

Copyright, circumvention, competition, and remedies

- 4.1 While chapter 3 canvassed some of the reasons provided by industry for practicing price discrimination, including higher costs for businesses operating in Australia, themes relevant to copyright law and competition arose repeatedly in discussions on IT pricing in Australia. Issues of access for users, ownership and licensing of content, and managing the impacts of infringement were also raised regularly. The development of the copyright regime, and its ability to adequately adapt to the challenges presented by an environment with increasing amounts of digital content were discussed in context with the balance between often competing rights of creators, owners or users to access that content.
- 4.2 Discussions about copyright and intellectual property inevitably include considerations of who benefits: what gives one party an advantage may disadvantage another. The Committee notes the many intersecting, and often conflicting interests, and that what might appear by one party to be solutions to problems, are seen by another party as threats to livelihood. The Committee notes that interpretations are often disputed and interests are often opaque.
- 4.3 This chapter discusses these broad issues of intellectual property as they apply to competition and consumer rights. The Committee notes that in the current legislative framework, there is tension between treatment of physical and digital content, and that current rules are seen by some to be inadequate. The Committee acknowledges the development of measures, including geoblocking, and methods to circumvent such measures, and their different impacts on consumers and industry. The Committee notes that some remedies proposed by inquiry participants to alleviate the effects of price discrimination are therefore not universally agreed, including those relating to the nature of rights and their protection, the legality of circumvention measures, the means of maintaining competition

in markets, and how to improve clarity for consumers. The chapter concludes with an overview of some international aspects: harmonisation of warranties and standards, and concerns about trade negotiations.

- 4.4 The Committee also notes that several claims from inquiry participants relating to price discrimination are *not* relevant to copyright issues, and may simply be business decisions for which there is little observable explanation. In its consideration of all of the above issues the Committee notes previous and ongoing inquiries into Australia's copyright regime.

Balancing copyright interests

- 4.5 Many of the IT products which appear to be subject to international price discrimination are protected by copyright. According to Dr Nicholas Suzor and Ms Paula Dootson, copyright scholars from the Queensland University of Technology:

Copyright operates to provide an incentive for firms to invest in the production and distribution of creative expression. As a utilitarian statutory monopoly, it operates to balance the incentives provided to producers against the interests of the public in having rich access to expression. Seen this way, access is the goal of copyright – access to culture is a predicate for individuals to learn, grow, create, and contribute back to society.¹

- 4.6 This inquiry has heard evidence suggesting that the balance between rights holders and consumers in Australian copyright law has shifted in recent years as a consequence of changes in the way content is delivered, changes in the terms under which content is acquired, and changes in the ways in which consumers are permitted to use the content they have purchased. The Committee notes the views of rights holders that these changes have at least in part been motivated by the incidence of copyright infringement, which is discussed later in this chapter. In the view of some observers the balance has swung in favour of rights holders at the expense of consumers, reducing competition in copyright markets and generating higher prices for copyright material, including through international price discrimination.
- 4.7 In its submission to the inquiry, the Treasury noted that the rights conferred by copyright and intellectual property laws have an inherent potential to generate price discrimination:

1 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 2.

... intellectual property laws provide various rights for the protection of economic investment in innovation and creative efforts. To the extent that these rights allow rights holders to control the marketing and distribution of goods and services, there is a potential for price discrimination, should the rights holder choose to do so.²

- 4.8 Lack of balance and competition in the copyright system can generate excessive prices for copyright material, which represents a significant social cost, according to Dr Suzor and Ms Dootson.³ The Australian Competition and Consumer Commission (ACCC), in its submission to the Australian Law Reform Commission's ongoing *Copyright and the Digital Economy* review highlighted the need for balance in the copyright regime:

Absent copyright laws, it is possible for users to 'free-ride' on copyright materials by using them without payment. Consequently, there may be inadequate incentives for investment in the creation of copyright materials that consumers value... [However], the costs for economic efficiency and consumer welfare associated with too high or too extensive protections for IP rights may be significant.⁴

- 4.9 In its review of the Australian copyright system in 2000, the Intellectual Property and Competition Review Committee (the Ergas Committee) also noted the importance of balance in copyright.⁵ The Ergas Committee's report argued that while copyright legislation must seek to 'redress the problems associated with free riding', it must also 'address the adverse economic effects that a grant of protection itself may create':

It is, in this respect, a fallacy to suggest that policies conferring more income on copyright owners in and of themselves are socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort... Over-compensating rights owners is as harmful, perhaps even more harmful, than under-compensating them.⁶

2 Treasury, *Submission 85*, p. 7.

3 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 2.

4 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 2.

5 Intellectual Property and Competition Review Committee (also known as the Ergas Committee, after its Chair, Professor Henry Ergas), *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 33.

6 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 33.

Development of current legislative framework

4.10 The Committee has considered the development of the copyright regime described by industry and consumers throughout the course of this inquiry. Clearly the increased presence of a digital IT environment has created challenges for interpretation of the balance of rights of access by consumers, protections for the artists, and the ability to generate financial benefits. It has also meant that ideas of appropriate competition are contested.

Copyright and competition in physical media

4.11 Many inquiry participants addressed issues of costs and competition, and described how these have been managed prior to the advent of the digital environment. The issue of parallel imports was raised extensively, and demonstrated claims that in a digital world, those rules are rapidly losing relevance.

4.12 The Committee notes the Choice description of parallel importation:

Parallel imports are legitimately produced goods imported into another country. The goods are manufactured with the authorisation or consent of the intellectual property rights owner and subsequently imported into another country by an unauthorised distributor. Unlike pirated (counterfeit) goods, parallel goods are genuine and manufactured by the intellectual property owners, or licensee of the owner.⁷

4.13 Parallel importation of copyright material is prohibited by sections 37 and 102 of the *Copyright Act 1968* (Cth). For much of the last century these sections effectively shielded copyright holders in Australia from international competition by preventing consumers and business from importing copyright material from cheaper overseas markets.

4.14 From the late 1980s, however, the Australian Government progressively removed parallel import restrictions (PIRs) for certain products after reviews by the Prices Surveillance Authority and the Copyright Law Reform Committee. In response to these reports the Copyright Act was amended in 1990 to permit the parallel importation of books in limited circumstances, and again in 1997 to permit the parallel importation of CDs.⁸

4.15 The Ergas Committee observed in 2000 that PIRs 'are likely to confer on the owners of copyrighted material the power to charge higher prices to

⁷ Choice, *Submission 75*, p. 36.

⁸ Matthew Rimmer, *Submission 92*, pp. 16-19.

Australian consumers than would otherwise be the case'.⁹ In relation to PIRs, the report said:

The Committee's considered view is that the restrictions do allow higher prices to be charged for the protected material than would otherwise prevail. A significant proportion of the benefits from these higher prices flow to foreign rights holders. The corresponding costs are borne in Australia, by Australian consumers and industries - such as the domestic software industry - that use imported protected material as an input in their production process. The Committee does not believe the gains to Australia from these restrictions outweigh their costs.¹⁰

- 4.16 Subsequently, PIRs on e-books, periodicals, sheet music and 'legitimate software' were removed by the *Copyright Amendment (Parallel Importation) Act 2003* (Cth).¹¹ In 2009 the Productivity Commission was asked to review the effects of continuing PIRs on books, concluded that reform is necessary, and therefore recommended that PIRs be terminated.¹² The ACCC has also advocated the removal of PIRs, most recently in its submission to the Australian Law Reform Commission's review of copyright law. In its submission to the ALRC, the ACCC emphasised its long-held opposition to PIRs:

[The ACCC] has consistently held the view that parallel import restrictions extend rights to copyright owners beyond what is necessary to address the 'free-rider' problem...[G]ranting a monopoly right to import creates the potential for market power to be conferred on copyright owners.¹³

- 4.17 Submissions to this committee indicate that parallel importation of physical media is one of the most effective ways for Australian consumers to mitigate international price discrimination in relation to copyright material. Mr Philip Noonan, Director-General of IP Australia, advised the Committee that the organisation 'favour[s] the retention of the capacity for parallel importation',¹⁴ and the Committee notes Choice's arguments that

9 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 62.

10 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, p. 7.

