



AUSTRALIAN DIGITAL ALLIANCE

Kay Collins
Director
Intellectual Property & Competition Review Committee Secretariat
Attorney-General's Department
Robert Garran Offices
BARTON ACT 2600

Monday 15 November 1999

Dear Madam

ADA Submission to the Intellectual Property & Competition Review Committee

The following submission to the Intellectual Property & Competition Review is made on behalf of the Australian Digital Alliance.

The Australian Digital Alliance (ADA) is a broad based coalition of public and private sector interests formed to promote balanced copyright law and inject a public interest perspective into the copyright debate in Australia. ADA members include schools, universities, interoperable software producers, major cultural institutions, consumer interest, scientific and agricultural research organisations, Internet industry representatives, libraries and individuals. Sir Anthony Mason, former Chief Justice of the High Court of Australia, and Mr Neville Roach, Chairman of Fujitsu Australia, act as Patrons of the Australian Digital Alliance.

If you have any queries or require further information, please do not hesitate to contact me on 02 6262 1273 or email kbeard@nla.gov.au.

Yours Sincerely

Katherine Beard
Executive Officer



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Intellectual Property & Competition Review Committee

Australian Digital Alliance Submission

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Introduction

- The Australian Digital Alliance (ADA) appreciates the opportunity to make this submission to the Intellectual Property & Competition Review (IPCR).
- The ADA represents a broad alliance of public and private sector organisations and individuals who seek to promote balanced copyright laws particularly as they apply in the digital and online environments.
- ADA members include:
 - Information technology businesses – represented primarily by Supporters of Interoperable Systems in Australia (SISA);
 - Consumers – represented primarily by the Australian Consumer's Association (ACA);
 - Science and research organisations – including the CSIRO.
 - Schools – represented by MCEETYA Task Force on Copyright Law, which speaks for the vast majority of private and public sector schools in Australia;
 - Higher education institutions – represented by various universities;
 - Libraries and cultural institutions – represented by a wide range of libraries, archives, museums, galleries and their representative organisations;
- The ADA membership consists of both copyright owners and copyright users. Thus the ADA strongly advocates a balanced approach be taken in considering the impact of the IPCR on copyright owners, copyright users and the general community.

Executive Summary

In the ADA's submission:

- 1 Copyright law should be subject to competition policy analysis, particularly with reference to the new digital information environment and to the wider public interest.
- 2 Intellectual property laws should not be overprotectionist in approach or effect. The current balance struck between creators and users needs to be retained in the digital world.
- 3 Australia's position in the global marketplace is unique. Our economic future relies on the vision of current policy makers to perceive this difference and reject the blanket application of other international policies to the Australian market.
- 4 Reshaping the balance between copyright owners and copyright users should not be undertaken under the guise of technological advancement.
- 5 Circumvention devices must be made available for non-infringing purposes.
- 6 Parallel importation should be supported where the benefits of wider range, access and cost differentials of information products are of value to the community.
- 7 The term of rights protection for copyright owners should not be extended.
- 8 The monopoly power of collecting agencies should continue to be subject to review via an independent tribunal. Other alternatives should also be sought in order to promote more accessible and affordable dispute resolution for copyright owners and users.
- 9 Broadening of copyright protection should not occur under the guise of enforcement of rights. Enforcement provisions and penalties should not be extreme or draconian.

Policy Considerations and the ADA

- 10 The ADA strongly supports the mandate of the IPCR Committee in its review of intellectual property laws within the framework of competition policy.
- 11 The Committee's consideration of the conclusions and recommendations of the Copyright Law Reform Committee report *Simplification of the Copyright Act 1968* will prove advantageous in assisting the aims of this inquiry.

- 12 The application of a public interest test to the operation of intellectual property laws (including to copyright law) is supported.
- 13 It is increasingly important, because of the digital environment, that intellectual property laws only restrict competition to the extent necessary to achieve the goals of intellectual property protection and no more. If the protection is too strong and the adverse effects on competition too great, the net effect on community welfare will be negative and the desired balance between protection and innovation will be rendered unachievable.
- 14 Intellectual property laws operate as an incentive to creation and the dissemination of information and entertainment products to society. Such laws are necessary to overcome underproduction of artistic and creative products. Intellectual property laws should not have the effect however of fostering anti-competitive conduct. Anti-competitive conduct without demonstrable net benefit will arise if intellectual property law settings are overprotectionist.

“Even where intellectual property rights are provided under economic (rather than moral) regimes, the economic interests promoted often tend to be those of intellectual property owners rather than the public at large. The benefits from greater protection accrue to a relatively small group of owners who have an incentive to organise and lobby government, as opposed to the dispersed benefits from greater competition”¹.

