



AUSTRALIAN
COPYRIGHT COUNCIL

**SUBMISSION IN RESPONSE TO THE COMPETITION POLICY REVIEW DRAFT
REPORT**

NOVEMBER 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 Panel is engaged in a 'root and branch' review of competition law and policy in Australia. It has identified intellectual property as a priority area for reform as part of its Draft Report. It has made a number of recommendations for reform of intellectual property. In this submission we address those recommendations specifically as they relate to copyright law and policy and examine their 'fitness for purpose' according to the six attributes the Panel has identified. Namely,

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

The specific recommendations are:

Draft Recommendation 7: Intellectual Property Review:

Draft Recommendation 8: Intellectual Property Exception:

Draft Recommendation 9: Parallel Imports: and

Draft Recommendation 26: Price Discrimination.

Draft Recommendation 7 Intellectual Property Review

While we appreciate that significant issues about intellectual property have been put to the Panel and that these go beyond the scope of the Panel's review, we do not support the draft recommendation for a review of intellectual property. The Panel has itself noted the number of reviews of intellectual property that have been conducted over the years. Indeed, given that the 'digital revolution' seems to be the main rationale for the Panel identifying intellectual property as a priority area, it is worth noting that the 'digital economy' was the focus of the Australian Law Reform Commission's (ALRC) inquiry into copyright published in February this year. This review provided a vehicle for competition issues in relation to copyright to be ventilated. Given that the Government has yet to respond to the ALRC's recommendations, we query the value of yet another review at this time.

Indeed, the rapid rate at which the digital marketplace is evolving suggests that a further review at this time is likely to be premature. In our submission, the dynamic state of the market makes it difficult to anticipate the long-term interests of consumers. We also note that such reviews require significant resources from both government and industry participants and create uncertainty. Without a clear objective in mind, in our submission, it is difficult to justify another review of intellectual property.

The Panel's main reason for recommending a review appears to relate to an alleged lack of a coherent policy for intellectual property in international treaty negotiations. We wish to make two observations in this regard.

Purpose reflects constitutional framework

It is true that Australian intellectual property legislation does not have a stated purpose. This is to be contrasted with the *Competition and Consumer Act 2010* (CCA), which sets out the objects of the legislation. This is largely because the CCA relies on a number of sources of Commonwealth legislative power. Power in relation to intellectual property, on the other hand, falls under s 51 (xviii) of the Constitution and is part of the general plenary power to legislate for the peace, order and good government of the Commonwealth.

Therefore, to the extent that there is not an easily identifiable overarching policy for intellectual property in Australia, in our submission, this is a reflection of the plenary power granted to Parliament under the Commonwealth Constitution. This is different to other jurisdictions, such as the United States, where the constitutional power in relation to copyright is for 'science and the useful arts'.

Intellectual Property in international negotiations

Secondly, we do not accept the assertion that there is no policy basis for the Government's position on intellectual property in international treaty negotiations. In this regard, we note that treaties represent negotiated outcomes rather than Australia's preferred position. We also note that in the case of free trade agreements, intellectual property is but one area in an economy-wide negotiation. It is also worth observing that Australia has generally pursued obligations which are consistent with existing Australian law in the intellectual property chapters of its free trade agreements.¹ This is to be contrasted with treaties negotiated through the World Intellectual Property Organisation which are generally vehicles for normative change.

In our submission, the existing parliamentary mechanisms provide for adequate scrutiny of treaties to which Australia is intending to become party. The Joint Standing Committee on Treaties Report on the Anti Counterfeiting Trade Agreement is a case in point.² We note that an examination of the costs and benefits of any treaty is already required as part of the national interest analysis.

Finally, as we noted in our earlier submission to the Panel, economists are likely to look at intellectual property as a question of efficiency, whereas a legal review is likely to focus on other factors, such as fairness and international treaty obligations. If the Panel is minded to recommend a further review of intellectual property, we suggest that the review be conducted by a multi-disciplinary body. This will ensure that the review is equipped to interrogate all the relevant issues.

¹ See DFAT summary of free trade agreements <https://www.dfat.gov.au/fta/>

² As a result of the Committee's recommendations, the treaty has yet to be ratified. http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/21november2011/report.htm

Draft Recommendation 8 Intellectual Property Exception

As we noted in our earlier submission, abolition of the exception in s 51(3) has been recommended in successive reviews and yet no government has acted on this. While such an amendment may 'tidy up' the CCA, it is not apparent to us how it meets the Panel's broader objectives. In our view, this amendment could create further obstacles and uncertainty for rights holders investing in new business models. In particular, we query whether such an amendment would encourage innovation and establish competition laws and regulations that are clear, predictable and reliable.

Draft Recommendation 9 Parallel Imports

The Panel is concerned with the digital market place and yet, parallel importation is largely a 'physical goods' issue. As we stated in our earlier submission, we therefore query the driver for this recommendation as far as it relates to copyright material. Consumers already can and do use the Internet to price compare and purchase goods from other jurisdictions. The parallel importation laws do not prohibit this. They only apply to commercial entities wanting to import stock from other jurisdictions.

