



U.S. CHAMBER OF COMMERCE

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By electronic submission

Mr. Peter Harris AO
Chairman
Australian Government Productivity Commission
Level 12, 530 Collins Street
Melbourne VIC 3000
Australia

Dear Chairman Harris:

On behalf of the U.S. Chamber of Commerce (the “U.S. Chamber”), the world’s largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, we appreciate this opportunity to share our views with the Australian Government Productivity Commission on the Draft Report on Intellectual Property Arrangements (the “Draft Report” or the “Report”).

I. Overarching Comments

The U.S. Chamber and its affiliate the Global Intellectual Property Center (GIPC) are deeply committed to advancing a global innovation economy, one where all of the world’s citizens are empowered both to produce and benefit from new technologies, inventions, and creative content. We believe that strong, predictable, and well-enforced intellectual property (IP) laws are essential to that goal. Indeed, there can be no access to innovative products, without first ensuring a sustainable flow of innovative output. It is critical to point out that the broad range of evidence confirms that effective IP protection is one of several key enabling factors that not only helps encourage innovation, but also enables the dissemination, deployment, and broader use of innovative technologies.

As a starting point, GIPC notes that the Government of Australia has a strong record of utilizing intellectual property (IP) laws and related measures to catalyze the innovative and creative talents of its citizens. The strength of its IP framework make Australia one of a small group of nations globally that not only enshrine appropriate IP incentives in law, but also implement effective administrative and enforcement measures to provide legal certainty to innovators in the marketplace. Indeed, Australia ranked 8th among 38 countries evaluated in the recently released [4th Edition of the U.S. Chamber International IP Index](#) (the “Index”), scoring 24.79 out of a possible 30 points.

This puts Australia among a relatively small group of nations that produces the vast majority of paradigm-changing technological innovations and related products, a list coextensive with that of countries that currently take an active role in protecting intellectual property. In contrast, countries that self-characterize as net-importers of innovative, or IP-intensive, goods and services tend to be those that eschew stronger IP laws because they believe that benefits may accrue only to the exporting country.¹

Hence, Australia’s long-standing tradition of fostering IP-led innovation is at odds with the fundamental conclusions of the Draft Report, which state among other things:

“Australia’s stance on IP rights is out of kilter with its position as a net importer of IP intensive goods and services. The costs associated with deficits in Australia’s IP arrangements are borne by Australian consumers, largely to the benefit of overseas rights holders.” (p. 73)

Australia may statistically speaking be, in the words of the Draft Report, a “net-importer” of IP-intensive goods and services; however, it has always been a key stakeholder, contributor to, and beneficiary of, the development and sustainability of a global innovation economy.^{2 3}

¹ IP Australia. “Australian Intellectual Property Report 2013.” [Government of Australia](#), 2013: 1-40. Web. 24 Feb. 2016. <http://www.ipaustralia.gov.au/pdfs/Australian_IP_Report_2013-web_version.pdf>. And above.

² “The Economic Contribution of Australia’s Copyright Industries, 2002-2014” - http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/pwc_report_2014_australia.pdf

³ “Intellectual Property and the Australian Economy - https://www.ipa.org.au/library/publication/1219635913_document_080612_-_paper_-_ip_and_the_australian_economy_in.pdf

Unfortunately, with such harmful self-characterizations countries can easily become locked into these contrasting roles. A country that considers itself an innovative producer may favor stronger intellectual property rights in order to further stimulate innovation at home and safeguard its assets overseas; a net-consumer of innovation may believe its national self interest lies in policies that devalue intellectual property rights in order to cheapen access to innovative products.

Without the protection of intellectual property rights, however, governments risk a policy path that further depresses domestic innovation and increases reliance on external producers of innovative goods and services, reinforcing a vicious cycle. When trapped in this cycle, investment in innovation and research and development suffers, depriving the world of potential breakthrough technologies.

The implications of this policy path are profound. Earlier this year, the U.S. Chamber released the 4th Edition of its International IP Index, assessing and ranking the IP environments of countries representing 85% of global gross domestic product. As a complement to this policy analysis, the U.S. Chamber Index also developed a set of rigorous and empirical statistical correlations demonstrating the strong, positive relationships between strength of an IP environment and important socioeconomic indicators.

