

THE COALITION OF MAJOR PROFESSIONAL AND PARTICIPATION SPORTS INCORPORATED

SUBMISSION TO THE PRODUCTIVITY COMMISSION'S DRAFT REPORT INTO INTELLECTUAL PROPERTY ARRANGEMENTS



1 Introduction

The Coalition of Major Professional and Participation Sports (**COMPPS**) consists of the following member organisations:

- Australian Football League;
- Australian Rugby Union;
- Cricket Australia;
- Football Federation Australia;
- National Rugby League;
- Netball Australia; and
- Tennis Australia.

Each of these organisations is the governing body and custodian of a major professional sport in Australia.

COMPPS members play an important role in developing, promoting and presenting sport in Australia from the grassroots through to the international level.

They are not-for-profit bodies and are responsible for the long-term development and sustainability of their sports. Between them, they have 8.95 million participants and 16,000 clubs.

COMPPS members provide a wide range of public benefits through a self-funding business model. A large portion of the revenue of COMPPS members is devoted to enhancing, promoting and developing sport for all Australians at both a national and community level.

One of COMPPS' roles is to facilitate a response to public inquiries on behalf of its member sports.

This document comprises COMPPS' written response to the Productivity Commission's April 2016 *Intellectual Property Arrangements* draft report (**Draft Report**).

2 Intellectual property is fundamental to COMPPS members

Strong and enforceable intellectual property laws are of fundamental importance to COMPPS members.

In particular, copyright is crucial to the exploitation and licensing by COMPPS members of media rights to the major sporting competitions and events, and other content controlled by COMPPS members.

These media rights are exploited and/or licensed by COMPPS members across a range of platforms including free to air television, subscription television, radio, online and mobile technology.

The revenue derived from the licensing of these rights is a very significant revenue stream for most COMPPS members. In particular, live broadcasts and communications of sports events are very popular and constitute valuable rights for COMPPS members.

COMPPS members are demonstrably innovative in exploiting their online and digital rights. They have made, and continue to make, significant investments to enable them to exploit their rights as broadly as possible and to enable the Australian community access to their content via various mediums.

The licensing of online and digital rights is an increasingly significant part of COMPPS members' revenue. The proportion and importance of revenue from online and digital rights as part of overall media rights revenue is expected to increase in the coming years.

Maintaining and growing media rights revenue is critical to the operation, survival and growth of COMPPS members and the sports they administer. In addition, the ability to develop new and valuable revenue sources by improving the ability of COMPPS members to deal in their existing rights and to develop new rights will allow COMPPS members to:

- (a) maintain and increase their distributions to members and clubs (and in turn to athletes), which have high levels of community support and interaction;
- (b) increase investment in the development of their respective sports, including at grassroots level;
- (c) maintain relatively low admission prices for attendees at matches, providing all Australians with the opportunity to participate in sports;¹
- (d) continue and increase support for important community relations programs;
- (e) continue to invest in facility development where appropriate and for the wider community benefit; and

¹ By way of example, COMPPS estimates that nearly half of all Australians attend at least one sporting event each year.

- (f) continue to operate without significant reliance on Government funding.

Copyright has an essential role in the licensing and exploitation of media rights to the major sporting competitions and events and other content owned or controlled by COMPPS members. As part of their licensing arrangements COMPPS members own copyright in the broadcasts and recording of their content. Ownership of copyright is important as it allows COMPPS members to license or exploit content across multiple platforms and, where necessary, take enforcement action against unauthorised use.

The prevalence and scope of online copyright infringement and the limitations of traditional copyright law enforcement tools in dealing with online copyright infringement are significant concerns for COMPPS members.

In particular COMPPS members face major challenges due to unauthorised online distribution and communication of coverage of sporting events and other content controlled by COMPPS members, for example through unauthorised live streaming sites.

3 General comments in relation to the Draft Report

COMPPS is concerned that the adoption of many of the recommendations in the Draft Report will have a significant adverse effect on COMPPS members and, by implication, their sports, athletes, supporters, communities and other stakeholders.

3.1 Current copyright system does not unfairly favour owners

The Draft Report suggests that 'Australia's copyright arrangements are weighted too heavily in favour of copyright owners'² and that the arrangements fail to take into account the interests of 'intermediate users'³ or encourage 'follow-on innovators'⁴.

COMPPS rejects these views. Copyright should give proper protection to persons or organisations who take the time and effort to create and develop the content and material that is subject to copyright protection. In the case of COMPPS members, this means that the film and broadcast copyright of their sporting and related activities must be adequately protected. Failure to do so will unnecessarily and unfairly put at risk existing and future authorised exploitation of their protected rights.

² Draft Report, page 16.

³ Draft Report, page 16.

⁴ Draft Report, page 6.

