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**Submission by
Australian Consumers' Association**

**to
House of Representatives Standing Committee on Legal and Constitutional
Affairs**

Inquiry into the Enforcement of Copyright in Australia

Introduction

The Australian Consumers' Association (ACA) is a not-for-profit, non-party-political organisation established in 1959 to provide consumers with information and advice on goods, services, health and personal finances, and to help maintain and enhance the quality of life for consumers. The ACA is funded primarily through subscriptions to its magazines, fee-for-service testing and related other expert services. Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests.

ACA publishes Computer Choice magazine, which with a subscriber base of over eighteen thousand, is Australia's leading home technology magazine, focussed on family and youth education and advice. ACA also publishes a website (see www.choice.com.au). Therefore, the ACA is actively involved in the electronic domain, and is aware of and informed about many of the issues and dilemmas in the area.

The Australian Consumers' Association does not perceive copyright infringement as one of the most pressing matters of concern in the Australian commercial and consumer landscape.

As a formalised marketplace, Australia is less likely to offer piracy success on the scale seen in other markets. Australia is fairly low on the scale of international piracy, even by the measures of copyright holder advocates, which can generally be discounted as embodying a high degree of self serving economic interest when they portray high levels of such behaviour.

With this caveat, an analysis of Australia's position in the world wide survey by the International Intellectual Property Alliance (IIPA) presents an interesting picture. The IIPA presents an analysis of 64 countries for estimated losses to US based corporations in 1997/98 due to "piracy".

In this analysis (available at URL http://www.iipa.com/html/worldp_piracy_losses.html) Australia performs extremely creditably.

In 1998:

- for video at 4%, lowest in the world
- for business applications (software) at 31% beaten only Germany at 28%
- for audio at 7%, bested only by Spain (5%), Czech Republic (6%), UAE (6%)

The IIPA categorically states that “any country with an audio and video piracy rate in excess of twenty-five percent or a software piracy rate in excess of forty percent has unmistakably failed to structure its copyright laws or enforcement system to deal adequately with piracy”. By this statement and IIPA’s own analysis, the obverse could be deemed to apply to Australia - that our copyright laws and enforcement system are structured so as to deal with piracy with unmistakable adequacy.

The Australian Consumers’ Association (ACA) considers that it is important to distinguish between personal or consumer piracy and systematic commercial fraud or large scale piracy. The word piracy is probably not useful - it is a colloquial expression. Commercial misappropriation occurs when one business takes the intellectual property of another and masquerades it as their own, or misrepresents it’s right to obtain benefit from it. This is a business to business problem, and also a serious problem to consumers when counterfeit items are passed off at the premium price of the genuine article. Consumer copying is another issue which relates more to marketplace behaviour and customer service.

Commercial misappropriation

Commercial piracy is a high risk enterprise. It should continue to be so. Penalties should be fair, proportionate to the offence and enforceable. Effective enforcement has been shown overseas to have an impact on commercial piracy, as reported in the US:

“Recent prosecutions of copyright pirates and the closure of their factories led to a drop in the number of unauthorised recordings during the first half of 1997”, according to the Record Industry Association of America (RIAA).
(Reuters/Variety, 4/9/97, Christopher Stern - <http://www.grayzone.com/1097.htm>)

A viable strategy for dealing with commercial piracy, which would protect the interests of consumers as well as of producers, could include the following proposals:

- cooperation between international law enforcement bodies
- mechanisms for the transfer of ‘intelligence’, about piracy from all levels of the music industry and from consumers.
- make it more difficult for pirated material to enter the Australian market.
- train and educate law enforcement officers, retailers and consumers in the detection of illicit music.
- better legal avenues for identification and punishment of corporate offenders

The ACA agrees that Australia needs to make itself even more difficult for pirates to consider it as a profitable destination.

It is however, important to lay to rest the argument that parallel import restrictions are the best or indeed any form of protection against piracy. There is no convincing evidence of any major increase in commercial music piracy in Australia since the introduction of parallel importation of audio recordings. What trends there are were established in advance of the change. In common with most criminological statistics, numbers on copyright infringement offences are largely enforcement driven. It is quite likely that the attention on piracy generated by the parallel import debate would contribute materially to any increase in reported offences.

Parallel imports of all kinds are legal in America and within the EU, yet consumers do not visibly suffer. On the contrary. Parallel imports increase competition for brand-owners and retailers, which leads to lower prices. Consumers also get more choice. They may prefer to do without after-sales service if it means paying less. When they genuinely value such a service, as added value, unofficial retailers have as much incentive to provide it and therefore compete with official distributors.

Legalising parallel imports of legally copied software or music does not mean allowing in illicit material as well. But the best defence a distributor can mount is to vigorously compete in terms of the value proposition they put to their customers.

