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IT Pricing: Copyright Law, Consumer Rights, and Competition Policy. A Submission to the House of Representatives Standing Committee on Infrastructure and Communications Inquiry into IT Pricing

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THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON INFRASTRUCTURE AND COMMUNICATIONS

IT PRICING: COPYRIGHT LAW, CONSUMER RIGHTS, AND COMPETITION POLICY

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Justice Lionel Murphy

'Copyright is being used to manipulate the Australian market.'

Justice Michael Kirby

'In effect, and apparently intentionally, those [technological] restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit.'

US Attorney-General Eric Holder

'As a result of this alleged conspiracy, we believe that consumers paid millions of dollars more for some of the most popular titles.'

Justice Denise Coates

'There can be no denying the importance of books and authors in the quest for human knowledge and creative expression, and in supporting a free and prosperous society.'

Andrew Leigh MP

'Access to many and affordable books is an important component of a civilised society.'

Cory Doctorow

'As good as Amazon is at what it does, it doesn't deserve to lock in the reading public. No one does.'

BIOGRAPHY

I am an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. I am an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I hold a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. I received a PhD in law from the University of New South Wales for my dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. I am a member of the ANU Climate Change Institute. I have published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. My work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

I am the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). I explore the significance of key judicial rulings and consider legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. I have also also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2010, and the *Trans-Pacific Partnership*.

I am also the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. I edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). I was also a chief investigator in an Australian Research Council Discovery Project, ‘Gene Patents In

Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions (2003). I am currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). I have participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

I am a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (RED) Campaign, the Gates Foundation, and the Clinton Foundation. I am also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012), with Alison McLennan.

I am the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. I am currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

I also have a research interest in intellectual property and traditional knowledge. I have written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics.

There is an accompanying submission by Ariel Bogle entitled *The Tethered Utility: The Amazon Kindle and the Right to Read*. Ariel Bogle holds a BA and a LLB with honours from the Australian National University. She has worked for a private law firm in Sydney and now works at the publisher Melville House in New York. This submission is her 2011 Honours Thesis in Law.

EXECUTIVE SUMMARY

For a hundred years, since Federation, Australian consumers have suffered the indignity and the tragedy of price discrimination. From the time of imperial publishing networks, Australia has been suffered from cultural colonialism. In respect of pricing of copyright works, Australian consumers have been gouged; ripped-off; and exploited. Digital technologies have not necessarily brought an end to such price discrimination. 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 geo-blocked.

Australian courts have repeatedly flagged policy problems in respect of price discrimination relating to copyright works. The High Court of Australia has been vocal in its concern about the problem. The Australian Parliament and government regulators have periodically sought to address such problems. There have been various efforts to address some of the root problems in relation to price discrimination – through copyright law; consumer law; and competition law. However, such efforts have also been opposed, thwarted, and frustrated by powerful industries – with a vested interest in preserving lucrative monopolies.

CHOICE Australia has provided compelling evidence to the inquiry that Australian consumers still suffer from significant and unjustified price discrimination:

> In putting that together, the main thing we did was undertake research across a range of IT hardware and software products. That research identified an approximate 50 per cent price difference between what Australian consumers and US consumers pay for more or less identical products. We looked at music downloads from iTunes, PC games, software, console games and computer hardware. Some of the starkest figures coming out of that were that, compared to US consumers, Australians pay around 52 per cent more on iTunes for the equivalent top 50 songs; we pay 88 per cent more for Nintendo Wii console games—that was a selection of the 20 most recently released games; and there was a difference of about 34 per cent across a selection of 44 popular home and business software titles. We also looked at

> hardware, and a selection of 12 Dell computers showed a price difference of about 41 per cent between what Australians and consumers in the US would pay. [1]

CHOICE Australia concluded: 'So we think these are significant price differences and we do not think they can be fully explained, let alone justified, by some of those factors that have been identified in other submissions to this inquiry.' [2]

The present inquiry by the House of Representatives Standing Committee on Infrastructure and Communications provides an important opportunity to acknowledge such long-standing, unjustified price discrimination; and moreover to fashion effective policy responses

As an independent scholar and expert in intellectual property and consumer rights, I would like to address the House of Representatives Standing Committee on Infrastructure and Communications on its inquiry into IT prices.

I understand that the House of Representatives Standing Committee is inquiring into and reporting on 'whether a difference in prices exists between IT hardware and software products, including computer games and consoles, e-books and music and videos sold in Australia over the internet or in retail outlets as compared to markets in the US, UK and economies in the Asia-Pacific.' I would like to focus in particular upon 'what actions might be taken to help address any differences that operate to the disadvantage to Australian consumers.' I would like to particularly assist the Committee in fashioning policy solutions to address price discrimination in respect of copyright works, which disadvantage Australian consumers. I have a number of recommendations. I would argue that there is a need for an integrated approach, which combines copyright law, consumer law, competition law, and trade law.

[1] CHOICE Australia, *Submission to House Standing Committee on Infrastructure and Communications Inquiry into IT Pricing*, 16 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs/sub075.pdf

[2] Ibid.

1. Parallel importation restrictions are anachronistic. The Australian Parliament should repeal all remaining parallel importation restrictions under Australian copyright law, in order to promote consumer choice, competition, and innovation.

2. The Australian Parliament should review the competition effects of technological protection measures, and reconsider the design of the regime. The Australian Parliament should address the issue of geo-blocking under both copyright law and technological protection measures.

3. The Australian Parliament should revise the *Copyright Act* 1968 (Cth) to remove all discriminatory barriers to access by persons with disabilities to cultural materials.

4. The Australian Competition and Consumer Commission has taken action in respect of misleading and deceptive advertising in respect of information technology companies. The regulator should broaden its focus on consumer rights and digital economy to consider in an integrated fashion the practices of information technology companies – including terms and conditions of use; price discrimination; and the use of digital rights management systems.

5. Especially in light of alleged overseas conspiracies involving price fixing by Apple Inc. and large multinational publishers, there is a need for the Australian Competition and Consumer Commission to investigate whether there has been any such restrictive trade practices resulting in respect of information technology products in Australia.

6. The Australian Government should not agree to an expansive Intellectual Property Chapter in the *Trans-Pacific Partnership* talks. In particular, there is a concern about text that undermines consumer rights – such as the confinement of copyright exceptions, parallel importation restrictions and technological protection measures.

7. As suggested by the Honours thesis of Ariel Bogle, 'The Tethered Utility: The Amazon Kindle and the Right to Read', there is a need to consider larger questions about access to knowledge and consumer rights in respect of information technology products and services – in addition to matters of price discrimination.

1. PARALLEL IMPORTATION

In the debate over parallel importation, Andrew Stewart, Philip Griffith and Judith Bannister observe: 'Restrictions imposed by copyright owners on the free movement of copyright products allow the division of the world into self-contained market segments so that optimum exploitation can occur, maximising profits and restricting or preventing competition in the sale of copyright products of the same type or brand within national boundaries.'[3]

A. History of Import Monopolies

In his book, *The True History of Copyright*, Benedict Atkinson is particularly concerned about the "cultural cringe" which has afflicted Australian copyright law. [4] He discusses the early history of the debate over parallel importation in the Australian Parliament, just after Federation:

> The import monopoly did, nonetheless, occupy the greatest amount of debating time and, more than any copyright issue discussed in Parliament in either 1905 or 1912, aroused the passions of a few speakers. Exchanges were frank. On one occasion Keating said of the Labor Senator Gregory McGregor, who betrayed no understanding that the monopoly might penalise consumers. "I really begin to totter my belief that the Vice-President of the Executive Council understands the Bill with which he is dealing."
>
> Australian legislators chose to believe the comforting illusion that British and Australian interests were indivisible and laws made by the former must benefit the latter. Though Joseph Vardon and John Keating pointed out to senators the importance of legislating in Australia's interest, and Keating implored them to reconsider their endorsement of the distribution monopoly, the need for imperial uniformity remained a predominant concern.[5]

Atkinson observes: 'In debate, none of the proponents of import controls advanced a single substantive argument for their re-enactment.'[6]

[3] Andrew Stewart, Philip Griffith and Judith Bannister, *Intellectual Property in Australia: Fourth Edition*, Sydney: LexisNexis, 2010, p. 248.

[4] Benedict Atkinson. *The True History of Copyright: The Australian Experience, 1905-2005*, Sydney: Sydney University Press, 2007, p. 95.

[5] Ibid. 100.

[6] Ibid., 100.

In his book, Atkinson's recounts the dissenting orations by John Keating against the imposition of an import monopoly upon Australian consumers:

> We have to realise that copyright legislation affects not merely publishers, printers, and authors, but readers. It may be assumed in these days of universal education copyright legislation affects the whole community….
>
> I do not wish to re-open the discussion upon clause 10 or to take the highly unusual course of asking that the Bill should be recommitted for its further consideration, because I feel that the Vice-President of the Executive Council and his colleagues will realise their responsibility. I point out to the Vice-President of the Executive Council in all friendliness, the dangers that will beset the people of Australia if the Bill goes through in the form in which the Committee is about to report it to the Senate … In adopting this legislation we are adopting British legislation, and honourable senators must recognise that Great Britain is a totally different country from Australia. In adopting clause 10 … we are adopting a provision made in the United Kingdom to meet conditions with respect to importation of pirated copies, which are totally dissimilar from those which apply in Australia.[7]

Keating warned: '[S]ection 10, as it stands, affords [opportunity] for blackmail. I used that word by interjection when the matter was being discussed, and I did so advisedly. The clause opens to the door to blackmail, unless we insert a provision of the nature to which I have referred.'[8]

David John Gordon expressed concerns about the impact of such restrictions upon competition. He said, 'we can easily imagine an Australian firm purchasing the copyright of a popular song or a set of films in England and under this clause securing a very large monopoly in Australia.'[9] He said of section 10:

> The clause as drafted is all very well from the British aspect, but from the Australian stand-point it seems to me that we ought to consider the position of the people in this part of the world, and to modify the law to suit our own purposes rather than to suit those of persons who are copyrighting in Great Britain. For example, we can easily imagine an Australian firm purchasing the copyright of a popular song or a set of firms in England, and under this clause securing very large monopoly in Australia … I submit that we should legislate according to

7 Ibid, 102-3.

8 Ibid, 103.

> Australian requirements, rather than be content to accept the honourable gentleman's [Attorney General Hughes's] statement that the Bill has been drafted to bring us into line with the British copyright law, and that we cannot amend it in any way without breaking some agreement at which we have arrived at the *Berlin Convention* …I do not wish to see any piracy going on. I desire to insure to the author of a popular song the fruits of his own brain. At the same time, the Australian public ought to be protected to the extent of preventing any person here from having a monopoly and charging them just what he may choose, merely because he happens to have purchased that monopoly for a mere song on the other side of the world.[10]

Speaking of the 1912 parliamentary debate in Australia, the historian observes that 'the imperial Government communicated to its antipodean counterpart a politely coercive message: failure to adopt British copyright legislation would mean that Britain no longer recognise Australian copyright.'[11] Atkinson comments:

> Politicians resolved to incorporate the British *Copyright Act* of 1911 in the new copyright legislation for pragmatic reasons. As Australian parliamentarians knew, uniform legislative rules throughout the Empire were an important preliminary to creating the uniform system favoured by imperialist politicians. They also knew that the privileges enjoyed by members of the Berne Union flowed to Australia in its capacity as a British possession, not as an individual State.[12]

A similar dynamic was at work with the enactment of the *Copyright Act* 1968 (Cth), in which deference was paid to the British empire. Atkinson notes how the Australian Spicer Committee was subservient to the recommendations of the Gregory Committee: 'The Spicer Committee never threatened to undermine the long tradition of Australian subservience to the copyright prescriptions of foreign nations'.[13] At most, he observes, there were some divergences, in terms of the treatment of sporting spectacles and compulsory licensing. Atkinson observed: 'The *Copyright Act* [1968 (Cth)] is a creature, or more accurately, a younger first cousin, of the British Act of 1956'.[14] He noted: "Although said, when originally passed, to be better drafted and

9 Ibid.,105.
10 Ibid, 105.
11 Ibid., 95.
12 Ibid., 95.
13 Ibid., 296.
14 Ibid., 328.

better arranged, it adopted the substance of the British Act's provisions and followed exactly the fundamental categories of the British legislation".[15]

B. The High Court of Australia

In the Fourth Edition of *Intellectual Property in Australia*, Andrew Stewart, Philip Griffith and Judith Bannister provide this overview of the topic of parallel importation:

> Of the indirect infringement provisions, ss 37 and 102 have been the subject of most debate. They have allowed a copyright owner or exclusive licensee to control the importation into Australia of works and other subject matter, even if the items in question are not 'pirated' copies but have been acquired quite lawfully overseas. However, these provisions have been substantially modified with respect to books (1990), sound recordings and accessories to imported goods (1998) and most recently computer software and electronic versions of books, periodicals and sheet music.[16]

The leading case on parallel importation is the 1977 High Court of Australia decision in *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV*.[17] Appropriately enough, for a nation obsessed with Master Chef and Iron Chef, this dispute involved the parallel importation of cook-books.

Angus & Robertson, a retail bookseller owned by the appellant, purchased cookbooks from a book wholesaler in California, and imported them into Australia to sell for $8.95. The respondent, the Time-Life Co, had an exclusive licence from the American publisher of the cookbooks to publish them throughout the world, other than in North America. They sold the books in Australia for $16.95.

Time-Life argued that Angus & Robertson's importation of the books into Australia infringed their copyright by virtue of ss 37 and 38 of the Act. Angus & Robertson

15 Ibid., p. 328.

16 Andrew Stewart, Philip Griffith and Judith Bannister, *Intellectual Property in Australia: Fourth Edition*, Sydney: LexisNexis, 2010, p. 247.

17 *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

argued that the importation involved no infringement because they were impliedly licensed to deal with the books, having purchased them legally in the United States, and that the sale had contained no restrictive terms as to the use to which the buyer might put the books.

Gibbs J held that Angus & Robertson did not have an implied licence to import the works:

> I conclude that the appellant did not have the licence of Time Incorporated to import the books in question or to resell them after importation. Infringements of the kind described in ss. 37 and 38 were accordingly committed. It becomes unnecessary to consider the submission made by Mr. Bannon, for the first respondent, that Time Incorporated could not validly have given a "licence" within ss. 37 and 38 once it had given the exclusive licence to Time-Life, and that in these circumstances s. 121 would not assist the appellant, or his further submission that it would be inequitable to allow the appellant to succeed, at least in relation to the second consignment of books, having regard to the knowledge with which it acted. (at p545)
>
> It seems apparent that ss. 37 and 38 of the Act contemplate that the owner of copyright in a book may make regional arrangements for the distribution of copies, so as to prevent the importation into Australia for sale of books which have been sold elsewhere in the world. The appellant did not base any submission upon the provisions of the *Trade Practices Act 1974* (Cth), as amended, and no argument was addressed to us as to the possible effect of that Act on such arrangements. I accordingly express no view, one way or the other, upon that question.[18]

Jacobs J held: 'There was no evidence of an express grant of a positive licence to resell in Australia and there was no evidence of circumstances from which the grant of a licence can be implied.'[19]

Stephen J prophetically observed:

> This conclusion means that what the appellant saw as a means, in appropriate circumstances, of selling in Australia books published abroad at much lower prices than are presently available through overseas publishers' Australian distributors is foreclosed to it. The high cost

[18] *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

[19] *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

> in Australia of imported books relative to prices in their country of publication and the reasons for it are discussed by Sir Richard Eggleston in *Re Books*. It is neither a novel or a local phenomenon … Any undesirable economic or cultural effects which some may discern as flowing from this aspect of copyright protection are a matter for the legislature.[20]

Murphy J was even more forthright, noting that the evidence suggested that 'copyright is being used to manipulate the Australian market, and that the respondents will control the outlets and the price to the public will be almost doubled, and the Australian public will have delayed access to publications freely available in the United States'.[21] He commented:

> In my opinion, the trial judge should have raised the issue and insisted, as a condition of relief, that the plaintiff demonstrate that the *Trade Practices Act* was not being breached, that the public interest was not being injured and that the enforcement of copyright by the relief sought would not be used to breach the Act or injure the public interest. Section 115 (2) of the *Copyright Act* provides for imposition of such terms, if any, as the court thinks fit. I have, of course, not reached any opinion on these matters and am conscious of the role of an appellate court and of the difficulties of dealing with these questions at this stage. (at p562) I have considered whether, notwithstanding the appellant's failure to rely on these discretionary matters, the appeal should be allowed, and (if the respondent Time-Life were to request it) a new trial ordered, and if not, judgment for the appellant.[22]

However, Murphy held: 'In all the circumstances, my conclusion is that the appeal should be dismissed.'[23]

In the 1998 case of *Holder* v *Searle*, the Federal Court dealt with whether the parallel importation of laser discs constituted an infringement of copyright in cinematographic works under s 132 and s 133 of the *Copyright Act* 1968 (Cth).[24]

[20] *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

[21] *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

[22] *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

[23] *Interstate Parcel Express Co Pty Ltd* v *Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

The case concerned whether Searle was knowingly concerned in the possession of laser video discs of a total of 11 cinematograph films for the purpose of offering or exposing for sale or hire. The discs had been imported from the USA where they had been legitimately purchased into Australia. Most of the discs bore a marking to the effect that the discs were for sale or rental for private home use in the USA or Canada only.

Spender J avoided dealing with the political debate over parallel importation:

> Before turning to the evidence, it is to be noted that the three informations are based on a provision of the Act which bans parallel importation. There is no suggestion in this case that the video laser discs the subject of the three informations are other than authentic, non-pirate products. Sections 132 and 133 give effect to the present legal position that it is competent for the owners of copyright overseas to control the price paid by Australian consumers or, more precisely, the system which bans parallel importation of genuine product has the clear potential of permitting the holder of copyright material to charge one price for consumers in one country, say the United States, or Hong Kong, or Britain, but the price paid by an Australian consumer for the same article is higher. Parallel importation will only occur, as a matter of commercial reality, if an Australian importer can source material overseas, pay freight and customs duty and still price the product competitively with the Australian licensee or distributor. The question of the continuation of that legislative regime is a matter of current political contention. I am, however, not concerned with the merits of that debate, but have to consider the evidence in the light of the law as it stood in September 1996".