Further, the promotion of innovation by third parties should not be seen as an appropriate goal or outcome if such innovation involves infringement of another person's rights. COMPPS members are very familiar with persons seeking to exploit their content without authorisation. "Innovative" use of intellectual property by new technology should not be used as a cloak for the infringement of important and valuable rights. For example, COMPPS opposes any changes to the law that would allow practices of the kind that were held to be unlawful in the *Optus TV Now* case⁵ or in the recent *Fanatix* litigation in the United Kingdom⁶.

COMPPS does not believe there is any competitive advantage for Australia in having less certain, less secure and less protective intellectual property regulation under the guise of innovation or otherwise.

To suggest that changes in intellectual property arrangements are required because Australia is a net importer of intellectual property is overly simplistic. Further, it should be noted that each of the COMPPS members are exporters of intellectual property.

COMPPS is strongly of the view that in order to encourage appropriate, front end innovation and creativity, right holders must have clarity and certainty as to their rights and a robust system to enforce those rights. COMPPS does not support a recalibration of the well-established property rights of its members, and is very concerned that the adoption of an open ended and uncertain fair use concept will immediately and significantly adversely impact its members' rights.

3.2 Inadequate consideration of enforcement

Infringement of intellectual property rights, in particular online copyright infringement, is a major concern for COMPPS members and their licensees.

The Productivity Commission is wrong to suggest that unauthorised infringement does not seriously impact the licensing of intellectual property rights and associated revenue, and that the 'solution' for online copyright infringement is based on the timing of content availability and pricing. COMPPS members have an excellent track record in making their audio-visual content available online in a timely (often live) basis and at no cost or at a reasonable cost for consumers. This does not stop unauthorised copyright use, including by third parties who seek to commercially exploit COMPPS members' content and would do so irrespective of the time or price that the material is made available.

⁵ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

⁶ *England & Wales Cricket Board Ltd v Tixdaq* [2016] EWHC 575 (Ch).

Australia's intellectual property arrangements must be supported by a more robust enforcement regime that allows rights owners to promptly address unauthorised downloading and other forms of infringement in a cost effective way.

3.3 International framework

COMPPS is concerned that some of the recommendations in the Draft Report which seek to reduce the rights afforded to rights holders are inconsistent with international intellectual property regimes and developments. It is our understanding that governments in some comparable jurisdictions are seeking to increase protection for intellectual property rights, rather than erode those protections. For example, in its recent strategy document on intellectual property protection, the United Kingdom Intellectual Property Office stated that one of its core strategic ambitions is to ensure that UK businesses are able to more confidently operate in the international marketplace as a result of better intellectual property protection globally.⁷

COMPPS would also be concerned if the recommendations in the Draft Report were inconsistent with Australia's existing international commitments.

4 Specific issues raised in the Draft Report

Part 4 of this submission sets out COMPPS' response to the following draft recommendations, findings and information requests in the Draft Reports:

- (a) draft recommendation 2.1 regarding intellectual property policy;
- (b) draft finding 4.1 regarding the scope of the copyright system;
- (c) draft finding 4.2 regarding copyright term;
- (d) draft recommendation 5.1 regarding geoblocking;
- (e) draft recommendation 5.3 regarding fair use;
- (f) information request 5.1 regarding contracting out;
- (g) draft recommendation 14.1 regarding section 51(3) of the Competition and Consumer Act 2010 (Cth) (**Competition and Consumer Act**);

⁷ United Kingdom Intellectual Property Office, *Protecting creativity, supporting innovation: IP enforcement 2020* (2016), page 1.

- (h) draft recommendation 18.1 regarding the safe harbour provisions; and
- (i) draft finding 18.1 regarding online copyright infringement.

In making the comments below COMPPS has sought to restrict its submissions to matters it believes are directly relevant to its members. If it emerges that other issues from the Draft Report are also relevant, or if the Productivity Commission wishes to raise any of other issues with COMPPS or its members, COMPPS can make a supplementary submission.

4.1 Intellectual property policy

COMPPS agrees that intellectual property policy in Australia should be informed by robust evidence. However, there are other important criteria that also need to be taken into account in formulating intellectual property policy. Most significantly, intellectual property policy must be directed to providing appropriate protections of the rights of content creators and owners.

COMPPS is concerned that the principles of *effectiveness, efficiency, adaptability* and *accountability* outlined in Draft Recommendation 2.1 do not address all relevant considerations for intellectual property policy.

4.1.1 Insufficient focus on protection of rights owners

The principles referred to in Draft Recommendation 2.1 do not have sufficient regard to the interests and perspectives of creators and rights holders.

Any intellectual property policy or reforms to copyright law must not undermine the economic incentives and business models of the rights owners. This is particularly true for the not-for-profit, self-funding COMPPS members for the reasons explained in part 2 above.

The principles referred to in Draft Recommendation 2.1 promote the wide dissemination of ideas seemingly at the expense of the protection of rights required to encourage and incentivise production of new content.

4.1.2 Insufficient focus on certainty

Certainty regarding the operation and interpretation of copyright laws is essential to enable COMPPS members to obtain the full benefit of the protected rights that form the foundation of their objectives within their individual sports. Making changes to copyright laws without evidence or legal foundation undermines this certainty.

