

Assessing Copyright Implications for Australian Content on Free-to-Air Television

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I. Introduction

The Australian Free-to-Air Television provides cultural material for Australian viewers, for the purposes of entertainment, social education and global awareness.

To ensure a fair delivery of such material on television, Australian regulations require that there be a mandatory amount of Australian generated content that is provided to viewers. In such an essence, the fairness of Australian content, is such that it would be easily identified as being of Australian origin, meaning towards Australian interests and professes a social implication in the interest of Australian society and its future.

II. Risk to Australian Viewers

The specific risk that currently exists for Australian viewers, is that all free-to-air television is innundated with material that could not qualify as Australian content, yet, is displayed within such allocations and requirements that are limited for such specified use. In prime time, on any day consisting of 24 hours, evidently more that 55% of the material would not qualify as Australian content.

A sample taken of current content, shows that from the hours of 12pm to 12am, the Australian viewer could expect television materials that consist only of 38% Australian content by the hour, and 39% overall. This is well below the prescribed level of at least 55% Australian content that should be provided.

As a result of such biased non-Australian material on television, the opportunity to educate and evolve the Australian society, with Australian values, culture and interests is forgone. Over time, this would lead to under-education of children and young adults whose expectations are not conversant with such appropriate values of the Australian society, as is not communicated through popular channels of the television. Non-Australian television contents that portray violence and crime as a normal way of everyday life, would lead to a community that is expecting of such social deficiencies, and a surreal anxiety about societal expectations, that is dissociative of Australian values, is constantly fed to children and young adults, who may then expect such corrections of the Australian society by emminently falling a victim of such social instigations and behavioural cues.

Gun violence is a particular example of such projected social risks, and television content that maximises exhibition of American crime dramas, are encouraging of gun ownership and use. Young adults, when overtly exposed to the values, cultures and behaviours of a society that allows ownership and use of guns, could thereafter be encouraged to procure and use such weapons, as an emulation, and by encouragement of such social cues, as is provided from such materials constantly displayed on Australian television. Even if a particular show is not about gun violence and associated crime, a society and culture that is constantly exposed to such social risks, would exhibit certain social anxiety, in non-crime dramas, that would infuse such certain fear and apprehension, and an associated behaviour, inappropriate to the Australian audience, who are not carrying such risks of gun violence, in comparison. Hence, a heightened social anxiety is infused and culturally imposed, when such cultural affiliations are constantly displayed on popular Australian television.

III. Economic Impacts

The risk of Copyright infringements, is therefore not only based on a commercial aspect, but consists of important social and cultural considerations for Australia's future. If such purposes of Australian content is ignored, it would certainly lead to a social degradation, leading to further economic deficits.

Currently, the arts and entertainment industry in Australia is seriously handicapped from such developments, as the opportunity to produce and participate in Australian cultural exhibitions, is seriously hampered and unduely exported overseas. A production company in Hollywood, California can easily produce an Australian version of a popular show, using dubbed voices and actors, within a Hollywood studio, and have such material displayed as Australian content on Australian television. As currently, there is no explicit check on the production of Australian content, using Australian accent by American artists in Hollywood, implicitly would deprive such an opportunity for Australian actors and production companies, who would thereby be left unemployed by such activities. Importantly, several American shows that are used as content on Australian television, are not contemporary American shows, but are a re-development or reproduction of past shows, which understandably would be dubbed using voice overs and second actors, in order to get into the Australian market.

Hence, the Australian interest is under-served in multiple aspects, as firstly, the latest cultural exhibitions are not being developed in Australia in order with the global social and cultural developments, and secondly that the economic space for cultural development is taken overseas, depriving Australian actors and production houses. If such an opportunity persists in Australia, Australian viewers would benefit from getting the latest trends in social and cultural content, as well as, participate themselves in such important cultural associations in conjunction with the world, and with an Australian perspective in contemporary terms.

IV. Importance of Copyright Protections

The aforesaid risks of content on Australian television, raises the importance of Copyright laws and its appropriate application, to protect the interests of Australians. A material that is obtained from overseas, would have Copyright implications in Australia. If a show that is produced in an overseas studio, is dubbed and voice-over actors applied to generate content, the project is owned and completed from such an overseas production house, and hence the Copyright of which would be owned by the respective company.