Spender J found that the prosecutor had established the elements of the charge in respect of five discs of one film (*Speechless*) and four discs of another film (*Bye Bye Love*). The court ordered that the prosecution pay 1/3 of Searle's costs in the matter, and ordered that Searle be released on a good behaviour bond.

C. Sound Recordings

In 1988, the Copyright Law Review Committee (CLRC) undertook a major review of the parallel import restrictions in ss 37, 38, 102 and 103 of the *Copyright Act* 1968 (Cth). The CLRC found that the sections should continue to apply to parallel imports

[24] *Holder* v *Searle* (1998) 44 IPR 1

but with certain exceptions, allowing the importation of non-pirated copyright material in certain circumstances. The CLRC concluded that, despite the potential for price discrimination and limitations on the availability of copyright material that flowed from the restriction, significant damage would be sustained by domestic industries if the restriction were abolished.

In a 1997 article entitled 'CD Monopoly Goes Into A Spin', Alan Ramsey provides a good idea of the legislative debate that followed around the subject of parallel importation.[25] He interviewed Allan Fels, the chairman of the Australian Competition and Consumer Commission. Professor Fels recalls:

> In 1989, I'd just started at the Prices Authority and we did a little report noticing that all other prices in Australia used to adjust to changes in the exchange rate but not to books. So we did an inquiry into books. And it turned out that on digging into books it was quite a big problem affecting the price of CDs, too.
>
> That led us to recommend to the Hawke Government that we look at CD prices. And, of course, there was huge lobbying by the record industry to stop us. They put a lot of pressure on the Government, but Cabinet was keen to get it through. So we started up the inquiry and then the industry challenged us legally. It went to the Federal Court but didn't get very far. The inquiry went ahead'.
>
> [The report] went to the Labor Cabinet five times in all. The first two times they deadlocked, each time after two to three hours on it. Over the years, at the five Cabinet meetings, they spent 15 hours on it in all. The third time, after two meetings of no decision, Michael Duffy got it through in December 1992. They introduced the legislation into Parliament the same month, but then the election intervened and Parliament was prorogued, so when the Government got back it required a positive decision to re-introduce it.
>
> So back to Cabinet it went, where they couldn't make up their minds and they delayed it. Then it went back a fifth time, in April 1995. And that's when it was defeated. I believe a majority in Cabinet supported reform, but it was the Prime Minister who blocked it. Yet I remember when I first did the report, Keating as Treasurer commended me on it. It was just the day after, I think, and he saw me and came over and congratulated me. He was very keen on it, he said, with its cheaper prices. He never spoke to me about it again, no. Not at any time in the more than four years Cabinet haggled over it.[26]

[25] Alan Ramsey, 'CD Monopoly Goes Into A Spin', *The Sydney Morning Herald*, 11 October, 1997.

[26] Ibid.

In the end, the Howard Government addressed parallel importation restrictions in respect of sound recordings. Furthermore, the Howard Government has commissioned a competition review of all aspects of intellectual property - with particular attention to the question of parallel importation in general.

In 1997, the Liberal Government put forward a bill to amend the Copyright Act to permit the parallel importation of CDs. After debate in the Senate Legal and Constitutional Legislation Committee, the majority of the Senate Committee recommended that the Bill be passed. The Liberal Government was able to implement the Bill, in the absence of Mal Colston.

The *Copyright Amendment Act (No 2)* 1997 (Cth) removed the copyright owner's control over "parallel importation" of music CDs. The effect of the removal of the controls on parallel importation was that CDs made legitimately in other countries, ie non-pirate CDs, can be imported into Australia without the consent of the Australian copyright owner.

To allay fears that pirate CDs would flood the Australian market, the *Copyright Amendment Act (No 2)* 1997 (Cth) included a range of measures that improve protection for owners of copyright in sound recordings. (1) In civil proceedings for importation of infringing copies of CDs, the onus of establishing the defence that the imported CD was not an infringing copy was placed on the importer or distributor. (2) The Act also increased the maximum monetary penalties for copyright offences. Persons could be fined of over $60 000 per offence and/or 5 years imprisonment. Corporations could be fined over $300 000 per offence.

The Government, through the Department of Communications and the Arts, has also decided to allocate $10 million over three years to an Australian music industry promotion package.

Professor Allan Fels commented upon the effect of the legislative changes:

> The predictions of doom and gloom made by opponents of the reforms have not come to pass. The technical quality of imported product has been found to be very high. Retailers and

> consumers have been getting better deals from Australian producers. Australian made product is now often enhanced by the inclusion of a CD ROM feature, foldout booklets, bonus tracks or bonus Cds. However, we are still interested in seeing head to head competition, as it may be that consumers prefer to buy the standard music product at much lower prices, rather than the enhanced product at higher prices. Only market competition can resolve this.[27]

D. Books

In 1989, following an inquiry into book prices, the Prices Surveillance Authority recommended the repeal of the importation provisions, except with regard to pirate editions and Australian resident authors with separate Australian publishing contracts.

The Government's response was to introduce the *Copyright Amendment Act* 1990 (Cth). The amendments apply only to 'non-infringing books', meaning books which are legitimately manufactured in their country of origin. Specifically excluded are books consisting mainly of musical scores, as well as computer software manuals and periodicals.

The Productivity Commission summarizes the regime in respect of parallel importation of books:

> *The 30 day release rule*
>
> Prior to 1991, publishers could buy the Australian rights to a foreign book and delay the release of the title indefinitely. Now, under section 29(5) of the Copyright Act, the holder of Australian copyright for a new book has 30 days to supply copies of the book to the Australian market after its release in another market. If the copyright holder fails to meet this requirement, Australian booksellers become free to import non-infringing copies of the book from any overseas supplier. Australian publishers therefore have an incentive to release titles promptly to preserve the PIRs on their titles.
>
> *The 90 day resupply rule*
>
> Section 44A contains the 90 day resupply rule, which places an onus on Australian publishers to maintain a supply of the books they publish to Australian booksellers. An Australian publisher forfeits parallel import protection over a publication if:

[27] Allan Fels, 'The Role of Competition Principles in Intellectual Property', Intellectual Property Society of Australia and New Zealand, 22 July 1999.

> • a bookseller has requested the publisher to supply a book, but the publisher has not responded within 7 days advising they will supply the book within 90 days, or
> • the publisher has not supplied the book to the bookseller within 90 days.
> Under the current law, it is not clear whether a publisher loses parallel importation protection permanently if unable to supply a book within 90 days, or only until supply is restored. This lack of clarity continues partly due to the fact that there has been very little parallel importation through forfeiture of protection under the 90 day rule.[28]

Thus, this regime allows for limited parallel importation of books, in the last instance.

One of the most powerful voices for law reform was the now Foreign Minister, Bob Carr.[29] He posed the question: 'Why does Australia tell its bookshops they cannot import books to sell at the cheapest price?'[30] Bob Carr lamented:

> Think of your childhood. You are challenged by an adult book. It stretches your vocabulary, your comprehension. You may give up on the first try but return later. Experimenting, you achieve, through trial and error, the discrimination of a reader. You soon recognise quickly this kind of book, that kind of author.
>
> But the present law rations those magic encounters. A new edition of the young adult bestseller *Twilight* sells for $24.99 in Australia but only $16.90 in the US and $16.52 in Britain. I have converted to Australian dollars for this and following comparisons.
>
> The winner of the 2008 Booker Prize, *The White Tiger*, sells for $32.95 in Australia, $21.53 in the US and $30.70 in Britain. Without the present restrictions, a parallel import edition of Harper Lee's classic *To Kill a Mockingbird* could be sold in Australian bookshops for $13.95. But the protected Australian edition sells for $21.95. A parallel import edition of Ian McEwan's *Atonement* could be sold for $13.95, yet the present Australian edition sells for $24.95. A parallel import edition of *Memoirs of a Geisha* could be sold for $13.95, whereas the Australian edition sells for $23.95. These best-selling books are unnecessarily more expensive because bookshops cannot buy from overseas if an Australian publisher expresses an interest in publishing it here.[31]

[28] Productivity Commission, *Restrictions on the Parallel Importation of Books*, Canberra: Productivity Commission, 2009, at 3.4, http://www.pc.gov.au/projects/study/books

[29] Bob Carr, 'On the Case for Cheaper Books', *The Australian*, 13 December 2008, http://www.theaustralian.com.au/arts/on-the-case-for-cheaper-books/story-e6frg8q6-1111118266177

[30] Ibid.

[31] Ibid.

He maintained that 'Lower prices mean more sales' and 'More sales mean more books in Australian homes.'[32]

During the period of the Rudd Government, there was a Productivity Commission inquiry into Copyright Restrictions on the Parallel Importation of Books in 2009.[33] This inquiry considered the current provisions of the *Copyright Act 1968* (Cth) that restrict the parallel importation of books, and provide advice on the potential for reform in the area. The Commission examined, and invited participants to comment on, a range of issues in regard to the parallel importation of books, including: the effectiveness of the parallel import provisions in achieving the objectives of the Copyright Act, having regard to the Government's overall policy framework; whether the benefits to the community from the provisions outweigh any costs, including any restrictions on competition and the impacts on all relevant industry groups; and options for reform to the current provisions, and any transitional arrangements that should accompany any reform.

In its report, the Productivity Commission noted that parallel importation restrictions under copyright law have a significant impact upon questions of prices and access:

> The immediate effect of PIRs is to insulate book titles published in Australia from import competition. In the absence of PIRs, local booksellers or book buying groups could source legally-produced foreign editions of that title from whichever international supplier had the lowest cost or best value for- money edition. This competitive threat would pressure the local publisher to lower the price of its own edition *if*, after taking into account taxes and freight etc:
>
> * □ an 'equivalent' edition of a title was available at a lower cost from abroad and/or
> * □ a different edition of the title, that represented 'better value', was available from abroad.
>
> But when shielded from this potential source of direct competition, a publisher can charge booksellers a price which is above the cost of an equivalent foreign edition, certain in the knowledge that it cannot be undercut by such an edition. In effect, PIRs support the

32 Ibid.

33 Productivity Commission, *Restrictions on the Parallel Importation of Books*, Canberra: Productivity Commission, 2009, http://www.pc.gov.au/projects/study/books

> segmentation of world book markets, assisting publishers to charge different prices for the same or a similar product in different countries.[34]

The Commission recognises 'the inherent limitations of price comparisons but, in conjunction with the other evidence presented in this chapter, the results of the Commission's extensive comparisons leave little doubt that, but for the PIRs, Australian booksellers could have obtained and shipped many titles to Australia in 2007-08 for substantially less than they were charged by Australian publishers'. [35] The Commission also commented: 'And while currency movements in 2008-09 have reduced the price differences between Australia and the US, the evidence suggests that there would have remained opportunities to source various titles from the UK or the US for less than the prices charged by Australian publishers'.[36]

The Productivity Commission report observed: 'The current PIR regime is unnecessarily costly for consumers, restricts the commercial operations of booksellers and is not a well targeted mechanism for supporting cultural externalities. Reform is necessary.'[37] The Productivity Commission provided recommendations for limited reform in respect of parallel importation restrictions on books:

> * Australia's Parallel Import Restrictions (PIRs) for books should be modified as follows.
> * PIRs should apply for 12 months from the date of first publication of a book in Australia. Thereafter, parallel importation should be freely permitted.
> * If a PIR-protected book becomes unavailable during this 12 month period, then parallel importation should be freely permitted until local supply is re-established, or the expiry of the 12 month period allows for generalised parallel importation. Booksellers should be allowed to overtly offer an aggregation service for individual orders of imported books under the single use provisions.
> * All other aspects of the current PIR arrangements should continue unchanged, including the 30 day rule.

34 Ibid 4.3.

35 Ibid., 4.22.

36 Ibid., 4.22.

37 Ibid., 7.1.

My view was that such reforms were weak and did not go far enough. Given the impact of parallel importation restrictions, there was a need to repeal such restrictions altogether.

In November 2009, the Australian Government declined to take action in respect of parallel importation restrictions for books.[38] Dr Craig Emerson observed:

> The Government has decided not to change the Australian regulatory regime for books introduced by the previous Labor government. Australian book printing and publishing is under strong competitive pressure from international online booksellers such as Amazon and The Book Depository and the Government has formed the view that that this pressure is likely to intensify. In addition, the technology of electronic books (e-books) like Kindle Books will continue to improve with further innovations and price reductions expected.
>
> The Government has not accepted the Productivity Commission's recommendation to remove the parallel importation restrictions on books. The Productivity Commission report acknowledged that removing these restrictions would adversely affect Australian authors, publishers and culture. The Commission recommended extra budgetary funding of authors and publishers to compensate them for this loss.
>
> The Government has decided not to commit to a new spending program for Australian authors and publishers. Compromise proposals were considered, involving reductions in the length of the 30-day publication rule and the 90-day resupply rule.
>
> In the circumstances of intense competition from online books and e-books, the Government judged that changing the regulations governing book imports is unlikely to have any material effect on the availability of books in Australia.
>
> If books cannot be made available in a timely fashion and at a competitive price, customers will opt for online sales and e-books. Introducing a price cap along the lines of the Canadian system would increase regulation with questionable effects on book prices. The Australian book printing and publishing industries will need to respond to the increasing competition from imports without relying on additional government assistance.[39]

[38] Government Response, 'Regulatory Regime for Books to Remain Unchanged', 11 November 2009, http://minister.innovation.gov.au/Emerson/Pages/REGULATORYREGIMEFORBOOKSTOREMAINUNCHANGED.aspx

[39] Ibid.

While it is true that online sales and e-books have introduced new forms of competition, there have nonetheless remained concerns about unjustified price discrimination, with retail sales, online sales and e-books.

E. The 2003 Amendments

The *Copyright Amendment (Parallel Importation) Act* 2003 (Cth) removed parallel importation restrictions in respect of electronic books, periodicals, sheet music, and legitimate software.

Section 44E of the *Copyright Act* 1968 (Cth) deals with importation and sale etc. of copies of computer programs: 'The copyright in a literary work: (a) that is a computer program; and (b) that has been published in Australia or a qualifying country; is not infringed by a person who: (c) imports into Australia an article that has embodied in it a non-infringing copy of the program; or (d) does an act mentioned in section 38 involving an article that has embodied in it a non-infringing copy of the program and that has been imported into Australia by anyone.'

S 44F of the *Copyright Act* 1968 (Cth) addresses the importation and sale etc. of copies of electronic literary or music items: 'The copyright in a work: (a) that is, or is part of, an electronic literary or music item; and (b) that has been published in Australia or a qualifying country; is not infringed by a person who: (c) imports into Australia an article that has embodied in it a non-infringing copy of the electronic literary or music item; or (d) does an act mentioned in section 38 involving an article that has embodied in it a non-infringing copy of the electronic literary or music item and that has been imported into Australia by anyone.

Films for direct distribution are still subject to parallel importation restrictions.

F. The Intellectual Property and Competition Review

In 2000, Henry Ergas and Jill McKeough of the Intellectual Property and Competition Review Committee recommended the repeal of the parallel importation provisions of the *Copyright Act* 1968 (Cth), with a 12-month transitional period allowed for books:

> The restrictions on parallel imports under the Copyright Act were considered by the Committee to be a significant competition issue. These restrictions allow owners of copyrighted material to geographically segment markets, creating added scope for owners of this material to charge higher prices in Australia than overseas. In the absence of these restrictions, competing imports more readily negate attempts to charge durably higher prices for material in Australia than overseas.
>
> The Committee received conflicting opinions on whether prices of copyrighted material were higher or lower in Australia than in the main overseas markets, and whether removal of the restrictions would result in lower prices.
>
> 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.
>
> Removing the restrictions is unlikely to materially alter the availability of copyrighted material. However, removing the restrictions will benefit consumers and the industries that rely on this material as an input, by ensuring that prices are not set higher than overseas.
>
> Removing the restrictions on parallel importation does not undermine the efficacy of copyright as a stimulus to creativity. Already, there are no restrictions on parallel imports within the European Union. This ensures that even the smaller economies in Europe can benefit from the intense competition, low prices and wide product availability associated with large, integrated markets. In contrast, Australia, as a relatively small, isolated economy, is exposed to segmentation of its market from international competitive pressures, as long as the parallel importing restrictions remain in place. Removing the restrictions will provide to Australia the same benefits as other economies secure through their far larger internal markets.
>
> The Committee considered whether removing restrictions would undermine the enforcement of copyright or the efficacy with which consumer standards are implemented. Based on advice received from the Australian Institute of Criminology, the Committee believes that removing the restrictions is consistent with effective copyright enforcement.

> The Committee does not believe restrictions on parallel imports are a cost-effective means of securing consumer standards.
>
> The Committee considered whether the restrictions are required under Australia's international obligations, and concluded that removing the restrictions would be fully consistent with these obligations and more generally with Australia's commitment to an open, competitive trading system.
>
> The Committee therefore recommends repeal of the parallel importation provisions of the Copyright Act, with a 12-month transitional period for books.[40]

There was a dissenting report in the committee that parallel import restrictions do not, in most situations, constitute a restriction on competition and considers that in the book industry at least, the benefits of parallel import restrictions exceed the costs.

G. The Fair IT for Australia Inquiry

The 2012 inquiry into Fair IT for Australia has circled around the question of parallel importation.

The chair of the Committee on Infrastructure and Communications observed at the first public hearing: 'Obviously what has happened in the last few years is that consumers have been parallel importing all on their own and largely ignoring our domestic legislation. Has our response been a little slow or are we playing catch up footy now in reorienting ourselves to a global marketplace as opposed to a smaller domestic one?'[41]

Jose Borghino for the Australian Publishers Association provided an overview of public policy inquiries into the book industry and "territorial" copyright:

[40] Intellectual Property and Competition Review Committee, *Review Of Intellectual Property Legislation Under The Competition Principles Agreement*. Canberra: Australian Government, 2000.