4.1.3 Overemphasis on additional / downstream innovation

Any encouragement of additional or downstream innovation should not be to the detriment of the persons who expend the time and effort to create or originate the material that is the subject of copyright protection. Without adequate protection for these persons there will be no material for others to innovate with.

4.1.4 Agility within the system rather than a system that is agile

COMPPS submits it is incorrect to frame policy requirements in terms of '*a system that is agile in response to change*'.⁸ Rather, the intellectual property system should be robust and promote sufficient certainty and protection to allow rights holders and users to innovate in response to change. Further, a system that is designed to be very agile will forgo the certainty that allows rights holders, and potential future rights holders, to reasonably exploit their rights.

4.1.5 Access and pricing

The Draft Report refers to intellectual property rights as '*imposing a cost to the community in the form of higher prices and restricted access*'.⁹ This is a simplistic view. To the contrary, it is the protection that intellectual property rights provide that allow COMPPS members to expend resources to develop and grow their sports and the associated audio-visual and audio coverage, and to innovate in the ways in which content is delivered to consumers. To suggest that these activities are an inappropriate cost ignores the benefits that flow from the authorised exploitation of these rights.

4.1.6 International intellectual property arrangements and Australia's international obligations

In formulating intellectual property policy the Australian Government must be mindful of intellectual property arrangements and regimes in other international jurisdictions. For example, although the fair use concept operates in the United States and has been considered by reviews in other jurisdictions, fair use does not apply in many comparable jurisdictions including the United Kingdom and New Zealand.

The Australian Government also needs to consider its international obligations as part of its intellectual property policy.

⁸ Draft Report, page 70.

⁹ Draft Report, page 60.

4.2 Scope of Australia's copyright system

COMPPS believes the current copyright system effectively balances the protection of rights and the interests of Australians getting access to content. Any previous expansion of rights has been appropriate and it is unnecessary and unhelpful to retrospectively review decisions made by the Commonwealth Parliament to amend or update copyright law.

Having said that, COMPPS supports any future changes to copyright law being undertaken in a transparent, considered and consultative manner. Additionally, it is COMPPS' view that there is no pressing need to add, or subtract from, the current quantum of rights. COMPPS will oppose any changes that erode the scope of COMPPS members' current rights.

COMPPS' view is that Australian copyright law is working well in the digital era. COMPPS members have embraced new business models for online and digital platforms based on the existing copyright system. Due in part to the existing framework of intellectual property protections, COMPPS members are able to, either by themselves or through others, exploit their content across multiple platforms. This allows consumers access to content in a wide variety of forms. The sporting event coverage of COMPPS members is available on at least one platform on a live basis.

In terms of the incentives for creation, COMPPS members are in the best position to develop and innovate with respect to the nature and delivery of their content. Any decrease in the protection of COMPPS members' rights that would allow third parties or users to disseminate COMPPS members' content without authorisation reduces not just the value of the rights to that content but also the incentive for COMPPS members to create new content.

4.3 Copyright term

Draft Finding 4.2 of the Draft Report provides that:

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

The current duration of copyright protection set out in the Copyright Act 1968 (Cth) (**Copyright Act**) strikes an appropriate balance between the interests of rights holders and consumers in the digital age. COMPPS does not support any changes to the Copyright Act that would shorten the duration of copyright protection, and particularly the drastic reduction in protection proposed by Draft Finding 4.2.

The Draft Report notes that while it is difficult to pinpoint an 'optimal' term, the current copyright term for most works is too long. COMPPS notes the Productivity Commission's discussion in relation to the optimal duration of copyright protection and the problems associated with a longer term, is primarily focused on copyright works, and in particular unpublished works.

The communication of live sport is an important right and revenue stream for COMPPS members. However, also important is the right to communicate highlights, replays and archives of sporting events. COMPPS members or their licensees make this content available to the public via various mediums and platforms and this content has currency for many years after the sporting event has occurred.

The duration of copyright protection for film is currently 70 years after the end of the calendar year in which the film was first published. Copyright in a television or sound broadcast lasts for 50 years from the year in which the television or sound broadcast was made. COMPPS considers the existing duration of copyright protection for both film and broadcasts to be adequate. These periods provide COMPPS members and their licensees with an incentive to invest in the creation and distribution of film and broadcast material, and to create popular and innovative services or products that allow consumers to access this content while allowing COMPPS members to be compensated for those activities. This revenue is re-invested back into Australian sport, which ultimately benefits the Australian sporting and broader community. Shortening the period of copyright protection would directly undermine the ability of COMPPS members to licence content, including extensive archive assets, that in the digital streaming era remain highly valuable far beyond the drastically reduced 15 to 25 year period proposed by Draft Finding 4.2. Any reduction in the duration of film or broadcast copyright will impact the time period within which COMPPS members can exclusively exploit this content. Ultimately, this will have a negative impact on the ability of COMPPS members to invest into sporting programs at all levels and therefore reducing the community and social benefit generated by COMPPS members that results from such investment.

