving a profit from use of the works belies the argument that it is economically unfeasible to conduct a reasonably diligent search. MPAA does not support development of an extended collective licensing scheme for commercial mass digitization projects, as the aim of an orphan works solution should be to facilitate, as much as possible, market-based licensing of copyrighted materials. This is in keeping with the general recognition of copyright as a form of property and two of the Framing Principles for Reform set forth in the Discussion Paper: acknowledging and respecting authorship and creation (Principle 1), and maintaining incentives for creation of works and other subject matter (Principle 2).

C. Limitation on Remedies is the Proper Approach

MPAA agrees with ALRC that a limitation on remedies, rather than creation of a new exception to the exclusive rights of copyright owners, is the best solution for those remaining cases where, after a diligent search, the copyright owner truly cannot be identified or located. Structuring orphan works status as a remedial limitation to a copyright claim creates a more efficient, market-oriented, and meaningful solution to the orphan works problem than can be

⁸ Whether the expected *use* of the work is commercial or non-commercial should not change the parameters of a reasonably diligent search. Even if a particular use is non-commercial, it can have effects on the commercial market for the work.

⁹ It is impossible to know whether a mass digitization project in fact includes "thousands of orphan works" (as the Discussion Paper references in para. 12.75) before performing a diligent search, as the very definition of an orphan work is one for which the author cannot be identified or located *after* a reasonably diligent search.

gained from a construct which imposes limitations on a (possibly unaware) copyright owner's rights. The incentive, after all, should be to find the author or copyright owner, rather than simply to use the work without permission. Of course, any limitation on remedies should be without prejudice to other exceptions that may entirely excuse a given use of the work.

The exact parameters of such a limitation on remedies for use of works that seemed to be orphans will need to be carefully considered, should such legislation go forward. We would welcome the chance to join in later discussions to determine the most effective and fair way to structure a limitation of remedies for use of apparent orphan works.

IV. Chapter 15: Retransmission of broadcasts, including over the Internet

Chapter 15 of the Discussion Paper presents two options for reform of the Copyright Act provisions governing retransmissions of free-to-air broadcasts. MPAA strongly favors Option 1, under which all the "free-use exceptions" and statutory licenses applicable to this activity would be repealed. As the Discussion Paper puts it, "this would effectively leave the extent to which retransmission occurs entirely to negotiation between [sic] the parties – broadcasters, retransmitters and underlying copyright holders." Para. 15.4. From MPAA's perspective, as representative of the "underlying copyright holders" in much of the most commercially valuable content that is currently subject to retransmission in Australia without the copyright holder's consent, this is exactly where issues surrounding retransmission should be "left" – to marketplace negotiations about the terms and conditions under which copyright owners will license the exercise of their exclusive right to control communication of their works to the public, including through the medium of retransmission of free-to-air broadcasts containing those works.

No matter how fairly or efficiently they are administered, statutory licenses inevitably harm copyright owners by limiting their control over their works and denying them the market level of compensation for their exploitation. As such, even when applicable international norms would permit governments to cut back on exclusive rights and substitute a system of equitable remuneration, sound policy dictates that they be avoided or strictly limited to situations in which there is a demonstrable market failure. Whatever the case may have been when the statutory licenses for retransmissions were first introduced into Australian law, no credible evidence of such market failure exists today. Where the market is not distorted by the presence of statutory licensing, a robust system of voluntary private licensing underpins the delivery of audio-visual content to consumers in markets around the world, including through forms of retransmission that are now subject to compulsory licensing in Australia.

