



AUSTRALIAN  
DIGITAL ALLIANCE



Australian Libraries  
Copyright Committee

# Competition Policy Review

Submission to the Issues paper from:

The Australian Digital Alliance

The Australian Libraries Copyright Committee

### About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

### About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

ALCC membership together comprises a large portion of the Australian library and archive sectors.

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## Executive Summary

The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) appreciate the opportunity to provide this submission in response to the Issues Paper to the Review Panel.

This submission is solely concerned with the interaction of copyright and competition. As such we have answered questions posed in Chapter 2 'Regulatory Impediments to Competition' and Chapter 5 'Competition Laws'.

We strongly support the objective to:

Identify competition-enhancing microeconomic reforms to drive ongoing productivity growth and improvements in the living standards of all Australians.

With this aim in mind, the ADA and ALCC make the following submissions:

The Australian Government amend the *Copyright Act 1968* section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.

Existing parallel importation restrictions in Australian copyright law should be repealed to facilitate more competitive pricing of content by domestic retailers and increase consumer choice.

The *Copyright Act 1968* provide a flexible 'fair use' exception to copyright infringement as recommended by the Australian Law Reform Commission in the *Copyright and the Digital Economy* inquiry

Section 51(3) of the *Competition and Consumer Act 2010* should be repealed and intellectual property licencing subject to the same rules regarding restrictive trade practices as other forms of property

We believe that these reforms would provide a regulatory framework with the right incentives to enable and promote healthy competition, leading to innovation, better choices for consumers and lower prices.

## Chapter 2 – Regulatory Impediments to Competition

**Review Question:**

**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?**

**Review Question:**

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

There is clear evidence that Australian consumers pay increased prices for IT products, digital content and books. Price differentials may be the result of a number of causes, including the size of the Australian market, wage and labour on-costs and tax. However, as explored by the recent *IT Pricing Inquiry* the most significant contributors to price differentials are geographical licence conditions coupled with the various exclusive rights of the copyright holder to determine conditions of access to and price of their copyright works. While copyright protection has clear public policy aims, its current implementation restricts market participation, leading to anti-competitive conduct.

With that in mind, we submit that:

- The Australian Government amend the Copyright Act's section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.
- Existing parallel importation restrictions in Australian copyright law should be repealed, to facilitate more competitive pricing of content by domestic retailers and increase consumer choice.

### International Price Discrimination

As the international trade barriers have been lowered, transportation costs reduced and the internet has facilitated a global market place, purveyors of copyright goods have sought other ways to enforce geographical market segmentation. The disadvantages to Australian businesses and consumers of market segregation are clear. In its submission to the *Inquiry into IT pricing* consumer group CHOICE noted that Australians were paying over 200% more for computer games, and on average over 50% more across the full range of digital content.<sup>1</sup> These high prices put Australian consumers and businesses at a competitive disadvantage.

One way that producers and distributors have enforced these price differentials is by using Technological Protection Measures (TPMS) on their products. The breaking of a TPM is an offence even if a user has a legitimate right to access the content, unless they come under one of the predefined exceptions.

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<sup>1</sup> CHOICE Submission to House [Standing Committee on Infrastructure and Communications inquiry into IT Pricing](#) [2012]

It seems likely that pure ‘geoblocking’ is not classed as a TPM, and therefore use of technology such as Virtual Private Networks (VPNs) to access legitimate content available in other countries may not be illegal under the *Copyright Act*.<sup>2</sup> However the provisions are currently unclear. We agree with the Inquiry into IT pricing’s recommendation:

The Australian Government amend the Copyright Act’s section 10(1) anti-circumvention provisions to clarify and secure consumers’ rights to circumvent technological protection measures that control geographic market segmentation<sup>3</sup>

## Parallel Importation

Parallel importation covers the importation of legitimate goods into Australia without the permission of the intellectual property owner. It is an alternative supply channel for legitimate goods to be imported and sold into the Australian market.

In Australia, the parallel importation of copyright works (ss37<sup>4</sup>, 102) is prohibited, although there are exceptions for software (s44E), music and e-books (s44F) and sound recordings (s112D) where the product is placed on the market overseas with the consent of the copyright owner in the relevant jurisdiction (grey market goods).

- Books

Australian copyright law provides for an almost total ban on Australian retailers importing books from overseas if a version of the book has been published locally.<sup>5</sup> The Price Surveillance Authority,<sup>6</sup> the Review of IP and Competition Law<sup>7</sup> and the Productivity Commission<sup>8</sup> have repeatedly recommended the repeal of parallel importation restrictions.

