Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013

Joint Submission August 2013

This submission is made by the following: Australian Screen Association (**ASA**), the Australian Home Entertainment Distributions Association (**AHEDA**), the Motion Picture Distributors Association of Australia (**MPDAA**), the National Association of Cinema Operators (**NACO**), the Australian Independent Distributors Association (**AIDA**) and the Independent Cinemas Association of Australia (**ICAA),** collectively referred to as the **Australian Film/TV Bodies**. These associations represent the following:

Australian Screen Association

The Australian Screen Association represents the film and television content and distribution industry in Australia. Our core mission is to advance the business and art of film making, increasing its enjoyment around the world. Our aim is to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. We have operated in Australia since 2004 and were previously known as the Australian Federation Against Copyright Theft.

The Australian Screen Association works on protecting and promoting the creative works of its members. Our members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

Australian Home Entertainment Distributors Association

The AHEDA represents the $1.3 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 12 members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.

Motion Picture Distributors Association of Australia

The MPDAA is a non-profit organisation formed in 1926 by a number of film distribution companies in order to promote the motion picture industry in Australia. The organisation represent the interests of motion picture distributors before government, media and relevant organisations, providing policy and strategy guidance on issues such as classification, accessible cinema, copyright piracy education and enforcement and industry code of conduct.

The MPDAA also acts as a central medium of screen-related information for members and affiliates, collecting and distributing film exhibition information relating to box office, admissions and admission prices, theatres, release details and censorship classifications. The MPDAA currently represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros.

National Association of Cinema Operators

NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 66th year.

NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as the prominent independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.

Australian Independent Distributors Association

AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

Independent Cinemas Association of Australia

ICAA develops, supports and represents the interests of independent cinemas and their affiliates across Australia. ICAA's members range from single screens in rural areas through to metropolitan multiplex circuits. ICAA's members are located in every state and territory in Australia representing nearly 500 screens across 110 cinema locations.

1 Executive Summary

1 The Australian Film/TV Bodies consider that the proposals in this Bill are misconceived, poorly-framed and would be fundamentally flawed in their operation. The proposals suffer from the following common problems:

(a) The proposals cut across existing inquiries undertaken by the Government or by the ALRC that have not yet been completed. This Bill seeks sweeping amendments without the benefit of the consultation with industry the Australian Government has expressly requested.

(b) The justifications in the Second Reading Speech are based on hypothetical propositions and not on evidence. There is no evidence that copyright law is resistant to new technologies or imposes unnecessary costs or inefficiencies on creators or users wanting to lawfully access or make use of copyright material. On any measure, the information, technology and communication sector and the Australian digital economy in general are thriving in the current copyright regime. The current framework is the result of detailed consultation with stakeholders and should not be lightly abandoned.

(c) There has been inadequate attention to Australia's international obligations under existing copyright treaties and the free trade agreement, including the recent Marrakesh Treaty. Many of the proposals put Australia at risk of breaching its international obligations.

(d) The proposals are poorly framed. They adopt ambiguous and imprecise language. There has been no consideration, for example, of instances where the proposed amendments clearly overlap with existing provisions within the *Copyright Act* 1968 (Cth) (**Copyright Act**).

2 Human rights and freedom of expression considerations are a wholly inappropriate basis for introducing wide-ranging, poorly considered and drafted reforms of this magnitude. There are no such positive rights under Australian law, including any intellectual property law such as the Copyright Act. Even if there were such legislated rights in Australia, such rights are necessarily balanced against the countervailing rights of copyright owners, as the European Court of Human Rights recently found when dismissing a challenge to the Swedish court conviction of the operators of the notorious file-sharing site The Pirate Bay.[1]

3 The Australian Film/TV Bodies would welcome the opportunity to further discuss the amendments proposed in the Bill, to meet with the Standing Committee, or to provide any further information the Committee may require.

[1] *Neij and Sunde Kolmisoppi v Sweden* (application no 40397/12), 19 February 2013.

2 TPMs and the visually impaired (s24)

4 s24 of the Bill[2] purports to provide an exception to liability for circumvention of access control TPMs for the purpose of providing the visually impaired with access to copyright works. The draft is misguided and should not be adopted for the following reasons.

5 The exceptions to the TPM regime under Australian law are currently being reviewed by the Attorney General's Department.[3] They were expressly excluded from the ALRC Copyright and the Digital Economy (**ALRC Digital Economy Inquiry**) for that reason.[4] A departmental review is the appropriate way for exceptions to TPMs to be evaluated. It permits the purposes of any proposed exceptions to be carefully articulated, for the proposals to be considered in the context of existing provisions of the Copyright Act and to ensure that they do not have unintended consequences. The Bill is flawed because it fails to adopt such an approach.

6 The purposes of the Bill, according to the Second Reading Speech (by Senator Ludlam), are to ensure that "*TPMs can no longer prevent visually impaired people from enjoying audio books in accessible formats*" and that it brings Australia into line with the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled.[5] These purposes involve misunderstandings of the existing copyright law regime and the Marrakesh Treaty.