4.4 Fair Use

4.4.1 The introduction of fair use is opposed

COMPPS opposes the recommendation in the Draft Report to replace the current fair dealing exceptions in Australian law with a broad, US-style exception of 'fair use'.

COMPPS does not believe a case has been made out for the introduction of a fair use exception. Further and significantly, COMPPS and its members believe a new fair use exception will undermine

and adversely impact the licensing and value of the media rights and other content rights of COMPPS members.

The replacement of the existing fair dealing exceptions with a fair use exception has been considered in past Australian reviews and inquiries. COMPPS and its members have consistently argued against the introduction of a new fair use exception, including in response to the recent Australian Law Reform Commission report.¹⁰ Some of the previous Australian reports rejected the need to introduce a fair use exception into Australian law. Further, recent international copyright reviews in the United Kingdom considered the introduction of a new fair use regime and did not recommend a new fair use exception be introduced.

COMPPS remains of the view that a broad fair use exception is not appropriate for Australian law.

In COMPPS' view:

- (a) fair use is not certain or predictable;
- (b) a single, general standard is not required;
- (c) fair use is not required by the digital economy;
- (d) fair use is not required to assist innovation; and
- (e) fair use will result in greater transaction costs.

4.4.2 Fair use is not certain or predictable

Exceptions to copyright impact the rights of copyright owners and licensees. Given these impacts, to the extent that any exceptions to copyright are justified, those exceptions need to be limited, clear in scope and able to be consistently applied.

COMPPS is concerned the scope and application of any new fair use exception will be difficult to predict, and this will result in inconsistent and arbitrary decisions. It will be difficult for parties to understand the boundaries of the relevant rights and difficult to predict outcomes when they seek to enforce their rights. Further, COMPPS is concerned that fair use will be seen as a standalone, new 'user right' rather than an exception to the exclusive rights of copyright owners, and this will lead to an increased culture of infringement in Australia. This is not in the interests of content rights holders or other stakeholders. These outcomes need to be avoided in Australian copyright law.

¹⁰ Australian Law Reform Commission, *Copyright and the Digital Economy* (2014).

Certainty is the cornerstone for encouraging business investment and innovation, and the protection of valuable rights. The uncertainty and unpredictability arising from a new copyright exception will create serious difficulties and costs for copyright owners, especially COMPPS members, when licensing their rights, determining whether a particular use falls within the exception, and in enforcing rights.

An illustration of the problems that can arise with fair use and content rights arose in 2009 in Israel. Following the introduction in 2007 of the broad fair use concept into Israeli law, a court held, in part, an entire soccer match could be streamed online by an unauthorised third party under the new fair use exception.¹¹ Although this decision was subsequently overturned on appeal, the case is an example of the uncertainty, interpretation and application problems that arise when a broad and uncertain new concept is introduced.

The suggestion that fairness factors and illustrative exceptions will assist in defining the scope of the new fair use exception is not helpful or determinative, given those concepts are not clear or exhaustive. The proposed fairness factors and illustrative exceptions are discussed in more detail below.

The lack of Australian case law in relation to any new fair use exception adds to the unpredictability and uncertainty of the exception. The suggestion that reference can be made to US case law to assist in interpreting Australian law is overly simplistic.

4.4.3 A single, general 'flexible' standard is not required

The open ended, fair use exception proposed by the Productivity Commission is based on a standard: 'fair use'.

The use of a general, 'one size fits all' standard is problematic. The concept of 'fair' is subjective and open to different interpretations. 'Fair' use will invariably mean different things to different people.

COMPPS believes the attraction of a single fair use exception to copyright based on a standard is illusory. The exception increases the complexity of copyright law and has inherent uncertainty.

4.4.4 No evidence a broad fair use exception is required by the digital economy

The proposed new fair use exception is a general exception to copyright and is not specifically related to the digital economy.

¹¹ (Tel Aviv) 11646/08 *Football Association Premier League Ltd. v John Doe* (unpublished) (July 16, 2008).

COMPPS does not believe that the introduction of a fair use exception is required for the digital economy.

Further, there is no evidence that the existing fair dealing exceptions are inflexible or otherwise inappropriate in the digital age. The fair dealing exceptions are technology neutral and importantly focus on the use of the copyright material by the user.

4.4.5 Fair use will not assist innovation

Any suggestion that 'fair use' is required to develop innovative copyright-dependent industries is not supported by evidence. Major technology companies have successfully established their presence in Australia within the boundaries of the existing copyright laws. Existing copyright laws have not prohibited the development of technology like cloud computing, provided that technology is used in a lawful manner

The innovations of rights holders, such as COMPPS members, also need to be recognised. These innovations occur within the existing copyright framework. COMPPS members are consistently innovating to provide their content to consumers in a format and through platforms that suit modern consumption patterns. Any reforms that undermine the protections granted by the existing copyright framework will reduce the incentive for rights holders to continue to invest in these innovative products and services and will likely lead to a reduction in innovation and dissemination of quality content.

