

**Submission by the Australian Digital Alliance to the Senate Standing Committees on Foreign Affairs and Trade**

**Inquiry into the proposed Trans-Pacific Partnership (TPP) Agreement.**

The Australian Digital Alliance (ADA) welcomes the opportunity to provide comments to the Senate Standing Committees on Foreign Affairs and Trade Inquiry into the proposed Trans-Pacific Partnership (TPP) Agreement.

Founded in 1998 with former Chief Justice of the High Court of Australia, Sir Anthony Mason as its patron, the ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, libraries, archives, galleries, museums, technology companies and individuals. Whilst the breadth of ADA membership spans various sectors, united in their support of copyright laws that support Australian culture, learning, innovation and inclusive growth.

The TPP is an ambitious agreement to set commonly agreed rules between the 12 participating countries, with the aspiration of extending those to other economies in the Asia-Pacific region. If successful, these rules will govern the vast majority of Australia’s international trade into the future. It is therefore crucial that these rules are in our best interests.

Our comments below are restricted to two parts of proposed agreement - the Intellectual Property (IP) Chapter, and specifically those aspects of the chapter relevant to copyright law; and the Investor State Dispute Settlement clause (ISDS).

**Summary**

This submission is in three parts - Part A deals with concerns the ADA has regarding the current text and process of the TPP, Part B details changes to Australian copyright law that should be introduced as part of the TPP implementation, and Part C addresses the process for negotiating the TPP.

The ADA is concerned that the detailed nature of the copyright provisions in the TPP, coupled with the chilling effect of the threat of challenge to new IP laws under the ISDS clause, will have a negative effect on future copyright reform, essentially locking us into laws designed for today’s environment for decades to come.

If the TPP is adopted by Australia, we argue that the following changes should be made to Australian copyright law as part of the implementation:

* The extension of the current ISP safe harbour scheme to all service providers, including schools, universities, libraries, and online platforms. This is an obligation under both the Australia-United States Free Trade Agreement (AUSFTA) and the TPP, and must be introduced before we are able to implement the TPP;
* The updating of our current anti-circumvention provisions to provide improved exceptions for non-infringing activities and ensure an effective method for updating these exceptions; and
* The introduction of a flexible open ended exception modelled on US style fair use. The TPP imposes on member States an obligation to promote balance in copyright systems through exceptions and limitations. Six Australian government reviews stretching back almost 20 years (including two tasked with examining the Australia-US Free Trade Agreement, which shares many features with the TPP) have found that the adoption of an open-ended fair use style exception is the best way to achieve this balance under Australian copyright law.[[1]](#footnote-0)

Finally, the ADA supports the recommendations of the Harper Review that Australia should establish an independent review of our processes for negotiating the IP aspects of trade agreements, and that all IP trade negotiations should be informed by a cost benefit analysis.

Detailed comments and specific recommendations in relation to each of these positions are provided below.

**PART A: Concerns the TPP will have a chilling effect on future IP reform**

The ADA holds significant concerns regarding TPP’s long term effect on Australia’s copyright regime. The highly prescriptive nature of the TPP’s copyright provisions, coupled with the uncertain impact of the ISDS clause, are likely to have a chilling effect on future copyright reform in Australia, locking us into aging and outdated laws as technology and society develops, and removing options for reform regardless of merit.

**Overly prescriptive text**

As is increasingly the case with free trade agreements (FTAs), the IP chapter of the TPP is very detailed and prescriptive. It runs for 75 pages and imposes explicit requirements regarding enforcement and recognition of owners’ rights, through mechanisms such as term extensions and anti-circumvention provisions.

We are concerned that the overly prescriptive nature of the agreement may have a detrimental effect on Australia’s ability to adjust its copyright system in future. The last few decades have made it clear how vital it is for copyright law to adapt as technologies and social norms change. But agreements like the TPP prevent us from doing so. With its highly prescriptive text and inflexible mandates, the TPP effectively locks Australia into copyright laws designed for today's climate, some of which are already outdated and failing to achieve their aims.