Unlike other jurisdictions, Australia does not recognise a general right to distribute copyright material and there is no doctrine of exhaustion or 'first sale'. Therefore it is not necessary to examine the extent of digital rights from a copyright perspective as for example, in the EU and the US. In Australia, these transactions are governed by contract law.

As we noted in our earlier response, there are sound cultural reasons for Australia's remaining parallel importation restrictions in relation to copyright material.

As Dr Warwick Rothnie noted recently in the *Copyright Reporter*

'if you want people to write Australian books, the publishers are going to have to earn most of their income back from Australia, or that's where the publishers expect they will have to earn most of their income back. Now I raise that because that's one of the ramifications that might flow from the committee's recommendations. It might be illustrated by Canadian experience back in the 1980s and 1990s. The Canadian publishers and authors claimed they needed to charge a higher price for books by Canadian authors due to the volume of sales available to offset the cost base. However, most of the buying public in Canada lives something like within 50 miles or so of the border with the USA and the consumers were able to go across the border and pay lower US prices for books. This was said to be undermining the price that could be charged in Canada for books by Canadian and so leading, or potentially leading, to reduced investment in publishing Canadian authors. Now that can be a real worry for us. I don't know about you, but I quite enjoy reading books written by Australian authors.'³

³ 'At What Cost? The IT Pricing Inquiry and Copyright' (2013) 31 *Copyr Rpt* 8.

See also, Canadian Heritage *The Role of the Book Importation Regulations in Canada's Marketplace for Books*, April 2012.

The point made powerfully by Australian authors and publishers (including in submissions to the Panel) also applies to other copyright industries. For example, local distribution of DVDs impacts on the revenue available for investment in local film and television programs. Viewed in this way, the restrictions on parallel importation may actually foster diversity in the interest of consumers.

Draft Recommendation 26 Price Discrimination

The ACC endorses the Panel's view that market-based mechanisms are the best means of addressing issues in relation to international price discrimination. However, we caution the Panel against endorsing recommendations of the IT Pricing Inquiry in relation to geo-blocking. This is for both practical and technical reasons.

In our submission, it is a mistake to consider the issue of geographic market segmentation from the demand-side only. Copyright is generally held territorially. If I am developing a product which is going to be distributed online, it makes sense for me to contain costs by only clearing the rights for my main markets. This will be reflected in my terms of trade and I will also likely use some form of technology to block access for other territories. This is an example of how geo-blocking can reduce barriers to entry for new businesses.

If a consumer circumvents such a geo-block, for example, through the use of a virtual private network (VPN) they may be causing the service provider to distribute content to a territory for which they are not licensed. This is likely to mean that the service provider is infringing copyright by reason of the consumer's actions.

Moreover, in our submission, a consumer using a VPN to access material in a territory where the service provider is not operating is likely to be in breach of contract. Accordingly, if something goes wrong, for example the file is corrupted or a virus is released on to the consumer's computer, the consumer will not be able to rely on the contract to fix the problem. It also follows, that the consumer will not be able to avail herself of Australian consumer law remedies. Given these considerations, in our submission it is unusual and at the very least, shortsighted, for a consumer advocacy body such as CHOICE to be campaigning for these kind of self-help mechanisms.⁴

In our submission, providing information or instructions on circumventing geo-blocks may well amount to inducing breaches of contract. It could also be seen as enabling copyright infringement. Regarded in this way, it is difficult to see how Recommendation 6 of the House of Representatives Standing Committee's Report on IT Pricing in Australia could be implemented. We therefore caution the Panel against lending its support to this recommendation.

As regards Recommendation 5 in the House of Representatives Standing Committee's Report which recommends amending section 10 of the *Copyright Act 1968*, we note that many geo-blocking tools will fall outside the Copyright Act. For example, an access control measure applied to an IP address is unlikely to amount to a technological protection measure within the meaning of the Copyright Act. We draw the Panel's attention to our submission to the Attorney-General's Department

⁴ See, for example these tips <http://www.choice.com.au/reviews-and-tests/computers-and-online/networking-and-internet/shopping-online/navigating-online-geoblocks/page/how-to-circumvent-geoblocks.aspx>

Review of Technological Protection Measures which was also cited by the Attorney-General's Department during its appearance before the House of Representatives Standing Committee.⁵

As we noted in our June submission to the Panel, digital technology has empowered consumers. And business models are responding. For example, in August a number of members of the content industry launched the Digital Content Guide to give consumers a guide to finding safe and licensed digital content.⁶ It is clear that the market is evolving and new services continue to proliferate. In our submission, it would be a mistake to regulate to deal with issues that are likely to be particular to a point in time. The ACC therefore supports the Panel's draft recommendation in favour of market-based solutions to address international price discrimination. In our submission, this is the best way of satisfying the principles identified by the Panel and ensuring that the regulatory environment is fit for purpose. We do not however think that this recommendation should extend to the mechanisms proposed by the House of Representatives Standing Committee.

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

⁵ http://www.copyright.org.au/admin/cms-acc1/_images/1805573838507357dc4816a.pdf and see also, pp 97-98 of the IT Pricing Inquiry Report.

⁶ <http://digitalcontentguide.com.au>

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 Artists 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
APRA/AMCOS
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