- 15 There should be no expansion of the range of legislative protection available to intellectual property owners as sufficient protection measures are currently available. It is critical that rights expansion should not be forthcoming under the guise of a response to technological advancement.
- 16 The need for ‘balance’ in intellectual property laws as outlined under heading 2 ‘Nature and Objectives of the IP System’ on page 3 of the Issues Paper is critical in regard to copyright law. Incentives for creation and investment in creative output need to be balanced with the need for wide dissemination of – and access to – output, ideas and information. Limiting access to information necessarily results in limiting further innovation as the creative process does not occur in a vacuum, but relies upon reference to the prior innovation of others.
- 17 This balance is achieved in the copyright law regime through such tools as the following: limited categories of protected subject matter, limited scope of exclusive (monopoly) rights, limited duration of protection, a wide range of free use exceptions, and the existence of a number of compulsory (statutory) licensing schemes overseen by an independent Tribunal.
- 18 In response to the specific issues outlined on page 6 of the Issues Paper, the extensive use of competition criteria as a factor in determining the scope of intellectual property protection is appropriate. In particular,

¹ Walker, Jill.. “The Interface between Intellectual Property Rights and Competition Law and Policy: An Australian Perspective”, *Prometheus*, Vol 16, No 3, September 1998; 383 at 385.

given the potential for impact upon competition in the market place, all proposals to amend the *Copyright Act 1968* should be considered from a competition perspective - perhaps by formal referral to the ACCC for a cost/benefit analysis. Where an amendment could potentially have a negative effect on competition or consumer interests, it should only proceed where the claimed positive results outweigh the negative. Greater cooperation between the intellectual property and competition arms of government operation could only benefit the intellectual property industry and the community at large.

International Obligations

- 19 Australia is a large net importer of technology and other intellectual property material (including copyright material).
- 20 The Australian Copyright Council Report, "Copyright: an economic perspective" by Hans Hoegh Guldberg (Second Edition), cites the level of imports for 1992-3 to be four times the level of Australian copyright exports (Summary). Our geographical isolation and widely dispersed population also contribute to the uniqueness of our situation.
- 21 As a result of this position, Australia does not share the same trade interest in broader and stronger intellectual property protection that typifies other countries that are net exporters of intellectual property (such as the United States).
- 22 Increases in the scope of intellectual property protection, which further the net financial returns to intellectual property owners, will have a negative impact on Australia's balance of trade and foreign debt position.
- 23 Australia should apply a competition and public interest test to any issues which arise for consideration under the TRIPS review. This is particularly important when considering the TRIPS element: 'limitations on exceptions to exclusive Intellectual Property rights where the interests of rights holders may be prejudiced'. Again the need for balance is essential when contrasting rights holders entitlements with the need to retain access for users of intellectual property for the purposes of research, study, criticism and innovation.

Intellectual Property Legislation

Copyright Act 1968

- 24 The Digital Agenda Bill makes provision for anti-circumvention laws which have the potential to enable copyright owners to extend the scope of their rights beyond that of the current legislative framework. This extension would take place without regard to the limitations on scope that are intended to address competition and consumer concerns. The Bill proscribes the manufacture of and commercial dealing in circumvention devices, whilst not prohibiting their use.
- 25 The prospect that technological 'lockouts' will restrict access, diminish competition and shift the balance between users and owners in a manner inconsistent with the balance struck under the Act, needs to be addressed. Anti-circumvention laws are supported to the extent that they improve enforcement of copyright, but not to the extent of allowing owners to expand the scope of protection without regard to the public interest. Circumvention devices are often used for legitimate purposes - non-infringing purposes. Locking away copyright material through technology is one means of controlling access to a creative work – the implications of which are extensive in a digital environment. The potential impact on innovation and creation, where works cannot be accessed for non-infringing purposes because of technological lockouts, is an expansion of the protective measures beyond the intention of the legislation. The policy objective behind what is essentially a ban on the commercial availability of circumvention devices can be achieved without making what is legitimate, illegal.

Computer Software Protection under the Copyright Act 1968

- 26 It is now recognised in international treaties that computer programs are protected as works under copyright law.
- 27 The ADA supports the amendments in the Copyright Amendment (Computer Programs) Act 1999 as these alterations will have a positive effect on competition, particularly for software and information technology industries.
- 28 By creating exceptions to infringement that permit decompilation for developing interoperable products, dominant players in the IT industry can no longer use their copyright protection as a tool for preventing access to critical interface specifications. The amendments will assist small,

innovative companies to create IT products that work effectively with the products of other often larger companies. The Computer Programs Act is an excellent example of the achievement of competition goals through the fine-tuning of the scope of intellectual property protection. Protection is balanced against access with the promise of further industry innovation.

- 29 The importance of precluding the ability to contract out of this entitlement must also be stressed. For instance, dominant software vendors should not be permitted to override the interoperability exception through the use of standard form contracts.
- 30 Circumvention devices facilitate the operation of the exception to permit decompilation for the development of interoperable products and should be made available for this purpose.

Parallel Importation under the Copyright Act 1968

- 31 We support the submission on parallel importation presented by the Australian Consumers Association (ACA).
- 32 Removal of restrictions to parallel importation where users are provided with better and cheaper access to a wider range of intellectual property content, without significant adverse affect to the legitimate interests of owners, is an appropriate objective.
- 33 Australia's international law obligations do not prohibit parallel importation. The benefit to the community of wider ranges of information being accessible through parallel importation, support Australia's position in the global environment and the nature of technological development. Distribution of material over the Internet is challenging traditional trade barriers and creating new market forces in the dissemination of creative innovation in copyrighted works. Competition policy and the wider public interest support the diversification of markets through parallel importation.

