SUBMISSION ON NZCC IP GUIDELINES

1 This submission is made on behalf of the Australia New Zealand Screen Association (ANZSA), the New Zealand Screen Producers Association (SPADA), Sky Television (Sky) and the Motion Picture Association.[1] We are proud contributors to a sector that in 2017/2018 delivered $3.277 billion in gross revenue[2] and supported an estimated 28,100 FTE jobs[3].

2 We welcome, and thank the Commission for, the opportunity to submit on its draft *Guidelines on the Application of Competition Law to Intellectual Property Rights* (the **Guidelines**).[4]

3 Overseas investors will turn to the Guidelines when assessing how IP rights and competition laws co-exist in New Zealand, so the document plays an important role in the local economy.

4 As presently drafted, we are concerned that the Guidelines could dissuade overseas investment in New Zealand's Screen Industry. Respectfully in our view, the Guidelines potentially suggest to investors that – following the Commerce Amendment Bill (the **Bill**) – they now face many different and new competition law hurdles when licensing IP in New Zealand. We do not believe Parliament intended the Bill to have that effect.

5 Specifically, we have two interrelated concerns:

5.1 **The Guidelines do not address how the s45 repeal will affect the New Zealand Screen Industry**. We respectfully submit that, for the Guidelines to be commercially and practically useful, they must explain what effect – if any – the s45 repeal has on stakeholders compared to the status quo. Indeed, we observe the Select Committee assured Bill submitters that Commission

[1] See Appendix 1 for more information about the submitting parties.

[2] See https://www.stats.govt.nz/information-releases/screen-industry-201718/

[3] See https://www.stats.govt.nz/information-releases/screen-industry-employment-data-201718/

[4] Commerce Commission draft *Guidelines on the Application of Competition Law to Intellectual Property Rights*, published 19 December 2022.

guidelines would provide that counterfactual analysis by "explaining how people might be affected by … the repeal of section 45".

5.2 **The Guidelines lack specificity**. If the Commission sees new risk to stakeholders, we think it is crucial the Commission more clearly and specifically describe where that risk lies. Our concern with the Guidelines is that they introduce potential IP-related issues that are unrealistic, couched in overly broad terms, and are out-of-step with the globally-accepted position that competition law and intellectual property rights are not in conflict.

We are concerned that if the Guidelines are not refined they will dissuade both local and international screen producers and financiers from investing in the New Zealand Screen Industry for fear that, from a regulatory perspective, New Zealand is too high risk following the Bill.

6 In light of these concerns, we finish these submissions with suggestions on how the Commission can improve the Guidelines. In particular, we believe the Guidelines should include safe-harbours and/or provide examples on situations where licensing IP, particularly copyrighted material, would *not* breach the Commerce Act.

7 In our experience, that type of positive guidance will significantly reduce the risk of the Guidelines becoming a barrier to market investment.

8 We expand below.

CONTEXT

9 ANZSA, SPADA, Sky and MPA represent a large share of the production, licensing and distribution of screen content in New Zealand. This ecosystem relies on the ownership and licensing of IP rights – such as Copyright - that attaches to the content produced.

10 These IP rights are crucial to ensure New Zealand's Screen Industry can recoup the significant investment it makes in creating film and television content, otherwise at risk of unlawful plagiarism, exploitation and/or pirated consumption.

11 Critically, IP rights allow content creators to decide how their work will be used and by whom.

12 In a New Zealand economy with well-understood and well-functioning IP rights and competition laws, the Screen Industry contributes over $3 bn to New Zealand's

economy each year and creates tens of thousands of jobs for New Zealanders across the country.

13 In that context, we therefore lobbied against the Bill.

14 We saw and continue to see:

14.1 no evidence, nor examples to provide any basis for the claim that s45 created Commerce Act loopholes; and

14.2 risk that Parliament's decision to repeal s45 could chill overseas investment in our Screen Industry by wrongly signalling to investors that there is a conflict between competition law and IP rights in New Zealand.

15 Unfortunately, our lobbying did not prevent the repeal of s45.

16 However, we were encouraged by the Select Committee's assurance that the Commission intends to prepare guidelines that would "[explain] how people might be affected by … the repeal of section 45", specifically:[5]

Commerce Commission should prepare guidance

We believe it is important that people understand clearly how the bill's changes would affect them. The bill's delayed commencement dates would give time for people to become familiar with the new requirements and ensure they are compliant before the changes came into effect.

