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Response to Intellectual Property Competition Review Committee Interim Report

9 June 2000

1. We thank the IPCRC for the opportunity to respond to its Interim Report. We note that we provided an earlier submission to the IPCRC dated 17 December 1999, in response to the IPCRC's Issues Paper. We also note that a number of organisations affiliated with the Copyright Council have made separate submissions.

The scope of inquiry

2. We have some concern about the use of limited public resources for development of IP policy being used to inquire into issues which are already the subject of recommendations to Government. These include the report of the National Competition Council (NCC) on sections 51(2) and (3) of the Trade Practices Act, the Copyright Law Review Committee (CLRC) report on simplification of the Copyright Act, and the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Andrews Committee) on the Digital Agenda Bill.

3. We note that the IPCRC's terms require it to "have regard to" recent reviews that have not yet been responded to by Government, including the report of the NCC report and the CLRC report. We query whether the terms of reference allow a new inquiry into issues covered by these reviews.

Benefits to the community as a whole

4. We note that the IPCRC is required to determine whether the Copyright Act restricts competition, and if so, whether the benefits to the community as a whole of such restriction outweigh the costs. As in our earlier submission of 17 December 1999, we submit that "the community as a whole" includes creators and producers of copyright material as well as consumers. We also repeat our earlier submission that, given the objectives of the Copyright Act, the benefits to creators, producers and consumers include non-material benefits.

Parallel importation

5. We maintain the position set out in our submission to the IPCRC of 17 December 1999, and thus oppose the recommendation of the IPCRC on page 23 of its Interim Report.

Contractual arrangements

6. We do not understand what the IPCRC means by its comments on page 23 that, if its recommendation were accepted, "firms in these industries would seek to amend their contractual arrangements with overseas suppliers so as to take

account of the changed environment, and notably so as to impose explicit restrictions on imports or re-imports".[1]

7. From the context, it appears that by "firm", the IPCRC means an owner or exclusive licensee of copyright for the territory of Australia (an Australian rights owner), and that by "suppliers" it means the organisations from which the Australian rights owner has acquired its rights, and from whom it acquires goods containing the licensed or assigned copyright material.

8. By "contractual restrictions", the IPCRC appears to mean an undertaking by the "supplier" not to supply to anyone in Australia other than the Australian rights owner.

9. The IPCRC says that "[i]n most instances" the contractual restrictions "will not adversely affect competition, but rather serve to protect suppliers' investments in market development".

10. If this is the case, then it is not clear how the position for importers under the IPCRC's proposed regime would be different to that under the current law, and why the IPCRC regards its proposed regime as more desirable than the current law.

11. We have a number of other serious difficulties with the IPCRC's recommendation which include:

- a parallel importer is likely to be able to source imports from suppliers with whom the Australian rights owner has no contractual relationship;
- the investment in market development referred to by the IPCRC is likely to be by the "firm" (the Australian rights owner) rather than the overseas supplier;
- the contractual restrictions referred to by the IPCRC may be subject to anti-monopoly laws in other jurisdictions, as well as those in the Trade Practices Act.

AIC report

12. The IPCRC responded (at page 22) to the arguments that removing parallel importation controls leads to an increase in piracy by reference to the report it commissioned from the Australian Institute of Criminology (AIC), but that report has a number of serious flaws.

13. We submit that the report commissioned by the IPCRC from the AIC is, at best, equivocal, and does not justify the IPCRC's summary dismissal of the arguments that allowing parallel importation increases the number of pirate products in Australia.

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[1] The IPCRC makes a similar comment, at page 22: "The Committee recognises that suppliers should be able to protect the investment they make in market development, including through controls over distribution channels. However, the Committee notes that this protection can be and generally is effected by contractual means".

14. The AIC acknowledges (at page 29) that relaxing parallel import controls makes the detection of imported pirate products more difficult. It also reports anecdotal evidence from Customs that there is a "continuing and probably increasing flow of pirated and counterfeit products into Australia".

15. On the other hand, in the Executive Summary, the AIC report asserts that there is "little evidence" of increased piracy since mid 1998, based on figures supplied by Customs, the Australian Federal Police and the Director of Public Prosecutions. However, the report acknowledges that "[i]t may be that insufficient time has elapsed, particularly given the approximately 2 year time lag for prosecutions, to make a realistic assessment on the basis of these statistics of the effect of parallel importation liberalisation".

16. In addition, the report notes, at page 35, that "a significant factor in the police response to intellectual property infringement is the perception that such matters are essentially commercial disputes best resolved through civil litigation". Thus, the report indicates that piracy is enforced both as a criminal and a civil matter, but has not referred to figures from copyright owner organisations, or to statistics about civil litigation, in stating its conclusion that piracy has not increased.