For instance, the U.S. Chamber found among other things that:

- Firms in economies with advanced IP rights in place are nearly 50% more likely to invest in R&D activities compared with those whose IP regimes lag behind;⁴
- When applied specifically to the life sciences sectors, advanced IP regimes experience 2 to 6 times more biopharmaceutical R&D expenditure than do economies with less supportive IP regimes;⁵
- Firms and people in economies scoring above the median level of the U.S. Chamber Index are 30% more likely to benefit from access to the most recent technological developments compared with those in economies with weak IP climates.⁶

⁴ Global Intellectual Property Center (GIPC). "Infinite Possibilities, IP as a Development Tool: Supplementary Statistical Analysis to the U.S. Chamber International IP Index." U.S. Chamber of Commerce, 2 Feb. 2016. Web. 17 Feb. 2016. <http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/2016/GIPC_IPIndex_Annex.pdf>.

⁵ *Ibid.* at 3.

⁶ *Ibid.* at 2.

These correlations continue to reaffirm that IP rights are critical to expanding the public knowledge pool and increasing the diffusion of IP-intensive goods and services. Notably, Australia's own performance against these indicators demonstrates the validity of these findings remarkably well in most instances, bearing out the merits of the pro-IP policies that have long characterized the Australian system.

With that as context, the GIPC offers the following issue-specific comments as the Australian Government Productivity Commission considers recommendations related to Australia's IP system. Given the short time period provided for comments, no inference should be drawn from the absence of comment on any issue not specifically addressed below.

II. Issue-Specific Comments

a. Copyrights

Copyright Term and Scope

Copyright protection provides the legal framework to develop and reap the benefits of local creative outputs. Absent strong copyright protections, countries miss out on the opportunities for economic and creative growth derived from a system which nurtures the creation of creative works. The U.S. Chamber's International IP Index "*Infinite Possibilities*" includes data which demonstrates the benefits of robust copyright systems, including increased creative outputs, enhanced online creativity in online environments, and support for the growth of knowledge-based economies. The Productivity Commission's draft recommendation 4.1 recommends reducing the term of copyright protection in Australia, which currently stands at the length of creator's life plus 70 years, to a term of 15 to 20 years⁷. According to the International Intellectual Property Alliance (IIPA), over 80 countries, including many European nations and Latin American trading partners, provide a 70 year term of copyright protection⁸. Drastically reducing the term to a period of 15 to 20 years will discourage the investment in Australia of creative industries seeking to distribute their works. Further, a reduction of the copyright term would undermine the standards committed to in a number of free agreements, most recently the Trans-Pacific Partnership (TPP) agreement, but also the Australia-U.S. Free Trade Agreement. The U.S. Chamber encourages the Productivity Commission to maintain the current copyright term as outlined by Australia's international treaty obligations.

⁷ Productivity Commission 2016, Intellectual Property Arrangements, Draft Report, Canberra. Pg. 119

⁸ International Intellectual Property Alliance, 2016 Special 301 Report. February 2016. Available at: <http://www.iipawebsite.com/pdf/2016SPEC301COVERLETTER.PDF>

Fair Use Exceptions

The Productivity Commission's Draft Report recommends replacing fair dealing with fair use in the Australian Copyright Act. This recommendation is based on false premises that do not support the conclusions and recommendation of the Report.

The Report is peppered with assertions that the AUSFTA favored rights holders and allegedly created an imbalance in Australia's Copyright Act.⁹ Based on these assertions, the Report recommends expanded exceptions, including adoption of fair use. The AUSFTA represented modern, widely accepted levels of copyright protection from over a decade ago. To the extent that Australian law lagged behind those standards, it suggests that Australia was under-protective of copyright, not that the adoption of such standards is overly protective today.