The Commerce Commission is New Zealand's competition authority and regulator. One of its functions is to provide information about the purposes and provisions of the Commerce Act. We would expect the Commission to release timely and detailed guidance to help market participants understand the provisions in the bill. Guidance might also outline how the Commission intends to enforce the provisions. It would be especially important for explaining how people might be affected by the proposed changes to the section 36 and 36A test, and the repeal of section 45.

We are satisfied with the Commission's assurance that it intends to do this

[5] https://www.parliament.nz/resource/en-NZ/SCR_115852/48191474b94d770dff2d7670b28d29db35bbb920

CONCERNS WITH THE DRAFT GUIDELINES

17 We have two key concerns with the Guidelines:

17.1 The Guidelines do not explain how the s45 repeal will affect our Screen Industry.

17.2 The Guidelines are cast in overly broad terms that risk confusing the interplay between competition laws and IP rights in this country.

Concern 1: the Guidelines do not explain the effect of the s45 repeal

18 Given the Select Committee's comments outlined above, we were expecting the Commission's Guidelines to explain what practical affect the s45 repeal has on businesses investing in IP in New Zealand.

19 We observe the ACCC took that counterfactual approach in its *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010*.

20 Those Australian guidelines discuss "the impact of the repeal of subsection 51(3)" so firms potentially affected by that repeal could better understand their potentially new compliance obligations.[6] In particular, the Australian guidelines explain to readers that the s51(3) exception was "limited" and, therefore, its repeal would have a *similarly limited effect on IP rights owners*. The Australian regulator also explained what conduct was not covered by the s51(3) exception – like "licence and assignment conditions that did not 'relate to' the subject matter of the intellectual property right".

21 We respectfully ask the Commission's Guidelines to similarly explain in detail what conduct is now "at risk" because of the s45 repeal.

22 We understand that conduct is, like in Australia, likely to be very "*limited*".

23 Indeed, we observe the Commission's submissions on the Commerce Act Amendment Bill recorded "*[the Commission] has found that the scope of the exception is often misunderstood by the parties, creating confusion relating to its application"*.[7] It follows then that we ask the Commission's Guidelines to explain s45's scope so that readers can clearly understand exactly what conduct is no longer

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[6] ACCC *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)* (August 2019), at [1.3].

[7] Commerce Commission submission on Commerce Amendment Bill (30 April 2021), at [17]

exempted under the Commerce Act. Or, to the extent not much has changed, the Guidelines should make that clear.

24 Further, once that point has been addressed, there is need for the Guidelines to distinguish the types of industries where the repeal of s45 has and will have '*limited*' or no effect on certain types of conduct. The NZ Screen Industry is highly competitive with many firms creating a broad range of entertainment, cultural and artistic content that inherently requires IP support and protection to exist and prosper. By comparison, it would seem that more consolidated industries, like perhaps the pharmaceutical industry, may face greater Commerce Act risks following the s45 repeal and the Guidelines should reflect that reality.

Concern 2: The Guidelines need to be specific

25 Our second concern is that the Guidelines are couched in overly broad terms and/or out-of-step with the globally-accepted position that competition law and IP rights do not conflict.

26 We were comforted by the Commission's submissions on the Commerce Amendment Bill that:

> *"the removal of the [s45] exception does not diminish the rights of intellectual property holders, it simply ensures that they are not used in an anti-competitive manner, similar to any other form of property or assets under competition law"* [8]
>
> *[and]*
>
> *"granting an exclusive licence to commercialise an IP right is unlikely to substantially lessen competition even if the manner of that commercialisation is restricted in accordance with the scope of the IP right".* [9]

27 We also support:

27.1 ACCC's advice that *"the ACCC acknowledges that intellectual property rights confer exclusive rights on rights holders, and considers that the bare exercise*

[8] Commerce Commission submission on Commerce Amendment Bill (30 April 2021), at [16]

[9] Commerce Commission submission on Commerce Amendment Bill (30 April 2021) supplementary document 1: *Commerce Commission Submission Targeted Commerce Act Review Issues Paper* (10 February 2016) at [43].

of these exclusive rights will not have significant anti-competitive implications".[10]

27.2 And DOJ commentary that "*Nor does … market power impose on the intellectual property owner an obligation to license the use of that property to others".* [11]

28 Against that context, we are concerned by the Guidelines' overly broad comment at [10] that:

> *"In certain circumstances, particularly where there are few actual or potential substitutes available from independent firms, the exercise of intellectual property rights can substantially lessen competition. Whether the exercise of intellectual property rights is pro-competitive or harmful to competition depends on the circumstances".*

29 Respectfully, this comment risks leading readers to conclude that competition law and IP rights are in conflict in New Zealand.