Hence, a loophole exists, where non-Australian Copyrighted material, such as from a production house in California, is dubbed and dressed as an Australian content, and exhibited under the allocation for Australian content, but is however, made available as an imported content from such an overseas provider. Indeed, such a overseas production house would thereby be exporting the Copyright for the purpose of display in Australia, however, no such checks are required or applied on Australian terms, as such materials would be passed as Australian content.

Popular television shows, that are displayed worldwide and with a worldwide viewership, would certainly bring financial benefits to its original composer. A show such as 'Survivor' or 'Who wants to be Millionaire' are not originally Australian shows, and are shows that are displayed in several destinations worldwide, and would be generating royalty for its original composers. Hence, the inherent Intellectual Property for the show is resident with the original composer for the show, and the associated Australian version, is a reproduction of such Copyrighted material that would have certain ownership overseas.

However, in the mix of Australian content requirements, and its associated definitions, in conjunction with rules of Copyright materials and its reproduction, leaves an economic gap, that is well exploited in current practices.

Schematically, this bid-ask gap can be represented as :

Material Overseas

- Has Copyright for Composer (Original Creator)
- Is Licensed to Australian Television (Using Dubbing/Voiceover Actors)
- Brings Revenue for Composer (Financial Benefit)

Australian Content

- Using Australian residents (Permanent Resident/Citizens Actors or Producers)
- Obtains Implicit License from Composer (Accepting Dubbing/Voiceover Actors)
- Material displayed on Television (Copyrighted Material)

Accordingly, an implicit exhibition License, is issued by the original composer, and accepted by Australia, when a popular show is dubbed and dressed into an Australian content, to be then qualified and exhibited on Australian television, with a claim of Australian content. Indeed, if the content was not explicitly qualified as Australian content, and meeting of the minimum requirement of 55%, which is rather even less than 40%, a claim of Australian content could not be recognized, but as regulations permit only upto 55%, any less exhibition of Australian content, by such dressups of foreign content, would quite certainly be geared as an implicit license by the original composer to exhibit such works in Australia.

Hence, a Copyright is issued and accepted in Australia by such terms and practices of providing content for Australian television, by such related acts of the original composer.

V. Risks of Implicit Copyright

When an implicit Copyright license is provided by inference of acts as per described above, the particular Australian Television producers, would become at a risk of subsequent violation of the provisions of the Australian Copyright Act 1968.

Under section 132AC of the Act, a person, such as the producer, would be committing an offence if there is a commercial scale infringement prejudicing the copyright owner.

A legal fallacy is thereby created, where Television shows in Australia are displayed at-risk, without any possible explicit Licensing of the content, in order to qualify as Australian generated content, however, only till such time, when the original owner of such a content would lay claim and proceed for damages from such sustained commercial abuse of their original concept.

If the original composer and owner, provides an explicit License, then such content would no longer be Australian Content, and if an explicit License is not provided, then a risk of Copyright violation, does indeed fall on the Australian Television producer who would display such obtained content, albeit without such required explicit License from its true owner.

VI. Association with Orphaned Materials

In a bid to create opportunity with such a Legal Fallacy, the rise of Orphaned Materials that would be easily available for display and use, is not surprising.

Indeed, a rendition of a popular show from overseas maybe made available, through a 'black-market' or underground methods, without clear disclosure of ownership and licenses. To prevent licensing costs, and to make a material more attractive, the owners of an original content, may indeed, not care about its display and distribution, intentionally or otherwise, at least initially. However, once a content and an original concept is commercialized in Australia, the original owners would certainly not hesitate to make claim and expect certain royalties from such commercial use of their concept.

Hence, orphaning content, maybe deemed as a method for market penetration, that maybe employed to gain market advantage, in consideration of strict government guidelines and regulations, however, once a market is gained, a retrospective application of Copyright laws, Licensing fees and associated costs maybe raised in order for the Australian producer to legally use such material with appropriate consent from its owners. Therefore, an ignorance of Copyright laws, whilst maybe initially over-looked for individual satisfaction, does not provide a sustainable solution for Australian content generation, and is indeed futile, when recognizing Australian content, in comparison to fair Australian content, that is produced completely in Australia, and adequately meets the requirements of Australian content and associated licensing.

The Australian viewer is thereby held liable for loss of interest from expansive non-Australian content, as well as being at the subjection of producers and content owners, at whose whims and contests, the Australian viewer would either have access to or not, in the expectation of viewing Australian television shows.

