

Department of Foreign Affairs and Trade

Australia-European Union Free Trade Agreement
Office of Trade Negotiations
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1. Introduction

A. About ANZSA

The Australian New Zealand Screen Association (ANZSA) appreciates the opportunity to provide a submission to the Department of Foreign Affairs and Trade with regard to the potential opportunities and impacts of a Free Trade Agreement between Australia and the European Union (AUS-EU FTA).

ANZSA represents the film and television content and distribution industry in Australia. Our core mission is to advance the business and art of storytelling for film and television, increasing its enjoyment around the world. Our aim is to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs to highlight the importance of content protection. Our Members include: Village Roadshow Limited; the Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Netflix Inc, Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.; and Fetch TV.

Our member companies own production companies such as Matchbox and Playmaker (owned by NBC Universal and Sony Pictures Television respectively) and film distribution companies which have distributed successful Australian films such as *The Dressmaker*, *The Water Diviner* and *Railway Man*.

B. Motion picture and television industry and the global economy

The market for film and television content is increasingly global, and films and television programs are no longer produced solely for domestic audiences. As the industry has migrated from physical to intangible, digital production and distribution has created great opportunities for filmmakers to find new audiences across borders and in new territories. At the same time, the digital environment has enabled and facilitated infringement of copyrighted content on an unprecedented scale, often facilitated by big online platforms, which threatens the ongoing

sustainability of an industry that employed over 46,600 full time equivalent employees in Australia in 2012-13.¹

C. The creative industries and the Australian economy

In 2017, the Australian Copyright Council released a study which shows the central role copyright industries play in the Australian economy.² This study shows that in 2016, Australia's copyright industries generated \$122.8bn in economic value (7.4% of GDP) and employed over 1 million people (8.6% of the workforce). This means the copyright sector generated more economic output than, for instance, the manufacturing, healthcare and mining sectors. However, Australia's copyright industries are under pressure. Their share of Australia's total economic output has declined from 9.7% in 2002 to 7.4% today. As a share of total employment, the copyright industries' contribution has contracted from 10.9% in 2002 to 8.6% today, with actual employment declining by 0.2% on average over the past five years. Piracy is the number one cause for this contraction.

While the digital environment has contributed to an increase in the consumption of copyrighted works, there has been a large displacement of legitimate consumption to infringing consumption, resulting in a smaller marketplace overall. Some of the more successful Australian films of the past few years illustrate this trend.³

Title	Australian Box Office (AU\$)	Global Box Office (US\$)	Total illegal Australian downloads	Total illegal worldwide downloads
Hacksaw Ridge	8,810,865	163,332,647	260,951	11,184,636
The Dressmaker	20,278,133	21,167,833	213,273	4,451,795
Lion	29,542,747	123,723,779	105,497	2,496,708
Mad Max: Fury Road	21,733,987	377,636,354	1,147,260	54,207,101

The destructive impact of online piracy to the industry is not restricted to major films only. From the WAVR Media graph below, smaller films are affected more than blockbusters in relative

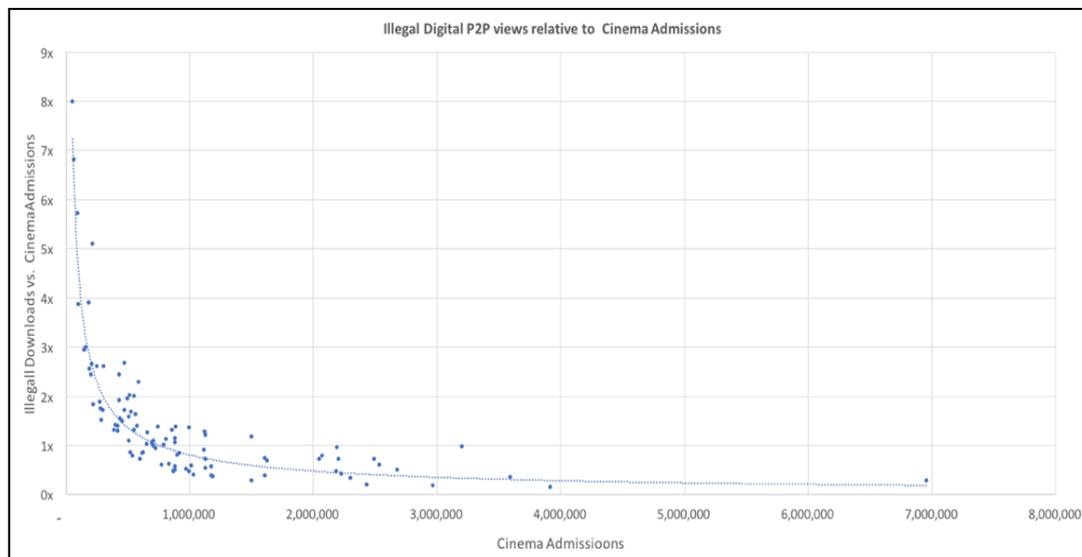
¹ http://auscreenassociation.film/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf

