Submission 095
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Inquiry into IT pricing

Submission by the Australian Digital Alliance and Australian Libraries Copyright Committee to the House Standing Committee on Infrastructure and Communications

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About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

ALCC membership together comprises a large portion of the Australian library and archive sectors.

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Executive summary

The ADA and ALCC thank the Committee for the opportunity to provide comment on the Inquiry into IT Pricing. This submission focuses on the relationship between IT pricing and copyright law. Its objective is to assist the Committee in its consideration of the various causes of price differentials and possible actions that might be taken to mitigate disadvantages to Australian consumers.

Specifically, this submission considers the impact of copyright restrictions regarding technological protection measures and parallel importations on access to content in Australia, with reference to Australian copyright law and obligations under bi-lateral and multi-lateral trade agreements. It also briefly highlights issues regarding the affordability and availability of e-book licenses for lending by Australian libraries.

Several submissions to the Inquiry have provided evidence of increased prices paid by Australian consumers for IT products when compared with overseas markets[1]. Price differentials may be the result of a number of causes, including the size of the Australian market, wage and labour on-costs, tax, geographical license conditions and (the focus of this submission), various exclusive rights of the copyright holder to determine conditions of access to and price of their copyright works.

In this submission, the ADA and ALCC argue that parallel importation restrictions and restrictions on circumvention of technological protection measures pose a number of disadvantages to Australian consumers accessing e-books, digital film, TV and music content. The ADA/ALCC make the following recommendations:

Recommendation 1: The Committee affirms the right of libraries in Australia to access e-book materials on reasonable commercial terms for the benefit of Australian citizens.

Recommendation 2: 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.

[1] Submission 075, **CHOICE**, 16 July 2012 p 7 -25; submission 074, **Australian Communications Consumer Action Network**, July 2012 p 14-17; submission 054, **Australian Commercial and Media Photographers** 5 July 2012 p 2-3;

Recommendation 3: Australia, in negotiation of the Trans-Pacific Partnership Agreement, should not agree to copyright provisions that entrench or further restrict parallel importation of copyright works.

Recommendation 4: The Committee recommend amendment to section 10(1)(b)(iii) definition of TPM and section 10(1)(c) definition of an access control TPM to achieve technology neutrality: excluding all devices, products, technology or components that are designed to *control geographic market segmentation.*

Recommendation 5: The Government should consider the extent to which technological protection measures (TPMs) attached to digital content contribute to price differentials, impede access to information by people with disabilities, expose consumers and institutions to inadvertent criminal liability and restrict use of content as permitted under Australian copyright law.

Recommendation 6: Australia, in negotiation of the Trans-Pacific Partnership Agreement, should not agree to copyright provisions that further restrict circumstances in which TPMs can be circumvented.

A. E-book prices and availability for lending by Australian libraries

Together, the Australian Digital Alliance and Australian Libraries Copyright Committee represent the interests of a broad coalition of national and state libraries, university and government libraries, public libraries, schools and various archives regarding copyright issues.

The availability of e-book licences to Australian libraries, and associated terms and conditions governing access to content by library users, is still being resolved as acknowledged by Ross Gibbs, Group Managing Director, MacMillan Publishers Australia, in his oral testimony before the Committee:

"*We are still trying to come up with a model for libraries. There are various products out there. The US has been struggling with this one – does the library buy the book once, have it forever and lend it as many times as it wants?...There*

are time periods being set and different models being experimented with. I do not think there is an answer anywhere yet.[2]"

The ADA/ALCC would like briefly to expand further on these comments, sharing some e-book experiences of Australian libraries with the Committee.

Almost half of all Australians are members of public libraries[3], with some 114 million visits to libraries being registered in 2009-2010. Libraries deliver an essential service in the public interest and are a cornerstone of civil society, providing free access to a broad range of reading material, ideas, information, educational and recreational opportunities to Australians. Libraries also have a particular concern for vulnerable populations, including those with disabilities, the unemployed, home-bound, students, senior citizens, culturally and linguistically diverse communities and low income families.

In response to community demand and the changing nature of research and publishing, Australian libraries are increasingly providing e-books to their clients. This presents many challenges for libraries including lack of ability to access to new release material, evolving business models that see pricing regimes changing regularly, lack of certainty about long term access to material and contracting away of rights available under Australian copyright law.