Scope of Rights under the Copyright Act 1968

- 34 There is no good case for any extension of the term of copyright protection and we submit that Australia should not follow the European or US lead in doing so.
- 35 The European Union's rationale for doing so was integration and harmonisation across its member states – a factor not relevant to Australia. The United States created its extension in response to arguments from copyright owner lobby groups. Australia is in a very

different position from either of these two states as we are a net importer of copyright material, as against a net exporter, and as a result our needs are quite different.

- 36 The benefits to copyright owners from an extension of protection are negligible, particularly when balanced against the detriment to competition and innovation. It is hard to perceive how a term of 'Life plus 70 years' provides any stronger incentive to individual creators than 'Life plus 50 years'. The latter is a very substantial period of protection and remuneration. It is even harder to believe that business would increase its current investment in intellectual property on the basis of an extra twenty years or so of protection. What is easier to perceive is the difference that the extra time will make in terms of a negative impact upon access and, ultimately, further creative innovation.

Administration and Enforcement of Rights under the Copyright Act 1968

- 37 It is recognised that collecting societies play a strategic role in administering payments to copyright owners. They provide an important practical solution to the problem of users requiring permission to use large numbers of works owned by many different parties.
- 38 Collecting societies are often monopoly providers of licences over particular works or rights. As such, it is critical that there are mechanisms in place to prevent the abuse of that dominant position.
- 39 In many cases, such as where a statutory licensing scheme operates, the monopoly power of a collecting society can be checked by making an application to the Copyright Tribunal. Many users however face cost disincentives in relation to arguing a case before the Tribunal. Also, if no statutory licence scheme exists (which is true for many users who approach collecting societies for a licence), there is no access to the Tribunal and no alternative for rights clearance other than to deal with the monopoly collecting society. Even though the society may only be a non-exclusive licensee (which means a user can still obtain rights clearance directly from each copyright owner), the society will still be the only realistic channel for rights clearance where a user requires clearance for many different works.
- 40 At no stage however should there be any diminishing of a copyright owner's ability to create a voluntary licence directly with an enduser – this will be increasingly important in the digital environment and is supported by competition policy. Of course voluntary licences and contracts between users and owners should be regulated in so far that owners are prevented from opting out of the exceptions to copyright infringement through contractual measures.

- 41 Enhanced resolution of copyright issues and disputes would be possible with the introduction of a Copyright Ombudsman, as recommended in the Simpson report on collecting societies. Cheap and equitable access to dispute resolution would be facilitated. This idea is supported by competition policy and the wider public interest.
- 42 The impact of new technologies and the ability of a copyright owner to electronically manage their rights on their work sited on the Internet, challenges the position of collecting societies. Just as individual creators are bypassing the traditional industry regulators of publishing houses, record industry companies, etc, the copyright owner is now in a position to bypass their traditional collectors of revenue. Owners and creators can have more control over their work and who has access to it. Whilst this is a positive in that it enables a direct challenge to be made to the power of collecting societies, for users of copyright material there is a potential for electronic material to be locked away, unable to be accessed even for permitted purposes. The potential for this to occur must be recognised and appropriate means established to retain access for users in an individually managed information environment. Circumvention devices must be permitted for non-infringing purposes.
- 43 With reference to forward caching, the ADA supports the drafting of an exception to cover proxy caching if copyright owners use copyright infringement claims in an anti-competitive manner against ISPs. The ADA strongly suggests that these copies are or should be covered by the temporary copies exception of the Digital Agenda Bill. A broad fair use defence (as recommended by the CLRC report) could apply. Competition policy should also be utilised when considering the broad fair use analysis.

The Copyright Law Review Committee Report

- 44 The CLRC Simplification Report has recommended significant changes to help promote greater efficiency in the copyright law system. Its address of the issue of Fair Dealing is particularly welcome and provides a good basis for reform in Australia. The importance of this report cannot be underestimated in any review of the copyright legislative environment.

Review of Australian Copyright Collecting Societies (1995) (The Simpson Report)

- 45 The Simpson Report was completed before the impact of the digital environment on the copyright system was fully realised. The prospect of a follow up report that could account for more recent developments would be welcomed. Monopoly collecting societies should be subject to further review in terms of their new and continuing obligations in the digitised world.

Enforcement of Intellectual Property Rights

- 46 The effective enforcement of copyright laws in Australia is a matter of concern for owners and users alike, particularly in regard to the digitised environment and electronic reproduction.
- 47 Penalties for copyright infringement should reflect the nature of the offence - extreme or draconian penalties are not in the best interests of the wider community.
- 48 Neither should the issue of enforcement be confused with the issue of rights protection. Copyright owners' rights should not be broadened under the guise of increasing enforcement measures for intellectual property offences, for instance through the proposed Digital Agenda Bill's treatment of circumvention devices.