REVIEW OF SECTION 36 OF THE COMMERCE ACT: RESPONSE TO DISCUSSION PAPER

1 This submission is made on behalf of Screen Production and Development Association (SPADA), Sky Television *Sky), the Australia New Zealand Screen Association (ANZSA), and the Motion Picture Association of America (MPAA).[1] We are proud contributors to a sector that in 2016/2017 delivered $3.5 billion in gross revenue and $1.1 billion in GDP value add to the New Zealand economy and supported an estimated 26,600 FTE jobs.[2]

2 We appreciate the opportunity to respond to this discussion paper and thank MBIE for the thoughtful analysis contained in the Discussion Paper.

3 The MPAA submitted on MBIE's November 2015 Issues Paper produced in the course of its targeted review of the Commerce Act 1986 (the **Act**). In that 2 March 2016 submission MPAA offered our broad support for an exclusionary conduct effects test.

4 We continue to believe that an effects test:

4.1 serves the interests of New Zealand consumers; and

4.2 appropriately aligns New Zealand competition law with that in comparable jurisdictions enabling the country to draw on international precedent, commentary and agency guidance.

5 Although it was beyond the targeted review, our response also touched upon the desirability of maintaining the Act's current s36(3) and s45 exceptions for intellectual property rights (**IPRs**; with these two provisions being, together, the **IPR Exceptions**).

GENERAL REMARKS ON THE IPR EXCEPTIONS

6 We support strong IP laws because they enable our members and their affiliates to produce and disseminate popular entertainment content to consumers around the world. Vast cultural and economic benefits flow from IP regimes that offer clear and

[1] See Appendix 1 for more details on the submitting organisations.

[2] Stats NZ, Screen Industry 2016/17, https://www.stats.govt.nz/information-releases/screen-industry-201617.

robust protection for creativity and inventiveness.[3] By the same token we also support efficient free-markets policed by effective competition law.

7 As the Discussion Paper notes, the modern and now mainstream view is that IP and competition law are best seen as complementary, not contradictory. Both regimes are focussed on protecting and encouraging dynamic efficiency in markets. The IPR Exceptions recognise that reality:

7.1 Section 36(3) of the Commerce Act makes clear that simply asserting an IPR cannot amount to the misuse of market power because, if it were otherwise, IP owners could not protect their intangible property and the IP regime would collapse.

7.2 Section 45 of the Commerce Act excludes the grant of rights clause in an IP licence from Part 2's substantial lessening of competition and cartel conduct provisions.

8 In continuing to support the IPR Exceptions we record that, to flourish, the New Zealand film and television industry requires the optimal interface between IP and competition law.

9 On the IP side, the industry needs robust copyright law protecting content, not least New Zealand-made content, to incentivise producers to invest in filming that content in this country.[4] And on the competition law front, we need a regime that ensures IP licence provisions do not fall foul of competition law simply because they involve arrangements that European and other competition law regimes recognize may appropriately reduce some aspects of competition by nature of the rights granted under IP law.

10 In supporting the status quo, we observe that there is no suggestion, let alone evidence, that the IPR Exceptions are working inappropriately in New Zealand.

11 Against that reality, the repeal of these long-standing provisions would create significant uncertainty for copyright industries. That uncertainty would extend to even standard copyright licence provisions creating material and unwarranted transaction costs for creators of, investors in and licensees of copyright, including international copyright owners wishing to make their work available in New Zealand.

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[3] See, for instance, EPO and EUIPO "Intellectual property rights, intensive industries and economic performance in the European Union" (2016); N Pham, J Pelzman, J Badlam, A Sarda "The economic benefits of intellectual property rights in the Trans-Pacific Partnership" (2014); R Merges "The economic impact of intellectual property rights: an overview and guide" (1995) 19(2) Journal of Cultural Economics 103.

[4] We are in the process of responding to MBIE's Issues Paper on the Review of the Copyright Act 1994.

12 The fact is that IPRs are qualitatively different from anything else regulated by competition law because they:

12.1 are essentially a limited right to exclude others from exploiting the statutory rights; and

12.2 have unique features like the special status of an exclusive licensee under IP legislation.

13 In saying that we note that IP licensing is not the only area of commerce with a limited Part 2 carve-out. Section 44 of the Act recognises that pursuits like professional partnerships, for example, should enjoy a similar exception on the basis that any perceived or superficial lessening of competition is far outweighed by the economic efficiency inherent in the activity.