This is a problem with all FTAs containing detailed IP chapters. However, the effect is heightened in relation to plurilateral agreements like the TPP. With bilateral agreements (eg the AUSFTA) changes can in theory be renegotiated relatively simply with a single other party. But plurilaterals like the TPP are far harder to adjust - it has taken 12 countries over a decade to negotiate the current provisions of the TPP. Once they are enshrined in domestic law it will be extremely difficult for even the smallest of changes to be achieved.

Detailed and prescriptive obligations such as those imposed by the TPP’s IP chapter are therefore inappropriate for such agreements, as they rapidly become outdated. 30 years ago we could never have predicted where we are now, in the world of 3D printing, cloud storage and virtual reality. But prescriptive agreements like the TPP try to do exactly that - set rigid standards for future generations. In doing so, they inhibit rather than encourage agility and innovation.

**Chilling effect of ISDS**

The “lock in” effect of the TPP with respect to future changes of Australian copyright law will only be heightened by its ISDS provisions and the explicit listing of IP as subject to them. As the suit by Philip Morris against the Australian government over plain packaging cigarette laws shows, companies are not shy about making use of ISDS provisions to protect their IP.[[2]](#footnote-1) The TPP will only make such suits more likely, as it opens Australia up to ISDS suits by US companies, who are currently the largest users of this mechanism.[[3]](#footnote-2)

We are particularly concerned that any decision by the Australian government to introduce appropriate exceptions and limitations, such as fair use, or solutions to the orphan works problem, could provoke a challenge. There is language in the TPP that purports to protect new IP limitations and exceptions from ISDS challenges (see Art. 9.8(5)), but this is only as long as they comply with the agreement’s IP chapter. This means new laws may still be challenged on the basis of, for example, compliance with the Berne three step test, which is incorporated into the IP Chapter but the meaning of which is still hotly debated internationally. Importantly, even if the likelihood of success seems low, with the cost of ISDS suits stretching into the hundreds of millions, the mere threat of litigation could have a significant chilling effect on future copyright reform in Australia.

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| **Recommendations:** 1. That the Committee recommend that Australia should not agree to Chapter 9 (Investment) of the TPP.
2. Further, if Australia does agree to Chapter 9, that Australia must take any and all possible steps to mitigate the impact of the potential for investor-state claims under the TPP to impact on IP law reform and IP decision-making in Australia, including by:
	1. Reaching agreements with as many TPP parties as possible similar to that already reflected in a side letter with New Zealand to the effect that investors from Australia may not bring an investor claim against New Zealand, and vice versa. The ADA notes that the Japan-Australia Economic Partnership Agreement did not include ISDS and queries why a similar side letter could not immediately be concluded at least with Japan;
	2. Working with other TPP parties to develop a list of arbitrators sufficiently expert in international IP law and sufficiently independent (that is, not having held any previous position with any industry body) to act as arbitrators on IP questions if necessary;
	3. Work with the other TPP parties to develop the strongest possible code of conduct for arbitrators including the strongest possible rules to prevent any real or perceived conflict of interest.
	4. Work with other TPP parties to further tighten and limit the language that allows for investor claims under Chapter 9, including by reference to ongoing developments in agreements with Europe.
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**PART B: Changes to copyright law if the TPP is adopted**

With respect to its copyright provisions, the ADA largely agrees with the National Interest Assessment’s (NIA) statement that “The TPP Intellectual Property Chapter is consistent with Australia’s existing intellectual property regime and will not require any changes to Australia’s legislation”.[[4]](#footnote-3) The TPP’s copyright provisions, on the whole, align closely with those of the AUSFTA which Australia ratified and implemented more than 10 years ago.

However the ADA believes that the NIA is incorrect in one critical aspect. The ADA submits that Australia cannot meet its TPP obligations without first amending our existing safe harbour schemes for online service providers (*Copyright Act* ss116AA-116AJ).

