Response to the Productivity Commission Draft Report dated June 2021: Right to Repair

Joint Submission from the Australian Film/TV Bodies

23 July 2021

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1 Introduction

1. The Australia New Zealand Screen Association (**ANZSA**), the Australian Home Entertainment Distributors Association (**AHEDA**), the Motion Picture Distributors Association of Australia (**MPDAA**), the National Association of Cinema Operators-Australasia (**NACO**), the Australian Independent Distributors Association (**AIDA**) and the Independent Cinemas Association (**ICA**) (collectively, the **Australian Film/TV Bodies**), are pleased to make this submission in response to the Productivity Commission's Draft Report *Right to Repair* (the **Draft Report**).

2. These associations represent a large cross-section of the film and television industry that contributed $9.2 billion to the Australian economy and supported an estimated 54, 818 FTE workers in 2017-18:[1]

   (a) The **ANZSA** represents the film and television content and distribution industry in Australia. ANZSA's core mission is to advance the business and art of filmmaking, increasing its enjoyment around the world. We seek to protect and promote the safe and legal consumption of movie and TV content across all platforms. Our members are proud participants and contributors of the film and television industry in Australia, and include Walt Disney Studios Motion Pictures Australia; Fetch TV; Netflix Inc; Motion Picture Association; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; Village Roadshow Limited and Warner Bros. Pictures International, a division of Warner Bros. Entertainment Inc.

   (b) **AHEDA** represents the $560 million Australian film and TV home entertainment industry covering the content that is accessed by consumers via digital transactional platforms as well as packaged media (DVD and Blu-ray Discs). 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; market insights and sales data tracking; classification; media access; technological innovation and challenges; copyright; and media convergence. AHEDA currently has 10 members and associate members including all the major Hollywood film distribution companies as well as Studio Canal, and wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel, Fetch TV and Telstra.

   (c) The **MPDAA** is the trade body for theatrical film distributors in Australia – the companies that acquire, market and release films for Australian cinema audiences. The MPDAA represents its members on all matters affecting film distribution in Australia in order to advance the cinema industry and the interests of film distributors who make available and promote the supply of a range of screen content to entertain all Australian audiences. The MPDAA represents Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International Australasia, The Walt Disney Company Australia and Warner Bros. Entertainment Australia.

   (d) **NACO** is the peak body representing cinema operators across Australia - including Event, Village, Hoyts, Reading and various independent and regional cinemas. NACO's members represent in excess of 85 per cent of the 2,400 cinema screens in Australia. NACO is a national organisation established to act in the interests of all cinema operators in respect of whole-of-industry issues.

   (e) **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

[1] Olsberg SPI, *Study on the Economic Contribution of the Motion Picture and Television Industry in Australia*, <https://anzsa.film/wp-content/uploads/2020/02/Study-on-the-Economic-Contribution-of-the-Motion-Picture-and-Television-Industry-in-Australia_Final-Report.pdf>

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).

(f) **ICA** is a not for profit industry association which represents independent cinema exhibitors and has members in every State and Territory in Australia including large and small businesses such as Palace, Grand, Wallis, Dendy and iconic cinema sites such as the Hayden Orpheum, Randwick Ritz and Cinema Nova. ICA represents around 80% of regional cinemas – mostly small family businesses. Independent cinemas comprise 26% of the 2,210 cinema screens in Australia and 29% of cinema sites – with ICA representing the owners and operators of 659 cinema screens across around 176 cinema locations ranging from rural areas through to metropolitan multiplex circuits. ICA members play a crucial role in bringing Australian and diverse stories to the big screen. For example, in 2019 independent cinemas generated over 90% of the box office for 22 individual Australian titles including four films in the Top 20 Australian Films. All of the Australian Film/TV Bodies and their members have a vital interest in a strong and effective protection of their copyright assets in Australia and the ability to enforce their copyright against threats of infringement, particularly online infringement. Online copyright infringement presents one of the biggest challenges to the film and television industry's participation in the Australian digital economy, and its contribution to the broader Australian economy. It also prevents legitimate online business models for the distribution of films and television programs from reaching their full potential.