Some publishers currently refuse to license/sell e-books to Australian libraries at all – at any price. Further, e-books are generally only available to Australian libraries for as long as the publisher is willing to license them (or until the publisher goes out of business, as pointed out by Australian Publishers Association in their oral testimony before this Committee[4]). There are few publishers offering an outright purchase model for e-book titles. In early 2012, Penguin Books withdrew licensing for its e-book catalogue to Australian libraries via the aggregator Overdrive – without providing notice to libraries.

Some Australian publishers have also amended licensing arrangements for libraries that, in effect, raise the price of e-books for libraries. An example is provided below:

Australian publisher Allen & Unwin recently amended their e-book licensing arrangements with large public library services and library consortia,

[2] Mr Ross Gibbs, oral testimony before House of Representatives Standing Committee on Infrastructure and Communications, *Inquiry into IT Pricing*, Monday 30 July p 14

[3] Minister for the Arts, Simon Crean, 'Support for local libraries and Australian authors' media release 21 May 2012 http://www.minister.regional.gov.au/sc/releases/2012/may/sc062_2012.aspx

[4] Above n 2, p 14

> mandating the purchase of multiple copies of any e-book, even where only one copy is desired. Until recently, the State Library of Western Australia (SLWA) could license one copy of an Allen & Unwin title for the WA public library network (restricted to single user access). The amended licensing arrangements mean SLWA would have to purchase *12 copies* of any e-book (current release or backlist title), with a resultant impact on budget. Even if SLWA only wanted one copy of a particular e-book title, they would effectively pay 12 times the list price. These price differentials will adversely affect acquisitions policy in libraries; in particular, the breadth of e-books available to library users.

The terms and conditions attached to e-book licences can further impact on the price of e-books for Australian libraries. The ADA/ALCC would be glad to provide further examples of e-book licensing issues affecting the price of content for libraries in Australia should the Committee be interested in hearing them.

On average, it appears Australian libraries pay approximately 58% more for print books than they are priced in the US, and 44% more for e-books[5] **(Attachment 1)**. For some e-books, libraries in Australia may be charged as much as 191% more than that e-book is priced in the US[6]. As noted by Andrew Leigh MP in his short submission to this Committee, there are also limitations on access to e-book readers themselves, and a limited range of titles available to Australian consumers[7].

While acknowledging this is a commercial situation, there is significant market power being exercised here by each publisher. A specific e-book title cannot be purchased from any other publisher due to parallel import restrictions, aggregators who act as intermediaries between libraries and publishers and the nature of the publishing industry itself. As a result libraries have little choice but to agree to the commercial terms and price offered (and therefore can supply a limited range e-books to their clients) or not at all.

[5] Data on e-book and print prices, based on random sample of 48 titles, collated by library staff between 8 – 10 October 2012. Spreadsheet attached to this submission.

[6] *Double Cross,* by Ben McIntyre, in e-book format is priced at $28.15 for Australian market compared with $9.72 (adjusted to AUD) in the US – **Attachment 1**

[7] Andrew Leigh MP, 'Submission to the House Standing Committee on Infrastructure and Communications and its inquiry into IT Pricing', 12 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs/sub076.pdf

Recommendation 1: The Committee affirms the right of libraries in Australia to access e-book materials on reasonable commercial terms for the benefit of Australian citizens.

B. Parallel Importation Restrictions

A number of submissions to this Inquiry extensively highlight the impact of parallel importation restrictions on the price and availability of content for Australian consumers[8].

In Australia, the parallel importation of copyright works (ss37, 102) is prohibited, although there exceptions for software (s44E), music and e-books (s44F) and sound recordings (s112D) where the product is placed on the market overseas with the consent of the copyright owner in the relevant jurisdiction (ie parallel importation /grey market goods)[9]. Subject to certain conditions, Australian copyright law provides for an almost total ban on Australian retailers importing books from overseas if a version of the book has been published locally. However:

- Booksellers can parallel import books that do not comply with the 30 day release and 90 day resupply rules.
- Booksellers can parallel import books to fill a single order
- Customers can import books directly for personal use

The Productivity Commission, the Australian Government's independent research and advisory body on economic, social and environmental issues affecting Australians, has published several reports recommending total repeal of parallel importation restriction[10]. The same conclusion has previously been reached in the 1995 Inquiry into book prices and parallel imports by the Prices Surveillance Authority[11]; the Ergas Review[12], commissioned by the Federal Government in

[8] Submission 092, **Dr Matthew Rimmer**, 'IT Pricing: Copyright Law, Consumer Rights and Competition Policy', p 9 -29; submission 055, **Choice;**
[9] Weatherall K, An Australian Analysis of the Feb 2011 Leaked US TPPA IP Chapter text – copyright and enforcement http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=kimweatherall p 5
[10] Most recently, Productivity Commission, *Copyright Restrictions on the Parallel Importation of Books,* 14 July 2009, http://www.pc.gov.au/projects/study/books
[11] Inquiry into book prices and parallel imports, Prices Surveillance Authority, 1995, Melbourne, VIC
[12] *Review of intellectual property legislation under the Competition Principles Agreement,* Final Report of the IP and Competition Review Committee, September 2000

1999 to consider IP rights and competition principles; and the Australian Competition and Consumer Commission in 2000.

