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Professor Ian Harper, Chairman, and
Peter Anderson, Michael O'Bryan QC and
Su McCluskey,
Commissioners, Competition Policy Review
Competition Policy Review Secretariat,
The Treasury,
Langton Crescent,
PARKES ACT 2600

Dear Commissioners,

Submission to the Competition Policy Review Draft Report, September 2014

The Australian Society of Authors (ASA) is the peak body representing the rights and interests of Australia's semi-professional and professional literary creators. The ASA was formed in 1963 and operates under Australian corporation law. Our organisation directly represents over 300 members nationwide who write and illustrate books in all genres. We also represent more broadly the interests of over 15,000 authors and illustrators working in Australia today.

In the following the ASA offers its response to the 'Panel Views' and 'Draft Recommendations' contained in the Draft Report of September 2014 that we consider are of direct relevance to Australian literary creators who produce and trade copyrightable content.

We note the expressed aims of the Competition Policy Review are to:

- 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.

However, we also note that the impetus for the present review stems from what the Panel identifies as '…important unfinished business (remaining) from the original National Competition Policy (NCP) agenda…' and its consideration that '…new areas have arisen where competition policy ought to apply'.

Before considering the specific recommendations, the ASA is of the view that the version of competition theory that underpins these aims, and the Draft Report itself, is both partial and of limited efficacy for literary creators. We believe that the theory as applied is not up to the task of dealing with the realities of intellectual property, the trade in such property, the role copyright and IP have in the expression and maintenance of Australian cultural production, and the vital activities of individual creators as competitors and traders themselves.

Section 2.5: Intellectual Property

In this section the Panel discusses the impact of the new technologies – especially digital technologies – on IP, and considers them to be '…a pervasive force for change in the Australian economy.' It suggests that, 'Excessive IP protection can not only reduce the adoption of new technologies but also stifle innovation'.

This statement has a corollary which is unfortunately too often ignored: that *insufficient* IP protection can also stifle innovation, by allowing conduct that directly and negatively impacts creators. The rise of internet piracy of books, for instance, is directly attributable to weak policing and sanctions regime under copyright law and culture of dismissal of the property right residing in copyright. Authors whose books have been pirated routinely express the view that there is little reason to continue if income from their work is compromised or reduced by theft.

Regarding the further enabling of digital commerce in IP, the Panel should appreciate that, before any electronic or any other form of distribution and exchange of IP can occur, individual creative work has to be performed. The primary role and tasks of copyright is to nurture and protect that creative work – and to allow for potential remuneration to the creators and producers. The interests of other commercial entities such as internet technology companies must be weighed on the basis that these entities are primarily distributive vehicles – which may certainly be licensed by creators to manage and exploit their copyright, but who can have no special control or primacy over copyright, the trade in copyright IP, or the laws governing these. Similarly, the consumer interest may be considered vital, but it too does not override the rights of the creator to have their work protected and be able to benefit from it materially.

By the time a work is ready to take to market, it should be understood that the creator/copyright owner has already been in a fierce form of competition. Before literary creators are able to enter into any commercial agreement for the sale of their work, they will have commonly first invested in themselves – taking the risk of spending time and money to produce a book or other text. After this, they compete against other writers to find an investor in the form of a publisher, who will apply capital and then submit their production to the vagaries of the market. The literary creator and their publisher may then go to market only to find themselves beaten by competitors on timing or quality, or price.

For literary creators of copyright work to be able take this form of commercial risk, and to deliver the social good of cultural production to the community, it is only common sense that a strong regime of regulation and support should be in place. For the purposes of identifying a property, allowing for remuneration, and enabling the delivery of an important social good, the Copyright Act is the creator's chief and in many ways only tool.

Copyright is the sole means enabling literary creators to protect the material expression of their IP. It is not local form of regulation or some sort of bureaucratic red tape but a national and international body of law which functions under a variety of national legislations and international treaty instruments. Australian literary creators – who produce tradeable IP in the form of books – d not see these laws as some form of competition impediment.

Draft Recommendation 7
This recommendation proposes that an '…overarching review of IP be undertaken by an independent body, such as the Productivity Commission' and that this review '…should focus on competition policy issues in IP arising from new developments in technology and markets.' It also states that 'trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions,' and that 'such an analysis should be undertaken and published before negotiations are concluded.'