VI. Recommendations for Amendments to the Copyright Act 1968

The Exposure Draft suggests that in dealing with Orphaned works, a reasonable search must be conducted to identify the owners prior to its use. The Exposure Draft assumes that the owners would like to be identified, prior to the material being used commercially. Indeed, if a Television producer has access to an Orphan Australian version of a popular American show, a search should be conducted to identify the owners and decide on royalty terms. However, it cannot always be assumed that the owner is available in Australia or would like to be identified, prior to the show being televised. This can be further explained, if considering that such popular shows already have producers overseas, and the original owner may have certain disclosure arrangements and Intellectual Property rights given to the foreign production company, that would prevent the owning up of the ownership by respective owners.

Hence, it may not be effective to develop regulations that requires a search for the owner, as further, when a owner does declare, a filing of litigation under provisions of Copyright protection could still not be reasonably expected. A remedy for correction may not exist, if the owner had already such IP protection clauses in effect with the original producers, that would have made such a claim to ownership, a violation of the owners current legal obligations.

To prevent the risk of Orphan materials being subjected to abuse, in being displayed on Australian television as Australian content, the Copyright Act 1968, should adequately clarify the regulation regarding identification and use of Australian content automatically, and that any Orphaned content could not reasonably be expected to precursively qualify as Australian content, for the purposes of Australian viewership. Specific provisions should be provided which :

a. States that Copyright provisions do exist for Orphaned material at all times

This is irrespective of whether an owner can be identified at a current time. It is based on the fact that all artistic works would be developed by a owner or group of owners at some point in time prior to the consideration. That a owner is not available during the consideration, should not imply that the owner thereby provides an implicit consent, fully in terms of the intending user.

Although the owner may not be identified, to have a valid contract, a consideration by both parties should be attempted, prior to having a legally valid and mutually accepted contract for use of such materials. Hence, to claim no ownership, by virtue of an unavailable owner, would be a violation of such contractual rights of the original creator of this content, and should not be defined by the validations of the laws.

b. Define the Intangible nature and Risks of an Implicit Licensing

Whilst an Implicit License maybe provided by original creator, using Australian accents for voiceovers and using dubbing artists, such an implicit agreement should not suffice the existing legislative requirements for obtaining explicit consent in order to display works for commercial purposes. An explicit Licensing for the content should be obtained, and executed as a contract under the Australian laws, to then be available to be used as content for Australian television.

This would reduce the use of Orphaning method, that maybe currently used in order to gain market advantage, and increasing the risk for the Australian viewers.

c. Mandate Copyright consent requirement for identifiable non-Australian content

An amendment is required in the Copyright Act 1968, which makes it compulsory to obtain explicit consent for content that is not Australian. For this purpose, Australian content would be identified using condition tests such as :

i. Is the Television Show, originally a foreign concept ?

This is widely the method being used to meet requirements of 'Australian Content'. Shows from US, are being overcast, using technologies such as dubbing etc., to put an Australian Accent, to meet this requirement. So, a show that is originally from the US, would be originally a foreign concept, and should not meet the requirements of an Australian content. In such cases, an explicit consent from foreign owners should be obtained, prior to it being classified as non-Australian content to be then displayed on Australian television.

Intellectual Property is a core element of the Digital Economy. As such an economy is inherently an inter-connected economy, with easily available goods and services across borders, however, the implications of Intellectual Property and its associated earnings for its original owners could not be ignored. Indeed, this economy, is an opportunity to excel on a global scale, as opposed to previous conditions of infrastructural barriers to present such goods and services across borders. Whilst such a barrier is overcome through digital technologies, however, the stability of an economy, could not be ignored based on such digital advances. Often, a digital technology may provide a further opportunity, however, that further opportunity would require certain resolutions by the laws. Intellectual Property across borders, is such an aspect, and in a haste and projected initial cost savings, IP is severely imported, without a full legal conditioning, as is in the case of Orphaned content, that is available for use in the Australian market.

Economic markets put exceptional importance on original Intellectual Property ownership, as the original owner would be to gain from such an export of services. An ignorance or diversion from recognition of such IP mutually, could not be least required for proper identification of Australian content. On a global scale in the connected digital economy, original IP, is a core determining factor for the rightful revenue from royalties, and such a condition should be required and adequately defined by the laws under Australian Copyright regulations.

ii. Are adequate (at least 80%) of the resources, including actors, background and administration staff for the TV Show, based in Australia?

