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Productivity Commission Inquiry into Intellectual Property Arrangements

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Summary

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.

Most businesses believe that Australia's intellectual property regime balances its conflicting objectives relatively well, but there is still substantial scope for further reform.

There are no easy answers to the balance of intellectual property in Australia. As a net importer of intellectual property, Australia will generally benefit for a more liberal intellectual property regime. Nevertheless, all forms of investment depend on certainty, so an overarching policy for reform should be that rights holders – who have already made significant investments – should not be significantly worse off following reform.

Recommendation 1: Compensation

The Productivity Commission should look to compensation schemes, such as statutory licences, where rights holders are adversely affected by reform.

Copyright

The largest opportunity for intellectual property reform in Australia is in copyright law.

The Australian Chamber is concerned that changing technology means that existing fair dealings exemptions may not be enough to prevent copyright laws from restricting legitimate business activity.

Recommendation 2: Exceptions

Australian copyright law should include:

- an exception for non-consumptive use.
- an exception for personal or domestic use.

Given the pace of technological change it may be difficult for the legislative process to keep up using additional fair use exemptions. The alternative to extending specific fair dealings exceptions is to move to a fair use system. We acknowledge that this is a controversial area and that the benefit of any change would need to outweigh the costs.

Recommendation 3: Fair use

The Productivity Commission should consider the benefits of a fair use system as an alternative to introducing new exceptions. But in doing so, it must weigh the potential benefits of fair use against the concerns with the system. Any changes would need to :

- 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.

If concern about excessive cost prevents the adoption of a fair use system, a middle-ground to help regulators keep pace with changing technology would be to allow them to add additional fair dealings exceptions which can operate for a fixed period before being subject to legislative review.

Recommendation 4: Fixed term exceptions

If fair use is not considered feasible, Australian copyright law should allow regulators to issue fixed term exceptions and no action letters for use that is considered fair.

Copyright law in Australia restricts third parties copying or hosting content for customers, despite that customer owning the material. This restricts cloud-based platforms from providing services to licence-holders. It also restricts traditional brick-and-mortar businesses from providing some third-party services.

Recommendation 5: Third party use

Copyright law should enable third parties to undertake the copying, hosting or transformation of copyrighted material where the rights holder would otherwise have been able to.

Parallel import restrictions can suppress competition and reduce opportunities for business profits. In the majority of cases, the concerns of parallel importing of non-homogenous goods can be being adequately managed by systems already in place in Australia.

Recommendation 6: Parallel imports restrictions

Restrictions on parallel imports should be removed unless it can be shown that the benefits of restrictions for a good outweigh the costs, and that the objectives of the restrictions can only be achieved by restricting competition.

Sellers of parallel imports are responsible if something goes wrong with a product. There is no obligation on the local manufacturer to provide a remedy. However, this is not always clear to consumers.

Recommendation 7: Parallel import clarity

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.

Patents

IP 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 patents, 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 patenting system is still problematic.

By IP Australia's own admission, applying for a patent 'can be a complex and time-consuming processes'. Patent backlog and delays are a real issue in Australia, with the time it takes to process 75 per cent of patents has ballooned from 3 years to 4.5 years.

Australia only has an official collaboration memorandum with the US on patents. Increased collaboration with other international patent offices may be another way to reduce processing times, and create additional reasons to register patents in Australia.

Recommendation 8: Complexity

The Productivity Commission should ensure that changes to the Intellectual Property system do not add to the existing complexity, and simplification should be pursued wherever possible.

Recommendation 9: Assessment delays

IP Australia should review their internal processes to identify where improvements can be made to timeliness. If necessary, regulatory changes and additional funding should be considered to reduce processing times.

Recommendation 10: International collaboration

Stronger collaboration with the European and UK patent offices should be sought to further streamline the application process and reduce duplication of applications.

The Australian Chamber is concerned about the findings of IP Australia's recent review into the innovation patent system. While the innovation patent system does not appear to be working for Australian small businesses, abolishing it entirely seems counterproductive. Instead the focus should be on reforming the system so that it does work for small businesses and the concern that innovation patents are typically used by larger businesses could be dealt with through a size based test.

Recommendation 11: Innovation patents

Innovations should be retained until an alternative mechanism for allowing small and medium businesses to access the patenting system can be identified. The concern that innovation patents are typically used by larger businesses could be dealt with through a size based test.

1 Introduction

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.