4.4.6 Fair use will result in greater transaction costs

It is clear there will be significant resources expended by rights holders and non-rights holders in navigating the broad and uncertain legal boundaries of any new 'fair use' exception.

The copyright material of COMPPS members is popular and valuable. COMPPS members need to be protected against unauthorised use of this material. COMPPS members have had to take legal action in the past to prevent unauthorised use of copyright material purportedly under exceptions in the Copyright Act.

The novelty, uncertainty and unpredictability of a new broad fair use exception will inevitably result in increased transaction costs, such as the expenditure of significant costs by rights owners and users on legal costs and litigation to provide certainty as to the scope of the new exception.

The burden of the transaction costs associated with defining the parameters of the new exception will fall to rights holders, such as COMPPS members, to incur. It is unfair that COMPPS members be

required to pursue advice and litigation to obtain certainty concerning the scope and possible infringement of their exclusive rights.

4.4.7 The proposed fairness factors

The Productivity Commission proposes a non-exhaustive list of ‘fairness factors’ to be used in determining whether a use constitutes fair use under the new exception.

The proposed fairness factors are uncertain, complex and involve consideration of multiple issues. There can be no certainty and predictability in a law based on a standard if the only guidance given for its application is a non-exhaustive list of fairness factors to be considered as part of any determination as to whether a use of copyright material constitutes fair use.

COMPPS raises the following concerns in relation to the use of fairness factors:

4.4.7.1 The effect of the use on the market for the copyright protected work at the time of the use

This factor places the onus on the copyright owner to establish the effect on the potential market for, or value of, the copyright material. It is unreasonable and inappropriate to place the burden of proof onto the owner of copyright to show that an unauthorised use of their copyright content is unlawful. No such onus exists under the current fair dealing exceptions. Any use that has an adverse impact on current or future copyright owners’ rights should not be capable of being fair use.

Further, it is also not clear how the market effect of an infringer’s conduct is to be determined and demonstrated. Ascertaining the market effect of the use of copyright material may entail complex economic considerations, and raise cost and evidentiary issues.

4.4.7.2 The amount, substantiality or proportion of the work used, and the degree of transformation applied to the work

This factor involves considering the degree of transformation in determining whether the use is fair. COMPPS members fear that transformative works based on their works may threaten the reputation of their brand.

The effect of the proposed use on the reputation of the copyright owner should also be taken into account. For example, COMPPS members must maintain the right to control the use of footage showing rough conduct in their sport or other content that may damage the image of the sport.

Such footage, if communicated in an unauthorised manner, has the potential to detrimentally affect the reputation of COMPPS members, their content and their sports.

4.4.7.3 The commercial availability of the work at the time of infringement

COMPPS members derive considerable value from highlights, replays and archival footage of past sporting events. Consideration of the commercial availability of the work as a factor at the time of the infringement could considerably devalue the property of COMPPS members.

The commercial availability factor is also inconsistent with the protection periods for audio visual and audio copyright material. In effect, such a change will nullify copyright protection unless commercially used. This will create a considerable burden on rights holders to constantly commercially exploit their content, even where it may be impractical or against the rights holder's interests to do so.

4.4.7.4 The purpose and character of the use, including whether the use is commercial or private use

There is no evidence that the existing provisions of the Copyright Act are unreasonably preventing individuals from using copyright materials for private and domestic purposes or that broader exceptions in respect of private and domestic use are required.

COMPPS believes there are already sufficient exceptions in the Copyright Act providing for use of copyright material for private and domestic use, such as the existing time shifting and format shifting exceptions. COMPPS considers the format shifting and time shifting provisions of the Copyright Act adopt the appropriate approach to exceptions for private and domestic use, being that any exceptions should apply to the use of copyright material for private and domestic purposes in certain limited and specific circumstances only. There is no evidence to suggest that these exceptions are too prescriptive or inflexible to keep up with modern trends.

COMPPS considers there is strong public recognition of, and support for, the need for the copyright content of COMPPS members to be protected and respected.

4.4.8 The 'illustrative exceptions'

The Productivity Commission has proposed a non-exhaustive list of illustrative exceptions be included in a new fair use exception.

Again, COMPPS is concerned that these illustrative exceptions will not provide clarity or certainty.

4.4.9 The Commission's draft recommendation

COMPPS strongly opposes any reform or amendment to the Copyright Act that would have the effect of extending the rights of unlicensed third parties to use copyright material.

It is a fundamental principle of copyright law that a copyright owner has the right to prevent third parties from copying, reproducing, communicating or otherwise exploiting its copyright material (subject to specific and certain exceptions). Allowing third parties broad, general 'user rights' to use copyright material under cover of a new fair use exception will significantly, immediately and adversely impact the ability of copyright holders, such as COMPPS members, to license and enforce their rights. Any unauthorised third party use should be prohibited (other than to the extent of the existing exceptions). Further, any unauthorised use for a commercial benefit – by a third party or otherwise - must not be capable of falling within any new fair use exception.

