

choice

SUBMISSION TO THE PRODUCTIVITY COMMISSION: INTELLECTUAL PROPERTY ARRANGEMENTS ISSUES PAPER



30 NOVEMBER 2015

WWW.CHOICE.COM.AU E CAMPAIGNS@CHOICE.COM.AU

57 CARRINGTON ROAD MARRICKVILLE NSW 2204 P 02 9577 3333 F 02 9577 3377

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and to support our campaigns, sign up at www.choice.com.au/campaignsupporter



57 CARRINGTON ROAD MARRICKVILLE NSW 2204
P 02 9577 3333 F 02 9577 3377

CONTENTS

Introduction	4
Recommendations	5
A flexible approach to legal frameworks	6
The Australian Consumer Law: an example	7
Fair Use: a flexible approach to copyright law	8
Trade agreement negotiations	11
Consumer issues and intellectual property	15
Geoblocking, piracy and the copyright law	16
Parallel imports	18

INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Productivity Commission as part of its review into Intellectual Property Arrangements.

As the Productivity Commission acknowledges in its Issues Paper, many reviews dealing with elements of intellectual property have been conducted and concluded over the last several years. In addition to the reviews listed, CHOICE would also draw the Commission's attention to the inquiries into IT pricing and online copyright infringement.¹

The purpose of this inquiry is to go beyond previous investigations into small-scale reforms of specific legislation, and to instead consider options for constructing a broad, principles-based approach to the law that provides a framework for intellectual property rights and the enforcement and trade of those rights.

We need an intellectual property framework that allows users to access the full benefits of copyrighted works while supporting creators' rights to be rewarded for their work. This submission will focus on three key reform options. Two of these are broad, structural reforms. The final could either take the form of structural change or a simple amendment to an existing provision of the copyright law. These are:

- Reforming copyright law to allow for more flexible, reasonable uses of copyrighted materials through a fair use system;
- Reforming the treaty-making process to promote transparency and effective consultation, particularly in relation to intellectual property provisions; and
- Addressing geoblocking and consumers' access to digital goods and services, either through a re-imagining of the current practice of carving up copyright into different regions or through an amendment to the *Copyright Act 1968* assuring consumers' legal rights to circumvent digital barriers.

¹ House Standing Committee on Infrastructure and Communications, 29 July 2013, *At what cost? IT pricing and the Australia tax* and the Attorney-General and Minister for Communications' joint public consultation on online copyright infringement, September 2014, documents available at <http://www.aq.gov.au/consultations/pages/onlinecopyrightinfringementpublicconsultation.aspx>

Recommendations

On the reform of copyright law -

- Australia's copyright law framework should be reformed to include a broad, flexible fair use exception for copyright infringement.
- The Australian Law Reform Commission's 2014 fair use proposal should be adopted, including the non-exhaustive list of illustrative uses or purposes that may qualify as fair uses. However, the ALRC's proposal that this include "private and domestic" uses should be amended to instead refer to "private or domestic" uses, to ensure that the example is not unnecessarily restrictive.
- Similar to the consumer guarantee rights provided by the ACL, the rights offered by a fair use exception should not be subject to contractual override.

On the reform of treaty-making processes -

- An independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.
- Trade negotiations should be informed by an independent, transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.
- The full negotiating texts of international trade agreements should be made public, and be accompanied by plain-English explanatory documents. If it is not possible to release full texts, redacted versions that anonymise proposals and exclude sections relating to tariff reductions should be made available. As a priority, sections that have the potential to substantially affect domestic regulatory arrangements (e.g. sections on intellectual property) should be made public.
- Explanatory documents and position statements should be published, particularly in relation to intellectual property.
- An expert advisory group should be established to assist negotiators by providing advice on the impact the agreement may have on health, environment, consumer and business interests. The minutes of meetings held by this group should be made public.