As the Discussion Paper indicates, the most credible initial justifications for depriving copyright owners of their exclusive rights over public communication of their works no longer apply. Statutory licensing may have been "originally intended to provide for the distribution of free-to-air broadcasts to areas which did not receive adequate reception," and "to assist in the early development of subscription television and to ensure competition in content provision across media platforms." Paras. 15.42, 15.46. But statutory licensing no longer advances those purposes, if it ever did. Rather, its net impact is anti-competitive and anti-consumer, because it subsidizes one form of public communication by allowing subscription television providers to

benefit from below-market rates for use of copyright materials in retransmission of broadcasts. *See* para. 15.47. The system thus disadvantages innovative new methods of dissemination, which must pay market prices for the content they exploit, ultimately depriving the public of new options for enjoying this content. In the Discussion Paper’s terms, “the interest in promoting fair access to and wide dissemination of content ... is no longer best served by the retransmission scheme.” Para. 15.41.¹⁰

That interest would be best served by enabling copyright owners, broadcasters and retransmitters to develop the appropriate transactional framework for such dissemination in a free market environment. Such private licensing is already working effectively in many markets for scores of new distribution channels for audio-visual content, including over the Internet. MPAA knows of no reason why it would not deliver the same benefits in Australia. While the particular forms that this transactional framework will take cannot be predicted with certainty, the availability of a wide range of market resolutions – including individual direct licensing, collective licensing, sublicensing by broadcasters, and other creative approaches – increases the likelihood of a positive result. Certainly from the perspective of right holders, MPAA members have every incentive to develop and tailor licensing agreements to satisfy the needs of their customers and deliver their content to as broad a public as possible. Eliminating the statutory licenses, after an appropriate transition period to allow these new market structures to develop, will give us the opportunity to act on those incentives.

Eliminating statutory licenses for retransmission would also dispense with the need for hairsplitting about the scope of the Internet retransmission exclusion in Section 135ZZJA. As the Discussion Paper notes, “if Option 1 were implemented, the extent to which internet retransmission occurs would be entirely determined by market mechanisms.” Para. 15.90. As spelled out in more detail in the initial MPAA comments, these market mechanisms are already delivering a plethora of timely content to U.S. consumers through Internet streaming to a wide range of consumer devices, and the same trends are in play in Australia as well.

If, on the other hand, Option 1 were not adopted, MPAA continues to oppose modification of Section 135ZZJA for the reasons more fully stated in our comments to ALRC’s initial Issues Paper. We note that several other commenters agreed that voluntary licensing is the “optimal and preferred model” for managing Internet retransmissions and for encouraging greater use of these new channels for dissemination. Para. 15.111, quoting submission of ARIA. Extending the statutory licensing scheme “to apply to retransmission by any technique,” as the ALRC recommends if Option 1 is not adopted, Para. 15.121, would be a step backward, and an unjustified curtailment of market principles in an area where there is simply no evidence of market failure. Furthermore, while the Discussion Paper acknowledges that the extension of statutory licensing to Internet retransmissions would require renegotiation of the Australia-U.S.

¹⁰ Much of the Discussion Paper’s analysis of the case for repealing the statutory licenses for retransmission of content is based on the assumption that the free-use exception for retransmission of the broadcast signal is also eliminated. While MPAA agrees that retaining the statutory license in this circumstance “may simply make negotiating retransmissions more complicated” between the broadcaster and the retransmitter, Para. 15.60, our support for elimination of the statutory license is in no way dependent on this conclusion. We believe the statutory licenses for works should be repealed whether or not any change is made in the status of copyright in the broadcast signal in the retransmission context.

Free Trade Agreement, it is completely silent on the yet more fundamental issue of whether this incursion on the exclusive rights of copyright owners could pass muster under the internationally-recognized three-step test. MPAA continues to believe that it cannot.

The ALRC recommends that a statutory license for Internet retransmissions be made “subject to geographical limits on reception,” but it is noticeably unspecific on what those geographical limits should be. Para. 15.121. It notes that among the “issues [that] then arise” is whether the geographical limits should extend across the entire continent or be restricted to the broadcast service area of the broadcasters whose signal is being retransmitted, “or some other formulation”; and whether those limits should be drawn based on the actual situs of the recipient of the retransmission or where she is “ordinarily resident.” Para. 15.117. In any case, the Discussion Paper demonstrates a powerful faith in “geoblocking” as the technological solution that will enforce these geographical limits – whatever they might turn out to be – and thus validate the decision to undermine the exclusive rights of copyright owners in this crucial and dramatically expanding form of “normal exploitation” of works, especially audio-visual works. MPAA suggests, once again, that this faith might be misplaced, or at least overstated. While technological controls on access that include a geographical component continue to be a vital component of voluntary licensing arrangements that increasingly enable dissemination of films and TV programs over the Internet, there is no reason to believe they could be similarly effective as part of a statutory licensing regime, in which a government agency, rather than the licensing parties themselves, is the final authority on whether particular technological means employed to enforce geographical limits are or are not fulfilling their objectives.