14 Repeal creates an unacceptable risk of uncertainty around how the Commerce Act would apply to an ordinary IPR exploitation in the absence of the express statutory clarification provided by s45 in particular. New Zealand cannot simply repeal the IPR Exceptions and leave nothing in its place. Canada has Intellectual Property Enforcement Guidelines informed by s79(5) of Canada's Competition Act 1985.[5] Similarly, the EU has the Technology Transfer Block Exemption. The United States, has decades of case law and extensive enforcement agency guidelines on the IP/competition law interface.

15 In our view, the initial preferred option outlined in the Discussion Paper will harm copyright industries on the one hand, without delivering discernible benefit anywhere else in the economy. We turn now to address briefly the Paper's specific questions on that option.

ANSWERS TO DISCUSSION PAPER QUESTIONS

Question 20: *Can you identify any example of potentially anti-competitive IP-related conduct that is likely to fall within the scope of the Commerce Act's IP-related provisions at present?*

16 No we cannot.

17 In saying that we think it right to comment further on the scope of the two IPR Exceptions. There is repeated suggestion in the Discussion Paper that "the boundaries of the provisions are unclear". That observation then seems to track

[5] s 79(5) of Canada's Competition Act 1985 provides that: "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

through to one justification for the "initial preferred option". We do not think the meaning and reach of the IPR Exceptions is unclear at all:

17.1 Section 45 excludes the grant clause in an IP licence from Part 2's substantial lessening of competition and cartel conduct provisions.

18 Section 36(3) makes clear that simply asserting an IPR cannot amount to the misuse of market power because, if it were otherwise, IP owners could not protect their intangible property and the IP regime would collapse. While the Discussion Paper does not address this point head on, we suspect MBIE would say that s 36(3) has become redundant because it is now so well-recognised that IPRs are not generally co-extensive with a market in the competition law sense (even though there is no New Zealand case law on point). But, with the position already written into the Act, why take a step backwards and replace the current certainty with uncertainty on the point? We note further that s36(3) does not overreach and immunise a powerful rights holder from liability for strategically abusive IPR enforcement. As the Court of Appeal said in *Electricity Corp. v Geotherm Energy* "*the manner of exercise of the rights by way of implementation of a policy to exclude competitors*" could amount to the misuse of market power; it all depends on the circumstances in any given case.[6] Building on the fact that we cannot identify any anti-competitive conduct which would fall within the IPR Exceptions, we note that all the trade practices canvassed at paragraph 235 (none of which are copyright-related) of the Discussion Paper would attract at least s36 attention. And where you have an effects test, we cannot see how any improper IP-based exclusionary conduct could be beyond the Commerce Act.

19 The IPR Exceptions are not letting IP owners engage in exclusionary conduct. They simply function as a block exemption would in jurisdictions like Europe or a safety zone in the US, encouraging innovation and delivering efficiency in circumstances where there is no material prospect of harm to any competitive process.

20 Moreover, repealing the IPR Exceptions could lead to protracted and costly litigation challenging IPR owners' statutory right of exclusive control over IPR exploitation per se, based on arguments that such exclusivity is potentially anti-competitive. New Zealand film and television and other creative industries are unlikely to have the financial resources to defend control of their IPR production against such challenges by global digital interests.

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5. [1992] 2 NZLR 641 (CA) at 651-652.

Question 21: *Do you agree with our initial assessment that there is not a strong rationale for treating IP-related conduct differently to other forms of conduct? If not, why not?*

21 No, we do not agree with that initial assessment.

22 IPRs are the legal manifestation of dynamic conduct and innovation. In this sense IP and competition law share a common goal of promoting dynamic efficiency which generates long-term welfare and economic growth within an economy. There is a compelling rationale for ensuring the Commerce Act offers limited accommodation to IPRs to ensure its provisions do not fetter growth and innovation and inappropriately limit technology transfer arrangements that will be subject to the "effects test".

Question 22: *Do you agree with the specific issues with the IP provisions that we have identified? If not, why not? Are there other specific issues with the provisions that we have not identified?*

23 As we have said, we do not think "uncertainty" of the provisions is an issue. Nor do we accept the argument from Ian Eagles that "the provisions lack a coherent policy underpinning".[7] Repeating our answer to question 21, the policy rationale for the IPR Exceptions is that they exist to reduce friction that might otherwise arise between two regimes which ultimately share a common goal.

