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Productivity Commission delivers final Report on its inquiry into Australia's intellectual property arrangements

Final report delivered to the Australian Government

Following a 12 month inquiry into Australia's intellectual property (IP) arrangements, the Productivity Commission has today delivered its final report to the Australian Government. The final report must be tabled in Parliament within the next 25 Parliamentary sitting days and will accordingly be made publicly available at that time.

Background

In August 2015 the Australian Government asked the Productivity Commission to conduct a broad-ranging inquiry into Australia's intellectual property (IP) arrangements.

The Commission's Terms of Reference asked it to consider whether current IP arrangements provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of creative works.

In October 2015 the Commission released its Issues Paper inviting submissions on the inquiry, which we reported here. In response, it received a total of 148 public submissions in response to its Issues Paper.

Draft report

The Commission released its approximately 600-page draft report on Australia's IP arrangements on 29 April 2016. Three key areas covered by the draft report related to copyright, patents and trade marks.

Copyright

Term and scope

The Commission considered that the term of protection for most works (ie life of the author plus 70 years) is considerably longer than necessary to 'incentivise' the creation of those works. It recommends a significantly shortened period of protection of around 15–25 years after creation. The Commission also recommended that unpublished works have the same terms of protection as published works.

Copyright licensing and exceptions

The Commission emphasised the importance of licensing in enhancing the overall efficiency of the copyright system in ensuring access to creative works.

In relation to copyright exceptions, it recommended:

— The current fair dealing exceptions – which are heavily weighted in favour of right holders – be replaced by a broad exception for fair use. The proposed fair use exception

would allow all uses of copyright material that do not materially reduce a rights holder's commercial exploitation of their work at the time of use and could therefore more readily facilitate fair use of orphan works (where the author is unknown) and unavailable works (where the author refuses to supply the market). This exception therefore goes further than the fair use model recommended by the Australian Law Reform Commission in its report on Copyright and the Digital Economy.

— The current parallel import restrictions for books should be repealed as these restrictions have led to higher prices being paid for books purchased in Australia.

— The Government should amend the *Copyright Act 1968* to clarify that it is not an infringement for Australian consumers to circumvent geoblocking technology (which restricts a consumer's access to websites and digital goods and services to within their 'home market'). It considers that this technology unfairly results in Australian consumers paying higher prices (often for a lesser or later service) than overseas consumers.

Patents

Standard patents

The Commission identified 2 key problems in Australia's patent system:

— The rights afforded to patent holders are excessively strong.

— The current rules have allowed for the creation of 'patent thickets' of low-value patents and the adoption of 'evergreening' practices that do not benefit the community.

The Commission found that these problems raised the costs of innovation and frustrated the efforts of follow-on innovators and researchers.

The Commission recommended that the threshold of 'inventiveness' required for patentability be raised to better target 'socially valuable' inventions and 'additional' inventions that would not otherwise have been developed. It recommends exploring the use of higher patent renewal fees later in the life of a standard patent, and making greater use of claim fees to limit the scope of patent protection sought and, consequently, the costs of patent protection on the community.

Innovation patents

The Commission considered that the current innovation patent system is costly, burdensome, and harming small and medium-sized enterprises (the very entities the system was designed to support). It recommended that the innovation patent system be abolished.

Business methods and software patents

The Commission recommended the explicit exclusion of business methods and software from being patentable subject matter. It considered that allowing patents for this type of subject matter does not encourage new and valuable innovation and can be used to block the implementation of new ideas.

Pharmaceutical patents

The Commission recommended that a range of adjustments be made to the pharmaceutical patent system, including by limiting patent term extensions so that they are calculated only on the time taken for regulatory approval by the Therapeutic Goods Administration over and above one year.

Trade marks

The main concern of the Commission was that legislative change has resulted in an imbalance between incumbent firms and new competitors due to a 'cluttering' of the Register with registrations that are broader in scope than necessary. This has also led to consumer confusion in some cases.

The Commission recommended:

— enabling the Trade Marks Office to once again apply 'disclaimers' in 'excessive' terms sought to be registered by incumbents

— that the Trade Marks Office return to its practice of routinely challenging trade mark applications containing geographical references

— abolishing defensive trade marks

— increasing fees for applications that seek overly broad trade mark rights

— prompting prospective business names registrants to search the Trade Marks Office database for conflicting marks at the point of registration.

The Commission also recommended amending s 123 of the *Trade Marks Act 1995* to ensure that parallel imports of marked goods do not infringe an Australian trade mark registration, provided that the goods have been brought to market elsewhere by the trade mark owner or its licensee.

Consultation process

The Commission received 472 formal submissions following the release of the draft report. These submissions represented a broad range of interests from Australia and overseas and included submissions from individuals and small independent companies and booksellers to large corporations and government agencies.

A large number of submissions were from authors and publishers who expressed concerns about removal of parallel importation restrictions for books, introduction of a broad 'fair use' exception, and a proposed reduction in the copyright term. A major pharmaceutical company expressed concerns that the reduction in protection for pharmaceuticals would not increase patient access to medical innovation but would reduce the likelihood of companies making the investment necessary to bring new medical technologies to Australian patients.

In the course of its inquiry, the Commission held informal consultations with government departments and agencies, regulatory bodies, peak industry groups in the government sector and a number of private organisations and individuals. Public hearings were in held June 2016 in Canberra, Melbourne and Sydney.

Publication of the final report

The final report which has been handed to the Australian Government today must be tabled in Parliament within 25 Parliamentary sitting days and will accordingly be made publicly available at that time.

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