This is important, because Hollywood is known to produce shows that are used in foreign TV, using staff from Americas, who are taught to speak in an Australian accent. This should clearly not qualify for an Australian Content.

Whilst at least 55% of the TV content should be Australian made, mostly implying that the persons involved in producing the content should be living in Australia ('Broadcasting Services (Australian Content and Children's Television) Standards 2020'). This has been insufficient to ensure the real Australian-ness of a show, as a person from Hollywood can be sponsored by a subsidiary production

company in Australia and made the producer of TV Shows delivered from Hollywood. Whilst the person is defined to be Australian (by Immigration status of Permanent Residency or Citizenship) for the generation of Australian Content, in a digital economy, this would be an insufficient condition to determine Australian Content, as a proxy person may reside in Australia, who is expected as per the regulations to be the primary in generating the content, however, becoming a dummy, and receiving all such displayed content from Hollywood, mostly of past shows in Americas, that are dubbed and voice-overed using an Australian Accent, to be then qualified as an Australian Content for Australian shows, and violating no laws in the process. This would clearly not suffice the requirement for an Australian TV Content, and the regulations should be amended, in consideration of such characteristics of the digital economy.

Also, for TV Shows where the concept is originally a foreign TV Show, should not be classified as Australian Content, as the original show is almost franchised to be on Australian TV, based on the original Intellectual Property for the Show being owned by the original provider of the Show overseas. In the digital economy, and with the wide availability of Internet Television, where Television shows from overseas are available online, such foreign content has become easily identifiable and visibly distinguished from original Australian shows and its associated contents. In such cases, whether a Show is Australian, should be determined by the ownership of original Intellectual Property, as would be the current standard in the global Entertainment Industry, including Internet Television and digital services, and associated exports of such services across borders.

iii. Is the show produced by a Production Company that is primarily Australian Owned?

Foreign Production companies, such as from Hollywood, may form a Branch or a Subsidiary company in Australia, and use Hollywood produced shows, as content on Australian TV. This is profitable for such Production companies, and takes up the opportunity and space allocated for Australian Shows and the associated Australian Arts industry. If a Production company in Australia is producing TV Content, and is primarily held by an foreign ownership (more than 50%), then the content of the Show, could not be expected to be Australian produced, and hence of an Australian Content. This is a major source of financial revenue for US TV Producers, and is mostly not interested in meeting of an Australian content requirements.

In the digital economy, Common Control for companies has raised certain issues that are being addressed globally. International Financial Reporting Standards (IFRS) in Accounting, on which Australian Accounting Standards Board (AASB), issues standards for use by Australian companies, provides further clarity on the importance of Australian-held companies for validation of Australian Content.

(http://eifrs.ifrs.org/eifrs/comment_letters//574/574_27997_SyamantakSahaIndividual_0_AuditDigi tCmCntl.pdf)

As the digital economy consists of digital technologies that are based on originally open source and shared repository, a sole determinant of ownership of the final product is often based on how much control a company can exert over the other, in order to establish such a Controlling power under Common Control. Specific and repeated use of any asset of a claiming Controlling company, by the targetted Controlled company, would provide an estimate of control, that would then add to the total asset that is controlled by the thus becoming Parent company. If an Australian company, repeatedly displays content that is originally owned by a foreign company, then the foreign company would

have a claim of Controlling Power over the Australian company. Thereafter, the Controlling Company would have a claim to a certain percentage of profits that the Australian company would generate, which would then be consolidated as per applicable accounting standards.

Orphaning content, would therefore be a method that could simultaneously be applied to Consolidate from Common Control of Australian Production companies by such foreign companies. As soon as the Australian company, picks up such Orphaned content, even if backed up by adequate search for its true owners, and failing to do so, starts exhibiting this content on Australian television as Australian content, this provides the financial bid-ask gap that would be required operationally, for the Controlling company overseas, to then identify and consolidate the finances of the Australian company in their respective accounting books.