Most businesses believe that Australia's intellectual property regime balances its conflicting objectives relatively well, but there is still substantial 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 rights. As a result, SMEs use the intellectual property system far less than larger firms.¹

This submission deals with the following issues:

- Fair dealing exceptions
- Fair use
- Fixed term exceptions
- Third party use
- Parallel imports
- Patent delays
- Innovation patents

2 Considering the impact on markets

There are no easy answers to the balance of intellectual property in Australia, but as a net importer of intellectual property, Australia will generally benefit for a more liberal intellectual property regime. Nevertheless, all forms of investment depend on certainty, so an overarching policy for reform should be that rights holders – who have already made significant investments – should not be significantly worse off following reform.

The Productivity Commission must consider the effect of reforms upon the copyright holders' markets. In this, the Australian Chamber supports the Australian Subscription Television and Radio Association comment to the previous copyright review that "Any recommendations for new

¹ Australian Bureau of Statistics, Innovation in Australian Business, 2012-13

exceptions that may arise from this review should include an assessment of the potential economic detriment for content owners.”²

There may be cases where markets are significantly affected due to reform. Such is the case with existing statutory licences for educational material, where prohibitively high transaction costs have allowed a market failure. When educational institutions copy material for exempt uses, they must pay a statutory fee as a royalty to rights holder. This allows the removal of a market failure, while ensuring rights holders are suitably compensated.

Recommendation 1: Compensation

The Productivity Commission should look to compensation schemes, such as statutory licences, where rights holders are adversely affected by reform.

3 Copyright

Fair dealing exceptions need to grow

Fair dealing is a system used in Australia that allows the reproduction of copyrighted material under certain circumstances. It relies on a limited number of specific exceptions that could be considered ‘fair’ – these include news, parody, critique, study, and some private copying.³

The Australian Chamber is concerned that changing technology means that existing fair dealing exemptions may not be enough to prevent copyright laws from restricting legitimate business activity. For example, big data analysis is a major emerging field, but it is subject to legal uncertainty in relation to copyright. This legal uncertainty means Australian businesses may be reluctant to use big data solutions, and Australian innovators may be reluctant to develop products based on data mining.

As one possible solution, existing fair dealing exceptions could be expanded, including by creating new exceptions for non-consumptive uses; personal non-commercial uses; archiving and digitisation; incidental uses; orphan works; and accessible formats for the disadvantaged.

Non-consumptive use

The Australian Chamber sees particular merit in an exception for non-consumptive or non-expressive use. Non-consumptive use is where the copying is only carried out due to technical processes, and does not trade directly on the creativity of the material. Non-consumptive use is an important process in software, as machines must first copy material before they are able to analyse them. An exception for non-consumptive use would support businesses that seek to increase productivity through the use of machines and software. The so-called Hargreaves Review in the UK similarly called for an exception for non-consumptive use.

² ASTRA, [Submission to the Australian Law Reform Commission Issues Paper: Copyright and the Digital Economy](#)

³ Copyright Agency, [Copyright Exceptions](#)

This is not about overriding the aim of copyright – these uses do not compete with the normal exploitation of the work itself – indeed, they may facilitate it. Nor is copyright intended to restrict use of facts. That these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.

Professor Ian Hargreaves, *Digital Opportunity* report⁴

Examples of non-consumptive use include displaying thumbnails of products in search results; caching; providing snippets of information from copyrighted material; search engine indexing; and text and data mining. Many of these processes are necessary for innovative products and businesses to thrive in Australia, in particular for those that rely on e-commerce, online search, research, analytics, and big data.

A significant case that included non-consumptive use was settled in the United States by *Authors Guild et al. v. Google*, where Google enabled users to search the digital contents of library books, and view snippets of copyrighted materials. The users were then able to purchase the book through several online retailers if they wished to read the entire text. The court found that the use was fair as it was transformative, did not impact the original market of the books, and only reproduced an insignificant portion of the text for review.

The purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books*, permitting a searcher to identify those that contain a word or term of interest, as well as those that do not include reference to it ... In addition, through the ngrams tool, Google allows readers to learn the frequency of usage of selected words in the aggregate corpus of published books in different historical periods.

The purpose of the copying is highly transformative, the public display of text is limited, and the revelations do not provide a significant market substitute for the protected aspects of the originals.

Authors Guild v. Google, Inc., US Court of Appeals⁵

Personal or domestic use

The Australian Chamber also sees a need for private or domestic use, where the copying is only used to format- or time-shift legitimately owned material to other personally or domestically used devices. An Australian consumer may be breaking Australian copyright law in using, say, a Plex media server⁶ to stream their legitimately obtained TV programs from their computer to their lounge. They are also circumventing the law when they rip a DVD to play on their Apple TV. And as

⁴ Professor Ian Hargreaves, [Digital opportunity: a review of intellectual property and growth](#)

⁵ US Courts, [The Authors Guild v Google, Inc](#)

⁶ Plex is software that allows you to organise media on your computer and stream to a TV or other media device

identified in a recent case between Optus and NRL Australia, they may be breaking the law if TV recordings are uploaded to the cloud for their own personal use instead of saving on a local drive.