On the matter of further analysis, the ASA supports the Australian Publishers' Association (APA) recommendation that , 'Should another review of IP be undertaken… it should not be undertaken by the Productivity Commission alone… To provide comprehensive advice to government, any further review would benefit from having… a multi-disciplinary approach… and a broad economic perspective that covers the complex intersection between innovation, entrepreneurship and competition in a digital world' (submission on Draft Report, November 2014, p.5).

The trade benefits that accrue to Australia through export of finished books or rights sales to the IP in books, must be able to rely on protective and supportive copyright provisions. For the book industry, any 'cost' of such provisions is minimal – but in any event these are not necessarily a matter for publishing companies and producers alone. It is a reasonable expectation of government that it provides infrastructure and the cost of developing that infrastructure as appropriate. IP provisions are enabling of trade, in the way that a tax-funded road or port facility are also enabling.

It is also an absence that the distinctions between technology and content and format are not better delineated than they are in the current Report. The cost of moving tradeable book IP around electronically is negligible, as is the cost of the IP provisions that protect and control this movement.

Draft Recommendation 8
Because the Panel considers that IP '…like all property rights can potentially be used in a manner that harms competition' it states: ' I is therefore appropriate that commercial transactions involving IP rights, including the transfer and licensing of such rights, be subject to the Competitions and Consumer Act 2010 (CCA)' and recommends '…subsection 51(3) of the CCA be repealed.' [Subsection 51(3) of the CCA offers limited exemption for licences and assignments that 'relate to' copyright and other forms of IP from parts of the CCA.]

Recommendations to repeal this subsection or otherwise limit these provisions have a history. In 1999 the National Competition Council (NCC) conducted a detailed review of subsections 51(2) and 51(3) of what was then called the *Trade Practices Act* and recommended amendments to 51(3) to remove, amongst other provisions, price and quantity restrictions from the exemption. Similarly, in the year 2000, the Ergas Committee also recommended amendments to 51(3).

The fact that none of the recommendations that emerged from these enquiries have been implemented is telling. The ASA suggests that the deeper reasons for this failure is that such recommendations are untenable in principle and unworkable in practice.

As recently as November 2012, in its inquiry into Copyright (report tabled in Parliament in February 2014) the Australian Competition and Consumer Commission put forward a case to abolish subsection 51(3) to the Australian Law Reform Commission, yet it still remains in force. While the Government has not seen fit to implement this recommendation, we question the value of reiterating it at this point. Moreover, we cannot see how its implementation would meet any of the Panel's overall policy objectives as previously identified.

The ASA does not support the recommendation that subsection 51(3) of the CCA be repealed now for a number of reasons:

(1) It is based on a narrow, technocratic assessment of the commercial 'utility' of a property right such as copyright. We stress that in liberal democratic societies such as ours, owners have pre-eminent rights under law as to who may access their property. The 'transfer and licensing of rights' cannot be taken out of owners' hands on the theory that 'competition may be harmed' unless there is consumer and/or competition law regulation of access or price to potential consumers.

We stress: property law is fundamental not only to the function of markets but also to the orderly and safe functioning of society itself. It is naïve to favour notions of 'price' ahead of such rights. Under our Constitution, copyright protection resides under the general plenary power to legislate for the peace, order and good governance of the Commonwealth. This is a power designed to manage the nation's laws and affairs on a higher plane than merely the cost of intellectual property products to consumers.

(2) The likely impact of the removal of subsection 51(3) on the IP of literary creators has in no way either been identified or assessed.

(3) The ASA does not believe that our members and constituents cause any restrictions on competition through the management and licensing of their IP based on copyright. On the contrary, the abolition of subsection 51 (3) may have an adverse effect on *their* ability to compete and succeed in satisfying consumer/reader demand by supplying desirable IP.

(4) We consider that there is no basis for introducing additional exceptions to supplement those already available under the Copyright Act and of kind which may lead to copyright materials being accessed and used more widely without permission or payment to the copyright owners.

(5) The Copyright Act is not intended to be an economic inhibitor, or indeed generator, of commercial IP activity. It offers no significant impediment to consumers, and does not prevent or obstruct efficient market functioning, whether in the 'digital economy' or the analogue and bricks and mortar economy. Its first and foremost role is to provide *protection to copyright creators* in the matter of access to their IP.

