Submission to Government re Exposure Draft of *Copyright Regulations 2017*

Joint Submission from the Australian Film & TV Bodies
October 6, 2017

The Australian Film & TV Bodies[1] welcome the opportunity to provide comments in response to the exposure drafts of the *Copyright Regulations 2017* (the 'Regulations') and the *Copyright Legislation Amendment (Technological Protection Measures) Regulations 2017*, and to the Department of Communications and the Arts Consultation paper.

1 How should the Copyright Regulations 2017 require items (such as notices and inquiries) to be published? In particular, how should the Copyright Regulations 2017 require the following to be published?

The Australian Film & TV Bodies support the Government's efforts to improve the clarity and precision of the language in the Regulations. The specific provisions of the Exposure Draft further that aim by providing, in clear terms, for publication of notices and inquiries in the Gazette. The Gazette is the logical option being a searchable online resource; it is easily accessible and capable of functioning as a 'single source of truth' regarding such notices and inquiries under the legislation (regardless of the changes in the technology used in the future). Given the benefits of a single platform for these types of notices and inquiries, the Australian Film & TV Bodies do not consider that the Regulations should permit, or require, publication in any other form at present.

2 Is the Copyright Regulations Exposure Draft subsection 7(2) requirement that a relevant notice be published at least 2 months, but not more than 3 months, before the publication (or subsequent publication) of a new work sufficient? Should the requirement merely be that a relevant notice be published at least 2 months before the publication of a new work (with no upper limit on how far ahead of the publication a relevant notice may be published)?

The Australian Film & TV Bodies support attempts to further enhance and expedite access to these unpublished works.

3 Are the prescribed requirements set out in proposed new section 18 appropriate?

As a preliminary point, given the ongoing consultation about changes to Part V, Div 2AA of the *Copyright Act 1968* (the 'Act'), it would be premature to implement substantive changes to the Regulations before any amendments to the Act are made. However, if changes are made at this stage, there will need to be a further opportunity to comment on the Regulations in conjunction with any future amendments to the relevant part of the Act.

Overcoming the current deadlock on an industry code

The Australian Film & TV Bodies are concerned that the Government has not made any proposal, in the proposed new section 18 or otherwise, to remedy the unsatisfactory status quo, whereby no industry code has ever been in place under s 116AB of the Act since its enactment in 2004.

This is despite the evident importance of such an industry code. Section 116AB was originally incorporated into the Act to ensure Australia's compliance with its treaty obligations (including Article 17.11 of the Australia – United States Free Trade Agreement ('AUSFTA')) by ensuring that the conditions in s 116AH of the Act remain both meaningful and up-to-date as technology evolves. This is an essential part of making s 116AH functional and fit for purpose, given the constantly evolving nature of online communications and related technologies.

[1] Further details on members of the Australian Film & TV Bodies can be found in Appendix A.

Despite the obvious need for the implementation of an industry code (including in the context of the objectives of the present consultation), such a code has never been agreed on, let alone implemented. Copyright owners and carriage service providers ('CSPs') have not reached consensus, in significant part because the current safe harbour scheme does not provide sufficient incentives for them to do so given the decision of the High Court in *iiNet*.[2] As such, during the last attempt to create an industry code for a graduated response scheme, CSPs had no incentive to agree to any requests from rightsholders to implement technical measures that would have meaningfully contributed to the reduction of copyright infringement on their platforms. This situation remains unchanged since talks ended in deadlock in 2015. The Government should create an effective incentive mechanism to bring all stakeholders to the table and incentivise agreement on an industry code.

Fall-back mechanism needed to advance the process

Draft section 18 should be further amended to provide a 'fall-back mechanism' through which the Government can mandate a code with minimum standard technical measures to comply with if a code that meets the requirements of section 18(a) and (b) cannot be agreed by relevant rights owners and CSPs. As currently drafted, a relatively minor or trivial disagreement between the relevant parties could prevent an industry code coming into force, even where agreement has been reached on a range of other (or most) relevant technical measures. The absence of such a fall-back mechanism has not only contributed to the current deadlock between relevant parties, it has denied the Government the power to fill the resulting void with a code that represents a compromise between the interested groups. Such a result would be consistent with Australia's obligations under the AUSFTA.