Furthermore, the ADA maintains that Australia should take advantage of places in which the TPP text differs from the AUSFTA to introduce the following improvements to its current law:

* update laws prohibiting circumvention of digital locks; and
* introduce fair use.

**Extending the safe harbour scheme**

The copyright safe harbour scheme is, to quote the TPP, intended to provide “legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorised storage and transmission of copyrighted materials” (Art. 18.82(1)(a)). It puts in place a series of requirements for entities that provide online services to others, including a system for notification and takedown of infringing material (Art. 18.82(3)). As long as online service providers comply with these requirements they are protected from liability for having authorised infringements carried out by people using their services. Such a system is now common internationally and was introduced in Australia in 2005 as part of the AUSFTA implementation.[[5]](#footnote-4)

The TPP dictates that this safe harbour scheme must apply to any “provider of online services undertaking the functions” in question, including hosting and transmitting material.[[6]](#footnote-5) The US, on whose law this provision is based, accordingly applies its scheme to ISPs, libraries, schools, universities and platforms - anyone, in essence, who provides online services for others. Australia, in contrast, restricts its safe harbours to "carriage service providers" - ie commercial ISPs. All other organisations providing identical online services, including schools, universities, libraries and technology companies, are excluded from the Australian scheme.

This puts Australian start ups such as Redbubble and Envato at a significant disadvantage to their international counterparts, raising their risk and creating a disincentive for tech businesses to establish here. Major US companies such as Facebook and Vimeo have thrived under the legal certainty provided by the US version of the scheme while Australian companies are asked to compete with them on an uneven playing field, or forced to move their servers offshore to more legally certain jurisdictions.

The current Australian system also means that:

* Schools, universities and libraries in Australia receive less legal protection than their overseas counterparts and local commercial ISPs when staff, students and clients transmit infringing materials over their networks;
* Australian creators do not have access to a cheap, uniform process for having infringing material removed from web services hosted in Australia, making copyright enforcement here slow, costly, inefficient and out of reach of individual creators; and
* Australian consumers using popular services to host their content do not have the same rights against erroneous takedown as companies using commercial ISP hosts.

We believe that Australia must remedy this error in its safe harbour provisions to comply with the TPP. The definition of service provider used by the TPP is broad and linked explicitly to the singular question of whether an organisation is providing certain online services, irrespective of the nature of the organisation or the manner in which those services are being provided.[[7]](#footnote-6)

The government released an exposure draft of the proposed Copyright Amendment (Disability Access and Other Measures) Bill (CADAOM Bill) late last year which would, among other changes, extend Australia’s safe harbour scheme to all online service providers. The safe harbour language used in this Bill is taken directly from Australia’s international obligations and would, if passed, put Australia in full compliance with the TPP. We commend this Bill and its proposed amendments. The changes are minor but important and should not be controversial - after all, the safe harbour scheme benefits both copyright owners and service providers by providing efficient mechanisms to combat online infringement, increasing legal certainty and minimising the cost for creators and users alike.

We note, however, that if the safe harbour amendments included in the proposed CADAOM Bill are not introduced and passed into law before Australia proceeds to ratify the TPP, Australia will be in breach of its TPP obligations until such time as these amendments are made.

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| **Recommendations:**  1. That the Committee acknowledge Australia is not currently compliant with TPP obligations re safe harbours
2. That it recommends the Copyright Amendment (Disability Access and Other Measures) Bill be tabled as a matter of urgency so Australia is in a position to implement the TPP.
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**Updating our anti-circumvention law**

If the TPP comes into force, Australia should also update its laws prohibiting circumvention of technological protection measures (TPMs), to provide more appropriate exceptions for non-infringing activities and a more effective system for updating these exceptions.

TPM laws are intended to provide protection for technologies designed to prevent copyright infringement, such as DVD copyright protection, and have been a feature of international copyright law for close to two decades. They were introduced in Australia in 2000 as part of the Digital Agenda Amendments, and amended in 2006 in response to the AUSFTA.[[8]](#footnote-7) As a result of restrictive language in the AUSFTA, Australian TPM law follows the US approach of providing an extremely broad prohibition on circumvention of TPMs (including separate bans on the act of circumvention and the manufacture of and trade in circumventions devices and services) coupled with extremely restrictive exceptions to this prohibition.

