

# **Submission to the Australian Law Reform Commission's Copyright and the Digital Economy Discussion Paper (DP 79)**

The Screen Producers Association of Australia (SPAA) unites screen businesses to campaign for a healthy commercial environment. We support the interests of businesses, both large and small, in their production of feature films, television programs, interactive content and games across all genres and formats.

The pressures facing the use and exploitation of screen content in a digital environment amid changing business models are significant and well documented. Central to these pressures is the commercial impact of rights management and copyright protections.

With this in mind, SPAA welcomes the opportunity to make further comments to the Australian Law Reform Commission's (ALRC) Copyright and the Digital Economy review.<sup>1</sup>

**SPAA does not support the broadening of copyright exemptions (Proposal 4-1) nor do we support the removal of the existing system of statutory licences for broadcast copying (Proposal 6-1). These concerns are outlined in the following areas:**

- 1. Copyright reform must reflect commercial reality**
- 2. Broader public policy objectives must be considered**
- 3. Infringement must not be the default practice**

Although this submission is limited to aspects of fair use and the statutory licences, SPAA endorses the views relating to a wider range of issues (including retransmission) that are addressed in more detail by a number of other industry stakeholders. In particular, we strongly endorse submissions by the Australian Copyright Council (ACC), Screenrights and the Australian Children's Television Foundation (ACTF), as well as several other film and television groups.<sup>2</sup>

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<sup>1</sup> Further information about the ALRC review can be found here:  
<http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>

<sup>2</sup> Other film and television groups include the Australian Screen Association (formerly the Australian Federation Against Copyright Theft); Australian Directors Guild; Australian Screen Composers Guild; Media Entertainment and Arts Alliance; Special Broadcasting Service; Free TV; Australian Home Entertainment Distributions Association; Motion Picture Distributors Association of Australia; National Association of Cinema Operators;

# 1. Copyright reform must reflect commercial reality

SPAA acknowledges that improvements to the existing copyright framework should be explored due to the changing digital paradigm. However, the paper's principal recommendation of a wholesale broadening of copyright exemptions gives little regard to the commercial underpinnings of Australian content creation. Particularly film and television works that typically have complex financing, revenue and rights structures.

Given the discussion paper's extensive reference to the commercial practice of 'fair use' in the United States (US),<sup>3</sup> it is important to highlight some of the structural differences in Australia. These structural differences relate to both the influence of government intervention and the size and scale of our production industry.

Alongside copyright protections, there are three further policy levers that the government uses to support the screen industry and cultural initiatives more broadly. Direct subsidy, tax incentives and regulation enable the local industry to not only produce culturally relevant screen content, but also remain competitive in a global marketplace dominated by the US.

Screen Australia, the Australian Government's key direct funding body, points out that the local industry 'must compete with the substantial output of the US industry, the most wide-reaching and economically powerful in the world, with a positive trade surplus of US\$11.7 billion.'<sup>4</sup> By comparison, Australia has an audiovisual trade deficit of AUS\$1.1 billion, of which two-thirds comes from the import of US film and television content.<sup>5</sup>

Despite this, continued support by government through each of these levers has resulted in growing business confidence and a continued rise in employment. But greater stability must be achieved and as the trade data indicates, there is a delicate balance of policy settings that must be struck during this period of transition so as not to further marginalise Australian content.

In June, the Australian Bureau of Statistics released the first comprehensive survey of the audiovisual production sector in five years. It revealed a 24 per cent rise in employment (to 13,414) and a 21 per cent increase in the number of film and television production businesses (to 2,412).<sup>6</sup> The latter is heavily skewed to very small

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Australian Independent Distributors Association; and, the Independent Cinemas Association of Australia.

<sup>3</sup> Further information about Fair Use in the United States can be found here:  
<http://www.copyright.gov/fls/fl102.html>

<sup>4</sup> *Convergence 2011: Australian Content State of Play*, Screen Australia, August 2011  
([http://www.screenaustralia.gov.au/documents/SA\\_publications/Rpt\\_Convergence2011.pdf](http://www.screenaustralia.gov.au/documents/SA_publications/Rpt_Convergence2011.pdf))

<sup>5</sup> *Total value of trade in royalties arising from imports and exports of cinema, television, video (Blu-ray, DVD and VHS) and multimedia releases, 1991/92–2011/12*, Screen Australia  
(<http://www.screenaustralia.gov.au/research/statistics/atradetotal.aspx>)

<sup>6</sup> *8679.0 - Film, Television and Digital Games, Australia, 2011-12*, Australian Bureau of Statistics  
(<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8679.02011-12?OpenDocument>)

businesses, with approximately 80 per cent of these businesses employing less than 10 people on a full-time basis.<sup>7</sup>

Diversity in content is achieved through the prevalence of these small production businesses, but it also raises a fundamental concern about their capacity to protect their rights under a fair use system and the extent to which they have the economies of scale to negotiate a reasonable voluntary licence for broadcast copying.

