

**SUBMISSION IN RESPONSE TO THE COMPETITION POLICY REVIEW ISSUES  
PAPER**

**JUNE 2014**

## **ABOUT THE AUSTRALIAN COPYRIGHT COUNCIL**

The Australian Copyright Council (ACC) supports a creative Australia by promoting the benefit of copyright for the common good.

We believe in the values copyright laws protect: creative expression and a thriving, diverse, sustainable, creative Australian culture. A society's culture flourishes when its creators are secure in their right to benefit from their creative work and when access to those creative works is easy, legal and affordable. Copyright effectively and efficiently enables this balance between protection and access.

The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.

We are advocates for the contribution of creators to Australia's culture and economy and the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and practical, user-friendly information, education and forums and pro bono legal advice on Australian copyright law for content creators and consumers.

The ACC has 24 member organisations. Many of them are making separate submissions to this review. We have had the opportunity to review some of those submissions in draft form. Where appropriate, we refer to them in this submission

A full list of our members is attached at Appendix 1.

## INTRODUCTION

The ACC welcomes the opportunity to make this submission to the Review Panel. We will confine our submission to copyright issues raised in the Issues Paper:

- International price discrimination;
- Parallel Importation;
- Restrictions arising from IP laws; and
- Section 51(3) of the CCA.

We note, however, that these issues necessarily raise broader matters (for example, market definition) being considered by the Panel.

## POLICY SETTINGS

The intellectual property power in the Commonwealth Constitution is found in s 51 (xviii). It forms part of the general plenary power, for the peace, order and good government of the Commonwealth. Understood in this way, intellectual property, and specifically copyright policy, can be seen as serving the same broad objective as competition policy: consumer welfare.

The relationship between intellectual property and competition policy was examined in detail in 2000 by the Ergas Committee. It concluded:

“Overall, the Committee believes that the system of intellectual property laws acts to promote competition by maintaining the incentives to innovate, while striving to strike a balance through the nature and content of the rights grants and between those incentives and society’s interest in the widespread diffusion of ideas. It believes that the terms of that balance are properly specified in the intellectual property laws themselves, securing the greatest clarity for the rights being granted.”<sup>1</sup>

Copyright is a key piece of infrastructure that supports the industries which comprise a modern economy. Evidence shows that copyright industries make a significant contribution to the Australian economy.<sup>2</sup> That much is not controversial. What is more controversial is the appropriate mechanism for regulation of copyright infrastructure. These controversies have been examined in a succession of reviews; the most recent being the Australian Law Reform Commission’s Report on *Copyright and the Digital Economy* and the House of Representatives Standing Committee on Infrastructure and Communications *Inquiry into IT Pricing*. This Issues Paper provides an opportunity to revisit some of those controversies.

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<sup>1</sup> *Review of intellectual property legislation under the Completion Principles Agreement: Final Report by the Intellectual Property and Competition Review Committee*, September 2000, p27.

<sup>2</sup> 6.6% of GDP in 2011: PwC, *The Economic Contribution of Australia’s Copyright Industries 1996-97 to 2010-11* [http://www.copyright.org.au/admin/cms-acc1/\\_images/27349904052d4b0c669c2f.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/27349904052d4b0c669c2f.pdf)

**Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?**

The Internet has created a global market place. However goods and services are still owned and regulated territorially. Therein lies the inherent disconnect of e-commerce. However, in our submission, this is not, of itself, anti-competitive.

International price discrimination occurs where the same goods are offered at different prices in different countries. The Internet enables consumers to compare prices and make informed choices. Indeed, in its 2012 report on the Economic Contribution of Australia's Copyright Industries, PwC nominated this as one of the reasons for the drop in copyright-related GDP between 2006-7 and 2010-11.<sup>3</sup> However, it will not always be possible for consumers in Australia to access goods from other countries at cheaper prices. This is because suppliers use technical measures to enforce geographic market segmentation. While this can be a frustrating experience for consumers (akin to looking in the window of a shop that is closed) that does not mean that international price discrimination is necessarily unfair or amounts to 'price gouging'.

As far as copyright is concerned, rights are generally owned and managed territorially. This means that an overseas suppliers may not have the rights to trade in Australia.<sup>4</sup> It also means that different royalty arrangements (and hence different pricing) are likely to apply in Australia compared with other countries. For example, in its submission to this review, CHOICE refers to the different pricing for digital downloads of music in Australia compared with the United States.<sup>5</sup> While Australians do pay more for music downloads than their United States counterparts, it should be noted that those royalties rates were set following proceedings in the Copyright Tribunal, to which the ACCC was a party.<sup>6</sup> In those circumstances, it is difficult to ascertain why the mere fact that international price discrimination exists requires a policy response.