A consistent definition of 'relevant industry code'

Section 18 of the proposed Regulations define a relevant industry code as 'an industry code that does not deal solely with caching'. This definition is inconsistent with the definition of 'relevant industry code' in item 1, condition 2, of s 116AH of the Act, which contains no reference to caching. The definitions of 'relevant industry code' in the Act and Regulations should correspond to, rather than compete with, one another. This analysis is further discussed in our response to question 4 below.

In addition, although the Department is not currently seeking submissions regarding the proposed expansion of the safe harbour scheme to a broad category of service providers, the Australian Film & TV Bodies believe it is important for the Department to note that the proposed section 18 would not be fit for purpose should these amendments be made in the future, unless the requirement that the code be registered under Part 6 of the Telecommunications Act 1997 (Cth) is removed. This is because registration under Part 6 of the Telecommunications Act 1997 (Cth) only applies to CSPs.

Owners or Exclusive Licensees?

The Australian Film & TV Bodies support the inclusion of exclusive licensees as a relevant member of the classes of parties to be involved in reaching a consensus of rights owners under s 18(a)(i). However, the proposed wording 'owners and exclusive licensees of copyright' has the potential, when interpreted literally, of requiring a consensus of both the owners and the exclusive licensees for any particular copyright subject matter. This is excessively burdensome because it could be interpreted as requiring participation by foreign copyright owners in attempts to agree to the code. It is also unnecessary, given that an exclusive licensee has all the relevant rights in Australia to the exclusion of the copyright owner and is typically the Australian representative of the copyright owner (e.g. where the owner and exclusive licensee are related or members of the same corporate group, in which case they can decide between themselves how their interests should be represented in the negotiations of an industry code). Reg

[2] *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42.

18(a)(i) should be amended to read 'owners or exclusive licensees of copyright (as the case may be)' to avoid this problem.

4 What requirements should the regulations prescribe for an industry code that enlivens condition 2 of item 3 of the table in subsection 116AH(1) of the Copyright Act?

In addition to our response to question 3 above, the Australian Film & TV Bodies consider that the Act and Regulations should contemplate having a single industry code to enliven all relevant conditions in s 116AH of the Act. Given that each industry code would have to be separately agreed, and because of the potential for confusion between different codes, it would be preferable to have a code that is a single source of information for parties seeking to invoke the protection of the safe harbour. Any such code could differentiate the obligations on different types of service providers, as appropriate. To this end, the Regulations should not prescribe any additional requirements for an industry code that enlivens condition 2 of item 3 of the table in subsection 116AH(1) of the Act. The description of the industry code should be amended to read 'a relevant industry code' (as proposed above in answer to question 3).

5 What procedure should the Copyright Regulations 2017 prescribe for the development of an industry code for the purposes of paragraph (b) of the definition of industry code (section 116AB of the Copyright Act)?

The Australian Film & TV Bodies propose the mechanism referred to in response to question 3 above that would permit the 'fall-back mechanism' through which the Government can mandate an industry code for the purposes of s 116AB(b) if a code satisfying section 18(a) and (b) cannot be agreed to by the relevant rights owners and CSPs.

Such a code would be capable of satisfying Australia's obligations under the AUSFTA (Art 17.11.29), which is phrased in terms of, for example, '*standard technical measures* accepted in the Party's territory' (Art 17.11.29(b)(vi)(B)). This does not *per se* require an industry-developed code, merely a code that reflects 'industry standards'. This is a matter that the Australian Film & TV Bodies consider the Government is capable of ascertaining, especially if following a further 12 months of negotiations that would allow the various stakeholders to put forward their positions as to what constitutes appropriate 'standard technical measures'.

The development of an industry code would also be facilitated by the definition of 'industry code' in s 116AB of the Act being amended to be an inclusive rather than an exclusive definition, as it would provide the relevant negotiating parties flexibility as to the form of the code that they choose to adopt.

6 Do you have any comments on the prescribed acts included in section 40 of the Copyright Regulations Exposure Draft or in the TPM Regulations Exposure Draft?