There are several problems with these provisions - the lack of a link between the TPM and the preventing of copyright infringement, the limited nature of the exceptions etc. However, there are two problems we feel in particular could be addressed by the TPP implementation:

1. The limitation of the exceptions to acts of circumvention, leaving an absolute prohibition on the manufacture of and trade in circumvention devices or services. This has led to the paradoxical situation where a person with a visual impairment (for example) is permitted under the exceptions to circumvent a TPM to obtain access to a work, but is not able to legally obtain tools or hire technical assistance to do so. The House of Representatives Standing Committee on Legal and Constitutional Affairs 2006 Inquiry into the TPM exception called this “a lamentable and inexcusable flaw in the text of Article 17.4.7; indeed, it is a flaw that verges on absurdity.”[[9]](#footnote-8) This flaw is a direct result of the language of the AUSFTA, which only permits exceptions in relation to acts of circumvention. The equivalent TPP language (Art 18.68.4) fixes it, allowing exceptions to cover both the act of circumvention and the manufacture of and trade in circumvention devices and services.
2. The exceptions are supposed to be reviewed every three years under a very specific scheme mandated by the AUSFTA, to allow new exceptions to be added and outdated exceptions removed. However, this mandated review is extremely laborious and has not been completed in Australia for nearly a decade.[[10]](#footnote-9) The end result is that Australia has not taken full advantage of the opportunities available to it to permit circumvention for activities that are socially beneficial and do not harm copyright owners. Our TPM exceptions are currently extremely limited and do not include a number of exceptions that have been added in recent reviews of the US provisions, such as accessing vehicle diagnostics (to allow repair of tractors and cars that incorporate computer systems); use of snippets of material in Massive Open Online Courses; and 3D printing.[[11]](#footnote-10) Again, the TPP (Art 18.68.4) improves on the AUSFTA by removing the mandated review requirements, and should allow Australia to devise its own more sensible method for introducing and updating the TPM exceptions (for example, through the normal legislative process).

Significantly, Australia issued a side letter specifically ensuring it was free to rely on the new TPP text regarding TPMs once it comes into force, rather than being bound by the old AUSFTA text.[[12]](#footnote-11) This was presumably to allow the Government to take advantage of the TPP implementation to update our TPM laws to a model that better achieves its aims. We urge the Committee to recommend that the Government take advantage of this opportunity.

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| **Recommendation:** 1. We propose that the Committee recommend that any TPP implementation be used to update and modernise Australia’s TPM laws to:
	1. extend the existing exceptions to cover the manufacture of and trade in circumvention devices and services; and
	2. create a more workable model for the introduction of new exception provisions.
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**Introducing fair use**

When Australia implemented the AUSFTA both the Joint Standing Committee on Treaties[[13]](#footnote-12) and the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America[[14]](#footnote-13) recommended that we counterbalance the increased rights for copyright owners under the agreement by adopting a flexible exception based on the US fair use model. However these recommendations were never implemented.

We argue that the case for the introduction of fair use remains just as strong - and in fact stronger - under the TPP.

The TPP contains, to quote the USTR, "an obligation to promote balance in copyright systems through exceptions and limitations to copyright for legitimate purposes."[[15]](#footnote-14) While the actual language in the treaty, which is set out at Art.18.66 titled “Balance in Copyright and Related Rights Systems”, is more flexible than this implies, there is no question that the language encourages member States to include balancing provisions in their domestic implementation, should they have the political will to do so.