11 Matthew Rimmer, *Submission 92*, p. 24.

12 Productivity Commission, *Restrictions on the Parallel Importation of Books*, 2009, p. 7.19.

13 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 11.

14 *Committee Hansard*, Canberra, 13 February 2013, p. 2.

this can be a useful mechanism in reducing international price discrimination:

Parallel imports help overcome IT price disparities in two main ways:

- presenting consumers with lower-priced options for goods; and
- putting competitive pressure on copyright owners to reduce their Australian prices.

If more consumers engaged in parallel importing, this would pressure copyright owners to reduce prices in the Australian market.¹⁵

- 4.18 Several inquiry participants have noted the benefits Australian consumers derive from parallel imports and have called for remaining restrictions to be abolished. The Australian Digital Alliance and the Australian Libraries Copyright Committee (ADA/ALCC), for example, argued in its submission that the remaining PIRs on books should be removed. Citing the history of independent reviews which have found PIRs to be ineffective and inefficient, and noting the negative effects of the remaining PIRs on Australian libraries, the ADA/ALCC recommended that:

Existing parallel importation restrictions in Australian copyright law should be repealed, to facilitate more competitive pricing of content by domestic retailers and increase consumer choice.¹⁶

- 4.19 After surveying the history of independent reports and subsequent amendments to the Copyright Act, Dr Matthew Rimmer, a copyright scholar at the Australian National University, concluded that PIRs should be repealed, in order to 'promote consumer choice, competition, and innovation'.¹⁷ Dr Rimmer's views were supported by Dr Suzor and Ms Dootson.¹⁸

- 4.20 Although Assoc Prof Weatherall argued that lifting remaining PIRs in relation to books and movies would increase competition, the precise extent to which this might translate into lower prices was uncertain:

If local retailers were able, by sourcing parallel imports, to charge a lower price (closer to cheaper prices being charged overseas) this could, indirectly, put pressure on high prices charged to Australians seeking to purchase online. Whether this would in fact occur would depend on all kinds of qualifications and

15 Choice, *Submission 75*, p. 36.

16 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 3.

17 Matthew Rimmer, *Submission 92*, p. 29.

18 Nichols Suzor and Paula Dootson, *Submission 121*, p. 4.

complications (such as local reluctance to source parallel imported goods in order to preserve relationships with suppliers.)¹⁹

- 4.21 Although the publishing industry did not directly address the issue of parallel import restrictions, industry representatives noted that the industry has been subject to frequent government reviews.²⁰ Evidence from the movie and music industries did not directly address the issue of PIRs, instead stressing the 'dynamic and highly competitive' state of home entertainment markets.²¹

Copyright and competition impacts of the shift to digital content

- 4.22 The shift to digital content has transformed the market for copyright material in fundamental ways, including impacts on business models, and access to copyright material by consumers. According to Mr Matt Minogue, First Assistant Secretary of the Civil Law Division at the Attorney-General's Department (AGD), digitally distributed content is treated differently to content on physical media in terms of copyright law:

The whole issue of parallel importation was very much a paradigm in the context of physical supply. It does not really apply in the digital world...²²

- 4.23 The Committee notes that digital distribution of copyright content is governed to a much greater extent by contractual and licensing agreements which can effectively prevent consumers and businesses from accessing content in cheaper overseas markets. Mr Minogue noted that these licenses can be regarded as a right in themselves and acknowledged that they can be used to defeat parallel importation:

If the original owner has divided the market up in such a way that you can sell to one market and someone else can sell to another, leaving each licensee to exploit it as they can in a different market, it also means that contractually you may not be able to sell at all to the other market.²³

- 4.24 The Committee has heard concerns that the terms under which digital copyright content is distributed, combined with recent expansions in the rights of copyright holders, may limit competition in copyright markets. The ACCC noted that situations can arise in which the extent of the rights provided by copyright may cause competition issues:

19 Kimberlee Weatherall, *Submission 127*, p. 4.

20 *Committee Hansard*, Sydney, 30 July 2012, p. 8.

21 Australian Home Entertainment Distributors Association, *Submission 58*, p. 1.

22 *Committee Hansard*, Canberra, 13 February 2013, p. 10.

23 *Committee Hansard*, Canberra, 13 February 2013, p. 8.

Although the mere grant and use of copyright seldom conflicts with competition laws, in some circumstances, the extent and use of those rights may give rise to competition concerns and be detrimental to efficiency and welfare... [G]ranted a monopoly right to import creates the potential for market power to be conferred on copyright owners.²⁴

4.25 The ACCC further observed in its supplementary submission to the inquiry that:

... a monopoly right to import, or a monopoly which is analogous to a monopoly right to import through exclusive digital delivery, is only one way in which market power might be conferred on copyright holders. Market power might also, but not necessarily, arise through licensing practices such as collective or exclusive licensing.²⁵

4.26 This evidence suggests that in markets for digitally delivered content, rights holders may enforce regional pricing arrangements, creating a monopoly right of sale and substantially lessening competition. The Committee notes that the evidence it has received highlighting high price differentials for digitally delivered copyright material may be an early sign that competition in copyright markets is lessening.

Access to digital works

4.27 As noted at the beginning of this chapter, impacts of copyright provisions over digital content on consumers and industry are contested, as are views as to how an appropriate level of competition is achieved. Some inquiry participants disagree with industry claims that more choice means more competition in copyright markets; the Committee also notes conflicting views as to effects on pricing, including for IT products. The following section canvasses some of the views on the benefits and disadvantages to stakeholders in a digital market.

Choice and immediacy of access

4.28 The Committee acknowledges evidence from rights holders and industry groups as to the advantages for consumers of copyright content; for example, more choices as to how copyright content is accessed. Mr Dan

24 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 11.

25 Australian Competition and Consumer Commission, *Submission 100.1*, pp. 1-2.

Rosen, CEO of the Australian Recording Industry Association (ARIA), highlighted 'a huge range of options' available to music consumers, noting that 'a music fan in Australia has more opportunity to purchase music in different ways than at any time throughout history.'²⁶

4.29 Mr Jose Borghino of the Australian Publishers Association also emphasised the variety of options Australian consumers have in accessing written content:

Apart from new e-book platforms... consumers can now log onto the search engines like booko.com.au and choose between American or British hardback editions mailed to them with free freight through Book Depository UK and US... They can buy second-hand books from AbeBooks or de-accessioned library books from Better World Books... They can go online and buy the book direct from the publisher.... The Australian book market is extremely competitive, with Australian consumers having more access to a greater diversity of titles than ever.²⁷

4.30 The Committee acknowledges that digitally delivered content can also offer advantages over physical media in terms of near-immediate access to content, and notes that this may be an advantage for which consumers may elect to pay a higher price. The Committee notes that with this increased level of immediate access, there is arguably an even greater focus on copyright protection and industry claims about the need for protective actions. Justifications for these claims are considered below.

IT pricing and copyright infringement

4.31 The Committee notes that there are many reasons for industry to take action against copyright infringement, and not all will be canvassed here. The Committee is also aware that consumers do not necessarily accept industry explanations that price discrimination can, at least in part, be defended by a need to protect against copyright infringement. The Committee understands that consumers will often seek to access material in the most cost-effective way possible.

4.32 Rights holders may seek to justify the use of contractual and technical devices, which may have the potential to affect competition, on the basis that such devices prevent copyright infringement. Rights holders have argued in submissions and in evidence before the Committee that

26 *Committee Hansard*, Canberra, 5 October 2012, p. 4.

27 *Committee Hansard*, Sydney, 30 July 2012, p. 9.

copyright infringement threatens creative industries and that government action is needed to address it. The Committee has also heard evidence, however, which suggests that high prices for copyright material and anachronistic business practices may undermine the copyright regime generally and may also serve to generate infringement. This section will outline the evidence presented to the Committee in support of these competing claims.

4.33 In relation to the issue of copyright infringement, the Committee acknowledges concerns of rights holder organisations in the music, movie and publishing industries about the ongoing unauthorised access to copyright works made possible by the internet. The Committee received contrasting evidence as to the impacts on revenues for industry or costs to consumers.