Consumer activity in streaming, recording and downloading media has increased considerably over the past few years. The total time consumers spend watching through these methods now surpasses traditional broadcasting.⁷

Restricting the ability to use content in new ways may dampen the ability of Australian firms to create technology that facilitates such uses.

Recommendation 2: Exceptions

Australian copyright law should include:

- an exception for non-consumptive use.
- an exception for personal or domestic use.

The case for fair use

Given the pace of technological change it may be hard for the legislative process to keep up with additional new uses of copyrighted material. The alternative to adding specific fair dealing exceptions is to move to a fair use system. With fair use, the judicial system in the United States has opened markets to the following use cases:

- displaying thumbnails of products in search results⁸
- news article aggregators⁹
- caching¹⁰
- text and data mining¹¹
- library resource preservation¹²

At the same time fair use does not appear to have allowed abuse of copyrighted works, with courts regularly siding with content creators where use is not considered fair. For example, in cases of:

- piracy, such as where a woman downloaded 30 songs illegally¹³
- excessive use, such as where a biographer published large portions of unpublished letters¹⁴

⁷ Deloitte, [Media Consumer Survey 2015](#)

⁸ Kelly v. Arriba-Soft

⁹ AFP v. Google News

¹⁰ Field v. Google Inc.

¹¹ Authors Guild et al. v. HathiTrust

¹² Authors Guild et al. v. HathiTrust

¹³ BMG Music v. Gonzalez

- non-transformative use, such as the creation of an unauthorised Harry Potter encyclopaedia¹⁵

Fair use in Australia is a contentious issue, with many proponents and opponents. The ACCC, the Australian Law Reform Council and a number of online companies have called for fair use provisions to be adopted in Australia. They state the economic, business and consumer benefits would be substantial. But content creators such as film and TV producers and publishing firms have traditionally questioned the benefits fair use would deliver. In its submission to the Australian Law Reform Council discussion paper, a joint submission by Australian Film/TV Bodies noted that 47 per cent of submissions were opposed to the introduction of fair use in Australia.

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:

- fair use increasing uncertainty for content creators
- fair use increasing complexity for judicial systems
- fair use would increase expenses unnecessarily for content creators and the tax payer
- that the Australian judicial system is too different from America's to support fair use

These concerns should not be discounted, and must be weighed against the potential benefits of a fair use regime.

Recommendation 3: Fair use

The Productivity Commission should consider the benefits of a fair use system as an alternative to introducing new exceptions. But in doing so, it must weigh the potential benefits of fair use against the concerns with the system. Any changes would need to :

- 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.

A potential middle ground

If concern about excessive cost prevents the adoption of a fair use system, a middle-ground to help regulators keep pace with changing technology would be to allow copyright regulators to add additional fair dealings exceptions which can operate for a fixed period before being subject to legislative review.

The Productivity Commission recently presented a draft recommendation that would allow "regulatory discretion in the form of fixed term exemptions and no action letters [as] short term solutions to help regulators keep pace with market developments." The Commission made this

¹⁴ Salinger v. Random House

¹⁵ Warner Bros. Entertainment, Inc. v. RDR Books

recommendation in the light of concern that innovative companies and business methods were unable to develop in Australia due to overly prescriptive and inflexible regulatory impediments.

Businesses generally aim to comply with their regulatory obligations. New business models, however, often claim that they are not required to comply with regulations because their business model is different and not within the scope of the regulatory coverage. Furthermore, there are also times when it is unclear whether certain actions by a business is a contravention of the regulation, or even if certain actions are clearly a breach and there may be net benefits from allowing the new innovative business models to operate.

Productivity Commission, *Business Set-up, Transfer and Closure*, Draft Report¹⁶

In the absence of fair use, the Australian Chamber recommends this approach for the copyright framework in Australia. Such an approach would allow a regulator to temporarily 'permit' the use of copyright where it would provide increased welfare for businesses and consumers, while still protecting the rights of copyright holders.

Recommendation 4: Fixed term exceptions

If fair use is not considered feasible, Australian copyright law should allow regulators to issue fixed term exceptions and no action letters for use that is considered fair.

Endorsing third party use

Cloud computing is a major emerging technology,¹⁷ but it is subject to legal uncertainty in relation to copyright. Copyright law in Australia restricts third parties copying or hosting content for customers, despite that customer owning the material. This restricts cloud-based platforms from providing services to licence-holders.

Cloud-based and other online third party services are a growing part of the global economy, and locking Australian businesses out of this environment would impose an unnecessary burden on business innovation.