Recent reviews by the Australian Law Reform Commission[[16]](#footnote-15) and the Productivity Commission[[17]](#footnote-16) (the final version of which is still to be made public) have highlighted that, as a result of the decision not to take up the JSCOT and Senate Select Committee recommendations, Australia's copyright laws do not strike an appropriate balance. In its draft report, for example, the Productivity Commission found that our copyright laws “are weighed too heavily in favour of copyright owners, to the detriment of the long-term interests of both consumers and intermediate users”, and the Australian economy as a whole.[[18]](#footnote-17) Both reviews repeated the earlier recommendations that the best way to restore an appropriate balance would be to introduce an open ended fair use exception into Australian law.[[19]](#footnote-18)

The ADA strongly supports this recommendation. Without a fair use exception any use that does not fall within one of a number of specific exceptions infringes copyright. This has led to a number of problems in Australia, such as:

* Ordinary consumers infringing copyright dozens of times a day, by forwarding emails, posting memes and other common day-to-day activities;
* cultural institutions being unable to digitise cultural heritage;
* schools paying to use freely available internet materials;
* tech companies being unable to index and cache materials onshore to provide services such as search engines;
* researchers being unable to use modern tools like text and datamining;
* artists, authors and musicians being restricted in quoting past works, even their own; and
* confusing inconsistencies in the law, such as it being legal to quote in a news story or parody sketch, but not in a serious artwork or academic article.

A fair use exception, as used in Singapore, the USA, South Korea and Israel, would provide the flexibility needed to deal with changes in technology, consumer behaviour and artistic practices without having to pass new legislation for each new technology or use. It would prevent situations such as use of VCRs only becoming legal in Australia 2006 and the current legal minefield which inhibits text and data mining for research.

Because fair use asks whether each use is “fair”, it balances the rights of all parties. The impact on rightsholders is considered as part of the fairness test, so the exception only allows uses that do not harm copyright owners’ interests. To provide guidance, illustrative uses (such as library and private use) may be referenced in the legislation, but importantly fair use is not confined by these uses if an innovative situation or technology emerges.

The introduction of fair use will replace almost 30 existing exceptions in Australia’s copyright law. Copyright will be easier to understand, will better accommodate experimentation and innovation, and will align more closely with the population’s expectations of what is and isn’t permitted. Fair use will add much needed common sense to Australian copyright law.

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| **Recommendation:** 1. That the Committee recommend the introduction of an open ended fair use exception to Australian law as an essential part of the TPP implementation, to meet our obligation to provide appropriate exceptions and limitations for legitimate purposes.
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**PART C: Improved process for treaty negotiation**

Finally, the ADA strongly advocates for the implementation of a more rigorous and transparent assessment process before Australia commits to future treaties that include such detailed IP chapters. We support Recommendation 6 of the government’s Competition Policy Review (the Harper Review), which states:

A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

 ...

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.[[20]](#footnote-19)

The ADA, in collaboration with the Australian Libraries Copyright Committee, provided detailed comments on Australia’s treaty making process to the *Senate Standing Committee on Foreign Affairs, Defence and Trade References Committee Inquiry into The Commonwealth’s treaty-making process*. Our submission included 16 recommendations designed to produce a more informed approach, greater stakeholder engagement; improved oversight; and effective implementation. Our complete submission is available on the Committee’s website.[[21]](#footnote-20)