4.34 Submissions from the music, movie and publishing industries demonstrated that copyright infringement is of concern to rights holders, and has a serious negative impact on industry revenue. ARIA, for example, indicated in its submission that copyright infringement is a serious issue for its members:

... a major issue for the Australian recorded music sector today is the impact of piracy. ... Unlike some other jurisdictions, there is no coherent industry or legislative framework in Australia to deal with the problem of unauthorised access to music.²⁸

4.35 As noted in chapter 3, Universal Music Australia Pty Ltd (UMA) stated that the prevalence of illegitimate music downloads and streaming has led to 'a rapid decline in willingness to pay for recorded music'.²⁹ In describing the impacts of piracy, UMA stated:

The enormous impact of piracy on the supply of authorised recorded music has dramatically reduced the resources available to UMA and other record companies to invest in new music. It has also fundamentally affected the way in which record companies make music available to consumers...

Piracy has already irreparably damaged the recorded music industry and will continue to be a major competitor to legitimate sales for as long as it remains unchecked.³⁰

4.36 The Australian Home Entertainment Distributors Association (AHEDA) made a similar argument in its submission:

28 Australian Recording Industry Association, *Submission 93*, p. 2.

29 Universal Music Australia, *Submission 129*, p. 2.

30 Universal Music Australia, *Submission 129*, p. 2.

It is important for the Committee to recognise that Australia has some of the highest rates of online piracy (both peer-2-peer and streaming) infringements in the world and 90 per cent of P2P piracy in Australia is infringing. Australia is currently exposed without a legislative regime to counter such behaviour.³¹

4.37 Mr Ross Gibb, Group Managing Director at Macmillan Publishers Australia noted that the publishing industry increasingly regards copyright infringement as a significant problem:

The main issue that we have with piracy is that people can circulate one digital file in very large numbers very quickly, and of course it removes the commercial value for that book.³²

4.38 Mr Jose Borghino of the Australian Publishers Association elaborated:

It is a growing problem, and we estimate that once the NBN is up and running it will become a bigger problem. All the content industries in Australia are very worried about the increase in piracy that we are facing in the future.³³

4.39 While copyright holders are clearly concerned about the impact of infringement on their industries, the Committee heard evidence that the impact of infringement may be less severe than rights holders claim. Mr John Stanton, from the Communications Alliance, advised the Committee that in contrast to the claims of rights holders, the entertainment industry grew significantly over the last decade. In describing the overall state of the entertainment industry, a 2012 report notes that:

... you wouldn't know it, just listening to the entertainment industry talk about how much the entertainment industry is 'dying', but data from PricewaterhouseCoopers (PwC) and iDATE show that from 1998 to 2010 the value of the worldwide entertainment industry grew from \$449 billion...to \$745 billion. That's quite a leap for a market supposedly being decimated by technological change.³⁴

4.40 The report cites statistics demonstrating growth in world-wide box-office receipts and broader film industry revenue, as well as growth in the global music industry.³⁵ In addition, the report cites US government statistics which indicate growth in the last decade of household spending on

31 Australian Home Entertainment Distributors Association, *Submission 58*, pp. 3-4.

32 *Committee Hansard*, Sydney, 30 July 2012, p. 15.

33 *Committee Hansard*, Sydney, 30 July 2012, p. 15.

34 *The Sky is Rising*, 2012, Michael Masnick and Michael Ho, *Exhibit 1*, p. 2.

35 *The Sky is Rising*, 2012, Michael Masnick and Michael Ho, *Exhibit 1*, p. 9.

entertainment, and growth in employment in the entertainment industry, and suggest that the number of creative works being produced has grown 'at a tremendous rate'.³⁶

- 4.41 In relation to the problem of widespread copyright infringement, Mr John Stanton, CEO of the Communications Alliance, stated that, while there are several reasons behind high rates of infringement, 'one of the most obvious of those is the lack in some cases of availability of legal and affordable online content'.³⁷ Mr Stanton also argued that artificial barriers to content created by rights holders can have a huge impact on the level of copyright infringement, and that geoblocking is a 'classic generator of online piracy'.³⁸
- 4.42 Mr Stanton advised that the price of copyright material can have a significant impact on infringement, and cited a pricing experiment conducted by computer game vendor Valve (owner of the distribution platform Steam), where the price of one of its most successful games was reduced by 75 per cent, and sales revenues skyrocketed.³⁹
- 4.43 The Committee received evidence that high prices and limited availability of content can also undermine the 'the legitimacy of Australian copyright law'.⁴⁰ Dr Suzor and Ms Dootson cited research which explored consumer perceptions of fairness, and how content restrictions and price discrimination affected the perceived legitimacy of illegal downloading:
- The more that Australian copyright law is seen as anachronistic and supportive of perceived unfair business practices, the less likely it is to be followed. The apparently unjustifiable difference between prices in Australia and comparable European and US markets is likely to lead consumers to infringement.⁴¹
- 4.44 The study found that Australian consumers consider higher prices to be 'discriminatory', that they make them feel like 'second-class citizens', and that this can create a mindset in which infringement is seen as more legitimate.⁴² Consumer submissions to this inquiry overwhelmingly support this view.⁴³ Dr Suzor and Ms Dootson went on to argue that high

36 *The Sky is Rising*, 2012, Michael Masnick and Michael Ho, *Exhibit 1*, pp. 2-3.

37 *Committee Hansard*, Sydney, 30 July 2012, p. 32.

38 *Committee Hansard*, Sydney, 30 July 2012, p. 34.

39 *Committee Hansard*, Sydney, 30 July 2012, p. 33.

40 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 3.

41 Nicholas Suzor and Paula Dootson, *Submission 121*, pp. 2-3.

42 Nicholas Suzor and Paula Dootson, *Submission 121*, pp. 2-3.

43 Including Kye Ridley-Smith, *Submission 61*, p. 1. As mentioned earlier in this report, more than half of the submissions to the inquiry were from consumers, many of whom expressed these concerns.

prices and limited availability of copyright material can generate infringement and undermine the copyright system as a whole, and concluded that:

... by failing to provide reasonably priced, effective, and convenient legal distribution channels, some copyright owners are contributing to infringement and the growing disregard for copyright law. In this context, recent attempts by copyright owners to shift the burden of enforcing copyright law to taxpayers (through criminal copyright regimes) and to internet intermediaries (through litigation against ISPs and lobbying for graduated response regimes) should be treated with strong scepticism.⁴⁴

Measures to limit access to content

4.45 From the above discussion, the Committee notes that despite industry claims about the costs of copyright infringement, consumers insist that their rights to access copyright material are being unfairly limited by methods such as copyright law provisions, or mechanisms such as geoblocking, which as discussed in earlier chapters can take various forms. The Committee also notes suggestions that copyright provisions can have a practical effect of reducing competition. The Committee acknowledges claims that access to content is sought in various ways, and notes that these claims are often the subject of debate about legitimacy.

4.46 The Committee notes the distinction between technological protection measures (TPMs) and geoblocking technologies. Mr Minogue of AGD, explained that:

... general geoblocking devices that allow market segmentation would not of themselves be a technological protection measure...to the extent that the Copyright Act allows an owner or assignee of property to impose a TPM over the content, that is not the same thing as geoblocking.⁴⁵

4.47 AGD suggested that it is unlikely that geoblocking mechanisms could be considered to be TPMs. The department observed that a particular geoblocking technology would only be protected under the Copyright Act if it falls within the definition of a TPM in section 10(1) of the Copyright Act, which requires the TPM to be used:

44 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 4.

45 *Committee Hansard*, Canberra, 13 February 2013, p. 4.

- in connection with the exercise of the copyright;
- by or with the permission of the owner or exclusive licensee of the copyright in the material, and
- to control access to the work or other subject matter.⁴⁶

Technological protection measures

4.48 TPMs (also referred to as effective technological measures, or ETMs) and digital rights management systems (DRM) are measures designed to prevent unauthorised access to or copying of copyright protected content. TPMs initially appeared in the 1990s, in response to concerns held by copyright owners about the rise of easily reproducible digital media. The Australian Copyright Council, in its submission to the current review of the TPM regime, has described access control TPMs as:

... a type of technological lock that prevents a person from accessing copyright material without permission... Technological protection measures are vital in enabling copyright owners to develop new business models and make their material available in digital formats.⁴⁷

4.49 TPMs are justified by some rights holders as necessary to protect content from copyright infringement,⁴⁸ but the Committee notes that some TPMs are easily circumvented. The 1996 World Intellectual Property Organisation copyright treaty provided for legal remedies to make circumventing TPMs illegal.⁴⁹ Subsequently, legal protections for TPMs were introduced in many international jurisdictions in the late 1990s. Australia enacted measures in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). As a consequence, as Assoc Prof Weatherall noted in her submission:

Australian copyright law makes it illegal to circumvent certain (access control) TPMs, to manufacture/provide/transmit a device for circumventing TPMs, or to provide or offer a service for circumventing TPMs. Circumvention of access control TPMs for a commercial offence is a criminal offence - a provision that would

46 Attorney-General's Department, *Submission 124*, p. 2.

47 Australian Copyright Council, *Submission to the Attorney-General's Department on Technological Protection Measures*, August 2012, p. 3.

