

**Comment by  
Australian Consumers' Association<sup>1</sup>**

**On  
Intellectual Property & Competition Review Committee  
Interim Report April 2000**

***Introduction***

The Australian Consumers' Association (ACA) is a not-for-profit, non-party-political organization established in 1959 to provide consumers with information and advice on goods, services, health and personal finances, and to help maintain and enhance the quality of life for consumers. The ACA is funded primarily through subscriptions to its magazines, fee-for-service testing and related other expert services. Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests.

The Australian Consumers' Association (ACA) considers the Interim Report from the Intellectual Property & Competition Review Committee a comprehensive and welcome review of the status of the regime for intellectual property management in Australia. The broad direction of the work reported in the document seems very consistent with the interests of Australian consumers. The Committee recommendations demonstrate a firm appreciation of the balance required between the interests of intellectual property rights holders and those of the broader community. Economic efficiency, access to information and competition, in the context of a socially responsible system to address market failure, usually deliver the best outcomes for consumers.

***Parallel Importation***

We note with particular interest the findings of the Committee on parallel importation and fully endorse the recommendation that the restrictions on parallel importation in the Copyright Act should be repealed, and agree with the reasoning stated. We also support the proposition that the Trade Marks Act should be amended so as to ensure that the assignment provisions are not used to circumvent the intent to allow the parallel importation of legitimately trade marked goods.

There is no reason why consumers should continue to bear the burden the inappropriate policy goals attached to the prohibition of parallel importation:

Clumsy and ineffective industry assistance as a by-product of this prohibition – direct industry assistance is indeed more effective;

Questionable relationship between parallel imports and enforcement issues – the statistical basis of the linkage between piracy and parallel imports is well demolished, as succinctly stated in the AIC report ““The period since mid-1998 reveals little evidence of the increase in CD piracy predicted by opponents of liberalisation.” The ACA has consistently argued that as a formalised marketplace, Australia is less likely to offer piracy success on the scale seen in other markets. Australia is fairly low on the scale of international piracy, even by the measures of copyright holder advocates, which can generally be

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<sup>1</sup> ACA Reference 004055

discounted as embodying a high degree of self-serving economic interest when they portray high levels of such behaviour;

The postulation of the prohibition as a useful control device is exposed as bogus – indeed, the premium for goods render more scarce and expensive by this mechanism is a positive incentive for copyright crimes. In our estimation the word piracy is probably not useful - it is a colloquial expression. Commercial misappropriation occurs when one business takes the intellectual property of another and masquerades it as it's own, or misrepresents the right to obtain benefit from it. Consumer copying is another issue that relates more to marketplace behaviour and customer service;

The development of mandatory product standards in sensitive safety areas (e.g. toys<sup>2</sup>) is a sensible approach, but it must be remembered that in the 'light-touch' regulatory environment we currently have, such recommendations should be couched forcefully, with reference to investigative powers, enforcement mechanisms and penalties and resources to achieve the standard desired – otherwise such recommendations may well be treated with lip service.

Some submissions bear brief rebuttal.

The proposition from IBM about “extensive obligations associated with supporting computer software”<sup>3</sup> suggests the myth of free software support. Unbundling support has largely occurred in the marketplace – for better or worse and most software support is on a user pays basis. The choice of whether to pay for support is legitimately within the gift of the consumer who can make the decision based on their needs, perceived value for money and service satisfaction. For many, cheaper imports with a choice of support provider may be a superior solution.

The example that: “the availability of replacement cartridges for printers may be limited to products supplied through authorised distributors and retailers.”<sup>4</sup> Such refusal to supply would probably breach the Trade Practices Act. In any event as a policy seems impractical and is certainly not the path to a happy customer. “Arguments ... raised in public consultations and written submissions that the development of the Internet may mean that the parallel importation debate will be made irrelevant by technological developments”<sup>5</sup> may be interesting for techno-speculation, but the timelines for such developments are notoriously treacherous, and are no justification for failure to act on the clear necessity to remove the entrenched distortions locked up in the current arrangements.

### ***Sections of the Trade Practices Act***

We concur with the Committees goal of ensuring that IP rights are not used to extend market power beyond the scope of the right initially granted. A good balance seem to have been struck in the notion that following the repeal of section 51(3) and related provisions be, that “each of the relevant IP statutes be amended to ensure that a contravention of Part IV of the Trade Practices Act, or of section 4D of that Act, shall not be taken to have been committed by reason of the imposing of conditions in a license, or the inclusion of conditions in a contract, arrangement or understanding, that relate to the subject matter of that intellectual property statute, so long as those

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<sup>2</sup> P22 The Interim Report, repeated at P26

<sup>3</sup> P15 The Interim Report

<sup>4</sup> P15 The Interim Report

<sup>5</sup> P21 The Interim Report

conditions do not result, or are not likely to result, in a substantial lessening of competition.<sup>6</sup>”

### ***Patent System***

We note and concur with the observation that “as the world economy becomes increasingly integrated the international characteristics of the patent system are becoming more important.”<sup>7</sup> We are a little concerned then that the Interim Report is silent on the matter of business process patents.

