



AUSTRALIAN
DIGITAL ALLIANCE



Australian Libraries
Copyright Committee

Competition Policy Review

Submission to the Draft Report from

The Australian Digital Alliance &

The Australian Libraries Copyright Committee

Executive Summary

The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) thank the Competition Policy Review Panel for the opportunity to provide this submission in response to the Draft Report. This submission is solely concerned with the interaction of copyright and competition policy.

The ADA and ALCC support in principle the following draft recommendations:

- Draft Recommendation 7 – Intellectual Policy Review
- Draft Recommendation 8 – Intellectual Policy Exception
- Draft Recommendation 9 – Parallel Imports

However we caution against Draft Recommendation 7 resulting in delayed implementation of other existing recommendations. In particular the introduction of a flexible, technology neutral ‘fair use’ exception as recommended by the Australian Law Reform Commission¹ (ALRC) would support the ‘pervasive presence of knowledge networks and the power of innovation to lift living standards’² with copyright law fit for purpose in the digital age.

Draft Recommendation 7 – Intellectual property review

The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission.

The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.

Overarching review of Intellectual Property

The ADA and ALCC agree in principle that an overarching review of intellectual property would be useful, and that the Productivity Commission is an appropriate organisation to undertake the review.

We note that amongst the recommendations suggested to be incorporated in the review are recommendations 7, 9 and 10 of the *IT Pricing Review*.³

Recommendation 7 provided that:

‘The Committee recommends that the Australian Government, in conjunction with relevant agencies, consider the creation of a ‘right of resale’ in relation to digitally distributed content, and clarification of ‘fair use’ rights for consumers, businesses, and educational

¹ Australian Law Reform Committee Report 122 [Copyright and the Digital Economy Final Report](#) [2013]

² The Australian Government [Competition Policy Review Draft Report](#) [2014]

³ House Standing Committee on Infrastructure and Communications [At what Cost? Inquiry into IT Pricing](#) [2012] – see box 16.4 *Competition Policy Review Draft Report*

institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem. '

In the period between the bipartisan committee making this recommendation and the Competition Policy Review consideration, the Australian Law Reform Committee (ALRC) released its final report into *Copyright and the Digital Economy*.⁴ This report recommended the introduction of a flexible 'fair use' exception, noting:

'By appropriately limiting the ambit of copyright, exceptions can increase competition and stimulate innovation more generally, including in technologies and services that make productive use of copyright material.

The recommendation to introduce fair use was made after an extensive and thorough 18 month process which consulted with all major stakeholders and follows from previous similar recommendations. It would be a perverse result if its implementation was delayed by further review of the intellectual property system.

The introduction of fair use would be of benefit to Australia's innovation and competition policy. Remarking on the way that 'limits on the scope of a copyright owner's rights can increase the value of the copyright' a recent report by Professor Henry Ergas and Professor Allan Fels concluded that:

'the extent of this effect will obviously vary according to circumstances. It is for that reason that the 'fair use' approach has always provided a significant degree of flexibility in defining the boundaries of non-infringing use.... the prescriptive nature of the Australian approach to fair dealing materially reduces that flexibility.'⁵

As the draft report says:

There is a natural tension between designing specific laws and regulations to deal with problems that emerge at a point in time and building in flexibility to cope with changing market circumstances as they arise. Laws that are less predictable in their immediate application may nevertheless prove more reliable over time as they are adapted through the judicial process to encompass novel developments.

This is especially relevant when new technologies are rapidly altering market conditions faced by businesses and consumers. The more tightly specified our laws, the more likely they are to lag behind developments in markets and possibly act against the long-term interests of consumers.

The Australian Competition and Consumer Commission (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'.⁶

⁴ Australian Law Reform Committee Report 122 [Copyright and the Digital Economy Final Report](#) [2013]. The IT Pricing Inquiry noted the ALRC inquiry was outstanding at 4.91.

⁵ Ergas & Fels [Assessment of Proposed Regulations to Address Internet Piracy](#) *Submission to the Online Copyright Infringement Discussion Paper* [2014] Prepared for the AIMIA Digital Policy Group 25-26

⁶ ACCC [Submission to Copyright and the Digital Economy Discussion Paper](#) [2013] at 4.4

The ACCC supported the introduction of fair use, noting that if copyright laws are ‘too extensive and not balanced by appropriate exceptions’ then there may be ‘significant costs for economic efficiency and consumer welfare’.⁷

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 use that is currently unsupported but has the potential to add value to the economy without harming the incentives of creators and distributors.

Further delays in implementation would be detrimental to Australia’s domestic needs and continue our international disadvantage when compared to major trading partners such as the USA. .

Independent and transparent analysis of the costs and benefits to Australia of IP in trade agreements

Since the release of the Draft Report, two government reports have looked at the negotiation of intellectual property (IP) in the context of the Korea-Australia Free Trade Agreement.

In both of these concerns were raised about the process and outcomes of the IP negotiation.

The Senate Foreign Affairs Defence and Trade Committee noted that:

‘The intellectual property (IP) chapter in KAFTA was negotiated ‘a few years ago’ and does not appear to have been substantially reconsidered since.

It does not appear that this chapter was checked or updated close to the time of finalisation of the entire agreement. This is a matter of concern, given the apparent lack of consultation on IP issues and the relatively fast moving pace of technology in this area.’⁸

The Senate Committee and the Joint Standing Committee on Treaties (JSCOT) highlighted the need for a cost benefit analysis of IP in future trade agreements,⁹ echoing the recommendation in the draft report.

Considering the continuing negotiation of several trade agreements, including the Trans-Pacific Partnership, the interim recommendations for a transparent, independent cost-benefit analysis prior to the conclusion of the overarching IP review would be beneficial. Experience, including the passage of KAFTA, shows that once a trade agreement is concluded there is unlikely to be renegotiation of the intellectual property provisions.

Draft Recommendation 8 — Intellectual property exception

The Panel recommends that subsection 51(3) of the CCA be repealed.

The ADA and ALCC support this recommendation.

Draft Recommendation 9 — Parallel imports

Remaining restrictions on parallel imports should be removed unless it can be shown that:

⁷ Ibid at 3.3

⁸ Senate Committee on Foreign Affairs Defence and Trade References Committee [Report: Korea-Australia Free Trade Agreement](#) [2014] at 5.16

⁹ Ibid recommendation 3 at 5.23 and Joint Standing Committee on Treaties [Report 142: Treaty tabled in 13 May 2014](#) at 5.11

- *they are in the public interest; and*
- *the objectives of the restrictions can only be achieved by restricting competition.*

The ADA and ALCC welcome this draft recommendation, which will not only benefit consumers but also support our domestic retailers.

We note the Committee's endorsement of the IT Pricing Inquiry recommendations 5 and 6. These recommendations would clarify consumers' (personal and business) ability to bypass geoblocks. They would work in conjunction with the removal of the last parallel importation restrictions to provide a market-based response to international price discrimination.

These recommendations are of increasing importance as more copyright content is released first, or only, in digital format. As an indication, university libraries are currently spending on average 80% of their budget on digital resources,¹⁰ and an increasing number of titles are not available in print format. And when last surveyed in 2012 Australian libraries were still paying 58% more for print books and 44% more for e-books¹¹ than US prices.

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, technology companies, consumers, galleries, museums, libraries and charitable organisations.

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.

¹⁰ Information collected from 8 academic libraries in 2014 by the ALCC and can be provided on request. Further information is available from the website of the Council of Australian University Librarians (CAUL) <http://www.caul.edu.au/caul-programs/caul-statistics/previousyears>

¹¹ 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*

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