



Submission to the Productivity Commission Issues Paper (October 2015) – Intellectual Property Arrangements

The Department of Communications and the Arts (the Department) welcomes the opportunity to provide comments on the Productivity Commission's *Intellectual Property Arrangements* Issues Paper. The inquiry will provide a valuable opportunity to consider, in the context of today's global economy, how best to encourage local innovation and the advantages that flow to Australian consumers from access to ideas, products and competition in copyright-related markets.

The Department supports the draft framework outlined in the Issues Paper for assessing Australia's intellectual property arrangements. The four draft principles (effectiveness, efficiency, adaptability, and accountability) provide a useful basis to guide assessment of the IP system, and to develop possible reform options.

The Department's role, as relevant to this inquiry, is to advise the Australian Government on copyright law and policy. Accordingly, our comments below focus on that aspect of the Productivity Commission's Issues Paper.

Role of the copyright system: Balancing the rights of creators and consumers

Copyright refers to the exclusive rights given to a creator, or copyright owner, in certain creative works, such as the right to copy, adapt and distribute the work. As such, copyright is an intangible property right. The fact that it is intangible, or that creators may have motivations other than financial reward, does not mean that this property right should not be recognised.

In Australia, the *Copyright Act 1968* (Cth) provides a legal framework for the recognition of copyright by creators and copyright owners of creative works. This enables copyright owners to control use of, and seek remuneration for, creative works. Copyright owners have the ability to take civil enforcement action where rights are infringed.

In addition to 'economic' rights, the Copyright Act also recognises a number of non-economic rights, known as 'moral' rights for creators. This includes the right of integrity of authorship, the right of attribution of authorship and the right against false attribution of authorship.

The Copyright Act, in promoting the aim of providing incentives to both create and disseminate copyright material, seeks to balance the rights of the creator, or copyright owner, to manage and protect their works with the rights of others to use these works. In the absence of clear copyright protection and enforcement provisions, third parties could exploit copyright and erode incentives to invest in innovation in this sector, ultimately to the detriment of consumers. However, it is equally important that the copyright system does not unreasonably restrict use and further innovation. The current copyright exceptions and limitations in the Copyright Act also have an important role to play in

allowing fair and reasonable access to copyright material, such as for schools and libraries, and encouraging innovation, for example, exceptions for the benefit of visually impaired people allow for the creation of accessible formats which would otherwise not be provided by the market.

Collective rights management and licensing practices

In recent decades, worldwide, copyright protection has been greatly expanded in response to the growth of the digital economy and ever changing technologies. However, excessive copyright protection can lead to market dominance by owner distributors, particularly in relation to the control exercised over the dissemination and licensing of copyright material. This has the potential to harm both creators and consumers.

There is widespread agreement that the statutory licensing provisions in the Copyright Act are complex and outmoded. In particular, the methodology for ascertaining licence fees is complicated, cumbersome and does not suit modern copying practices and technology. The Act is inflexible as it does not provide for alternative methods for negotiating licence fees. There are also few requirements to be transparent about how remuneration that is collected is to be distributed to members and non-members of collecting societies.

The UK Hargreaves Review¹ recommended the construction of a not-for-profit, industry-led initiative, that could link the growing network of right registries, copyright-related databases and digital copyright exchanges, to facilitate cross-border and cross-sector copyright licensing. As a result, a 'Copyright Hub' was established in the UK, with the aim of making licensing of content easier, and increasing the relevance of copyright to creators and users.

The Hub operates via a website which has two functions: the provision of copyright information and education to a wide audience; and access for users to simpler licensing, with much lower transaction costs, via websites connected to the site. The Hub also provides a forum where members of the creative industries and others meet across sector and national boundaries to streamline licensing processes and organisations (reflecting the borderless and multimedia nature of the internet).

The Department encourages the Productivity Commission to consider whether a model based on the Copyright Hub could be effectively implemented in Australia, or whether other more effective and flexible copyright licensing solutions can be developed. An appropriate regime may not require a legislative basis.

Copyright and the digital economy

Creators, consumers and businesses all depend on ongoing innovation in digital platforms to produce, disseminate and access content. Australia's copyright framework has the ability to either impede or promote this innovation.

Concerns have been raised by some stakeholders that Australia lags behind other countries with well-developed copyright frameworks and more flexible, technology neutral copyright laws. This is seen to create disincentives for innovation and investment in local markets. Many stakeholders believe that the introduction of a more flexible copyright regime may allow the Australian economy to more effectively compete in critical growth industries associated with technology.

¹ Digital Opportunity, A Review of Intellectual Property and Growth, An Independent Report by Professor Ian Hargreaves, May 2011 (<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-finalreport.pdf>)

While Australia has not had major copyright reforms since 2006, the United Kingdom and Canada have recently implemented a range of new reforms to modernise their copyright frameworks, aimed largely at addressing the challenges of the digital age. Recent changes in the UK resulted from the implementation of recommendations of the Hargreaves Review. That review had a particular emphasis on changes required to copyright regulation to reflect technological developments. Examples in this area include:

- establishment of a Digital Copyright Exchange (as discussed earlier in this submission)
- changes to orphan works provisions.

The United States Copyright Office has also recently undertaken consultations on the issues of orphan works and mass digitisation which have recommended schemes to address these issues.