The reduction of such protection through greater exceptions and exemptions may have the deleterious effect of *destroying or compromising property rights and inhibiting reward to creators and the rights holders they license* It should be recognised that this is one identifiable and likely economic impact on copyright creators and rights holders of changing the present form and foundational intents of the Copyright Act.

Repealing this provision of the CCA also runs the risk of engendering unacceptable levels of uncertainty into the trade in IP as created by our members and constituents, a trade which is already subject to enormous volatility.

We share with Australian publishers the view that copyright law creates the necessary market incentive for our members and constituents to develop and supply the materials for the specialised trade in intellectual property that consumers need and want. We hold that if the law is weakened, the ability of our members and constituents to innovate and grow their activity will be weakened along with it.

Section 2.6 Parallel Imports

In this section the Panel identifies Parallel Import Restrictions (PIRs) as an implicit tax on Australian consumers and businesses. It notes that the '…impact of changing technology and shifting consumer practices (such as the purchasing of books online)…' has made it possible for some of the restrictions to be easily circumvented. It considers that '…the removal of remaining PIRs would promote competition and potentially deliver lower prices for many consumer goods.' I identifies concerns associated with further relaxing PIRs - to do with consumer safety, the production of counterfeit goods and inadequate enforcement (which in any event do not apply to the trade in the IP produced by our members and constituents) that could be addressed directly through 'regulation and information' It holds that relaxing PIRs '…is expected to deliver net benefits to the community, provided appropriate regulatory and compliance frameworks and consumer education programs are in place…' And it notes that, '… transitional arrangements should be considered to ensure that affected individuals and businesses are given adequate notice in advance.'

Draft Recommendation 9

This recommendation proposes that the remaining restrictions on PIRs should be removed unless it can be shown that: (1) they are in the public interest; and (2) that the objectives of the restrictions can only be achieved by restricting competition. The ASA questions the need for this action, given the following:

(a) Although the market for digital or electronic format titles is relatively new it is already extremely competitive. Australian consumers can choose to buy from a multitude of online retailers and distributors who offer discounts as a matter of course with some – notably Amazon – offering discounts at below cost. This process itself invites the seeking-out and comparison of the best prices available.

(b) With regard to titles issued in print form – and this includes educational as well as general trade titles – many different overseas companies have bases in Australia and from which they service local consumers' book needs.

(c) Against this, the present PIRs embraced in the Copyright Act work to serve the broadest definition of public interest – by balancing the right of creators and publishers to manage their activity via territorial copyright markets, against the interests of consumers who seek to access as wide range of purchasable books as possible.

(d) Where titles are not made available in Australia within 14 days of publication by publishers who hold the relevant territorial rights, these may then be freely imported for sale in Australia without restriction.

The ASA does not consider the removal of PIRs will enhance consumption, access, or price of books, but would instead impact negatively on local creators. PIRs currently support our authors' livelihoods by restricting rights to their works on a territorial basis; they may prevent remaindered foreign edition stock of an author's title – for which there is no remuneration to the author – from being shipped back to Australia from an overseas location in the absence of an agreement for this territory.

As the Book Industry Strategy Group put the case, 'The reproduction and first sale of books in Australia is governed by the Copyright Act, which aims to provide a balance of incentives between the creation and consumption of creative works, including books. Included within the Act are the PIRs, which establish the rules pertaining to the importation of books into Australia. The PIRs provide protection for holders (generally publishers and authors) of Australian rights to a title from competition by suppliers of foreign editions of that title' (BISG Report 2011, p. 16).

Although the Productivity Commission in 2009 proposed the removal of the PIRs, the government concluded at the time that changing the regulations governing book imports would '…not be likely to affect the availability of books in Australia, and rejected the Commission's recommendation (Productivity Commission 2009)' (BISG Report 2011, p. 16). Nevertheless, since 2011 – and in response to a recommendation arising out of that report, the major book industry participant organisations – the ASA, APA and AB – acted together to reduce the time impacts of the PIRs in order to get books onto the shelves more quickly to meet consumer demand: '… industry associations successfully negotiated and implemented a voluntary agreement to reduce the conditions around the parallel importation of books from 30/90 days to 14/14' (BISG Report 2-13, p. 22).

This agreement has become known as the 'Speed-to-Market Initiative' and as a result, the greater part of what are anticipated as popular titles or big sellers are available in Australia at the same time as they are overseas, with the effect that Australian consumers experience little if no delay in acquiring the titles of their choice. The ASA agrees with the APA in its submission that, 'There is wide agreement that this agreement has removed the remaining concerns about availability and is operating effectively' (p.3).