17. The Executive Summary also asserts that factors other than allowing parallel imports may be responsible for "any CD piracy that does eventuate", and that these factors "suggest that increased enforcement by Customs and other public authorities of the existing copyright and trade mark regime would be of limited effect in reducing overall levels of piracy". The factors cited are:

    - changes in economic conditions which encourage greater production of pirate CDs in other countries, and
    - changes in technology which encourage "low-cost domestic CD piracy and electronic music piracy (Internet downloading)".

18. This is a highly speculative assertion, based only on "anecdotal evidence and media reports".

19. Even if the assertion is correct:

    - The first factor misses the point of the piracy argument. Copyright owners are not arguing that allowing parallel imports results in more pirate products being *produced*; they are arguing that allowing parallel imports results, in practice, in more pirate products entering Australia because they are harder to detect by Customs. If the downturn in Asian economies is resulting in more pirate product being produced overseas, the detection problem caused by allowing parallel imports (which is acknowledged in the report) is even greater.
    - The second factor, coupled with the first and the acknowledgement of the detection problem, suggests that a proportion of the pirated music in Australia will be imported pirate CDs, but that this level of piracy is somehow acceptable.

Effect on Australian culture

20. In response to arguments that removing controls over parallel imports would have a detrimental effect on Australian culture, the IPCRC said (at page 22)

that "policy goals such as those of promoting Australian cultural production are best pursued by means that are direct, transparent and publicly accountable". The IPCRC does not state what means it has in mind, but would appear to be referring to Government subsidies. If so, we note:

- such subsidies are at the discretion of the government or the funding body of the day, and there can be no guarantee that a subsidy recommended by the IPCRC would be introduced, let alone continued;
- careful consideration would need to be given to Australia's WTO obligations if an Australian industry is to be given a government subsidy in the place of copyright protection.

The "windows" system

21. The IPCRC did not respond at all to the major argument in favour of retaining control over parallel imports put to it by the film industry – the "windows" system (referred to by the IPCRC on page 16 but not in connection with its recommendations).

Relationship between parallel importation and piracy

22. The IPCRC refers (at page 18) to the ACCC's comment that "restrictions on parallel imports are a blunt means to clamp down on piracy". The comment suggests that the purpose of the importation provisions is to control piracy, and thus indicates that the ACCC both misunderstands the purpose of the importation provisions, and the arguments about piracy put by copyright owners.

23. The importation provisions apply to both pirate and parallel imports. In relation to pirate imports, the provisions are intended to assist with the control of piracy.

24. In relation to parallel products, however, the provisions are intended to prevent free-riding on investments made by Australian rights owners, based on their exclusive rights in the territory. Copyright owners have argued that increased piracy is a *practical consequence* of allowing parallel imports – because it is harder to differentiate pirate imports from parallel imports (a consequence acknowledeged in the AIC report). They have not argued that controlling piracy is a *purpose* of the importation provisions as they apply to parallel imports.

Distinction between production and distribution

25. The IPCRC refers (at page 20) to the view of the ACCC that the importation provisions relate to distribution rather than to production, and are thus "not justified by the traditional free-rider concerns about intellectual property". We submit that the ACCC has misunderstood the nature of the parallel importation provisions.

26. The provisions in the Copyright Act dealing with parallel importation treat an imported article as if it were produced in Australia – that is, the provisions are based on an assumption that an unauthorised import (whether parallel or pirate) has the same free-rider effect for the Australian rights owner as an infringing copy made in Australia.

Trade Practices Act

Section 51(3)

27. We maintain our preferred position that section 51(3) remain unchanged. As noted in our submission of 17 December 1999, this position is argued in detail in our submissions to the NCC.

28. We have noted our concerns about the NCC recommendations in our submission to the IPCRC of 17 December 1999.

Third party access

29. The IPCRC has stated (at page 36) that it "considers that there is merit in having third party access to IP rights along the lines provided in respect of other services by Part IIIA and Part XIC" of the Trade Practices Act. The TPA allows "access" to "a range of facilities of national importance" (IPCRC at page 35).

30. The IPCRC was asked about the issue at the public seminar the IPCRC held in Sydney, but its discussion of the issue was at a theoretical level rather than by reference to any examples of "facilities of national importance" it had in mind, or what it means by "access". It is thus difficult to respond to the IPCRC's recommendation.

31. As noted in our comments below on the Digital Agenda Bill, any exceptions or limitations to the rights of copyright owners must comply with the three-step test set out in international treaties to which Australia is party. This test allows specific exceptions or limitations to copyright rights "in the public interest", and the Copyright Act already contains a wide range of exceptions and limitations. These include exceptions allowing use of copyright material without permission for educational purposes, library purposes, government purposes, research or study, criticism or review, reporting news, and judicial advice.