7 There is already an exception in the Copyright Act permitting the visually impaired to access copyright works (to which no reference was made in the Second Reading Speech). Item 3 of Schedule 10A of the *Copyright Regulations* 1969 (Cth) (**Copyright Regulations**) allows institutions assisting persons with a print disability to reproduce or communicate published editions, sound recordings, literary works and dramatic works for the purpose of providing assistance. It expressly extends to making "*one or more Braille versions, large-print versions, photographic versions or electronic versions of the work or a part of the work*".[6]

8 The Marrakesh Treaty was only adopted by the World Intellectual Property Organisation on 27 June 2013 and is not yet in force, let alone signed or ratified by Australia. Even if it was in force, by reason of the existing exception in Item 3 of Schedule 10A of the Copyright Regulations, Australia would be compliant with the requirements of the Marrakesh Treaty as was recognised by the Attorney-General, the Hon Mark Dreyfus in a recent media release.[7] The government has indicated that it will consider the existing copyright exception as part of its review of the Marrakesh Treaty.[8]

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[2] Inserting a new s 116AN(8).

[3] The Attorney General's Department *Review of Technological Protection Measure exceptions made under the Copyright Act 1968* is expressly directed to the exceptions relating to access control TPMs in Schedule 10A of the Copyright Regulations.

[4] See the Terms of Reference for the ALRC Inquiry (**TOR**), which expressly require the ALRC not to "duplicate work being undertaken on…. a review of exceptions in relation to technological protection measures; and increased access to copyright works for persons with a print disability". The TOR are available at http://www.alrc.gov.au/inquiries/copyright/terms-reference.

[5] Second Reading Speech, p 23.

[6] The precise scope of the exception is set out by reference to Part VB of the Act (here, s 135ZP).

[7] See the Joint Media Release dated 28 June 2013, available at http://foreignminister.gov.au/releases/2013/bc_mr_130628.html

[8] See the Joint Media Release dated 28 June 2013, available at http://foreignminister.gov.au/releases/2013/bc_mr_130628.html

9 The proposed exception would not remunerate copyright owners for use of the works, contrary to the current scheme in the statutory licence in Part VB of the Act[9] and therefore fail to maintain the existing careful balance between the rights of copyright owners and users of copyright works. It would also likely cause confusion, because the Bill only purports to protect the "visually impaired", thereby excluding many other Australians who currently fall within the much broader definition of "person with a print disability"[10] in the Copyright Act from access to copyright works.

10 It would also have potentially serious international law consequences for Australia. A number of aspects of the Bill go beyond the text of the draft Marrakesh Treaty, which would place Australia in conflict with its obligations under that treaty.[11] Other features of the Bill, such as the removal of the right to obtain compensation for uses, will put Australia in breach of its obligations under existing copyright treaties such as the Berne Convention.[12]

3 Amendments to TPM re "geocoding" (ss1, 2, 3, 6 and 7)

11 The proposed amendment to the TPM scheme to exclude what are described as "geocode" mechanisms[13] should also be rejected.

12 Once again this proposal would cut across the Attorney-General's review of TPM exceptions (which has received submissions relating to TPMs used to enforce geographic market segmentation).[14] It would also cut across the ALRC Digital Economy Inquiry, which is considering geoblocking in the context of the retransmission of free to air broadcasts over the internet.[15]

13 The proposed amendment also ignores the carefully balanced position on geographic market segmentation that already exists in the Copyright Act. "Geocode mechanisms", as they are described in the Second Reading Speech, include many types of TPMs that are used to control the distribution of copyright material for a broad range of legitimate business reasons. Existing markets and channels of supply of copyright content have developed in the current legislative environment.

14 The amendment would also be confusing in operation, since it is designed to apply where a TPM controlling geographic market segmentation "acts in a manner that enforces differences in the price of

[9] See Part VB Div 3 of the Act.

[10] S 10 of the Act.

[11] In particular, the proposed s 116AN(8A)(d) relating to "accessible format for private and domestic use" is much broader than the draft Treaty, which refers to "personal use" (Art 2(b)). "Private and domestic use" is potentially a very broad concept in the digital context, and may breach the three-step test for copyright exceptions in Art 9(2) of the Berne Convention (which is expressly preserved by the text of the Marrakesh Treaty).

[12] See the WIPO press release at http://www.wipo.int/pressroom/en/articles/2013/article_0017.html and Art. 4 of the draft Marrakesh Treaty, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=241683. In particular, Art.4(5) provides that it is a matter for national law to determine whether this exception is subject to remuneration, recognising existing copyright treaty obligations.

[13] Sections 1,2,3, 6 and 7 of the Bill amend the definitions of "access control technological protection measures" and "technological protection measures" in s 10(1) of the Act.

[14] See http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Pages/Submissionsforthe ReviewofTechnologicalProtectionMeasures.aspx.

[15] See Question 36 of the Issues Paper, and Proposal 15.2 of the Discussion Paper.

content for people located in different geographical areas."[16] It is not clear how this test would be applied by a Court. The language is clumsy and introduces concepts not known to copyright law.