² Australian Copyright Council, *The Economic Contribution of Australia's Copyright Industries 2002 – 2016*, http://www.copyright.org.au/acc_prod/ACC/Research_Papers/PwC_Report-_Value_of_Copyright_Industries.aspx

³ Sources for this table include:

- MPDAA for Australian Box Office
- IMDb for Worldwide Box Office
- GfK Retail Tracking for DVD/Blu-ray units
- Tecxipio for illegal download statistics

terms.⁴ It shows the number of in-cinema views on the horizontal axis, and on the vertical, it shows the multiple of that number in illegal views.



The passing of site blocking legislation (Section 115a of the Copyright Act) in December 2015 was an important step forward. Following six successful applications, overall usage of the top 250 unauthorised sites has decreased by approximately 25.4% overall, in line with overseas experience.⁵ ANZSA also welcomes the amendments to this act which passed in December of last year. However, much more can be done to both stamp out piracy and promote legal content. Indeed, the European Union's impact assessment for the FTA found that non-tariff market access barriers for EU businesses operating in Australia includes insufficient protection or enforcement of IP rights.⁶

2. An Australia-EU Free Trade Agreement

The challenge for governments across the world is to support the production of high-quality film and television, ensure distribution of film and television productions through the reduction of market access barriers and strengthen enforcement measures to protect copyright. An AUS-EU FTA may present an opportunity to fortify copyright protection, enforcement measures, and market access standards for the benefit of Australian and European filmmakers and audiences.

Although Free Trade Agreements are an ideal way to do this, ANZSA notes that the Governments of Australia and the European Union have different powers available to rectify outstanding issues. Because of the European Union's political structure and the role of its member states, some

⁴ WAVR Media analysis (MPDAA data for Box Office, Texcipio for illegal download stats).

⁵ [Publicly accessible Citation to incopro research to be made available on ASA website].

⁶ Commission Staff Working Document- Impact Assessment, Page 8 (SWD(2017) 293 final)

<https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-293-F1-EN-MAIN-PART-1.PDF>

subjects, such as criminal enforcement, included in a traditional FTA may be closed to discussion in an AUS-EU FTA.

Lastly, both parties have adopted markedly different policies, particularly on market access, which could make the negotiation of some provisions extremely difficult. The Government of Australia, for instance, has supported Australian creators through strong copyright protections, limited market access restrictions, proven enforcement mechanisms, and the creation of tax incentives to support Australian jobs. The EU, by contrast, offers a much less positive regulatory environment – especially in light of its Digital Single Market (DSM) initiative. The DSM, consisting of a package of policies regulating content portability, territoriality, geo-blocking, contracts, collective management, and even the nature of copyright itself, contains a number of worrisome provisions for the global audiovisual industry. As the Government of Australia enters into consultations on an AUS-EU FTA, negotiators should be fully aware of the EU’s restrictive audiovisual regulatory landscape, and adjust their expectations accordingly in securing benefits for Australian creators.

A. INTELLECTUAL PROPERTY

The production and dissemination of film and television content to the public through legitimate channels depend on a foundation of adequate and effective copyright protection and enforcement. This foundation is essential to the success of the motion picture and television industry, allowing consumers in Australia to enjoy a vast array of film and television content in more diversified ways and with more flexible pricing than at any time in history.

The current size and scope of digital piracy and its impact on the digital marketplace are substantial. A 2017 study “estimate[d] that the commercial value of digital piracy in film in 2015 was \$160 billion,” and spelled out methodological reasons why “it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount.”⁷ Another recent study by Carnegie Mellon determined that if film piracy were eliminated in the theatrical window, then box-office revenues would increase by 15% or \$1.3 billion per year in the US alone.⁸ In Spain, it is estimated that in 2016, 32 percent of consumers accessed pirated films, resulting in loss revenues of 1.78 billion euros.⁹ And, in France in 2016, it is estimated that 27 percent of consumers accessed pirated audiovisual content, resulting in losses of 1.35 billion euros.¹⁰ Along with other market distortions, digital piracy impedes the commercial licensing of film and television content. It is therefore critical that a modern trade agreement includes high standards that address the problem of digital piracy to enable the production and dissemination of legitimate creative content.

In any FTA negotiation, strong intellectual property provisions are key to the continued success of the audiovisual industry. As a matter of principle, ANZSA always advocates for the following points in a “high-standard” deal, including:

⁷Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-39, available at <http://www.inta.org/Communications/Pages/Impact-Studies.aspx>.