2 General comments

3. The Australian Film/TV Bodies recognise there may be circumstances where repairs of consumer devices are necessary and that there may be some impediments to carrying out repairs as a result from limitations on the availability of and access to information and spare parts. However, those issues can be properly addressed by existing competition laws and existing exceptions to copyright laws. Further, it is our view that the data provided by the Productivity Commission in its Draft Report does not support the case for any change to copyright law. However, if the Productivity Commission were to establish a case for such change, supported by data, in its Final Report, the Australian Film/TV Bodies would not oppose a narrow fair dealing style defence, drafted to fit only those circumstances which justify repair of consumer devices as is necessary and no more.

4. Several points need to be made at the outset about the issue of "right to repair" and copyright law.[2]

   a) As the Productivity Commission acknowledges, difficulties associated with repair "reflects growth in the number of products that incorporate sophisticated technology." These technologies provide enormous benefits to consumers and high degrees of confidence in the safety, security and proper functioning of consumer products and acceptable prices. There is an obvious trade-off between these objectives and the objective of permitting consumers, or third parties, to effect repairs on sophisticated consumer products which may put them outside a variety of safety, regulatory and other legal controls. A strong case needs to be made before fundamental changes are made to the law which would primarily benefit a small class of traders (third party repairers) or consumers (those who seek to repair rather than replace products that are no longer functioning, and which are not covered by warranty).

[2] Which distinguish it from other areas of law, such as patents, where concepts of exhaustion of rights on first sale apply now in Australia, following the decision in *Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41. Under copyright law, the right to control the reproduction or communication of a work is not lost based on the fact that there has been a prior reproduction or communication. The closest analogue for the concept of "first sale" in patents, is that a purchaser or an article that embodies a work is personal property that can be generally dealt with without restriction under copyright laws.

b) Copyright law does not generally protect consumer products per se, nor does it prevent the sharing of information that could be used in conjunction with the proper operation of products. What it does protect is the specific expression of the information.[3] To the extent that particular forms of information have not been published, it is not the role of copyright to force their publication. While copyright law facilitates access to information indirectly, by providing incentives to copyright owners to publish and distribute their works, copyright law does not oblige a copyright owner to do so. Understanding the distinction between incentives created through statutory copyright protection and mandatory obligation to distribute information is fundamental to recognising the limits of copyright law.

c) The Competition and Consumer Act 2010 (CCA) already provides extensive protections for consumers and obligations on manufacturers and suppliers, particularly through the consumer guarantee regime. Competition laws contain strong protections against anti-competitive behaviours, including misuse of market power (under s 46) and the practice of exclusive dealing (under s 47). Regulatory protections for consumers have continued to increase in most areas of the economy.

d) There is a fundamental difference between different types of copyright works that needs to be maintained. The includes the difference between 'information' works used in connection with a product or device – content such as is found in user or technical manuals, which is provided for informational purposes only – and 'expressive' works such as film and television content – which are the ultimate product consumed. Whereas the former works are adjunct to a product being supplied, the latter works are the product itself. Important distinctions are drawn between different types of copyright works (e.g. works vs. other subject matter, software vs. other forms of literary works) under the *Copyright Act 1968* (Cth) (**Copyright Act**) as a reflection of their different natures, bundles of rights and appropriate scope of protection. This can be illustrated in the context of computer software, where there are a number of specific fair dealing exceptions directed to the particular characteristics and issues relevant only to that type of work. It would not be appropriate for exceptions designed for computer software to be expended to other forms of works which do not share the same characteristics. The Productivity Commission needs to be wary of proposing amendments that are not narrowly targeted to a particular work, or categories of works, or scenarios and which are likely to have much wider consequences that have not been fully investigated.