[41] House Standing Committee on Infrastructure and Communications, 'Inquiry into IT Pricing', Public Hearing, 30 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/hearings.htm

> Firstly, I would like to point out that the book industry and territorial copyright have been the subject of many inquiries in the past few decades, including the Copyright Law Review Committee in 1988, the Prices Surveillance Authority in 1989 and 1995, the ACCC in 1999 and 2001, the Intellectual Property and Competition Review Committee in 2000, the Senate Legal and Constitutional Affairs Legislation Committee in 2001, and the Productivity Commission commenced an inquiry in 2008, received over 500 submissions and delivered a report in mid-2009. The ALP national conference considered the matter in 2009 and commissioned a taskforce headed up by Mark Dreyfus which delivered its report in in 2009. In recent years, it has been the subject of ALP federal caucus consideration on three occasions and cabinet also on three occasions. The Book Industry Strategy Group established by the federal government delivered a report in 2011. In addition, the Australian Law Reform Commission has been commissioned to examine exceptions under the Copyright Act and is due to report on 30 November 2013. [42]

It is striking that the representative of the Australian Publishers Association does not mention the phrase 'parallel importation'. This overview also gives a distorted impression that the parallel importation has been adequately address in the past. It has not. There is still a need to remove remaining forms of parallel importation under the *Copyright Act* 1968 (Cth) – particularly with respect to books – and ensure there is a uniform treatment across subject matter.

The Howard Government removed restrictions in respect of parallel importation in respect of sound recordings. Nonetheless, there remains concerns about price discrimination between Australia and other jurisdictions. There was a fascinating exchange between Richard Mallett and Ed Husic:

> **Mr HUSIC:** I had someone locally, in western Sydney, raise an example of an artist—Richard Clapton. They said they went to get his greatest hits at the Australian iTunes store and found it was more expensive at the Australian iTunes store, to the rate of, I think, $17 compared to $10 in the states. You are saying that, of the $17 charged here, nine per cent goes to APRA as part of the royalties. Over in the States, if a US user downloads it from the US iTunes store at the rate of $9.99, does APRA charge the US or Apple in the US nine per cent? How does it work?

[42] House Standing Committee on Infrastructure and Communications, 'Inquiry into IT Pricing', Public Hearing, 30 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/hearings.htm

> **Mr Mallett:** Let's take two artists—we will use Richard Clapton and Stevie Wonder. The price that we charge here at nine per cent is applied to their songs downloaded here in Australia. It does not matter that one is Australian and the other is American. The rate in the US has also been set by a rate court over there, similar to the Copyright Tribunal here, and that rate applies to sales of any artist—so, to Richard Clapton or Stevie wonder. The rates are set territorially. We have no influence on the rate being paid to an Australian artist whose songs are downloaded in the States.[43]

Record companies have a great deal of agency in pushing for price changes. One of the fascinating tensions at the moment is between copyright owners and large information technology intermediaries, such as Apple, Google, and Amazon.

Mr Matt Levey, head of campaigns at CHOICE Australia, told the inquiry:

> We have called for some action to reduce this disadvantage faced by Australian consumers. We believe the federal government could play a greater role in educating consumers on the protections and rights they enjoy when shopping online. That is important for a range of reasons but, from the perspective of this inquiry, we think it is one way of increasing access to legitimate parallel imports from foreign markets thereby putting pressure on international businesses to reduce their prices in Australia, and we have seen evidence of that occurring in recent times.[44]

Responding to questions from Husic, Levey responded: 'When you look at some parallel importers like Kogan, the TV parallel importer, who, as far as we understand it, has an extremely strong refund/return policy you will see that, even though the goods that it is selling are parallel imported so you would assume not covered by that manufacturer's domestic warranty requirements, it obviously shows it is quite possible

[43] House Standing Committee on Infrastructure and Communications, 'Inquiry into IT Pricing', Public Hearing, 30 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/hearings.htm

[44] House Standing Committee on Infrastructure and Communications, 'Inquiry into IT Pricing', Public Hearing, 30 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/hearings.htm

to operate here profitably, sell a lot of products and still offer significant price savings compared to what, if you like, the official supply chains would provide.'[45]

1. Parallel importation restrictions are anachronistic. The Australian Parliament should repeal all remaining parallel importation restrictions under Australian copyright law, in order to promote consumer choice, competition, and innovation.

[45] House Standing Committee on Infrastructure and Communications, 'Inquiry into IT Pricing', Public Hearing, 30 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/hearings.htm

2. TECHNOLOGICAL PROTECTION MEASURES

There is a need to consider the impact of technological protection measures upon price discrimination in Australia.[46]

In the 1990's, there was a push by copyright industries to obtain legal backing for technological protection measures (TPMs) designed to prevent copying. Article 11 of the *WIPO Copyright Treaty 1996* provided that 'contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law'.

The *Digital Millennium Copyright Act* 1998 (US) (*DMCA*) provided for new copyright offences related to circumventing TPMs[47] and disseminating decryption tools that could disable or avoid TPMs.[48] Pamela Samuelson has argued that the provisions of the *DMCA* were designed to buttress the interests of copyright industries:

> … by colorful use of high rhetoric and forceful lobbying, Hollywood and its allies were successful in persuading Congress to adopt the broad anti-circumvention legislation they favoured… Had the Administration sought to broker a fairer compromise between the interests of Hollywood and its allies and the interests of Silicon Valley and its allies, this process would almost certainly have produced better legislation than the anti-circumvention provisions of the DMCA.[49]

[46] This account is derived from Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, July 2007, http://www.e-elgar.co.uk/bookentry_main.lasso?id=4263

[47] S 1201(a)(1) of the *Digital Millennium Copyright Act* 1998 (US).

[48] S 1201(a)(2) and (b)(1) of the *Digital Millennium Copyright Act* 1998 (US).

[49] Pamela Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti Circumvention Regulations Need to be Revised' (1999) 14 *Berkeley Technology Law Journal* 519 at 523.

There has been concern expressed that the drafting of the anti-circumvention provisions were the result of lobbying by copyright industries, such as the Motion Pictures Association of America (MPAA) and the Recording Industries Association of America (RIAA). Arguably, the long, convoluted, prescriptive provisions of the *DMCA* exceeded the minimalist requirements of the *WIPO Copyright Treaty* 1996.

Thus far, the *DMCA* has been interpreted in an expansive fashion by United States courts. In early case law, the United States courts were unwilling to countenance constitutional challenges to the TPMs regime in the *DMCA*.[50] Indeed, in the *2600* case, Kaplan J denied that the *DMCA* should be read in the context of constitutional arguments about freedom of speech:

> Society must be able to regulate the use and dissemination of code in appropriate circumstances. The Constitution, after all, is a framework for building a just and democratic society. It is not a suicide pact.[51]

In addition, there have been concerns that TPMs have been deployed to undermine the defence of fair use, and the *Sony Betamax* decision. There have been a number of precedents, in which copyright owners have successfully sued technology developers for breach of TPMs, notwithstanding the substantial, non-infringing uses of their products.[52] Indeed, in his book *Free Culture*, Lawrence Lessig complains that TPMs have disrupted the traditional balance in copyright law: 'Using code, copyright owners restrict fair use; using the *DMCA*, they punish those who would attempt to

[50] *Universal City Studios v Reimerdes* 82 F.Supp.2d 211 (S.D.N.Y.2000).*Universal City Studios v Corley*, 273 F.3d 429 (Fed. Cir. 2nd, 2001); and *United States of America v Elcom Ltd* 203 F.Supp.2d 1111 (N.D.Cal.2002). For a more extensive discussion, see Kathy Bowrey, and Matthew Rimmer, 'Rip, Mix, Burn: The Politics Of Peer To Peer And Copyright Law', (2005) 10 (7) *First Monday*, http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/974/895

[51] *Universal City Studios v Reimerdes* 111 F.Supp.2d 294 at 304-305 (S.D.N.Y.2000).

[52] *RealNetworks, Inc.* v. *Streambox, Inc*., No. 2:99CV02070, 2000 WL 127311 (W.D.Wash., Jan 18, 2000); *Macrovision Corp*. v *321 Studios*, Not Reported in F.Supp.2d, 2004 WL 1066323 (S.D.N.Y.) and 2005 WL 678851 (S.D.N.Y.); and *Macrovision v. Sima Products Corporation* WL 1063284 (S.D.N.Y. 20 April 2006); and WL 1472152 (S.D.N.Y. 26 May, 2006).

evade the restrictions on fair use that they impose through code'.[53] There have been concerns 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.[54] There have also been a number of cases in which there have been difficulties engaging in security testing[55] and reverse engineering because of the use of TPMs.[56] Furthermore, there has been a push within Congress to review the operation of TPMs under the *DMCA*. There has also been a parallel debate about the use of a 'Broadcast Flag' to prevent the unauthorised copying and distribution of digital media.[57]

Fred von Lohmann has argued that the regulation of TPMs has failed to achieve its stated goal of reducing copyright infringements:

> To put the matter simply, when enacting section 1201 of the DMCA, it appears that legislators may have chosen to regulate the wrong thing. The error is particularly grievous in light of the mounting evidence that the anti-circumvention provisions of the DMCA are inflicting serious collateral damage on other public values, including scientific research, free speech, innovation, fair use and competition. There have been more than a dozen reported incidents involving DMCA threats to researchers, journalists, and hobbyists. Bowing to DMCA liability fears, self-censorship is common: online service providers and bulletin board operators have

53 Lawrence Lessig, *Free Culture: How Big Media Uses Technology And Law To Lockdown Culture And Control Creativity*, New York: Penguin, 2004, 160.

54 *Chamberlain Group, Inc.* v. *Skylink Techologies, Inc*. 292 F.Supp.2d 1040 (N.D.Ill. 2003) and on appeal 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark International, Inc. v. Static Control Components, Inc* 253 F.Supp.2d 943 (E.D.Ky. 2003) and 387 F.3d 522 (Fed Cir 6th, 2004); *Storage Technology Corporation* v. *Custom Hardware Engineering & Consulting, Inc.* 421 F.3d 1307 (Fed. Cir. 2005); and *Tracfone Wireless Inc*. v *Sol Wireless Group Inc* 05-23279 (US District Court for the Southern District of Florida,21 December 2005), http://www.copyright.gov/1201/2006/reply/14granick_WA.pdf.

55 *Felten and others* v *RIAA* (unreported, United States District Court of New Jersey, 28 November 2001), http://www.eff.org/IP/DMCA/Felten_v_RIAA/20011128_hearing_transcript.html.

56 *Davidson & Associates, Inc.* v *Internet Gateway* 334 F.Supp.2d 1164 (E.D. Mo. 2004) and on appeal, *Davidson & Associates* v. *Jung* 422 F.3d 630 (Fed Cir 8th 2005).

57 The Court of Appeals for the District Circuit of Columbia ruled that the Federal Communications Commission had exceeded its statutory authority by promulgating regulations on the 'Broadcast Flag', *American Library Association* v *Federal Communications Commission* 406 F.3d 689 (C.A.D.C., 2005). For a review of the 'Broadcast Flag', see Susan Crawford, 'The Biology of the Broadcast Flag', (2003) 25 *Hastings Communications and Entertainment Law Journal* 603-652.

> censored discussions of copy-protection systems; programmers have removed computer security programs from their Web sites; and students, scientists, and security experts have stopped publishing the details of their research.[58]

The attorney concluded that policy-makers in the US should give serious consideration to repealing the anti-circumvention provisions of the *DMCA* in favour of a new, workable approach to the digital crisis.[59] He advised that the trading partners of the US should refrain from adopting such a regime.

The High Court of Australia decision in *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment*[60] *(Stevens* v *Sony)* is the first time a superior court has had the opportunity to consider the operation of TPMs. The case is a synecdoche for the various theoretical and practical concerns expressed about digital rights management. Kirby J observed:

> In 1493, Pope Alexander VI, perhaps the most corrupt of pontiffs, divided the New World of Americas between Spain and Portugal, in a supreme act of arrogance. These days global marketers don't require papal dispensation… Pope Alexander's 1493 wave of the papal staff found echoes in Australia's High Court recently, when it dealt with a case involving Sony's bid to divide the world into three separate markets for its Playstations and their accompanying CD-ROM games.[61]

The Australian High Court considers constitutional objections to TPMs - namely, that 'para-copyright' measures are beyond the scope of government power, and in any case violate protections of freedom of speech. The judges also examine whether TPMs will affect consumer rights to engage in fair dealing, and make use of library and archives exceptions. The Australian High Court canvassed larger policy issues about TPMs and competition policy as well.

58 Fred Von Lohmann, 'Measuring the Digital Millennium Copyright Act against the Darknet: Implications for the Regulation of Technological Protection Measures', (2004) 24 *Loyola of Los Angeles Entertainment Law Review* 635.

59 Ibid.

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

61 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448. See also Allan Fels, and Fred Brenchley, 'Copyright: Divide and Rule', *The Australian Financial Review*, 18 October 2005, 62.

In February 2005, there was an unusual spectacle in the High Court of Australia in the capital city of Canberra. Two junior lawyers were playing an arcade game called 'Gran Turismo' on a Sony PlayStation II. The motorcycle race was projected onto the walls of the highest court of the land. Six High Court judges watched this display, with a mixture of curiosity and intrigue. They were hitherto unfamiliar with the technology involved. The High Court had requested this demonstration in an effort to determine whether a Kensington man, Eddie Stevens, had circumvented any TPMs pertaining to the Sony PlayStation II. The matter concerned the amendments made to the *Copyright Act* 1968 (Cth) by the *Digital Agenda Act*. It also provided an opportunity for the High Court to contemplate the future impact of the *Australia-United States Free Trade Agreement* 2004 *(AUSFTA)* in respect of TPMs.

A. The *Digital Agenda Act*

In 2000, the *Digital Agenda Act* established a new regime providing remedies for copyright owners in respect of the circumvention of TPMs.

Section 116A of the *Copyright Act* 1968 (Cth) provides a right of action to the owner or exclusive licensee of the copyright in a work or other subject matter which is protected by a 'technological protection measure'. The right of action is against a person who makes, sells, or does certain other acts in relation to, a 'circumvention device' capable of circumventing, or facilitating the circumvention of, the technological protection measure.

S 10(1) of the *Copyright Act* 1968 (Cth) provides a definition of 'technological protection measure'. It stipulates:

> Technological protection measure' means a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:
>
> (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the

> work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;
> (b) through a copy control mechanism.

TPMs could include copy-control protection for compact discs, encryption for DVDs, software protected by passwords and registration codes.

Sony brought legal action against Eddy Stevens who had mod-chipped Sony Playstation consoles. The company claimed that Stevens had circumvented an access code protected as a 'technological protection measure' under the Australian *Copyright Act* 1968 (Cth). In the alternative, Sony argued that Eddy Stevens had infringed copyright in temporary reproductions and cinematographic films.

The competition regulator, the Australian Competition and Consumer Commission (ACCC), intervened early in this case as a friend of the court. The ACCC has expressed policy concerns about TPMs, suggesting that 'the provisions increase the likelihood of anti-competitive conduct with consequent detrimental outcomes for both consumers of the copyright works and society in general'.[62] The Australian Digital Alliance later appeared as a friend of the court in this case, because of fears that TPMs would undermine fair dealing and access to information.

At first instance in the Federal Court, Sackville J considered the meaning of a TPM under s 10(1) of the *Copyright Act* 1968 (Cth). His Honour ruled that the protective devices relied upon by the Sony companies could not be regarded as TPMs because they merely discouraged people from copying these games as a prelude to playing them on a PlayStation console:

> It is in this sense that the device or product must be designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work. I do not think the definition is concerned with devices or products that do not, by their operations, prevent or curtail specific acts infringing or facilitating the infringement of copyright in a work, but merely have a general deterrent or discouraging effect on those who might be contemplating

[62] ACCC (2003), 'Submission to the Digital Agenda Review: Circumvention Devices and Services, Technological Protection Measures and Rights Management Information', http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub294aatt1.pdf, October.

> infringing copyright in a class of works, for example by making unlawful copies of a CD-ROM.[63]

The judge doubted 'whether the temporary storage of part of a computer program in the RAM of a computer (in this case, the PlayStation console) can be said to constitute reproduction of a substantial part of the computer program 'in a material form' and thus infringe copyright in the computer program'.[64] His Honour also questioned whether the PlayStation game embodied a 'cinematograph film'.

Following the lead of United Kingdom authorities on TPMs,[65] the Full Federal Court allowed the appeal by Sony. The Bench held that the definition of TPMs embraces inhibition in the sense of deterrence or discouragement of infringement, which results from a denial of access to a program copied in infringement of copyright.[66] Having regard to extraneous materials, Lindgren J believed that a broader approach to the interpretation of TPMs was intended by the legislature:

> If, as in the present case, the owner of copyright in a computer program devises a technological measure which has the purpose of inhibiting infringement of that copyright, the legislature intended that measure to be protected (subject to any express exception), even though the inhibition is indirect and operates prior to the hypothetical attempt at access and the hypothetical operation of the circumvention device.[67]

For his part, French J expressed his frustration at the complicated legislative regime, noting: 'The law develops its own access codes requiring special readers'.[68] Although

63 *Kabushiki Kaisha Sony Computer* v *Stevens* (2002) 55 IPR 497 at 523 -524.

64 *Kabushiki Kaisha Sony Computer* v *Stevens* (2002) 55 IPR 497 at 524.

65 In *Sony Computer Entertainment Inc* v *Owen* [2002] EWHC 45, Jacob J of the High Court of Justice, Chancery Division, held that the authorisation codes for a Sony Playstation were a device or means intended to prevent or restrict copying of copyright works. The judge held that the Messiah chip was a device or means specifically designed or adapted to circumvent the form of copy-protection employed. This decision was later followed by Laddie J in the High Court of Justice, Chancery Division, in *Sony Computer Entertainment Inc* v. *Ball* [2004] EWHC 1738 (Ch). His Honour held that the use of the Messiah2 mod-chip on a Playstation 2 was a circumvention of a TPM.

66 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161.

67 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161 at 201.

68 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161 at 173.

aware of policy concerns about the expansion of copyright protection and related issues of competition policy, he adopted a broad definition of TPMs, observing: 'It is not for the Court to cage the ordinary meaning of the words which have been adopted by reference to policy considerations of its own divining'.[69] Finkelstein J concurred.

However, the majority of the Full Federal Court agreed with Sackville J's resolution of two other issues against Sony. French and Lindgren JJ held that there was not a reproduction of the computer programs in the Random Access Memory of the PlayStation console when a game was played.[70] The judges also ruled that there was also no copy of the game, regarded as a 'cinematographic film', made in RAM when a game was played.[71] Finkelstein J dissented on these points. Citing US precedents,[72] his Honour supported an American approach in respect of the protection of temporary copies. Finkelstein J also believed that the arcade game should be protected as a cinematographic film.[73]

B. High Court Decision

The High Court of Australia heard debate on *Stevens v Sony* in February 2005, and handed down its judgment in October 2005. All six sitting judges held that the Sony protection device was not a 'technological protection measure' because it did not prevent copyright infringement. It found that the device merely inhibited copyright infringement. The High Court also rejected the alternative arguments of Sony. It denied that there had been any infringement of copyright through a temporary reproduction. The judges also doubted that the work of Sony could be protected as 'cinematographic films'.