Question 23: *Are there other options that we should consider? For example, are there modifications that could be made to one or more of the provisions to clarify or reduce their scope?*

24 We strongly favour the status quo. Again, we think the scope is clear and that the IPR Exceptions effectively facilitate IP commercialisation and technology transfer in this country. The Exceptions do not immunise powerful IP owners from liability for exclusionary conduct which remain subject to market power and effects test analyses under applicable competition law. Section 36(3) protects the IPR owner's statutory right of exclusive control over IPR exploitation as essential to the value of IPR production.

Question 24: *Do you agree with our assessment of this option against the criteria? If not, why not?*

25 No we do not agree with your assessment of the situation. The Commerce Commission or a private plaintiff could, without undergoing a complicated, costly, or

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[7] Discussion Paper at [243]-[244].

time-consuming process, assess whether the IPR Exceptions apply in any given situation.

26 By contrast, as we have said, removing the IPR Exceptions would create uncertainty over how IPRs can ordinarily be utilised in distributing films and TV shows. Because financial investment in producing new content is usually tied to IP licencing and controlling the distribution of the content, this uncertainty could undermine the creation and exploitation of new content, from financing and production through to licensing for exhibition via various media. A lack of legal certainty will impede licensing, production and investment decisions in the film and television industry and restrict availability of content to New Zealand audiences. Given the critical role that licensing plays in production and investment decisions and content distribution, any weakening of the rights to license content under flexible commercial arrangements runs the risk of damaging future investment in the sector, and consequently the size of the local industry and the options available for New Zealand consumers to access content.

27 Take for instance, the New Zealand Screen Production Grant for New Zealand Productions. One of the criteria for obtaining government productions funding is that the "production must have market attachments that comprise 10% or more of the production budget. Market attachments are limited to international sales advances, distribution advances and licence fees, for the screening or broadcast of the production itself and where there is no entitlement to share in the net receipts from the production in respect of that sales advance, distribution advance or licence fees. Equity and loans cannot qualify as market attachments. Any market attachments must be from parties unrelated to the applicant and from bona fide screen production sales agents, distributors or broadcasters."[8] The integrity and practicality of the NZ Screen Production Grant would therefore be undermined by removing IPR Exceptions as producers would find it harder to secure the "non—government funding" and "market attachments".

28 The Australian experience (discussed in greater detail at paragraph 34 below) is instructive. The lack of legal certainty around the validity of licensing arrangements and their scope could result in reduction in film and TV/SVOD content financing, a reduction of interbrand competition among film and TV/SVOD content producers, reduction in distribution models and narrower distribution to customers (with unbundling of content).

[8] Paragraph 9.6 of the New Zealand Screen Production Grant for New Zealand Production. Available at https://www.nzfilm.co.nz/new-zealand/funding-and-support/new-zealand-screen-production-grant/nzspg-criteria-new-zealand-1-0

Question 25: *Do you support our initial preferred option? If not, why not?*

29 We are strongly opposed to MBIE's preferred option for the reasons we set out earlier.

30 We also note that it is not as simple as just repealing the IPR Exceptions. We expect MBIE would need to recommend changes to the cartel provisions and, in particular, the s32 exception for vertical supply contracts. In the IP context, a licensor and licensee are potentially persons "in competition with each other for the supply…of… services" pursuant to s30B(c)'s extended definition. In many cases, the licensor could commercialise the IPRs itself in place of the licensee or in competition with the licensee *but for* the licensee's choice to create exclusivity in the grant in the licence. At the moment s45 exempts licenses from the cartel provisions. If s45 were repealed, the act would require a different specific exemption to exclude IP licensing from the cartel provisions. Section 32, as it stands, does not go far enough because the "dominant purpose" of the grant in an exclusive license is of course not just to lessen competition between the parties to the contract, but to completely extinguish it.

31 Under no circumstances can Parliament simply repeal the IPR Exceptions without making concurrent amendments to sections 30-32 of the Act as well.

AUSTRALIAN EXPERIENCE

32 We have opposed removal of the Australian equivalent to the IPR Exceptions without an underlying legal framework dealing with the proper application of competition laws to IP rights, such as US case law and EU block exemptions.

33 We are currently working with the Australian Treasury in addressing and exploring the potential impact on the types of arrangements set forth below, and we would need to work with MBIE in New Zealand, as well, if a repeal would proceed because repealing the IPR Exceptions is likely to create uncertainty for copyright industries.