This is a concrete and practical concern, because any geo-blocking technology employed to enforce such “geographical limits” will immediately find itself under attack. Recent news reports confirm this. The third largest Internet service provider in New Zealand in late June launched “a new product allowing users to block their physical location to access material normally prohibited to those based in the country.” See <http://online.wsj.com/article/BT-CO-20130627-701756.html>. In a voluntary licensing situation, a copyright owner would be in a position to require its Australian licensee to modify the access controls imposed on retransmissions over the Internet in order to minimize the damage caused by such a security breach. Were the scenario to unfold in a statutory licensing environment, however, the damage control protocol would be much less clear, and almost certainly much less effective.

Finally, recognizing that subjecting Internet retransmissions to statutory licensing “is unlikely to happen in the short term,” Para. 15.130, the ALRC asks how section 135ZZJA should be clarified, especially with regard to IPTV services. MPAA appreciates the ALRC’s apparent conclusion that any such clarification should retain the exclusion except as applied to “closed, secure distribution systems that offer complete protection against copying and redistribution of programming over the Internet, and that respect the principle of territorial exclusivity.” Para. 15.144, quoting MPAA submission. However, we reiterate that any further sharpening of the definition of “transmission over the Internet” would grapple with the question of what framework should apply to technological models (including, in theory at least, some systems now commonly labeled as IPTV services) that fall outside the scope of a “clarified” definition. As explained above, MPAA strongly believes that copyright owners should have full authority to

exercise their exclusive rights over such retransmissions, and that the existing statutory license regime should not be extended to them. Since we do not agree with the premise that such retransmissions should be made subject to statutory licensing, we respectfully decline the ALRC's invitation to suggest language that would "allow retransmission using internet protocol to identifiable subscribers within Australia and subject to access control technological protection measures," Para. 15.145, though of course we would welcome the opportunity to comment upon any such formulation proposed. We conclude by reiterating that there is absolutely no need to amend Australian copyright law to "allow" such Internet retransmissions of free-to-air broadcasts. They are allowed today – so long as they are carried out with "the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal." AUSFTA Art. 17.4.10.b.

V. Chapter 17: "Contracting Out"

In commenting on Chapter 17 of the Discussion Paper, MPAA first wishes to reiterate our view that sound copyright policy must encourage and defer to voluntary licensing arrangements to the greatest extent possible. Licensing has enormous power to deliver the broadest possible access to consumers while preserving strong incentives for more investment in production and dissemination of works. A policy to maximize flexibility in licensing advances these goals. Conversely, government-imposed restrictions on voluntary licensing terms risks jeopardizing the achievement of these goals. Accordingly, enacting laws that would nullify the terms and conditions that licensing parties have agreed to should be approached with great caution and circumspection. In this regard, we appreciate that the ALRC has rejected a blanket approach that would nullify any licensing term that might restrict the applicability of any free-use exception to copyright. Para. 17.4.

We also commend the Discussion Paper's skepticism about arguments that allowing parties to reach a different conclusion by contract than the statute reaches in the absence of a contract is repugnant because it would "upset the copyright balance." Para. 17.112. Such arguments mechanistically assume that there is only one such "balance," that it applies to the entire universe of diverse factual settings, and that parties could not through negotiation come to a more satisfactory balance for their particular purposes than the balance struck by the legislature *a priori* and without regard to specific situations. Especially in a common law system, it is far more appropriate to treat the statutory delineation of exclusive rights, and of exceptions to those rights, as setting default rules that apply in the absence of a contract, but that are sufficiently flexible to allow parties to embody in a license agreement a different balance. It follows that such agreements should be fully enforceable so long as no other principle of contract or consumer law is violated.