48 As an example, the Advanced Access Content Licensing System Licensing Administrator, in *Re: Review of Technological Protection Measure exceptions*, October 2012, p. 1, argues that copyright holders would not be willing to offer content for consumers' enjoyment without protection against ready infringement.

49 Matthew Rimmer, *Submission 92*, p. 30.

not impact on individual consumers but could impact on Australian businesses seeking lower prices for software.⁵⁰

4.50 The Committee notes Dr Rimmer's observation that laws around TPMs are a form of 'paracopyright' – it is illegal to circumvent a TPM which has been applied to content, even when that content would otherwise be in the public domain. Under TPM laws, copyright holders effectively have the ability to control *access* to works, whereas previous copyright only allowed control of the *uses* falling within exclusive rights.⁵¹

4.51 Industry groups did not provide any evidence to this inquiry in relation to TPMs. However, concerns about TPMs were raised in several submissions to this inquiry. Dr Suzor and Ms Dootson argue that while TPMs were developed to protect the interests of copyright holders and should not protect market segmentation, 'the reality of TPMs has turned out much differently'. Dr Suzor and Ms Dootson observe:

TPMs now appear to impose significant costs on legitimate but technically unsophisticated users. They prevent users from making backups of their software as permitted by the copyright act. They prevent blind people from using software to read books aloud. They cause untold headaches for consumers who purchase content only to find that the copy protection is faulty, rendering their purchase useless. If and when Australia introduces new copyright exceptions to allow commonplace activities like making backups of digital copies of films, books, games and music; and making copies of each of these for viewing on portable devices or over cloud services, these activities will also be hampered by TPMs. They do not, however, prevent technically sophisticated individuals from breaking the locks and engaging in large-scale infringement.⁵²

4.52 Dr Rimmer argues that not only have TPMs been largely ineffective in preventing copyright infringement (thereby failing at the task that is their primary justification), there is also evidence that:

... TPMs have been used for anti-competitive purposes in attempts to control secondary markets for remote controls, printer cartridges, data storage, and wireless telephone services. There have also been a number of cases in which there have been

50 Kimberlee Weatherall, *Submission 127*, pp. 7-8.

51 Matthew Rimmer, *Submission 92*, p. 44; Ariel Bogle, *Exhibit 2*, p. 9.

52 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 4.

difficulties engaging in security testing and reverse engineering because of the use of TPMs.⁵³

4.53 The ADA/ALCC submission notes that TPMs can limit or prevent a number of legitimate uses of content by libraries, schools and universities. The submission cites a list provided by the Copyright Advisory Group of the Standing Council on School Education and Early Childhood representing Australian schools and TAFES, which highlights:

... circumstances in which teachers are prevented from using content because of TPMs, even where the intended use of that content is non-infringing under copyright law. Where TPMs are attached, educators cannot:

- Create subtitled versions of films for hearing impaired students
- Use devices other than a DVD player (like iPads, laptops, content management systems) to play protected DVDs in the course of classroom instruction
- Compile film clips and other snippets of content protected by TPMs to aid student analysis or classroom discussion.⁵⁴

4.54 The ADA/ALCC also describes practical challenges for legitimate users:

Even where copyright law recognises a specific situation in which TPMs can be circumvented or removed, in practice this may be difficult to achieve... Digital locks attached to content can restrict a user's ability to print, copy or email portions of the text as permitted under copyright law, and in some circumstances, library staff do not have the technical expertise or circumvention device to remove the lock.⁵⁵

4.55 This evidence indicates that TPMs can restrict competition in copyright markets by preventing consumers from accessing and using legally acquired content in legitimate ways. The Committee is also aware that TPMs have been used in some circumstances to enforce geographic market segmentation (that is, as a form of geoblocking).

Geoblocking

4.56 As discussed earlier in this report, geoblocking is the term given to the methods vendors have adopted to differentiate between regions and to keep customers separate (see chapter 2). From the perspective of industry, it can be a legal means of conducting business. From the perspective of

53 Matthew Rimmer, *Submission 92*, pp. 31-32.

54 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, pp. 12-13.

55 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95*, p. 13.

consumers (see chapter 3), it can mean being unfairly overcharged for IT products or discriminated against based on geographical location. The Committee heard about interpretations of geoblocking practices as they relate to copyright and debates about access to intellectual property, including the way in which it has been suggested that practices have unintended consequences for consumers, markets and the copyright regime.

- 4.57 Despite positive developments in terms of the choices offered by rights holders to consumers to access content, Dr Suzor and Ms Dootson elaborated on content vendors' attempts to limit competition by capturing consumers within 'walled gardens':

The recent trend has been towards the creation of locked digital ecosystems: phones locked to app stores, book readers locked to single retailers, music and films only playable on the retailing company's devices, computer games only available through a single digital distributor. One of the unfortunate results of this trend is to drive up prices for consumers and to enable publishers to exercise unprecedented control over how and where cultural goods are enjoyed. This is bad for three reasons: increased control over how media is used limits legitimate acts of consumption, expression, learning, sharing, and cultural play; increased prices and closed ecosystems limit consumer access to cultural goods; and perceived unfairness challenges the legitimacy of copyright law.⁵⁶

- 4.58 Another way in which rights holders exercise control is through the license agreements under which copyright content is acquired. Cyberworld Publishing explained that digital content is not purchased in the same sense that physical media are purchased. Instead, consumers purchase a license to access that content:

An e-book may be accessed electronically but it always remains the property of the publisher. An e-book purchaser merely acquires a license or the right to access and read the contents of a file they download. They cannot perform any actual process or manipulation with the contents of the e-book file and should not transfer it or its contents - which are subject to copyright - to anyone else.⁵⁷

- 4.59 Similar licensing conditions are attached to the acquisition of other digital media. Conditional licenses to access copyright content contrast sharply

56 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 5.

57 Cyberworld Publishing, *Submission 34*, p. 2.

with the traditional rights of consumers over purchased copyright content and have broad flow-on effects in relation to the cost of copyright material. The Committee notes views regarding impacts of restrictive licenses, for example, the prevention of resale, on competition. According to Dr Suzor and Ms Dootson, the lack of a robust secondary market entrenches the monopoly power of distributors.⁵⁸

Limits to geoblocking strategies

4.60 Dr Rimmer noted that for copyright owners who may have hoped that their business models would be protected by elements of 'technological protection measures, digital locks, strong economic rights [and] strong enforcement', this hadn't occurred.⁵⁹ In his submission, Dr Rimmer states:

Australian consumers have been locked out by technological protection measures; subject to surveillance, privacy intrusions and security breaches; locked into walled gardens by digital rights management systems; and geoblocked.⁶⁰

4.61 At a public hearing, Dr Rimmer told the Committee:

You would have to say over the last decade the choices by the big copyright owners in publishing, music and film have been to try to rely on exclusive rights, to have a very tight control of that regime through peer networks, but that strategy has not necessarily been effective. Really in the void these other intermediaries have appeared because they have helped satisfy consumer demand for legitimate products in an accessible way.⁶¹

Methods of accessing cheaper goods

4.62 As the Committee has been advised, consumers have developed many ways to improve their ability to access content despite geoblocking mechanisms. According to Ms Erin Turner from the Australian Communications Consumer Action Network:

... consumers, due to the high prices in Australia, use a number of methods to purchase overseas – or at least the particularly savvy consumers do. They might shop while they are travelling; they might purchase through online stores that know they are selling to

58 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 6.

59 *Committee Hansard*, Canberra, 19 September 2012, p. 14.