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| **Recommendation:** 1. That the Committee endorse the recommendations of the Harper Review and encourage the government to implement them for all future treaties in which Australia plans to participate.
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1. Copyright Law Review Committee report on [Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners](http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/clrc/14/20.html?stem=0&synonyms=0&query=%22copyright%20law%20review%20committee%22) (1998) para 6.10; Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement, para 16.50; Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) p72; House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax (July 2013) at xiii; ALRC Report 122 Copyright and the Digital Economy (2014) para 4.73; Productivity Commission Inquiry into Intellectual Property Arrangement Draft Report (2016) recommendation 5.3. [↑](#footnote-ref-0)
2. <https://www.ag.gov.au/tobaccoplainpackaging> [↑](#footnote-ref-1)
3. See Trans-Atlantic Business Council, ISDS Fact Sheet (January 2015) available at <http://www.transatlanticbusiness.org/wp-content/uploads/2014/05/ISDS-Fact-Sheet.pdf>. [↑](#footnote-ref-2)
4. National Interest Statement [2016] ATNIA 4 para. 39. [↑](#footnote-ref-3)
5. See *US Free Trade Agreement Implementation Act 2004* (Cth) Schedule 9, Part 11. [↑](#footnote-ref-4)
6. See art.18.81: Internet Service Provider means: (a) a provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, undertaking the function in Article 18.82.2(a) (Legal Remedies and Safe Harbours); or (b) a provider of online services undertaking the functions in Article 18.82.2(c) or Article 18.82.2(d) (Legal Remedies and Safe Harbours). [↑](#footnote-ref-5)
7. This language has in fact been broadened since the AUSFTA making it even more clear that all organisations providing such services should be covered by the safe harbours.Compare the TPP language with AUSFTA art. 17.11.29(xii): “For the purposes of the function referred to in clause (i)(A), service provider means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user’s choosing, and for the purposes of the functions referred to in clause (i)(B) through (D), service provider means a provider or operator of facilities for online services or network access.” Note that we believe that Australia’s current safe harbour provisions also fail to satisfy the AUSFTA requirements, meaning Australia has for the last decade not been in compliance with its obligations under the treaty. [↑](#footnote-ref-6)
8. See *Copyright Amendment (Digital Agenda) Act 2000* (Cth) Schedule 1 and *Copyright Amendment Act 2006* (Cth) Schedule 12.. [↑](#footnote-ref-7)
9. See para 3.118, available at file:///C:/Users/User/Documents/ADA/http---www.aphref.aph.gov.au-house-committee-laca-protection-report-fullreport.pdf [↑](#footnote-ref-8)
10. Although a review was commenced in 2012 and public submissions accepted, not formal response or recommendations have ever been issued by the government. THe original documentation for the review seems to have been removed, however references can be found at <https://www.ag.gov.au/Publications/AnnualReports/AnnualReport201112/Documents/Attorney-Generals%20Department%20-%20Annual%20Report%202011-12.pdf>; <http://www.digital.org.au/content/review-tpms-exceptions> and <http://ipwars.com/2012/08/01/tpm-exceptions-review/> [↑](#footnote-ref-9)
11. See https://assets.documentcloud.org/documents/2488067/2015-27212.pdf [↑](#footnote-ref-10)
12. See http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-us-intellectual-property-regulatory-review-exception-technical-protection-measures-patent-office-delays.PDF [↑](#footnote-ref-11)
13. Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement, para 16.50 [↑](#footnote-ref-12)
14. Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) p72 [↑](#footnote-ref-13)
15. See USTR Trans Pacific Partnership IP Chapter summary, available at <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Intellectual-Property.pdf> [↑](#footnote-ref-14)
16. ALRC Report 122 Copyright and the Digital Economy (2014) para 4.73 available at <http://www.alrc.gov.au/publications/copyright-report-122> [↑](#footnote-ref-15)
17. Productivity Commission Inquiry into Intellectual Property Arrangement Draft Report (2016) recommendation 5.3 available at http://www.pc.gov.au/inquiries/completed/intellectual-property/draft. [↑](#footnote-ref-16)
18. Productivity Commission Inquiry into Intellectual Property Arrangement Draft Report (2016) p.16 available at http://www.pc.gov.au/inquiries/completed/intellectual-property/draft. [↑](#footnote-ref-17)
19. Similar recommendations have also been issued by the Copyright Law Review Committee report on [Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners](http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/clrc/14/20.html?stem=0&synonyms=0&query=%22copyright%20law%20review%20committee%22) (1998) and the House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax (July 2013) at xiii [↑](#footnote-ref-18)
20. Harper, Anderson, McCluskey and O’Bryan, Competition Policy Review Final Report, March 2015, Recommendation 6, p.41 [↑](#footnote-ref-19)
21. The ADA’s full submission is available at http://www.aph.gov.au/Parliamentary\_Business/Committees/Senate/Foreign\_Affairs\_Defence\_and\_Trade/Treaty-making\_process/Submissions [↑](#footnote-ref-20)