To ensure consumers have fair access to digital goods and services -

- Retailers must make it clear to consumers that they are not purchasing products, but rather rights to access. This includes removing “buy” or “purchase” buttons from online stores.
- The ACCC should conduct an investigation into unfair contract terms in the online market for content services, mirroring the 2013 review of unfair contract terms in the airline, telecommunications, fitness and vehicle rental industries. This review should particularly focus on terms that allow the service provider to unilaterally change the offering of the service without providing the consumer with compensation or the option to cancel the contract.
- The *Copyright Act 1968* should be amended to clarify that consumer circumvention of geoblocking is legal, and education should be provided as to how this may be done and whether it will affect consumers rights under existing law.
- As a last resort, businesses should be restricted from using geoblocking, or from entering into contracts seeking to enforce geoblocking.
- Remaining restrictions on parallel imports should be removed, including for second hand cars.

1. A flexible approach to legal frameworks

Intellectual property and copyright law have been subject to multiple reviews, as noted by the Productivity Commission in its Issues Paper. Amendments to existing laws have been passed, but primarily in an ad hoc manner intended to address specific, situational concerns, rather than for the purpose of creating a new framework that best meets the community's needs.

The 2006 Copyright Act reforms: failing to future-proof the law

The 2006 amendments were intended to create a “world-class, up-to-date copyright regime... ensuring that ordinary consumers are not infringing the law through everyday use of material they have legitimately purchased” (Ruddock, P., 2006, *House of Representatives Hansard, Wednesday 1 November 2006*).

The amendments aimed to address the fact that consumers were regularly engaged in certain acts that appeared legitimate but were in fact breaches of the law. For instance, recording a TV program to watch later (time-shifting), or copying a CD to play on an iPod (format-shifting).

However, the laws focused on particular types of technology, like “videotapes” , and were consequently out-of-date immediately. By focusing on specific types of technology others, like DVDs and cloud computing, were excluded.

The Australian Consumer Law: an example

The Australian Consumer Law (ACL) is in part a principles-based law that, when working well, can be applied in a relatively simple way by individual consumers and businesses. Although broad, the law provides certainty for both consumers and businesses in their dealings with one another.

Section 18, for example, provides “simply an obligation, in trade or commerce, to not engage in misleading or deceptive conduct” .² The provision is comprehensive, establishing a norm of conduct for businesses rather than creating a narrow liability.

The consumer guarantees contained within the ACL are also an example of law that empowers consumers, in part because it is relatively easy to understand and apply.³ The guarantees require that goods and services meet certain common-sense standards – goods must be safe, durable, and fit for purpose. Services need to be delivered with due care and skill and within a reasonable period of time. These concepts of “fitness” and “reasonableness” are broad, applying to a wide range of situations to the benefit of consumers and the marketplace.

Fair use: a flexible approach to copyright law

The *Copyright Act 1968* governs copyright law in Australia. It provides copyright owners with exclusive rights to their copyright material, including the right to publish and communicate it.

Copyright infringement is prohibited. This can occur when someone other than the copyright owner exercises any of the owner’s rights without their permission. Exceptions to the law exist, primarily if the infringement occurred for the purpose of research or study, or criticism or review. These exceptions are found in the “fair dealing” provisions in the Act.⁴

Fair dealing provisions are less flexible and adaptable in operation than a fair use exception. ‘Fair use’ is a defence to copyright infringement found in other jurisdictions that essentially asks of any particular use of copyrighted work, ‘is this fair?’

For instance, under Australian law it can be an infringement of copyright for a teacher to reproduce a poem on an electronic whiteboard, requiring them to pay a copyright fee. Writing the same poem on a blackboard is not an infringement.⁵ Fair use would provide

² Miller, R, 2013, *Miller’s Australian Competition and Consumer Law Annotated 35th Edition*, Thomson Reuters, Pyrmont NSW.

³ *Competition and Consumer Act 2010* (Cth), Schedule 2, ss51-62.

⁴ *Copyright Act 1968* (Cth) ss40-42.

⁵ See the Copyright Advisory Group – Schools of the Standing Council on School Education and Early Childhood, July 2013, submission to the Australian Law Reform Commission, Discussion Paper 79: Copyright and the Digital Economy, available at http://www.alrc.gov.au/sites/default/files/subs/707_org_cag_schools_submission_-_dp79_-_final_version.pdf

a defence against an accusation of copyright infringement in this scenario. This defence is not currently available in Australian law.