30 In giving this impression, the Guidelines risk signalling to global investors that New Zealand treats IP rights differently than they are in other parts of the world. The Commission's comment also risks suggesting that IP rights owners must run a substantive competition law analysis each time they look to exercise their IP rights, something that would add unnecessary complexity and cost to doing business.

31 We see these concerns also play out in the Guidelines' overly broad discussions on refusals to license IP, exclusive licenses, territorial licences and field-of-use licenses at [51] to [68].

32 Dealing with each of those sections in turn:

32.1 **Refusal to license**. The Commission risks suggesting that firms with market power could breach the Commerce Act by simply refusing to license their IP. That analysis is out-of-step with international thinking (see, for instance, ACCC and DOJ comments above). It cannot be that a firm that creates something new and, in doing so, innovates its way to a position of market power is obliged by competition law to license its IP to that creation. That

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[10] ACCC *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)* (August 2019), at [2.3].

[11] Department of Justice *Antitrust Guidelines for the Licensing of Intellectual Property* (12 January 2017), at p4.

finding would, in effect, nullify IP rights as firms with market power would – in all circumstances – be required to license their IP to "facilitate" downstream competition.

Further, the Commission's statement that, "refusals to license intellectual property are likely to be treated the same way as a refusal to provide access to a service or physical input", confuses essential inputs with licenses to use someone else's intellectual property. The two are unrelated. A firm with market power may be obliged under s36 to give rivals access to an "essential input", but that obligation does not mandate that firm to license its IP. On the contrary, that firm could meet its s36 obligation by granting access to its input, without licensing any IP at all. Indeed, in the Guidelines' telecommunications example on p10, it is Firm A's refusal to give its competitors access to its 5G product that may breach the Commerce Act; not the mere fact that Firm A refused to license its patent to rivals.

In these circumstances, the Guideline's inference that firms merely refusing to license IP are acting contrary to competition law is misguided. We respectfully ask the Commission to revisit this analysis and make sure that it does not unnecessarily conflate or confuse the interplay between competition law and IP rights.

32.2 **Exclusive licensing**. In a similar vein, the Guidelines give the impression that firms licensing IP on an exclusive basis are constantly at risk of breaching the Commerce Act when, in reality, that risk would seem exceptionally remote.

An exclusive licence means that only the named licensee can exploit the relevant IP. Exclusive licenses are critical to ensuring IP owners control who can use their IP and how it is used. If IP owners could not license their IP on an exclusive basis then no one would license their creations; undermining the primary and intrinsic value of IP rights.

We are concerned that the Commission's commentary on p12 suggests firms licensing IP must – somehow – weigh up whether they could achieve the same commercial outcomes by licensing their IP on a less exclusive basis. That "counterfactual" analysis wrongly puts competition law and IP law in conflict by suggesting the value IP owners get from licensing their IP exclusively is at the expense of competition and consumer welfare, when that

is not so. Rather, the value IP owners get from being able to properly commercialise their IP – including through standard exclusive licenses – encourages innovation that benefits all New Zealand markets.

In short, the draft Guidelines risk confusing exclusive licensing of IP with *other terms* that licensors may potentially place on licensees, terms that could possibly substantially lessen competition. To illustrate this point using the Commission's example on p13:

- The fact that Firm A chose to exclusively license its smart ear tags to Firm B cannot, in itself, breach the Commerce Act. There can be no competition law obligation on Firm A to – all else equal – license its invention to other firms more broadly to "stimulate" competition.

- But, as part of that exclusive license, Firm A potentially included *other terms* that prohibited Firm B from competing with Firm A more generally (i.e., the term requiring Firm B to not develop, manufacture or distribute its own competing smart ear tags). Those other terms *might*, in themselves, breach the Commerce Act but they are not exclusive licenses as that term is commonly used.

As with the Commission's commentary on refusals to license IP, it is crucial that the Commission clearly describes where issues may arise in the context of licensing IP. Overly broad statements that misuse common terms, like "an exclusive licence can harm competition without completely foreclosing competitors", risk confusing the issue and, most importantly, dissuading overseas and local investment.

