



Australian
Competition &
Consumer
Commission

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Submission to the Productivity Commission's Draft Report into Australia's Intellectual Property Arrangements

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1 Introduction

The ACCC welcomes the opportunity to comment on the Draft Report of the Productivity Commission's (PC) Inquiry into Australia's Intellectual Property (IP) arrangements. This submission follows three previous submissions made by the ACCC to the PC's Issues Paper.¹

The ACCC strongly supports the analytical framework which the PC has adopted. In the ACCC's view, the approach taken by the PC generally supports the overarching objective of providing appropriate incentives for innovation, investment and the production of IP, while also ensuring it does not unreasonably impede competition and innovative 'follow-on' use of IP once created.

The ACCC is of the view that a number of the PC's recommendations have the potential to significantly benefit competition and consumers, including:

- the introduction of a broad exception for 'fair use' in the *Copyright Act 1968* (Copyright Act);
- the repeal of the limited IP exception at section 51(3) of the CCA; and
- providing greater clarity that it is not an infringement of the Copyright Act for consumers to circumvent geoblocking technology.

The ACCC supports in-principle the PC's recommendation that the ACCC formally monitor 'pay-for-delay' settlements in the pharmaceutical sector.

These particular matters are discussed further in this submission.

The ACCC would be happy to provide further detail on any of the issues raised in this or earlier submissions, and to respond to issues of interest to the PC.

¹ The ACCC's previous submissions to this inquiry can be found at: <http://www.pc.gov.au/inquiries/current/intellectual-property/submissions#initial>

2 Specific IP reforms

2.1 Broad 'fair use' exception

The ACCC supports the draft recommendation to replace the current 'fair dealing' exceptions under the Copyright Act with a broad exception for 'fair use'. The Australian fair use provision should be consistent with approaches taken in other jurisdictions, such as the United States.

As outlined in previous submissions, the ACCC is of the view that a fair use exception would accommodate and foster technological advances and innovations that would otherwise be curtailed by prescriptive and/or narrow exceptions in the Copyright Act, while not impeding incentives for creation.

The ACCC notes there is some opposition to a fair use exception in Australia, mainly centred on concerns about legal uncertainty and a perceived conflict with Australia's international obligations.

In the ACCC's view, these concerns are mitigated by the following:

- As recommended by the PC, the fair use provision should include 'fairness factors' to assist parties and the courts;
- Existing Australian case law on fair dealing would remain relevant and could provide some guidance;²
- Fair use exceptions are a long-standing feature of copyright law in other jurisdictions, including the United States. As proposed by the Australian Law Reform Commission (ALRC) in its Copyright Review, the relevant Explanatory Memorandum could expressly state that the scope of the Australian fair use provision is to be informed by related foreign law;³
- In its Copyright Review, the ALRC concluded that fair use is consistent with Australia's international legal obligations.⁴ Similarly, the Department of Foreign Affairs and Trade has expressed the view that a fair use provision, if consistent with the approach taken to implementation in other jurisdictions, would fall within international intellectual property law;⁵ and
- There is already considerable legal uncertainty surrounding fair dealing. Unlike existing prescriptive exceptions, a principles-based standard like fair use can provide greater clarity and certainty in accommodating changing technology, business models and consumer expectations.

2.2 Repeal of section 51(3) of the CCA

The ACCC supports the draft recommendation to repeal section 51(3) of the CCA, and considers appropriate the recommendation to require the ACCC to produce guidelines on the application of Australia's competition laws to IP.

² Australian Law Reform Commission, *Final Report on Copyright and the Digital Economy*, November 2013, available at <http://www.alrc.gov.au/publications/copyright-report-122>, p. 151.

³ Ibid, p. 155.

⁴ Ibid, p. 232.

⁵ See ACCC correspondence with DFAT: <http://www.pc.gov.au/inquiries/current/intellectual-property/submissions#initial>

As stated in its previous submissions, the ACCC has a long-standing view that the CCA should apply to commercial transactions involving intellectual property rights in the same way it applies to other property rights. In the broader context of exceptions to the CCA, the ACCC maintains the view that the onus should be on those seeking the retention of an exception to make the case that special treatment is justified and that there remains a clear policy rationale.

As the holders of IP rights may engage in arrangements with users of the material or with other IP rights holders, in some circumstances these arrangements may give rise to competition concerns. Where there are significant competition concerns it is imperative that the use of IP rights is subject to the CCA in the same way as any other property.

