

C©**PYRIGHT**AGENCY

Submission to Competition Policy Review June 2014

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1 SUMMARY OF SUBMISSION

The Issues Paper for the Review raises some issues regarding the relationship between competition policy and intellectual property, including copyright.

In this submission, we address:

- objectives of copyright law
- relationship between copyright and competition regulation
- copyright and innovation
- costs of introducing new copyright exceptions
- efficient licensing in the digital economy

In answer to a specific question raised in the Issues Paper, we are not aware of restrictions arising from IP laws that have an unduly adverse impact on competition.

2 ABOUT COPYRIGHT AGENCY

Copyright Agency is a not-for-profit copyright management organisation (CMO). It has more than 26,000 members, who include writers, artists and publishers.

Copyright Agency is appointed by the Australian Government to manage statutory licences in the Copyright Act for educational and government use of text and images, and to manage the artists' resale royalty scheme. It also offers a range of other licences as non-exclusive agent for its members, including to the corporate sector.

Copyright Agency also manages Viscopy's licensing and membership services. Viscopy is a CMO whose members are visual artists.

Both Copyright Agency and Viscopy are affiliated with similar organisations in other countries, enabling the licensing of foreign content in Australia, and the collection of royalties for the use of Australian content overseas.

The terms of licences managed by Copyright Agency and Viscopy are usually negotiated with licensees but can be determined by the Copyright Tribunal if negotiations fail.¹ The Copyright Tribunal can also determine distribution arrangements.

3 OBJECTIVES OF COPYRIGHT

The purpose of copyright is to provide an environment that fosters the creation of new content for the benefit of society of a whole. It does this by:

- providing an incentive for the creation of new content, by enabling those who create and invest in new content to set the terms on which others can use the content, which can (but may not necessarily) include payment directly associated with the consumption of content.
- enabling reward to people who have created content that others find valuable, but lack the skill or time to produce for themselves.

¹ www.copyrighttribunal.gov.au

The government-appointed committee whose report led to the introduction of Australia's current Copyright Act said:

The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.²

In order to achieve its objectives, the copyright system treats different types of uses of content in different ways. Some uses require the permission (licence) of the copyright owner, enabling the copyright owner to set the terms of use. Some uses do not require permission, but do require fair payment under statutory licences. Some uses do not require permission or payment because they are covered by special 'exceptions' (defences to copyright infringement).

The *Report on Intellectual Property Legislation under the Competition Principles Agreement* (Ergas Report), released in 2000, described the role of copyright as follows:

As with other types of IP, the principal issue that copyright seeks to address is possible free riding on investment of intellectual effort. It seeks to do this by granting the right to prevent unauthorised copying, as well as other exclusive rights. This channels creative endeavour into new ways of expressing ideas, rather than encouraging mere copying, and granting such exclusive rights to generate a return is necessary to promote adequate levels of investment in creative effort. However, it is also in the public interest to ensure dissemination of ideas to the public, thus permitting their use and subsequent development. For this reason, copyright protects only forms of expression, and not the underlying ideas themselves; the ideas in a copyright protected work can be freely used by others as long as they are expressed in a different form.

There are also important exceptions to the rights of copyright owners. For example, fair dealing provisions and/or compulsory licences are contained in the copyright regime to ensure appropriate access to material for a range of social policy reasons. As in other areas of IP, the key to copyright reform is to set the level of the exclusive right granted by the statute so the interests of producers and consumers are both maximised.

Non-economic aspects of copyright

Australia's copyright system, following international standards, includes obligations relating to recognition and respect for creators, commonly referred to as 'moral rights' or 'non-economic rights'. The obligations require attribution of creators, and maintaining the integrity of creative content. Creators are entitled to take legal action for failure to attribute and 'derogatory treatment' of their work, whether or not they own copyright.

These moral rights are one indication that the policy objectives of copyright are not purely economic.

4 RELATIONSHIP BETWEEN COPYRIGHT AND COMPETITION POLICY

The Ergas Report described the relationship between intellectual property and competition as follows:

² Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations in the Copyright Law of the are Desirable in the Copyright Law of the Commonwealth (1959), known as the Spicer Report.