As the Department is aware, TPMs are key enabling technologies for digital dissemination of creative works and are of critical importance in light of today's digital, networked landscape and the scale of online piracy. Access-control TPMs are things like passwords and other forms of authentication that allow legitimate websites and streaming services like iTunes or Netflix to charge fees for their services, differentiate between long-term downloads and short-term rentals, and enable access by multiple family members across a variety of devices, among other things, thus enabling businesses to generate revenue and providing consumers with more choices and flexibility in access models. 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 permitted then businesses providing content would face pressure to withhold their content, to limit the diversity of access models, or release it at higher price points with the hope of recouping costs from those 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 the law and on technological protection measures for their protection.

The Australian Film & TV Bodies believe the majority of the TPM exceptions proposed in the exposure draft are drafted effectively and will enhance access to copyright material while remaining appropriately limited in scope to avoid interference with the rights of copyright owners. However, proposed Regs 40(2)(a), 40(2)(b) and 40(2)(f) require amendment because, as drafted, they are overbroad and will inappropriately interfere with the rights of copyright owners. Furthermore, these Regulations should not be introduced at this stage because they relate directly to the responsibilities of libraries, archives and educational institutions as intermediaries to provide access to content. The overall responsibilities of these institutions are currently being considered as part of the safe harbour review. As such, any major changes to the Regulations in this regard should only be considered after the Government has determined whether or not any relevant legislative reforms should take place following the safe harbour review.

Regs 40(1)(a)-(h) and Regs 40(2)(c)-(e)

The Australian Film & TV Bodies do not object to the TPM exceptions in ss 40(1)(a)-(h) and 40(2)(c)-(e). We support the introduction of Regs 40(1)(f), (g) and (h), which represent an effective implementation of Australia's obligations under the Marrakesh Treaty and which will facilitate greater access to works for all Australians, regardless of ability.

Regs 40(2)(a), (b) and (f)

While the Australian Film & TV Bodies acknowledge that students and researchers at educational institutions have concerns about accessing copyright material protected by TPMs, the Government should be cautious about introducing blanket TPM exceptions relating to fair dealing exceptions and the similar exceptions under s 200AB of the Act. The Department, at page 22 of the Consultation Paper, suggests that 'the exception would encourage the use of legitimate, paid content'. However, this assertion has not been substantiated. The Australian Film & TV Bodies submit that these proposed new TPM exceptions are different in character from the types of exceptions provided for in Reg 40(1) of the Exposure Draft and are likely to have significant unintended consequences, including the four identified below.

First, the language of Regs 40(2)(a) is excessively broad and wide open to exploitation. The requirements to qualify for being a student (or researcher) are set inappropriately low and the description of the permitted purposes are overly broad. To qualify as a student, a person merely needs to be 'enrolled in a course of instruction provided by an educational institution'. Such a person would only need to satisfy themselves that the circumvention was 'for the purposes of completing that course', a phrase so ambiguous that it will not represent any practical limitation on circumvention by students. Notably, there is no requirement that the course of study require access to an unprotected, perfect digital copy in order to meet the objectives of the course or that the sufficiency of access through alternatives to circumvention, including those discussed below, be considered. This could mean, for example, that a student involved in a continuing education French or other language course at a university would consider that they were entitled to circumvent access control TPMs on any French film or e-book, on the basis that completing their course required them to engage extensively with French media to improve their speaking and vocabulary skills. Even if the student may not be able to support this position in Court (because the copyright owner may well succeed in an argument that the

circumvention was not actually required for the student to complete the course), the Australian Film & TV Bodies submit that it is the interpretation and practice of students that will matter most in this context.

Given that TPM exceptions by their nature create unpoliced (and often un-policeable) practices, it is virtually inevitable that these exceptions would lead to widespread practices of circumvention by students, without a case-by-case analysis that is required in the case of the underlying fair dealing exceptions. Moreover, the risks attendant to the fact that circumvention results in entire and permanent removal of protections applied to the copyrighted work must be taken into account and balanced against the need for such access. Once a TPM is circumvented, there is a high probability that the then unprotected content will be accessible to other students on, for example, a university server that is accessible to all network users. These risks also arise in the cases of Regs 40(2)(b) and (f).