15 The existing TPM scheme is drafted in line with Australia's international obligations and excludes devices, products, technologies or components that control geographic market segmentation of films, computer games and other computer programs by preventing playback in Australia of non-infringing copies acquired outside Australia.[17] The exclusion is not intended to apply to 'geo-location' or 'geo-filtration' measures that allow copyright owners to control who they make copyright material available to in the first place (for example, by filtering IP addresses or credit card details).[18]

16 This current balance between the interests of copyright owners and copyright users was reached following extensive consideration of how best to implement Australia's obligations under the Australia-US Free Trade Agreement (**AUSFTA**).[19] In particular, the House of Representatives Standing Committee on Legal and Constitutional Affairs was specifically instructed to focus on region coding of digital technologies and, in doing so, it reviewed submissions from 64 stakeholders.[20] The exclusion of technologies preventing use of genuine films, computer games and programs acquired overseas was a key part of balancing the competing interests as a result of this consultative process.[21]

17 The amendments set out in the Bill would disrupt this carefully considered balance of interests. Copyright owners will no longer be able to control who they make content available to. Because this control is exercised for many legitimate commercial reasons, not just simply to enforce price differentials between markets, the current exclusion of geocoding mechanisms from the TPM scheme is also likely to become of significantly less value to copyright users.

18 The focus on price differentials in the Bill's TPM definitions means that, for example, Australian consumers will no longer have the benefit of a clear exemption from liability where they circumvent a TPM in order to play a film legitimately acquired overseas, as it is unclear that geographic market segmentation is acting "in a manner that enforces differences in the price of content."[22] The new definitions also demonstrate a lack of understanding of the specific schemes of the Act which ensure the authenticity of sound recordings, computer programs and literary or musical items.[23] By removing

[16] s 3 of the Bill.

[17] See definitions of "access control technological protection measures" and "technological protection measures" in s 10(1) of the Act.

[18] Explanatory Memorandum, Copyright Amendment Act 2006 at [12.10]ff.

[19] Art. 17.4.7 of the AUSFTA requires Australia to impose civil liability for and criminal penalties on (amongst other things) the unauthorised circumvention of effective technical measures controlling access to certain protected works.

[20] See the Terms of Reference at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/protection/tor.htm and the submissions received by the Committee at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/protection/subs.htm.

[21] See general recommendations 1-4 of the Standing Committee in its report, *Review of technological protection measures exceptions*, February 2006, available at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/protection/report.htm. These were accepted by the Government in its response.

[22] S 3 of the Bill.

[23] See s 10AA, 10AB and 10AC of the Act, which go beyond the concept of consent of the copyright owner or their exclusive licensee proposed in sections 2 and 7 of the Bill.

the definition of "non-infringing copy"[24] from the TPM provisions, the Bill further exposes the Australian market to importation of unlicensed copies of copyright works.

4 Expansion of the safe harbour regime [ss4, 5, 8-23 and 25-26]

19 The sweeping changes proposed by the Bill to the provisions of the Copyright Act relating to the liability of intermediaries for copyright infringement should not be accepted.

20 Again, the proposed amendments cut across an ongoing consultation by the Attorney General's Department, this time into the scope of the safe harbour scheme.[25] This ongoing investigation is reflected in the limitation of the ALRC Digital Economy Inquiry, which has been specifically instructed not to consider the extension of the definition of 'carriage service provider' (**CSP**) as it applies to the safe harbour scheme,[26] and the inquiry has operated within this limitation.[27] The fact that "the government never reported in response to submissions,"[28] as acknowledged in the Second Reading Speech, is a factor against the proposed amendment not in favour of it; the Attorney General Department's Consultation should be allowed to run its course before any amendments are tabled to Parliament.

21 The Second Reading Speech claims that "Australian universities, libraries, schools, digital innovators, cultural institutions and IT companies provide internet services without the benefit of the same safe harbour as their equivalents overseas".[29] This ignores s 112E and its sister provisions which provide a complete, unconditional defence to infringement and are not limited to CSPs.[30] US copyright law does not have an equivalent broad based defence. Any proposal to expand the safe harbour provisions needs to take into account the benefit that these provisions provide to all categories of intermediaries under Australian law.

22 There is no evidence to suggest that the current scheme of the Act – consisting of this wide defence together with the safe harbour regime – is inadequate to protect the legitimate interests of intermediaries or is inconsistent with Australia's international obligations. Non-CSPs that merely act as intermediaries already benefit from a defence to infringement that goes well beyond any US-style 'safe harbour'. There has never been a case before the Australian courts that would have been decided differently had the safe harbour scheme been extended beyond the CSPs. Contrary to the assertion in the Second Reading Speech that "operating a search engine in Australia risks infringing copyright",[31] the reality is that search engines freely conduct business in Australia. They rely on the specific exceptions relating to online activities in the Copyright Act, without threats of active litigation.