COMPPS does not agree with the suggestion in the Draft Report that *'the objective of a new Australian fair use exception would be to ensure that the copyright system applies only to those works where infringement would undermine the ability of a rights holder to commercially exploit their work at the time of infringement'*¹². While commercial considerations are often important, there may be other reasons why the use of content is unfair or unreasonable and should not occur without the authorisation of the copyright owner. For example, audio-visual coverage of a sporting event undertaken by a COMPPS member may feature rough conduct or a person getting seriously injured, or other events or incidents that the rights holder does not want to be exploited outside its control. It is inappropriate and unfair that third parties be able to use this content outside the scope of existing, understood fair dealing exceptions.

COMPPS is sceptical and concerned about the Productivity Commission's suggestion that the uncertainty associated with an open ended fair use exception can be addressed by relying on jurisprudence from other jurisdictions or on guidelines. Those suggestions are indicative of the inherent uncertainty that would result from any adoption of a fair use exception, and the inevitable years of disputes (and associated costs) in determining what types of use are not permitted.

If fair use was to be introduced (which is strongly opposed by COMPPS and its members), then additional detailed Government regulations or guidelines will likely be required to ensure that no use can be made of COMPPS members' copyright material in a way which adversely impacts their interests.

¹² Draft Report, page 159

4.5 Contracting out

Information Request 5.1 of the Draft Report relates to the practice of ‘contracting out’ of the exceptions in the Copyright Act.

In response to Information Request 5.1, COMPPS advises that its members do contract out of the fair dealing exceptions from time to time, including as part of the media rights arrangements referred to in part 2 above.

COMPPS members do not oppose limitations on contracting out being applied to the exceptions for libraries and archives.

However, COMPPS does not support the introduction of any limitations on contracting out of the fair dealing exceptions in a broader context.

The media rights agreements of COMPPS members should be able to allow parties to agree to contract out of copyright exceptions. These agreements are detailed, negotiated agreements entered into by sophisticated commercial parties. ‘Contracting out’ is something that is undertaken by these parties with knowledge of their rights. COMPPS does not see any reason why these parties should be restricted from contracting out of the fair dealing exceptions.

This is particularly the case given that COMPPS members may seek to contract out of these exceptions to protect the reputation and/or integrity of their sports (for example to restrict use of sporting event footage in ways which may harm the reputation of a sport).

There are also legitimate reasons why COMPPS members or their licensees may wish to contract out of fair dealing exceptions in agreements with consumers. For example, COMPPS members or their licensees may licence consumers to ‘rent’ audio visual content of sporting events for a limited duration (similar to the time limited content arrangements available using services such as Apple TV). Such arrangements require the parties to be able to contract out of fair dealing exceptions, including to prevent users being able to contravene the time limited arrangements under cover of a fair dealing exception.

4.6 Geoblocking

Recommendation 5.1 of the Draft Report provides that:

The Australian Government should implement the recommendation made in the House of Representatives Committee report ‘At What Cost? IT pricing and the Australia tax’ to

amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

The Australian Government should seek to avoid international agreements that would prevent or ban consumers from circumventing geoblocking technology.

Geographic market segmentation is a common and entirely appropriate licensing practice.

COMPPS members all licence intellectual property (such as copyright and trade marks) on an exclusive territorial basis. Market segmentation is a means of maximising commercial value for the valuable media rights.

The licensing of media rights by COMPPS members is usually undertaken in a way that restricts the exploitation of rights to a particular territory. The grant of those rights is often supported by a requirement to use protection measures to ensure content cannot be accessed outside that territory. Such requirements have enabled COMPPS members to structure global broadcast agreements in such a way as to maximise value across international markets, for example through strategically differentiated content entitlements or the introduction of virtual signage allowing jurisdiction-specific (and non-conflicting) sponsorship arrangements. Permitting Australian consumers to circumvent geoblocking technology would upend the commercial model for international broadcast content, thereby harming not only COMPPS members but ultimately Australian sports consumers and participants.

In addition to licensing media rights within Australia, COMPPS members also licence their media rights outside Australia, often on a territory by territory basis and sometimes to different licensees than their Australian media rights partners. The revenue derived from international licensing can be a very significant component of COMPPS members' media rights revenue. For example, one of COMPPS members derives more than 40% of its media rights revenue from international arrangements.