Secondly, these proposed TPM exceptions are also not consistent with Australia's obligations under the AUSFTA. The scope of permissible exceptions under Art 17.4.7(e) is limited to a closed set of strictly confined use cases that do not include the exceptions proposed by Regs 40(2)(a), (b) and (f). There is no scope for providing another set of exceptions which would dilute the protections for TPMs that Australia has agreed to maintain under the AUSFTA. The only exception under the AUSFTA that could conceivably be relied on is Art 17.4.7(e)(viii). But there are problems with this. This article of the AUSFTA does not extend to Regs 40(2)(a), (b) or (f), which are not limited in scope, are likely to extend beyond non-infringing uses in practice, and are not supported by the required "legislative or administrative review or proceeding" demonstrating "an actual or likely adverse impact on those non-infringing uses" and to be "conducted at least once every four years". The most recent TPM review summarised in the Consultation Paper and relied on to support these proposed new TPM exceptions was conducted by the Attorney-General's Department in August 2012. Since that time, relevant market circumstances have changed – for example, there has been a dramatic increase in the extent of film and television content delivery services available in Australia. Neither Netflix, Stan nor Amazon Prime Video, or a specialist platform such as DocPlay which has the potential to have great relevance to the educational sector, were available in Australia in 2012 when the last review was conducted. These broader developments, together with the education-specific services mentioned below, fundamentally alter the rationale for these new TPM exceptions and put Australia outside the scope of the permissible exceptions under the AUSFTA.

Thirdly, Regs 40(2)(a), (b) and (f) in the exposure draft do not contain a provision that disqualifies the user from reaping the benefits of the exceptions where there is subsequent infringing use. For example, there is no provision similar to s 111(3) of the Act, which deems the relevant exception not to have applied if the copy is subsequently used for infringing purposes. Without such a provision, students and researchers could rely on these exceptions to avoid liability in relation to an infringement (even a widespread infringement) first facilitated by breaking a TPM.

Fourthly, such exceptions also tend to discourage what should be a key aspect of all Australian education and research, especially in courses such as film studies: respect for content and the steps that content creators need to take in the online environment to monetise their content and contribute to Australia's creative economy.

There are alternative approaches that are more suitable to address the issues of concern raised with the Department.

Universities and other institutions already have access to extensive licensing and remuneration schemes. Allowing the proposed new TPM exceptions has the potential to undermine existing educational licensing arrangements. The forum for seeking expanded access to content should be through established licensing schemes that respect the economic and moral rights of creators. This is preferable to an unregulated and un-policeable right to access content that has been protected by TPMs

to prevent the very creation of unprotected copyright material that facilitates further infringements occurring, particularly online.

Further, courses and research at educational institutions do not generally require a student or researcher (who already has the benefit of fair dealing exceptions to use and copy content in appropriate circumstances) to circumvent access control TPMs. There are good practical examples of how students can access material covered by TPMs under the statutory licence in the audiovisual space. Various resource centre services, including Clickview, InfoRMIT's EduTV and EnhanceTV provide enormous archives of copies of broadcasts for educational purposes. Depending on how their educational institution chooses to participate in the service, students can then independently access this content for educational purposes. The services include copies from pay television as well as free to air television. The resource centres also include tools, for example, clipping tools which allow the material to be cut into short excerpts and made into compilations. The resource centres include, and are subscribed to by, over half the secondary schools and universities in Australia.

The proposed exceptions are also out of step with exceptions in comparable jurisdictions. The relevant exceptions permitted under the corresponding US Regulations are far more limited and specific in scope. For students, they allow only the screen recording of extracts of motion pictures or alternatively allow breaking DVD, Blu-Ray and streaming TPMs only as part of film studies or related courses.[3]

Even more pertinent, the UK *Copyright, Designs and Patents Act 1988* includes an exception to the TPM regime under s 296ZE for educational establishments, which does not extend to students. It is also appropriately limited to cases where pre-approval of the UK Government is obtained and where it can be shown that there is a legitimate need and that the rightsholder does not offer an alternative form of access to the copyrighted material. If the Government proceeds with any additional TPM exceptions for educational and research purposes, it should implement a provision in terms of s 296ZE of the UK Act, and not the current drafts of Regs 40(2)(a) to (b), and Reg 40(2)(f).

The Australian Film & TV Bodies also support AHEDA's submission regarding TPMs which, among other things, provides further relevant examples in this space.

7 Is the infringement notice scheme that is set out in Part 8 still necessary?

The Australian Film & TV Bodies support the revised infringement notice scheme set out in Part 8. The scheme is both necessary and important, as it provides an effective and efficient means of enforcing copyright without the need for unnecessary time and resources to be spent on prosecutions, in appropriate cases.