Until the 1998 decision of the U.S. Federal Circuit in *State Street Bank and Trust Company v. Signature Financial Group Inc.*, pure business process patents were generally considered to be unavailable. The *State Street* decision has removed this restriction and opened the door for a large number of new business process patents in the U.S. The patenting of business methods has far-reaching repercussions, particularly in software, Internet commerce, and the networked world in general.

We feel that the extension of patents into this domain is undesirable from the consumer perspective and inimical to competition and indeed further innovation. Patents for example on the way interest is calculated on a loan, the way stocks are picked for portfolio or the way goods are marketed to consumers. There have even been very broad patents attempted about the idea of electronic commerce or the idea of selling music on the Internet. We think that these are inappropriate uses for patents. We understand that the WTO provisions on patents require countries to extend patents to all fields of technology with a small number of exceptions such as surgical procedures. There is a significant issue as to whether or not countries can use the WTO to force others to do things which are fundamentally unwise such as creating patents on things like marketing practices and methods of finance and ways of doing business on the Internet.

Australia needs to guard against such practices creeping in via patent law harmonisation initiatives. To this purpose, we endorse the notion that “the preamble to the Patent Act should have a statement that more clearly sets out the objectives being pursued by the legislation.”<sup>8</sup>, so long as that statement coheres with the ACCC recommendation that “all intellectual property laws be amended to require that the **long term interests of end-users** in Australia should be the predominant consideration when making future changes to rights”<sup>9</sup> (emphasis added).

### ***The Digital Agenda Bill***

We support the approach of the Committee that the **current balance that has evolved between holders of rights and access seekers should be carried forward** into the evolving digital world. It should not be assumed that technological change is solely inimical to the interests of rights holders.

We feel that there is alarm on the side of the rights holders over digital impact on their rights, evoked in the phrase “the end of copyright” which suggests some kind of free for all. However the opposite is more likely. The end of copyright is likely to be the far more rigorous control of access, not using copyright law, with its guarantee of consumer

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<sup>6</sup> P35 The Interim Report

<sup>7</sup> P37 The Interim Report

<sup>8</sup> P48 The Interim Report

<sup>9</sup> P48 The Interim Report

rights, but via technology and contract, leaving a much slimmer margin for consumer interests. There are many threats to consumer rights of access to material in the digital future. Intrusive rights management systems, pay per view environments and comprehensive monitoring of usage with accompanying violations of privacy are all serious concerns.

Therefore serious review of intellectual property regimes in the manner of the work of the Committee will be essential before the balance is tipped away from consumers.

The ACA noted the way the bill potentially alters the **cost structure of libraries** with possible ripple effects of degraded service and impaired collections for all consumers of library services, particularly students and consumers on the information poor side of the 'digital divide'. We note the Committee expresses similar concerns<sup>10</sup> and feel a stronger recommendation is warranted in this respect.

We also share the reservations the Committee expresses about the notion of '**first digitisation**', and endorse the recommendation<sup>11</sup> that the bill be adopted without the incorporation of this approach.

We support the intended recommendation that that the current **term for copyright** should not be extended.<sup>12</sup> We also support the notion of thorough and independent review of the resulting costs and benefits before any extension of the copyright term at a future time.

We share the concern that ISP proxy **caching**<sup>13</sup> may not be allowed by the Digital Agenda Bill exemption. It has been our contention that IP regulation needs to pay specific attention to the treatment of temporary, ephemeral and insubstantial copies not intended for final consumption, and made solely in the purpose of facilitating that consumption.

Section 43A allows that temporary copies made in the course of a non-infringing communication are themselves non-infringing. However, by inference, this makes other temporary copies, not made in the course of communication, infringing. The current status of temporary copies is indeterminate and this treatment of temporary copies may unfortunately crystallise the status of non-communication temporary copies with unintended consequences.

Such temporary or ephemeral copies may be found in the anti-jog buffers of portable music equipment, in caching arrangements for CD playing on PCs, inside digital photocopiers, all of which are copies made in the course of the legitimate enjoyment of a work and are not made with any intent to infringe. As consumer equipment becomes increasingly digital, such temporary copies abound. Legal uncertainty in this area is not helpful in developing consumer confidence in new technology.

It has been our recommendation that the Bill state that temporary copies necessarily made in the process of using or facilitating the use of a digital work and which do not persist in an end-use form after the use of the work are not reproductions in material form.

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<sup>10</sup> P61 The Interim Report

<sup>11</sup> P64 The Interim Report

<sup>12</sup> P77 The Interim Report

<sup>13</sup> P83 The Interim Report

This would cater for cache usage in communication and otherwise

***Designs Act 1906.***

We are happy with the proposed recommendation in this regard<sup>14</sup>.

***Trademarks/Domain Names***

We note the observation of the areas of overlap and likely confusion between trade marks, domain names, business and company names<sup>15</sup>, and suggest that a further reason for urgent and careful attention in this area is the coming demands of authentication technology. Uncertainty of name is a key stumbling block to dependable implementation.

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<sup>14</sup> P91 The Interim Report

<sup>15</sup> P94 The Interim Report