COMPPS and its members do not support any recommendation that encourages the circumvention of geoblocking technology for the following reasons:

- (a) geoblocking is a well-recognised, standard, lawful and commercially appropriate practice in Australia and overseas;
- (b) the practices and technology that COMPPS members and their licensees use to prevent unauthorised access to their content are reasonable, lawful and appropriate;

- (c) COMPPS members are concerned that the use of technology to circumvent geoblocking in the Australian and overseas markets can undermine the grant of exclusive territorial rights and the management of Australian and global markets;
- (d) there is no evidence that the geoblocking practices of COMPPS members or its licensees are inappropriate or have resulted in Australian consumers being offered a lower level or inappropriate level of digital service;
- (e) there is no evidence that the geoblocking practices of COMPPS members or its licensees involve inappropriate cost differentials;
- (f) the encouragement of circumvention of valid and lawful licensing arrangements directly undermines the rights of content owners. It also encourages circumvention in overseas territories which may jeopardise overseas licensing arrangements;
- (g) the distinction between the use of circumvention technology for commercial and non-commercial purposes is not straightforward;
- (h) no detail has been provided by the Productivity Commission or in the previous House of Representatives Standing Committee report on what particular types of circumventions of geoblocking technology are said to not infringe copyright law. It is unfair and unreasonable to assume that all forms of circumvention of geoblocking technology are lawful and legitimate. Any change to the law in relation to circumvention of geoblocking technology must be carefully considered to ensure there are no unintended or adverse consequences for rights owners and their licensees. COMPPS and its members reserve their rights to review any further proposal that identifies specific practices or conduct said to be legitimate;
- (i) to the extent that existing practices and conduct are currently prohibited by the anti-circumvention provisions of the Copyright Act then the law should not be altered to make those practices lawful; and
- (i) in any event amendments to the Copyright Act to address this issue are not appropriate. We also note the comments in the House of Representatives Committee report "At What Cost? IT Pricing and the Australia tax", that the Attorney-General's Department's view is that *'the Copyright Act is not the appropriate vehicle to consider any such proposed amendment'*¹³ in relation to circumvention of geoblocking technology.

¹³ House of Representatives Standing Committee on Infrastructure and Communications (2013), page 108.

Further, COMPPS does not support any steps by the Australian Government to enter into or give effect to international agreements that would limit the ability of rights owners to impose geoblocking requirements or that encourage the circumvention of geoblocking technology.

4.7 Intellectual property rights and competition law

Recommendation 14.1 of the Draft Report provides that:

The Australian Government should repeal s. 51(3) of the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act).

COMPPS does not support this recommendation for the following reasons:

- (a) COMPPS is not aware of any evidence that section 51(3) has a negative economic impact, any negative impact on competition, or that there are other compelling reasons justifying the repeal of section 51(3). The Draft Report acknowledged that the costs and benefits of repealing section 51(3) are 'finely balanced'¹⁴ and that there is 'little evidence to suggest that the costs of retaining the exemption are significant'¹⁵. COMPPS considers that it is inconsistent with an evidence based approach to policy making to propose the repeal of section 51(3) in the absence of such evidence;
- (b) section 51(3) is already limited and narrow in operation. For example, section 51(3) does not apply to all forms of intellectual property or provide an exemption for all of the provisions of Part IV of the Competition and Consumer Act;
- (c) COMPPS members frequently licence intellectual property (such as copyright and trade marks), including on an exclusive, territorial or platform specific basis. It is therefore important to COMPPS members that appropriate exemptions apply where competition laws and the intellectual property rights of rights holders potentially conflict; and
- (d) COMPPS members are concerned that repealing section 51(3) would result in increased risk and uncertainty for rights holders, would increase transaction costs and may act as a disincentive to some forms of licensing or assignment of intellectual property by rights holders.

The Draft Report suggested that uncertainty resulting from the repeal of section 51(3) could be addressed by the issuing of ACCC guidance. As stated above, COMPPS does not support the repeal of section 51(3). However, if the Australian Government did propose to repeal or amend section

¹⁴ Draft Report, page 385.

¹⁵ Draft Report, page 391.

51(3) and/or issue ACCC guidance, COMPPS considers that the following guiding principles should apply:

- (a) rights holders should not have less protection or a more limited exception than currently exists under section 51(3); and
- (b) any such action should focus on increasing certainty for rights holders and the ability of rights holders to exploit their intellectual property rights.

4.8 Extended safe harbour scheme

Recommendation 18.1 of the Draft Report provides that:

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).

The safe harbour scheme essentially provides an exemption to certain persons to carry out activities which would otherwise result in a breach of copyright. In providing this exemption, the safe harbour provisions effectively take rights away from the copyright owner. Copyright protection is integral to the ability of COMPPS members to exploit the copyright they own in media rights and provides an incentive to them to continue to innovate in the methods and platforms used to disseminate their content to the Australian public. As such any proposal which seeks to expand an exemption to copyright infringement must be carefully considered.

COMPPS does not support extending the operation of the safe harbour scheme as provided in Recommendation 18.1 to apply beyond 'carriage service providers' (as defined in the *Telecommunications Act 1997 (Cth)*).

