



Communications Law Centre, UTS

Submission in Response to the Competition Policy Review
Draft Report

17 November 2014

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Communications Law Centre, UTS

1. Introduction

- 1.1 The Communications Law Centre, UTS (“CLC”) is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate this opportunity to respond to the *Draft Report*.
- 1.2 The CLC will confine the following discussion to comments upon certain issues raised, and Draft Recommendations made, in the *Draft Report* in relation to intellectual property. The discussion below will touch upon the following Draft Recommendations only:
 - Draft Recommendation 7: Intellectual Property Review;
 - Draft Recommendation 8: Intellectual Property Exception; and
 - Draft Recommendation 26: Price Discrimination.

Specifically, the CLC will address these Draft Recommendations as they relate to copyright law and policy.

2. Draft Recommendation 7: Intellectual Property Review

- 2.1 The CLC agrees with the view of the *Draft Report* that the nation’s intellectual property (“IP”) system should be designed to operate in the “best interests of Australians”.
- 2.2 Likewise, the CLC supports the view that IP rights should be tailored carefully, to ensure that they achieve their policy objectives. It is proper that legislation on all subjects should be reviewed periodically, so that its continuing appropriateness in changing circumstances is tested.
- 2.3 However, the CLC does not support the draft recommendation for an imminent review of IP law in Australia.
- 2.4 First, we endorse the observations of the Australian Copyright Council (“ACC”) in its submissions in response to the *Draft Report* (of which we have seen a draft) that there have been a number of reviews of intellectual property law in recent years. Some of these are cited in the *Draft Report*.
- 2.5 In particular, as commented by the ACC, copyright in the digital economy was the focus of a recent Australian Law Reform Commission (“ALRC”) inquiry, the findings of which were reported in February of this year. Therefore, to the extent that any new review of intellectual property would consider

copyright law in the changing technological environment, we submit that the relevant issues have already been addressed by the ALRC's inquiry.

- 2.6 The federal Government is also currently considering submissions in relation to online copyright infringement in Australia, and to the capacity of existing copyright law to deal with the challenges created by the internet.
- 2.7 Secondly, as a general proposition the CLC supports copyright protection in Australia, and would not therefore endorse a review conducted with a view to recommending significant reductions in protection on competition grounds.
- 2.8 It is true, as stated in the *Draft Report*, that IP materials such as copyright works are often used as "intermediate inputs" when innovating. Accordingly, it is important to balance IP rights with the ability to access IP materials for follow-on uses. Yet, it would be inconsistent to legislate for wider free use of valuable copyright materials (enjoying weaker copyright protection) with the aim of creating new valuable commercial copyright materials and innovations (enjoying strong copyright protection).
- 2.9 We question the view that when IP rights act to prevent access to technologies (in particular), this is necessarily against the "best interests of Australians". Whilst Australia is at present a net importer of IP, it should not be assumed that IP protection is to the benefit of other countries and not to Australia.
- 2.10 Indeed, weaker copyright protection in Australia could be expected to impact minimally on foreign exporters of copyright products to Australia, as this nation often represents a small portion of global markets. However, weaker protection would impact heavily upon on local creators, for whom royalty receipts and incentives would decline. This may well have a paradoxical flow-on effect, causing a decrease in production of Australian content and an increased reliance on foreign IP products and services.
- 2.11 In addition, Australia has the potential to become a net IP exporter, with a service-based economy built upon industries such as the education, entertainment and knowledge-based service industries. Australia needs strong copyright protection, creating a secure and reliable market, to build a knowledge economy and international exports.
- 2.12 Australia is served by technological advances, the internet in particular, which allow global communication and delivery. With respect to online cultural and knowledge-based products and services, these advances dissolve the tyranny of distance that has historically been to the nation's disadvantage in export. Therefore, harnessing new technologies and a strong IP system, Australia is well-positioned to develop a competitive knowledge economy and become a net exporter of innovative, IP-based products and services in the creative, cultural and knowledge-based sectors.
- 2.13 The CLC acknowledges the suggestion by the Productivity Commission, cited in the *Draft Report*, that the extension of the copyright term to 70 years (required by the Australia-United States Free Trade Agreement) has imposed net costs on Australia. In addition to the comments made above, which suggest that copyright protection will serve Australia well, now and into the future, we note that it

would be impracticable for the term of copyright protection in Australia to be less than that recognised by our major trading partners, including the US and members of the European Union.