Accordingly, we cannot agree with the ALRC's conclusion – that "contractual terms that limit the operation of the fair dealing and libraries and archives proposals should be unenforceable." Para. 17.90. In particular, it is difficult to understand how such a conclusion could advance the ALRC's stated goal of achieving greater certainty. In fact, precisely the opposite is more likely to be the case, especially with regard to the fair dealing arena. While the scope of the current fair dealing provisions may be more predictable and specific than would be

the case with a general fair use defense, their boundaries remain inherently uncertain, turning as they do both on the definition of the specified purposes for which fair dealing with a work may apply, and on the application of a “fairness” test that must be applied on a case-by-case basis by the courts. Consider that under the ALRC’s proposal, a contractual provision is unenforceable not only if it explicitly “excludes or limits” the fair dealing exception, but also if it “has the effect of excluding or limiting the operation of” such an exception. Thus, a licensor might have no recourse if a licensee breached a contractual term that does not explicitly refer to, for example, research, study, or review, so long as the licensee can establish retrospectively that its enforcement could “have the effect of limiting” the operation of that exception.¹¹

The proposal in Chapter 17 to impose markedly greater restrictions on the freedom of contract of parties to a copyright licensing agreement seems completely at odds with the call 13 chapters earlier in the Discussion Paper for “copyright exceptions that are more like standards than rules.” Para. 4.102. While it might be possible to reduce the impact of the trade-off between flexible standards (or “principles”) and specific, predictable rules, it cannot be avoided entirely. As the copyright statute becomes less specific and certain in outlining the parameters and boundaries of free-use exceptions, the value of contractual provisions that can translate general statutory “principles” into specific licensing “rules” to which the parties to the contract agree to be bound increases proportionally. In effect, ALRC is calling upon the legislature to state that the parties cannot be bound by these contractual “rules” if they are retrospectively found to have the “effect” of reaching a different outcome than would be the case if the statutory “principles” were applied directly. This is a recipe for greater uncertainty, and a disincentive for the creation of the specific, tailored voluntary licensing agreements that ought to be the goal of sound public policy.

It is no accident that the jurisdiction with the most advanced and comprehensive fair use regime – the United States – is also the one most dedicated to freedom of contract for parties entering into licenses for the exploitation of copyright works. *See* para. 17.41 et seq. Under this model, the inherent uncertainties of a general, “principles-based” exceptions regime is counterbalanced by the ability of parties to enforce the private arrangements they have agreed to, arrangements that fill in the details of what uses of copyright materials they may or may not make within the context of their licensing relationship. Particularly to the extent that Australia may choose to move closer to the U.S. model regarding exceptions, it must refrain from further exacerbating the inherent uncertainties that flow from this choice.¹² Accordingly, we urge that

¹¹ There is also the question of who has standing to seek to avoid the enforcement of a particular contractual provision. Must it be demonstrated that the specific activity which the defendant has undertaken in breach of her contractual undertaking might fall within the scope of fair dealing for, e.g., research; or is it enough to establish that the provision could, on its face, be so applied in a different set of circumstances? In other words, would invalidity of a license term be decided on a facial or on an as-applied basis?

¹² The Discussion Paper concludes by intimating that some or all copyright exceptions ought to trump not only licensing terms to the contrary, but also statutory prohibitions on the circumvention of technological protection measures (TPMs) and on trafficking in circumvention products or services. Para. 17.131. MPAA notes its strong disagreement with this view. However, as the Discussion Paper notes, issues regarding TPMs are outside the ALRC’s terms of reference. Para. 9.76. Accordingly we will not pursue the topic further in these comments, and will simply urge that any references to TPMs provisions be excluded from ALRC’s final report.

the ALRC reconsider its conclusion that statutory principles must trump contractual rules in a wide range of circumstances.

Again, we appreciate the opportunity to share our views and welcome the opportunity to explore them in further detail, particularly if you have questions.

With best personal regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read "G. Frazier". The signature is fluid and cursive, with a prominent initial "G" and a long, sweeping underline.

Greg Frazier

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