e) The evidence relied on in the Draft Report in support of broader rights of repair without infringing intellectual property rights is very limited and largely from narrow group of parties with a vested interest in exploiting that opportunity commercially (e.g. independent repairers). The Draft Report appears to acknowledge this by noting in many places that the available evidence on the right to repair is largely or entirely anecdotal: in relation to IP,[4] in relation to repair markets[5] and OEMs,[6] and in relation to manufacturers.[7] Anecdotal evidence is not a substitute for proper research, particularly given the likelihood that any legislative changes will have wide-ranging and the potential unintended consequences for the balance under IP laws between IP owners and users which may need to be addressed with further remedial action. A strong case is made by manufacturers and organisations such as the Law Council of Australia (representing the legal industry), that existing laws generally provide adequate rights and remedies.[8]

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[3] See eg. *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14.

[4] See page 175: "*In Australia, evidence on the extent to which intellectual property protections restrict repair* ***is patchy and largely anecdotal****. Notwithstanding this, copyright laws that prevent third-party repairers from accessing repair information (such as repair manuals and diagnostic data) appear to be one of the more significant intellectual property-related barriers to repair.*", also pages 31 and 155.

[5] Page 137.

[6] Page 107.

[7] Page 11.

[8] Draft Report page 23.

5. Should there be any additional copyright exceptions introduced, they should be targeted and limited. There is no justification for a more radical amendment to copyright law, such as the introduction of a fair use defence, nor is there any justification for winding back protections from technological protection measures (TPMs), given the existing exceptions available.

3 Fair use or fair dealing exception to address repair

Amend the Copyright Act 1968 to allow for the reproduction and sharing of repair information, through the introduction of a fair use exception or a repair-specific fair dealing exception.

6. The Australian Film/TV Bodies oppose the introduction of a broad fair use exception under Australian copyright law. To the extent that there is any case for the need for a new exception for repair, which the Australian Film/TV Bodies do not consider has been established in the Draft Report, it should be confined to a fair dealing exception, cast narrowly to address the specific issues of concern in a form similar to the form of narrow exceptions applicable to certain acts in relation to computer software.

3.1 Fair use has been considered (and rejected) numerous times

7. Fair use has been considered many times in Australia over the last decade and rejected each time.

8. In September 2000 the *Intellectual Property and Competition Review Committee* (the **Ergas Committee**), in a highly regarded economic report, found that the "transaction costs of changing the Copyright Act [to an open-ended fair dealing exception] could outweigh the benefits."[9]

9. In 2006 the Government considered and rejected the introduction of fair use into Australian law because "no significant interest supported fully adopting the US approach" and because of concerns about it failing to meet Australia's international legal obligations.[10] It 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*".[11] An open fair use model was less desirable, because the Government concluded that:

> *"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 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*."[12]

All of these significant concerns continue to exist and have not been displaced by the Draft Report.

10. In 2014, under a reference by the former Government, the ALRC examined whether Australia should adopt fair use. In response to the ALRC enquiry into whether Australia should adopt fair use under copyright law, the majority of submissions were opposed to its adoption in Australia. The ultimate recommendations of the ALRC were equivocal, with the committee proposing a series of alternatives which ranged from introduction of a modified US-style fair use system to a modification of the existing scheme. The Commission has now come up with its own set of factors.[13] The level of uncertainty

[9] Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000).

[10] Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10. The second reason was concerns about compliance of a new Australian fair use exception with the three-step test: see also Discussion Paper, [4.27].

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

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

[13] Draft Recommendation 5.3, Draft Report,162.

around the recommendations and lack of widespread support are illustrative of the difficulties involved in implementing a US-style fair use scheme in Australia.

11. The Commissions' Recommendation 6.1 in the Intellectual Property Arrangements Report, regarding a fair use exception, was rejected by the Government in August 2017.

12. In these circumstances, it is regrettable that it is necessary for copyright owners and representative organisations, such as the Australian Film/TV Bodies, to address the issue of fair use again in the context of repair when it has been so comprehensively rejected over such a long period of time.

