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SWINBURNE UNIVERSITY OF TECHNOLOGY

9 June 2016

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

Dear Mr Harris,

Submission to the Productivity Commission's inquiry into intellectual property arrangements

Thank you for the opportunity to submit to the Productivity Commission's inquiry into intellectual property arrangements.

Swinburne University is leading university in Science, Technology and Innovation, with significant interest in the production, application and regulation of intellectual property.

Please find attached responses to the specific draft findings and recommendations outlined in the Commission's draft report.

Should you require further information please contact Professor Beth Webster

Yours sincerely

Professor Aleksandar Subic
Deputy Vice-Chancellor
Research and Development

Swinburne Research
John Street Hawthorn
Victoria 3122 Australia
PO Box 218 Hawthorn
Victoria 3122 Australia
Telephone +61 3 9214 5223
Facsimile +61 3 9214 5267
www.swinburne.edu.au/research
ABN 13 628 586 699
CRICOS Provider 00111D

Intellectual Property Arrangements

Response to draft report of the Productivity Commission

Swinburne University of Technology
24 Wakefield Street, Hawthorn

03 June 2016

DRAFT RECOMMENDATION 2.1

In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and have regard to the principles of:

• *effectiveness*, which addresses the balance between providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely
• *efficiency*, which addresses the balance between returns to innovators and to the wider community
• *adaptability*, which addresses the balance between providing policy certainty and having a system that is agile in response to change
• *accountability*, which balances the cost of collecting and analysing policy–relevant information against the benefits of having transparent and evidence–based policy that considers community wellbeing.

Swinburne University of Technology supports draft recommendation 2.1.

DRAFT FINDING 4.1

Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.

Swinburne University of Technology supports draft finding 4.1. Swinburne considers that the government has a role to fund research which provides more evidence on the costs and benefits of the current copyright regime.

DRAFT FINDING 4.2

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

Swinburne University of Technology supports draft finding 4.3.

DRAFT RECOMMENDATION 4.1

The Australian Government should amend the *Copyright Act 1968* (Cth) so the current terms of copyright protection apply to unpublished works.

DRAFT RECOMMENDATION 5.1

The Australian Government should implement the recommendation made in the House of Representatives Committee report *At What Cost? IT pricing and the Australia tax* to amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology. The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

Swinburne University of Technology *strongly* supports draft recommendation 5.1.

DRAFT RECOMMENDATION 5.2

The Australian Government should repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.

Swinburne University of Technology *strongly* supports draft recommendation 5.2.

DRAFT RECOMMENDATION 5.3
The Australian Government should amend the *Copyright Act 1968* (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.
The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.
The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:
• the effect of the use on the market for the copyright protected work at the time of the use
• the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work
• the commercial availability of the work at the time of the infringement
• the purpose and character of the use, including whether the use is commercial or private use.

The Copyright Act should also specify a non–exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

Swinburne University of Technology *strongly* supports draft recommendation 5.3.

DRAFT RECOMMENDATION 6.1
The Australian Government should amend ss. 7(2) and 7(3) of the *Patents Act 1990* (Cth) such that an invention is taken to involve an inventive step if, having regard to the prior art base, it is not obvious to a person skilled in the relevant art.
The Australian Government should state the following in the associated Explanatory Memorandum:
• the intent of this change is to better target socially valuable inventions
• the test should be applied by asking whether a course of action required to arrive at the invention or solution to the problem would have been obvious for a person skilled in the art to try with a reasonable expectation of success.

The Australian Government should explore opportunities to further raise the overall threshold for inventive step in collaboration with other countries in international forums.

Swinburne University of Technology supports draft recommendation 6.1.

DRAFT RECOMMENDATION 6.2
The Australian Government should incorporate an objects clause into the *Patents Act 1990* (Cth) (Patents Act). The objects clause should describe the purposes of the legislation as being to enhance

the wellbeing of Australians by providing patent protection to socially valuable innovations that would not have otherwise occurred and by promoting the dissemination of technology. In doing so, the patent system should balance the interests of patent applicants and patent owners, the users of technology — including follow–on innovators and researchers — and Australian society as a whole.

The Australian Government should amend the Patents Act such that, when making a decision in relation to a patent application or an existing patent, the Commissioner of Patents and the Courts must have regard to the objects of the Patents Act.

Swinburne University of Technology supports draft recommendation 6.2.

DRAFT RECOMMENDATION 6.3

The Australian Government, with input from IP Australia, should explore the costs and benefits of using higher and more pronounced renewal fees later in the life of a standard patent, and making greater use of claim fees to limit the breadth of patent protection and to reduce strategic use of patents.

The Australian Government should seek international cooperation on making greater use of patent fees to help ensure that patent holders are not overcompensated and to limit the costs of patent protection on the community

Swinburne University of Technology supports draft recommendation 6.3.

DRAFT RECOMMENDATION 7.1

The Australian Government should abolish the innovation patent system

Swinburne University of Technology supports draft recommendation 7.1.