In its 2009 report into parallel importation restrictions on books, the Productivity Commission made some key findings:

- th**e additional income flowing overseas is around 1.5 times that retained by local copyright holders** (50% greater benefit to foreign rights holders)
- **the magnitude of the return to rights holders under PIR is dependent on the willingness of others to pay for the work in the market place** (In the digital environment, consumers are increasingly purchasing books from online retailers where prices are lower)[13].

And:

> **"In effect, PIRs impose a private, implicit tax on Australian consumers which is used largely to subsidise foreign copyright holders"[14].**

The Australian Book Industry Strategy Group (BSIG), mentioned by the Australian Publishers' Association[15] in their submission to this Inquiry, concluded that existing parallel importation restrictions on books should be reduced to facilitate competitive pricing. The final report released by BISG included a recommendation that the Australian book industry 'formalise an agreed, industry-wide code of practice to reduce the time frame for retention of territorial copyright from 30/90 days to 14/14 days[16]'.

Despite a number of Australian independent studies recommending the partial or complete repeal of PIRs, they are at risk of being further entrenched by multi-lateral trade obligations. Australia is currently one of nine countries negotiating the Trans-Pacific Partnership Agreement (TPP), a comprehensive agreement covering all aspects of trade and including an extensive chapter relating to the

http://www.ag.gov.au/Documents/Review%20of%20intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement,%20%28September%202000%29.pdf

[13] PC goes further to say "hence, like other property rights, copyright law does not seek to ensure that rights holders obtain any particular return for their rights; nor would it be well suited to doing so" (3.6)

[14] Productivity Commission review of parallel importation of books, http://www.pc.gov.au/__data/assets/pdf_file/0006/90267/02-overview.pdf p 20

[15] Submission 066, Australian Publishers Association, 6 July 2012 p 3

[16] Book Industry Strategy Group Final Report, www.innovation.gov.au/Industry/BooksandPrinting/BookIndustryStrategyGroup/Documents/BISGFinalReport.pdf page 58

enforcement and protection of intellectual property. While TPP negotiations have been confidential, draft leaked text indicates some countries are advocating rigid parallel importation restrictions.

Article 4.2 of a US draft IP proposal, leaked in February 2011, entrenches PIRs for all copyright works:

> *Each Party shall provide to authors, performers and producers of phonograms the right to authorize or prohibit the importation into that Party's territory of copies of the work, performance, or phonogram made without authorization, or made outside that Party's territory with the authorization of the author, performer, or producer of that phonogram.*
>
> *FN11: With respect to copies of works and phonograms that have been placed on the market by the relevant right holder, the obligations described in Article [4.2] apply only to books, journals, sheet music, sound recordings, computer programs, and audio and visual works (i.e., categories of products in which the value of the copyrighted material represents substantially all of the value of the product). Notwithstanding the foregoing, each Party may provide the protection described in Article [4.2] to a broader range of goods.*[17]

It is essential that Australia be able to amend domestic copyright law with regards parallel importation restrictions in the national interest. Australia's abolishment of PIRs in sound recordings in 1998, for example, was in part because of research that suggested the then relatively high prices for recorded music in Australia reflected an ability of record companies to use their market power to exploit local demand conditions[18].

Benefits have been observed in Australia as a result of the repealing of PIRs. Leading trade economist Keith Maskus noted in a report in 2000 after Australia reduced limitations on parallel importation of books in 1991, by 1994 price

[17] Available online: http://keionline.org/node/1091

[18] It was Australia's repeal of restrictions on parallel importing of sound recordings in 1998 that saw Australia that year included on the USTR's special 301 watch list, as one of the countries found to have "denied adequate and effective protection of IP rights". *Note: compliance with TRIPS does not preclude inclusion on the Special 301 Watch list.

differentials between AU and UK/US decreased to just above shipping costs, and speed of introduction of overseas titles increased[19].

Recommendation 2: 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.

Recommendation 3: Australia, in negotiation of the Trans-Pacific Partnership Agreement, should not agree to copyright provisions that entrench or further restrict parallel importation of copyright works.