[24] S 10 of the Act.
[25] See http://www.ag.gov.au/Consultations/Pages/RevisingtheScopeoftheCopyrightSafeHarbourScheme.aspx
[26] See the TOR and the Issues Paper at [19].
[27] See the Discussion Paper, in particular at [1.8].
[28] Second Reading Speech, p 23.
[29] Second Reading Speech , p 23.
[30] Sections 39B and 112E (economic rights) and ss 195AVB and 195AXI (moral rights). See further para 24 below.
[31] Second Reading Speech, p 22

Similarly, the case for educational institutions and libraries to be included within the safe harbours has not been established. They have a privileged position under the Copyright Act and are the beneficiaries of a range of measures, including preferential schemes for access to copyright works with no compensation to copyright owners.[32] They also have the benefit of the unconditional defence under s112E. There has not been any litigation in Australia that has identified any material risks to either the search engine or educational sectors which would justify them being treated as if they were carriage service providers, particularly in light of the defence in s 112E and related provisions. This is likely to be a reflection of the controls that those organisations already impose on the use of their internet infrastructure which have proved effective in minimising online infringement emanating from their users.

23 There is no suggestion that the current definition of service provider under the Australian safe harbour scheme puts Australia at risk of breaching its obligations under the AUSFTA or other international treaties. The existing provisions were carefully drafted, taking into account the competing interests of stakeholders and Australia's international obligations, including pursuant to the AUSFTA.

24 Although the Second Reading Speech focuses on the term "safe harbour", the Bill goes beyond the "safe harbour scheme" of the Copyright Act and amends all of its provisions relating to intermediary liability. It replaces the definition of "carriage service provider" (which covers ISPs and network providers) with a broader definition of "service provider".[33] This amendment is unnecessary given s 112E and related provisions which, as referred to above, create a broad based, unconditional defence to authorisation liability where a "person (including a carrier or carriage service provider)" has merely provided communication facilities used to infringe copyright or moral rights. The existing provisions have been applied beyond provision of physical facilities to facilities involving software and services,[34] and are a powerful protection for online service providers, including libraries and educational institutions.

25 The new definition of "service provider", however, materially extends the safe harbour scheme in the Copyright Act, which is currently limited to "carriage service providers". The voluntary safe harbour regime does not provide a defence to ISPs for infringement by authorising the infringing activity of subscribers. It operates only to limit the relief, including compensation, that an ISP would otherwise have to pay in the event that it is found liable for authorisation. In return for this benefit, ISPs are required to provide demonstrable assistance to copyright owners through a range of measures, including the implementation of repeat infringer policies for all categories of activity (under s116AH) and the processing of take down notices for certain types of activity (Category C and D activities). This balance reflects the obligation in Article 17.11.29 of the AUSFTA for each party to include legal incentives in its respective domestic legislation to encourage service providers to cooperate with

[32] See the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Act 2000 (the Digital Agenda Act at p 13-14.
[33] See s 5 of the Bill. The definition of "carriage service provider" in the Act refers to *the Telecommunications Act 1997* (Cth) (s 87).
[34] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 per Wilcox J at [394] re s112E.

copyright owners in deterring the unauthorised storage and transmission of copyright protected materials, in exchange for liability limitations.[35]

26 The proposed extension of the safe harbours to "service providers" is inappropriate when considered in the context of the regime as a whole. Providers of services that fall within all categories under the safe harbours (Categories A to D) exercise control, to different degrees, over the activities of their users. In *Cooper* the Full Court found, unanimously, that the host of the website had control over the presence of the links to the content files, the power to prevent them from being accessed and the ability to take them down.[36] This reflects the basic scheme of the safe harbour regime which, as discussed above, is to provide legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyright materials. Accordingly, the extension of the safe harbours to a wider category of providers necessarily involves a recognition of their capacity to control user activity because they would immediately become subject to the requirement to "adopt and implement a policy of terminating the accounts of repeat infringers, in appropriate circumstances" (s116AH); the take down regime that applies in respect of Category D activities; and the ability of a court to order termination of the subscriber account or disabling of access to the linked content even if the safe harbour applied. The providers could only be seeking the protection of the scheme if they were ready and willing to exercise control over what their users were intending to do.

27 Further, treating all "service providers" as if they were a single type of business ignores the differences between them. Search engines, online vendors and educational institutions, for example, all have very different business models and operational structures. This creates other potential legal consequences which would be inconsistent with the purpose of the safe harbours, namely to provide incentives for certain types of service providers to cooperate with copyright owners. Rights owners have elsewhere recognised the need for these types of service providers to be subject to some form of regulation, such as a code of practice which includes measures to ensure that they do not support the business models of substantially infringing web sites and that they do not themselves profit from online infringement. A code (such as provided for under 116AH) is necessary given that there may be little or no utility for such service providers (such as social media networks or email providers such as "hotmail") having a policy under 116AH allowing for the termination of repeat infringers which would invariably never be exercised (because of the mixture of services offered to the user) or never be exercised effectively (because of the manner in which the services are offered to the users). These considerations do not arise in the case of a carriage service provider.

28 This problem is exacerbated by the excessively general nature of the definition of "service provider" in the Bill. Unlike the broad definition of "service provider" in the AUSFTA, the Bill's definition does not make any distinction between the different types of providers carrying out the functions in Category A

[35] The safe harbour provisions were introduced into the Act with effect from 1 January 2005, following the conclusion of the AUSFTA.
[36] *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

as opposed to Categories B to D.[37] Rather, it simply lumps the two options together, creating further problems by ignoring even the most basic differences between the businesses covered by the definition that are relevant to the text of the Act. In this context, the "simple and technologically neutral definition" of service provider heralded by the Second Reading Speech is not a virtue.