Intellectual property laws on one hand and competition policy on the other are ... largely complementary. The intellectual property system serves to promote innovation, which is a key form of competition. Competition policy, by keeping markets open and effective, preserves the primary source of the pressure to innovate and to diffuse innovations.

In a similar vein the National Competition Council said in a 1998 report said:

... properly understood, intellectual property rights and competition laws are compatible and consistent. They share the same overall objective of enhancing community welfare. Competition enhances community welfare by ensuring that, over time, new and better products, and existing products at lower cost, are offered to consumers. Intellectual property laws seek to enhance community welfare by encouraging innovation and invention through granting exclusive property rights. Innovation and invention result in new and better products becoming available to consumers. Competition can spur innovation and invention by providing incentives to undertake research and development.

And more recently, the Australian Law Reform Commission (ALRC) said:

Copyright law and competition law are largely complementary in that both seek to promote innovation, higher living standards, and expand choices and benefits to society.

5 COPYRIGHT AND INNOVATION

As indicated above, encouraging innovation is a core objective of intellectual property.

Those seeking to develop businesses based on content produced by others sometimes seek to portray copyright as a barrier to innovation. A number of submissions to the recent review of copyright law by the Australian Law Reform Commission (ALRC), for example, asserted that current copyright law inhibits innovation.

There was, however, no evidence of actual instances in which copyright had unreasonably impeded an innovation that would otherwise have benefited Australian society as a whole. To the contrary, there was evidence of innovative products and services supported by the copyright system.

An example is Massive Open Online Courses (MOOCs), which are being developed by some universities. Australian universities are in a better position compared to their US counterparts, because of the Australian statutory licence for education, which enables the use of any text and images for education without the permissions processes usually required.

Another example is LearningField, a world-first subscription-based platform enabling Australian schools to use and share an unlimited number of extracts from a range of publishers' resources, linked to National Curriculum and other curricula.³

There was also evidence of a number of innovative products and services for other types of content, such as music.⁴

³ www.copyright.com.au/learningfield

⁴ For example, as outlined in the submissions from APRAIAMCOS.

A report by PwC, *The Startup Economy: How to support tech startups and accelerate Australian innovation* (commissioned by Google) says:

Australia has one of the best regulatory environments for entrepreneurship, and an engaged and strengthening culture of inclusion and openness. However, we have a considerably higher 'fear of failure' rate than many other innovative countries (e.g. US & Canada) which is constraining the growth of our tech startup sector.

There is no reference in the report to any constraints from the copyright system.

Similarly, a recent report from *StartupAUS, Crossroads: An action plan to develop a vibrant tech startup ecosystem in Australia* (April 2014) makes no reference to copyright as an impediment. To the contrary, its recommendations include enhancing government funding programs that support entrepreneurs, including through protection and exploitation of intellectual property.

The 2011 Hargreaves Review in the UK considered the role of the copyright system in the development of technology companies, and whether (as had been suggested by some), a US-style 'fair use' exception would have made a difference in the UK:

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.⁵

6 COSTS OF INTRODUCING NEW COPYRIGHT EXCEPTIONS

There are calls from some for new 'exceptions' in the Copyright Act to allow uses of content without permission or payment.

The outcomes sought by those making the calls vary widely. For example, Choice wants greater and cheaper access to content for consumers (who merely consume content, without creating anything new), Google wants to expand its business interests based on the digitisation and sharing of other people's content, and others are interested in enabling the creation of new content based on existing content.

Despite these widely varying aims, and the different social values of each, the ALRC essentially recommended a single 'one size fits all' amendment to the Copyright Act. It recommended a broad, new, 'flexible' exception, based on a provision in the US Copyright Act that is referred to as 'fair use'. That term has a specific legal meaning that does not necessarily reflect common understandings of what 'fair use' might mean. In addition, the US provision operates in the particular context of US law (including other provisions in the US Copyright Act, and provisions in the US Constitution).

The ALRC acknowledged that its recommendations were based on hypothesis rather than evidence:

Stakeholders referred to the need for proper evidence before law reform is introduced. However, the available economic evidence is incomplete and contested. The ALRC

⁵ <http://www.ipa.gov.uk/ipreview.htm> at [5.17].

