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Submission DR569 - Australian Chamber of Commerce and Industry - Intellectual Property Arrangements - Public inquiry

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Summary of recommendations

Recommendation 1: Fair use

The Australian Chamber recommends that the final report undertake more detailed analysis of the costs of replacing the current fair dealing exceptions with a broad exception for fair use. .

Recommendation 2: Duration of copyright protections

The Australian Chamber recommends that the final report consider the implications of digital subscription services on the optimal term for copyright protection.

Recommendation 3: Parallel Imports

The Australian chamber supports draft recommendation 5.2 to repeal parallel import restrictions for books and draft recommendation 11.2 to allow parallel imports of trade marked goods provided the good has been brought to market elsewhere by the owner of the mark or its licensee.

However, when parallel imported goods are sold, it should be identified to the consumer that the good may not be the same as a domestic good, and the obligation for warranty claims lies exclusively with the importer.

Recommendation 4: Patents

The Australian Chamber does not support the abolition of the innovation patent system proposed in recommendation 7.1.

Rather, the Australian Chamber supports consideration of reforms to raise the threshold for meeting the innovative step and reducing the incentive to make strategic use of innovation patents.

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1 Introduction

The Australian Chamber of Commerce and Industry welcomes the opportunity to provide a submission on the Productivity Commission's Intellectual Property Arrangements draft report.

Intellectual property policy can contribute to a more competitive economy, benefiting both businesses and consumers by promoting innovation, productivity and access to markets. Strong intellectual property policy provides an incentive to innovate and prevents others from free-riding without contributing to the costs. However, overly strong intellectual property rules can stifle innovation and prevent valuable ideas from being fully exploited.

Research has shown that protections are most effective at encouraging non-sequential innovation, which is where innovation focuses on single applications. This is often the case for pharmaceuticals. Where innovation is sequential, building on previous intellectual property, protections can restrict innovation. This is particularly relevant in growing fields such as computer technology and telecommunications.

The Australian Chamber believes that Australia's intellectual property regime balances its conflicting objectives relatively well, but there is still scope for further reform.

In particular, Australia's intellectual property system presents challenges for small and medium enterprises (SMEs) that often lack the resources to apply for, enforce, or defend their property rights. As a result, SMEs use the intellectual property system far less than larger firms.

The Australian Chamber's initial submission made recommendations relating to:

- Compensation for rights holders impacted by reforms.
- Personal or domestic use of copyrighted material.
- Introduction of fair use exceptions.
- Fixed term exceptions (as an alternative to fair use exceptions).
- Third party use of copyrighted material.
- Parallel imports.
- Complexity.
- Assessment delays.
- Innovation patents.

While many of the issues raised in the Australian Chamber's initial submission have been addressed in the draft report, this submission provides further comment on draft recommendations relating to the introduction of fair use exceptions, parallel imports, innovation patents and the complexity of the patent system.

2 Copyright

The Australian Chamber's initial submission recommended that the Productivity Commission consider the benefits of a fair use system and that any changes should:

- be based on fairness
- give businesses reasonable predictability and certainty
- consider the financial impact to both consumers and businesses
- adhere to Australia's international treaty obligations.

The initial submission also recommended that copyright law:

- should also enable third parties to undertake the copying, hosting or transformation of copyrighted material where the rights holder would otherwise have been able to
- include exceptions to allow for non-consumptive, personal or domestic use of copyrighted material.

Fair use in Australia is a contentious issue, with many proponents and opponents. The Australian Competition and Consumer Commission (ACCC), the Australian Law Reform Council and a number of online companies have called for fair use provisions to be adopted in Australia.

They argue that the economic, business and consumer benefits would be substantial. Conversely, content creators such as film and TV producers and publishing firms have traditionally questioned the benefits fair use would deliver.

Fair use is more flexible than fair dealing and would remove the need to continuously update exceptions as the use of products change with technology. However, there are legitimate concerns about the implications of introducing fair use in Australia, including:

- increasing uncertainty for content creators
- increasing complexity for judicial systems
- increasing expenses unnecessarily for content creators and the tax payer
- that the Australian judicial system is too different from the United States' to support fair use.

Draft recommendation 5.3 proposes replacing current fair dealing exceptions with a broad exception for fair use. The objective of the exception would be to ensure that the copyright system only targets circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement.

The Australian Chamber urges caution with respect to the adoption of a fair use exception to replace the existing 'fair dealing' exception.

The Commission correctly sets out the shortcomings associated with the current fair dealing approach.

However, arguably the Commission is too quick to recommend fair use as a solution to these problems, and fails to appropriately evaluate the option of expanding the existing fair dealings exceptions, and giving the copyright regulator greater flexibility to grant additional exceptions in response to changing market conditions.

The Commission notes that in the United Kingdom, the Hargreaves Review recommended an expanded approach to fair dealing. However, the approach recommended by the Hargreaves Review is not considered in the draft report as an alternative to fair use. Even if it is not recommended as a first best solution, it is pragmatic for the Commission to set out a next best alternative in the event that full fair use is not adopted.