The ASA does not believe anything more can or should be done to loosen the rules governing importation, without risking the creation of a chaotic 'open' market, which in our view would destroy Australian authors' territorial copyright – and which, as mentioned, is the only real tool available to control their IP and its licensing both within Australia and beyond.

Our trading partners do not operate without territorial copyright restrictions covering their IP and it would be fundamentally damaging and destructive to our culture, its trade and educational book sectors and to our members and constituents, for Australia to entirely throw off the protections offered by the PIRs.

Again in concert with APA we agree that, 'Removing PIRs will remove competitors from the market and in doing so will remove diversity of content and diversity of supply and

therefore, remove the fundamentals of competition that have made the Australian publishing industry [and the creative output of the ASA's members and constituents] a significant source of value to Australian consumers' (p.11).

Finally, we suggest more expansive definition of 'public interest' is needed in determining the role of further copyright exemptions. We point the Commissioners to the Copyright Agency's (CA) June submission ('6. Cost of Introducing New Copyright Exceptions') and the comment that 'outcomes sought by those making calls [to allow use of content without permission or payment] vary widely' – from greater and cheaper access to content for consumers, to Google wanting to expand its business interests by digitising and sharing other people's content, to the enabling of new content 'transformed' out of existing content.

To take one of the potential outcomes sought – cheaper access to content for consumers: just as there is no consideration of the question of fair reward for the cost of an individual's creative work, there is similarly little understanding that before consumption of content can occur there must be *creation* of content. The nurturing of creative production is also, or should be, a matter of public interest. The content created is not 'freely' achieved, but means significant costs and risks to the creator. An important 'objective of the restriction' asserted by copyright is to allow at least the safety net of private property for such individuals and the entities who invest in them.

In short, there is no one public interest around IP but many interests. And while many interests may be aggregated for descriptive purposes, they cannot all be satisfied in reality by the application of any single mechanism such as price. Against this, some interests – such as the ability to have the protection of a property right over the creation and trading of one's own goods – must remain fundamental.

Section 3.9 Price Discrimination

Draft Recommendation 26

It would likely be impossible to arrive at Australian-based initiatives (GST, legislative or otherwise) that could effectively define, control or remove 'international price discrimination' without also limiting choice or introducing price inflexibility. We therefore agree that a specific prohibition on price discrimination should not be reintroduced into the CCA.

However, we do not consider that with regard to books the removal of the current protection of the PIRs should be part of any additional means to: '…ensure that consumers are able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.'

We take this position on the basis that: (a) there is already sufficiently competitive range of prices evident for the same or similar print format book titles in Australia; (b) in the Australian marketplace, consumers are already able to legally access competitively-priced books; (c) removal of the PIRs, which would create a form of 'open market', might in theory make some difference to price/availability of a limited number of overseas titles, but would also undermine or destroy territorial copyright benefits for Australian authors and their publishers; (d) geo-blocking exists as an important and internationally applied, i imperfect, tool for writers and publishers to trade and manage the supply of their electronic-format copyright works into other markets.

Conclusion

It is clear that the availability of books, and the price to Australian consumers, has improved in recent years due to the benefits provided by internet commerce. Competition on price is occurring naturally, both nationally and across borders, with consumers today offered a variety of sources and means by which to purchase books, together with a range of competitive prices.

The book market is very competitive for publishers and booksellers based in Australia. Local publishers holding rights, and booksellers both online and bricks and mortar, know they must be able to meet – or improve on – the prices offered for a given or similar title of overseas origin. They have no other choice when consumers are free to purchase and import directly from Amazon and other suppliers.

Equally, in the contemporary world of e-commerce, where a locally-originated title is available to be purchased either from within Australia or elsewhere and at range of prices, inefficient booksellers and publishers simply become unviable.

Today's successful Australian book industry is founded on the talents and energies of ambitious – and themselves highly competitive – book creators. We urge the Commissioners to understand that these many thousands of authors, artists and illustrators represent a vital 'supply-side' element too often left out of economic policy calculations. We also urge that any final recommendations regarding intellectual property rules be made in full cognisance of their vital contribution to our economy, culture, and society, and with a view that they be supported in their tasks.

Angelo Loukakis
Executive Director
on behalf of the Board of the Australian Society of Authors
24 November 2014