69 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161 at 174.

70 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161.

71 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161.

72 *MAI Systems Corp v Peak Computer Inc* 991 F2d 511 (9th Cir 1993); cert denied 114 S Ct 671 (1994); and *Advanced Computer Services of Michigan Inc v MAI Systems Corporation* 845 F.Supp 356 (E.D. Va 1994).

73 *Kabushiki Kaisha Sony Computer* v *Stevens* (2003) 57 IPR 161 at 212.

The High Court was frustrated that the task of statutory interpretation was complicated by the ambiguities in the *Digital Agenda Act*, and the lack of clear legislative guidance. The joint judgment observed:

> Copyright legislation, both in Australia and elsewhere, gives rise to difficult questions of construction. Given the complexity of the characteristics of this form of intangible property, that, perhaps, is inevitable. It may be going too far to say of the definition of 'technological protection measure' and of s 116A, as Benjamin Kaplan wrote of the American law even as it stood in 1967, that the provisions have a 'maddeningly casual prolixity and imprecision'. However, in this Court no party advanced the proposition that its task on this appeal was satisfied merely by a consideration of the ordinary meaning of the words in the definition of 'technological protection measure'.[74]

Similarly, McHugh J noted that 'the Federal Parliament resolved an important conflict between copyright owners and copyright users by an autochthonous solution'.[75] His Honour reflected: 'Much modern legislation regulating an industry reflects a compromise reached between, or forced upon, powerful and competing groups in the industry whose interests are likely to be enhanced or impaired by the legislation.'[76] McHugh J commented: 'There is a good deal of evidence that supports the view that the legislative provisions with which this litigation is concerned are the product of a compromise agreed to, or forced upon, interest groups in the industry affected by the legislation'.[77] His Honour despaired that it was difficult to divine the purpose of legislation created during such free-wheeling political debate.

Kirby J emphasized the need to engage in statutory interpretation with an appreciation of the larger matters of domestic politics and international law: 'A court, not fully aware of the compromises that have been struck nationally and internationally and of the large debates that have addressed so-called super or "übercopyright", is well advised, in the end, to confine itself to offering its best solution to the contested task of statutory interpretation'.[78]

74 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 461.

75 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 476.

76 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 476.

77 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 476.

78 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 493.

The High Court favoured a narrow construction of 'technological protection measures' because there were penal provisions involved. The joint judgment noted 'that, in choosing between a relatively broad and a relatively narrow construction of legislation, it is desirable to take into account its penal character'.[79] Furthermore, the joint decision noted that 'an appreciation of the heavy hand that may be brought down by the criminal law suggests the need for caution in accepting any loose, albeit 'practical', construction of Div 2A itself'.[80] Similarly, Kirby J noted that the presence of penal provisions was a final, albeit less important, consideration. His Honour observed: 'The fact that the phrase TPM appears in the new criminal offences, as well as in the provision for civil remedies under s116A, pursuant to which the appellant was sued for copyright infringement, lends some weight to a stricter meaning of the contested definition of TPM, in preference to the broader meaning adopted by the Full Court.'[81]

In the course of oral argument, two opposing views were presented to the High Court as to the nature of the relationship between the defence of fair dealing under the *Copyright Act* 1968 (Cth), and the TPM provisions in the *Digital Agenda Act*. On behalf of Sony, David Catterns argued that there were no explicit exemptions for the defence of fair dealing under the TPM regime: 'If we allowed every single person, under the rubric of fair dealing, to be an exception to the circumvention device provisions, then it would be practically useless'.[82] By contrast, Basten QC for the Australian Digital Alliance maintained that the TPM regime should not undermine the defence of fair dealing: 'It is in the case where the customer already has acquired, legitimately, let us assume, a copyright work and seeks apprehension of that work, that too broad a construction to the terms of this provision will ultimately provide the

79 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 459.

80 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 459.

81 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 501.

82 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment & Ors* [2005] HCATrans 30 (8 February 2005).

copyright owner with a right to control all forms of apprehension going well beyond the control of reproduction of copyright material'.[83]

The High Court was concerned that the expansive definition of TPMs would have a detrimental impact upon the defence of fair dealing, and special exceptions for libraries and archives.[84] The joint judgment emphasized:

> The true construction of the definition of 'technological protection measure' must be one which catches devices which prevent infringement. The Sony device does not prevent infringement. Nor do many of the devices falling within the definition advanced by Sony. The Sony device and devices like it prevent access only after any infringement has taken place.[85]

McHugh J observed 'that the s 10(1) definition of 'technological protection measure' ought to be read according to its ordinary meaning and not artificially stretched to include within its scope acts of copyright infringement that are not comprised in the copyright'.[86] Kirby J noted concerns of libraries that 'Sony's interpretation of s 116A would enable rights holders effectively to opt out of the fair dealing scheme of the Act'.[87] He maintained: 'This is not an interpretation that should be readily accepted'.[88]

Kirby J was alert to the irony that Sony had in the past advocated broad fair use rights for consumers in superior courts. Famously, in *Sony Corp of America v Universal City Studios, Inc*, the Supreme Court of the United States held that Sony, as the distributor and seller of the Betamax video cassette recorder, was not liable if users of that recorder infringed the copyright of others in television broadcasts.[89] The superior court found that it was a fair use for consumers to be engaged in 'time-shifting' - namely, the taping of television programmes for viewing at more convenient times. The Supreme Court of the United States recently reaffirmed the *Sony Betamax* rule in

83 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment & Ors* [2005] HCATrans 30 (8 February 2005).

84 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 496.

85 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 459.

86 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 480.

87 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 496.

88 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 496.

89 *Sony Corporation of America* v *Universal City Studios, Inc*, 464 US 417 (1984).

the case of *MGM* v *Grokster*.[90] In particular, Breyer J observed that the *Sony Betamax* decision was strongly protective of new technology and avoided the introduction of a 'chill of technological development' in the name of responding to alleged copyright infringement. Kirby J noted: 'Many of these considerations apply in the present case to suggest a preference for a stricter, rather than a broader, meaning of the expression TPM in s 10(1) of the Copyright Act'.[91]

In *Stevens* v *Sony*, 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. This concern about the anti-competitive effects of TPMs was no doubt a result in part of the earlier intervention of the ACCC. Kirby J observed:

> By their line the Popes of old divided the world into two spheres of influence. Sony, it appears, has divided the world (for the moment) into at least three spheres or markets. By the combined operation of the CD ROM access code and the Boot ROM in the PlayStation consoles, Sony sought to impose restrictions on the ordinary rights of owners, respectively of the CD ROMS and consoles, beyond those relevant to any copyright infringement as such. In effect, and apparently intentionally, those restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit.[92]

His Honour concluded that 'where a choice of interpretation has to be made, the existence of the additional non-copyright purpose of enforcing global market price differentiation does constitute a reason to prefer an outcome that is consistent with the balances ordinarily inherent in copyright legislation over a result that is not'. [93]

Similarly, the joint judgment considered that 'in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright

90 *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 125 S.Ct 2764 (2006).

91 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 493.

92 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 486.

93 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 497.

monopoly rather than match it'. [94] The decision noted that the broad construction would 'extend the copyright monopoly by including within the definition not only technological protection measures which stop the infringement of copyright, but also devices which prevent the carrying out of conduct which does not infringe copyright and is not otherwise unlawful'.[95] The High Court was no doubt sensitive to a number of United States cases, in which companies had relied upon TPMs to control secondary markets and stifle competition.[96]

There has been great debate over the constitutionality of so-called 'para-copyright', both in terms of its relationship to a government's intellectual property power, and constitutional guarantees of the freedom of communication.

In *Stevens* v *Sony*, Kirby J favoured a narrow construction of 'TPMs' because it would uphold fundamental rights under the Australian Constitution.[97] His Honour noted: 'Ordinary principles of statutory construction, observed by this Court since its earliest days, have construed legislation, where there is doubt, to protect the fundamental rights of the individual'.[98] The judge observed: 'The right of the individual to enjoy lawfully acquired private property (a CD ROM game or a PlayStation console purchased in another region of the world or possibly to make a backup copy of the CD ROM) would ordinarily be a right inherent in Australian law

94 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 459.

95 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 459.

96 For a review of the debate over technological protection measures and competition policy in North America, see Michael Geist, 'Anti–Circumvention Legislation and Competition Policy: Defining a Canadian Way' in: Michael Geist (ed.), *In The Public Interest: The Future of Canadian Copyright Law*, Toronto: Irwin Law, 2005, 221–250. *Chamberlain Group, Inc.* v. *Skylink Technologies, Inc.* 292 F.Supp.2d 1040 (N.D.Ill. 2003) and on appeal 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark International, Inc. v. Static Control Components, Inc* 253 F.Supp.2d 943 (E.D.Ky. 2003) and 387 F.3d 522 (Fed Cir 6th, 2004); *Storage Technology Corporation* v. *Custom Hardware Engineering & Consulting, Inc.* 421 F.3d 1307 (Fed. Cir. 2005); and *Tracfone Wireless Inc.* v *Sol Wireless Group Inc* 05-23279 (US District Court for the Southern District of Florida, 21 December 2005), http://www.copyright.gov/1201/2006/reply/14granick_WA.pdf.

97 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 497.

98 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 497.

upon the acquisition of such a chattel'.[99] The judge stressed that copyright law operates against the backdrop of Australian constitutional law: 'The provisions of the Australian Constitution affording the power to make laws with respect to copyright operate in a constitutional and legal setting that normally upholds the rights of the individual to deal with his or her property as that individual thinks fit'.[100] He warned that over-reaching copyright legislation could encounter constitutional problems: 'To the extent that attempts are made to push the provisions of Australian copyright law beyond the legitimate purposes traditional to copyright protection at law, the Parliament loses its nexus to the constitutional source of power'.[101]

The High Court was quite careful to ensure that its decision would be relevant for future legislative changes. Kirby J, in particular, comments upon the need to address very particular concerns in any future iterations of the law with respect to TPMs:

> Such considerations included the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. They are integrated in the protection which that law offers to the copyright owner's interest in its intellectual property.[102]

The Federal Government will have to comply with the High Court's demands that any future laws on TPMs be drafted with precision and clarity. The government will also need to take into account wider policy concerns, so that there are not inadvertent, detrimental impacts for competition, access to information, and fundamental freedoms.[103] If the Federal Government fails to take heed of the decision, the High

99 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 497-498.

100 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 498.

101 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 498.

102 *Stevens* v *Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 at 500.

103 For a consideration of the linkage between digital rights management and privacy, see Ian Kerr, 'If Left to their Own Devices… How DRM and Anti-Circumvention Laws Can Be Used to Hack

Court has made it quite clear that they will exercise judicial restraint, and read down the law. There is even the possibility that a constitutional challenge could be successfully launched against over-reaching copyright regulation.

There have been similar concerns expressed about the constitutionality of 'para-copyright' in the United States and Canada.[104]

United States scholar, Neil Weinstock Netanel, has argued: 'Even if copyright's traditional safety valves did continue to afford some semblance of First Amendment protection, those limitations on copyright-holder prerogatives are poised to give way before a technology and contract-based 'para-copyright''.[105] He observed that such 'para-copyright' expanded content provider control over content significantly beyond that which was traditionally obtained under the *Copyright Act* 1976 (US). First of all, Netanel noted: 'the DMCA enables content providers effectively to control access to content, not merely control uses that fall within the parameters of copyright holders' exclusive rights'.[106] Second, he observed that 'nothing in the Act requires content providers to use that technology only for copyrighted works or only for portions of content that are protected by copyright'.[107] Finally, Netanel objected: 'The DMCA prohibits circumvention of access controls and trafficking in circumvention devices even when necessary to enable users to use copyrighted works in ways, such as fair use, that are permitted under copyright law'.[108] He concluded that such provisions should not survive First Amendment scrutiny, because of their internal contradictions, undue burdens on freedom of speech, and expansive scope.

Privacy', in Michael Geist (ed.), *In The Public Interest: The Future of Canadian Copyright Law*, Toronto: Irwin Law, 2005, p. 167-210.

104 Neil Weinstock Netanel, 'Copyright and the First Amendment: What Eldred Misses and Portends', In Jonathan Griffiths, and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses*, Oxford: Oxford University Press, 2005, 127-152.

105 Neil Weinstock Netanel, 'Locating Copyright Within the First Amendment Skein', (2001) 54 *Stanford Law Review* 1-83 at 22.

106 Ibid., 75.

107 Ibid., 75.

108 Ibid., 75.

Alarmed by developments in the United States, a number of Canadian academics have questioned whether the Canadian Parliament has the constitutional power to pass laws with respect to TPMs and electronic rights management systems. Jeremy de Beer has observed: 'Although para-copyright provisions are in a way connected to copyrights, they simultaneously implicate issues typically reserved for provincial legislators, such as contractual obligations, consumer protection, e-commerce, and the regulation of classic property'.[109] He observed that legislation dealing with TPMs could only be tangentially related to the Federal Government's copyright power or even treaty-implementation; the matter might more appropriately be placed within provincial authority over Property and Civil Rights. Jane Bailey expressed concerns that legislative protection of TPMs would conflict with the *Canadian Charter of Rights and Freedoms*. She emphasized: 'Any legislative prohibition on circumvention of TPMs must take into account not only copyright holders' rights, but users' rights and the public interest in access to and use of information and knowledge'.[110]

C. International Law

In *Stevens* v *Sony*, The High Court noted that the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) was intended to ensure that Australia provided adequate legal protection and effective legal remedies to comply with 'the technological measures obligations' in two treaties negotiated in 1996 in the WIPO.[111] Article 11 of the *WIPO Copyright Treaty* stated: 'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law'. The joint judgment noted: 'It will be apparent that the provision is expressed in broad terms,

[109] Jeremy de Beer, 'Constitutional Jurisdiction over Paracopyright Laws', in Michael Geist (ed.) *In The Public Interest: The Future of Canadian Copyright Law*, Toronto: Irwin Law, 2005, 89-124, 90.

[110] Jane Bailey, 'Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process', in Michael Geist (ed.) *In The Public Interest: The Future of Canadian Copyright Law*, Toronto: Irwin Law, 2005, 125-166, 166.

[111] For an overview of these treaties, see Ian Kerr, 'Technical Protection Measures: Tilting at the Copyright Windmill' (2003) 34 *Ottawa Law Review* 9-82.

leaving considerable scope to individual States in deciding on the manner of implementation.'[112]

There has been much debate about the best means of implementation of such measures. The Phillips Fox Digital Agenda Review made a number of recommendations in respect of TPMs.[113] The Review advised that the reasoning of Sackville J should be followed and the definition of a TPM should be limited to measures to protect or control only rights that fall within copyright.[114] Furthermore, the Review recommended an extension of the 'permitted purposes' or exceptions to the prohibition on circumvention devices under the Act. This would include exceptions for fair dealing and for access to a legitimately acquired non-pirated product. The Digital Agenda Review believed that if these recommendations were accepted, the objectives of the *Digital Agenda Act* would be better met, and a more appropriate balance, reflecting the Government's previous policy decisions, would be created.

However, the *Australia-United States Free Trade Agreement* 2004 required Australia to adopt a TPM regime very similar to that established in the *DMCA*. Article 17.4.7 (b) expands the definition of a TPM: 'Effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright'. There has been concern that such a broad definition could also cover regional coding devices. As Jacob Varghese comments:

> A ban on devices that circumvent TPMs significantly strengthens the copyright holder's ability to prevent parallel importing, by making it illegal to circumvent the region-coding, and thus play a DVD or computer game purchased in another country on an Australian-bought machine. It does seem incongruous that a 'free trade' agreement, purportedly intended to liberalise trade, should assist copyright holders to establish their own trade barriers.[115]

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

113 Phillips Fox, *Digital Agenda Review*, Canberra: Attorney General's Department, 2004, http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations.

114 Ibid.

115 Jacob Varghese, (2004/ 2005), 'Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004', *Parliamentary Library Current Issues Brief*, 3 (17),

As well, Article 17.4.7 (a) of *AUSFTA* requires Australia to provide civil and criminal liability for the circumvention of any TPM (this would include circumvention by an end-user). The Article also provides remedies against the 'trafficking' in devices that are designed or promoted as enabling or facilitating the circumvention of TPMs or for 'trafficking' in devices which have only limited commercial purpose other than circumvention of TPMs. Article 17.4.7 (d) provides: 'Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law'. Moreover, Article 17.4.7 (e) narrows the range of certain exemptions or defences to these actions and offences.

In addition, Article 17.4.9 of the *AUSFTA* required Australia to provide stronger protection for electronic rights management information. Article 17.7 obliged Australia to provide protection against the decoding of encrypted broadcast television signals.

Furthermore, Article 17.4.1 of the *AUSFTA* compels Australia to extend the definition of reproduction to cover all reproductions in any manner or form, permanent or temporary (including temporary storage in material form). However, Australia has retained its ability to include specific exceptions to allow reproductions in certain circumstances. There were concerns that the protection of temporary copying under the *AUSFTA* could disadvantage Australia's ISPs, the cultural and educational sectors, and consumers.[116]

The Federal Government professed itself to be indifferent to the outcome of the decision of the High Court. Asked about the pending decision in *Stevens* v *Sony*, Senator Robert Hill observed during the parliamentary debates over *AUSFTA*:

> The parliament is the master of its own destiny. The parliament sets the law. The High Court interprets the situation as it existed at the time the case was brought. So be it. The idea that the

http://www.aph.gov.au/library/pubs/CIB/2004-05/05cib03.pdf.

116 Ibid.

> parliament should not determine the appropriate future legislative structure because previous matters are being litigated does not seem to me to be particularly persuasive.[117]

Nonetheless, the extent of legislative change to the existing regime will no doubt in part depend upon the outcome in *Stevens* v *Sony*.