34 For example, removing the s45 safe harbour could expose the following pro-competitive innovative arrangements in our industry to greater compliance costs and uncertainty:

34.1 **Film content financing**. The content production and distribution ecosystem relies on the common practice of pre-selling specific exclusive rights by territory or distribution channel to raise the financing required for a feature film to even go into production. Pre-selling tailored exclusive distribution rights creates certainty and is typically a mandatory requirement by parties providing production finance. Those parties also often impose licensing conditions to preserve investment value, like requiring licensees to support

the potential revenue opportunities for that content, or complying with conditions to ensure the content is secure and protected against unauthorised access and exploitation. In turn, these licensees will seek to mitigate the risks associated with paying advances for this content by licensing exclusive sub-distribution rights in various release windows (output deals). Without certainty around the validity of these licensing arrangements and their scope, financiers and producers will be less willing to step forward meaning that less content or less varied content will be approved for production, in turn reducing the overall size of the local film and TV industry.

34.2 **TV/SVOD content financing**. The main incentive for a broadcaster, Pay TV operator, Subscription Video-on-Demand (**SVOD**), or Advertiser Supported Video on Demand (**AVOD**) provider to invest in the production or licensing of content is that they can use the content to differentiate itself from the competitors, and to use that differentiation to derive income through advertising or subscription revenue. The content or content libraries an operator commissions or acquires through exclusive licenses explains why a consumer is prepared to subscribe in the first place. Exclusivity promotes competition and demand for more and better content by ensuring licensees are able to acquire rights to unique content that attracts viewers to each service.

34.3 **Exclusive licenses**: Licensing practices for audio visual content are both exclusive and non-exclusive based on a range of factors, such as the nature of the content, the distribution channel, the technology chosen to distribute the content and consumer preferences for the way the content is consumed. Screen content is very expensive to produce. It relies heavily on exclusivity as a means to managing the risk associated with content investment as described above. Licensees are more likely to promote content that they have exclusive rights to via advertising and other means. Without exclusivity, other licensees could free ride on this promotion reducing interbrand competition and, as noted above, allows licensees to differentiate their product offerings from those of others. The mass availability of content would also reduce competition because it would mean that consumers would only need access to one service to access all of their desired content.

34.4 **Distribution models**: Investment in film and television content depends on a variety of distribution models that can vary depending on the nature of the distribution channel. Distribution through Free-to-Air (**FTA**) platforms differs from Pay TV and SVOD, AVOD and Transactional Video on Demand (**TVOD**) services. These include offering pre-release/preview rights, release windows, pricing-based release windows, territorial exclusives and alignment with merchandising. Release windows optimise the revenue that can be generated

from film and television distribution, while technological advancements (such as catch up TV) cater to viewers' changing preferences. TVOD, SVOD and AVOD business models license direct-to-consumer.

MEETING WITH OFFICIALS

35 We are conscious that IP licensing can be a complicated business, as this brief summary of different arrangements illustrates. We would be happy to spend time with officials working through the detail if MBIE would like to know more about our industry and the benefits we see in the status quo.

APPENDIX 1: FULL DESCRIPTION OF SUBMITTING PARTIES

1 **Screen production and Development Association (SPADA)** promotes the interests of independent producers of feature films, television, animation, interactive media companies and television commercials in New Zealand. It is a leading advocate for New Zealand screen culture and for healthy production businesses. It has regular and constructive dialogue with funding bodies, broadcasters, government and with other national and international industry groups and opinion formers in order to monitor and influence the development of New Zealand's screen production policies and to provide a voice for the production industry. SPADA also provides a range of services including training, industry events, and advice on employment, copyright and contractual issues for its members.

2 **Sky Television (Sky)** began broadcasting in 1990 and has grown to be New Zealand's leading media and entertainment company, serving more than 750,000 customers throughout New Zealand. We broadcast more than 115 channels of live sport, movies, news, documentaries, dramas, nationwide free-to-air channels and pay-per-view channels. 20 of these channels are owned and operated by Sky, including free-to-air channel Prime. Like any media and entertainment company, our business relies on the licensing of films and TV shows; as part of this we rely on IPR content from members of SPADA, ANZSA and MPAA and many others. Exclusivity in IPR licensing arrangements is an essential and important feature of the competitive market in which we operate.

3 **Australia New Zealand Screen Association (ANZSA)** represents the film and television content and distribution industry in Australia and New Zealand. 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. ANZSA has operated in New Zealand since 2005 (and was previously known as the New Zealand Federation Against Copyright Theft and the New Zealand Screen Association). ANZSA 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; Netflix Studios, LLC; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc., and Fetch TV.

4 The **Motion Picture Association of America (MPAA)** represents the voice of the global film and television industry, a community of storytellers at the nexus of innovation, imagination, and creativity. Our members are Walt Disney Studios,

Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Warner Bros. Pictures International