⁸Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

⁹ <http://lacoalicion.es/2017/04/25/piracy-down-4/>

¹⁰ <https://www.ey.com/fr/fr/newsroom/news-releases/ey-communique-de-presse-piratage-de-contenus-audiovisuels>

- Provisions that account for technological changes and reflect the global consensus on minimum standards of protection including the duration of protection, and effective legal protections for technological protection measures used by copyright owners to control access to and copying of their works;
- Comprehensive obligations regarding copyright enforcement with a panoply of criminal penalties and civil remedies, including liability for aiding and abetting and fully effective injunctive relief; and
- Provide incentives for online service providers to cooperate with right holders.

As indicated above, while EU member states provide for criminal enforcement of copyright, the Commission does not have the competency to negotiate disciplines in this area.

i. Full implementation of The WIPO Internet Treaties

The World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT), known collectively as the WIPO Internet Treaties, set the global minimum standards for providing copyright holders with a full panoply of exclusive rights in the digital networked environment. The WIPO Internet Treaties were the catalyst for the global consensus on the need to provide legal protection to technological protection measures (TPMs) that copyright owners use to control access to their works. As discussed below, these access controls are key enabling technologies for the range of online digital services that have brought more creative works than ever to consumers. The treaties also include an overarching commitment to deterrent levels of enforcement of those rights online as well as offline. In the 22 years since their adoption, 96 countries have acceded to each of these critical treaties, although some have yet to implement the treaties' obligations into their national laws. It is important that the Trade Agreement obligates Parties both to accede to and fully implement the obligations of the WIPO Internet Treaties.

ii. Protection of Technological Protection Measures (TPMs)

A major reason why so much legitimate television and movie content is now available to consumers, and in so many formats and platforms, is because of the widespread use of TPMs by content producers and (licensed) services. TPMs have fostered many of the innovative products and services available online by allowing rightsholders to control and manage access to copyrighted works, as well as to diversify products and services and the pricing of them. In short, new business models depend on such controls.

Unfortunately, there are business models built entirely around providing services, and/or manufacturing and distributing technologies, software, devices, components, or tools, to circumvent TPMs in order to gain unlawful access to the content or to copy it without authorization. Any FTA negotiated by the Australian government should prohibit acts of circumvention of access controls and trafficking in tools, devices, components, or services that can be used to circumvent TPMs protecting all copyright works. Exceptions should be narrowly crafted and confined to accepted global standards. A legislative or administrative proceeding requiring substantial

evidence of demonstrated actual or likely adverse impact on non-infringing uses of the work should be required for additional exceptions, and any additional exceptions should be effective for a renewable period of time of not more than three years. An AUS-EU FTA should ensure that a full range of remedies is available for acts of circumvention, and for the distribution or trafficking, including importation, of circumvention devices.

iii. Exceptions and Limitations Confined to 3-Step Test

ANZSA believes that an AUS-EU FTA should enshrine the concept that limitations and exceptions to copyright protection are confined to those that are consistent with the longstanding internationally recognized and accepted “3-step test.” This touchstone of global copyright norms—which is found in the Berne Convention for the Protection of Literary and Artistic Works, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and numerous other international agreements that include copyright obligations—is the gold standard against which copyright exceptions and limitations should be measured.¹¹

iv. Global Consensus Duration of Protection

Many countries have moved their laws into line with the evolving global trend with respect to the duration of copyright protection. These countries have done so not only to provide greater incentives for the production of creative works, but also to provide producers with a stronger incentive to invest in their local industries, spurring economic growth and tax revenues and enabling producers to continue offering content to local consumers in the latest formats. Setting the term of copyright protection at life of the author plus 70 years (or at least 70 years from publication for products whose terms are not measured by the life of the author) has become a *de facto* global norm. More than 80 countries, including many industrialized countries in Europe and throughout the Americas, and all but a handful of developed economies in the Organization for Economic Cooperation and Development (OECD), already meet or exceed this norm for some or all categories of creative works. The Trade Agreement should meet or exceed this global consensus standard.

v. Online enforcement

Combating digital piracy requires a legal framework that prevents the operation of services that promote or otherwise induce infringement, and that creates incentives for neutral network service providers to work with rights holders to curb the use of their proprietary networks and services for infringing purposes. Such a legal framework should, among other things, foster cooperation among all industry stakeholders in the online supply chain, including by removing impediments to the collaboration needed to combat online infringements. An AUS-EU FTA must include clear primary and secondary liability rules to discourage abuses and to remove the safe harbour as an unjustifiable excuse for inaction or license evasion.

¹¹ See, e.g., WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement Art. 13; Berne Convention for the Protection of Literary and Artistic Works Art. 9.