D. The 2006 Amendments

Furthermore, the Attorney–General, Philip Ruddock, asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to inquire into TPM exceptions.[118] The Committee recommended that the balance between copyright owners and copyright users achieved by the *Copyright Act* 1968 (Cth) should be maintained upon implementation of Article 17.4.7 of the *AUSFTA*. The Committee advised that, in the legislation, the definition of a TPM should clearly require a direct link between access control and copyright protection. In its view, the Government should ensure that access control measures are related to the protection of copyright, rather than to the restriction of competition in markets for non–copyright goods and services. The Committee warned that regional coding devices should be specifically excluded from the definition of a TPM in the legislation. The Committee recommended that the Government allow for as broad as possible exceptions for TPMs in relation to a range of activities — including fair dealing, library and archive exceptions, the use of copyright material by educational institutions, security testing and reverse engineering. The Committee recommended that future administrative reviews required under Article 17.4.7(e)(viii) be conducted by the Attorney–General's Department. There has been some debate, though, as to whether such recommendations are consistent with the *AUSFTA*.

[117] Robert Hill, 'US Free Trade Agreement Implementation Bill 2004 (Cth)', Senate Hansard, 12 August 2004, 26428, http://www.aph.gov.au/hansard/senate/dailys/ds120804.pdf.

[118] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions*, 2006, http://www.aph.gov.au/house/committee/laca/protection/report/fullreport.pdf.

The Attorney–General's Department has developed amendments to the *Copyright Act* 1968 (Cth) to ensure compliance with Article 17.4.7 of the *AUSFTA*.[119] Such amendments will introduce civil and criminal remedies in relation to circumvention of TPMs that prevent access to copyrighted material, and 'dealings with' devices and services that may be used to circumvent a TPM that either controls access to copyright material, or otherwise protects the copyrighted material.

The *Copyright Act* 1968 provides this ungainly definition of a 'technological protection measure' and an 'access control technological protection measure':

> ***"technological protection measure"*** means:
>
> (a) an access control technological protection measure; or
>
> (b) a device, product, technology or component (including a computer program) that:
>
> (i) is used in Australia or a qualifying country by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and
>
> (ii) in the normal course of its operation, prevents, inhibits or restricts the doing of an act comprised in the copyright;
>
> but does not include such a device, product, technology or component to the extent that it:
>
> (iii) if the work or other subject-matter is a cinematograph film or computer program (including a computer game)--controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia; or
>
> (iv) if the work is a computer program that is embodied in a machine or device--restricts the use of goods (other than the work) or services in relation to the machine or device.
>
> For the purposes of this definition, ***computer program*** has the same meaning as in section 47AB.
>
> ***"access control technological protection measure"*** means a device, product, technology or component (including a computer program) that:
>
> (a) is used in Australia or a qualifying country:
>
> (i) by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and

[119] *Copyright Amendment (Technological Protection Measures) Act* 2006 (Cth).

(ii) in connection with the exercise of the copyright; and

(b) in the normal course of its operation, controls access to the work or other subject-matter;

but does not include such a device, product, technology or component to the extent that it:

(c) if the work or other subject-matter is a cinematograph film or computer program (including a computer game)--controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia; or

(d) if the work is a computer program that is embodied in a machine or device--restricts the use of goods (other than the work) or services in relation to the machine or device.

For the purposes of this definition, ***computer program*** has the same meaning as in section 47AB.

Such definitions are quite limited in terms of the exclusions for regional coding devices in respect of cinematographic films and computer programs.

The *Copyright Amendment Act* 2006 (Cth) introduced particular provisions in respect of Circumventing an Access Control Technological Protection Measure - S 116AN of the *Copyright Act* 1968 (Cth); Manufacturing etc a Circumvention Device for a Technological Protection Measure - S 116AO of the *Copyright Act* 1968 (Cth); Providing etc a Circumvention Service for a Technological Protection Measure - S 116AP of the *Copyright Act* 1968 (Cth). There are a wider range of civil and criminal remedies - S 116AQ of the *Copyright Act* 1968 (Cth).

The Attorney-General's Department explains the current regime of exceptions for technological protection measures like so.[120]

'Two types of exceptions to access control TPM liability apply under the scheme:

Specific exceptions in sub-sections 116AN(2)-(8) and s132 APC (2) – (8) (which are not subject to review and will not be considered as part of this process):

- where there is permission of the copyright owner

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

- interoperability between computer programs
- encryption research
- computer security testing
- online privacy
- law enforcement and national security
- acquisitions by libraries and other related institutions.

Additional exceptions in Schedule 10A of the *Copyright Regulations* are subject to review and will be considered in this review. These currently include:

- reproduction of computer programs to make interoperable products
- the reproduction and communication of copyright material by educational and other institutions assisting people with disabilities
- the reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes
- the inclusion of sound recordings in broadcasts and the reproduction of sound recordings for broadcasting purposes
- access where a TPM is not operating normally and a replacement TPM is not reasonably available, and
- access where a TPM damages a product, or where circumvention is necessary to repair a product.

Section 249(4) of the Copyright Act allows an additional exception to be created when a submission for an exception is made, and the Attorney-General makes a decision to grant an exception. The review process is intended to inform the Attorney-General in making a decision relating to an exception.'

Bilateral trade agreements, such as the *AUSFTA*, serve the dual purpose of entrenching the regime of TPMs into United States domestic law, while at the same time exporting those standards of protection to other jurisdictions.

In July 2010, the United States Copyright Office recognised a number of new exceptions to the technological protection measures regime.[121] Remarkably, the Librarian of Congress announced six classes of works subject to the exemption from

[121] Library of Congress, 'Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies' (2010) 75 (143) *Federal Register* 43825, 27 July 2010, http://www.copyright.gov/fedreg/2010/75fr43825.pdf

the prohibition against circumvention of technological measures that control access to copyrighted works. The exemptions included:

(1) Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:
(i) Educational uses by college and university professors and by college and university film and media studies students;
(ii) Documentary filmmaking;
(iii) Noncommercial videos.

(2) Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.

(3) Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.

(4) Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works, when circumvention is accomplished solely for the purpose of good faith testing for, investigating, or correcting security flaws or vulnerabilities, if:

(i) The information derived from the security testing is used primarily to promote the security of the owner or operator of a computer, computer system, or computer network; and
(ii) The information derived from the security testing is used or maintained in a manner that does not facilitate copyright infringement or a violation of applicable law.

(5) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace; and

> (6) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

In 2012, there is another round of rule-making in respect of exceptions for technological protection measures. The Electronic Frontier Foundation 'asked the Copyright Office to protect the 'jailbreaking' of smartphones, electronic tablets, and video game consoles'.[122] The civil society group comments:

> Over the past three years, smartphones and tablets have become some of the most popular consumer electronic devices in the world. Unfortunately, manufacturers continue to impose firmware-based technological restrictions that hamper the development and use of independently created software applications that have not been approved by the device or operating system ("OS") maker. These restrictions harm competition, consumer choice, and innovation. In response, an active community of innovators has continued to develop methods to bypass these constraints, giving consumers the freedom to modify and enhance their devices through lawfully acquired applications. Their creative efforts have in turn spawned a vibrant alternative marketplace that serves consumers and application creators alike. These innovations also benefit the manufacturers themselves, which continue to adopt many unauthorized innovations into the official versions of their products.
>
> Courts have long recognized that modifying device-operating software to permit interoperability with independently created software is a non-infringing use. Consequently, there is no copyright-related rationale for imposing legal liability on those who circumvent the technological protection measures that prevent access to the firmware on smartphones and tablet devices. In the 2009 rulemaking proceeding, the Register of Copyrights recognized that the § 1201 circumvention ban was established to foster the availability of copyrighted works in the digital environment, and agreed that the prohibition on smartphone 'jailbreaking'—the practice of enabling the phone to become interoperable with unauthorized applications—was 'adversely affecting the ability to engage in the non-infringing use of adding unapproved, independently created computer programs to their smartphones.[123]

122 Electronic Frontier Foundation, '2012 DMCA Rule-Making', https://www.eff.org/cases/2012-dmca-rulemaking

123 Ibid.

The Electronic Frontier Foundation 'has also asked for legal protections for artists and critics who use excerpts from DVDs or downloading services to create new, remixed works'.[124]

E. Geo-blocking

There is currently an inquiry into the Australian exceptions for technological protection measures. CHOICE has argued in this inquiry

> CHOICE has previously stated that companies should not use technological measures to discriminate against Australian consumers. We believe the Federal Government should assess whether technological measures that enable international copyright holders to discriminate against Australian consumers should be allowed to continue. Given the rapid growth of online retailing and the increasingly global market for IT hardware and software, Australian consumers should not be disadvantaged through restrictive, anti-competitive practices that sustain international price discrimination.[125]

The inquiry into high IT prices has particularly focused upon the problem of geo-blocking. James Hutchinson observed: 'Consumer groups and some private sector industry bodies have called on vendors and rights holders to remove geographic restrictions on content and online stores as one way of reducing pricing discrepancies between Australian and overseas markets.'[126]

CHOICE Australia highlights the problem in a parallel submission to the Attorney-General's Department:

> The growth of the internet and of online retail has led to increased awareness amongst consumers of the price differences between Australian and foreign markets. Websites offering 'direct' or parallel importing to Australia, such as Kogan and the Book Depository, have

124 Ibid.

125 CHOICE Australia, *Submission to House Standing Committee on Infrastructure and Communications Inquiry into IT Pricing*, 16 July 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs/sub075.pdf

126 James Hutchinson, 'IT Price Inquiry Zeroes in on Geo-blocking', IT News, 31 July 2012, http://www.itnews.com.au/News/310297,it-price-inquiry-zeroes-in-on-geoblocking.aspx

> become popular in recent times. The internet has therefore made business practices which rely on geographic market segmentation for price discrimination increasingly transparent and anachronistic. However instead of adapting to these new market conditions many companies have sought to sustain market segmentation by attempting to restrict the access of consumers to legitimate and genuine products online. Amazon, Netflix, Hulu, Steam, and iTunes are just some of the websites which use measures to identify a consumer's location via their IP address in order to prevent them accessing certain goods and services at certain prices, or at all. However many consumers have worked around these restrictions using circumvention devices and services, such as Virtual Private Networks (VPNs). CHOICE believes that the use circumvention measures to buy or access genuine products and services online are perfectly legitimate.[127]

In his evidence, Andrew Leigh MP commented: 'A simple solution to my concerns would be for Amazon to treat Australian purchasers exactly like US purchasers on its site (ie. not to prevent them buying certain products, and not to force them into buying zone-specific products).'[128]

In *The Sydney Morning Herald*, Adam Turner wondered, 'Will the Geo-Blocking War Ever Be Won?'.[129] He reflects

> One thing that remains consistent is the desire of Australians to enjoy online content which people in the US take for granted. Access to the wealth of content on the likes of Netflix and Hulu is considered the holy grail for some. The truth is that they're not really that difficult to reach from Australia. Complexity is perhaps the most effective deterrent that content providers can put in place. To be fair, local offerings from the likes of Quickflix are improving, but they've still got a long way to go to match what you can get from the US. Anybody who has tried knows that it's not actually that hard to bypass the great content wall of America. With a little know-how, a little research and perhaps a few dollars, you can

[127] CHOICE Australia, 'Submission to the Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968', 22 August 2012, http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Choice%20Submission.PDF

[128] 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

[129] Adam Turner, 'Will the Geo-Blocking War Ever Be Won?', *The Sydney Morning Herald*, 13 July 2012, http://www.smh.com.au/digital-life/computers/blogs/gadgets-on-the-go/will-the-geoblocking-war-ever-be-won-20120713-22059.html

> tap into a wide range of supposedly US-only services. Even the requirement for a US credit card isn't an insurmountable challenge.

Turner makes several points. First, he observes: 'The hardest thing about breaching the great content wall of America is the initial set up - finding a solution that looks good, works reliably and is relatively easy to engage when you need it.'[130] Second, he comments: 'The next challenge is keeping up with the cat and mouse game between content providers and those who offer the tools to bypass geo-blocking restrictions.'[131] Third, he observes: 'The new generation of DNS-based geo-blocking workarounds make the process a little easier, but they're not foolproof and many people will still put geo-dodging in the too hard basket.'[132]

130 Ibid.

131 Ibid.

132 Ibid.

In a thoughtful piece, Karl Schaffarczyk and Bruce Arnold considered the issue of copyright law and geo-blocking in the context of the FYX internet service provider.[133] The pair commented:

> The launch of FYX (pronounced 'fix') by established online services provider Maxnet has already made a splash in New Zealand because FYX offers 'global mode' internet access. This is designed to avoid 'geo-blocking' – the restriction of content to the country or region of origin – as implemented in services such as ABC iView, BBC iPlayer, Netflix, Apple's United States iTunes store and many others.
>
> While 'global mode' is an exciting development for consumers, the legality of such circumvention services is unclear. The likelihood of similar services appearing in Australia will depend on the success of FYX in New Zealand and the compatibility of such services with Australian law.
>
> International copyright law is founded on what critics, such as communications researcher Herbert Schiller, damn as "information colonialism". Markets such as Australia and New Zealand, pay higher prices than the US domestic market for videos, software, music, books and other content.
>
> Consumers in these markets are often subjected to long delays before the content is available locally. This is reinforced by technological mechanisms that inhibit the free flow of copyright material across national borders.[134]

The pair comment that is legal uncertainty as to whether FYX would be in breach of New Zealand or Australian law: 'In Australia, FYX or a similar service might also be considered responsible for enabling breaches of copyright.'[135] They note: 'But according to NZ intellectual property law commentator Justin Graham, FYX is in the clear under NZ law: 'It [the bypassing of geographical restrictions] is consistent with New Zealand's policy on intellectual property, parallel importing and geographical restrictions'.[136] Karl Schaffarczyk and Bruce Arnold comment: 'Australian law and New Zealand law both allow the bypassing of region coding on DVDs. But the application of these laws to geo-blocking is yet to be tested.'[137]

133 Karl Schaffarczyk and Bruce Arnold, 'FYX ISP Will Unblock 'Geo-blocked' Sites, But Will It Breach Copyright', *The Conversation*, 11 May 2012, https://theconversation.edu.au/fyx-isp-will-unlock-geoblocked-sites-but-will-it-breach-copyright-6927

134 Ibid.

135 Ibid.

136 Ibid

137 Ibid.

In its submission to the Attorney-General's inquiry on technological protection measures, CHOICE Australia commented on the need to address the issue of geo-blocking:

> The confusion surrounding IP address lockouts means that many consumers may be civilly or criminally liable by circumventing 'access control' Technological Protection Measures. CHOICE believes that this review is an opportunity to clarify this confusion by explicitly exempting the circumvention of IP address lockouts from liability. 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. Consumers are already allowed to circumvent TPMs which control for geographic market segmentation on DVD players and video gaming consoles. CHOICE is recommending an expansion of that principle to IP address lockouts.[138]

2. The Australian Parliament should review the competition effects of technological protection measures, and reconsider the design of the regime. The Australian Parliament should address the issue of geo-blocking under both copyright law and technological protection measures.

[138] CHOICE Australia, 'Submission to the Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968', 22 August 2012, http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Choice%20Submission.PDF

3. Copyright Law and Disability Rights

I would like to amplify the submission of Australian Communications Consumer Action Network in respect of information technology, price discrimination, and disability rights.[139]

In its submission, the Australian Communications Consumer Action Network commented:

> There is a notable difference between prices in Australia and other markets for hardware and software designed for people with disability. For example, the Nokia LPS-5 Wireless Loopset, a mobile phone attachment for people with a hearing impairment, sells for US $19921 in the USA but AU $29922 in Australia. Another example is the Wireless DECT Telephone Headset Jabra PRO 9450 which allows people with Complex Communication Needs (CCN) to communicate using a mobile phone. This product sells for US $279.9523 in the USA but AU $43524 in Australia. People with disability are acutely aware that they are paying more for some hardware and software products compared to people in the US, UK or other similar markets.[140]

I would supplement this evidence by observing that, in addition to problems with price discrimination, those with disabilities and their carers suffer problems in respect of access to knowledge.

Article 30 (3) of the *United Nations Convention on the Rights of Persons with Disabilities* 2006 provides that 'States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'.

[139] Australian Communications Consumer Action Network, *Submission on Inquiry into IT pricing, the House Standing Committee on Infrastructure and Communications*, August 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs/sub074.pdf

[140] Ibid.

Lamentably, Australia's copyright regime fails to adequately address the problem of disability discrimination, particularly in respect of copyright works in a digital form. In a classic article, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare', Nicolas Suzor, Paul Harpur and Dilan Thampapillai comment:

> In Australia, blind people are able to access texts in braille and books on tape, but the demand for these media is decreasing. Blind people today are increasingly reliant on texts in electronic form, and these are much less readily available in Australia. Electronic texts are more portable and less cumbersome than large braille volumes, and are much faster to navigate than audio recordings. However, in Australia it is difficult for blind people to get access to a wide range of electronic texts and there exists no scheme enabling such access. At the same time sighted people are using electronic text and other digital media at an ever-increasing rate. In order to approximate the same level of access as sighted people, blind people require access to accessible electronic versions of all published material. The authors suggest that given the legal imperatives of Australia's domestic legislation, treaty obligations and social values, that there exists a moral imperative to create a scheme providing blind people with access to digital print media.[141]

The authors note: 'In Australia blind people struggle to succeed in their education, careers and personal growth due to the difficulty which they face in accessing published texts.'[142] They conclude: 'If publishers continue to refuse to provide blind people with access to their works, then the Australian government should consider the introduction of a broad exception from copyright liability for any person providing access to published material to those with a print disability'.[143] The authors comment that: 'This would allow commercial business models to emerge and allow blind people to access published materials on a competitive basis.'[144]

The Honours Thesis by Ariel Bogle also highlights controversies over the Amazon Kindle, copyright law, and disability rights – in the context of the read-aloud function.