DRAFT RECOMMENDATION 8.1

The Australian Government should amend s. 18 of the *Patents Act 1990* (Cth) to explicitly *exclude* business methods and software from being patentable subject matter.

Swinburne University of Technology supports draft recommendation 8.1.

DRAFT RECOMMENDATION 9.1

The Australian Government should reform extensions of patent term for pharmaceuticals such that they are calculated based only on the time taken for regulatory approval by the Therapeutic Goods Administration over and above one year.

DRAFT RECOMMENDATION 9.2

Regardless of the method of calculating their duration (draft recommendation 9.1), extensions of term in Australia should only be granted through a tailored system which explicitly allows for manufacture for export in the extension period.

DRAFT RECOMMENDATION 9.3

There should be no extension of the period of data protection, including that applicable to biologics.

Further, in the context of international negotiations, the Australian Government should work with other nations towards a system of eventual publication of clinical trial data in exchange for statutory data protection

DRAFT RECOMMENDATION 9.4

The Australian Government should introduce a transparent reporting and monitoring system to detect any pay-for-delay settlements between originator and generic pharmaceutical companies. This system should be administered by the Australian Competition and Consumer Commission.

The monitoring should operate for a period of five years. Following this period, the Australian Government should institute a review of the regulation of pay-for-delay agreements (and other potentially anticompetitive arrangements specific to the pharmaceutical sector).

DRAFT RECOMMENDATION 9.5

The Australian Government should reform s. 76A of the *Patents Act 1990* (Cth) to improve data collection requirements. Thereafter, extensions of term should not be granted until data is received in a satisfactory form.

After five years of data has been collected, it should be used as part of a review to consider the ongoing costs and benefits of maintaining the extension of term system.

Swinburne University of Technology supports draft recommendations 9.1 – 9.5.

Swinburne notes that compulsory licensing of drug trial data is a good alternative to compulsory public release of data after 5 years. A license would give compensation to the party who paid for the cost of the data without necessitating expensive duplicate trials.

DRAFT RECOMMENDATION 10.1

Australia should not join the Hague Agreement until an evidence-based case is made, informed by a cost–benefit analysis.

Swinburne University of Technology supports draft recommendation 10.1.

DRAFT RECOMMENDATION 11.1

In order to improve the effectiveness of the trade mark system, the Australian Government should:

• restore the power for the trade mark registrar to apply mandatory disclaimers to trade mark applications, consistent with the recommendation of the Advisory Council on Intellectual Property in 2004

• repeal part 17 of the *Trade Marks Act 1995* (Cth) (Trade Marks Act)

• amend s. 43 of the Trade Marks Act so that the presumption of registrability does not apply to the registration of marks that could be misleading or confusing

• amend the schedule of fees for trade mark registrations so that higher fees apply for marks that register in multiple classes and/or entire classes of goods and services.

IP Australia should:

• require the Trade Marks Office to return to its previous practice of routinely challenging trade mark applications that contain contemporary geographical references (under s. 43 of the Trade Marks Act).

Challenges would not extend where endorsements require goods and services to be produced in the area nominated

• in conjunction with the Australian Securities and Investments Commission, link the Australian Trade Mark On-line Search System database with the business registration portal, including to ensure a warning if a registration may infringe an existing trade mark, and to allow for searches of disclaimers and endorsements.

Swinburne University of Technology supports draft recommendation 11.1.

DRAFT RECOMMENDATION 11.2

The Australian Government should amend s. 123 of the *Trade Marks Act 1995* (Cth) to ensure that parallel imports of marked goods do not infringe an Australian registered trade mark provided that the marked good has been brought to market elsewhere by the owner of the mark or its licensee. Section 97A of the Trade Marks Act 2002 (New Zealand) could serve as a model clause in this regard.

Swinburne University of Technology supports draft recommendation 11.2.

DRAFT RECOMMENDATION 12.1

The Australian Government should proceed without delay to implement the Advisory Council on Intellectual Property 2010 recommendation to amend the *Plant Breeder's Rights Act 1994* (Cth) to enable essentially derived variety declarations to be made in respect of any variety.

Swinburne University of Technology supports draft recommendation 12.1.

DRAFT RECOMMENDATION 14.1

The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act).

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property

Swinburne University of Technology *does not* support draft recommendation 14.1.

Section 51(3) of the *Competition and Consumer Act 2010* provides a limited exception from most of the competition law prohibitions for licensing or assignment of IP.

We consider that there is merit in retaining this provision. Patents are legal monopolies which permit the owner to exclude all others from use for up to 20 years. As is well recognised, once invented, it is optimal for the idea to be accessed by all people without charge. Any licensing of the ideas behind the patent represents an increased use of an idea. Hence, any licencing of an idea is an improvement on the default position of a single user only. Any barrier the law places on licensing will increase the incentive for the owner to not license and therefore limit the legal use to themselves.

DRAFT RECOMMENDATION 15.1

All Australian, and State and Territory Governments should implement an open access policy for publicly-funded research. The policy should provide free access through an open access repository for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.

The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.

Swinburne University of Technology *strongly* supports draft recommendation 15.1.