The Australian Chamber is also concerned that the Commission is too quick to dismiss the potential legal costs that could be associated with a fair use exception. The issue is not merely the costs of making the initial transition, but whether there are inherently higher legal costs in enforcing rights under a fair use exception. The final report should include more detailed analysis of the relative costs for rights holders under a fair use exception compared with a fair dealing system.

Recommendation 1: Fair use

The Australian Chamber recommends that the final report undertake more detailed analysis of the costs of replacing the current fair dealing exceptions with a broad exception for fair use.

The Commission also noted that the optimal term for copyright protection is likely to be closer to 25 years post creation than the current approach of 70 years after death.

Without commenting specifically on what the optimal term for copyright protection should be, it is worth noting that much of the evidence that the Commission relies on in drawing this conclusion predates most of the more recent technological revolution in the distribution of creative content.

The papers relied on for the Commission's estimates were published in 2002 and 2007 respectively, and given the delays associated with academic publications they are likely to be based on substantially older data. This is problematic because technology has drastically changed the nature of content distribution.

The ABS estimates referred to by the Commission also appear to be based largely on older sources. For example, the ABS refers to Martin Dale's 1997 book, *The Movie Game* in estimating the average commercial life of a movie.

In discussing the life of books, the ABS observes that "the increasing availability of new print technology such as 'print on demand' could redistribute the author's income, and therefore the life of book titles, over a longer period in the future".

The Australian Chamber agrees with this observation. On-demand electronic access, and subscription services such as Spotify, Netflix and Amazon Prime all seem likely to greatly extend the commercial life of creative works and address concerns that copyrighted material will be orphaned or made commercially unavailable. Subscription services also seem likely to reduce the cost differential in between copyright and non-copyright material.

Recommendation 2: Duration of copyright protections

The Australian Chamber recommends that the final report consider the implications of digital subscription services on the optimal term for copyright protection.

3 Parallel Imports

Parallel import restrictions can suppress competition and reduce opportunities for business profits. They also reduce opportunities for domestic sellers, where consumers are already able to access parallel imports online. The lifting of these restrictions would increase competition and force prices down for consumers. The Australian Chamber has previously called for restrictions on parallel imports to be reduced in its submission to the Harper Review, which the government has accepted in part.

In the majority of cases, concerns over the parallel importing of non-homogenous goods can be adequately managed by systems already in place in Australia. This includes health and safety concerns with imported food and chemical-based products. Restrictions on the parallel importation of homogenous goods, where those goods are already sold in Australia in an identical format, should be lifted.

The ACCC already provides guidance to sellers of parallel imports that they are responsible if something goes wrong with the product. There is no obligation on the local manufacturer to provide a remedy. However, this is not always clear to consumers. When parallel imported goods are sold, it should be identified to the consumer that while the good is covered by the same mandatory warranties as any other good, the good may not be the same as a domestic good, and the obligation for warranty claims lies exclusively with the importer.

Recommendation 3: Parallel Imports

The Australian chamber supports draft recommendation 5.2 to repeal parallel import restrictions for books and draft recommendation 11.2 to allow parallel imports of trade marked goods provided the good has been brought to market elsewhere by the owner of the mark or its licensee.

However, when parallel imported goods are sold, it should be identified to the consumer that the good may not be the same as a domestic good, and the obligation for warranty claims lies exclusively with the importer.

4 Patents

Australia recently undertook a range of reforms to help make Australia's patent system more efficient. While we should continue to investigate how businesses in Australia are using the patent system, we should provide adequate time for the latest reforms to filter through the system before considering other major changes. Nevertheless, there appear to be some areas where the patent system is still problematic.

Applying for a patent can be a complex and time-consuming process. This is compounded where other regulations already add significantly to the time it takes to introduce a product to market. Any changes to Australia's patent system should not further increase the complexity of the system.

Recommendation 6.2 regarding the incorporation of an objects clause into the Patents Act may assist in reducing complexity if it is able to provide greater clarity to businesses and the courts regarding the overarching objectives of the Act.

However, the Australian Chamber is concerned with the Commission's recommendation 7.1 that the Australian Government abolish the innovation patent system.

As the Australian Chamber noted in its initial submission, while the innovation patents system may not be working well for Australian SMEs, it should be retained until an alternative mechanism for allowing small and medium businesses to access the patent system can be identified.

The draft report's consideration of reforms that would be required if innovation patents are retained is welcome and provides valuable direction for reforms to improve their efficacy, in particular regarding increasing the threshold for meeting the innovative step and in reducing incentives to make strategic use of the system.

Recommendation 4: Patents

The Australian Chamber does not support the abolition of the innovation patent system proposed in recommendation 7.1.

Rather, the Australian Chamber supports consideration of reforms to raise the threshold for meeting the innovative step and reducing the incentive to make strategic use of innovation patents.

5 About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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