- 2.14 With respect to the recommendation that an overarching IP policy framework be developed, to guide negotiations of international trade agreements, the CLC endorses the comments made by the ACC in its submissions in response to the *Draft Report*. First, we consider that Australian representatives negotiating trade agreements do so with a guiding policy (but the necessary flexibility) of achieving what is in the overall best interests of Australians. Secondly, as noted in the ACC's submissions, each agreement represents a negotiated outcome in the particular circumstances of the bilateral or multilateral relationship. Intellectual property is one matter of concern in each complex and particular negotiation.

3. Draft Recommendation 8: Intellectual Property Exception

- 3.1 The CLC endorses the view, adopted in the *Draft Report*, that IP rights are comparable to other property rights. As with property rights of any nature, IP rights may sometimes be used in a monopolistic or anti-competitive manner. Yet, it is unhelpful to speak of IP rights as "monopoly" rights rather than property rights that can be legitimately exercised.
- 3.2 The CLC also endorses the Australian Competition and Consumer Commission's observation (in its submission in response to the Competition Policy Review *Issues Paper*, cited in the *Draft Report*) that "IP and the competition law are for the most part complementary". IP and competition law have a common goal of promoting innovation, which is to the ultimate benefit of consumers.

4. Draft Recommendation 26: Price Discrimination

- 4.1 The CLC agrees that a specific prohibition on price discrimination should not be reintroduced into the *Competition and Consumer Act 2010* (Cth), and that market-based mechanisms should instead be relied upon to place downward pressure on prices.
- 4.2 A market solution is preferable to a legislative solution, which, as acknowledged in the *Draft Report*, would pose "significant implementation difficulties".
- 4.3 With respect to international price discrimination in relation to intellectual property products, the CLC considers that copyright owners are entitled to:
- segment markets by territory, and to enter into territorial licensing and distribution agreements;
 - discriminate as to price in different territories; and
 - use geoblocking measures to protect market segmentation.
- 4.4 Price discrimination is not necessarily anti-competitive. However, where price discrimination has an anti-competitive effect, the CLC supports the view of the *Draft Report* that this can be dealt with by existing competition law.

- 4.5 Despite copyright owners having the ability (and entitlement) to segment markets territorially, providers of products and services now operate in a global environment. In this sense, we agree with the comments of the ACC, in its submission in response to the *Issues Paper*, that e-commerce currently poses an “inherent disconnect” between territorial and global approaches.
- 4.6 If market forces are left to operate, we expect that there will be continued movement towards a truly global marketplace. As a result, we expect that copyright owners will continue to respond to Australian consumer demand by offering books, music, videos and software more quickly, in new forms, and at more competitive prices.

5. Conclusion

- 5.1 The CLC considers that Australia’s IP system should operate in the best interests of Australians. The current IP system supports the functioning of a secure and reliable market for IP, to the benefit of creators, investors and the wider community.
- 5.2 Australia is well-positioned to become a net exporter of IP with a service-based economy. For a knowledge economy to develop, a secure and reliable market for IP is necessary.
- 5.3 IP rights are comparable to other property rights and may be legitimately exercised without anti-competitive effect. However, as with other property rights, there is the potential for IP rights to be exercised in a manner that is anti-competitive. Existing competition law should be used to address instances of anti-competitive behaviour with IP.
- 5.4 Increasingly, Australian consumers are armed with better product and price information, and a broader array of purchasing choices. Accordingly, the CLC expects that IP rights holders such as copyright owners will continue to respond to consumer demand, by offering creative, knowledge-based, cultural and technological products and services more quickly, in new forms, and at more attractive prices. The market is already evolving.
- 5.5 Whilst the CLC considers that it is the right of copyright owners to price differentiate by territory (and to use technological measures to protect market segmentation), we expect that the circumstances of the global market will place downward pressure on Australian prices over time.

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