141 Nicolas Suzor, Paul Harpur and Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare', (2008) 13 (1) *Media and Arts Law Review* 1-16 http://nic.suzor.net/_media/publications/2008-digital_copyright_and_disability_discrimination_2008_13_1_malr1.pdf

142 Ibid.

143 Ibid.

144 Ibid.

In June 2012, the disability commissioner Graeme Innes encouraged the Australian Government to address this issue.[145] He observed that only 5% of all books produced in Australia are published in accessible formats such as large print, audio or braille, while in developing countries it is just 1%. He commented: 'People with a print disability throughout the world are currently experiencing a 'book famine', yet the Australian government has failed to take action that could change the situation.' He added: 'Australia should change its position and take the lead in ending this 'book famine'.[146] Graeme Innes urged the Australian government not to fund the publishers; Trusted Intermediary Global Accessible Resources project, or TIGAR. He observed that, while publishers have had the chance for more than 20 years to voluntarily end the book famine, they had chosen not to do so. Innes commented: 'I support the call on the Australian government by Maryanne Diamond, President of the World Blind Union, to publicly support and actively pursue a treaty in this area.'[147] He observed: 'Australia could lead the change to international law in this area and, at little cost to us, provide the opportunity to read to millions more people with print disability throughout the world.'[148]

Unfortunately, the July discussions at the World Intellectual Property Organization regarding a treaty on copyright law and disability rights was frustrated by some nation states, particularly the United States, and countries within the European Union. Australian disability activists and advocates attended the hearing. For the *Huffington Post*, Zach Carter reported on the event:

> Trade negotiators are currently wrangling over a treaty designed to provide access to reading materials in formats that are accessible to blind people, including Braille and audiobook platforms. Works used by the visually impaired are far more costly to create and distribute than traditional print publications, and have a much smaller market. Many nations have specific copyright exceptions protecting such works, exempting their producers from having to pay high royalties to publishers. But poor countries still have very limited resources to produce

145 Graeme Innes, 'Australia can help end world book famine', Australian Human Rights Commission, 28 June 2012, http://www.hreoc.gov.au/about/media/news/2012/62_12.html

146 Ibid.

147 Ibid.

148 Ibid.

> works for the blind, and thus have extremely limited libraries. An international treaty would allow wealthier nations, like the United States, to share works with other countries. By focusing on intellectual property issues, rather than government subsidies, the treaty would not cost governments any money.
>
> The U.S. Patent and Trademark Office, which is leading negotiations for the Obama administration, declined to comment for this article. The administration has resisted efforts throughout negotiations to ensure that the final deal is an enforceable treaty, pushing instead to make any agreement an informal set of policy recommendations. Advocates for the blind warn that only an enforceable treaty would effectively expand access to reading materials, noting that nations have long been able to pass legislation to permit the sharing of blind-accessible works across borders, but have decided not to. There is no legislation pending in the U.S. Congress to establish such a program.[149]

Given such intransigence and procrastination, it seems unlikely that there will be a binding, comprehensive treaty on copyright law and disability rights under the auspices of the World Intellectual Property Organization.

Rather than idly for action in respect of a new international treaty, the Australian Government should take legislative action to implement Article 30 (3) of the *United Nations Convention on the Rights of Persons with Disabilities* 2006, which provides that 'States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'. This will involve overhauling the *Copyright Act* 1968 (Cth).

3. The Australian Parliament should revise the *Copyright Act* 1968 (Cth) to remove all discriminatory barriers to access by persons with disabilities to cultural materials.

[149] Zach Carter, 'Obama Administration Wants Treaty for the Blind Delayed, Sources Say', *The Huffington Post*, 24 July 2012, http://www.huffingtonpost.com/2012/07/24/treaty-for-the-blind-obama_n_1699678.html

4. Consumer Law

In 2012, the current chairman of the Australian Competition and Consumer Commission Rod Sims emphasized that one of his key priorities was addressing the challenges of the digital and online economy.[150] His four main priorities were the digital and online economy; concentrated sectors; mergers and acquisition; and cartels. Sims observed: 'The online economy poses the biggest regulatory challenge in a generation'.[151] He observed: 'The two main challenges – for the ACCC - are: 1. Ensuring consumers enjoy the same protections in the digital and online economy as they do elsewhere; and 2. And, crucially for competition, ensuring the digital and online economy produces the benefits of new and innovative competitors to challenge incumbents that it promises, and that this promise is not eroded by anticompetitive conduct.'[152]

The Australian Competition and Consumer Commission have been involved in a number of high-profile consumer law disputes with Apple, Google, and Facebook.

In the 2012 case of *Australian Competition and Consumer Commission* v *Apple Pty Limited*, the regulator brought an action against Apple for misleading and deceptive conduct in respect of its advertisements.[153] Bromberg J provided this overview of the matter:

> A person must not engage in conduct that is liable to mislead the public as to the characteristics of the goods the person sells. That command is one of the requirements imposed on those engaged in trade or commerce, by s 33 of the *Australian Consumer Law*, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("the ACL"). It is a command, that the first respondent ("Apple") admits it disobeyed. That admitted breach of the law occurred in the period 8 March 2012 to 12 May 2012 ("the relevant period"). It related to the promotion and sale by Apple and Apple resellers of a particular model of a well-known

150 Australian Competition and Consumer Commission, 'ACCC chairman outlines priorities in enforcing competition law', Press Release, 5 May 2012, http://www.accc.gov.au/content/index.phtml/itemId/1050215

151 Ibid.

152 Ibid.

153 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646

> computer tablet device called an 'iPad'. Apple is one of the most popular suppliers of computer devices and related products in Australia and one of the largest participants in the tablet industry. The 'iPad' is a major product of Apple.
>
> A new series of the iPad was launched in a number of countries on 7 March 2012 and was available for Australian consumers to pre-order from 8 March 2012. The new iPad began to be supplied to Australian consumers from 16 March 2012. The new iPad came in a range of models. One model of the new iPad ("the cellular model") is able to access the internet by connecting to a mobile data network via a cellular connection known as a SIM card. During the relevant period, the cellular model of the iPad was promoted and sold by both Apple and some one hundred and fifty Apple resellers under the brand or product designator "iPad with WiFi + 4G". Apple resellers were required by Apple to use promotional and marketing materials containing the product designator.
>
> The term "4G", which appeared in the product designator for the cellular model of the new iPad ("the product designator"), is a term familiar to Australian consumers. From 27 September 2011, one of Australia's largest telecommunications providers, Telstra Corporation Limited ("Telstra"), began to operate a Long Term Evolution mobile data network in Australia and promoted that network to consumers as a "4G" network ("the Telstra LTE network"). When it is used in the Australian marketplace in relation to mobile data networks, the term "4G" is used exclusively to describe either LTE networks or Wimax networks. During the relevant period, Telstra was the only carrier to use an LTE network commercially.
>
> The understanding of Australian consumers of the term "4G" in relation to data mobile networks, is to be distinguished from that relating to other mobile data networks and, in particular, those which have been promoted in Australia as "3G" networks. No Australian carrier uses the term "4G" to describe any network which operates on HSPA, HSPA+ or DC-HSDPA networks. Those networks have always been referred to by Australian carriers as "3G" networks. Apple has also referred to those networks as "3G".[154]

The judge noted that there was agreement as to a breach of Australian Consumer Law: 'The ACCC and Apple jointly contend that the Court should be satisfied of four contraventions by Apple of s 33 of the Australian Consumer Law'.[155]

Considering the proposed penalty, Bromberg J commented:

> Conduct of that kind is serious and unacceptable. Multi-national corporations who (through their subsidiaries or otherwise) operate in and profit from the Australian market, must respect that market and the laws which serve to regulate it and protect its participants. Those who

154 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

155 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

> design global campaigns, and those in Australia who adopt them, need to be attuned to the understandings and perceptions of Australian consumers and ensure that representations made by such campaigns will not serve to mislead. The penalty imposed in this case, needs to make that message clear. [156]

Bromberg J concluded that 'a strong message through a substantial penalty is required'. [157] The judge concluded: 'The fact of the litigation and the media attention which it has drawn, will no doubt be a sober reminder to Apple, and others who rely on their brand image that, as well as a penalty, there will likely be an intangible cost involved in a contravention of the Australian Consumer Law'. [158]

The Federal Court provided the following declarations:

> 1. The first respondent ("Apple") did between 8 March 2012 to 12 May 2012, by use of the product designator "iPad with WiFi + 4G" in each of the following ways:
> (i) online on Apple's webpage at the URL *www.apple.com/au/* and other webpages linked to that webpage, and on the Apple online store at the URL *http://store.apple.com/au/*;
> (ii) in signage contained on demonstration units of iPads at retail stores operated by Apple;
> (iii) in promotional and marketing material provided to Apple resellers by Apple, for use in retail stores operated by those resellers; and
> (iv) in promotional and marketing material subject to the control of Apple on websites operated by resellers of Apple,
> impliedly represent that an "iPad with WiFi + 4G" ("the Device") could connect directly to the Telstra LTE mobile data network in Australia, which it could not do, and thereby, in each case, engaged in conduct that was liable to mislead the public as to a characteristic of the Device, in contravention of s 33 of the *Australian Consumer Law*, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth).[159]

The court ordered: 'Within 14 days of the date of service of these Orders, Apple pay to the Commonwealth of Australia a pecuniary penalty in respect of the contraventions of s 33 of the *Australian Consumer Law*, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth), in the total amount of $2.25 million' and

156 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

157 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

158 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

159 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

'Within 14 days of the date of service of these Orders, Apple pay the Applicant a contribution to its costs in the amount of $300,000.'[160]

In August 2012, Google and the Australian Competition and Consumer Commission presented argument to the High Court of Australia in a case involving alleged misleading and deceptive conduct over AdWords.[161] The transcripts of the argument are now available.[162] The High Court of Australia registry has summarised the dispute in this way:

> Google Inc. ("Google") runs an internet search engine, a search of which produces both organic and sponsored links. Organic links are displayed free of charge, while sponsored links are highlighted paid advertisements. When a user enters a search term, Google returns a list of organic search results. These are matching web pages ranked in order of relevance determined by a complex algorithm developed by Google. The process of producing sponsored links however is determined through Google's AdWords program. When a user enters a search term, an internal "auction" is triggered that determines which sponsored links to show, in which order to show them and how much Google charges its advertisers. An AdWords customer may elect to trigger advertisements (or participate in an auction that will determine which advertising text will be displayed as a sponsored link) by choosing three different types of keywords. These are 'exact match', 'phrase match' or 'broad match'. Hence a search of a key word or phrase may trigger a number of similar, but commercially unrelated results.
>
> At issue in this matter is whether Google has engaged in misleading and deceptive conduct contrary to section 52 of the *Trade Practices Act* 1975 (Cth) ("the Act"). It particularly concerns those sponsored links triggered by searches relating to: "Harvey World Travel", "Honda.com.au", "Alpha Dog Training" and "Just 4x4s Magazine". The Australian Competition and Consumer Commission ("ACCC") alleged that Google infringed section 52 by displaying an advertiser's web address in a sponsored link which also included the name of a competitor. This conduct is said to amount to a misrepresentation of the commercial relationship between the two. Google submitted that it was merely acting as the advertisers' conduit.
>
> The primary judge held that each of the advertisers had engaged in misleading and deceptive conduct by falsely representing that there was a commercial association between

160 *Australian Competition and Consumer Commission* v *Apple Pty Limited* [2012] FCA 646.

161 *Google Inc* v. *Australian Competition and Consumer Commission* S175/2012 http://www.hcourt.gov.au/cases/case_s175-2012

162 *Google Inc* v *Australian Competition and Consumer Commission* [2012] HCATrans 224 (11 September 2012), http://www.austlii.edu.au/au/other/HCATrans/2012/224.html

> themselves and another. His Honour however held that Google had neither endorsed nor adopted the advertisements in question.
>
> On 3 April 2012 the Full Federal Court (Keane CJ, Jacobson & Lander JJ) unanimously upheld the ACCC's appeal, finding that the primary judge had erred in failing to conclude that Google had engaged in misleading and deceptive conduct. Their Honours held that what appears on Google's webpage is Google's response to the user's specific search inquiry. They further held that in the four relevant instances, through use of its proprietary algorithms, Google had actively created the message that it presented. It did not merely repeat or pass on the advertisers' statements.

Google's appeal is against the finding of the Full Court that Google had made the representations contained in each of STA Travel's Harvey World Travel advertisement, Carsales' Honda.com.au advertisement, Ausdog's Alpha Dog Training advertisement and Trading Post's Just 4x4s Magazine advertisement which were displayed on the results pages of Google's internet search engine, and that Google had thereby engaged in conduct that was misleading or deceptive or likely to mislead or deceive. The High Court of Australia has reserved its judgment in this matter.

The Australian Competition and Consumer Commission has also lent its support to a finding of the Advertising Standards Board in respect of false and misleading comments on Facebook pages.[163] Commissioner, Sarah Court, observed that companies needed to manage their social media:

> If you are a big corporate player with lots of resources that's putting a lot of effort into social media then it wouldn't have to be too long. Perhaps 24 hours or less. A court would have to be satisfied that a big company had somehow become aware and ignored these false testimonials … If you knew about them and they worked to your advantage and [you] left them there, then I don't think you could say, 'it isn't our fault and therefore it isn't our responsibility'.[164]

[163] Julian Lee, 'Warning to Firms on Facebook Comments', *The Sydney Morning Herald*, 13 August 2012, http://www.theage.com.au/technology/technology-news/warning-to-firms-on-facebook-comments-20120812-242vr.html

[164] Ibid.

It would seem that the Australian Competition and Consumer Commission will be willing to take action for misleading and deceptive conduct in respect of Facebook pages.

Moreover, in the previous year in 2011, the Australian Competition and Consumer Commission took action against Optus in respect of misleading and deceptive advertising about broadband.[165] In 2012, in *Singtel Optus Pty Ltd* v *Australian Competition and Consumer Commission*, the Full Court of the Federal Court of Australia considered the matter.[166] Keane CJ, Finn J and Gilmour J observed of the nature of the dispute:

> Singtel Optus Pty Ltd (Optus) is a major supplier of telecommunications services in Australia. For approximately five months from Anzac Day 2010 Optus prosecuted a multi-media advertising campaign promoting its "Think Bigger" and "Supersonic" broadband data service plans to consumers. The campaign deployed advertisements in five different media: television, metropolitan and local newspapers, billboards, online and direct marketing. There were eleven separate advertisements and, although each advertisement in each medium was couched in different terms, each advertisement indicated in "headline" claims that the plans had an overall cap or quota, made up of distinct peak and off-peak quotas of broadband availability. Each headline claim was accompanied by a disclaimer in smaller and less prominent print noting "Speed limited once peak data exceeded". In fact, once the peak quota was used up, the speed of the service was significantly slowed irrespective of the usage of the off-peak or overall quotas. Optus' campaign commenced on 25 April 2010. On 18 June 2010 the ACCC wrote to Mr Derber, one of Optus' in-house legal Counsel, advising that it had concerns in relation to the "Think Bigger" campaign. The ACCC's concerns were focussed on the deployment of a headline style message with a less prominent disclaimer. Optus' campaign continued after receipt of this letter. [167]

Optus appealed to the Full Court of the Federal Court of Australia against the penalty judgment. Allowing the appeal against the penalty of $5.26 million, the Full Court of the Federal Court of Australia instead imposed 'a total penalty of $3,610,000 in relation to the 11 advertisements.'

[165] Australian Competition and Consumer Commission, 'Optus Penalised $5.26 million for misleading broadband advertising', Press Release, 7 July 2011, http://www.accc.gov.au/content/index.phtml/itemId/996058/fromItemId/2332

[166] *Singtel Optus Pty Ltd* v *Australian Competition and Consumer Commission* [2012] FCAFC 20

This combination of actions by the Australian Competition and Consumer Commission against Apple Inc., Google, Facebook, and Optus certainly show that the regulator has been active in respect of consumer law and the digital economy in 2011 and 2012.

Thus far, the Australian Competition and Consumer Commission has been very much focused upon internet advertising. Arguably, though, the regulator could expand its examination of the digital economy and the online economy. The regulator could consider in an integrated fashion the relationship between consumers and information technology companies – looking at the terms and conditions of use; price discrimination; and the use of digital rights management systems.

4. The Australian Competition and Consumer Commission has taken action in respect of misleading and deceptive advertising in respect of information technology companies. The regulator should broaden its focus on consumer rights and the digital economy to consider in an integrated fashion the practices of information technology companies – including terms and conditions of use; price discrimination; and the use of digital rights management systems.

[167] *Singtel Optus Pty Ltd* v *Australian Competition and Consumer Commission* [2012] FCAFC 20

5. Competition Law

A. Australia

In the case of *Universal Music Australia Pty Ltd* v *Australian Competition & Consumer Commission*, the Australian Competition and Consumer Commission took action against the record industry, because of concerns that it was seeking to compromise the new parallel importation regime.[168]

The public summary of the Full Court of the Federal Court decision summarizes this complex litigation:

> On 30 July 1998, important amendments to the *Copyright Act 1968* (Cth) came into operation. The effect of the amendments was that Australian wholesalers and retailers of compact disc recordings and other sound recordings could import stock from other countries provided the manufacture of that stock overseas had not infringed copyright law in the source country and had been carried out with the consent of the copyright owner. Previously the importation of sound recordings had been prohibited without the consent of Australian copyright owners or licensees. The changes meant that retailers of recorded music and, in particular, CDs were no longer limited to purchasing their CDs from Australian sources.
>
> Two major Australian distributors, Universal Music Australia Pty Ltd (formerly Polygram Pty Ltd) (`Universal') and Warner Music Australia Pty Ltd (`Warner'), made it known that they might not supply retailers who exercised their right to import CDs from overseas and that, in any event, they would or might review the terms upon which they dealt with such retailers. In certain cases, and for a short time, they ceased to supply some retailers who imported CDs from overseas.
>
> The Australian Competition and Consumer Commission (`ACCC') instituted proceedings in this Court asserting that the conduct of Universal and Warner contravened the competition law set out in the *Trade Practices Act 1974* (Cth) and in particular ss 45, 46 and 47 of the Act.
>
> Hill J found on 14 December 2001 that both distributors contravened ss 46 and 47 of the Act by engaging in abuse of their market power and exclusive dealing conduct. He also found that certain of their executives were knowingly involved in those contraventions. He dismissed the ACCC case based on s 45, which is to do with anti-competitive agreements or arrangements. His Honour delivered a supplementary judgment on 6 March 2002 in which he

[168] *Universal Music Australia Pty Ltd* v *Australian Competition & Consumer Commission* [2003] FCAFC 193

made declarations and granted injunctions and imposed pecuniary penalties. He imposed penalties of $450,000 on each of Universal and Warner. He also imposed penalties on two Universal executives, Mr Handley and Mr Dickson, of $45,000 and $50,000 respectively. He imposed penalties of $45,000 on each of two Warner executives, Mr Smerdon and Mr Maksimovic. He ordered Universal and Mr Dickson to pay 75% of the ACCC's costs in the proceedings against them and Mr Handley to pay 70% of the ACCC's costs in the proceedings against him. In the proceedings against Warner and its executives, all three were ordered to pay 75% of the ACCC's costs.