29 CSPs were singled out for the additional protection of the safe harbours because they were an identified and regulated class that could be expected to cooperate with copyright owners to deter copyright infringements in return for the protection of the safe harbour regime. They are required to be licensed under the *Telecommunications Act 1997* (Cth) and each is subject to the terms imposed on its licence. They are subject to the jurisdiction of the Telecommunications Industry Ombudsman (**TIO**) in relation to its dealings with customers or potential customers. CSPs are also subject to regulatory oversight by ACMA and to the industry codes that are declared by ACMA. Regulatory oversight is missing in relation to non-CSP service providers.

30 A similar lack of attention to appropriate legislative drafting is indicated by the superficial nature of the amendments in the Bill. In reality, a raft of further textual and other amendments would need to be made to Div 2AA if the scheme were extended beyond carriage service providers. The Bill makes no attempt to consider these consequential amendments, which is wholly inappropriate when what is involved is not merely drafting for discussion purposes but is on the point of becoming law. For example, the definition of "financial benefit" in s116AH, which makes reference to the "industry practice in relation to the charging of services by carriage service providers, including charging based on the level of activity". Service providers such as P2P operators (MovieX[38]) and Australian based cyberlockers (eg. equivalents of the US based Hotfile[39]) would presumably claim that they had a legitimate server space business or search engine functionality that entitled them to safe harbour protection; despite their operations being funded by infringement. Similarly, the special presumption of compliance with the scheme in favour of ISPs, set out in s116AI[40] would be inappropriate if it was extended beyond regulated carriage service providers.

31 The Bill also contains a specific limitation on remedies for public or non-profit higher education institutions where a faculty member or graduate student employed by the institution infringes copyright in any other way than by providing online access to instructional materials that were required or recommended for a course taught by that person within the previous three years.[41] This is subject to a requirement that the institution provide accurate information about compliance with copyright law.[42]

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[37] Art. 29 (xi) defines "service provider" as follows: "For the purposes of the function referred to in clause (i)(A), service provider means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for the purposes of the functions referred to in clause (i)(B) through (D), service provider means a provider or operator of facilities for online services or network access."

[38] http://afact.org.au/archive_pressreleases/pdf/2008/FEDERAL%20POLICE%20CHARGE%20ORGANISERS%20OF%20ILLEGAL.pdf

[39] *Disney Enterprises, Inc. et al v. Hotfile Corp. et al* (1:11-cv-20427).

[40] Section 116AI states "If a carriage service provider, in an action relating to this Division, point to evidence, as prescribed, that suggests that the carriage service provider has complied with a condition, the court must presume, in the absence of evidence to the contrary, that the carriage service provider has complied with the condition.´

[41] See s 19, inserting a new s116AG(2A).

[42] Proposed new s 116AG(2A)(b).

Although described in far more general terms in the Second Reading Speech,[43] this is in fact an extremely detailed, university-specific provision that sits oddly in the safe harbour regime, and moreover is completely inappropriate in that part of the Act. Its exact meaning and intention is not clear, even when the Explanatory Memorandum is taken into account. The only possible conclusion is that it reflects specific lobbying requests and vested interests, rather than the detailed policy and legal considerations which are the proper basis for the legislative process.

32 The above considerations are reinforced by the likely adverse impact on copyright owners of an extension of the safe harbour regime as set out in the Bill. The existing scheme of the Copyright Act, including the safe harbour regime and the defences for intermediaries discussed above, was introduced as a package of reforms that was designed to maintain the balance between the interests of copyright owners and those of users and other affected parties.[44]

33 This would be disrupted by an extension of the safe harbour regime to a broader category of "service provider". This definition may cover intermediaries such as cyberlockers, peer-to-peer trackers, and linking sites (among others) which operate solely, primarily, or specifically to facilitate widespread copyright infringement. For example, it would be open to rogue service providers such as those in *In Re Aimster*,[45] *Napster*[46] and *Isohunt*[47] (all of which were found liable for contributory infringement of copyright) to claim that they qualified for protection under the safe harbours. We consider it essential that the Standing Committee consider the impact on content owners of providing such entitles with the benefit of liability limitations that were originally intended for a narrower class of intermediaries.

34 This concern is further supported by the mounting evidence of the extent of internet-based copyright infringement, including films and television programs. In 2010 AFACT commissioned IPOS (a market research organisation) and Oxford Economics (an economics consultancy) to measure the economic impact of movie piracy in Australia (**Oxford Study**).[48] The Oxford Study found that:

(a) a third of the adult population of Australia is active in some form of movie piracy (downloading, streaming, buying counterfeit, borrowing unauthorised, burning);

(b) the highest volume of pirated movie content is from receiving digital copies of movies – an activity that accounts for a quarter of all pirated movies;

(c) just under half (45%) of all people consuming pirated movies would have paid to view the movie via an authorised channel had the unauthorised channel not been available;

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[43] p 23 "It also details the responsibilities for a public or non-profit institution to promote and comply with copyright law, but recognises limits in the extent to which the institution is responsible for the behaviour of persons utilising their services."