ANZSA notes that the state of play on this issue is very much in flux. In June 2018, Australia's House of Representatives passed the Copyright Amendment (Service Providers) Bill 2017 (the Bill was passed by the Senate on May 11). The Bill extends the operation of the safe harbour scheme to a broader range of service providers but does not extend safe harbour protections to commercial service providers. The EU is continuing discussions on such issues through its DSM initiative and the Copyright Directive must still be implemented by member states. Though ANZSA believes that there is room to improve enforcement standards under a potential Agreement, it also hopes the Australian government bear in mind the unclear enforcement status on the European side.

An AUS-EU FTA should address the serious problem of illegal marketplaces hosted in one country that target consumers in another. This is necessary because of the failure of the host country for services based there to take effective action against their own "homegrown" notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments, including Australia and the EU and its member states, have pushed back against this "offshoring" of enforcement responsibility, by developing means and processes for blocking access to these foreign pirate sites from within their borders.

vi. Remedies Against Pay-TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures and television content, including the unauthorized retransmission of broadcast signals over the Internet, has been a long-standing problem for the motion picture and television industry. Related problems include operators who take cable and satellite signals by unauthorized means (hacked set top boxes; decoding or decrypting signals; or, stealing "overspill" signals from neighboring countries) and sell them to consumers without paying for any of the content. In most of these cases, the signals are encrypted, and pirates must circumvent or hack in order to access the content.

Therefore, an AUS-EU FTA should require (as appropriate) parties to provide remedies to prohibit the trafficking in pay-TV or signal theft devices or technologies; the unlawful decryption of encrypted cable or satellite signals; and the onward use of the signals already decrypted (whether lawfully or not) without the authorization of the rights holders of the content or of the signal. Implementation of such laws will help foster licensing of broadcasters and cablecasters, and weed out unlicensed television distributors.

vii. Customs Ex-Officio Authority

The Trade Agreement should also include border enforcement obligations that ensure adequate and effective enforcement against infringement. For example, to combat the flow of counterfeit trademark or pirated goods, countries should provide their customs authorities the ability to act *ex-officio* against imports, exports, goods in transit, and goods in free trade zones. Enforcement authorities should also have the authority to order seizure of suspected infringing goods, forfeiture or destruction of such goods and destruction of material and implements used in their creation, and seizure of assets derived from infringements.

viii. Domain Names

WHOIS data—containing identifying information about domain name holders—has been a cornerstone of online transparency, accountability, security, and safety since the dawn of the commercial internet. Access to such information is critical to combatting misuse of personal data and online lawlessness generally. Curbing both is necessary to preserve trust online and maintain a hospitable environment for individuals and businesses to engage in internet commerce and communication. ANZSA notes that the misapplication of the EU’s recent General Data Protection Regulation (also known as GDPR) by domain name providers has complicated the use of WHOIS data for enforcement in many territories. An AUS-EU FTA, therefore, should seek to clarify this confusion, working to make WHOIS data available for legitimate purposes, such as consumer protection, law enforcement, and enforcement of rights, including copyrights.

3. **Market Access and Digital Trade**

Cultural promotion and open markets are compatible and complementary. The ANZSA is committed to the promotion and protection of cultural diversity and firmly believes that Australia and the European Union can effectively rely on the flexibilities built into modern free trade agreements, including permissible support programs, to promote their cultural interests. That being said, ANZSA realizes that the EU as a matter of principle, does not include audiovisual services within the scope of its trade agreements.

The motion picture and television industry has fully embraced all means of digital technologies to produce and distribute movies and television content. Consumers around the world are able to access a vast array of legitimate movies and television programming through an increasing number of licensed digital services. There are more than 480 legitimate online services around the world providing high-quality video on demand content to consumers. As of year-end 2015, 98 percent of premium films and 94 percent of premium TV series were digitally available on at least one of the online services that were reviewed, including online video-on-demand (VOD) and TV Everywhere on-demand services¹². It is this high-quality content that drives the success of these digital platforms and drives further technological developments to respond to this demand. As an illustration, Cisco estimates that by 2020, there will be one million minutes of video content crossing global IP networks each minute.

As a result, the motion picture and television industry depends on strong rules and practices for digital trade. Furthermore, given the nature of the online marketplace – including essentially unlimited capacity, immense diversity, and rapid change – ANZSA supports efforts to ensure non-discrimination in the online marketplace. In addition, ANZSA supports the inclusion of provisions to ensure the free flow of data between markets and to prevent localization barriers. Further, the agreement should prohibit the assessment of duties on digital products and electronic transmissions.

¹²

<http://go.snl.com/rs/spglobal/images/U.S.%20Availability%20of%20Film%20and%20TV%20Titles%20in%20the%20Digital%20Age.pdf>

4. Conclusion

ANZSA welcomes negotiations to deepen trade between Australia and the European Union and secure protections for creative works – especially in the digital space. ANZSA also recognizes that some provisions may be difficult to agree on particularly with regard to market access. All the same, ANZSA supports dialogues to afford greater protection for creators and greater choices for content lovers.

Paul Muller

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