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## **Australian Government invites submissions on Productivity Commission's final report on its inquiry into Australia's intellectual property arrangements**

### ***Final report publicly released***

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On 20 December 2016, the [Australian Government](#) publicly released the Productivity Commission's [final report](#) into Australia's intellectual property (IP) arrangements.

This follows a 12-month inquiry and an extensive public consultation process including the release of a [draft report](#) on 29 April 2016 and the [delivery](#) of the final report to the Australian Government on 23 September 2016.

In its final report, the Productivity Commission concludes that Australia's IP arrangements are in need of reform and that the current arrangements do not provide an appropriate balance between access to ideas and products and encouraging innovation, investment and the production of creative and innovative works.

### ***Findings and recommendations***

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The Commission makes a number of findings and recommendations in its final report – some of which differ from those stated in its draft report. If its recommendations are implemented, this will shift the balance in favour of greater access to creative works and technologies with a corresponding reduction in protection to rights holders.

Key areas covered in the final report relate to copyright, patents, trade marks and public institutions.

## **Copyright**

### ***Term and scope***

The Commission considers that the scope of copyright protection has expanded over time, often with no transparent or evidence-based analysis, and heavily favours copyright holders. It considers that copyright does not solely target works where 'freeriding' by users would undermine incentives to create new works and is therefore 'skewed too far in favour of copyright owners to the detriment of consumers and intermediate users.'

The Commission makes no recommendations regarding an appropriate copyright term. However, it finds that the optimal copyright term is likely to be considerably less than the current term of protection of the life of the author plus 70 years.

It also maintains that no case exists for unlimited copyright protection for unpublished works and that the corresponding term of protection should be less than the current term for published works.

## **Copyright use and licensing**

The Commission recommends increasing access to copyright material by introducing amendments to the *Copyright Act 1968*, including by:

- making unenforceable any part of an agreement that purports to prevent or restrict the use of material that would otherwise be permitted by an exception to copyright infringement
- clarifying that it is not an infringement of copyright for consumers to circumvent 'geoblocking' technology (which restricts access to content based on a user's 'home market')
- no later than the end of 2017 – repealing current parallel importation restrictions on books – which allow rights holders to engage in geographic price discrimination and increase prices for Australian consumers
- expanding the safe harbour scheme for carriage service providers to cover all providers of online services.

## **Collecting societies**

The Commission also notes concerns about a 'lack of transparency' in respect of collecting societies, and in particular, a lack of information and disclosure around the distribution of funds to rights holders. It recommends that the Australian Competition and Consumer Commission review the current code of conduct for collecting societies to determine whether it represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

## **Fair use**

The Commission reaffirms its finding that Australia's current exceptions for fair dealing are too narrow and prescriptive, do not reflect the way people today consume and use content in the digital world, and do not accommodate new legitimate users of copyright material.

It considers that fair dealing is unduly focused on the type or purpose of use and that it should instead be targeting the *effect* of any potential use on the incentives to create new works.

It recommends that the Australian Government replace the current fair dealing exceptions for use of copyright works with the open-ended fair use exception recommended by the Australian Law Reform Commission (ALRC) in its 2014 report on [Copyright and the Digital Economy](#).

That fair use model would allow any use of a copyright work which is 'fair' by reference to 4 'fairness factors': (1) the effect of the use on the purpose and character of the use; (2) the nature of the copyright material; (3) the amount and substantiality of the part used; and (4) the effect of the use upon the potential market for, or value of, the copyright material. It also provides a non-exhaustive list of illustrative purposes.

The Commission's recommendation is supported by a 2016 [Ernst & Young cost-benefit analysis](#) which considers the impact of the ALRC's previous recommendations to change to Australian copyright laws, including by implementing a 'US style' fair use exception.

## **Orphan works**

While adopting the fair use model would facilitate the use of orphan works, the Commission also recommends that the Australian Government implement the ALRC's recommendation to limit liability for use of orphan works (for which the copyright owners cannot be identified), where a user has undertaken a diligent search to locate the relevant rights holder.