Fair use can benefit the public by stimulating competition and innovation, and opening up access to materials where this access does not result in revenue being driven away from the copyright owner. A fair use provision in Australian law would build on the existing fair dealing provisions.

The Competition Policy Review Final Report recommended that part of this review of intellectual property arrangements consider clarification of 'fair use' rights.

CHOICE offered broad support for the Australian Law Reform Commission's (ALRC) recommendation in 2014 to implement a fair use copyright exception, including fairness factors and a non-exhaustive list of illustrative uses.⁶ This defence has been applied by US courts for decades, where the copyright industry flourishes.⁷ It remains CHOICE's view that this is one of the most important substantive reforms that could be made to Australian copyright law to enhance consumer welfare and generate benefits for the Australian economy.

A fair use system would better reflect the behaviours and reasonable expectations of Australian consumers. It would provide an improved framework for enabling Australian companies to thrive, providing Australians with the ability to develop and adopt the latest technological innovations, while continuing to reward creators for their existing work and provide incentives to create new works. It is important to note that under the fair use 'fairness factors' as formulated by the ALRC, the exemption would not apply to pirated material or uses that undermine the ability of creators to be rewarded for their work. This strikes the right balance between financially incentivising creators, and allowing consumers the flexibility to use content reasonably for private or domestic purposes.

CHOICE has been calling for copyright reform, and particularly for the introduction of fair use, for the last ten years⁸. There has been, and remains, a strong case for reforming

⁶ ALRC, 'Copyright and the Digital Economy', <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>

⁷ In 2012, total copyright industries added \$1.7 trillion in value to US GDP, International Intellectual Property Alliance, 2013, *Copyright Industries in the US Economy*.

⁸ See CHOICE submissions to Attorney-General's Department 2005 issues paper, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, Attorney-General's Department 2008 issues paper, *Copying Photographs and Films in a Different Format for Private Use* and Australian Law Reform Commission's 2014 report, *Copyright and the Digital Economy*.

Australia's copyright law framework. It is currently failing to reflect the behaviours and reasonable expectations of Australian consumers.

In August of this year, the Attorney-General's Department announced that it would

Current law failing to meet reasonable expectations

CHOICE conducted a nationally representative survey in 2013, and found 8% of Australians were likely to have breached s109A of the *Copyright Act* by copying a CD or audio file that they own onto more than one personally owned device (e.g. a computer and an iPod). Among those who regularly use legal digital content, the number was 20%.

9% of consumers were breaching the law by copying a DVD or video file to at least one personally owned device. Section 10AA of the *Copyright Act* provides an exception for copying "cinematograph film" for private use. This narrow, technical exception refers to "videotapes" and consequently does not apply to DVDs or digital video files.

22% of consumers were using cloud storage services in 2013 to store copyrighted music and films, another act that breaches current copyright laws.

These are common uses of copyrighted material, and are perceived by the public to be legal. 60% of Australians surveyed by CHOICE agreed that they should be able to transfer devices to as many devices as they own, with only 5% disagreeing. Under a fair use system, this behaviour and the acts described above would likely not breach the law. Instead of implementing yet more piecemeal reforms intended to address individual, specific problems like the "videotapes" issue, the introduction of a fair use exception would be a more flexible option.

commission a cost-benefit analysis of the ALRC's recommendation on fair use. CHOICE looks forward to an opportunity to provide input to this process.

The introduction of a flexible fair use exception would result in another amendment to an existing, complicated legal framework. However, as an individual provision it is more

comparable in flexibility and breadth to the ACL' s broad prohibitions and protections than it is to the flawed approach of the 2006 *Copyright Act* amendments. When applying the ACL in their daily lives, consumers are encouraged to ask of advertising, "is this misleading?" and of products and services, "does this do what it' s supposed to?" . Fair use will let consumers similarly ask a simple question when considering the legality of using copyrighted material; "is this fair?" . Fair use will give consumers more flexibility for uses that are legitimate and widely understood to be legal or reasonable, while also providing creators with financial incentives to create works.

