australian screen association

HARPER REVIEW FINAL REPORT

SUBMISSION BY THE AUSTRALIAN SCREEN ASSOCIATION

MAY 2015

Executive Summary

1. The Australian Screen Association (**ASA**) provides this submission in response to the Final Report released by the Harper Panel on 31 March 2015 (the **Final Report**) as part of the Competition Policy Review.

2. The ASA was established in January 2004 by the Motion Picture Association (**MPA**[1]) to protect the film industry in Australia from the adverse effects of audio-visual copyright theft. The ASA's principal objective 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 unauthorised copying of copyright and trademark protected films, often referred to by the generic term 'movie piracy'. The ASA is also associated with Australian based film producers, distributors and exhibitors, as well as the video and optical disc replicators and distributors.[2]

3. The ASA and its members strongly support the central premise of the Final 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-competitive and has been able to embrace the opportunities and

[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] ASA's members include Village Roadshow Australia, Walt Disney Studios Motion Pictures Australia, Paramount Pictures Australia, Universal Pictures International Australasia, Icon Film Distribution (owner of Dendy), Hopscotch Films, Palace Films, Transmission Films, Madman Entertainment, Pinnacle Films and Hoyts Distribution.

challenges of a dynamic and increasingly digital market. The available evidence – the development of numerous new sources of legitimate content online[3] - is overwhelmingly in support of this conclusion. These new sources of content have expanded consumer choice and the overall output of filmed entertainment in Australia consonant with the goals of the competition laws.

4. In light of this, ASA makes this limited submission in response to Recommendations 7 and 13 of the Final Report. The ASA submits to the Harper 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.

Final Recommendation 7 – s 51(3) CCA

5. The Final 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 Final 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.[4] The Final 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 Final 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).[5]

6. However, this observation is completely opaque. Although the evolving digital environment has dynamically 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. Instead, the licensing foundation that has supported these changes has expanded consumer choice and the output of filmed entertainment for the public benefit. Persistent references to only the "potential" for adverse effects, highlights that the case for repeal is weak and speculative. Any concern about the potential for anti-competitive

[3] http://digitalcontentguide.com.au/.
[4] Final Report at p 103.
[5] Final Report at p 112.

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 s 46 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.

8. The use of intellectual property necessarily operates through the granting of licences, which is generally a pro-competitive, output enhancing activity. Licensing facilitates the integration of the licensed work with complementary factors of production and distribution. This integration leads to more efficient use of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products and services. These arrangements increase the value of intellectual property to consumers and the creators of new works. By potentially increasing the expected returns from intellectual property, licensing also increases the incentive for its creation and thus promotes research, development and creativity for the public benefit.[6]

9. In the online environment, this integration of rights via licensing is key to the development and expansion of audio-visual services. In addition, these 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. Without this flexibility, consumers could be left with a 'one size fits all' approach that would limit choice and restrict output. It is difficult to see how, and the Final 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

[6] See United States' Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (1995), § 2.3.

consumers, intellectual property owners and third party suppliers of these services.[7]

10. 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.[8] None of these are referred to in the Final 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.

11. It is also difficult to reconcile the position taken by the Final Report with Australian experience so far. 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.[9]

12. The ASA notes that this is not the first time that the future of s 51(3) has been considered. As identified in Box 8.4 in the Final 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.

13. 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 formulate guidelines to assist industry to understand s 51(3), rather than repeal it. 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).

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[7] http://www.digitalcontentguide.com.au/movies-tv/

[8] E.g. Div 3, Copyright Act under which exclusive licensees have rights to bring actions in their name.

[9] 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.

Final Recommendation 13 – Parallel Imports

14. It is important to consider the differences between various forms of intellectual property. While copyright provides certain exclusion rights over one work such as a single motion picture, sound recording, or book, patents provide a different and potentially much broader exclusivity over entire categories of products, methods, or processes. Accordingly, patents possess much greater potential to impact competition than copyrights. Thus potential is increased when patents are pooled in certain industries such as electronics. The Panel admits two distinctions and identifies its main concerns lie in "fields in which there are multiple and competing intellectual property rights, such as pharmaceutical or communications industries".[10] While ASA objects to any repeal of s 51(3), it respectfully suggests that any initial effort should be focused on patents and not treat all forms of intellectual property (e.g. patents, copyrights, trademarks and plant breed rights) as the same.

15. As was also submitted by APRA AMCOS at the draft stage of this review,[11] 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.

16. It is unfortunate that Recommendation 13 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. 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.

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[10] Final Report at p 109.
[11] http://competitionpolicyreview.gov.au/files/2014/06/APRAL_AMCOS.pdf.

17. The ASA otherwise refers to and supports the submissions of the Australian Copyright Council, Australian Publishers' Association, Book Industry Strategy Group and the Book Industry Collaborative Council to the Harper Review Issues Paper in relation to the proposed amendments to the parallel import restrictions.[12]

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[12] 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