



“... creating your IP solutions”

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BRISBANE

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23 July 2021

Right to Repair inquiry
Productivity Commission
Locked Bag 2
Collins Street East
Melbourne Vic 8003

SENT BY EMAIL TO repair@pc.gov.au

Dear Commissioners,

All Correspondence

to: PO Box 5535
West End PO
West End Qld 4101

Re: The Right to Repair Inquiry – Intellectual Property (IP) considerations

Introduction

Email:

1. This is a short submission directed to the matters raised in Chapter 5 “Intellectual Property protections and repair” of the draft Commission’s Report published June 2021 (the **Report**).
2. As there are no specifically posed questions requiring response, I will make some observations on the issues identified by the Commission arising from the Terms of Reference. These are:
 - (a) Examination of the various ways IP can act as a barrier to product repair (section 5.1).
 - (b) Evidence on the extent of IP-related barriers to repair in Australia (section 5.2), and
 - (c) Recommendations to government to address such barriers (section 5.3).

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IP acting as a barrier to product repair – The Report 5.1

3. The proposition that copyright is the “... the most significant IP-related barriers to repair appear to relate to the inability of third-party repairers to access repair information under copyright law,” has not been supported by overwhelming evidence that consumer experience is that their products are rendered useless by the inability to access copyright information whether physically or in an online environment.
4. The experience of most including myself, is that product manufacturers provide software updates with little difficulty, for example printer software updates and ‘How to fix’ resources appear ad nauseum.
5. Why is this? In my opinion it relates to a perception like that in the 1990s regarding patents. That perception was that patent owners could hold the public to ransom because of their statutory monopoly, and unless the invention was over subject matter of national importance triggering the Crown Use provisions in Chapter 17 of the *Patents Act 1990* (Cth), the public would have no option but to pay the patentee the exorbitant cost of using the product or method.
6. By and large, that didn’t happen. What happened was that the patented product was a little more expensive but that there were comparable alternatives, which were met the need and possibly had the effect of making the patented product competitive.
7. Similarly, there is clearly a theoretical position and some not so theoretical instances, such as the Toshiba example, where copyright works or subject matter other than works, could be used aggressively to delay or make repairs more expensive. However, like the patent scenario, that is not evidenced by widespread instances in submissions, evidencing that this is a common occurrence.

8. Like patents, there appears to be a goodwill or ‘value add’ approach to retaining custom by providing these resources and “usually at no cost to the consumer”.¹
9. Again, in my opinion, it may be market forces in a buoyant and competitive marketplace which forces copyright owners to take this approach. That doesn’t mean that the copyright material might not be a little more expensive to accommodate cost recovery for the resource, but it appears to indicate that copyright owners are mindful that a strict enforcement of their copyright is likely to be counterproductive in the real market.
10. Over the years there has been difficulty by committees to identify evidence that clearly supports the proposition that certain changes in IP laws will act as a disincentive to innovation. As a general proposition, it is unremarkable to suggest that there if there is an outlay in R & D, to achieve an IP right which provides a period of exclusivity, that one would re-consider embarking on such a path if the result were that the public including competitors, could use the invention/design/work at the expense and effort incurred by the inventor /designer or author for free.
11. The proposition is not unrealistic, that the effort and expense in preparing manual and information relevant to repair could be seen as a disincentive, if there was a fair use right to the resource. This is recognised in the Report.²

Key IP-related barriers to repair in Australia – The Report 5.2

12. Notably, the Report states that no submissions explicitly stated that manufacturers were using IP law protections to restrict access to spare parts.³ The Report identifies that the issue could be a reluctance by manufacturers to provide the information, IP protected or not.⁴

¹ The Report p 174-175.

² The Report p 158.

13. The Apple example in Box 5.1 can be seen as an aggressive approach using the Apple trade marks to block the importation of goods of mixed origin. However, the actions also have the benefit of protecting consumers from inferior or counterfeit products.
14. It is unlikely trade mark infringement on such a basis would succeed in Australia. A use of an invisible trade mark does not constitute a use.⁵
15. I raise a point of clarification arising from Box 5.3 of the Report.⁶ The submission seems to have been made and accepted that ‘spare parts can be acquired for both repair and enhancement, and that the defence should be available in such cases’.⁷
16. The statement appears to indicate by reference to both repair and enhancement and the suggestion that it be available in such cases (plural), that the defence under s 72(1) is available for repair *and/or* enhancement.
17. In considering s 72(1) his Honour in *GM Global*, referred to the Explanatory Memorandum to the *Designs Act 2003* (Cth), noted the following limitation:

“However, **this subclause does not provide a defence against infringement where the use of a component part embodying a design results in the enhancement of the appearance of the complex product.** This approach preserves the incentive to innovate by allowing all designs of component parts of complex products to be registered if they meet the innovation threshold, without introducing any risk of subsequent anti-competitive behaviour. This enables original component parts to be protected, while the same or substantially similar component parts may be used for repairs without the risk of infringement.”⁸ (His Honour’s emphasis)

³ The report p 160.

⁴ Ibid.

⁵ *Complete Technology Integrations Pty Ltd v Green Energy Management Solutions Pty Ltd* [2011] FCA 1319 at [62].

⁶ The Report p 162.

⁷ Ibid.

⁸ *GM Global* at [62].

18. This would indicate that the enhancement is a product of a repair and not as an independent defence.
19. I would like to make an observation regarding EULAs. As stated in the Report, EULAs are contracts.⁹ I find it curious that in the whole of Chapter 5, there is no reference at all to the repeal of the limited exemption under the former s 51(3) of the *Competition and Consumer Act 2010* (Cth).
20. Notably the government is accepting the Productivity Commission's recommendation to repeal the limited IP protection to Part IV contraventions under s 51(3), did not adopt the Harper Committee or the Productivity Commission's recommendation to exempt IP rights from the cartel provisions, on the basis that IP licence arrangements are usually vertical arrangements.
21. I found it curious that in considering licenses in the context of IP rights being used to thwart access to repair resources, that the removal of the limited exception was not considered a factor militating against the use of IP rights to block repair. This is even more so given the serious consequences of a contract limiting competition and exposed to cartel arrangements.
22. In relation to the High Court decision in *Calidad*, there appears no reason to consider that the design regime would not also be covered by the same principal. Notwithstanding the limited right to repair a design embedded in the statute, the patent and design regimes share similarities which would allow the *Calidad* result of the majority of the Court to apply to designs.
23. Both patents and designs require an applicant and grant dependant on a "novel" invention and design.
24. Both recently had Crown Use provisions overhauled in mirror like provisions.
25. Both have a limited monopoly.

⁹ The Report p 171.

Conclusion

26. In circumstances where there is no clear evidence of consistent abuse of the IP rights, copyright in particular, caution in terms of amendments by the introduction of an exception to infringement as a fair dealing defence or any other form of dilution of the exclusive rights accompanying copyright, is justified.

D. Eliades

23 July 2021