Limitations and exceptions are an important aspect of copyright, provided they are narrowly and appropriately tailored to achieve a specific socially desirable purpose. The AUSFTA recognizes this, allowing for exceptions that are consistent with the globally accepted three-step test. The Report's apparent conclusion that appropriate limitations can only be achieved through fair use is belied by the facts. Jurisdictions such as the European Union and Japan, as well as numerous countries that have implemented the copyright provisions of U.S. free trade agreements, have modern copyright systems and have provided for exceptions those governments find appropriate without implementing fair use. In some cases, those exceptions go beyond the scope of fair use, affording users even wider latitude than traditional notions of fair use would grant. The Report dismisses the fact that other countries have considered and rejected fair use, but it misses the key point: That those countries have found ways to achieve and maintain exceptions outside the context of fair use.

The Report also errs by applying fallacious reasoning, assuming that by adopting some aspects of U.S. law necessarily requires adopting other aspects. Such an approach might be legitimate if it were possible to replicate the entirety of a national copyright system in another jurisdiction, but a more realistic, nuanced view recognizes that any nation's copyright system is the product of many factors beyond the scope of rights and exceptions prescribed by the law. Such elements include, but are not limited to, the use and effectiveness of the civil judicial system; the effectiveness, resources, and priorities of police, prosecutors, and judges; consumer

⁹ Draft report pg. 17; 105-06; 148; 152-53.

behaviors; social and cultural mores and norms; history of domestic copyright law and enforcement; voluntary private sector arrangements; and many others. Whether to enact a new fair use system should stand or fall on its own merits, not as some manner of retribution for select AUSFTA provisions with which the authors of a report a decade after the fact happen to disagree.

Another false premise of the Report is that fair use offers users of copyrighted works some degree of certainty. In fact, fair use is a famously ambiguous doctrine, its metes and bounds circumscribed not only by statutory language, but by more than a century of judicial interpretation. One of the most respected jurists in American history, Judge Learned Hand, characterized fair use doctrine as “the most troublesome in the whole law of copyright...”¹⁰ Some of the commenters upon whom the Report relied for the assertion that fair use may not be “as uncertain as claimed” have, in other circumstances, admitted just the opposite. Their writings describe fair use as uncertain, unpredictable, chilling, and confusing.¹¹ One of America’s most outspoken copyright critics has often repeated, “[f]air use in America is the right to hire a lawyer.”¹²

In any event, the Report insists that “legal uncertainty is not a compelling reason to eschew a fair use exception in Australia...Courts interpret the application of legislative principles to new cases all the time....”¹³ While true, the Report again misses the point. In the United States, existing business models and licensing arrangements have been built within the context of a fair use doctrine and attendant judicial precedent. To be sure, when court decisions appear to depart from past

¹⁰ *Dellar v. Samuel Goldwin, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

¹¹ Jaszi, *Glushko Samuelson Intellectual Property Law Clinic Response to Notice of Inquiry on the Issue of ‘Orphan Works,’* (March, 2005) speaks of “uncertainty entailed by the highly situational ‘fair use’ doctrine and the multi-factor analysis associated with it.” <http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf>; *Response by the Society of American Archivists to the Notice of Inquiry Concerning Orphan Works*, (March, 2005) “...**the fair use exemption represents a weak, inadequate, confusing, and costly device for the support of scholarship, learning, and public education**... Fair use rules are not clear, but overlapping and highly circumstantial.” (emphasis in original) <http://www.copyright.gov/orphan/comments/OW0620-SAA.pdf>; Michael Goodwin and Gigi Sohn, *In the Matter of Orphan Works Comments of Public Knowledge*, (March, 2005) referred to “...the chilling effect of a particularly unpredictable fair use doctrine.” <http://www.copyright.gov/orphan/comments/OW0629-PublicKnowledge.pdf>; William F. Patry and Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 Cal. L. Rev. 1639, 1645 (2004) (“...the four statutory factors are expressly illustrative rather than controlling, that their weight is not specified, and that the purposes of the defense in light of which its contours are to be determined are left open-ended...the uncertain contours of the defense raise serious problems....”) available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1316&context=californialawreview>.

¹² Lawrence Lessig, available at <http://www.washingtonpost.com/wp-dyn/articles/A58249-2004Apr7.html>

¹³ Draft Report, p. 147.

precedent and practice, it disturbs the marketplace and increases risk, but what the Report proposes is an order of magnitude greater: To force fair use on a market that has developed under an entirely different system. This will subject the Australian marketplace to two layers of uncertainty – the short- and medium-term wave of litigation to test the boundaries of this new doctrine, as well as the long-term uncertainty inherent in fair use, even after judicial precedent has been developed. Particularly in the case of the short and medium-term, the new approach is likely to upend the existing marketplace, ultimately harming consumers.