Similar differences have been raised by the British Copyright Council (BCC) in regards to their experience in the United Kingdom (UK). The BCC state that their copyright review, conducted by Professor Hargreaves, concluded, 'that the wholesale adoption of a fair use approach into the UK legal framework would not be advisable. In particular he recognised that the success of the US technology sector is based on factors other than fair use...' and he asserted the claim that 'fair use was the key element for the establishment of Google in the US has been proven to be wrong.'<sup>8</sup>

The BCC go on to say that 'the fair use system does not provide greater benefits than fair dealing' and that 'consequentially, fair use is detrimental to all business in the creative value chain, from the original creator to the publisher or record company to the platform provider and ultimately to the end user.'<sup>9</sup>

The disparity between our Australian screen industry and that of the US is so great that the merit of a fair use system would need to be interrogated in greater commercial detail than has been offered in this discussion paper. If we are to look to international models, then it is essential that the Australian copyright framework be appraised against markets of a more similar size, character and economic output.

## **2. Broader public policy objectives must be considered**

The current system of 'fair dealing' in Australia is not fundamentally broken.<sup>10</sup> It is widely understood through longstanding commercial practice and there is not a weight of evidence that indicates that the existing exceptions and statutory licences are disadvantaging fair access.

While there may be greater flexibility for content creators to incorporate elements of other creative works on their own, these potential benefits must be considered alongside a likely increase in cost to business and investor uncertainty. This is perhaps an unintended and unavoidable consequence of a system predicated on litigation,

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<sup>7</sup> *Submission to the Australian Government's 2010 Review of the Independent Screen Production Sector*, Screen Australia ([http://www.screenaustralia.gov.au/documents/SA\\_publications/2010Review\\_full\\_Final.pdf](http://www.screenaustralia.gov.au/documents/SA_publications/2010Review_full_Final.pdf)); and, *Number and size of businesses in the film and video production and post-production services industry, 1993/94, 1996/97, 1999/00, 2002/03 and 2006/07*, Screen Australia (<http://www.screenaustralia.gov.au/research/statistics/trade.aspx>)

<sup>8</sup> *Copyright and the Digital Economy – inquiry and public consultation process*, British Copyright Council, July 2013

<sup>9</sup> *Ibid*

<sup>10</sup> Further information about Fair Dealing in Australia can be found here: [http://www.copyright.org.au/admin/cms-acc1/\\_images/9596827704f39afefd0112.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/9596827704f39afefd0112.pdf)

one in which the financial burden will rest with rights holders, be they large or small business, to defend and define what is and isn't fair.

This is reinforced in submissions from the ACC and Screenrights. They state that 'producers have a strong working knowledge of the current exceptions' and that this understanding 'is essential to exploiting the finished product and receiving returns.'<sup>11</sup> Furthermore, fair use is not a 'mechanism for moderating all competing copyright interests' and that there has been a '(failure) to take into account differences between the US and Australian copyright systems.'<sup>12</sup>

The ACTF reached a similar conclusion, stating that the ALRC has a 'narrow market analysis of content creation' and that 'this is not surprising given that the terms of reference provided for the discussion paper are focused primarily on opportunities for legislative reform, the ALRC's natural areas of expertise, without necessarily taking into account broader cultural and economic concerns that are relevant to the creation of screen content in Australia.'<sup>13</sup>

This lack of understanding to the challenges faced by Australian content creators is deeply concerning. There has been both a disregard of much evidence submitted by industry groups as well as what appears to be a departure from the shared objectives of the Australian Government.

For example Australia's national cultural policy, Creative Australia, states that the ALRC 'is tasked with reviewing how Australian copyright law will continue to provide incentives for investment in innovation and content in a digital environment, while balancing the need to allow the appropriate use of both Australian and international content.'<sup>14</sup>

The focus on incentivising investment in content appears to have been largely ignored. Instead, the current recommendations emphasise greater usage rights ahead of the content creator's commercial opportunities. This may potentially damage revenues that are intrinsically linked to strong copyright protections. These protections are needed to ensure that the creative industries remain a viable long-term career option for Australians wishing to make high quality, professional content.