13. The Australian Film/TV Bodies have previously made lengthy submissions in relation to fair use to the Productivity Commission Draft Report dated April 2016: Intellectual Property Arrangements (submission No. DR497) and, where relevant, adopt those submissions without repeating them here. These include the submissions directed to the history of fair dealing exceptions in Australia, the differences between the fair dealing regime and the fair use doctrine in the United States, the limited adoption of fair use around the world and the commercial factors that undermine the case for a fair use defence being introduced into Australia. The earlier submissions by the Australian Film/TV Bodies on those issue remain as relevant today as when they were made in 2016 and the case for adoption of a fair use defence to replace the existing comprehensive fair dealing regime is as weak today as then.

14. In this submission the Australian Film/TV Bodies will focus on the case advanced in the Draft Report for a fair use defence in the context of the current inquiry into the 'right of repair'.

3.2 The case for 'fair use' in the Draft Report

15. The case for a broader "fair use" defence in the Draft Report is tenuous. It appears to have been proposed largely by the Productivity Commission itself. Only 6 submissions referred to "fair use" (and only a further 6 referred to 'fair dealing', based on the Australian Film/TV Bodies' analysis). It is a long bow to be drawn to attempt to use the concept of fair use as a solution for access to repair information.

16. The Productivity Commission appears to be relying on its previous recommendation that a fair use exception would be "broader, more flexible and technology neutral" than a fair dealing exception. That earlier recommendation was strongly opposed by many parties including the Australian Film/TV Bodies in the previous inquiry in 2016 and was, of course, not accepted by Government. The justification for fair use in the context of the 'right of repair' is even weaker than before.

17. The Draft Report claims that the most significant IP related barrier to repair is the inability of independent repairers to access repair information[14] and, in that context, the relevant copyright materials constituting 'repair information' are manuals, written repair information, diagnostics equipment and programs, software code, service schematics, which are documents or software used with a product.[15] None of the examples considered relate to film or television content, or the type of entertainment content that is supplied overwhelmingly in digital form over the internet such as via streaming platforms and subscription models, and they are not considered in any detail.

18. Given that the Productivity Commission's consideration of a fair use exception is not directed to film or television content, it would have been expected that there should be an investigation of the potential negative impacts to film or television content – of the type previously identified by the Australian Film/TV Bodies in their lengthy submissions in relation to fair use to the Productivity Commission Draft Report dated April 2016: Intellectual Property Arrangements (submission No. DR497) and sought to evaluate these impacts against any positive impact if the exception was introduced. However, there is no disclosure of such an evaluation in the Draft Report.

[14] Page 15.

[15] Examples include Apple regarding the retransmission of service schematics (raised by iFixit) and Toshiba regarding the reproduction and dissemination of repair manuals, and of regarding Apple laptop manuals and schematics and hospital ventilator manuals.

19. The fact that the Draft Report identifies the need for some form of 'positive obligation' on manufacturers to make repair information available, illustrates how far removed the issue is from the reach of copyright law, and how it could not logically be addressed by the introduction of a fair use defence which operates only if an attempt is made to enforce copyright works, and not a statutory compulsion to ensure information such as user manuals are published and widely disseminated.

20. Finally, the suggestion in the Draft Report that a fair use exception would provide other benefits to the community, because it could facilitate new, valuable and socially beneficial uses of copyright material by members of the public, thereby improving local creative industries, culture and knowledge, is little more than unsubstantiated assertion – no research or evidentiary support is identified for it. No attempt is made to explain how such benefits could be achieved by adoption of a fair use exception. A much more extensive investigation would be required to be undertaken by the Productivity Commission before any of these suggested benefits of fair use would warrant consideration.

21. Ultimately, the Productivity Commission should abandon any consideration of the possible introduction of fair use doctrine in Australia and focus instead on the real issues in this inquiry which centre on specific concerns about access to information for use in repairs of consumers products and devices.