If ambiguity is on one side of the fair use coin, flexibility is on the other. The plasticity of the fair use doctrine is undeniably one of its strengths. While the U.S. Chamber appreciates and agrees with the Report’s desire to keep Australian copyright law up to date, one must also consider that the flexibility of fair use empowers courts to expand the doctrine well beyond the scope of a properly crafted limitation enacted by a legislative body in response to appropriate, credible evidence of the need for such a limitation. Such expansion is especially likely where, as here, fair use is introduced in an entirely new environment. The Report stokes fears about how such a flexible doctrine would be implemented by specifically recommending “illustrative purposes”¹⁴ that are go beyond what is agreed as fair use in the United States.

The U.S. Chamber supports appropriate exceptions and limitations to the exclusive rights of copyright owners. In the United States, fair use was developed by decades of judicial precedent that considered features and characteristics of U.S. law and culture. While it is not impossible for fair use to be implemented in an appropriate way in other jurisdictions, it is not the sole route to a properly calibrated copyright system. The Report gives short shrift to concerns that adopting fair use, without the judicial precedent that has shaped the doctrine over time, has the potential to go beyond an adaptive, flexible copyright exception to interpretations so broad that the exception overtakes the rule, undermining the incentive and ability of creators to practice their craft. Ultimately, the decision of whether or not to adopt fair use in Australia should not be undertaken based on faulty premises, nor should the likely and potential disturbances to the existing marketplace and the rights of creators be ignored.

¹⁴ Draft Report, pg. 154.

b. Patents

Regulatory Data Protection

Regulatory data protection (RDP) protects innovative companies against the unfair commercial use of their data during the marketing approval process. RDP, as a compliment to patent protections, allows a biopharmaceutical company to recoup the significant investment needed to generate the data required for the marketing approval of a new drug. Currently, Australian law provides for five year of RDP and the Productivity Commission's draft recommendation 9.3 calls for the term to remain at five years¹⁵. This represents an exclusivity level far below the U.S.-standard of 12 years and is a significant roadblock for innovative companies that are stimulating research and development in treatments for some of the riskiest and most complex issues facing human health. Australia recently announced plans to further develop its domestic pharmaceutical industry and create an A\$20Billion Medical Research Fund to help Australia achieve even greater international prominence as a center for medical search and (presumably) pharmaceuticals development. In order to grow the domestic pharmaceutical industry in Australia and continue to attractive new, innovative medicines into the market, the U.S. Chamber recommends an extension of the term of RDP to one similar to its high-income trading partners.

Inventive Step Threshold

The U.S. Chamber appreciates the Commission's recognition that follow-on patents represent an important part of the overall innovation process. In many cases, cumulative innovation enables the creation of medicines which improve patient outcomes. However, the U.S. Chamber is concerned by the Commission's draft recommendation 6.1 regarding amending the inventive step threshold included in the Patent Act¹⁶. Broadly, the Commission's proposal to raise the inventive step threshold appears to be inconsistent with Australia's international obligations under the TRIPS agreements and mirrors the troubling initiatives undertaken in other nations to adapt patentability standards as the current government or judicial system sees fit. In India, the government has added an additional hurdle for patentability known as the "enhanced efficacy" requirement, which in practice deters further investment into the R&D of existing molecules. In Canada, the Canadian Judiciary has utilized an arbitrary heightened standard for patent utility to revoke existing patents. Industry has actively engaged with both governments to convey that the additional patentability standards are both inconsistent with the country's TRIPS obligations and disruptive of the

¹⁵ Draft Report, Pg. 289

¹⁶ Draft Report, pg. 186

innovative life cycle process. The U.S. Chamber is dismayed to see similar proposals to raise the inventive step threshold under discussion in Australia.