In our submission, that is the major flaw in the recommendations of IT Pricing Inquiry – the Committee focused on the fact of international price discrimination rather than taking a principles-based approach. This is to be compared with the approach of the Hilmer, and later the Dawson Review, which were in favour of the abolition of the prohibition against price discrimination in the then *Trade Practices Act 1974*.

Even if one accepts that not all international price discrimination is justified, it is difficult to see that a solution, such as the one currently being posited by Canada will be workable. That is because consideration of whether conduct is justifiable necessitates an assessment of whether it is anti-competitive. This surely must begin with defining the relevant market. This is likely to be difficult in circumstances where one is comparing international prices. And of course, the bigger the market, the less likely that a supplier will have market power. This is to say nothing of technical issues

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<sup>3</sup> PwC, *ibid.* p 4

<sup>4</sup> See, for example, the submission of APRAIAMOCS.

<sup>5</sup> CHOICE Submission, p 14.

<sup>6</sup> 7 Dec 2009 *Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited* [2009] ACopyT  
[2://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/2009/2009acopyt0002](http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/2009/2009acopyt0002)

about the constitutional basis for such legislation or its compliance with Australia's international treaty obligations.<sup>7</sup>

In our submission the "disconnect of e-commerce" to which we have referred may be pronounced at this point in time, but it is unlikely to remain so. It is in the interests of copyright industries to innovate in order to deliver content to their customers in new, timely and cost effective ways. And they are doing so. The current ecosystem may not yet be perfect, but it is in transition and in our submission it is unlikely to be served by legislation to restrict international price discrimination.

**Should any current restrictions on parallel importation be removed or altered in order to increase competition?**

Restrictions on parallel importation have been the subject of much controversy over the years. We refer to submissions that the ACC has made to previous inquiries on this issue.<sup>8</sup>

We note that the IT Pricing Inquiry recommended the abolition of remaining restrictions on parallel importation. We do not support this recommendation. This is for two reasons:

Firstly, business models for copyright industries are generally focused on digital rather than hard copy goods. Therefore, we query the policy driver for this recommendation.

Secondly, there are few remaining restrictions on parallel importation in Australian copyright law. In our submission where they do exist, they serve sound policy objectives. In this regard, we refer to and support the submission of the Australian Publishers' Association. We also refer to the work of the Book Industry Strategy Group and the Book Industry Collaborative Council.<sup>9</sup>

**Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of these IP laws be achieved in a manner more conducive to competition?**

In our submission, the limitations and exceptions that form part of the copyright system safeguard the public interest. As noted in the submission of APRAIAMCOS, this is enhanced by other mechanisms, such as the role played by the Copyright

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<sup>7</sup> See, for example, the submission of ARIA on this point.

<sup>8</sup> Submission to Productivity Commission on the Parallel Importation of Books, 2009.  
<http://www.copyright.org.au/admin/cms-acc1/images/3105897054c97fc1e33254.pdf>

<sup>9</sup> See, for example  
<http://www.industry.gov.au/industry/booksandprinting/BookIndustryStrategyGroup/Pages/Library%20Card/BISGFinalReport.aspx> and  
<http://www.industry.gov.au/industry/booksandprinting/BookIndustryCollaborativeCouncil/Pages/default.aspx>

Tribunal of Australia in setting equitable remuneration for copyright licences and by the voluntary code of conduct for copyright collecting societies.

We note that the ALRC recommended significant changes to the current exceptions to copyright as part of its recent inquiry into Copyright and the Digital Economy. In particular, the ALRC recommended the introduction of a broad fair use defence, similar to that in the United States. The ACC does not support that recommendation for the reasons stated in our submissions to the ALRC.<sup>10</sup>

Further, we note that although the ALRC's inquiry was about copyright and the digital *economy* it did not focus on any economic evidence nor on the likely regulatory impact of its recommendations. As Professor Henry Ergas observed at the Copyright Law and Practice Symposium in March 2014, economists are concerned less with fairness and more with efficiency:

“The growing significance of transformative use may increase the importance of both the incentives for investment and of low transactions costs – and both of these tend to make for clearer, if not necessarily stronger, rights. How that affects the desirability of a fair use provision really depends on how you assess the costs, benefits and possible risks such a provision would give rise to. Assessing that requires looking not only to evidence but also to the standard of proof required to justify change. It's not merely a question of whether there is evidence that circumstances have changed; one also needs to examine whether that evidence is sufficiently compelling to establish that the benefits of change will outweigh its costs.”<sup>11</sup>