Hence, Orphaning method, would be a bridge that is used by foreign ownership to make its foreign assets liquid in the Australian market, and even if an established Australian company, which is not completely Australian owned, but is significantly held by a foreign parent, picks up such Orphaned content, it should thereafter, not be considered as Australian content, as as per the rules of accounting in Common Control, the Australian company would therefore cease to be of Australian interest. Orphaning method also releases the Australian company of any legal protection that maybe offered in Australian under the Australian laws, to use any foreign generated content, however, economically conceding to the financial Controlling Power of the thus Parent company, when exhibiting shows that are originally of foreign content.

Whilst a company that is fully Australian owned, would be interested in practicing and protecting the interest of Australian Content, a significantly foreign held company can be expected to employ methods such as Orphan Content use, that is thus influenced by the intending foreign Controlling company.

Sample taken on 5th February 2022.

Sheet1											
8 pm	8:32 pmAll Creatures 8:00 pmQCR32 pelLive At The Apollo	8:03 pmKung Fu Panda: Legends Of Awesomeness8:26 pmSluggers8:47 pmChadly With A Chance Of Menstruati	8:00 pmABC News Tonight 28 pmAustralian Story	8:30 pmEscape To Th	MOVIE8:30 pmTwilightSPORTS 15 pmRacely Review - KystianSPORTS 45 pmRacely Review - Morpennville	8:30 pmHouse Hunt					
9 pm	9:18 pmCAE The Mad's 19 pmWhere Line Is It Anyway?9:40 pmWhere Line Is It Anyway?	9:00 pmHank Ziquo's 25 pmDepress: The Next Generation9:45 pmABC ME Programs Resume At 10pm	9:00 pmABC Nightly News9:29 pmWhere Line Is It Anyway? One Plus One	MOVIE9:00 pmWiser	SPORTS 15 pmThe Wrap - Group 1 GlowSPORTS 45 pmRacely Review - Caulfield	9:30 pmHouse Hunt					
10 pm	10:18 pmFather Bow10:03 pmGavin And Sacey10:33 pelSweet Nature Home	10:00 pmABC Late News Weekend10:30 pmThe World This Week	MOVIE10:20 pm2.25SPORTS 30 pmRaceMOVIE10:15 pmS&S10:31 pmHouse Hunt								
11 pm	11:06 pmFinding Alice11:54 pmRage: Quest Zero	11:04 pmSchick's Check11:28 pmThe Trip To Greece	11:00 pmABC Late News11:30 pmABC News Regional		SPORTS 1:00 pmChampion - V0 RugbySPORTS 1:15 pmRacely Review - Caulfield	11:30 pmHouse Hunt					
22	58	20	40	100	60	22	2	100	42	42	0

9 Co	9 Gen	9 Tech	10	10 Bod	10 EID	10 Reach	10 Scale
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MOVIE3:15 pmDown	3:30 pmFuturistic Cam 3:00 pmWhat's Up Down Under3:30 preFarm To Fork	3:00 pmDagwood Mc3:00 pmWhat's Up Down Under3:30 preFarm To Fork	3:30 pmFriends Road3:30 pmHow To Cook3:30 preSnake Takes				
MOVIE4:59 pmGaleMOVIE4:58 pmIndividual 31 pmTravel	4:00 pmTime Of Australia With Hayden Quinn4:30 preBottle: Rescue Travelled	4:00 pmTime Of Australia With Hayden Quinn4:30 preBottle: Rescue Travelled	4:00 pmFriends4:30 preFriends Magical Things4:30 preBottle: Rescue Magical Things4:56 preSnake Takes				
5:30 pmFun Resources5:00 pm10 News Five5:00 pm1 Fish Summer Series5:30 preScorpion		5:00 pm10 News Five5:00 pmFriends preFriends	5:00 pmThe Thundermans3:0 preThe Thundermans				
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Sheet1					
MOVIE8:53 pmDivee	8:31 pmAlaska: The I	8:30 pmLaw & Order	8:05 pmThe Big Bang Theory8:30 pmThe Big Bang Theory8:45 pmThe Big Bang Theory	MOVIE9:45 pmBounce	
MOVIE9:17 pmWhite9:30 pmDevil's Canyon	9:25 pmLaw & Order	9:20 pmThe Big Bang Theory9:45 pmThe Big Bang Theory			
10:30 pmBesting Sam (10:30 pm)Amblance 10:20 pmThe Psi Dec10:30 pmAmblance 10:15 pmFriends					
11:40 pmWind Screen1:18 pmKenney Let1:29 pmAlaskan Bay	11:20 pmSci Team			11:30 pmWorkbooks	
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