This degree of naivety is perhaps a symptom of content creators being underrepresented at various levels in the process, including the review's advisory committee.

While SPAA welcomes the inclusion of the ACC on this committee, it is clear that their involvement is an exception that highlights a fundamental imbalance. It is a missed opportunity to dig deeper into the diverse experiences of people whose livelihoods are directly affected by the proposed changes. It also leaves the review open to the

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<sup>11</sup> *Response to the Copyright and the Digital Economy Discussion Paper*, Screenrights, July 2013

<sup>12</sup> *Submission to Australian Law Reform Commission*, Australian Copyright Council, July 2013

<sup>13</sup> *Copyright and the Digital Economy: Discussion Paper (DP 79)*, Australian Children's Television Foundation (ACTF), July 2013

<sup>14</sup> *Creative Australia: National Cultural Policy*, Australian Government, March 2013

risk of a systemic bias, be it perceived or actual.

### 3. Infringement must not be the default practice

In addition to the broadening of copyright exemptions, SPAA also rejects the proposal to abolish the current statutory licence system for broadcast copying. We strongly agree with Screenrights that 'Australian educators enjoy the most comprehensive access to broadcast material in the world' and that the current system 'provides comprehensive and flexible access to broadcast material while ensuring that rights holders are fairly remunerated for the use of their work.'<sup>15</sup>

This is reiterated by the ACTF who also 'oppose these proposals as the rights they grant users would be at the sole expense of copyright holders, and would unacceptably undermine the legitimate expectation of copyright holders to obtain remuneration for use of their works.'<sup>16</sup>

In practice, these royalties are a vital revenue stream for content creators in an industry prone to fluctuating activity levels. They allow for the development of new content, and can also cash flow administration costs of the business and reduce interest payments associated with gap financing.<sup>17</sup>

These types of reinvestment demonstrate good public policy outcomes and align with the government's sustainability objectives for the creative industries. There is not sufficient evidence to demonstrate that the current system of statutory licences amount to a policy failure.

On the contrary, 'educational institutions are under no compulsion to take out a licence, yet most choose to do so. Some also take out additional voluntary licences to "top-up" their use.'<sup>18</sup> Clearly, there is already a great deal of flexibility.

The dangers associated with a voluntary system are two fold. Firstly, there may be a return to copyright infringement as a default practice by the education sector. This was demonstrated by the indemnity payments made by institutions upon the introduction of Part VA. Secondly, voluntary negotiation is likely to favour large institutional copyright holders over small business and individuals.

This is most likely to negatively impact the diversity of content used legally in the classroom as well as reduce the diversity of business that currently receive a fair payment for the use of their work.

In conclusion, SPAA encourages the ALRC to give further consideration to the impact of changing longstanding commercial practice. This commercial practice has resulted in

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<sup>15</sup> *Response to the Copyright and the Digital Economy Discussion Paper*, Screenrights, July 2013

<sup>16</sup> *Copyright and the Digital Economy: Discussion Paper (DP 79)*, Australian Children's Television Foundation (ACTF), July 2013

<sup>17</sup> *First Australians has earned more than \$1m in education royalties*, Screenrights, July 2013 (<http://www.screenrights.org/news/2013/07/first-australians-has-earned-more-than-1m-in-education-royalties>)

<sup>18</sup> *Response to the Copyright and the Digital Economy Discussion Paper*, Screenrights, July 2013

comprehensive access, flexibility of use and fair remuneration to content creators from access to their work, particularly from the education sector. The industry has very real concerns as to the extent by which this income may be eroded by where the line of fairness is drawn.

Screen content is an expensive and complex proposition. To ensure the continued creation of high quality programming, the cost and uncertainty of litigation must not be deferred onto an industry skewed by small business. This is an industry in which very few production companies will have the capacity to fight for their rights through the courts. This has the potential to not just harm business but also threaten the diversity of local content that Australians, and the world, enjoy.

SPAA bases these concerns on both our understanding of the domestic market and international comparisons. We note that the discussion paper promotes industry codes as a way to alleviate some of these concerns, however further details are needed to understand how these may be developed and enforced. SPAA looks forward to continue working with the Australian Government and the ALRC to find practical outcomes and advance workable improvements to the copyright framework.

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