The Australian Government has called for the wider uptake of cloud computing services in its National Cloud Computing Strategy,¹⁸ but has identified several regulatory barriers including the lack of third party exemptions.

Not only does the absence of third-party exceptions broaden the risk of online businesses breaking the law, it also restricts traditional brick-and-mortar businesses from providing third-party services. For example, the Australian Law Reform Council has indicated that educational institutions cannot copy material on behalf of students, a digital archivist cannot digitise a client's book and music

¹⁶ Productivity Commission, [Business Set-up, Transfer and Closure \(Draft Report\)](#)

¹⁷ KPMG, [Modelling the Economic Impact of Cloud Computing](#)

¹⁸ Department of Communications, [National Cloud Computing Strategy](#)

collection, and an IT technician cannot back up their client's files.¹⁹ These actions are currently permissible under copyright exceptions, but not if a third-party undertakes the action.

Copyright law should enable third parties to undertake the copying, hosting or transformation of copyrighted material where the rights holder would otherwise have been able to.

Recommendation 5: Third party use

Copyright law should enable third parties to undertake the copying, hosting or transformation of copyrighted material where the rights holder would otherwise have been able to.

Allowing parallel imports

Parallel import restrictions can suppress competition and reduce opportunities for business profits. They also reduce opportunities for business profits, 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 Review²⁰, which the government has accepted in part.

In the majority of cases, the concerns of 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.²¹ 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.

Restrictions on parallel imports should be removed unless it can be shown that the benefits of restrictions for a good outweigh the costs, and that the objectives of the restrictions can only be achieved by restricting competition.

¹⁹ Australian Law Reform Council, [Examples of Third Party Use](#)

²⁰ Australian Chamber of Commerce and Industry, [Submission to Competition Policy Review](#)

²¹ ACCC, [Selling Parallel Imports](#)

Recommendation 6: Parallel imports restrictions

Restrictions on parallel imports should be removed unless it can be shown that the benefits of restrictions for a good outweigh the costs, and that the objectives of the restrictions can only be achieved by restricting competition.

Recommendation 7: Parallel import clarity

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 patent system is still problematic.

By IP Australia's own admission, applying for a patent 'can be a complex and time-consuming process'.²² 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 8: Complexity

The Productivity Commission should ensure that changes to the Intellectual Property system do not add to the existing complexity and simplification should be pursued wherever possible.

Patent delays

Patent backlog and delays, known as 'pendency', are a real issue in Australia. The rise of patents from emerging economies over the past decade exacerbates this issue two-fold. Firstly, 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 – 10 years ago 75 per cent of applications were granted within roughly 3 years. Last year, it would take up to 4.5 years for the same portion.²³ This increases uncertainty for business

²² IP Australia, [Patent Application Process](#)

²³ IP Australia, [Report on patent backlogs, inventories and pendency](#)

unnecessarily. These delays mean Australian businesses are waiting years for their patents to be approved by the national intellectual property administrator.

IP Australia has begun to turn this around, but they will require the necessary resources and regulatory framework so that businesses do not continue to face unnecessarily long wait times. IP Australia should review their internal processes to identify where improvements can be made to timeliness. If necessary, regulatory changes and additional funding should be considered to reduce processing times.

The Australian Chamber notes that Australia only has an official collaboration memorandum with the US Patent and Trademark Office under the Patent Cooperation Treaty. Stronger streamlining with the European and UK patent offices should be sought to further streamline the application process and reduce duplication of applications.

Recommendation 9: Assessment delays

IP Australia should review their internal processes to identify where improvements can be made to timeliness. If necessary, regulatory changes and additional funding should be considered to reduce processing times.

Recommendation 10: International collaboration

Stronger collaboration with the European and UK patent offices should be sought to further streamline the application process and reduce duplication of applications.

Innovation patents

The Australian Chamber is concerned about the findings of IP Australia's recent economic review into the Australian innovation patent system. The review noted '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.'

According to the review large and international firms file the most innovation patents, and these firms tend to obtain the majority of the value from innovation patents. The intent of innovation patents was to encourage innovation among Australian SMEs.

While the innovation patent system does not appear to be working for Australian SMEs, abolishing it entirely seems counterproductive. Instead the focus should be on reforming the system so that it does work, and the concern that innovation patents are inappropriately used by larger businesses could be dealt with through a size based test.

Recommendation 11: Innovation patents

Innovations should be retained until an alternative mechanism for allowing small and medium businesses to access the patenting system can be identified. The concern that innovation patents are typically used by larger businesses could be dealt with through a size based test.

5 About the Australian Chamber

Who We Are

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

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.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

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

What We Do

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

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