[44] In particular, the Digital Agenda reforms in 2000 and the 2005 amendments that followed the entry into force of the US FTA. Both were the result of an extensive and exhaustive review of copyright law in Australia, which involved consultation with industries and the public, Parliamentary committee investigation and bi-partisan support for the eventual package of reforms.

[45] *In Re Aimster* 252 F.Supp. 2d 634 (N.D Ill. 2002).

[46] *A&M Records, Inc v Napster,Iinc*., 239 F.3d 1004 (9th Cir. 2001).

[47] *Columbia Pictures Industries Inc v. Fung* (2:2006cv05578).

[48] Ipsos Australia & Oxford Economics, *Economic Consequences of Movie Piracy: Australia* (January 2011) AFACT <http://www.afact.org.au/assets/research/IPSOS_Economic_Consequences_of_Movie_Piracy_-_Australia.pdf >. The study defined "movie piracy" as "*anyone watching a full length movie via 'unauthorised' means, including digital (downloading, streaming, digital transfer of pirated copies physically buying counterfeited / copied DVDs)*."

(d) direct consumer spending loss to the movie industry (i.e.cinema owners, local distributors, producers and retailers) in 2010 totalled A$575m, with approximately $240 million attributable to digital piracy.[49]

35 It is beyond doubt that that piracy presents one of the biggest challenges to the film and television industry's participation in the Australian digital economy, and is preventing legitimate online business models from reaching their full economic potential. The extent of the problem and the consequences to the Australian economy are extensive. Approximately 55% of people admit to participating in film and television theft.[50] 23.76% of global internet traffic is estimated to be infringing.[51] Almost half of this is infringing bittorrent traffic,[52] of which 43.3% have been estimated as being film files.[53]

36 In the case of cinematograph films, these losses do not capture the significant loss of revenue suffered by the film industry where newly released motion picture content is made available for illicit download through file-sharing, pirated DVDs, and streaming sites. Not only has digital piracy caused a decrease in revenue, but it has led to the loss of 6100 jobs, with almost 2300 lost in the Australian film industry.[54] Ill-considered reforms that may have the effect of exacerbating a problem of this magnitude should not be accepted.

37 Extending the safe harbours may have other unintended consequences. There are already attempts by at least one ISP[55] to adopt a policy under the safe harbour scheme (s116AH) that unilaterally impose a pre-requisite fee[56] on any rights holder that notifies the ISP of infringements before it is prepared to take any action as stipulated under s116AH. While this is contrary to the terms of the Copyright Act (and Australia's obligations under the AUSFTA) and will disqualify that ISP from safe harbour protection, it sets a very unfortunate precedent that could be exploited by a wider class of service providers, such as those discussed above, if the safe harbour scheme were extended to them.

5 The Fair Use Exception (s 251)

38 The Bills proposal for a fair use exception cuts across an existing inquiry undertaken by the ALRC that has not yet been completed. This Bill seeks sweeping amendments without the benefit of the consultation with industry that the Australian Government has expressly requested.

39 The Bill proposes the wholesale introduction of section 107 of the US Copyright Act 1976 into Australian law. It does so without any consideration of existing provisions, consultation with stakeholders or principled examination of the US model. It is an inappropriate and flawed model.

[49] Ibid, p 3-5.

[50] Vicky Roach, '$1 billion dollar pirates killing film in Australia' *The Daily Telegraph* (Sydney, 12 September 2011) 1.

[51] Envisional Ltd, *Technical Report: An Estimate of Infringing Use of the Internet – Summary* (January 2011) Motion Picture Association of America <http://mpaa.org/resources/8aaaecf5-961e-4eda-8c21-9f4f53e08f19.pdf>.

[52] Ibid.

[53] Ibid.

[54] Ipsos Australia & Oxford Economics, n 48 above, p 3.

[55] http://www.iinet.net.au/legal/notice%20of%20claimed%20infringement%20of%20copyright.pdf.

[56] www.iinet.net.au/legal/notice-of-claimed-infringement-of-copyright-form.pdf.

40 The Australian Government has already considered and rejected the fair use model proposed by the Bill. As recently as 2006, the Government found that, in the public consultation phase of its Fair Use review, "*no significant interest supported fully adopting the US approach.*"[57] That finding remains pertinent today. Of the 280 respondents to the current ALRC Digital Economy Inquiry, only 32 stakeholders (or 11% of total respondents) expressly supported the introduction of the US fair use model.