32.3 **Territorial, customer, field-of-use restraints.** For the same reasons, we are concerned that the Commission's sweeping statements that standard territorial, customer and field-of-use restraints are at risk of breaching the Commerce Act are misguided. As with exclusive licenses, standard territorial, customer and field-of-use restraints are necessary for firms to effectively exercise their IP rights. These terms are necessary to ensure IP owners can control who can use and how their IP is used. We respectfully ask the Commission to take greater care when discussing these terms (if it is necessary to discuss them at all).

33 Further, the following table outlines other parts of the Guidelines we think are drafted too broadly or not practically or commercially realistic. For the same reasons as above, we ask the Commission to revisit these examples/comments to ensure the Guidelines are fit for purpose.

Guideline reference	**Our comments**
Refusal to supply, for example (page 9)	We query whether this example is helpful. The example suggests firms producing artistic copyrighted material – like television schedules – should run a substantive competition law analysis each time they decide whether or not to license that material. That suggestion, respectfully, seems unrealistic and unnecessary. It seems highly unlikely that the IP-specific terms on which firms license copyrighted artistic materials in New Zealand, like movies, books, songs and TV guide content, could possibly 'substantially lessen competition' given our commentary on exclusive licenses at [30.2] above and given how many competing producers, writers, singers and magazine companies exist in each relevant market. To that end, the Guidelines would benefit from explaining to readers that specific movie franchises, book series, songs or magazines are not competition law markets in themselves. And, it follows, the Guidelines should make clear that licensors of this types of content are in a low Commerce Act risk zone.
Cartel comments, [67]-[70]	We struggle to see how standard geographic territories, fields-of-use, customer groups or price arrangements attached to licenses for use of specific IP could possibly be a cartel provision where the licensee and licensor are, more generally, market competitors. In those circumstances, the licensor is giving the licensee the right to use its IP on terms it is entitled by law to set. The licensee and licensor are not otherwise competitors for the

	"goods or services" in question – being the licensor's IP. This reality differs to, say, two publishing companies agreeing, more generally, to license the books they produce at a particular rate or to specific geographic areas, which could possibly be a cartel.
Collecting Societies	It is not clear how the Commission's collecting societies example on p17 could breach the Commerce Act. We understand Firms B, C and D are entitled to sell their copyrighted material to whoever they like, in the same way other firms across the economy can choose their trading partners. In this instance, each firm has chosen to license their copyrighted material to Firm A. We understand that Firms B, C and D are not otherwise obliged to sell directly to a radio station in the same way electronics manufacturers are not obliged to sell direct to consumers. Further, it is not clear what market the Commission thinks could face a SLC in this example. Music producers, Firms B, C and D, do not seem to believe the collecting society has market power over the supply and acquisition of their music rights or that its conduct somehow substantially lessens competitions in the markets they operate in. It is also not clear how the arrangement affects competition in New Zealand's radio market which continues to have access to music and content through, at least, Firm A on equal terms. Unless the Commission is clear on these points, the example risks wrongly suggesting to readers that New Zealand competition law gives Firm E – the radio station – a legal right to purchase direct from music producers when we do not understand that to be the case. The Commission's example also potentially confuses the role of the Copyright Tribunal which, among its' other functions, exists to ensure the reasonableness of copyright licensing fees and terms.

SUGGESTIONS

34 To address concerns 1 and 2 above, we respectfully request the Commission:

34.1 directly address how the s45 repeal affects the economy;

34.2 distinguishes between certain industries that the s45 repeal will have 'limited' impact, e.g. one of them being our New Zealand Screen Industry; and

34.3 consider the comments we make above and, where appropriate, give more detail on the Commerce Act risks (if any) associated with intellectual property in this country.

35 In making these points, we emphasise again that overseas investors will turn to the Guidelines when assessing how IP rights and competition laws co-exist in New Zealand. It is, therefore, crucial that the Guidelines carefully present the New Zealand landscape, so as to ensure investors can make informed commercial decisions. If, on the other hand, the Guidelines are unclear or overly general, there is a very real risk that regulatory uncertainty would dissuade investment in our Screen Industry and other local markets.

36 On this front, we suggest that the Guidelines record situations where IP owners would *not* likely breach the Commerce Act. In our experience, those types of "safe harbour" comments are the most effective way to give IP owners assurance that they can invest in New Zealand with confidence.