The ACA does not accept the link between parallel imports and piracy control. We argue that some countries with open parallel import rules (Japan) have very low piracy rates, while other countries with tight parallel import rules (many Asian and some European countries) have poor piracy control. Likewise, the US, Canada, NZ, and Australia also allow parallel imports, but do not make it into the worlds "top pirate list" drawn up by IFPI (the International Federation of the Phonographic Industry) in relation to music. Indeed at the recent AMRA (Australian Music Retailers Association) national convention discussion on deregulation, industry participants noted that when Hong Kong's open import regime was closed, with the aim of combating piracy, the subsequent level of piracy actually rose. This reinforces the relationship between piracy and the value proposition to the consumer. When economic opportunities arise, pirates will leap to maximise their advantage. What are more important determinants of commercial piracy are enforcement and strength of rules and penalties domestically - where governments and corporations participate in enforcement - than monopoly wholesale trade rights that matters.

Consumer copying

ACA feels that the imperative in the digital economy is not for increasing pursuit of consumers. There is no legal remedy for the uncertainties and demands of the future on-line environment. Smart businesses will ensure they have a relationship to customers strong enough, and a business model of values flexible enough to ensure their survival. Sitting on static property rights is unlikely to meet either of these criteria.

There seems to be considerable business concern about the fate of intellectual property in the digital world. Indeed there is a great deal of uncertainty about where the information revolution is taking us. A natural reaction to change is for people to try to hang on to what they have got of value, certainly before they are persuaded what is coming will be better for them.

It seems to ACA that much of the consumer level 'piracy' or copying is a failure of customer service. The business has failed to communicate well enough with the customers, has not put a sufficiently persuasive proposition to them. What businesses are then doing is putting their business problem onto the consumer.

Problem. How to protect your property rights. Solution. Make the consumer do it or pay for it one way or another. As noted above, restricting imports to designated dealers diminishes choice and increases cost for consumers, and is not effective in containing copying. Various copy protection schemes have been tried at different times and they are universally detested by consumers. By and large not because consumers are dishonest and want to steal from the vendor, but more usually because they get nothing for it.

With copy protection what you do get are problems with installation and re-installation, possible invasions of privacy when you register, difficulties in backing up, impacts on your operation of your equipment, possible clashes between multiple schemes, geographic zone problems etc.

Enforcement by legal means targeted at the consumer only operates at the margins. Law at this consumer level is largely self administered. Enforcement operates at the margins, dealing with the unscrupulous and the criminal, and occasionally with the careless and the ignorant. People deem the legislated rules to be a fair thing and by and large obey them. Australian consumers are generally fair minded and appreciate the importance of paying for legitimate copies of works.

But if bad law is made, the law falls into disrepute, and enforcement becomes a very blunt and inefficient method of achieving public policy.

In the realms of copyright, the digital change requires revisitation of the source of value in intellectual property. In the prior paradigm of information scarcity, the possession of information bestowed value on the holder.

However in the context of information abundance, indeed over-abundance, value lies less in the possession of the information than in other attributes. In the internetworked world which terrifies many copyright holders, the value of their information can be derived from aspects such as timeliness, navigability, authentication, and contextualisation. These collectively could be referred to as the velocity of information. The overwhelming characteristic of the bit-based economy is the increase of that velocity and the increasing irrelevance of static sinks of value. The primary challenge for an information seller in the digital age is how to get noticed.

Successful business models will be those shaped to fit these value parameters. Consumers want information when and where and why they want it. They value the information in terms of proximity to their immediate need. Being able to find, or navigate to information is valuable.

Many people may possess a digital copy of an information source. However, the provenance of that information item is increasingly important. In the world of perfect digital copies, subtle digital alterations can be introduced and may be critical although undetectable in the absence of gross tampering. Therefore, knowing the document is an authentic copy conveys considerable value.

Digital technology facilitates the breaking up of information to a finer level of granularity than taken for granted in the print world. Chapters can be broken out of books, articles out of magazines, paragraphs out of articles, tracks, songs, samples out of CDs. But eventually, the meaning of information is derived from context, so information providers that can retain and manage a flexible and meaningful context for the information under their control will add considerable value for consumers.

The important point is that these sources of value have little to do with the enforcement of copyright and a great deal to do with the recognition of where value lies and conveying that value to the consumer in a marketplace proposition.

In opinion of the ACA, the solution is rather for business to make a commercial proposition to their customer such that either

(a) the customer does not want to pirate, because the sheer benefit of the proposition is overwhelmingly good and the costs of illicit copying (slight legal risk, materials, time, no support etc) are not worth it;

or

(b) their business model is such that copying doesn't matter - speed to market, closeness to consumer trends, additional services provided etc.

The business that does the right thing at the right time, at the right price will be unlikely to have a major headache from consumer copying style 'piracy'.

Summary

In summary therefore, the ACA considers that consumers should be protected from counterfeit goods, imported or otherwise by a fair and proportionate regime of law enforcement which builds on Australia's structured marketplace, low base of "pirate" activity and general environment of fair trade.

The question of commercial misappropriation of intellectual property should not be confused with the issue of parallel importation of copyright or branded goods. The free admission of such items stands to significantly benefit the consumer and does not of itself create additional piracy. Indeed, by improving the consumer proposition for the genuine article, it could be argued that such importation is a useful tool in the fight against counterfeits.

Additional sanctions should not be sought against consumer copying, where education to assist the fight against commercial piracy, market propositions which capture real and immediate value for consumers and good consumer relationships are the keys to containing such behaviour.