41 The Copyright Act already exempts the purposes listed in the US provision through fair dealing and includes temporary copying, library and archive and private copying exceptions addressing many of the supposed "*anomalies in Australian copyright law*"[58] referred to by the Senator in his Second Reading Speech. Those provisions are clear, unambiguous and have the benefit of accumulated case law. The US fair model, by contrast, is characterised by uncertainty and unpredictability.[59] One US law professor has observed that the "*facial emptiness of the statutory language means that … it is entirely useless analytically, except to the extent that it structures the collection of evidence*."[60] Another leading scholar has suggested the idea that the statutory test determines the outcome of fair use cases is "*largely a fairy tale*."[61] Leading US intellectual property judges have characterised the doctrine as "vague" and "uncertain", commenting that the case law on fair use is littered with contradictory findings, reversals and divided Courts.[62] Indeed, such is the uncertainty of the US doctrine that the White House recently established a task force to develop and publish an index of major fair use decisions to "*ease confusion about permissible uses*".[63]

42 Introducing fair use into Australian copyright law will create uncertainty in the law beyond what exists in the United States. The apparently open-ended language of the US provision was actually confined by 135 years of US jurisprudence. In Australia there would not be any judicial interpretations when the law is enacted and consequently there will be no guidance as to the scope of the exception in an Australian setting. It would be a highly undesirable outcome.

43 The Standing Committee will be conscious of the importance of Australia's international treaty obligations when considering the amendments proposed in this Bill.[64] Copyright experts agree that open-ended models risk violating international copyright obligations. Professor Okediji's careful

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[57] Explanatory Memorandum, *Copyright Amendment Act* 2006 (Cth), p 10.

[58] Second Reading Speech, at 23

[59] William F. Patry & Shira Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, (1993) 11 *Cardozo Arts & Entertainment Law Journal* 667, 667-68

[60] Michael J Madison, "A Pattern-Orientated Approach to Fair Use", (2004) 45 *William & Mary Law Review* 1525, 1564

[61] David Nimmer, "Fairest of them All and Other Fairy Tales of Fair Use" (2003) 66 *Law and Contemporary Problems* 263, 282

[62] The Honourable Pierne Leval, "Towards & Fair Use Standard" 103 (1990) *Harvard Law Review* 1105, 1106-7.

[63] 2013 Joint Strategic Plan on IP Enforcement, 18 available at http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf

[64] Australia is party to at least 14 international treaties that constrain its law-making authority in relation to copyright. These treaties imposes three substantive requirements (the, three-step test) that must be satisfied before an exception or limitation can be introduced into domestic copyright law. Specifically, the proposed exception or limitation must be confined to:

(i) certain special cases;

(ii) that do not conflict with the normal exploitation of rights; and

(iii) that do not unreasonably prejudice the legitimate interests of authors or right holders.

analysis of the compatibility of TRIPS with the fair use doctrine led her to conclude that the international instrument cannot accommodate the US doctrine. [65] Herman Jehoram observed that such is the uncertainty of the US model and its capacity to adversely affect the rights of authors that it is not capable of complying with three-step test requirements.[66] When writing for the WIPO Standing Committee on Copyright and Related Rights, distinguished Australian copyright academic, Professor Sam Ricketson, concluded that the "*open-ended, formulaic provisions contained in s. 107 of the U.S. Copyright Act were vulnerable to the three-step test*."[67]

44 Australia is not alone in having rejected an open-ended fair use defence in the past.

45 In the *Gower Review of Intellectual Property: Proposed Changes to Copyright Exceptions*, the UK government rejected moving to a fair use model, favouring instead a series of clearly-defined exceptions for particular circumstances due to risks that the open-ended model would not comply with the UK's international obligations and the administrative burdens uncertain standards would impose on business.[68]

46 New Zealand likewise considered and rejected a fair use regime, commenting that no compelling reasons had been presented for an open model and describing its existing closed fair dealing system as "*technologically neutral and adaptable for the digital environment*".[69]

47 Canada, in its recent copyright review, also specifically rejected a fair use in favour of fair dealing provisions for the specific purposes of parody, satire and education.[70]

48 In its 2006 amendments to the Copyright Act, the Australian Government similarly rejected the fair use model in favour of enacting targeted exceptions designed to apply to specific institutions and in specific circumstances. In so deciding, the Australian Government noted that "*the present system of exceptions and statutory licences …has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright*".[71] An open fair use model was considered less desirable, as:

> *this approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there*

[65] Ruth Okediji, "Towards an International Fair Use Doctrine" (2000) 82 *Columbia Journal of Transnational Law* 75,at 114 -23 outlining three reasons why the fair use doctrine violates Article 9(2) of the Berne Convention including (1) the indeterminacy of the fair use doctrine (2) the breath of the fair use doctrine and (3) the nullification and impairment of rights-holders' expected rights.

[66] Herman C. Jehoram, "Restrictions on Copyright and their Abuse" (2005) 27 *European Intellectual Property Review*. 359, at 360.

[67] Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 2002.

[68] UK Intellectual Property Office, Taking Forward the Gowers Review of Intellectual Property, at [1.6]. More recently, in his *Review of Intellectual Property and Growth*, Professor Hargraves commented that "*most responses to the Review from established UK businesses were implacably hostile to adoption of a US Fair Use defence in the UK on the grounds that it would bring: massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods*." Professor Ian Hargreaves, *Digital Opportunity A review of Intellectual Property and Growth: An independent report by Ian Hargreaves* (May 2011), at 44

[69] Digital Technology and the Copyright Act 1994 Position Paper, at [160-61].