60 Matthew Rimmer, *Submission 92*, p. 6.

61 *Committee Hansard*, Canberra, 19 September 2012, p. 14.

Australia; or, as we are increasingly seeing, services are offered online – virtual private networks or even stores – that give you a fake US address and then courier products to Australia. They allow you to access those cheaper products.⁶²

- 4.63 Consumers may use a proxy server or a virtual private network (VPN) to bypass IP address-based geoblocking. Proxy servers and VPNs create an encrypted tunnel between a customer's computer and a server elsewhere, usually in another country. The customer's internet traffic is routed through that server and as a result vendor websites recognise the IP address of the server, rather than that of the customer, which may enable consumers to access content that would otherwise be region-blocked.
- 4.64 Many IT vendors seek to further enforce geoblocking by checking customers' credit cards at the point of sale, or by only shipping to addresses within a certain region. These geoblocking methods can be challenging for consumers to circumvent. The Committee notes however, that other options are available to consumers seeking to access lower overseas prices. These include the purchasing of US iTunes store gift cards through intermediaries set up for that purpose and by making use of 'freight-forwarding' companies which ship goods from the US on behalf of overseas customers.
- 4.65 The Committee was made aware of various ways which enable access to cheaper computer games. Many consumers expressed a preference for parallel importation of physical media from online stores based in cheaper jurisdictions – the UK-based ozgameshop.com being among the most popular.⁶³ The Committee is also aware of means by which consumers can access CD keys re-sold from cheaper markets – a practice not generally approved by games publishers, who have been known to remove English-language support from those games, making them unplayable.⁶⁴ The Committee also notes that some vendors may terminate a user's account and confiscate that user's legally purchased items if it decides they have breached the terms and conditions which enable geoblocking.⁶⁵

Legality of circumvention methods

- 4.66 While many submissions strongly support the avoidance of geoblocking mechanisms put in place by IT companies and vendors, there is also uncertainty as to whether such actions are legal in all circumstances,

62 *Committee Hansard*, Canberra, 19 September 2012, p. 7.

63 Stuart Skene, *Submission 52*, p. 1; Scott Nelson, *Submission 4*, p. 1; Dmitry Brizhinev, *Submission 30*, p. 1.

64 Daniel Myles, *Submission 33*, p. 5.

65 Nicholas Suzor and Paula Dootson, *Submission 121*, p. 6.

including as a possible breach of the Copyright Act's anti-circumvention provisions in relation to access control TPMs.

4.67 AGD noted that 'the relevant provisions of the Copyright Act have not been tested by a court. There are no judicial decisions that provide any further guidance as to whether a particular technology would be considered a TPM or not.'⁶⁶ However on the basis of a plain English reading of the definition, AGD:

... considers it unlikely that the technologies discussed would fall within the definition of an 'access control technological protection measure'. Where a geoblocking technology is not a technological protection measure, the Copyright Act does not prevent a person bypassing that geoblocking technology.⁶⁷

4.68 Assoc Prof Weatherall, while agreeing with AGD in some respects, reached a less definite conclusion on whether geoblocking mechanisms could be considered to be TPMs:

Determining whether geoblocking is prohibited turns on deciding whether technologies used to enforce geographical market segmentation fall within the definition of an 'access control technological protection measure' (ACTPM) under section 10 of the Australian Copyright Act.⁶⁸

4.69 According to Assoc Prof Weatherall, it is 'far from straightforward' to determine whether a particular form of geoblocking is protected under the Copyright Act. Such a determination would need to consider:

- the way the technology works
- how Australian courts could interpret the anti-circumvention provisions of the Copyright Act, and
- the language of the Act itself, which is 'complicated and opaque'.⁶⁹

4.70 Assoc Prof Weatherall considered it 'unlikely' that requiring a US credit card or US mailing address could ever be considered as an TPM because 'such measures are too distant from the exercise of copyright rights'. However geoblocking technology on the basis of IP address raises 'questions of legal interpretation for which we have no guidance from the legislative history or court decisions'.⁷⁰

66 Attorney-General's Department, *Submission 124*, p. 2.

67 Attorney-General's Department, *Submission 124*, p. 2.

68 Kimberlee Weatherall, *Submission 127*, p. 9.

69 Kimberlee Weatherall, *Submission 127*, p. 9.

70 Kimberlee Weatherall, *Submission 127*, p. 10.

- 4.71 In addition to uncertainty over the extent to which geoblocking mechanisms can be considered TPMs, the Committee has heard that there is some uncertainty surrounding the extent to which Australians are permitted to circumvent geoblocking TPMs.
- 4.72 The Committee understands that section 10(1) contains an exception which permits Australians to circumvent some TPMs. The exception arose as a consequence of the High Court's decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment (Stevens v Sony)*.⁷¹ In that case the High Court ruled that the circumvention of TPMs designed to enforce geographical market segmentation – specifically, the installation of 'mod chips' in PlayStation gaming consoles – was permitted. In his analysis of the case, Dr Rimmer notes that:
- ... the High Court was concerned that an expansive interpretation of 'TPMs' would provide unwarranted protection to regional coding devices, which would allow copyright owners to engage in price discrimination between markets.⁷²
- 4.73 As a consequence of the High Court's decision in *Stevens v Sony*, the Copyright Act was amended to permit the circumvention of some TPMs. Section 10(1) provides that Australians are permitted to circumvent a TPM if it is applied to a 'film or computer program (including a computer game)' and if the TPM 'controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the [content] acquired outside of Australia'.⁷³
- 4.74 The ADA/ALCC noted that the application of the section 10(1) exception is not clear, as it may exclude geoblocking TPMs which: are applied to books, music or other content; are applied to content acquired in Australia; do not 'prevent playback'; or which have a dual purpose.⁷⁴
- 4.75 This evidence may suggest that the TPM provisions of the Copyright Act are not intended to protect geoblocking mechanisms. The Committee notes the views of Assoc Prof Weatherall that:
- ... the law in this area is plagued by uncertainty. Thus submissions suggesting that the legal status of circumvention of geoblocking mechanisms is a grey area are correct.⁷⁵

71 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448.

72 Matthew Rimmer, *Submission 92*, p. 41.

73 Matthew Rimmer, *Submission 92*, pp. 49-50.

74 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 95.1*, pp. 1-2.

75 Kimberlee Weatherall, *Submission 127*, p. 12.

- 4.76 Considering the evidence above, and earlier in this chapter, the Committee has considered areas where remedies have been proposed, or may be desirable.

Possible remedies to address IT price discrimination

- 4.77 This chapter has considered the issue of price discrimination in the context of legal frameworks and formal pricing mechanisms. It has considered the competing and often overlapping interests of industry and consumers, based on evidence received during the course of the inquiry. The Committee received various suggestions as to possible remedies to matters which affect the cost burden on Australian consumers, as well as the challenges of providing a sustainable and competitive market. In this section, the Committee deliberates on some areas for possible remedy, including some of the conflicting claims and predictions about their success, and makes recommendations accordingly.

Parallel importation restrictions

- 4.78 The Committee notes views of inquiry participants that the shift to digitally delivered content has altered the balance between the interests of rights holders and those of consumers. The Committee notes concerns about finding a balance in the copyright regime and that, in order to address this challenge, remaining restrictions to parallel importation of goods should be removed. The Committee concurs with views that the remaining restrictions on parallel imports are neither appropriate nor necessary.⁷⁶

Recommendation 4

The Committee recommends that the parallel importation restrictions still found in the *Copyright Act 1968 (Cth)* be lifted, and that the parallel importation defence in the *Trade Marks Act 1995 (Cth)* be reviewed and broadened to ensure it is effective in allowing the importation of genuine goods.