4 Technological Protection Measures (TPMs) exception for repair

Amend the Copyright Act 1968 to allow repairers to legally procure tools required to access repair information protected by technological protection measures (TPMs), such as digital locks. This may also require the Australian Government to clarify the scope and intent of the existing (related) exception for circumventing TPMs for the purpose of repair.

22. The Australian Film/TV Bodies oppose the introduction of a further or broader repair exception to the current TPM regime under the Copyright Act.

4.1 The TPM regime

23. Any consideration of whether there need to be additional exceptions to the TPM regime needs to begin with an understanding of the regime and its origins. The existing TPM regime was developed in accordance with Australia's international obligations under the WIPO Copyright Treaty and the Australia-United States Free Trade Agreement (**AUSFTA**). Article 11 of the WIPO Copyright Treaty requires contracting parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures." All of Australia's major trading partners have implemented TPM regimes to give effect to Article 11.

24. The regime was enacted with the Digital Agenda Act (**DAA**) in 2000. In the 1999 Explanatory Memorandum to the DAA, the Government explained the importance of the TPM scheme to protecting copyright material against infringement in the digital environment in the following way:

> *"Enforcing copyright in the digital environment is a major concern for copyright owners as there is little or no cost associated with the transmission of multiple infringing copies of copyright material using digital technology. In response to the problem of enforcement, the Bill introduces new measures to provide effective remedies against the abuse of technological copyright protection measures, the deliberate tampering with rights management information and unauthorised access to encoded subscription broadcasts."* (emphasis added)

25. The importance of a TPM protection scheme was also recognised by the Legal and Constitutional Affairs (**LACA**) Committee undertaking its review of copyright enforcement in Australia in 2000. In its November 2000 report titled "Cracking Down on Copycats", the LACA Committee recommended that "industry be encouraged to develop technological protection devices that are used to protect copyright

material" and that the Copyright Act be amended "so as to provide legal sanctions against the removal of alteration of technological protection measures". As the Committee noted:

> *[3.43] … Protection devices have the advantage of providing intrinsic protection to copyright material; they prevent infringement from occurring, rather than merely providing a remedy once it has occurred. The Department of Communications, Information Technology and the Arts (DoCITA) submitted that in many cases preventative action is the most appropriate form of protection against infringement.*
>
> *[3.44] Technological protection devices are especially important in the electronic environment. This is because the possibilities for infringement in the electronic environment are vast, rendering legal protection largely ineffectual."*

26. The TPM regime was updated following Australia's entry into the AUSFTA. Article 17.4.7 of the AUSFTA obligated Australia to amend its TPM scheme to bring it into line with the scheme contained in the US Digital Millennium Copyright Act (**DMCA**). The Copyright Amendment Act 2006, which introduced the AUSFTA amendments to the Act, substantially amended the TPM regime, including amending the key definitions of "technological protection measure and "access control technological protection measure" and expanding the scope of activity which would be in breach of the Act to include circumvention of an access control protection measure, in addition to the prior prohibitions against manufacturing, importing and dealing in circumvention devices. Critically, both the new definitions and the new breaches of the regime are subject to significant exceptions.

27. The 2006 amendments expanded the scope of the TPM regime, while at the same time providing for a significant range of exceptions to liability under the regime, thereby providing for balance between the interests of copyright owners and the interests of those using copyright material. The exceptions introduced in the 2006 amendments were carefully considered by Parliament in preparing the enacting legislation. The exceptions included seven new specified amendments to circumvention (ss 116AN(2) to (8)), as well as an exception relating to prescribed non-infringing acts (s 116AN(9)). Those prescribed non-infringing acts were introduced into the legislation into Schedule 10A of the Copyright Regulations 1969 (now superseded by the Copyright Regulations 2017). As noted in the Draft Report, Regulation 40(2)(d)(ii) via section 116AN(9) of the Copyright Act permits the circumvention of TPM's to access protected copyright information for the purposes of repair in certain circumstances.