Digital Agenda Bill

32. We strongly oppose the IPCRC's recommendation about the Digital Agenda Bill on page 61, and we disagree with some aspects of the IPCRC's analysis on pages 58 to 61.

Access to information

33. On page 58, the IPCRC appears to misunderstand the idea/expression distinction in copyright law, and copyright owners' attitude to dissemination of, and access to, information. Copyright law does not prevent the use of ideas or information. It does provide a mechanism for payment to a person who has expended skill and effort giving expression to that idea or information. Copyright owners are not seeking to deny access to information, but rather payment for others' use of their expression of that information;

34. We thus agree with the IPCRC's views in paragraphs c) and d) on page 61.

"Balance" between owners and users

35. The IPCRC makes many references to the "balance" between owners and users of copyright material without saying what it regards that balance to be. The balance, we submit, is that expressed by the "three-step test" set out in international treaties to which Australia is a party. Under the "three-step test", exceptions and limitations to copyright must:

    - be confined to certain special cases;
    - not conflict with a normal exploitation of the work; and
    - not unreasonably prejudice the legitimate interests of the rights holder.[2]

36. The exceptions in the Digital Agenda Bill must comply with this test.

No reference to "first digitisation"

37. At page 59, the IPCRC refers to the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Andrews Committee) in a way that suggests the Andrews Committee gave unqualified support to the exceptions in the Digital Agenda Bill. Of course, this is not the case, as the Andrews Committee recommended that the proposed exceptions in the Bill not apply to "first digitisation" (referred to later in the IPCRC's report, in another context, at page 63).

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[2] Article 13 TRIPS. The three-step test is also set out in Article 9(2) of the Berne Convention, and is included in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (Australia has not yet acceded to the latter two treaties).

38. The recommendation of the Andrews Committee that the library provisions should not allow "first digitisation" address many of our concerns, but not our submission that any exceptions allowing digital copying of digital material by libraries should require payment to copyright owners.

Copyright owners' concerns misunderstood

39. The IPCRC appears to have misunderstood, or discounted, the copyright owners' argument that because the online economy is in its early stages, they should have a reasonable opportunity to develop and launch online products and services, including online products and services containing material they have already published in other formats, without their investment being undermined by free copying by libraries. In our submission to the Andrews Committee of 6 October 1999, we gave the following example:

> … under the proposed amendments, a library could request another library to make electronic reproductions of a large number of articles and/or extracts from works for inclusion in the requesting library's collection. The supplying library could supply these in the form of a searchable database – on CD-ROM, for example. It appears that the library could make this database available online on the library premises.[3] The library could also lend the CD-ROM to its clients, who could view the contents for the purposes of research or study. In addition, the library could subsequently sell the CD-ROM.[4]
>
> A publisher that wanted to produce such a database would require a licence from the owner of copyright in each item. The proposed amendments would thus operate to the detriment of the copyright owners who would lose the opportunity to negotiate a licence fee or other conditions (such as technological protection measures), and would allow libraries to compete unfairly with other database publishers.

40. The exceptions in the Digital Agenda Bill thus allow a library to undermine an online service a publisher is developing, because the library is not required to invest the time and money necessary to acquire any necessary licences from contributors, and to establish an e-commerce facility, a payment mechanism for the contributors, and technological protection measures to deter unauthorised copying. The exceptions would also rob the contributors of payment, and of an opportunity to ensure that the digital version of their work was protected by effective technological protection measures.

41. In relation to the IPCRC's analysis on page 60, we have not argued that the sale of digitised periodical articles is always a "primary" market, but that it is *a* market that should be allowed to develop. By definition, an "article" is a work that has been published in a periodical publication. The digitised version of the article may be the only version in which it has been published (eg as part of an online periodical publication) or it may be one of the versions in which it has been published (eg if the article was first published in a printed periodical).

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[3] Because it has "acquired" the material in electronic form for the purposes of the proposed new s49(5A)

[4] Provided a reproduction is made for a permitted purpose by a library, the subsequent use of the reproduction is not regulated.

42. Where a work has, at some point, been published as an article, it would appear that, under the Digital Agenda Bill, it would be treated as an "article" for the purposes of sections 49 and 50, even if the library copied the work from somewhere other than a periodical publication. Thus, we do not agree with the IPCRC's analysis (on page 60).[5]

"Subsidies to the creation of copyright material"

43. On page 61, the IPCRC asserts that "society already provides substantial direct and indirect subsidies to the creation of copyright material". The IPCRC does not say what subsidies it is referring to here, or how those subsidies would compensate copyright owners for income lost due to free copying by libraries, or unauthorised copying allowed by the distribution by libraries of digital material without technological protection measures.

CLRC reports

44. We have already made known to the IPCRC in our submission of 17 December 1999 that we oppose the recommendations by the CLRC about fair dealing.