The excerpt from Professor Ergas highlights the significance of 'transformative use' in recent fair use jurisprudence in the United States. In finding that a particular unauthorised use of copyright material is 'transformative', United States courts have readily been able to find that the use is fair because it is not competing in the same market or potential market as the original copyright material. However, in our submission, the potential market for copyright material is by no means easy to determine given the lengthy term of copyright protection. Put another way, by focusing on transformative use, courts in the United States have tended to get the market definition wrong. And in doing so, they have failed to have adequate regard to the free-riding concerns caused by such uses.

**Do the statutory exemptions, exceptions and defences, including liner shipping, operate effectively, and do they work to further the objectives of the CCA?**

### **Section 51(3)**

This part of our submission will focus on s 51(3) of the *Competition and Consumer Act* (CCA) which provides a limited exemption for licences and assignments that 'relate to' copyright and other forms of intellectual property from parts of the CCA.

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<sup>10</sup> See ACC Submission in response to the ALRC Issues Paper <http://www.copyright.org.au/admin/cms-acc1/images/4834555974f9a241ea6e13.pdf>

See also our submission in response to the Discussion Paper <http://www.copyright.org.au/admin/cms-acc1/images/164470341851f9908dc9575.pdf>

<sup>11</sup> An edited transcript of Professor Ergas' presentation is to appear in volume 32, issue 1 of the *Copyright Reporter*.

In 1999 the National Competition Council (NCC) conducted a detailed review of s 51(2) and s 51(3) of the *Trade Practices Act* (as it then was). It recommended amendments to s 51(3) to remove price and quantity restrictions and horizontal arrangements from the exemption. It also recommended that the ACCC formulate guidelines to assist industry to understand s 51(3). The following year, the Ergas Committee also recommended amendments to s 51(3) as part of its review of intellectual property legislation under the Competition Principles Agreement. Despite the significant passage of time, neither recommendation has been implemented.

In a recent submission to the ALRC, the ACCC argued in favour of the abolition of s 51(3) of the CCA.<sup>12</sup> However, in our submission, a case has not been made out for the abolition of s 51(3). We refer to our previous submission to the NCC<sup>13</sup> and to the Ergas Committee<sup>14</sup> in this regard. In light of the uncertainty about the application of s 51(3) and the lack of litigation in this area, we see no reason for change at this time.

It is also necessary to say something about the practicality of the ACCC issuing guidelines on the application of s 51(3). While the Commission has expressed concern about the uncertainty of s 51(3) it has not sought to ameliorate this by issuing guidelines. And even where it has a statutory mandate to issue guidelines in relation to copyright licensing, it has yet to finalise the draft guidelines that it issued in 2006.<sup>15</sup> In these circumstances, it has hard to be confident about the impacts of any proposal to abolish s 51(3).

We thank the Panel for the opportunity to make this submission and would be happy to address any questions it may have.

Fiona Phillips  
Executive Director

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<sup>12</sup> [http://www.alrc.gov.au/sites/default/files/subs/165\\_org\\_acc.pdf](http://www.alrc.gov.au/sites/default/files/subs/165_org_acc.pdf)

<sup>13</sup> [http://www.copyright.org.au/admin/cms-acc1/\\_images/7127972334fc300010978e.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/7127972334fc300010978e.pdf)

<sup>14</sup> [http://www.copyright.org.au/admin/cms-acc1/\\_images/19096890394c97f84044ff0.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/19096890394c97f84044ff0.pdf)

<sup>15</sup> <http://www.accc.gov.au/regulated-infrastructure/communic>

Appendix 1: Australian Copyright Council Affiliates

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 24 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artist Agency  
Ausdance  
Australian Commercial & Media Photographers  
Australian Directors Guild  
Australian Institute of Architects  
Australian Institute of Professional Photography  
Australian Music Centre  
Australasian Music Publishers Association  
Australian Publishers Association  
APRAIAMCOS  
Australian Recording Industry Association  
Australian Screen Directors Authorship Collecting Society  
The Australian Society of Authors Ltd  
Australian Writers' Guild  
Christian Copyright Licensing International  
Copyright Agency  
Media Entertainment & Arts Alliance  
Musicians Union of Australia  
National Association For The Visual Arts Ltd  
National Tertiary Education Industry Union  
Phonographic Performance Company of Australia  
Screen Producers Association of Australia  
Screenrights  
Viscopy