[19] Keith E Maskus (2000) *Intellectual Property Rights in the Global Economy* (Washington: Institute for International Economics)

C Technological Protection Measures

Technological protection measures (TPMs) limit the ways in which consumers are able to use and access digital content. Access control TPMs prevent a person from being able to read, listen to or watch material. A consumer can be held civilly or criminally liable under Australian copyright law for circumventing an access control TPM, unless an exception applies.

Choice, in their submission to this Inquiry, highlights issues with the geographic market segmentation of digital content via IP address lockouts[20]. IP address lockouts prevent Australian consumers from accessing content at cheaper prices, or of a wider range, from overseas websites.

The current definition of 'technological protection measure' in the Copyright Act excludes a device, product, technology or service that "controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of [a] work or other subject matter acquired outside Australia[21]." This was introduced in response to concerns regarding the inflexibility of TPM provisions proposed in the Australia-United States Free Trade Agreement, and in the context of High Court action regarding the legitimacy of "mod chips" used to circumvent region coding on computer programs and DVDs [22].

Although the geo-based access controls described by Choice and others in their submissions to this Inquiry do have a similar function to region coding – both are designed to effect geographic market segmentation – the Copyright Act excludes only TPMs that 'prevent playback'. IP address lock outs and other geo-coding TPMs, while having a similar effect as region coding, do not 'prevent playback' in a direct sense.

Recommendation 4: The Committee recommend amendment to section 10(1)(b)(iii) definition of TPM and section 10(1)(c) definition of an access control TPM to achieve technology neutrality: excluding all devices, products, technology or components that are designed to *control geographic market segmentation.*

[20] Choice, p 40
[21] Section 10(1)(b)(iii) and 10(1)(c) *Copyright Act 1968 (Cth)* – definitions of technological protection measure and access control technological protection measure.
[22] *Stevens V Kabushiki Kaisha Sony Computer Entertainment* (2005) HCA 58 (6 OCT 2005

In addition to issues with geo-locks, consumers may find themselves inadvertently exposed to civil or criminal liability for copyright infringement where purchasing content lawfully from Australian websites. E-books are commonly protected by TPMs that only permit access to the work via a proprietary device or software. An e-book title, for example, may only be available for purchase to consumers in Australia in a Sony eReader format. A consumer who purchases the e-book title lawfully in this format, and then bypasses the TPM so as to read the title on their Kindle, is liable for copyright infringement.

Specific exceptions in sub-sections 116AN(2) – (8), s132 APC (2) – (8) and Schedule 10A of the *Copyright Regulations 1969 (Cth)* detail the circumstances in which an access control TPM may be circumvented. In his submission to this Inquiry, Dr. Matthew Rimmer (Australian National University) sets out these exceptions in full[23], and provides a succinct overview of the current review of TPM exceptions being undertaken by Attorney-General's Department[24].

First round submissions to the Attorney-General's Department review of TPM exceptions make it clear that a number of legitimate uses of content by libraries, schools and universities are being significantly impeded by TPMs. In their submission to that inquiry, the Copyright Advisory Group of the Standing Council on School Education and Early Childhood (SCEEC), representing Australian schools and TAFES, provides a compelling range of 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[25]. 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

[23] Above n 5, Dr. Matthew Rimmer, p 50 - 51

[24] Ibid 50; Attorney-General's Department, *Review of Technological Protection Measure exceptions made under the Copyright Act* 1968, 2012, http://www.ag.gov.au/Consultationsreformsandreviews/Pages/ReviewofTechnologicalProtectionMeasureexceptionsmadeundertheCopyrightAct1968.aspx

[25] The Copyright Advisory Group of the Standing Council on School Education and Early Childhood, submission to the Attorney-General's Department, August 2012 http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Copyright%20Advisory%20Group%20%28CAG%29%20Submission.PDF

- Compile film clips and other snippets of content protected by TPMs to aid student analysis or classroom discussion.

Even where copyright law recognizes a specific situation in which TPMs can be circumvented or removed, in practice this may be difficult to achieve. Schedule 10A of the *Copyright Regulations* includes an exception for libraries to circumvent TPMs in order to undertake inter-library loan and document supply. 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.