Additionally, the U.S. Chamber is concerned with Commission's intention to modify the inventive step threshold in the Patent Act in order to "better target socially valuable inventions."¹⁷ The Commission fails to define what is considered socially valuable. The U.S. Chamber is worried that an arbitrary definition of socially valuable could lead to discrimination against certain types of technology. Consequently, we encourage the Commission to ensure that the inventive step threshold, as defined by the Patents Act, is consistent with Australia's international obligations under TRIPS.

Innovation Patent System

The U.S. Chamber has concerns with innovation patent systems, known elsewhere as utility model patents or petty patents, in many markets around the world. The U.S. Chamber is troubled by the lower inventiveness criteria for innovation patents relative to invention patents. This, in turn, makes it more difficult to invalidate innovation patents due to the decreased threshold for inventiveness. We also oppose the abbreviated examination period for innovation patents, which reduces the quality of the patents granted. As a result of these concerns, the U.S. Chamber is supportive of the Commission's draft recommendation 7.1 to abolish the innovation patent system¹⁸. If the Australian government keeps the innovation patents system, we would support raising the level of inventive-step of innovation patents to the same level as standard patents.

Business Method and Software Patents

Patents are critical to driving global innovation. As noted previously, the U.S. Chamber's Index delineates the economic benefits of robust IP protection. Specifically, economies with strong patent protection are more likely to have increased inventive activity, a larger growth in high-tech sectors, and greater foreign direct investment. Industry has been concerned by the recent Federal Court cases that move towards a stricter view of software patentability, which would raise the bar for patentability beyond the current requirement of producing a physical effect. The Productivity Commission's draft recommendation 8.1 explicitly recommends that the government "exclude business method and software from patentable subject matter."¹⁹ The U.S. Chamber broadly opposes efforts to discriminate eligible subject matter for patentability by area of technology. Further, discriminating against

¹⁷ Draft Report, Pg. 186

¹⁸ Draft Report, Pg. 231

¹⁹ Draft Report, Pg. 252

categories of invention is inconsistent with Article 27(1) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) treaty, of which Australia is a signatory. As such, the U.S. Chamber encourages the Productivity Commission to recommend that business method and software patents continue to be considered patentable subject matter.

Extension of Patent Term

Extension of term (EoT) of patents enables an innovative company to file for additional patent life in order to compensate for the time lost during the regulatory approval process. EoT provides a critical incentive for the innovator to invest in the time-consuming and expensive pharmaceutical drug development process. Creating an environment which incentivizes innovative research is critical to the discovery of new ground-breaking medications, and this system must be supported by robust IP laws, including patent term extension. Recommendation 9.2 of the Productivity Commission's Draft Report states that the "extension of term in Australia should only be granted through a tailored system which explicitly allows for manufacture for export in the extension period."²⁰ Limiting the circumstances under which EoT can be applied undermines the full patent right and is inconsistent with the fundamental purpose to restore patent term to compensate for regulatory delays. Additionally, restricting the term extension to permit export creates a double standard. The extension of term should not be predicated on the destination market of the innovative medicine; the patent life should not be limited based on whether the drug is available to domestic or foreign consumers. It also appears to be inconsistent with the terms of the US-Australia Free Trade Agreement, which requires such adjustments be made to compensate for marketing approval delays.²¹ Moreover, both Parties have expressed their understanding that, where such an adjustment of term is granted, Australia may permit export during that term "only for the purposes of meeting the marketing approval requirements of Australia or another territory."²² The U.S. Chamber encourages the Productivity Commission to recommend that the Australian Government maintain the current provisions on extension of patent term which fulfills its purpose to compensate for regulatory delays by ensuring the same rights are conferred as during the base twenty year term.

Thank you for your kind consideration of these comments. For all the reasons outlined above, we urge the Government of Australia to move forward in a spirit of

²⁰ Draft Report, Pg. 274

²¹ US-Australia Free Trade Agreement Article 17.9.8(b).

²² See Letter from Mark Vaile, Australian Minister for Trade, to Ambassador Robert Zoellick, US Trade Representative (May 18, 2004)

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preserving and optimizing the appropriate incentives for innovative and creative activity that are already integral to Australia's legal and economic culture, and continuing to enhance legal certainty for creators and innovators. We welcome the opportunity to discuss these views at any time.

Respectfully submitted,

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Global Intellectual Property Center

U.S. Chamber of Commerce