The Department believes that there would be value in the Productivity Commission examining the recommendations of the Hargreaves Inquiry and the recent consultations of the US Copyright Office, with a particular focus on how the copyright framework (both legislative and non-legislative) can be reformed to enable the development of new business models appropriate to the digital age.

Intersection of copyright law and competition law

The question arises whether legal doctrines that are external to copyright law, such as competition law, can be applied to help ensure that there is an appropriate balance in the copyright system between creators and consumers.

The relationship between copyright law and competition law is complex. Whilst there is an inherent tension between the exclusivity of rights that copyright grants and open competition, they can also be complementary. In this digital age, with the technology available to copy and distribute information globally at almost no cost, the operation of the copyright system essentially depends on efficient and competitive distribution markets for authorised use. Where there is evidence of anti-competitive unilateral conduct, competition law could potentially play an important role in enhancing distribution of, and access by consumers to, works at an appropriate cost and thereby reducing incentives to seek out and access infringing copyright material.

The Department would support consideration by the Productivity Commission of what role competition law may play in ensuring economic efficiency in the copyright system.

Parallel imports

The inquiry's terms of reference include having regard to recommendations made by the Competition Policy Review on the parallel import restrictions in the Copyright Act. That Review recommended, amongst other matters, that consistent with previous Productivity Commission reviews, parallel import restrictions should be removed on books subject to transitional arrangements recommended by the Productivity Commission.

The Government responded to the Competition Policy Review recommendations on 24 November 2015 by supporting the removal of parallel import restrictions on books². The Government announced that this would be progressed following the Productivity Commission's current IP inquiry, and consultations

² See at: <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response> (p 13).

with the sector on transitional arrangements. The findings of the current inquiry, and submissions put to it, will be useful in assisting the Government to develop options to implement this decision.

The Productivity Commission considered the parallel importation restrictions on books in 2009 (Copyright Restrictions on the Parallel Importation of Books, July 2009). Given the changes in the book industry and market since that time, it would be useful for the Productivity Commission to update its analysis of the benefits that would be achieved by the removal of these parallel import restrictions. The Department also requests that the Productivity Commission provide advice on appropriate transitional arrangements for the removal of these restrictions. In its 2009 report, the Productivity Commission recommended full removal of the restrictions, with 3 years notice, combined with appropriate subsidies, noting that there was a case for changing then existing subsidy arrangements to more directly support outputs that generate cultural externalities. In considering transitional arrangements, the Department also recommends that international models for industry support are considered, such as the Book Publishing Industry Development Program, which was first established in Canada in 1979 to foster a viable Canadian book industry for Canadian authors.

A 'graduated' approach

In the Issues Paper (p20), the Productivity Commission has raised the issue:

Are the protections afforded under copyright proportional to the efforts of creators? Are there options for a 'graduated' approach to copyright that better targets the creation of additional works?

Adopting a 'graduated' approach to copyright in order to align protections with creators' efforts is an unnecessarily complex proposition, which would be inconsistent with the Government's approach of simplifying regulation. It would potentially have unanticipated consequences by creating inconsistency and significant uncertainty for rights holders and users. Given the significant challenges that arise with such an approach, the Department recommends that it not be adopted.

Moral rights

The Department notes that the Issues Paper questions whether moral rights provisions are necessary, and whether they duplicate other provisions. While they are a useful tool for creators seeking to reduce the likelihood of their material becoming orphaned, and ensuring that it is treated respectfully, moral rights are of less economic value compared to copyright rights and no major concerns have been raised by stakeholders as to the operation of these provisions since they commenced. Given this is the case, the Department suggests that there would be more value if the Productivity Commission's inquiry was focussed to other copyright priorities that raise more challenges or stakeholder interest, such as those outlined above.

Enforcement

Concerns have been raised by both copyright owners and users about the enforcement of copyright in Australia. Civil enforcement takes time and is a costly exercise. This operates as a disincentive for individual creators and smaller copyright owners to take action. Larger copyright owners are also unwilling to enforce their own rights in court where the alleged infringers are individual end users, preferring instead to seek the cooperation of internet service providers (ISPs) in deterring online copyright infringement.

To overcome some of these challenges, the Government has encouraged the development of industry-based solutions to complement legislative enforcement options. For example, in December 2014, the now Prime Minister and the Attorney-General requested the development of an industry code to foster collaboration between rights holders, ISPs and consumers to prevent online infringement. There are ongoing discussions between these groups with the aim of finalising the code for registration by the Australian Communications and Media Authority. The Department encourages the Productivity Commission to examine whether other non-legislative options would assist in promoting more effective enforcement of copyright. Further consideration of collaborative stakeholder models by the Productivity Commission would therefore not appear warranted.

The Department however supports the Productivity Commission examining the small claims model adopted by the UK Intellectual Property Enterprise Court (IPEC) to consider whether, from an economic perspective, it would be an appropriate model for Australia to adopt. The IPEC small claims track is aimed at straightforward IP claims where the amount in dispute (excluding costs) is £10,000 or less. The Department has received positive anecdotal feedback about the operation of the IPEC, and there will be value in undertaking a more detailed analysis of the IPEC's effectiveness, and whether a similar model could be adopted in Australia.