45. We take issue with a number of aspects of the IPCRC's analysis on pages 63 to 65 of its report.

46. We make the same point about the IPCRC's references to "balance" as we made in relation to the Digital Agenda Bill

47. We submit that the IPCRC, on pages 63 and 64, has misunderstood the recommendation of the Andrews Committee regarding remote users, and that it is clear from the context that the Andrews Committee intended to refer to section 49(2A) of the Copyright Act, as it would amended by cl 51 of the Digital Agenda Bill. In listing the exceptions which would allow first digitisation under its recommendations, the Andrews Committee is clearly referring in each case to the existing exceptions as they would be amended by the Digital Agenda Bill.

48. The paragraph on page 64 dealing with "first digitisation" suggests that the IPCRC has misunderstood the Andrews Committee's proposal. Under the current law, the creation of a digitised version of a non-digitised work is usually a reproduction of the work requiring the permission of the copyright owner, and the proposed new section 21(1A) is intended to confirm this. Under the current law, however, it appears that libraries are entitled to photocopy, but not to digitise, works under Part III Division 5 of the Copyright Act. The amendments in the Digital Agenda Bill would expand the application of the current provisions by allowing libraries to (among other things):

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[5] By analogy – under the current provisions, a library may have in its collection a photocopy of a periodical article supplied by another library under section 50. If the first library received a request from a user for a copy of that article, our understanding is that it would be regarded as an "article" for the purposes of section 49 (so that the library would not be required to make enquiries as to its commercial availability), rather than as a work (other than an article).

- digitise non-digital material,
- produce non-digital versions of digital material (eg by printing an electronic document), and
- duplicate digital material

49. The Andrews Committee did not recommend that copyright owners be given a new right of "first digitisation", but that certain exceptions in the Copyright Act should not allow users to first digitise without the copyright owner's licence.

50. We do not understand the IPCRC's assertion, on page 64, that if the Copyright Act does not allow people to digitise more than a substantial part of non-digitised material, this "would ultimately erode Australia's ability to make productive use of copyright material". The IPCRC provides no examples to illustrate why it thinks this would be the case.

51. In addition, the reference to "productive use" indicates a confusion between the provisions in the Australian Copyright Act allowing fair dealing for research or study (which make no reference to "productive use"), and the US case law on the fair use provision in the US Copyright Act (which have held that a "productive" or "transformative" use is more likely to be a fair use).

52. The IPCRC says in its recommendation on page 64 that "potentially very significant changes should not be made without a careful consideration of the resulting costs and benefits". The Digital Agenda Bill would effect significant changes, and the Andrews Committee correctly recognised that the effect of those significant changes on the emerging online economy had not previously been given sufficient consideration.

Copyright term

53. The IPCRC has asked us to comment on the relative costs to users and benefits to copyright owners of extending the term of copyright from 50 to 70 years.[6]

54. If the period of protection were extended in Australia, the benefit to owners of copyright would be an increase in the value of their copyright. They would be able to negotiate licence fees for the additional 20 year period in Australia, and in countries which would grant the longer period of protection to Australian material on a reciprocity basis (such as the UK). Those licence fees would be a cost borne by the licensees.

55. Countries which have extended their term of protection from 50 to 70 years have taken different approaches to the application of the extended term to foreign works. In the US, the longer period of protection applies to Australian works. Thus, for example, an Australian film producer must get a clearance to base a film on an Australian novel whose author died 60 years ago, if the film is to be distributed in the US. By contrast, the UK protects Australian works for the same period they are protected here.

56. We submit that the transaction costs would not be higher where:

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[6] We note that we are not arguing for a perpetual term of copyright.

- there is one clearance for all relevant territories; and
- the work would still be in copyright under the current law; or
- the relevant territories include a territory which currently protects Australian works for the longer term (such as the US).

57. The transaction costs may be higher if it is not possible to negotiate a single licence for all relevant territories, and a separate clearance had to be negotiated for a territory which would not require a clearance under the current law.

58. We submit that these costs are outweighed by the benefits to Australian rights owners of more valuable copyrights.

Crown ownership

59. We support the IPCRC's recommendation about Crown ownership on page 78.

Broadcast fee capping

60. We support the IPCRC's recommendation regarding broadcast fee capping on page 80, but submit that the price cap for the ABC should also be replaced with an obligation to pay equitable remuneration. The characteristics of the ABC referred to by the IPCRC could be taken into account by the Copyright Tribunal in determining equitable remuneration, in the way that the similar characteristics of community broadcasters would be taken into account.

Performers' rights

61. The Council supports the introduction of more extensive rights for performers, but notes that this position is not supported by some affiliated organisations, including the Screen Producers Association of Australia. We can provide the IPCRC with a copy of our publication, and of earlier submissions, on the issue.

Libby Baulch
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