In its 2009 report into parallel importation restrictions on books, the Productivity Commission made some key findings:

- the additional income flowing overseas is around 1.5 times that retained by local copyright holders (50% greater benefit to foreign rights holders) .
- the magnitude of the return to rights holders under PIR is dependent on the willingness of others to pay for the work in the market place (In the digital environment, consumers are increasingly purchasing books from online retailers where prices are lower).

They concluded:

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<sup>2</sup> Opinion expressed by Mr Matt Minogue, First Assistance Secretary, Attorney-General’s Department, quoted in [At what Cost? Inquiry into IT Pricing](#) [2012] at 97

<sup>3</sup> [At what Cost? Inquiry into IT Pricing](#) [2012] at 108

<sup>4</sup> All section references are references to *The Copyright Act 1968*

<sup>5</sup> There are some exceptions: Booksellers can parallel import books that do not comply with the 30 day release and 90 day resupply rules; booksellers can parallel import books to fill a single order; customers can import books directly for personal use

<sup>6</sup> Inquiry into book prices and parallel imports, Prices Surveillance Authority, 1995, Melbourne, VIC

<sup>7</sup> Review of intellectual property legislation under the Competition Principles Agreement, Final Report of the IP and Competition Review Committee, September 2000

<sup>8</sup> Most recently, [Productivity Commission, Copyright Restrictions on the Parallel Importation of Books](#), 14 July 2009,

In effect, PIRs impose a private, implicit tax on Australian consumers which is used largely to subsidise foreign copyright holders.<sup>9</sup>

In recent research for the *IT Pricing Inquiry* examining one small area, the prices that libraries pay for books, the ADA and ALCC found:

On average, it appears Australian libraries pay approximately 58% more for print books than they are priced in the US, and 44% more for e-books<sup>10</sup>. For some e-books, libraries in Australia may be charged as much as 191% more than that e-book is priced in the US<sup>11</sup>.

Further, e-books are generally only available to Australian libraries for as long as the publisher is willing to licence them (there are few publishers offering an outright purchase model for e-book), may be offered under restrictive licences, and some publishers simply refuse to licence/sell e-books to Australian libraries at any price. As e-book titles cannot be purchased from any other publisher due to parallel import restrictions, libraries have no choice but to accept the conditions imposed on the books they can get, and continue to work towards gaining access to a wider range of titles.

- Other products

Other items that would generally not face import restrictions, may contain copyright components and be stranded outside of the 'carve-outs'. One example identified by the Productivity Committee is clothing that incorporates a copyright-protected image, which requires the permission of the copyright holder to be imported and resold in Australia. As the Commission noted 'the law as it stands appears to have undesirable anticompetitive effects and confers more power on the owner of the copyright than applies in the case of the owner of the trademark'<sup>12</sup>

The Commission recommended that the Australian Law Reform Commission (ALRC) examine parallel imports in its forthcoming Copyright Review<sup>13</sup>. However in the end the matter was excluded from the terms of reference. This review provides another opportunity to address this outstanding issue.

Existing parallel importation restrictions in Australian copyright law should be repealed to facilitate more competitive pricing of content by domestic retailers and increase consumer choice.

**Review Question:**

**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?**

We strongly agree with the view of the panel that 'Competitive markets are dynamic and innovative, which can benefit Australians both now and into the future'.<sup>14</sup>

<sup>9</sup> Productivity Commission [Review of parallel importation of books](#), at 20

<sup>10</sup> Data on e-book and print prices, based on random sample of 48 titles, collated by library staff between 8 – 10 October 2012, the detailed information can be provided on request and was provided to the *IT Pricing Inquiry*

<sup>11</sup> Double Cross, by Ben McIntyre, in e-book format is priced at \$28.15 for Australian market compared with \$9.72 (adjusted to AUD) in the US

<sup>12</sup> P XXIV Productivity Commission 2011, [Economic Structure and Performance of the Australian Retail Industry](#)

<sup>13</sup> Which became the *Copyright and the Digital Economy Inquiry*, the final report for which was tabled in February 2014

<sup>14</sup> [The Australian Government Competition Policy Review](#) at 1

Unfortunately Australia's current copyright regime is unnecessarily rigid and technologically specific, which does not support innovative products or uses for materials. In the recent Australian Law Reform Commission (ALRC) inquiry, organisations noted numerous beneficial uses that were not currently supported.<sup>15</sup> A few examples include:

- Submissions from the tech sector noted that the basic functions for ISPs such as caching and search-engine indexing are not allowed under Australian copyright law.
- Schools noted they face a 'technology tax' under the educational licences where using technologies such as interactive whiteboards can result in more remunerable occurrences than teachers photocopying material
- Consumers' use is restricted by formats, for example shifting content from VHS to your tablet for personal use is allowed, but not transferring the same content from a DVD.
- Cultural institutions were unable to crowd-source information-gathering for orphan works, and were restricted in their digitisation projects of cultural material.