76 Kimberlee Weatherall, *Submission 127*, p. 5.

Clarification of legality of measures

4.79 The Committee notes that there is a degree of uncertainty about the legality of methods used to avoid geoblocking mechanisms, and whether those methods could be considered to circumvent TPMs, and possibly be liable for prosecution. Consumer group Choice was among many inquiry participants who expressed the view that the government should act to remove doubts about the legality of circumventing geoblocking:

The confusion surrounding IP address lockouts means that many consumers may be civilly or criminally liable by circumventing 'access control' TPMs... Choice believes that such circumvention should be exempt because consumers are merely accessing products and services which are being provided knowingly and willingly by the copyright holder.⁷⁷

4.80 The ADA/ALCC suggested that the Copyright Act could be amended to ensure that Australian consumers who remove, disable or circumvent geoblocking mechanisms should not be subject to civil or criminal sanctions.⁷⁸ In her submission, Assoc Prof Weatherall canvassed the possibility of drafting legislative amendments to ensure that Australian consumers who do take steps to circumvent geoblocking are not acting in breach of the Copyright Act:

In my opinion it would be possible to draft an exclusion to ensure that Australian consumers who take steps to evade technical measures used to enforce market segmentation on the basis of geographical location are not at risk of infringing the Copyright Act 1968. Such measures should be excluded from the definition of ACTPM [an access control TPM]. This would protect consumers, although individual consumers are unlikely to be sued. More importantly it would have the effect of ensuring that commercial providers of services for evading geoblocking do not risk liability under the Copyright Act 1968; either civil liability under the manufacturing or services provisions of anti-circumvention law, or accessory liability for assisting others to undertake a criminal act.⁷⁹

4.81 Assoc Prof Weatherall further expressed the view that such amendments could be adopted consistent with Australia's international obligations and

77 Choice, *Submission to the Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968*, available at www.ag.gov.au/Consultations/Documents/Choice%20Submission.doc, viewed 23 January 2013.

78 Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 95.1*, p. 1.

79 Kimberlee Weatherall, *Submission 127*, p. 12.

would have the effect of removing any doubt regarding the potential liability of consumers for circumventing geoblocking technology.⁸⁰

- 4.82 The Committee notes evidence from AGD that geoblocking devices which allow market segmentation are not of themselves a TPM.⁸¹ The Committee also notes AGD's view that 'the Copyright Act is not the appropriate vehicle to consider any such proposed amendment'.⁸²

Recommendation 5

The Committee recommends that the Australian Government amend the Copyright Act's section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.

Recommendation 6

The Committee further recommends that the Australian Government investigate options to educate Australian consumers and businesses as to:

- **the extent to which they may circumvent geoblocking mechanisms in order to access cheaper legitimate goods;**
- **the tools and techniques which they may use to do so; and**
- **the way in which their rights under the Australian Consumer Law may be affected should they choose to do so.**

Increasing competition and protecting consumer rights

- 4.83 While some inquiry participants suggested that current levels of competition are adequate, the Committee notes that not all share the view of ARIA that no change is needed as 'very considerable choice' exists for consumers. Referring to the number of services currently operating in the digital sector of the retail segment of the market, and the abundance of free or near-free services, 'there is no policy justification for governmental

80 Kimberlee Weatherall, *Submission 127*, pp. 12-13.

81 Matt Minogue, *Committee Hansard*, Canberra, 13 February 2013, p. 4.

82 Attorney-General's Department, *Submission 124*, p. 3.

intervention by price regulation or by trying to prohibit national differential pricing'.⁸³

- 4.84 The Committee notes that evidence was received from inquiry participants which suggested that several aspects influencing competition should be considered for possible remedies:
- competition in digital-only markets
 - mobility and rights in 'locked' environments, and
 - powers of the ACCC to operate in IP markets.

Copyright in a digital-only environment

4.85 The Committee received evidence noting that existing competition pressures in copyright markets may only be exacerbated if content is only available in digital form. Consumers' ability to access content at internationally competitive prices may be severely constrained. If content is no longer distributed via physical media which can be parallel imported, evidence from some inquiry participants suggested that competition would likely be adversely affected, and rights holders may come to exercise significantly increased market power.

4.86 The Committee notes the views of the ACCC and others that this may result in negative outcomes for consumers and the Australian economy more generally, owing to the greater cost burden on Australian consumers. The Committee sought additional advice from AGD as to whether the potential loss of the ability to parallel import warranted any government action to maintain competitive markets. In its response, AGD noted that the 'marketplace is evolving very quickly, in terms of method of content delivery, physical or digital form and domestic and international markets', and that:

Buying content in an electronic form is ultimately a consumer's decision. While ever content exists in a physical form such as CDs and DVDs, parallel importation may still be a relevant option. However, parallel importation applies only to hard copies, as the focus is on goods that are imported at the border.⁸⁴

4.87 The Committee notes that the ACCC has stated that it is aware of, and adopting a watching brief in relation to, potential competition issues arising from technological changes in respect of copyright markets:

Given there remains some uncertainty about whether exclusive digital delivery models will become the only mode of delivery in the future, the ACCC has not formed a view at this time as to

83 Australian Recording Industry Association, *Submission 93*, p. 2.

84 Attorney-General's Department, *Submission 124.1*, p. 1.

whether such a move would necessarily raise competition concerns. The ACCC notes that technological change, including the emergence of exclusive digital delivery models may raise concerns about the nature and extent of copyright. The ACCC considers that, to the extent possible, copyright protection and exceptions should operate on a technology neutral basis. The ACCC will continue to monitor developments in relevant markets carefully to ensure that competition is not restricted.⁸⁵

Mobility and rights in 'locked' environments

4.88 The Committee heard evidence to suggest that in order to increase competition, some mobility in digital markets is necessary. Dr Suzor and Ms Dootson suggest that in order to ensure that distributors do not engage in anti-competitive behaviour, it is critical to limit their monopolies:

Consumers should be able to access digital content from a range of suppliers, and creators should have a range of distribution channels available to them.⁸⁶

4.89 Dr Rimmer also addressed these issues in his submission, which contained a quote from IT consumer activist Cory Doctrow in relation to Amazon's e-book cloud service:

...the Kindle is a 'roach motel' device: its license terms and DRM [Digital Rights Management] ensure that books can check in, but they can't check out. Readers are contractually prohibited from moving their books to competing devices; DRM makes that technically challenging; and competitors are legally enjoined from offering tools that would allow readers to break Kindle's DRM and move their books to other devices.⁸⁷

4.90 The Committee notes the views of Dr Suzor and Ms Dootson about the need for the ACCC to take a more active role in investigating whether the contractual restrictions vendors and distributors attach to content do not limit competition or consumer rights. They also recommend that the government establish a legally protected right of resale for digital content.⁸⁸

4.91 The Committee notes the Australian Law Reform Commission's ongoing review of copyright in the digital economy, and AGD's review of TPM exceptions, and will continue to monitor developments in this area with

85 Australian Competition and Consumer Commission, *Submission 100.1*, p. 2.

86 Nichols Suzor and Paula Dootson, *Submission 121*, p. 5.

87 Matthew Rimmer, *Submission 92*, p. 94.

88 Nichols Suzor and Paula Dootson, *Submission 121*, p. 6.

interest, especially with regard to the way in which consumers' rights to legitimately use legally acquired copyright material are affected.

Recommendation 7

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

Powers of the ACCC to operate in IP markets

4.92 The Committee was interested during the course of the inquiry in the effects of changing demands of markets, and ongoing suitability of legislative frameworks. The Committee was advised that section 51(3) of the *Competition and Consumer Act 2010* (Cth) (CCA) exempts intellectual property (IP) licenses from some parts of Australia's competition law. While limited, the exemptions are potentially significant. According to the ACCC:

Section 51(3) ... provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not exempted). While the extent of the exception is unclear, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA.⁸⁹

4.93 The Committee notes the views of Dr Rimmer, who argued the section acts to 'constrain the circumstances in which the ACCC can investigate instances in which there are restrictive trade practices in relation to intellectual property rights'.⁹⁰ The Committee also notes suggestions made by some inquiry participants that the section has the potential to permit copyright holders to engage in anti-competitive behaviour. According to the ACCC:

... section 51(3) has the effect of exempting the imposing, or giving effect to, conditions of IP licences and assignments from the competition provisions of Part IV of the CCA (except sections 46,

89 Australian Competition and Consumer Commission, *Submission 100*, p. 1.

90 *Committee Hansard*, Canberra, 19 September 2012, p. 15.