*considers that, given it is unlikely that reliable empirical evidence will become available in the near future, law reform should proceed, based on a hypothesis-driven approach*⁶

In considering a recommendation by the Copyright Law Review Committee (CLRC) for a broad new exception similar to that recently recommended by the ALRC, the Ergas Committee said:

Because they are relatively open-ended, the factors recommended by the CLRC will require careful judicial construction. The Committee does not believe that offsetting benefits have been identified to justify bearing the costs and uncertainties this entails. More generally, we believe that the current arrangements reduce the transactions costs involved in operating the copyright system, and make for enhanced efficiencies.

At a recent conference, Professor Ergas indicated similar concerns with the ALRC's central recommendation. He referred to the high threshold and substantial evidence required to disturb existing arrangements, the need to ensure that the risks associated with change are manageable, and the importance of ensuring that adaptation of the copyright system to its changing environment is efficient.⁷

7 COPYRIGHT LICENSING SYSTEMS

A key part of the copyright system is licensing arrangements through CMOs (also known as collecting societies). These enable efficient use of a broad range of content without the need for individual negotiations.⁸

For example, all copying and sharing of text and images in Australian schools is covered by a three-year, flat rate agreement between the body representing the school sector and Copyright Agency. Copyright Agency distributes the licence fees to content creators, based on information from surveys of usage in schools. The arrangement enables teachers to choose the best content for their needs (e.g. additional material for advanced students), and supports the creation of new resources.

The Copyright Tribunal has power to determine licence terms for licences managed by CMOs, in the rare cases they cannot be determined through negotiation. The Tribunal also has power to determine arrangements for the distribution of licence fees to content creators.

Other oversight mechanisms for Copyright Agency include provision of annual reports to the Attorney General for tabling in Parliament, and reporting annually to the Code Reviewer (a former Federal Court judge) on compliance with the Code of Conduct for Collecting Societies.

⁶ A report provided to the ALRC purporting to provide evidence of the economic benefits of broad copyright exceptions, *Excepting the Future* (Lateral Economics, 2012), was comprehensively rebutted in a study by George Barker subsequently submitted to the ALRC, *Estimating the Economic Benefits of Fair Use and Other Copyright Exceptions: A Critique of Recent, Research in Australia, US, Europe and Singapore*.

⁷ Transcripts and papers from the conference, the Law and Practice Copyright Symposium (March 2014), will be published in a forthcoming issue of *Copyright Reporter*.

⁸ A report by PwC for Copyright Licensing Agency in the UK and submitted to the Hargreaves inquiry, *An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing*, quantifies the economic benefits of collective licensing by comparing the transaction costs for collective licensing with transaction costs for an 'atomised' framework.

8 EFFICIENT LICENSING IN THE DIGITAL ECONOMY

In a submission to the ALRC, the Australian Competition and Consumer Commission (ACCC) said:

... the ACCC notes that where transaction costs of gaining lawful access to copyright materials are too high, some potentially valuable uses of these materials will not occur, to the detriment of efficiency and welfare.

...

... digital technologies and digital licensing systems can be used to lower the transactions costs for some types of 'low value' uses. The ACCC submits again that the ALRC should explore whether a version of the digital copyright exchange (DCE) should be introduced, as proposed in a 2011 UK report, Digital Opportunity, A Review of Intellectual Property and Growth (the Hargreaves Report). The key benefits identified for this model include the potential for reduced transaction costs, increased transparency in the marketplace as to the relative price of copyright materials and easier facilitation of audit by users and regulatory authorities. In considering this approach, the ACCC submits the ALRC should contemplate how rights holders could be incentivised to join voluntary digital licensing arrangements and thereby lower transaction costs for both copyright holders and users of copyright. The ACCC considers that the benefits of improving incentives to creators and distributors of copyright material need to be balanced against any disincentives to users of copyright material and the consequent costs.

The UK Government accepted the recommendation for a digital copyright exchange, and funded a feasibility study by Sir Richard Hooper, which resulted in the industry-funded Copyright Hub.⁹

The ALRC did not address the desirability of an initiative like a digital copyright exchange for Australia.

9 FURTHER INFORMATION

We would be happy to provide any further information that may be of assistance to the Review, including on copyright-related issues raised by other submitters to the Review process.

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⁹ <http://www.copyrighthub.co.uk/>