



Productivity Commission Issues Paper into Intellectual Property Arrangements

AIIA response

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Introduction

About AIIA

The Australian Information Industry Association (AIIA) is Australia's peak representative body and advocacy group for those in the digital ecosystem. We are a not-for-profit organisation to benefit members, and AIIA membership fees are tax deductible.

Since 1978 the AIIA has pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment for our members and to contribute to Australia's economic prosperity.

We do this by delivering outstanding member value by providing a strong voice of influence; a sense of community through events and education; enabling a network for collaboration and inspiration; and through the development of compelling content and relevant and interesting information.

We represent organisations nationally, including global brands such as Apple, Adobe, Avanade, EMC, Deloitte, Gartner, Google, HP, IBM, Infosys, Intel, Lenovo, Microsoft and Oracle; international companies including Optus and Telstra; national companies including Ajilon, Data#3, SMS Management and Technology and Technology One; and a large number of ICT SMEs.

Our national board represents the diversity of the digital economy. There is more detailed information on our [web site](#).

Overview

AIIA appreciates the opportunity to comment on this important issue. Intellectual Property (IP) rights encourage and reward innovation. They provide the owner with the opportunity to take advantage of their creation while limiting competition for varying periods and in various ways. However as the Commission points out, granting parties exclusive rights can limit competition and restrict the diffusion of knowledge.

Getting the balance right is becoming more important than ever as we move towards an interconnected digital economy. This shift has started to change what is considered valuable - in addition to traditional physical objects or land to more intangible knowledge, systems and data through intellectual property rights.

This submission represents views across the ICT sector noting that views differ in relation to the innovation patent system. Specifically, this paper provides:

- The case for and against the innovation patent system. While AIIA makes no recommendations on whether or not to abolish the system, we support all members in the market place including SMEs and start-ups equal access to innovation and/or opportunities to innovate;
- Copyright exceptions are not adaptive to technological change and should be broadened; and
- ISP blocking is not a solution to enforcing IP rights.



Views in industry differ on the innovation patent system

IP Australia's recent economic review into the Australian innovation patent system found that 'Given the low private value of the system, it is likely that the system is a net cost to most of the SMEs that use it, and the system has imposed a regulatory burden of more than \$100m since its introduction.'¹

In light of these findings, the Advisory Council on Intellectual Property (ACIP) in its updated statement on the *Review of the Innovation Patent System*² found that the Government should consider abolishing the system as it doesn't meet its stated objective.

The objective of the innovation patent system is to stimulate innovation in Australian small to medium business enterprises (SMEs). This is done by providing Australian businesses with expeditious IP rights for their inventions so competitors are encouraged to innovate themselves and not copy.

Innovation patents are specially intended to reduce the compliance burden on users of the patent system by providing easier, cheaper and quicker rights for inventions than the rights formerly provided by the petty patent system.

Views in the industry differ as to whether or not the innovation patent should be abolished. This paper outlines the case for both below.

While we make no recommendations, AIIA supports all members in the market place including SMEs and start-ups equal access to innovation and/or opportunities to innovate.

The case for the innovation patent system

Some parts of industry consider the innovation patent system serves a critical purpose and can be improved to benefit all applicants. Particularly, they argue that abolishing the innovation patent system altogether without reforms to incentivise SME innovation is counterproductive.

SMEs consider that the standard patent system is overly complex and any system that simplifies the process is a good thing.

A key argument is drivers that create need of the system are still reverent and must be addressed. That is, the need to provide easier access for SMEs to protect IP and promote innovation is still a highly relevant policy concern. It is widely accepted that for Australia to remain globally competitive we need to be more innovative. SMEs make up the majority of Australian businesses and as such, policies to incentivise innovation among SMEs are curial to Australia's prosperity.

Another argument is that while it is clear that there is low SME take up of the innovation patent it is difficult to be confident that the innovation patent system itself is flawed, as there are too many variables that could explain the low take up amongst SMEs.

For example, one reason why SMEs who have applied for an innovation patent but go on to let it expire is because they realise the invention is not commercially viable. Arguably, this is the exact

¹ http://www.ipaustralia.gov.au/uploaded-files/reports/Economic_impact_of_innovation_patents_-_Report.pdf

² <http://www.acip.gov.au/reviews/all-reviews/review-innovation-patent-system/>



point of the innovation patent system: to buy time to protect new ideas at low cost in order to test its viability - some ideas will work but others will not. Consequently, the number of companies that let their patents expire is not a reliable indicator that the system is not working.

Furthermore, it is unsurprising that SMEs participate in the innovation patent system at a lower rate than larger enterprises. This is true with regard to all patent systems. SMEs oftentimes lack the resources necessary to take full advantage of patent systems.