Universal and Warner and their executives have appealed against his Honour's findings relating to abuse of market power and exclusive dealing. The ACCC has appealed against the penalties imposed on Universal and Warner.

In our opinion the appeal against his Honour's decision in relation to the contravention of s 46, abuse of market power, should be allowed. In order to make out a contravention of s 46 it is necessary to show that the corporation said to be contravening it has `a substantial degree of power in a market'. After the primary decision in this case, the High Court of Australia clarified that concept by its decision in the case of *Boral Ltd v ACCC*. In this case, the relevant market was the market for wholesale recorded music in Australia. However in our opinion it could not be said that the degree of power held by either Universal or Warner in that market immediately after 30 July 1998 was so significant as to warrant the description `substantial' within the meaning of s 46 as explained by the High Court in *Boral*.

On that basis we are of the opinion that no contravention of s 46 was proven.

However we agree with Hill J that both Universal and Warner contravened s 47 of the *Trade Practices Act* by engaging in exclusive dealing and that their executives were knowingly concerned in their respective contraventions. These contraventions arose out of the refusal of the companies to supply certain retailers for a time and their imposition of conditions upon supply. The retailers whose accounts were closed were small traders. The cessation of supply to them of itself could have had no significant effect on competition in the market. However, that cessation fortified a general warning to all retailers against acquiring Universal or Warner titles other than through Universal or Warner in Australia. We agree with Hill J that the purpose of Universal and Warner was to discourage retailers from importing or acquiring non-infringing CDs of titles in the Universal and Warner catalogues respectively. If that purpose had been achieved, it would have had a substantial effect upon competition in the market. The fact that the purpose was not achieved is no defence.

We also agree with the conclusion reached by his Honour that the Universal and Warner executives were accessories in the contravening conduct of their companies.

In relation to penalty, we are of the opinion that the penalty imposed upon Universal and Warner was inadequate even allowing for the fact that, on appeal, the finding of a contravention of s 46 has not been sustained. In our opinion, the appropriate penalty in relation to the exclusive dealing conduct engaged in by Universal and Warner is $1 million each. The penalties imposed on the executives will not be changed except that the penalty imposed upon

> Mr Dickson should be reduced from $50,000 to $45,000 as his Honour made a factual error in respect of Mr Dickson's involvement in one of the closures.
>
> The Court has also on appeal modified the declarations and injunctions to reflect its conclusions about the s 46 contravention. The costs orders have been altered so that in each case the relevant corporation and its officers are to pay one half of the ACCC's costs of the trial and of the appeals.

This case is significant – as it shows the Australian Competition and Consumer Commission can and will take action in respect of such matters. However, it would also be fair to say that, in the decade since this case, the regulator has shown less interest in questions about intellectual property and competition policy.

In its submission, Treasury opposed any new reforms in respect of competition law:

> In particular, Treasury considers that the current competition laws are capable of addressing anti-competitive conduct without the need for a specific price discrimination prohibition. This does not mean that there is nothing that can be done. Where prices remain high for particular goods, this may nonetheless create opportunities for the alternative sourcing of products or for local businesses to enter the market to provide a more competitive price. In relation to digital products, where parallel importing is not relevant, encouraging local or international competitors to supply the Australian market with alternative, substitute products to drive prices down will be particularly beneficial. This may include removal of any barriers to entry to the Australian market that may exist, particularly those which would prevent alternative suppliers and substitute products that could help to place additional competition on existing suppliers.[169]

The submission of Treasury fails to address matters of copyright law – particularly in respect of parallel importation and technological protection measures.

It is true, though, that the Australian Competition and Consumer Commission does possess a wide range of powers to take action in respect of restrictive trade practices. Part IV of the *Competition and Consumer Act* 2010 (Cth) prohibits various anti-

[169] Treasury, 'Inquiry into IT Pricing', House of Representatives Standing Committee on Infrastructure and Communications, 9 August 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs/sub085.pdf

competitive practices that limit or prevent competition. In particular, the Australian Competition and Consumer Commission can take action in respect of cartel conduct (ss. 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK), price fixing (ss. 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK), anti-competitive agreements (s. 45), misuse of market power (s 46), predatory pricing (s 46(1) and s 46(1AA)), exclusive dealing and third line forcing (s 47), and resale price maintenance (s. 48). The regulator would, of course, need evidence to establish such actions.

B. The United States

On the 11th April 2012, the United States Department of Justice filed an antitrust lawsuit against Hachette, HarperCollins, Macmillan, Penguin and Apple Inc. over the pricing of e-Books.[170] The Department alleged that the defendants had conspired to raise retail prices of E-Books in violation of Section 1 of the *Sherman Act*. It is worth discussing this complaint in detail.

In its complaint, the United States Department of Justice reflected upon recent developments in technology and literary publishing:

> Technology has brought revolutionary change to the business of publishing and selling books, including the dramatic explosion in sales of 'e-books' – that is, books sold to consumers in electronic form and read on a variety of electronic devices, including dedicated e-readers (such as the Kindle or the Nook), multipurpose tablets, smartphones and personal computers. Consumers reap a variety of benefits from e-books, including 24-hour access to product with near-instant delivery, easier portability and storage, and adjustable font size. E-books are also considerably cheaper to produce and distribute than physical (or "print") books.[171]

The complaint notes: 'In developing and then mass marketing its Kindle e-reader and associated e-book content, Amazon substantially increased the retail market for e-

[170] *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), complaint, antitrust case filings, http://www.justice.gov/atr/cases/applebooks.html

[171] Ibid.

books'.[172] The complaint observes that 'one of Amazon's most successful marketing strategies was to lower substantially the price of newly released and bestselling e-books to $9.99.'[173]

The complaint paints a portrait of a conspiracy between Apple Inc. and major multinational publishing houses:

> The Defendants' conspiracy to limit e-book price competition came together as the Publisher Defendants were jointly devising schemes to limit Amazon's ability to discount e-books and Defendant Apple was preparing to launch its electronic tablet, the iPad, and considering whether it should sell e-books that could be read on the new device. Apple had long believed it would be able to "trounce Amazon by opening up [its] own ebook store," but the intense price competition that prevailed among e-book retailers in late 2009 had driven the retail price of popular e-books to $9.99 and had reduced retailer margins on e-books that Apple found unattractive. As a result of discussion with the Publisher Defendants, Apple learned that the Publisher Defendants shared a common objective with Apple to limit e-book retail price competition, and that the Publisher Defendants also desired to have popular e-book retail prices stabilize at levels significantly higher than $9.99. Together, Apple and the Publisher Defendants reached an agreement whereby retail price competition would cease (which all the conspirators desired), retail e-book prices would increase significantly (which the Publisher Defendants desired), and Apple would be guaranteed a 30 percent 'commission' on each book.[174]

The complaint observed that 'Apple facilitated the Publisher Defendants' collective effort to end retail price competition by coordinating their transition to an agency model across all retailers.'[175]

The complaint observed: 'The plan – what Apple proudly described as an "aikido move" worked.'[176] The complaint elaborated:

172 Ibid.

173 Ibid.

174 Ibid. [4]

175 Ibid. [6].

176 Ibid. [7].

> Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers led to an increase in the retail prices of newly released and bestselling e-books. Prior to the Defendants' conspiracy, consumers benefited from price competition that led to $9.99 prices for newly released and bestselling e-books. Almost immediately after Apple launched its iBookstore in April 2010 and the Publisher Defendants imposed agency model pricing on all retailers, the Publisher Defendants' e-book prices for most newly released and bestselling e-books rose to either $12.99 or $14.99.[177]

The complaint observed: 'Now that the Publisher Defendants control the retail prices of e-books – but Amazon maintains control of its print book retail prices – Publisher Defendants' e-book prices sometimes are higher than Amazon's prices for print versions of the same titles'.[178]

The complaint noted: 'Apple clearly understood that its participation in this scheme would result in higher prices to consumers'.[179] The Department of Justice explained the nature of the action: 'The purpose of this lawsuit is to enjoin the Publisher Defendants and Apple from further violations of the nation's antitrust laws and to restore the competition that has been lost due to the Publisher Defendants' and Apple's illegal acts'.[180] The complaint observed: 'Defendants' ongoing conspiracy and agreement have caused e-book consumers to pay tens of millions of dollars more for e-books than they otherwise would have paid.'[181]

In terms of its competition analysis, the Department of Justice noted: 'The relevant geographic market is the United States' and 'the rights to license e-books are granted on territorial bases, with the United States typically forming its own territory'.[182] It also observed: 'E-book retailers typically present a unique storefront to U.S.

177 Ibid. [91]-[92].

178 Ibid. [93].

179 Ibid. [6].

180 Ibid. [9].

181 Ibid. [10].

182 Ibid. [100].

consumers, often with e-books bearing different retail prices than the same titles would command on the same retailer's foreign websites.'[183]

The Attorney General Eric Holder observed on the action:

> Beginning in the summer of 2009, we allege that executives at the highest levels of the companies included in today's lawsuit – concerned that e-book sellers had reduced prices – worked together to eliminate competition among stores selling e-books, ultimately increasing prices for consumers. As a result of this alleged conspiracy, we believe that consumers paid millions of dollars more for some of the most popular titles.
>
> During regular, near-quarterly meetings, we allege that publishing company executives discussed confidential business and competitive matters – including Amazon's e-book retailing practices – as part of a conspiracy to raise, fix, and stabilize retail prices. In addition, we allege that these publishers agreed to impose a new model which would enable them to seize pricing authority from bookstores; that they entered into agreements to pay Apple a 30 percent commission on books sold through its iBookstore; and that they promised – through contracts including most-favored-nation provisions – that no other e-book retailer would set a lower price. Our investigation even revealed that one CEO allegedly went so far as to encourage an e-book retailer to punish another publisher for not engaging in these illegal practices.[184]

In September 2012, the Department of Justice moved for entry of a proposed Final Judgment with respect to the settling defendants Hachette, HarperCollins, and Simon & Schuster pursuant to the *Antitrust Procedures and Penalties Act*. District Court judge Denise Cote granted that judgment. [185]

Under the final judgment, the settling defendants were required to do a number of things:

183 Ibid. [100].

184 Eric Holder, 'E-Books Press Conference', the United States Attorney-General, Washington DC, 11 April 2012, http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1204111.html

185 *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The*

> 1. They must terminate their Agency Agreements with Apple within seven days after entry of the proposed Final Judgment.
> 2. They must terminate those contracts with e-book retailers that contain either a) a restriction on the e-book retailer's ability to set the retail price of any e-book, or b) a "Price MFN," as defined in the proposed Final Judgment, as soon as each contract permits starting thirty days after entry of the proposed Final Judgment.
> 3. For at least two years, they may not agree to any new contract with an e-book retailer that restricts the retailer's discretion over e-book pricing.
> 4. For at least five years, they may not enter into an agreement with an e-book retailer that includes a Price MFN.

Moreover, the judgment imposes prohibitions on retaliating against e-book retailers based on the retailer's e-book prices, agreeing to raise or set e-book retail prices, and conveying confidential or competitively sensitive information to other e-book publishers.

Cote J noted the arguments in favour of the final judgment:

> Broadly speaking, the comments in favor of the decree mirrored arguments presented by the Government. They argued that the proposed Final Judgment will promote retail competition and benefit consumers by allowing for lower, competitive e-books prices. A number of comments further argued that the decree will benefit industry stakeholders, like authors, by increasing their royalty payments and facilitating self-publishing. Some comments claimed that the decree would be more effective if its time-limited provisions lasted longer, but nonetheless supported its entry. [186]

Cote J considered a large amount of public comments and opposition to the proposed judgment:

> The Public Comments on the proposed Final Judgment were both voluminous and overwhelmingly negative. More than 90 percent of the 868 comments opposed entry of the proposed Final Judgment. Some comments were filled with extreme statements, blaming every

Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc. (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

[186] *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

> evil to befall publishing on Amazon's $9.99 price for newly released and bestselling e-books, and crediting every positive event -- including entry of new competitors in the market for e-readers -- on the advent of agency pricing. Other comments were very thoughtful. They do not condone collusive price-fixing but seek to predict whether the consumer will be harmed or benefited from a suspension of the agency model for a two year period.
>
> Many comments were submitted by third parties alleging that they would suffer significant harm if the judgment is entered. Other comments caution that the decree will positively harm books consumers, or damage the marketplace of ideas and information. Comments were received from a variety of interested individuals, companies, and industry groups, including booksellers, authors, literary agents, publishing consultants, a consumer activist group, and consumers themselves. In addition, defendants Penguin, MacMillan, and Apple, as well as non-parties Barnes & Noble, the ABA, the Authors Guild, and RoyaltyShare, Inc. Chairman and CEO Bob Kohn ("Kohn") submitted briefs in opposition to entry of the proposed Final Judgment after the close of the 60-day comment period. [187]

In particular, the judge discussed at length arguments about the position of Amazon.com: 'The comments claim that Amazon was pricing e-books below cost in order to cement its monopoly, and would eventually seek to reap the rewards of this monopoly by inflating prices and retarding innovation.' [188] The judge, in the end, thought that such allegations were speculative: 'What cannot be disputed is that the Agency Agreements ended retail price discounting and eliminated potential pricing innovations, such as "all-you-can-read" subscription services, book club pricing specials, and rewards programs.'[189]

[187] *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

[188] *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

[189] *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

Summing up, the judge noted: 'There can be no denying the importance of books and authors in the quest for human knowledge and creative expression, and in supporting a free and prosperous society.'[190] After considering the various arguments, the judge held that the 'interests of judicial administration and the equities involved weigh heavily in favour of immediate entry of judgment'. [191]

C. The European Union

In the European Union, competition authorities – the European Commission for Competition - have also investigated the matter. It was reported that Apple and four publishing houses have made proposals aimed at ending a European Union probe into price fixing in the e-book market.[192] EU Competition Commissioner Joaquin Almunia commented:

> In the context of its antitrust investigation into the distribution of e-books, the European Commission has received proposals of possible commitments from Apple and four international publishers, Simon & Schuster, Harper Collins, Hachette Livre and Verlagsgruppe Georg von Holtzbrinck. I welcome the fact that these five companies are making proposals to reach an early resolution of the case, so promptly after we opened proceedings in December 2011. We are currently engaged in fruitful discussions with them, without prejudice to the outcome of these talks.[193]

The Competition Commissioner noted that any final proposals will be tested to determine whether they are 'sufficient to preserve competition for the benefit of

190 *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

191 *United States* v. *Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.* (2012), order and opinion http://www.justice.gov/atr/cases/f286700/286727.pdf

192 'EU says Apple, publishers make offers to end antitrust probe,' EU Business, 12 April 2012, http://www.eubusiness.com/news-eu/us-it-competition.g0j

193 Ibid.

consumers in this fast-growing market'.[194] The Commissioner observed: 'I am happy that the very close and productive cooperation between the DOJ and the Commission has benefitted the investigations on both sides of the Atlantic.'[195]

5. Especially in light of alleged overseas conspiracies involving price fixing by Apple Inc. and large multinational publishers, there is a need for the Australian Competition and Consumer Commission to investigate whether there has been any such restrictive trade practices resulting in respect of information technology products in Australia.

194 Ibid.

195 Ibid.

6. Trade Law: The *Trans-Pacific Partnership*

There is also need to take into account matters of trade law – particularly the Trans-Pacific Partnership.

The United States Trade Representative, Ron Kirk, has called the Trans-Pacific Partnership 'an ambitious, next-generation, Asia-Pacific trade agreement that reflects U.S. priorities and values.'[196]

His office maintains, 'Through this agreement, we are seeking to boost U.S. economic growth and support the creation and retention of high-quality jobs at home by increasing American exports to a region that includes some of the world's most robust economies and that represents more than 40 percent of global trade.'[197]

The negotiating partners for the treaty include a selection of countries from the Pacific Rim: Australia, New Zealand, Brunei Darussalam, Malaysia, Singapore, Vietnam, Chile, and Peru. There has been much discussion as to whether Canada, Mexico, and Japan will join the agreement. And Ron Kirk has observed that the treaty has open architecture, and accommodate new members. 'The Trans-Pacific Partnership Agreement... could become a vehicle by which all of the 21 members of the APEC cooperative would aspire to join.'[198]

Although the draft texts remain secret, the outline indicates that the agreement is wide-ranging, covering some twenty areas, including competition, customs, e-commerce, intellectual property, investment, industrial relations, and trade.[199]

196 The United States Trade Representative, *The Trans-Pacific Partnership: Fact Sheets*, http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership

197 Ibid.

198 'Press conference with World Trade Organization Director-General, Pascal Lamy, United States Trade Representative, Ron Kirk, Canadian International Trade Minister, Ed Fast', 23 May 2012, http://www.trademinister.gov.au/transcripts/2012/ce_tr_120523_press_conference.html

199 The United States Trade Representative, *The Trans-Pacific Partnership Agreement: Outlines*, http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement

In the United States, there was a great public outcry over draconian copyright bills - such as the *Stop Online Piracy Act* (SOPA) and *Protect Intellectual Property Act* (PIPA). Thousands of websites, most notably Wikipedia opposed these bills through site "blackouts". In response to this public uproar, the bills lost support.

Nonetheless, there has been concern that the intellectual property chapter of the *Trans-Pacific Partnership* represents a similar threat to civil liberties, innovation, and the digital economy.

