



Critique of the Attorney-General's Draft Terms of Reference for the Australian Law Reform Commission Copyright Review

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Introduction

Pirate Party Australia is part of an international political movement that promotes the reform of copyright, right to privacy, freedom of expression, and the need for increased governmental transparency, as well as civil and digital liberties in general. Currently there are Pirate Parties registered in twenty countries, including Canada, Germany, Sweden and Spain (as well as four US States), with estimates of up to twenty-four additional unregistered parties that have formed.

Approximately 360 Pirate Party candidates have been elected to various levels of government around the world, most significantly 15 state parliament seats in Berlin and 4 state parliament seats in Saarland, Germany, and two Members of the European Parliament from Pirate Party Sweden. Pirate Parties will compete in the upcoming Greek federal elections, German state elections, and UK local elections in May. Pirate Party Australia plans to compete in the next Australian federal election.

Note: this submission to the Attorney-General uses the Chicago Manual of Style referencing system. A bibliography is included.

Critique

Pirate Party Australia disagrees with the first bullet point on the grounds that copyright law does not exist to perpetuate copyrighted material.

The original conception of Copyright was outlined in the *Statute of Anne (1710)*¹. Its aim was to protect authors from unscrupulous publishers, who would *commercially* reproduce works without reimbursing the author. The limit was set at twelve years because it was seen as striking the 'right balance' between the interests of writers on one hand and publishers and consumers on the other. Its purpose was "for the encouragement of learned men to compose and write useful books."²

Origins of contemporary copyright can also be found in the United States Constitution which empowers the US Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."³

The United Nations International Covenant on Economic, Social and Cultural Rights states:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;

¹ *Statute of Anne (1710)*, United Kingdom, Section I.

http://avalon.law.yale.edu/18th_century/anne_1710.asp

² *ibid.*

³ *United States Constitution (1787)*, United States of America, Article I, Section 8. <http://www.law.cornell.edu/constitution/articlei#section8>

- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁴

It is therefore evident that the objective of copyright law is not "to promote the production of original copyright materials," but to promote the "progress of science and useful Arts" and to protect the author's right to "the moral and material interests resulting from any scientific, literary or artistic production" they have created.

Pirate Party Australia believes that the following is a far more appropriate statement to make regarding the objectives of copyright law:

"Having regard to the objective of copyright law to promote the progress of science and culture, and to protect the creators' right to any moral and material interests resulting from works they have created."

There is no objection to the second or third bullet points.

The fourth bullet point should be entirely removed on the grounds that Australia should not be required to take into account international obligations when reviewing its own laws. If it is found that international agreements are not in line with the necessary reforms to copyright law in Australia, then it is the international agreements that must be brought into line with domestic legislation, not the reverse.

International agreements have harmed, or will harm, Australia's economy. There are concerns that the Australia-United States Free Trade Agreement (AUSFTA) has the following impact:

The net effect is that Australia could eventually pay 25 per cent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to \$88 million per year, or up to \$700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia.⁵

The Productivity Commission has indicated that Australia should seek to exclude intellectual property provisions within bilateral and regional trade agreements, unless those changes can be justified by economic assessment, which must include the impact of the Agreement on consumers in both Australia and other countries⁶.

Furthermore, there has been considerable concern over the Anti-Counterfeiting Trade Agreement (ACTA) as well as the Trans-Pacific Partnership Agreement (TPPA) that is currently under negotiation. Pirate Party Australia noted in a submission to the Joint Standing Committee on Treaties earlier this year the many implications ACTA would have for Australia, particularly the substantial ambiguity in regard to differentiation between commercial and non-commercial copyright infringement, and the broad reaching provisions for litigation, industry and

⁴ *International Covenant on Economic, Social and Cultural Rights (1966)*, United Nations, Article 15. <http://www2.ohchr.org/english/law/cescr.htm#art15>

⁵ Dee, "The Australia-US Free Trade Agreement," 31.

⁶ Productivity Commission, *Bilateral and Regional Trade Agreements*.

personal liability, as well as the detrimental effects it would have on individuals' privacy⁷. In a presentation, the Party raised much the same concerns about the TPPA⁸, and in both critiques of the Agreements noted the lack of transparency in the negotiating processes.

These agreements are not good examples to follow, and Pirate Party Australia believes that international obligations should not be taken into account when reviewing copyright law in Australia, as reform is intended to ensure copyright law meets domestic needs, not the demands of other nations. If this requires the renegotiation of, or withdrawal from, international treaties and agreements, then this *must* be the approach taken.

The Party also believes that the Scope of Reference is far too limited to be reasonable for a review of the exceptions of the Copyright Act. The third point should be scrapped entirely, or alternatively, change "not duplicate work being undertaken on" to "consider the work being undertaken on" to ensure that all possible exceptions possible in the Copyright Act may be explored by the Australian Law Reform Commission.

Pirate Party Australia would also like to raise the point that a review of Technical Protection Measures legislation is much overdue and we look forward to a review into the matter occurring soon.

Pirate Party Australia has no objection to the remainder of the draft terms of reference provided by the Attorney-General, but would like to see explicit instruction for inquiry into whether exceptions for all non-commercial use of copyrighted materials are required and the implementation of broader fair use exceptions.

Bibliography:

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⁷ Pirate Party Australia, *Submission*.

⁸ Pirate Party Australia, *Presentation*.