46A and 48) to the extent that the condition *relates to* the subject matter of the IP.⁹¹

4.94 The section 51(3) IP exceptions were enacted with the then Trade Practices Act (now the CCA) in 1974. At the time, according to the ACCC:

... it was likely that IP laws were believed to confer on the owners of IP a limited economic monopoly. This led to a concern that the unrestrained application of competition law to IP could undermine IP rights. This original rationale is no longer relevant. It is now accepted that, generally, IP laws do not create legal or economic monopolies.⁹²

4.95 The ACCC has a long-standing position in favour of repealing section 51(3). In its submission, the Commission said that:

The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. While recognising the importance of granting and protecting exclusive intellectual property rights, the ACCC considers that the subsequent licensing or assignment of those intellectual property rights should be subject to the same treatment under the CCA as any other property rights.⁹³

Recommendation 8

The Committee recommends the repeal of section 51(3) of the *Competition and Consumer Act 2010*.

Options for removing geoblocking restrictions

4.96 Consumer groups have argued for the removal of geoblocking to reduce pricing discrepancies between Australian and overseas markets. Choice, the Australian Retailers Association and the Communications Alliance all supported such a change, and the Committee notes the view of the Australian Information Industry Association that geoblocking mechanisms 'warrant scrutiny'.⁹⁴

91 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, p. 31.

92 Australian Competition and Consumer Commission, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012, pp. 31-32.

93 Australian Competition and Consumer Commission, *Submission 100*, p. 1.

94 *Committee Hansard*, Sydney, 30 July 2012, p. 6.

4.97 Mr Matthew Levey of Choice told the Committee that geographical restrictions are ‘increasingly making no sense’ in a global marketplace. Choice recommended further investigation and potential removal of such restrictions, labelling the measures ‘anti-competitive when they result in significant price differentials for Australian consumers’.⁹⁵

4.98 The ADA/ALCC submitted that there should be ‘a general prohibition on all geoblocking mechanisms ... where these mechanisms serve to enforce different prices and associated conditions of use of content by Australian consumers’.⁹⁶

4.99 Industry groups argued that the government should be cautious in framing a response to geoblocking. AIIA CEO Suzanne Campbell noted that:

The challenge for us though is that these arrangements are legacies from other times when we were seeking to protect Australian content ... To the extent where we were prepared to be exposed to a global market, then there may be a basis for negotiating a different outcome with international providers of comparable content.⁹⁷

4.100 Adobe’s Mr Paul Robson argued that government should be conscious of how its policy on geoblocking could affect business confidence:

In relation to the first question on geoblocking I think that as representatives of the people of this country and in relation to running and governing the country you would need to take into account the impact that would have on organisations globally being willing to invest in the country and run a local operation employing staff and building an ecosystem that delivers inputs and adds value to the economy.⁹⁸

4.101 In response to consumer calls for action to remove geoblocking mechanisms, and in its consideration of possible remedies, the Committee sought input from three relevant government stakeholder agencies, and notes their responses. Treasury cautioned against interventions in the market. Mr Geoff Francis advised the Committee that:

Treasury is not a fan of geoblocking technology. We are certainly not enthusiastic about price discrimination where it results in

95 Choice, *Submission 75*, p. 5.

96 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 95.1*, p. 1.

97 *Committee Hansard*, Sydney, 30 July 2012, p. 6.

98 *Committee Hansard*, Canberra, 22 March 2013, p. 30.

Australians paying higher prices. But we are wary of forms of intervention which may end up being counterproductive.⁹⁹

- 4.102 Mr Francis noted that legislation which seeks to ban geoblocking may be counterproductive:

We would be very wary of more interventionist measures that seek to dictate the terms on which consumer and business transactions take place. We believe that they may stifle innovation and reduce competition further ... Those types of measures should only be considered if there is a significant market failure that would cause what we would term a substantial and persistent consumer detriment. We do not believe that such a market failure has yet been demonstrated in this space.¹⁰⁰

- 4.103 AGD also cautioned against an attempt to ban geoblocking. To prevent the use of geoblocking it would be necessary 'to be satisfied that such legislation would not introduce adverse or unintended consequences such as having the effect of limiting content available to Australians'.¹⁰¹ The AGD noted that any legislation would only impact geoblocking used on Australian websites, and that a possible outcome of a move to ban geoblocking would be 'that offshore suppliers may not provide goods to Australia, or there may not be any local distributors, which may ultimately drive up prices for Australian consumers and lead to further online piracy'.¹⁰²

- 4.104 Mr Marcus Bezzi from the ACCC argued that Australian consumers' efforts to circumvent geoblocking – including through illegal downloads – would tend to undermine geoblocking over time, and that this might make a legislative response unnecessary:

From our point of view as a competition regulator, these things – and I should say the illegal downloading capacity, which is well-known to many Australians, including probably the majority of teenagers – operate to put some competitive tension into the market. If the methods start to become a big enough way in which consumers are circumventing the limitations that are imposed by the companies on consumers, those methods can start to have an impact on sales, and we are aware that that can have an impact in the market.¹⁰³

99 *Committee Hansard*, Canberra, 31 October 2012, p. 16.

100 *Committee Hansard*, Canberra, 31 October 2012, p. 11.

101 Attorney-General's Department, *Submission 124*, p. 3.

102 Attorney-General's Department, *Submission 124*, p. 3.

103 *Committee Hansard*, Canberra, 31 October 2012, p. 4.

- 4.105 While the Committee acknowledges that in some cases geoblocking is a necessary business practice, it also notes that many IT vendors appear to use geoblocking as a means to raise prices by constraining consumers' ability to access the global marketplace. The Committee considers this form of geoblocking to be a significant constraint on consumer choice.

Recommendation 9

The Committee recommends that the Australian Government consider enacting a ban on geoblocking as an option of last resort, should persistent market failure exist in spite of the changes to the Competition and Consumer Act and the Copyright Act recommended in this report.

Options for voiding contractual arrangements

- 4.106 The Committee notes that AGD also addressed suggestions from consumers and consumer groups that Australia should deny copyright protection to products sold on websites utilising geoblocking technology:

From a copyright perspective, Australia has obligations to provide copyright protection in most circumstances where a work satisfies the basic elements required for copyright to subsist. Where copyright would otherwise subsist in material, the international agreements to which Australia is a party would not allow Australia to deny copyright protection to a copyright owner purely because geoblocking was used in the sale of a work (most likely by someone other than the copyright owner such as a licensee or distributor).¹⁰⁴

- 4.107 The possibility of using the unfair contract provisions of the Australian Consumer Law (ACL) to void contractual terms that seek to enforce geoblocking was also raised during the inquiry. In response, the Treasury noted that such measures may not be easily enforceable:

It may be possible to draft a specific law that voids contract terms that seek to enforce geoblocking. However, as with any Australian law, the effectiveness of such a measure on the rights of Australian consumers engaging in contracts internationally may be impacted by the laws applying in the relevant international jurisdiction. This may include: where the foreign law was the proper law governing the contract in question; when the requirement was imposed on an Australian distributor by an international IP rights holder (such as

104 Attorney-General's Department, *Submission 124*, p. 3.

through an exclusive licensing agreement); or if the geoblocking mechanism was already embedded in the product prior to sale in Australia. In such circumstances an Australian law voiding contract terms may be ineffective.¹⁰⁵

4.108 The Committee notes, however, evidence from the ACCC suggesting that it is possible to regulate aspects of international trade. Mr Marcus Bezzi of the ACCC said:

If there is any anticompetitive purpose associated with the policies that the companies are applying then there is something that can be done, from our point of view. And that is the case whether the supplier is in Barton or in Botswana. From our point of view, if the supplier is engaging in business in Australia, supplying services to Australians, and it is doing things to stop people from getting access to lower priced goods and it is doing it for an anticompetitive purpose, then action can be taken against them.¹⁰⁶

Recommendation 10

That the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.

Banning price discrimination

- 4.109 In response to views from consumers which suggested that price discrimination could be removed by legislative change, the Committee investigated options, noting a former legislative provision which prohibited price discrimination.
- 4.110 Section 49 of the Competition and Consumer Act (the CCA, known at the time as the *Trade Practices Act 1974*), 'made it illegal to offer or attempt to induce discriminatory pricing if the discrimination was of such magnitude or was of such a recurring or systematic character that it was likely to have the effect of substantially lessening competition'.¹⁰⁷
- 4.111 Section 49 was repealed after a number of reviews found that it operated to reduce price flexibility, had inflationary effects, and that other sections of the act (especially the provisions on anti-competitive agreements and

¹⁰⁵ Treasury, *Submission 85.1*, p. 1.