TPMs have also had a significant adverse impact on access to digital content by people with disabilities. There is no general exception in the Copyright Act permitting someone with a visual impairment (or intellectual or hearing impairment) to change content into a format they can access if there is a TPM attached. Only institutions assisting persons with a print disability (including educational institutions) may circumvent TPMs for the purposes of educational instruction[26]. People with disabilities cannot circumvent TPMs in order to access a work for private study, for creative use, for pure enjoyment, even in circumstances where the work is unavailable for purchase in Australia. In an article for tech publication zdnet, respected UK technology journalist Rupert Goodwins details his frustration as a person with a visual impairment accessing content encumbered with TPMs:

> *"With DRM, the commercial model of the provider goes beyond an application or a service. It is designed to constrain the customer to using something in only the way approved by the content provider, and it has legal backing.*
>
> *If I can't use a particular word processor, I can find another. But if I can't read a particular book because it is only readable on a particular platform and that platform isn't readable to me, I'm stuck….[27]"*

After describing a lengthy attempt to access an e-book in a format he could read, Goodwins eventually stripped the DRM from the content (an infringement of copyright in the UK, as in Australia), concluding:

[26] Item 3, Schedule 10A *Copyright Regulations 1969* (Cth).
[27] Rupert Goodwins, 'Going Blind? DRM will dim your world' September 22 2012 http://www.zdnet.com/going-blind-drm-will-dim-your-world-7000004586/

> *"This is the reward you get for being disabled and wanting to do the right thing. This is how the world's most splendid machine for freeing our minds from our physical shackles is itself being shackled. This is what will happen to all of you reading this as you get old. I know this, I've done the research: most of you will start to go blind before you die.*
>
> *And you will lose your digital world, the one that most promises to save you, unless people who are granted the protection of DRM are made conscious of the responsibilities that come with it. Those responsibilities include fair use, accessibility and accountability: you do not get to set the rules you like and ignore the rest."*

In this Inquiry, it is essential that the Committee take into account not only the prohibitive costs of IT hardware and software for Australians with disabilities, but other ways in which digital content providers may restrict (or exclude outright) their enjoyment of content.

Despite the clear need for further exceptions permitting the circumvention of TPMs by consumers, educators, libraries and other institutions for non-infringing uses of content, copyright obligations imposed on Australia through the Trans-Pacific Partnership Agreement could further restrict our existing TPM regime.

Article 4.9(d) of the leaked US IP Chapter of the TPP (discussed under Part B – Parallel Importation in this submission) allows for limited exceptions to prohibitions on circumvention and trafficking circumvention devices. **This list is exhaustive**. Australia is subject to a very similar regime under AUSFTA, implemented in the *Copyright Act* Part V div 2A, but with scope for revision of the regime. Take the wording of Article 4.9(d)(viii) of the TPP proposal:

> *"where 'an actual or likely adverse impact on [other] non-infringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence; provided that any limitation or exception adopted in reliance upon this clause shall have effect for a renewable period of not more than three years from the date of conclusion of such proceeding.'*

In comparison, under existing Australian law:

- The impact on non infringing uses need only be 'credibly' demonstrated rather than "by substantial evidence".
- Exceptions do not need to be renewed. Exceptions only end if a submission is made to vary or revoke the exception, and 'an actual or likely adverse impact' can no longer be credibly demonstrated.

Exhaustive, restrictive TPM provisions in trade agreements are increasingly preventing educational institutions, libraries, archives and consumers from using content in ways **recognised as legitimate by Parliament through copyright exceptions.**

Recommendation 5: The Government should consider the extent to which technological protection measures (TPMs) attached to digital content contribute to price differentials, impede access to information by people with disabilities, expose consumers and institutions to inadvertent criminal liability and restrict use of content as permitted under Australian copyright law.

Recommendation 6: Australia, in negotiation of the Trans-Pacific Partnership Agreement, should not agree to copyright provisions that further restrict circumstances in which TPMs can be circumvented.

Conclusion

There are a number of factors limiting or impeding access to e-books for libraries and individual consumers in Australia. The ADA/ALCC in this submission have focused specific copyright law implications affecting the cost, availability of and access to e-books. We recommend:

Recommendation 1: The Committee affirms the right of libraries in Australia to access e-book materials on reasonable commercial terms for the benefit of Australian citizens.

Recommendation 2: 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.

Recommendation 3: Australia, in negotiation of the Trans-Pacific Partnership Agreement, should not agree to copyright provisions that entrench or further restrict parallel importation of copyright works.

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Recommendation 6: Australia, in negotiation of the Trans-Pacific Partnership Agreement, should not agree to copyright provisions that further restrict circumstances in which TPMs can be circumvented.

We would be glad to provide further information to the Committee, either by written submission or in oral testimony, to assist in this Inquiry.