COMPPS would only consider supporting an extension of the safe harbor scheme if:

- (a) liability for authorisation of copyright infringement is appropriately expanded and clarified; and
- (b) the parties to whom the extended safe harbour scheme would apply are:
 - (i) identifiable by reference to clear and objective criteria (such as 'carriage service providers' are currently identifiable); and
 - (ii) subject to an appropriate industry agreement, commercial arrangement or other 'reasonable steps' regime to prevent the relevant infringement (particularly given the breakdown in negotiations in February 2016 around the draft copyright notice scheme).

This position is consistent with COMPPS' submission to the Attorney General's 2014 *Online Copyright Infringement* discussion paper (**2014 Discussion Paper**).

In the Draft Report the Productivity Commission states that it is of the view that *'the operation of authorisation liability and the coverage of Australia's safe harbour regime are separate issues.'*¹⁶

COMPPS respectfully disagrees with this view. Given the safe harbour provisions largely protect persons from authorisation liability, the scope of authorisation liability will necessarily inform which persons may require protection from those provisions under the safe harbour regime. COMPPS notes that in the 2014 Discussion Paper the extensions to the safe harbor provisions were considered alongside an expansion of the scope of authorisation liability.

COMPPS considers that, in light of the narrow construction of the authorisation liability provisions following the decision in *Roadshow Films Pty Ltd v iiNet Limited*,¹⁷ without an expansion and clarification of the provisions relating to authorisation liability, there is no need for any extension of the safe harbour scheme.

COMPPS also considers that any extension of the safe harbour scheme beyond carriage service providers must also place obligations on persons who benefit from the protection to undertake certain minimum and reasonable steps to prevent the infringement (i.e. they cannot simply passively allow infringement).

COMPPS notes while the Draft Report advocates for an extension of the safe harbor scheme, no detail has been provided by the Productivity Commission as to whom specifically the scheme should be extended to cover. Any extension of the safe harbour scheme would need to carefully consider which specific classes of persons will be afforded protection under such an extension to ensure that no persons are unintentionally granted an exemption. A general carve out would be entirely inappropriate as the safe harbour scheme should only create limited exceptions to authorisation liability, not broad exemptions.

COMPPS and its members reserve their rights to review any further proposal that identifies specific classes of persons to whom the safe harbor scheme practices may be extended.

4.9 Online copyright infringement

Draft finding 18.1 of the Draft Report provides:

The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

¹⁶ Draft Report, page 490.

¹⁷ [2011] FCAFC 23.

Subject to any legislative restrictions¹⁸, COMPPS members are free to licence (or not licence) their content on different platforms on terms they believe appropriate.

Each COMPPS member provides timely and cost effective access to Australian consumers of their copyright protected audio-visual sporting coverage content. In most instances, this content is first made available by COMPPS members or their licensees on a live basis on at least one platform. Hundreds of hours of this content is made available by COMPPS members each year on free-to-air television across Australia usually on a live or near live basis and at no direct cost to the viewer. Where the content is made available on a fee paying basis, via subscription television, online or mobile delivery, the pricing is reasonable.

Notwithstanding this, online copyright infringement remains a problem for COMPPS members. Ongoing and systematic problems with online copyright infringement can have a negative impact on the value obtained by COMPPS members when licensing their media rights.

It is clear to COMPPS and its members that timely and cost-effective access of content is not a complete solution to the problem of online copyright infringement. It is also clear to COMPPS and its members that some persons and organisations will engage in online infringement of copyright-protected material irrespective of the timely and cost effective (or free in many instances) availability of content via authorised channels. These infringers are often, but not always, motivated by commercial gain.

In addition to licensing live or near live coverage of sporting events, COMPPS members also licence highlights, replay and archive rights of their sporting events. This is popular and valuable content, and is often subject to online copyright infringement. The timely and cost effective provision of this copyright protected material through authorised channels is not the 'key' or sole solution for preventing online infringement of this content. Australian copyright law needs to provide a robust, quick and cost effective system to deter, prevent and punish third parties who infringe these valuable rights.

COMPPS rejects the assertion in the Draft Report that *'the case for further policy change or Government action on copyright infringement is weak'*¹⁹. COMPPS and its members call on the Productivity Commission to encourage the Australian Government to strengthen the Australian copyright enforcement regime through the introduction of harsher sanctions, particularly for flagrant and repeat infringers and persons obtaining a commercial benefit from copyright infringement.

¹⁸ Including the so-called anti-siphoning provisions in the *Broadcasting Services Act 1992* (Cth) which require free to air television broadcasters to acquire the right to televise listed events (many of which are conducted by COMPPS members) prior to a subscription television broadcaster acquiring the right to televise the event.

¹⁹ Draft Report, page 493

5 Contact details

Should the Productivity Commission have any questions in relation to this submission or require any further information from COMPPS or its members please contact Malcom Speed at mspeed@compps.com.au or at:

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Yours sincerely

A handwritten signature in black ink, appearing to read 'Malcolm Speed', is written over a light grey circular background.

Malcolm Speed

Executive Director