Recommendations 1, 2 and 3:

- Australia's copyright law framework should be reformed to include a broad, flexible fair use exception for copyright infringement.
- The ALRC's 2014 fair use proposal should be adopted, including the non-exhaustive list of illustrative uses or purposes that may qualify as fair uses. However, the ALRC's proposal that this include "private and domestic" uses should be amended to instead refer to "private or domestic" uses, to ensure that the example is not unnecessarily restrictive.
- Similarly to the consumer guarantee rights provided by the ACL, the rights offered by a fair use exception should not be subject to contractual override.

2. Trade agreement negotiations

The Competition Policy Review Final Report recommended that the Productivity Commission conduct an overarching review of intellectual property; this review is the result.⁹ The Final Report recommended that the review focus on competition policy issues in intellectual property arising from new developments in technology and markets, and on the principles underpinning the inclusion of intellectual property provisions in international trade agreements. This recommendation also called for a separate independent review to assess Australian Government processes for establishing negotiating mandates for incorporating intellectual property provisions in trade agreements. The final element of the recommendation stated that trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions, to be published before negotiations are concluded.

While the Federal Government has already adopted the first part of the recommendation, the rest has been rejected. In its response to the Competition Policy Review Final Report, the Government stated that Australia "already has robust arrangements in place to ensure appropriate levels of transparency of our negotiating mandate... these include public and stakeholder consultation... and cost benefit analyses" .¹⁰

⁹ Harper et al, 31 March 2015, *Competition Policy Review Final Report*, Recommendation 6.

¹⁰ Australian Government, 24 November 2015, *Australian Government Response to the Competition Policy Review*.

CHOICE has been a stakeholder in recent trade negotiations, and has been as involved in consultation on the recently completed Trans-Pacific Partnership (TPP) Agreement as has been possible. CHOICE became involved in this process due to significant consumer concerns arising from leaked sections of the draft text of the agreement. The possibility of medicine price rises, criminal punishments for minor, private copyright infringement, and threats to the government's ability to pass laws like the tobacco plain packaging legislation were all raised as concerns – and all have intellectual property at their core.

Earlier this year, CHOICE made a number of recommendations for improving the treaty-making process in our submission to an inquiry conducted by the Foreign Affairs, Defence and Trade References Committee.¹¹ CHOICE's experience in the TPP negotiations demonstrates that current levels of transparency are inadequate. Consultation could be improved by implementing recommendations like the ones described above; it is disappointing that the Federal Government refuses to consider these options.

CHOICE is of the view that the full text of treaties like the TPP should be released at the earliest opportunity, in order to enable genuine consultation before an agreement is signed and finalised. However, given that the Federal Government has rejected this approach, there are other incremental steps that could be taken to improve the consultation process.

The EU's approach to the Transatlantic Trade and Investment Partnership (TTIP) negotiations provides a model for improving transparency. A number of explanatory documents and position statements have been published, and an expert advisory group has been established to assist negotiators by providing advice on the impact the agreement may have on health, environment, consumer and business interests. If such a model were adopted in Australia, including intellectual property experts in the advisory group would assist in ensuring a comprehensive assessment of the overall impact that an agreement may have on a wide range of industries and interests.

Despite the Federal Government's stated concern that increasing transparency in negotiations will "signal Australia's position to our negotiating partners and potentially compromise our capacity to achieve Australia's national interest", the evolution of the TTIP negotiation process demonstrates that it is possible to release

¹¹ CHOICE, 27 February 2015, Submission to the Foreign Affairs, Defence and Trade References Committee on the Commonwealth's Treaty Making Process.

information regarding sensitive and complex international treaties. In situations where free trade agreements include sections that directly impact on our domestic regulatory or legal framework, there is enormous value in of frank and open debate.