Those that support maintaining and improving the innovation patent recommend:

1. **Enhance education** - it is very possible that SMEs are not fully aware of the advantages or the simple procedures for taking advantage of the innovation patent system. SMEs also tend to be less aware of the importance of patenting their innovations. While the Australian government has done a very good job of keeping the cost of applying for an innovation patent very low, some believe the government could enhance its education and outreach to SMEs to promote the advantages of using the system.
2. **Investigate why there is low take up amongst SMEs** - while the IP Australia Economic Research Paper 5 on the Economic Impact of Innovation Patent 2015³ found very low initial and repeat take up of the patent by SMEs it did not explore the drivers behind the trend. Since then, a number of bodies have proposed a number of improvements to the innovation patent system. However without more information on why take up is low, reforms to the system risk being ill targeted.

The case against the innovation patent system

Other members support ACIP's recommendation that Australia's innovation patent system be abolished.

ACIP's findings that innovation patents create considerable uncertainty for both consumers and manufacturers without providing any significant incentive for SMEs to innovate are consistent with some member's experience of the system - particularly among larger members (but not all large members).

One argument against innovation patents is that they can encourage the proliferation of weak and trifling patents, and create uncertainty in the market.

Another argument is that when innovation patents are accorded the same remedies as traditional patents, those remedies can be disproportional to the innovation patents' minimal benefits and can undermine incentives to develop innovations that are more substantial.

Those against the innovation patent recommend abolishing the system or at least actions to minimize the negative costs that such a system imposes on product manufacturers. This is irrespective of why there is low take up of the system amongst SMEs. They argue the current system simply produces negative effects to the overall market and should be addressed. Some recommenders include but are not limited to:

1. **Raise the step** - the 'innovative step' standard is too low. As ACIP points out the current low threshold for inventiveness, combined with the lack of substantive examination prior to registration, encourages proliferation of obvious patents and creates legal

³ <http://www.ipaustralia.gov.au/about-us/what-we-do/reports/The-economic-impact-of-innovation-patents>



uncertainties. A market that is covered in a “thicket” of patents has higher barriers to entry for new market participants and reduced investment in new innovations in that field.

2. **Limit remedies** - damages and injunctions available are greater than the benefit of the innovation. Innovation patents are designed to protect incremental or minor advances. Their remedies should be limited accordingly to avoid undermining traditional patents’ more substantial contributions and to appropriately balance their inventiveness with their remedy.
3. **Reduce the term** - the nature of the trade-off between the ‘innovative step’ standard, and the length of protection, is a key policy lever for determining how, and by whom, innovation patents are used. Raising the step and reducing the term are both mechanisms to encourage inventors with a higher-level innovation to opt for standard patent protection.

Delays in the standard patent system also a real issue

Most members, irrespective of their position on the innovation patent, point to delays in the standard patent system.

Patent backlog and delays, known as ‘pendency’, are a problem in Australia. The rise of patents from emerging economies over the past decade exacerbates this issue two-fold - first, by increasing the number of patents an examiner must process; and secondly, by increasing the number of patents an examiner must consider in their review. The time it takes has ballooned in recent years - ten years ago 50 per cent of applications were granted within roughly two to three years. Last year, it took anywhere between 2.5 and 4.5 years. Most members, both for and against the innovation patent, believe this increases uncertainty for business unnecessarily.

Australia only has an official collaboration with the US Patent and Trademark Office under the Patent Cooperation Treaty. Most members consider that stronger streamlining with the European and UK patent offices would further streamline the application process and reduce duplication of applications.

To ensure the overall effectiveness and efficiency of Australia’s patent system AIIA recommends:

1. Improving the standard patent system: reduce pendency through further international collaboration to streamline the application process and reduce duplication of applications



Copyright exceptions not adaptive to technological change and should be broadened

Innovation, culture and creativity are inherently dynamic, but our copyright law is not. There is an urgent need to enact flexible copyright exceptions that will keep pace with rapid developments in technology as well as the expectations of consumers and creators.

Examples of how inflexible copyright exceptions are hindering innovation in Australia

For businesses

Social networking sites like Facebook and Pinterest could have never have been created in Australia because they involve the posting of huge volumes of content by users, some of which may result in technical copyright infringements.

Search engines have become a fixture of our daily lives at home, school and work, yet the basic internet functions that search engines rely on such as web crawling, indexing and caching arguably technically infringe copyright in Australia.

Cloud computing services which involve making copies on behalf of users are not covered by existing copyright exceptions.

For Schools

The Copyright Act contains a statutory licence that effectively imposes a financial penalty on schools for using new digital technologies versus “old” technology. For example a typical classroom scenario might involve a teacher saving a page from a website onto their laptop, emailing it to their school email account, uploading it to the school’s learning management system, and displaying it on an interactive whiteboard in the classroom. Under the existing statutory licence, this is treated as four separate activities that have to be recorded and potentially paid for. If the same teacher had simply printed out the webpage and handed this out to students, there would only be one potentially remunerable activity.

Australian schools also pay millions of dollars of public funds to use content that is used without payment in comparable jurisdictions. One example is freely available internet materials (such as online health fact sheets or free tourism maps of Australia). In Australia, there is no exception that permits schools to use the content without payment. That means that Australian schools and only Australian schools are required to pay for it. This is a highly inefficient and inequitable use of public funds.