¹⁰⁶ *Committee Hansard*, Canberra, 31 October 2012, p. 5.

¹⁰⁷ Treasury, *Submission 85*, p. 8.

misuse of market power in sections 45 and 46 of the CCA) would likely address breaches of the section.¹⁰⁸

- 4.112 Treasury's Mr Geoff Francis noted that price discrimination laws may function differently to the way they are intended:

Anecdotally, the suspicion is that it [a price discrimination ban] reduces price flexibility rather than increasing it, because typically the activity you see is one company taking another company to court to stop them from discounting.¹⁰⁹

- 4.113 Consequently the Treasury recommended against reintroducing a provision similar to section 49. The Committee concurs with this view.

Prospects for international cooperation

International warranties and standards

- 4.114 Consumer groups argued in submissions to the inquiry that more Australian consumers would shop online if they had confidence that goods they bought overseas were still covered by a warranty. At present, in many cases, such products are either not covered or warranties are difficult to enforce. While chapter 2 looked at consumer perceptions of warranties, and chapter 3 described cost impacts on industry, in this chapter they are considered in terms of international harmonisation.
- 4.115 Mr Madison Cartwright from Choice advised the Committee that some larger IT companies, particularly Apple and Dell, already provide international warranties,¹¹⁰ but Ms Erin Turner from ACCAN warned that making overseas purchases can also involve some risk:
- What these consumers may not know is that Australian consumer law possibly does not extend to these international purchases or, if it does, the law would be extremely difficult to enforce. This matters because if something goes wrong it can be difficult to seek redress. These consumers may not have access to repairs, refunds or replacements, as they would if they had purchased the product in Australia.¹¹¹
- 4.116 Ms Turner called for an international warranty regime to be developed, to provide 'at least some security in shopping elsewhere and accessing lower

108 Treasury, *Submission 85*, p. 10.

109 *Committee Hansard*, Canberra, 31 October 2012, p. 16.

110 *Committee Hansard*, Sydney, 30 July 2012, p. 24.

111 *Committee Hansard*, Canberra, 19 September 2012, p. 1.

prices – hopefully, bringing competition to Australia'.¹¹² Ms Turner also acknowledged that:

Not every consumer at the moment feels competent about shopping online. ... Knowing that there is an international warranty for a purchase can go to help ease some of that stress and nervousness.¹¹³

4.117 Warranty protection is of particular concern for businesses that are heavily reliant on IT products to operate. Mr Russell Zimmerman from the Australian Retailers Association (ARA) told the Committee that in search of cheaper prices, many businesses would look overseas for their hardware and software needs. However, the after sales service and support offered by Australian suppliers is a major issue for businesses that are dependent on IT products for their operation.¹¹⁴

4.118 Choice argued that warranties provide an indirect mechanism for IT suppliers to reinforce regional market segregation, and that 'some companies explicitly state that that will not recognise a product's warranty if it was not bought in Australia'.¹¹⁵

4.119 In its submission to the Committee, ACCAN urged the Australian Government to encourage the 'development of international warranties, product repair and replacement rights through international trade agreements and discussions with international companies'. ACCAN further recommended that 'education campaigns to inform consumers about the limits of Australian Consumer Law for international purchases' be undertaken by the ACCC and consumer protection bodies.¹¹⁶

4.120 The Committee also heard evidence suggesting that the Australian Government could relieve some pressure on IT prices by pursuing international agreements that would reduce localisation costs for IT products. The Australian Industry Group (Ai Group) argued that the government should:

... ensure that Australian regulation harmonises with international approaches where possible to reduce the need for Australian specific product requirements.¹¹⁷

112 *Committee Hansard*, Canberra, 19 September 2012, p. 6.

113 *Committee Hansard*, Canberra, 19 September 2012, p. 7.

114 *Committee Hansard*, Sydney, 30 July 2012, p. 30.

115 Choice, *Submission 75*, p. 37.

116 Australian Communications Consumer Action Network, *Submission 74*, p. 9.

117 Australian Industry Group, *Submission 56*, p. 6.

The Trans-Pacific Partnership

- 4.121 The TPP is a proposed trade agreement being negotiated by Pacific Rim countries including Australia, New Zealand, the United States, Singapore, Mexico, Peru, Canada and Chile. It is envisioned that the treaty will cover around 20 subject-matter areas, including competition, customs, e-commerce, intellectual property, investment, industrial relations and trade.¹¹⁸
- 4.122 Although no official draft text has been released, a draft of the TPP's proposed intellectual property chapter was disclosed by US Congressman Darrel Issa in February 2011, and has caused widespread concern particularly among intellectual property academics, including Dr Rimmer. Dr Rimmer describes the content of the leaked draft chapter as 'alarming in terms of the impact in respect of copyright law and exceptions, parallel importation restrictions, technological protection measures, and, more generally, consumer rights'.¹¹⁹
- 4.123 Given that the draft IP chapter contains provisions which would appear to require legislative changes to enact in Australia, the Committee wrote to the AGD seeking clarification on the Department's statement that the TPP would not require legislative change and did not represent an expansion of copyright protections. AGD responded:
- Your letter refers to a document made public by US Congressman Darrell Issa which purports to contain text of the intellectual property (IP) chapter of the Trans-Pacific Partnership. This document has not been acknowledged by the US Government as official text. As such, and as the IP negotiations are ongoing, it would not be possible or appropriate for me to address the clauses identified in your letter or speculative comments made by academics on the purported text.¹²⁰
- 4.124 The Committee notes concerns about the potential impact of the TPP on the Australian copyright regime. Article 4.2 of the draft TPP IP chapter, if adopted, would appear to entrench parallel import restrictions in an international agreement.¹²¹ It has also been suggested it would more tightly constrain Australia's freedom to adopt its own regime governing the use of technological protection measures (TPMs).

118 Matthew Rimmer, *Submission 92*, p. 81.

119 Matthew Rimmer, *Submission 92*, p. 84.

120 Attorney-General's Department, *Submission 124*, p. 1.

121 Quoted in Kimberlee G. Weatherall, 2011, *An Australian Analysis of the February 2011 Leaked US TPPA IP Chapter Text - copyright and enforcement*, <http://works.bepress.com/kimweatherall/22>, viewed 7 December 2012, p. 5.

4.125 The Committee sought a response to these concerns from the AGD, as the agency that administers the Copyright Act. In response, Mr Matt Minogue, First Assistant Secretary of AGD's Civil Law division, said:

We are aware of those views. Our position is that the TPP in terms of copyright would not require any amendment to the Copyright Act for Australia to implement – subject to it still being negotiated. So they are not views that we share.¹²²

4.126 The Committee notes failed attempts in the US to enact expansive copyright regimes similar to that suggested by the leaked draft chapter. In 2011 and early 2012, two pieces of IP-focused legislation – the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA) – were abandoned after significant public protest against them. Similarly expansive provisions were contained in the proposed Anti-Counterfeiting Trade Agreement (ACTA) which foundered after the EU refused to ratify it and the Australian Parliament highlighted significant problems with the treaty.¹²³

4.127 The Committee notes the observation made by the Joint Standing Committee on Treaties in relation to the secrecy with which DFAT conducted negotiations for the Anti-Counterfeiting Trade Agreement:

...confidentiality is not common or appropriate in IP negotiations which impact directly and in minute detail on domestic law and domestic innovation policy.¹²⁴

4.128 The Committee further notes that the Australian Law Reform Commission is currently conducting a review into copyright and the digital economy, and that the Attorney-General's Department is currently reviewing Australia's TPM exception regime. The Committee agrees with the Joint Standing Committee on Treaties that any international agreement relating to intellectual property should not pre-empt the outcome of, nor be incompatible with, those reviews.¹²⁵

122 *Committee Hansard*, Canberra, 13 February 2013, p. 9.

123 Joint Standing Committee on Treaties, *Report 126: Treaty tabled on 21 November 2011*, June 2012, pp. 57-62.

124 Joint Standing Committee on Treaties, *Report 126: Treaty tabled on 21 November 2011*, June 2012, p. 55.

125 Joint Standing Committee on Treaties, *Report 126: Treaty tabled on 21 November 2011*, June 2012, pp. 60-61.

A handwritten signature in blue ink that reads "Nick Champion". The signature is written in a cursive, flowing style.

Mr Nick Champion, MP
Chair