The ALRC recommended replacing the outdated exceptions in the current act with a flexible 'fair use' exception, such as that operating successfully in the USA. Fair use is an exception to copyright infringement that concentrates on whether the use of copyright material is fair, as judged against four fairness factors, including the impact on the copyright holder's market.

The Australian Competition and Consumer Commission (ACCC) supported fair use in their submission to the ALRC, including its applicability to third parties. The ACCC consider that that competition in IP markets will generally self-regulate; optimising incentives for the creation of copyright materials and promoting fair licensing regimes to ensure that copyright material is disseminated throughout the community. However if copyright laws are 'too extensive and not balanced by appropriate exceptions' then there may be 'significant costs for economic efficiency and consumer welfare'.<sup>16</sup> The two potential sources of market failure that are most relevant are:

- transactions costs associated with licencing of copyright materials; and
- the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power.

Fair use facilitates low-value uses where otherwise the transaction costs outweigh the value of the arrangement. It also facilitates third-party uses where the use does not have a 'free-riding' effect on the value of the copyright. Cloud computing is a strong example of third party uses that is currently unsupported but has the potential to add value to the economy without harming the incentives of creators and distributors.

The ACCC agree that that 'copyright law as it currently stands does not provide the flexibility to required to be able to respond to changes in the way copyright material is consumed and used' and that more flexible laws would 'accommodate and foster technological advances and innovations'.

Importantly significant delays between developments in the market and legislative change would be reduced by a 'standards-based' technology-neutral form of exception such as fair use. This gives

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<sup>15</sup> Submissions to the *Copyright and the Digital Economy* inquire are available from the ALRC at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc>

<sup>16</sup> ACCC [Submission to Copyright and the Digital Economy Discussion Paper](#) [2013]

space to innovate business models and products, unlike the current law which inhibits business development and growth.

A flexible 'fair use' exception will remove some barriers preventing Australians from accessing products and markets enabled by new digital technologies. It will support innovative, agile firms to compete with large incumbents on a domestic and global scale.

## Chapter 5 – Competition Laws

### Review question:

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

Currently the *Competition and Consumer Act 2010 (CCA)* is not adequate for the ACCC to regulate anti-competitive conduct in IP markets. In the recent ALRC *Copyright and the Digital Economy* inquiry the ALRC again recommended that s51(3), which exempts intellectual property licencing from some of the restrictive trade practices provisions of the CCA, be re-examined. In reaching this conclusion they noted both the submission from the ACCC asking for repeal and also the long history of recommendations for the section to be amended. As they note:

The Ergas Committee regarded s 51(3) as seriously flawed and unclear and noted that the National Competition Council had previously recommended repeal of s 51(3). The repeal and replacement of s51(3) of the Trade Practices Act (now Consumer and Competition Act) was recommended.<sup>17</sup> In 2013 repeal of s 51(3) was again recommended, by the House of Representatives Standing Committee on Infrastructure and Communications in its July 2013 report, *At What Cost? IT Pricing and the Australia Tax*.<sup>18</sup> The Committee recommended the repeal of s 51(3) on the basis that it constrains the ACCC unjustifiably from investigating restrictive trade practices in relation to intellectual property rights.<sup>19</sup>

The ADA and ALCC strongly support the calls for repeal of s51(3). Intellectual property rights should be subject to the same treatment as other property rights, and the ACCC empowered to take action against restrictive trade practices.

Section 51(3) of the *Competition and Consumer Act 2010* should be repealed and intellectual property licencing subject to the same rules regarding restrictive trade practices as other forms of property.

<sup>17</sup> Intellectual Property and Competition Review Committee, Review of Intellectual Property Legislation under the Competition Principles Agreement [2000], 203

<sup>18</sup> House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* [2013].

<sup>19</sup> ALRC [Copyright and the Digital Economy Final Report](#) [2013]