28. In 2012, the Attorney General conducted a review of the exceptions to liability for circumventing TPM's. The 2012 review was restricted in scope to the additional exceptions in Sch 10A and excluded the specific exceptions contained in ss 116AN(2)–(8) and 132APC(2)–(8). The TPM regime was also considered in 2017 as part of the review of the Copyright Regulations. The Regulations provided that certain acts allow for the lawful circumvention of access control TPMs. The Attorney-General recognised there was significant disagreement between stakeholders as to whether new TPM exceptions would be met and the threshold for incorporating additional exceptions under the power in s 294(4). Therefore, amendments were made to address such concerns.

4.2 The vital importance of the TPM regime

29. The TPM regime plays a vital role in supporting the protection of copyright content in a digital environment It allows copyright owners to include technological features on their copyright material which are intended to prevent or inhibit copyright infringement, which is particularly critical in today's digital environment. Despite the widespread availability of legitimate entertainment content, particularly films and television programs, research into both the scale of unauthorised activities in Australia and the attitudes of members of the public provides a strong public policy basis for maintaining and strengthening laws that deter unauthorised copying and distribution, which include TPMs.

30. Access-control TPMs, such as passwords, allow legitimate websites and streaming services like Netflix to deliver streaming content securely to intended viewers, thus enabling them to generate revenue from their businesses. Copy-control TPMs prohibit unauthorized copying of digital goods, like a digital download of a film in iTunes, from one format to another. These services depend on the

integrity of access control systems and other TPMs. If exceptions to circumvention are too widely available then the only choice remaining to businesses providing content is to either withhold their content or release it at higher price points with the hope of recouping costs from those fewer paying customers. Once TPM protections have been circumvented for a particular work, the work is left exposed and unprotected against any further acts of exploitation, ranging from copying to mass distribution. The market for such a work is instantly undermined and the effect is worldwide. This is why copyrighted works, more than any other type of property, are reliant on law and on technological protection measures for their protection.

31. The Australian Film/TV Bodies' members all rely on technological protection measures to offer innovative products and licensed access to consumers. Access controls make it possible for consumers to view motion pictures at home or on the go via discs, downloadable copies, digital rental options, cloud storage platforms, TV Everywhere, video game consoles, and subscription or advertising supported streaming services. The economic implications of a TPM-free copy of a single popular film becoming freely available to the public because of an improper use of this exception, or a failure to properly secure a TPM-free copy, are very substantial.

32. The Draft Report acknowledges the important role that the existing TPM regime plays for manufacturers that use TPM measures to control access to embedded data in order to protect their financial interests in their intellectual property such as by preventing the pirating of software, and to protect public safety and cybersecurity breaches.[16] The Draft Report acknowledged the submission of the Interactive Games and Entertainment Association[17] that TPM's underpin the entire video game ecosystem and that access to TPM circumvention devices may allow malicious actors access to software.[18]

33. The evidence relied on by the Productivity Commission is either highly theoretical[19] or largely from independent repairers and individual consumers rather than based on any rigorous market research (see above Section 3.2). There is certainly no evidence to support the claim made in the Draft Report that sophisticated hackers may already have access to circumvention devices or have skills to develop them so relaxing the law "might have limited risks" or that the existing "substantial penalties which would still provide deterrent to non-repair TPM circumvention".[20] Such claims could carry little weight when considered against the evidence of the important role played by TPMs in protecting copyright materials and supporting digital markets.

4.3 The existing TPM exception for repair requires no amendment

34. As the Draft Report acknowledges,[21] the Copyright Regulations 2017 (Cth) already provides exceptions for repair; under sections 116AN and 132APC, in relation to a product in which it is installed (the host product) or another product used in conjunction with the host product to repair the host product or another product (if circumvention of a TPM is necessary to enable the repair).[22]

35. Against that background, the concerns about the existing repair exception identified in the Draft Report are centred on two issues: whether the existing exception lacks certainty and whether the TPM repair

[16] Draft Report page 168.