Republican Californian representative, Darrell Issa, has established a website entitled Keep the Web Open. He has posted a leaked version of a 2011 Intellectual Property Chapter of the *Trans-Pacific Partnership*, and called for public comment and criticism of the proposed text. [200] Issa commented: 'I have decided to publish the intellectual property rights chapter of the *Trans-Pacific Partnership* in Madison so that the public can provide input to those negotiating this agreement.'[201] Issa observed: 'While the Obama administration speaks publicly about protecting an open Internet and delivering open government, they continue pushing secretive agreements like the *Anti-Counterfeiting Trade Agreement* and *Trans-Pacific Partnership* that exclude the public and could undermine individual privacy rights and stifle innovation.'[202] He said: 'They need to explain this apparent inconsistency.'[203]

For his part, Ron Kirk has maintained that 'the Trans-Pacific Partnership reflects the incentives and stable framework that can nurture a healthy digital environment in the Asia-Pacific region'.[204] He maintains: 'We respect and advocate key balancing aspects

200 Keep the Web Open, *Trans-Pacific Partnership*, http://keepthewebopen.com/tpp

201 Ibid.

202 Zach Carter, 'Darrell Issa Questions Obama On Trans-Pacific Partnership, Leaks Key Text Of Trade Deal', *The Huffington Post*, 16 May 2012, http://www.huffingtonpost.com/2012/05/16/darrell-issa-trans-pacific-partnership-trade-deal_n_1521035.html

203 Ibid.

204 The United States Trade Representative, 'Letter to Christopher Sprigman', 30 May 2012, http://infojustice.org/wp-content/uploads/2012/06/kirk0530212.pdf

of U.S. law like safe harbors that shield legitimate providers of cloud computing, user-generated content sites, and a host of other Internet-related services.'[205] Kirk's 'balancing' mechanisms, though, are limited. He notably omits to mention the defence of fair use. The 'safeguards' in respect of copyright law and the digital environment remain somewhat hazy and vague.

Instead, Congressmen Issa and Wyden have called for the creation of a substantive Citizens' Digital Bill of Rights.[206] The draft calls for an open internet; a free flow of knowledge; and the protection of internet freedom and privacy.[207] Wyden warns: 'If the *Trans-Pacific Partnership* is written as badly as we hear it is, then all of the wins that we have won [by defeating SOPA and PIPA] could be unraveled.'

There has been concern about the Intellectual Property Chapter of the *Trans-Pacific Partnership*.[208] There was a leak of the draft text of the Intellectual Property Chapter of the *Trans-Pacific Partnership* in 2011,[209] and the draft text on copyright exceptions in 2012. [210] The United States has promoted an ambitious intellectual property chapter with standards above and beyond those in the *TRIPS Agreement*,[211] the *Australia-United States Free Trade Agreement* 2004, [212]and even the *Anti-Counterfeiting Trade*

205 Ibid.

206 Tamlin Bassen, 'Wyden, Issa Say Digital Bill of Rights Needed to Prevent New Versions of SOPA', Bloomberg BNA, 12 June 2012, http://www.bna.com/wyden-issa-say-n12884909994/

207 Keep the Web Open, Digital Bill of Rights, http://keepthewebopen.com/digital-bill-of-rights

208 Matthew Rimmer, 'A Mercurial Treaty: The Trans-Pacific Partnership and the United States', *The Conversation*, 15 June 2012, http://theconversation.edu.au/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471 [accessed 1 September 2012].

209 Knowledge Ecology International, 'The complete Feb 10, 2011 text of the US proposal for the TPP IPR chapter', 10 March 2011, http://keionline.org/node/1091 [accessed 1 September 2012].

210 Knowledge Ecology International, 'Leak of TPP Text on Copyright Limitations and Exceptions', 3 August 2012, http://keionline.org/node/1516

211 The *TRIPS Agreement* 1994 http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm

212 The *Australia-United States Free Trade Agreement* 2004, http://www.dfat.gov.au/fta/ausfta/index.html

Agreement 2011.[213] The chapter will cover copyright law, trade mark law, patent law, customs and border measures, and intellectual property enforcement. The draft text of the Intellectual Property Chapter of the *Trans-Pacific Partnership* put forward by the United States is alarming in terms of the impact in respect of copyright law and exceptions, parallel importation restrictions, technological protection measures, and, more generally, consumer rights.

The leak of the proposed text on copyright limitations and exceptions has been of concern, especially as the United States and Australia have been arguing for confinement:

> **Article QQ.G.16: Limitations and Exceptions**
>
> [US:
> 1. [US/AU: With respect to this Article [(Article 4 on copyright) and Article 5 and 6 (which deal with copyright and related rights section and the related rights section)], each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.]
>
> 2. Subject to and consistent with paragraph (1), each Party shall seek to achieve an appropriate balance in providing limitations or exceptions, including those for the digital environment, giving due consideration to legitimate purposes such as, but no limited to, criticism, comment, news reporting, teaching, scholarship and research.92]
>
> [NZ/CL/MY/BN/VN propose; AU/US oppose93: 1. Each party may provide for limitations and exceptions to copyrights, related rights, and legal protections for technological protections measures and rights management information included in this Chapter, in accordance with its domestic laws and relevant international treaties that each are party to.]
>
> [US/AU propose: With respect to this Article and Articles 5 and 6, each party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.]

213 The *Anti-Counterfeiting Trade Agreement* 2011, http://www.dfat.gov.au/trade/acta/

> 2. [NZ/CL/MY/BN/VN propose; US/AU oppose: Paragraph 1 permits a party to carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws. Similarly, these provisions permit a Party to devise new] [US/AU propose; NZ/CL/MY/BN/VN oppose: its understood that each party may, consistent with the foregoing, adopt or maintain] exceptions and limitations for the digital environment.]
>
> ---
>
> 92 [US: For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under paragraph 2]
> 93 Negotiator's Note: SG/PE: Can accept both versions of paragraph 1.[214]

This is disturbing – as it may undermine consumer rights in Australian copyright law. Moreover, there has been concern that the *Trans-Pacific Partnership* will undermine the inquiry of the Australian Law Reform Commission into copyright exceptions.

Proposed article 4 (2) of the Intellectual Property Chapter of the *Trans-Pacific Partnership* calls for wide restrictions on parallel importation, across all subject-matter: '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 the phonogram'. Footnote 11 provides: '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.'

Sean Flynn and his colleagues observe of this section:

> TPP article 4.2 would create a new international legal requirement to provide copyright owners an exclusive right to block "parallel trade" of copyrighted works – meaning the importation of a copyrighted work from one country where the good is voluntarily placed on

[214] Knowledge Ecology International, 'Leak of TPP Text on Copyright Limitations and Exceptions', 3 August 2012, http://keionline.org/node/1516

> the market to another country where the same good at the same price is unavailable.41 The language of the U.S. proposed TPP Art. 4.2 is not consistent with current U.S. law, is not required by any multilateral agreement and is not in the best interests of TPP member countries.
>
> The issue of parallel trade arises because rights owners desire the ability to segment markets and determine their own prices and policies for entry into each market. Many countries are disadvantaged by such rights, particularly where they lack a sufficient consumer base to attract market entry at the lowest possible prices. Parallel trade allows distributors to seek supplies of the legitimate copyrighted work in another market where the good is available. If for example, as is often the case, a text book is sold at a higher price in a poor country than in a wealthier one, a supplier in the poor country could purchase the book in the lower priced market and resell it in the domestic market – benefiting both consumers and the local firm.
>
> In recognition of the divergence of legitimate policies between countries, the WTO TRIPS agreement leaves countries free adopt domestic policies on parallel importation through their regimes of exhaustion of intellectual property rights.[215]

Alberto Cerda of Knowledge Ecology International has also worried about the implications of such text on parallel importation.[216] He commented:

> Successive analysis has been conducted by the government respect to the parallel importation. In 2005, a government report found that lifting the ban on parallel importations has not affected the investment in and promotion of New Zealand creative sector, but improved choices and quality of services to retailers and consumers through increased competition, a result similar to Australia.
>
> The case of New Zealand shows how parallel importations are particularly important for smaller economies. Almost all the countries involved in the TPPA negotiations are comparative small economies, including Chile and Australia. However, even in the U.S., this new right would clearly affect consumers and retailers, by increasing their access cost and limiting their business opportunities. USTR has aligned itself with the right holders.
>
> The USTR's proposal on this new exclusive rights for exportation will meet resistance from negotiators of those economies that have adopted international exhaustion of rights. After all, this is a decision that the TRIPS Agreement reserves to domestic law of the WTO-members (article 6). It would thus be interesting to know, what evidence or "studies"

[215] Sean Flynn, Margot Kaminski, Brook Baker, and Jimmy Koo, 'Public Interest Analysis of the US TPP Proposal for an IP Chapter' (2011) *PIJIP Research Paper Series*. Paper 21. http://digitalcommons.wcl.american.edu/research/21 [accessed 1 September 2012].

[216] Alberto Cerda, *USTR New Exclusive Right for Copyright Holders: Importation Provision in the Trans Pacific Partnership Agreement (TPPA)*, 5 July 2011, http://keionline.org/node/1176

> support the decision by the USTR to include an exclusive right for controlling importation in the TPP negotiations? And, how does it affect competition, and what wiil be the harm to consumers? How will the right be enforced in a digital environment, like the Internet? [217]

In this context of the current inquiry into IT pricing in Australia, such a provision is highly problematic – given that it would involve the imposition of parallel importation restrictions (even in areas where they have been repealed or relaxed).

Proposed article 9 of the Intellectual Property Chapter of the *Trans-Pacific Partnership* puts forward a highly prescriptive regime in respect of technological protection measures.

Article 9 (f) provides a broad definition of technological protection measures: '**Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.'

Article 9 proposes a wide range of legal remedies in respect of circumvention of effective technological protection measures:

> 9. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:
>
> (i) circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter; or
>
> (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, that:
> (A) are promoted, advertised, or marketed by that person, or by another person acting in concert with that person and with that person's knowledge, for the purpose of circumvention of any effective technological measure,

217 Ibid.

(B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
(C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure

shall be liable and subject to the remedies set out in Article [12.12]. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a non-profit library, archive, educational institution, or public non-commercial broadcasting entity, is found to have engaged wilfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities. Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (f) of Article [15.5] as applicable to infringements, *mutatis mutandis*.

Section 9 (c) proposes: 'Each Party shall provide that a violation of a measure implementing this paragraph is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights.'

Section 9 (d) strictly confines the exceptions and limitations for technological protection measures:

(d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the following activities, which shall be applied to relevant measures in accordance with subparagraph (e):
(i) noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
(ii) noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of research consisting of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
(iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing subparagraph (a)(ii);

(iv) noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;

(v) noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;

(vi) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes;

(vii) access by a nonprofit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and

(viii) noninfringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms when an actual or likely adverse impact on those noninfringing 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.

Section 9 (e) provides further prescriptions as to exceptions and limitations in respect of technological protection measures:

The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph [4.9(d)] may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:

(i) Measures implementing subparagraph (a)(i) may be subject to exceptions and limitations with respect to each activity set forth in subparagraph (d).

(ii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i), (ii), (iii), (iv), and (vi).

> (iii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i) and (vi).

It is disturbing that the United States has proposed such text for the Intellectual Property Chapter.

Inside U.S. Trade has reported that Australia, New Zealand, and Singapore have proposed replacing some elements of the United States proposal on Intellectual Property enforcement with language drawn from the *Anti-Counterfeiting Trade Agreement* 2011.[218] This is also disturbing. The European Parliament and its various committees overwhelmingly rejected the *Anti-Counterfeiting Trade Agreement* 2011.[219]

In June 2012, the Australian Parliamentary Committee - the Joint Standing Committee on Treaties - has recommended delaying and postponing ratification of the *Anti-Counterfeiting Trade Agreement* 2011.[220] The Committee recommended: 'That the Anti-Counterfeiting Trade Agreement not be ratified by Australia until the: Joint Standing Committee on Treaties has received and considered the independent and transparent assessment of the economic and social benefits and costs of the Agreement referred to in Recommendation 2; Australian Law Reform Commission has reported on its Inquiry into Copyright and the Digital Economy; and the

[218] 'Countries Offer ACTA Language To Replace U.S. IPR Proposal', *Inside US Trade*, 14 May 2012, http://insidetrade.com/201205142398797/WTO-Daily-News/Daily-News/countries-offer-acta-language-to-replace-us-ipr-proposal/menu-id-948.html and http://lists.keionline.org/pipermail/a2k_lists.keionline.org/2012-May/001218.html [accessed 1 September 2012].

[219] Stephanie MacDonald, 'ACTA Dead and Buried', *Computerworld*, 5 July 2012, http://www.computerworld.com.au/article/429588/acta_dead_buried_europe/ [accessed 1 September 2012].

[220] Joint Standing Committee on Treaties, *The Anti-Counterfeiting Trade Agreement*, Report 126: Review into Treaty tabled on 21 November 2011, Canberra: Australian Parliament, June 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/21november2011/report.htm [accessed 1 September 2012].

Australian Government has issued notices of clarification in relation to the terms of the Agreement as recommended in the other recommendations of this report.'[221]

6. The Australian Government should not agree to an expansive Intellectual Property Chapter in the *Trans-Pacific Partnership* talks. In particular, there is a concern about text that undermines consumer rights – such as the confinement of copyright exceptions, parallel importation restrictions and technological protection measures.

221 Ibid.

A Coda: Access to Knowledge: The Amazon Kindle and the Right to Read

The short submission by Andrew Leigh MP was very powerful.[222] The strength of the submission was that it called for a holistic consideration of the issue – not only focusing upon questions of price discrimination; but also larger matters of access to knowledge and consumer rights.

Focusing upon Amazon.com, Andrew Leigh focused upon three ways in which Australians are 'restricted in their access to one of the world's largest collections of e-books.' [223] First, he highlighted 'limitations on access to the Kindle itself'.[224] Leigh observed: 'While Australians have access to some Kindle models, others—the Kindle Fire, for example—will not be delivered to Australia'.[225] Second, Leigh worried about the limited access to the range of books that are provided on the Kindle: 'According to Delimiter figures, if one looks at fiction books, a United States Kindle reader can access 501,610 books; an Australian reader, 456,237 books—a difference of 45,000 books available to US readers but not Australian readers'.[226] He noted: 'For nonfiction, the gap is larger: US readers get access to 930,139 titles; Australians to 723,852 titles—a difference of 206,000 titles'.[227] Moreover. 'For magazines: 450 titles available to US readers and 183 for Australian Kindle readers—a difference of 267'.[228] Third, Leigh emphasized problems of price discrimination:

> In addition, some books are more expensive for Australian readers than they are for United States Kindle readers. For example, quoting prices in US dollars: *Gone with the Wind*, $14.05 for an Australian reader, $13.99 for a US reader, $12.71 for a UK reader; *The Colour Purple*,

[222] 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

[223] Ibid.

[224] Ibid.

[225] Ibid.

[226] Ibid.

[227] Ibid.

[228] Ibid.

> $12.04 for an Australian reader, $8.50 for a US reader, $7.94 for a UK reader; and, appropriately enough, *The Book Thief*, $12.93 for an Australian reader, $9.99 for a US reader, $7.83 for a UK reader. Some books are cheaper in Australia, but the analysis done by teleread.com suggests that for many books Australians are paying higher prices than Europeans, Latin Americans and people in the United States. Expanding access to a larger catalogue of Kindle books is absolutely essential since the world is moving to an e-book world. Paper books will exist for some time to come, but increasingly younger readers will begin on e-books and that will be their entire experience. Having access to the world's knowledge at an economical price is important for our education system and also for the strength of the Australian economy. Part of the problem is the limitations of copyright law that allow territorial restrictions imposed by e-book retailers seeking to limit access; however, part of it is simple differential pricing, and I urge Amazon to abandon it. [229]

Andrew Leigh emphasized the need to take into account larger considerations about access to knowledge: 'Access to many and affordable books is an important component of a civilised society.'[230] He concluded: 'Access to the world's knowledge is as important as access to the world's music, and Australians have a right to be treated equitably by Amazon.com.'[231] I would echo such sentiments. Much more needs to be done at a national and international level to secure access to knowledge.

This submission reminded me of two complementary pieces of writing.

In his collection, *Context*, Cory Doctorow considers the problem of price discrimination in respect of e-Books.[232] He discusses the competing profit maximising strategies of price discrimination and elasticity:

> Everyone with a product to sell practices both price discrimination and demand elasticity in varying degrees. But when the product you're selling is digital, the correct ratio of one to the other becomes a lot harder to calculate. If you're selling hard goods, whether books, shovels, or coffee beans, the math is easy: you can't make money if you drop your price below the marginal cost of production. But digital goods, like e-books, have almost no marginal costs.

229 Ibid.

230 Ibid.

231 Ibid.

232 Cory Doctorow, *Context: Further Selected Essays on Productivity, Creativity, Parenting, and Politics in the 21st Century*, 24 August 2011, http://craphound.com/context/Cory_Doctorow_-_Context.xhtml

> Things like credit card processing fees, electricity and bandwidth, and a few other considerations keep the cost from truly falling to $0, but the low marginal cost of selling digital copies opens up some very exciting possibilities for publishers. Could the pool of people willing to buy books—the total number of regular readers—be increased by dropping the price? And could that increase in new customers be large enough to offset losses from smaller margins? Amazon clearly thinks so.[233]

Cory Doctorow comments upon the problem of digital rights management in respect of Amazon:

> At the heart of the Macmillan-Amazon spat is the realization that allowing Amazon to dominate the e-book market will only make it harder for publishers to balance their interests with Amazon's. That's because the Kindle is a "roach motel" device: its license terms and DRM 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. Price conflict aside, this is the real challenge for publishers, because it means that e-book customers can't break with Amazon without jettisoning their digital libraries. [234]

As an author, he notes: 'Amazon refused to allow any changes to its terms for my last book, both in the Audible edition and the Kindle edition, refusing to allow me to offer the book with some introductory text affirming readers' rights to move the books to devices that Amazon hasn't approved.'[235]

Cory Doctorow discusses the need for greater competition in the field of publishing:

> Amazon has done an incredible job of figuring out how to cross-sell, upsell, and just plain sell books. They have revolutionized bookselling over the course of a decade. As a reader and a writer, and as a publisher and a bookseller, I am constantly amazed at how good they are at this. But I don't believe in benevolent dictators. I wouldn't endorse a lock-in program run by a cartel of Santa Claus, the Tooth Fairy, and Mohandas Gandhi. As good as Amazon is at what it does, it doesn't deserve to lock in the reading public. No one does.[236]

233 Ibid.
234 Ibid.
235 Ibid.
236 Ibid.

In addition, I supervised a Honours thesis by Ariel Bogle entitled, 'The Tethered Utility: The Amazon Kindle and the Right to Read'. This thesis is attached as a companion to this submission. It addresses

7. As suggested by the Honours thesis of Ariel Bogle, 'The Tethered Utility: The Amazon Kindle and the Right to Read', there is a need to consider larger questions about access to knowledge and consumer rights in respect of information technology products and services – in addition to matters of price discrimination.