37 To that end, we request the Commission adopts commentary from ACCC's guidelines which begin with the well-established position that (emphasis added):[12]

> ***Intellectual property rights and competition law are not in fundamental conflict****. This was part of Parliament's rationale for repealing subsection 51(3) of the CCA. Intellectual property rights and competition law share a common purpose in promoting innovation and dynamic efficiency, and enhancing consumer welfare.*
>
> *In particular, the ACCC acknowledges that intellectual property rights confer exclusive rights on rights holders,* ***and considers that the bare exercise of these exclusive rights will not have significant anti-competitive implications****. As a result, the ACCC considers that the repeal of subsection 51(3) of the CCA will not impact the majority of intellectual property rights arrangements. The ACCC acknowledges that*

[12] ACCC *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)* (August 2019), at [2.2] and [2.3].

the exclusive nature of intellectual property rights is an important incentive for parties to invest in innovation and commercialisation.

38 We respectfully request that the Guidelines also record that, in practice, almost every IP license will contain standard exclusivity terms, territorial restrictions, field of use restrictions, quality requirements and/or other controls to protect the IP from unauthorised exploitation. They should also record that those standard IP-specific restrictions are necessary for firms to enjoy their basic IP right to protect and commercialise the content and inventions they create.

39 We understand, in line with Australian and international positions, that the repeal of s45 would not compromise these general propositions:

39.1 the bare exercise of exclusive IP rights will not have significant anti-competitive affects (to the contrary, IP rights and competition law are not in fundamental conflict);

39.2 the s45 repeal does not generally affect firms in the Screen Industry from licensing their copyrighted content on the standard terms they do today; and

39.3 as a result, these firms can be guided by safe harbour principles like, by way of example:[13]

Firms licensing IP are unlikely to breach the Commerce Act if:

- *The firm merely relies on its IP right to not license its intellectual property.*
- *The firm licenses its intellectual property on terms that are necessary and proximate for it to control and monetise that intellectual property. By way of example, territorial restrictions, field of use restrictions, quality requirements and other practical controls are all common terms to ensure licensees do not exploit a firm's intellectual property contrary to its specific IP rights.*

[13] ANZSA observes the Commission offers such "safe harbour" guidance in its *Merger & Acquisition* guidelines.

40 We observe that potential safe harbour would be consistent with the Commission's submissions on the Commerce Amendment Bill which recorded:[14]

> *"[G]ranting an exclusive licence to commercialise an IP right is unlikely to substantially lessen competition even if the manner of that commercialisation is restricted in accordance with the scope of the IP right – without the licence, the IP could not be commercialised at all. In addition, we agree that IP-related conduct in relation to cartels may fall within the general exceptions for such conduct".*
>
> *[and]*
>
> *"IP licences remain exempt from the per se cartel provisions in the CCA [Australia] insofar as they impose restrictions on the production of goods or services through licensed IP. We do not propose a similar exemption because of the general exceptions that already exist in the Act.*

41 Lastly, given the importance and size of New Zealand's Screen Industry, we request that the Guidelines give specific examples of copyright owners licensing IP in a Commerce Act compliant way.

42 We observe, by way of example, the ACCC's guidelines provide that the following example is unlikely to breach Australian competition laws:[15]

> *Firm A is a film distribution corporation, specialising in acquiring licences to independent Australian films for distribution to cinemas around Australia. Firm B owns the copyright to an independent Australian film. Firm B agrees to license the film to Firm A for distribution. Firm A insists that the licence agreement contain a provision that prevents Firm B from licensing that film to any other distributors in Australia*

43 We would welcome the opportunity to work with the Commission to provide New Zealand-specific examples to be included in the Guidelines to assist its members and Screen Industry investors more generally.

44 We thank the Commission for its time and consideration.

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[14] Commerce Commission submission on Commerce Amendment Bill (30 April 2021) supplementary document 1: *Commerce Commission Submission Targeted Commerce Act Review Issues Paper* (10 February 2016)

[15] ACCC *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)* (August 2019), at p19.

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** is New Zealand's leading entertainment company and home to the best and broadest choice in live sport, movies, shows, documentaries, and breaking news. Sky offers a suite of viewing choices to suit every New Zealander, whether it's through the Sky Box and companion app Sky Go for premium direct-to-home customers, or through its streaming services Sky Sport Now for sport or Neon for movies and entertainment. Sky also owns free-to-air channel, Prime. Unique New Zealand stories and free-to-air sport are a strong part of Prime's line-up.

3. **Motion Picture Association (MPA)** 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. Entertainment Inc.

4. **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.