[17] Draft Report page 168.

[18] Submissions number 103 at page 26: *"The reality is that even the most robust laws prohibiting IP infringement have little meaningful impact on changing piracy behaviour and, for our sector at least, practical measures like TPMs are not only at the top of the list of tools that we have available to fight IP theft, but it is also one of the only available tools*.

[19] Draft Report page 168.

[20] At page 177.

[21] Pages 166-167: Copyright Regulations 2017 (Cth) which provide a defence/exception to sections 116AN and 132APC.

[22] Regulation 40(2)(d)(ii) via section 116AN(9) of the Copyright Act

exception should be limited to the situation where a TPM protected device is 'malfunctioning'.[23] Neither concern provide a justification for amendment to the existing TPM exceptions.

36. In relation to the first issue, the absence of case law dealing with the repair exception[24] is not evidence of a lack of certainty in the operation of the provision. Historically, many provisions of the Copyright Act, particularly exceptions and defences, have been introduced based on perceptions of need and have never been judicially considered. The absence of judicial decisions that consider the exception is more likely to be evidence that the provision is working as intended – otherwise it would be expected that a manufacturer would have challenged repair activities under the exception. In relation to the second issue, it is clear that the repair exception is not limited to device malfunction. The secondary materials associated with the exception (original recommendation, EM and the 2017 copyright regulations previous consultation paper and 2012 review of TPM exceptions) indicate that TPM 'malfunction' is not required and expressly state that the exception applies where circumvention is necessary to repair a product. [25] This conclusion is reinforced by the specific removal of the word 'malfunctioning' in the heading of the provision when the Copyright Regulations 2017 were introduced.

37. Unless the real objective of the individuals and organisations who seek to circumvent protections is to be able to make modifications to products that extend beyond repair,[26] the existing TPM repair exception is sufficiently broad to permit all reasonable acts of repair and should not be amended.

5 Contracting Out

To reduce the risk of manufacturers using contractual arrangements (such as confidentiality agreements) to 'override' the operation of any such reforms, it may also be beneficial to amend the Copyright Act 1968 to prohibit the use of contract terms that restrict repair-related activities otherwise permitted under copyright law.

38. The Australian Film/TV Bodies do not support additional amendments to the Copyright Act to prohibit contracts that restrict repair related activities and do not consider that a case has been established for the general law rights of manufacturers to impose restrictions on licensees to be overridden. We generally oppose any attempts to restrict contractual freedoms without any clear evidence that such restrictions are necessary.

6 Conclusion

39. The case of amendments to copyright law to address the concerns of repairers is weak and we do not see the case has been made for changes to Australia's copyright laws. However, if the Productivity Commission were to establish a case for such change in its Final Report and available data supports the case, if any amendment is to be made to copyright law, it should be confined to a narrow fair dealing style defence, drafted to fit only those circumstances which justify repair of consumer devices as is necessary and no more. Proposals for a US-style fair use exception have been repeatedly

[23] As the Government identified in its 2017 copyright regulations consultation paper and a 2012 review of TPM exceptions: … access where a TPM damages a product, **or** where circumvention is necessary to repair a product. [emphasis added] (Department of Communications and the Arts 2017, p. 15).

[24] Draft Report Page 167.

[25] Draft Report pages 167.

[26] See for example page 2 of Submission 86 by the Western Australian Local Government Association (WALGA) "Safeguarding strategies such as Technological Protection Measures (TPMs) are used to control manufacturer copyrights, however they also prevent consumers from carrying out repairs or any other form of modification to products".

rejected and such an exception is neither warranted nor is it appropriate in the context of the issue of product repair. In terms of the existing TPM regime, the current repair exception is sufficient to enable necessary repairs to be undertaken without infringement. It would not be appropriate to introduce further provisions against contracting out in the context of repair, given the likely impact.

40. The Australian Film/TV Bodies remain willing to assist the Commission in this process to achieve an appropriate final report, and they are available for further consultation.

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