The Department of Foreign Affairs and Trade states on its website that it has hosted more than 700 public consultations on the TPP. CHOICE attended several of these meetings, and they were of extremely limited use. Australian stakeholders were given no access to the negotiating documents during this consultation period, and consequently our ability to engage constructively in consultation was severely constrained. Departmental staff were unable to provide CHOICE with any negotiating documents, position papers, issues papers, or the wording of any sections of the agreement. They were not able to provide descriptions of the content of the agreement, or directly answer questions on this. Despite this, CHOICE was asked to raise concerns about the specific wording of particular sections. General questions could not be answered.

Copyright provisions included in international trade agreements can lead to negative impacts on Australians. Negotiating parties cannot always be relied upon to take into account the interplay between the provisions of an agreement and the application of Australian domestic law. For instance, early TPP leaks included provisions criminalising certain private copyright infringements that are currently civil offences in Australian law.¹² While theoretically all signatories to a trade agreement sign the same document, the way this provision is applied will differ depending on the surrounding intellectual property framework in each country. In the US, the fair use defence operates to limit the impact of such provisions. In Australia, however, this defence is not available, meaning that private, largely harmless acts could incur criminal penalties had the final agreement reflected these early provisions. In this way, Australia was at risk of taking on board a harsher, more restrictive IP regime that is more stifling to innovation and competition than other signatories to the same agreement. It is these kinds of complexities that highlight the need for open consultation on trade agreements, particularly in relation to intellectual property provisions.

To help avoid these kinds of unintended consequences, it would be useful to conduct and publish independent, transparent cost/benefit analyses of all trade agreements prior to the conclusion of negotiations. At a minimum, an analysis of provisions relating to

¹² Wikileaks, 16 October 2014, 'Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (second publication)', <https://wikileaks.org/tpp-ip2/>

intellectual property should be made publically available well in advance of agreements being finalised.

Recommendations 4, 5, 6, 7 and 8:

- An independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.
- Trade negotiations should be informed by an independent, transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.
- The full negotiating texts of international trade agreements should be made public, and be accompanied by plain-English explanatory documents. If it is not possible to release full texts, redacted versions that anonymise proposals and exclude sections relating to tariff reductions should be made available. As a priority, sections that have the potential to substantially affect domestic regulatory arrangements (e.g. sections on intellectual property) should be made public.
- Explanatory documents and position statements should be published, particularly in relation to intellectual property.
- An expert advisory group should be established to assist negotiators by providing advice on the impact the agreement may have on health, environment, consumer and business interests. The minutes of meetings held by this group should be made public.

3. Consumer issues and intellectual property

The ACL provides protections for consumers, including those who buy digital goods or physical goods from online stores. However, in the online space consumers often experience dissatisfaction that cannot be easily remedied by turning to the ACL. This is particularly true in instances where intellectual property rights are involved. For instance, consumers have the ability to seek out more competitive markets with broader offerings when shopping online, but it is unclear under copyright law whether or not a consumer can legally circumvent digital barriers to purchasing goods and services when navigating these markets. Consumers can also be confused by licensing agreements that appear to

be straightforward sales, only to be disappointed when the product that they thought they purchased is no longer available to them.

Recommendations 9 and 10:

- Where applicable, retailers must make it clear to consumers that they are not purchasing products, but rather rights to access. This includes removing “buy” or “purchase” buttons from online stores.
- The ACCC should conduct an investigation into unfair contract terms in the online market for content services, mirroring the 2013 review of unfair contract terms in the airline, telecommunications, fitness and vehicle rental industries. This review should particularly focus on terms that allow the service provider to unilaterally change the offering of the service without providing the consumer with compensation or the option to cancel the contract.

