

Summary note on the Productivity Commission's Intellectual Property Arrangements Draft Report

By Michael Williams and Xavier Fijac

BACKGROUND

The Productivity Commission (**PC**) has released its Intellectual Property Arrangements Draft Report on 29 April 2016 (**Draft Report**) (<http://www.pc.gov.au/inquiries/current/intellectual-property/draft>).

The Draft Report follows the PC Issues Paper dated October 2015.

KEY ISSUES

The PC has recommended sweeping changes to copyright law in Australia based on its adoption of the following positions:

- Copyright arrangements are “weighed too heavily in favour of copyright owners, to the detriment of the long term interests of both consumers and intermediate users”.¹
- Enforcement measures to encourage Internet service providers to cooperate with rights holders, and litigation, have only had a “modest impact in reducing infringement”, and further legislative change is unlikely to improve compliance with the law.²
- Infringement declines with better content availability and the timely release of content to Australian consumers.³
- Increased protection for rights holders will have limited impact on infringement.⁴

SUMMARY ADVICE

Topline PC recommendations:

Term

- Reduce copyright term from 70 year duration to 25 years, by seeking mutual amendment of terms in collaboration with other countries.⁵
- Reduce the term of protection for unpublished works from perpetuity to the current terms of copyright protection.¹⁰

Fair Use

- Replace Fair Dealing with a US-style Fair Use exception, with the acknowledgment that legal uncertainty and increased litigation will be the result.⁶ The fair use exception includes a new list of ‘fairness factors’:⁷
 - effect of the use on the market or value of the copyright protected work at the time of the use;
 - amount, substantiality or proportion of the work used, and the degree of transformation applied to the work;
 - existing commercial availability of the work;
 - purpose and character of the use, including whether the use is commercial or private.

There would also be a non-exhaustive list of “illustrative uses” which will constitute fair use.

- Extend fair use to cover the use of orphan works and commercially unavailable or out-of-commerce works.⁸

Parallel Importation

- Repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.⁹

Safe Harbour Scheme

- Expand the safe harbour scheme to cover the broader set of online service providers such as search engines.¹¹

Promoting global cooperation

- Australia should revive its role in supporting opportunities to promote global cooperation on intellectual property policy among intellectual property offices through the

1 Draft Report, p 16.

2 Draft Report, p 477.

3 Draft Report, p 477.

4 Draft Report, p 477.

5 Draft Finding 4.2; Draft Report, p 17.

6 Draft Report, p 18.

7 Draft Report, p 18.

8 Draft Report p 121.

9 Draft Recommendation 5.2, Draft Report p 30.

10 Draft Recommendation 4.1, Draft Report p 119.

11 Draft Recommendation 18.1, Draft Report p 37.

12 Draft Finding 17.1; Draft Recommendation, 17.1, Draft Report p 37.

WIPO and the WTO to avoid duplication and reduce transaction costs.¹²

Geo-blocking

- Legalise circumvention of geo-blocking as recommended by the 2013 House of Representatives Committee Report *At What Cost? IT Pricing and the Australia Tax (House Report)* to make it clear that Australian consumers may legally circumvent geo-blocking technology.¹³
- Avoid entering international treaties and trade agreements which impose obligations to prevent consumers using circumvention of geo-blocking technologies.¹⁴
- The geo-blocking recommendation was not present in the Issues Paper.
- There are more radical proposals on geo-blocking in the House Report which have the potential to impact commercial licensing arrangements. Other than legalising circumvention for consumers (explicitly referred to by the Draft Report), these recommendations include:
 1. A right of resale for digital content for consumers, business, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem;¹⁵
 2. enacting a ban on geo-blocking as an option of last resort, should persistent market failure exist in spite of the changes to the *Competition and Consumer Act* and the *Copyright Act* recommended in the report;¹⁶
 3. investigating the feasibility of amending the *Competition and Consumer Act* so that contracts or terms of service which seek to enforce geo-blocking are considered void.¹⁷

Competition Law

- The Draft Report reiterates the Harper Report¹⁸ recommendation that the Australian Government should repeal s. 51(3) of the *Competition and Consumer Act* which currently provides an exception or intellectual property transactions from prohibitions under competition law.¹⁹

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13 Draft Recommendation 5.1, Draft Report p 30; House Report, July 2013, Recommendation 5, p xiii.

14 Draft Recommendation 5.1, Draft Report p 30.

15 House Report, Recommendation 7, p xiii.

16 House Report, Recommendation 9, p xiii.

17 House Report, Recommendation 10, p xiii.

18 Competition Policy Review, Final Report, March 2015.

19 Draft Recommendation 14.1, Draft Report p 36; Recommendation 7, Competition Policy Review, Final Report, March 2015.