The infringement notice scheme was introduced in 2006 as part of a comprehensive revision to the offence provisions in the Copyright Act to bring them into line with the revised *Commonwealth Criminal Code*. In the Explanatory Memorandum, the regime that included the notices was described as a set of 'tiered offences [to] penalties are not expressed generally but are reflective of the moral culpability of a particular offence. Again this is to ensure compliance with Commonwealth criminal law policy'.

The amendments were described in the following way by the then Attorney-General Philip Ruddock in his Second Reading Speech on 19 October 2006:

> *The bill will create indictable, summary and strict liability offences with a range of penalty options. The strict liability offences will be underpinned by an infringement notice scheme in the Copyright Regulations. This will give law enforcement officers a wider range of options depending on the seriousness of the relevant conduct, ranging from infringement notices for more minor offences, to initiating criminal proceedings to strip copyright*

[3] US Code of Federal Regulations, Title 37, Part 201, § 201.40.

pirates of their profits in more serious cases. These offences are aimed at copyright pirates who profit at the expense of our creators.[4]

That rationale remains as valid today as it did at the time. These notices continue to have a role to play as part of a coordinated strategy between Federal and State agencies.

8 How can the Copyright Regulations Exposure Draft be amended to better facilitate informal proceedings in the Copyright Tribunal?

The Australian Film & TV Bodies have no comment on this issue.

9 Is the newspaper publication requirement in sub-section 63(1) too burdensome (in terms of cost, or otherwise)? Should some other form of publication be required?

Consistent with our response to question 1, the Australian Film & TV Bodies propose that the Gazette be used as the primary source of all notifications under the Act and the Regulations.

10 Which matters (if any) should sections 70 and 72 prescribe for the purposes of item 1 of the table in new section 153A to be inserted by the DAOM Act (as matters to which the Copyright Tribunal must have regard in determining the relevant question), so far as it relates to an application under new subsections 113P(4) and 113S(4) to be inserted by the DAOM Act?

The Australian Film & TV Bodies support the submission made by Screenrights on this issue.

11 Are the matters for the Copyright Tribunal to have regard to in 71(2) appropriate?

The Australian Film & TV Bodies support the submission made by Screenrights on this issue.

12 Is the list in proposed new section 122 appropriate?

The Australian Film & TV Bodies support the proposed new s 122. In addition, we propose that the following international organisations be added to the list in s 122:

- The International Police Organization (Interpol);
- United Nations Conference on Trade and Development (UNCTAD); and
- The World Customs Organization (WCO).

13 Are all of the transitional provisions set out in Part 16 of the Copyright Regulations Exposure Draft still necessary? Are any additional transitional provisions needed?

The Australian Film & TV Bodies support the changes proposed in Part 16 to ensure continuity with previous versions of the Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969.

[4] Parliamentary Debates, Commonwealth, House of Representatives, (Philip Ruddock, Attorney-General), 19 October 2006, p 2.

Appendix A: Full descriptions of members of the Australian Film & TV Bodies

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), 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 Australia (ICA). These associations represent a large cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[5]

a) The ASA represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and 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. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on promoting and protecting the creative works of its members. 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.

b) AHEDA represents the $1.1 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 13 members and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel and Telstra.

c) The MPDAA is a non-profit organisation representing the interests of theatrical film distributors before Government, media, industry and other stakeholders on issues such as classification, accessible cinema and copyright. The MPDAA also collects and distributes cinema box office information including admission prices, release schedule details and classifications. The MPDAA represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros. Entertainment Australia.

d) 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, 2017 being its 71st year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as the prominent independent exhibitors Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners which together represent over 1400 cinema screens.

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 releasing to the Australian public approximately 75% of Australian feature films which are

[5] Access Economics, *Economic Contribution of the Film and Television Industry,* Access Economics Pty Limited, (February 2015), <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf>, p iv.

produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

f) ICA develops, supports and represents the interests of independent cinemas and their affiliates across Australia. ICA's members range from single screens in rural areas through to metropolitan multiplex circuits and iconic art house cinemas. ICA's members are located in every state and territory in Australia, and in New Zealand, representing over 159 cinema locations.