## **Patents**

The Commission confirms its earlier finding that the patents system grants rights too readily, allowing a proliferation of low-quality patents, which frustrates follow-on inventors and raises the costs of innovation.

It recommends:

- adding an objects clause to the *Patents Act 1990* (Cth) to describe that the purpose of the legislation is to enhance the wellbeing of Australians by promoting technological innovation and the transfer and dissemination of technology – and to balance the interests of producers, owners and users of technology.
- further increasing the ‘inventive step’ threshold for grant of a patent
- setting patent renewal fees to promote broader intellectual property policy objectives, rather than merely achieving cost-recovery, and having them increase over the patent term
- abolishing the innovation patent system
- reforming extensions of patent term for pharmaceuticals so that they are only available for patents covering an active pharmaceutical ingredient and are calculated based on the time taken by the Therapeutic Goods Administration for regulatory approval over and above one year.

## Trade marks

One of the Commission’s key concerns is trade mark ‘cluttering’ where the Trade Marks Register contains a large number of unused or ‘overly broad’ marks – which it considers undermines the effectiveness of the trade mark system by making it harder for other parties to identify a viable mark. However, the Commission has backed away from its earlier recommendations to abolish defensive trade marks and to increase trade mark fees, as its analysis clarified that these measures would do little to reduce trade mark cluttering.

Instead, it recommends:

- reducing the grace period for seeking removal of a trade mark registration for non-use from 5 years to 3 years
- removing the presumption of registrability in relation to potentially ‘deceptive or confusing’ marks under s 43 of the *Trade Marks Act 1995*
- ensuring the parallel imports of marked goods do not infringe an Australian trade mark registration where the goods are brought to market elsewhere by the trade mark owner or its licensee
- requiring a statement of intention to use at application, registration and renewal
- in conjunction with the Australian Securities and Investment Commission, linking the Australian Trade Marks Office Search System with the business name registration portal, including to provide a warning if a business name registration may infringe an existing trade mark.

## Public institutions

The Commission also makes a number of recommendations about public institutions and institutional arrangements including:

- that Australian, State and Territory governments implement an open access policy for publicly funded research which provides free and open access arrangements for all publications funded by governments, directly or through university funding, within 12 months of publication
- establishing a standing (interdepartmental) IP Policy Group and formal working arrangements to ensure agencies work together within the policy framework outlined in the Commission’s report

- charging the IP Policy Group and the Department of Foreign Affairs and Trade with the task of developing guidance for IP provisions in international treaties
- introducing a specialist IP list in the Federal Circuit Court limiting trials to 2 days, imposing limitations on costs and damages and including a small claims procedure
- expanding the jurisdiction of the Federal Circuit Court so that it can hear all IP matters.

### ***Call for submissions on final recommendations***

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In a joint [media release](#), the Minister and Assistant Minister for Industry, Innovation and Science indicated that the Australian Government would respond to the report in mid-2017.

The Department of Industry, Innovation and Science is undertaking a [consultation](#) process to inform the Australian Government's response to the final report. In particular, it invites stakeholder submissions which focus on the Commission's final recommendations which are additional or different to those contained in the Commission's draft report.

These include recommendations relating to contracting out, review of the voluntary code of conduct for collecting societies, limitation on liability for use of orphan works, changes to the proposed inventive step threshold for patents and extensions to the patent term for pharmaceuticals, reducing trade mark cluttering by focusing on non-use actions, changes to the Australian Government's approach to IP policy both domestically and internationally, and changes to the Federal Circuit Court to improve access to enforcement. A list of the new and amended recommendations can be found [here](#).

The consultation process is open until **14 February 2017**.

*For further information please contact:*

**Rachel Chua**

Senior Executive Lawyer

T 02 6253 7086

[rachel.chua@ags.gov.au](mailto:rachel.chua@ags.gov.au)

**Kenneth Eagle**

National Manager Commercial

T 03 9242 1290

[kenneth.eagle@ags.gov.au](mailto:kenneth.eagle@ags.gov.au)

**Adrian Snooks**

National Leader Commercial

T 02 6253 7192

[adrian.snooks@ags.gov.au](mailto:adrian.snooks@ags.gov.au)

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