For consumers

The following everyday activities risks infringing copyright in Australia:

- Copying a funny photo on Twitter and sharing it on Facebook
- Using Pinterest to pin favourite things on the web
- Including a part of an online video in a presentation at work



The following undesirable technicalities could also occur:

- Its fine to copy music from a CD to a smartphone or tablet but not to a smartphone *and* tablet
- Its fine to copy music from a CD to a tablet but not copy a film from a DVD to a tablet
- Its fine to backup a CD or DVD to a computer, but not to store it privately online to listen to it on mobile
- Its fine to use a mobile app to record a TV show on a device stored at home, but not if it is recorded and stored in the cloud
- Its fine to backup your own email attachments and shared pictures, but not emails and attachments someone else sends to you.

Fair use exception more adaptive than fair dealing

Fair dealing relies on a limited number of specific exceptions that could be considered 'fair'. In order to use any copyright material without obtaining a licence or permission, users must fall within one of the specific exceptions - and the almost 30 exceptions distributed throughout the Copyright Act are mostly complex and technologically non-adaptive (as illustrated above).

The ALRC and a number of other bodies have recommended replacing the exceptions with a flexible 'fair use' exception, taking into account factors such as the purpose of the use and any market harm to the copyright holder.

World leading digital economies, which Australia is hoping to emulate all have flexible copyright exceptions. The USA, the world's largest exporter of copyrighted content has had a 'fair use' exception since the 1970s. Similar provisions have been introduced in Israel, Singapore, South Korea, Canada and were recommended in the recent Irish copyright review.

A study in the United States found that industries that relied on fair use contributed 16.2 per cent to the US economy in 2007. A recent study in Australia indicated that industries relying on copyright exceptions contributed 14 per cent to Australia's GDP in 2010, and grew significantly faster than the rest of the economy.⁴ Though this does not necessarily mean fair use itself contributed these portions to the economy, it does identify the importance and growing requirement of these exceptions for industry.

We believe that the introduction of a flexible exception into Australia's Copyright Act will:

- Ensure Australian institutions and business can compete internationally
- Provide the right regulatory structure to foster innovation
- Enable Australians to effectively harness new technological developments
- Reduce inefficiencies and red tape
- Ensure that copyright holders rights are maintained
- Be simpler, clearer and easier for consumers to understand.

⁴ Australian Digital Alliance, Potential \$600m Annual Economic Boost From Copyright Reform (September 2012), 3 digital.org.au/media/165



Extend Safe Harbour provisions

The Copyright Act currently contains a “safe harbour” scheme that gives rights holders a way to seek removal of infringing content from networks by granting legal protections for online service providers for collaborating with rights holders under the scheme. Safe harbours provide regulatory certainty for those entities that come within them.

Currently, the Australian safe harbour scheme applies only to commercial ISPs, and not to other online service providers such as search engines, business platforms and social media platforms. This puts Australia out of step with major trading partners such as the US, the EU, Singapore and Korea, and makes Australia a less attractive place to start up an internet company.

Successive government reviews since 2005 have identified the need for this reform. The Government expressly agreed with the need to fix the scheme in its 2014 Online Copyright Infringement Discussion Paper. This simple reform is long overdue and is critical to Australia’s digital future.

To ensure copyright laws are adaptive to technological change and in line with modern consumer behaviour, AIIA recommends:

2. Introducing a flexible exception into Australia’s Copyright Act - by replacing the current fair dealing exceptions with a fair use exception
3. Extending the safe harbour provisions to include search engines, business platforms and social media platforms to keep in step with major trading partners and remain a globally competitive destination for internet start-ups



ISP blocking not a solution for enforcing IP rights

ISP blocking was introduced in Australia as a voluntary scheme to help Interpol fight child pornography. Interpol acknowledged that blocking could be circumvented and was burdensome for ISPs to implement. The seriousness of child exploitation meant that blocking was considered worthwhile even if it only prevented a single offense. However, blocking of child pornography was meant to be a one off solution that was proportionate to the potential harm to the community.

There is now an alarming trend for government to propose blocking as a means to change any undesirable online behaviour, such as illegal downloading and online wagering. While these are genuine issues, the level of harm and criminality is not comparable to child pornography, and does not warrant the same response. ISPs are not censors for the internet and should not be treated that way. More to the point, internet censorship is a very serious issue and should not be introduced through ad hoc and fragmented policies.

Addressing underlying problems - such as improving legal access to content or addressing social attitudes to gambling - is a more effective way to bring about long lasting behavioural change.

ISP blocking is not the solution to changing online behaviour. Instead, AIIA recommends:

1. Address the underlying problems - for illegal downloading this includes improving legal access to content and for online gambling, addressing social attitudes to gambling
2. Blocking should not be introduced through ad hoc and fragmented policies
3. Blocking is only appropriate for very serious criminal activities. ISPs are not censors for the internet and should not be viewed as such.