The ACCC generally agrees with the PC's assertion that 'repeal of the exemption with relief to be provided in ACCC guidance would likely retain the benefits of the exemption without imposing the costs of allowing anticompetitive conduct in some cases'.⁶ As the ACCC outlined in response to the PC's issues paper, guidelines issued by the ACCC could provide rights holders with guidance on whether conduct is likely to breach the CCA, and where authorisation under Part VII of the CCA might be available. The ACCC may grant authorisation, broadly speaking, if it is satisfied that the likely public benefits of the conduct outweigh the likely public detriment.

Guidelines addressing the application of competition laws to IP have previously been issued in Australia.⁷ These were developed many years ago and would require revision to ensure relevance to current policy settings and the characteristics of modern IP markets. The ACCC notes also that guidelines addressing the potential treatment of various types of conduct involving IP have been issued in the United States and Canada.⁸

2.3 Copyright settings that promote clarity and access

The ACCC considers that copyright settings, in seeking to provide adequate incentives for investment in the creation of copyright material, should not operate to impede consumers' timely access to legitimate content. In the ACCC's view, copyright settings should promote competition and efficiency in the supply of copyright material to consumers.

The ACCC supports the PC's recommendation to provide clarity for consumers with regards to the status under Australian copyright law of circumventing geoblocking technology to access legitimate content.

As matters stand, different rules apply on circumvention of geoblocking, depending on the type of copyright content, and these rules appear unnecessarily complex. The ACCC has long supported government providing clarity for consumers on this issue.⁹ Further, in the ACCC's view, additional complexity in the rules would only be appropriate where it is first established that it would be essential to realise the overarching policy objectives.

⁶ *Productivity Commission Draft Report on Intellectual Property Arrangements*, April 2016, p. 393.

⁷ See *Application of the Trade Practices Act to Intellectual Property*, 1991. Online at: <https://www.accc.gov.au/system/files/Application%20of%20the%20TPA%20to%20intellectual%20property.pdf>

⁸ See Canadian Intellectual Property Guidelines: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03935.html>; and US Antitrust Guidelines for the Licensing of Intellectual Property: <https://www.justice.gov/atr/antitrust-guidelines-licensing-intellectual-property>

⁹ See ACCC media release, *Consumers in dark about DVD imports*: ACCC, 21 December 2000.

Making clear that it is not an infringement under Australian law to circumvent geoblocking technology would remove a significant impediment for consumers to access legitimate content, and thereby promote competition. The ACCC notes, however, that other restrictions, such as contractual terms and conditions that content providers offer to consumers and/or statutory provisions in jurisdictions outside Australia, would likely continue. As a result, broader market effects would likely take time.

In addition, the ACCC welcomes the PC's approach in promoting greater clarity regarding access to safe harbours under the Copyright Act, particularly given the apparent limitations in the class of persons that can access these safe harbours as new online services have become available.

3 Proposed ACCC role in 'pay-for-delay'

The ACCC supports in-principle the PC's draft recommendation that the ACCC have a reporting and monitoring role to detect 'pay-for-delay' settlements in the pharmaceutical sector. In the ACCC's view, this recommendation has merit and should be further explored. Such a scheme could aid the ACCC to detect potentially significant anticompetitive conduct (e.g. two would-be competitors agreeing to avoid competition to the detriment of consumers) that might otherwise go undetected.

Generally speaking, efficiency and consumer welfare can be significantly harmed if IP owners limit competition and extend market power through agreements with rivals. The ACCC is of the view that 'pay-for-delay' agreements of this sort would be detrimental to efficiency and welfare by delaying the entry of competitors in the market, reducing competition and prolonging the introduction of reduced prices to consumers.

The ACCC also notes the OECD's focus on how the strategic use of patents, including via 'pay-for-delay' agreements, can harm competition and innovation.¹⁰

In order for the scheme to be most effective, the ACCC considers that it would need to capture agreements with an effect on markets in Australia, which may include agreements reached in other jurisdictions. Further, the ACCC notes that definitional issues may arise with regards to what constitutes 'pay-for-delay'. Consequently, it will be important that the ACCC has the ability to monitor and report on settlements that cover a diverse range of agreements that delay generic drug market entry to the detriment of consumer welfare.

Lastly, the ACCC is of the view that further consideration will also be required on a suitable compliance mechanism where there is a failure by a party, or parties, to lodge relevant agreements with the ACCC.

¹⁰ See OECD, *Generic pharmaceuticals and competition*, available at <http://www.oecd.org/daf/competition/generic-pharmaceuticals-competition.htm>