[70] Copyright Modernization Act 2013

[71] Explanatory Memorandum, *Copyright Amendment Act* 2006 (Cth), p 6.

may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.[72]

49 The Australian Government also rejected the fair use model as inconsistent with the three-step test mandated by the Berne Convention, observing that it "*is not consistent with treaty obligations to include such general uses in a flexible exception.*"[73]

50 The fact that only 4 countries (the US, the Philippians, Israel and South Korea)[74] out of 166 signatories to the Berne Convention adopt an open-ended "fair use" defence sounds an alarm of caution before such a path is pursued. Of those 4 countries, the open-ended provisions in the Philippines, Israel and South Korea are far more restrictive than the US legislation this Bill seeks to imitate. For instance, the fair use exception in Korea applies only where the impugned use *"does not conflict with a normal exploitation of [the] copyright work and does not unreasonably prejudice the legitimate interests of the copyright holder".*[75] The Standing Committee will recognise the gravity of the situation and the need for very compelling, evidence-based policy justifications before recommending changes which could have a radical impact and are out-of-step with the international community.

51 The proposed model is, in any event, poorly drafted. Section 251 of the Bill completely parrots the language of section 107 of the US Copyright Act 1976, including its antiquated reference to "*phonorecords*" and the preambular purposes of criticism, comment, news reporting, teaching, scholarship, or research. These preambular purposes are already exempted in the Copyright Act's fair dealing provisions. There appears to have been no consideration of the appropriateness of the US statutory language or of consequential amendments to the Copyright Act that are necessary to avoid overlap and confusion. The scope of the provision is also inappropriately broad. For instance, the phase "*Notwithstanding the provisions of any other section of this Act*" means that the provision potentially applies to and overrides all parts of the Copyright Act, including unintended parts such as TPM provisions, safe harbour provisions and moral rights. The resulting scheme would be hopelessly uncertain.

52 More generally, it is submitted that the open-ended nature of the provision provides no bright line for users or rights-holders on whether conduct is infringing or non-infringing and will therefore inevitably have a detrimental economic impact on users and content providers alike.[76] The potential knock-on effect of such radical reforms may be far-ranging and their impact on existing business models and commercial arrangements developed in the current regime profound. A recent study by Ghafele and

[72] Ibid, p 10.

[73] Ibid, p 10.

[74] It is often incorrectly suggested that Singapore adopts an open-ended fair use model. In fact, Singapore uses a Fair Use type multi factor test within its fair dealing provisions.

[75] Republic of Korea, *Copyright Act 1957*, Art. 1-3. The fair use provision in the Philippines is also far more restrictive that the US model. In particular, section 185 of the *Philippines Intellectual Property Code* delimits fair use to the specified purposes of criticism, comment, news reporting, teaching and similar purposes. The position in the Philippines is therefore more akin to an expanded fair dealing than an open-ended 'fair use' model.

[76] Business growth is helped by Legal certainty. Fair use does not provide it. See e.g. United Nations Economic Commission For Europe, *Financing Innovative Development for Europe: Comparative Review of UNECE Countries in Early Stage Financing* (January 2007) UNECE <http://www.unece.org/index.php?id=2152> (characterising uncertainty as an impediment to securing finance).

Gilbert[77] made unsubstantiated claims that "fair use will *not necessarily* cause economic harm to rights holders". However this study does not refer or relate to Australia. It is a study of the Singaporean market. Furthermore this study has recently been found to be flawed. In a peer reviewed and published economic paper Australian economist Dr George Barker has demonstrated that the underlying data used to reach the conclusions in the Ghafele and Gilbert report was corrupted, rendering the analysis and conclusions unreliable. Dr Barker was given access by the Singapore Government to the underlying data relied upon by Ghafele and Gilbert and identified that the underlying data cannot support the claims made in their research. For instance, Ghafele and Gilbert claim expanded fair dealing provisions in Singapore increased value add in computers, digital storage media, smart cards and other electronic devices used in copying. However, as Dr Barker points out, the data used by Ghafele and Gilbert includes value add for both domestic sales and exports. Given that over 95% of Singapore's output in these catagories are 'export sales', Dr Barker reasons that Singapore's open-ended fair dealing laws could not have affected domestic distribution of electric private copying devices and that Ghafele and Gilbert's conclusions to the contrary are unsound.[78]

53 There is no evidence, let alone compelling evidence, to suggest that Australian copyright laws have unduly restricted commercial activity, including in digital environments. Assertions that are sometimes made to this effect have never been established and are all too often, understandably, conditioned by the commercial interests of those making them. Technological developments in the last several decades, including the development of software, telecommunications, the internet etc have developed with copyright laws in place. In the last decade Australian copyright laws have done nothing to stifle legitimate economic activity, restrict consumer offerings or hold back the development of useful technology. The proposed amendment to insert an open-ended fair use exemption in the Copyright Act should be rejected.

[77] Ghafele, Roya and Gibert, Benjamin, *The economic value of fair use in copyright law: counterfactual impact analysis of fair use policy on private copying technology and copyright markets in Singapore,* (2012), at 3

[78] "Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age" Dr. George Barker (2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298618