Geoblocking, piracy and the copyright law

Australians have long been subject to the ‘Australia Tax’ – international price discrimination that leads to higher prices for a variety of goods and services in Australia, disadvantaging Australian consumers and businesses. Often this price discrimination is supported through the use of geoblocks, digital barriers that prevent consumers from particular geographic regions from transacting with online sellers based in different regions. In 2012, CHOICE research found that on average Australians paid 50% more for a variety of digital goods in comparison with consumers in the United States.¹³

Online copyright infringement is linked to this practice of carving up goods and services based on regions. CHOICE research has consistently shown that the main drivers behind piracy are expensive prices, timeliness of releases and unavailability of legal content. In November 2014, we found that 41% of pirates downloaded content unlawfully because it was faster than waiting for it to be released for purchase in Australia.¹⁴ Timeliness was also a major problem; films that are subject to release ‘windowing’ are sought out online prior to official digital release. This leads to individuals accessing content unlawfully, when if the option were available they would pay.

CHOICE conducted a follow-up survey early in September 2015, after the introduction of new legal streaming services such as Stan and Netflix.¹⁵ The results demonstrated that increasing legal options for consumers to access content is the best way to reduce piracy rates. Six months after the introduction of these services, piracy rates among regular pirates dropped by a quarter. The number of people who never watch pirated content increased modestly, rising from 57% to 63%. The research also found a significant increase in the number of people using pay-per-view or subscription services (from 46% to 59%).

The drivers of piracy remained consistent across both surveys. Expensive prices and wanting content sooner than legally available were the main reasons for piracy (21% and 15% in the 2015 survey).

¹³ CHOICE, 16 July 2012, *Submission to House Standing Committee on Infrastructure and Communications Inquiry into IT Pricing*.

¹⁴ CHOICE, November 2014, *CHOICE digital consumers paying for content behaviour and attitudes*.

¹⁵ CHOICE, September 2015, *Desperately Seeking Streaming - Research update: CHOICE digital consumers paying for content behaviour and attitudes*.

The Federal Government's own research into consumer behaviour and copyright infringement has mirrored CHOICE's findings.¹⁶ According to the Government's survey, 65% of internet users accessed digital content, and the majority only did so legally. Only 31% engaged in a combination of piracy and accessing lawful content, and a mere 12% were exclusively consuming pirated content.

The reasons people pirated related mostly to price and user experience, matching CHOICE's research. 51% of survey respondents felt that piracy was a convenient way to access digital content, and 45% said they pirated because it was quick. Approximately one third pirated because they felt legal content was too expensive.

The survey also asked people what would be most likely to stop them from pirating content. Unsurprisingly, the best options were found to be reducing the price of legal content (39%), improving availability (38%) and eliminating release delays (36%).

CHOICE's research into consumer behaviour and rates of piracy is consistent with the Federal Government's recent findings, and leads to the conclusion that an effective response must include removing barriers that sustain artificially high prices for digital products in Australia. The most effective method for reducing piracy is not to introduce new penalties or enforcement options under copyright law, but to instead address access to and affordability of digital content.

Unlawful downloading comes down to availability, timeliness and affordability. If the industry is serious about reducing copyright infringement, there is still work to be done on the supply side. Introducing new, punitive legal measures for enforcing copyright is an ineffective way of dealing with an issue that has its roots in business models that are failing to meet consumer expectations.

Recommendations 11, 12 and 13:

- The *Copyright Act 1968* should be amended to clarify that consumer circumvention of geoblocking is legal, and education should be provided as to how this may be done and whether it will affect consumers' rights under existing law.

¹⁶ Department of Communications, 24 June 2015, *Australian Online Copyright Infringement Research*.

- As a last resort, businesses should be restricted from using geoblocking, or from entering into contracts seeking to enforce geoblocking.

Parallel imports

CHOICE has consistently advocated for the removal of restrictions on parallel imports. Parallel imports provide benefits to Australian consumers, being one means of reducing the impacts of international price discrimination. They create situations where Australian consumers are able to exercise the choice to purchase legitimate products at more competitive prices.

Just as a company may import their inputs from markets where they are cheapest, consumers should also be able to access products from markets where they are cheapest. CHOICE supported the recommendation of the Competition Policy Review's Final Report that remaining restrictions on parallel imports be removed. We are disappointed that the Federal Government is choosing to take action to remove restrictions on parallel imports for books only at this stage.

Recommendation 14:

- Remaining restrictions on parallel imports should be removed, including for second hand cars.