



Australian Government
Attorney-General's Department
Civil Law Division

12/14322

17 April 2013

Mr Nick Champion MP
Chair
Standing Committee on Infrastructure and Communications
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Champion

Thank you for your letter dated 27 March 2013, in which you seek further information in the form of a written supplementary submission. During my appearance before your Committee on 13 February 2013 to provide information on copyright-related issues, I also undertook to provide the Committee with some additional information, which is set out below. As requested by the Committee, I also attach the Australian Copyright Council's submission to the Attorney-General's Department's Review of Technological Protection Measure (TPM) Exceptions Made under the *Copyright Act 1968*.

The Trans-Pacific Partnership

Your letter refers to a document made public by US Congressman Darrell Issa which purports to contain text of the intellectual property (IP) chapter of the Trans-Pacific Partnership. This document has not been acknowledged by the US Government as official text. As such, and as the IP negotiations are ongoing, it would not be possible or appropriate for me to address the clauses identified in your letter or speculative comments made by academics on the purported text. The Government supports TPP provisions that protect the IP rights of Australia's creative and innovative industries and that are in line with our existing IP enforcement standards. Our objective is not to change domestic IP laws, but rather to seek a more consistent regional approach to IP enforcement.

Geoblocking

Geo-blocking is a collection of different types of technologies and it is difficult to generalise about how particular technologies would be treated under copyright law. The Department has assumed that where the Committee has used the term geo-blocking, that it refers to a technology that prevents access to a website, or directs a user to an alternative website based on their location. This would include geo-blocking of an IP address to prevent sale or access to content (e.g. Netflix or Hulu), geo-blocking of an IP address to charge different prices (e.g. many international department stores) and geo-blocking by practical means to prevent sale, such as requiring a particular nationality, address or credit card (e.g. iTunes).

A particular geo-blocking technology would only be protected under the Copyright Act if it falls within the definition of an 'access control technological protection measure' in section 10 of the Copyright Act, which would require it to be:

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

Importantly, the relevant provisions in the Copyright Act have not been tested by a court. There are no judicial decisions that provide any further guidance as to whether a particular technology would be considered to be a TPM or not. On the basis of a plain English reading of the definition, the Department considers it unlikely that the technologies discussed above would fall within the definition of an 'access control technological protection measure'. Where a geo-blocking technology is not a 'technological protection measure', the Copyright Act does not prevent a person bypassing that geo-blocking technology.

Some copyright owner interests have stated that they think geo-blocking of IP addresses would not be a TPM:

The Copyright Council submission to the AGD TPM review (attached) states:

The submission of Choice raises the issue of geographic market segmentation through blocking access to IP addresses. We note the Copyright Act already deals with this issue to some extent by excluding devices used to control geographic market segmentation of non-infringing films and computer programs. However, in our view, applying a lock to an IP address, rather than to particular copyright material, is not an access control TPM within the meaning of s 10(1) of the Act.

The Department considers that region coding differs from geo-blocking in an important respect. Region coding generally applies to an individual item rather than a website as a whole. For example, region coding on software is applied to a particular computer program which is protected by copyright. From that perspective, it would be considered to be used in connection with the copyright material. Region coding is also much more likely to be used by or with the permission of the owner or exclusive licensee of the copyright in the material. In contrast, geo-blocking can be used by any retailer, irrespective of whether it is being used by or with the permission of the owner or exclusive licensee of the copyright in the material. The current TPM regime in the Copyright Act incorporates provisions agreed in the IP chapter of the Australia-United States Free Trade Agreement, which were implemented in consultation with relevant stakeholders. The Department is not proposing to revisit the TPM regime in the Copyright Act at this time.

Terms and Conditions of Use

The Department does not undertake assessments of IT product contract terms. Whether Government can offer consumers relief from unfair contract terms is a matter for the Treasury. I refer you specifically to Treasury's response to questions on notice from the Committee received on 4 February 2013 at pages 1-2 which address this question.

Questions on notice

Appropriateness of legislating to prevent use of geo-blocking

Our view is that geo-blocking does not raise copyright issues and the Copyright Act would not prevent the Government from attempting to legislate to prevent the use of geo-blocking. However, the Copyright Act is not the appropriate vehicle to consider any such proposed amendments. Further, before recommending such an approach the Committee would need to be satisfied that such legislation would not introduce adverse or unintended consequences such as having the effect of limiting content available to Australians. This is because any such legislation would only impact geo-blocking used on Australian websites.

Copyright owners often provide an exclusive licence for the sale and distribution of their works within a defined geographic market. For example, the film industry is divided into different geographic markets, with a different distributor in each market, including Australia. In this regard, the use of geo-blocking for the purpose of preventing sale outside a particular market can be a justifiable means for a seller to comply with their own contractual or licence obligations.

Usually, an Australian distributor of products is obliged to implement some form of geo-blocking to ensure they only distribute products within their licence area. For example, the Australian online movie rental company Quickflix utilises geo-blocking to ensure that it only distributes films within Australia, in accordance with their contractual obligations to their suppliers. If a company like Quickflix was legislatively prevented from ensuring they comply with their obligations to only distribute films in Australia, that company is not only likely to breach its contractual terms but will also be severely disadvantaged when negotiating licences for the ongoing distribution of products. A possible consequence of this could be that offshore suppliers may not provide goods to Australia, or there may not be any local distributors, which may ultimately drive up prices for Australian consumers and lead to further online piracy.

Appropriateness of denying copyright protection to products sold on websites utilising geo-blocking technology

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

ADA Submission – e-Books and Libraries

I undertook to provide the Department's view on any ramifications arising from a recommendation made by the Australian Digital Alliance in its submission to the Committee in relation to affirming the rights of libraries in Australia to access e-book materials on reasonable commercial terms.

The Department is aware that this is an issue that is increasingly being faced by libraries. However, the Copyright Act does not prevent e-book publishers from making e-books available to libraries on reasonable commercial terms. The Book Industry Collaborative Council (BICC) established by the Minister for Industry and Innovation, Hon Greg Combet MP, is looking at the issue of the lending of e-books through libraries through one of its Expert Reference Groups.

TRIPS Agreement

The Department of Foreign Affairs and Trade is best-placed to respond to questions from the Committee on the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement).

However, in referring to Article 8 ("*appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders*"), the Committee sought clarification as to the definition of 'abuse' in this context.

To assist the Department in responding to the Committee, the Department of Foreign Affairs and Trade has provided the following information:

There is no definition of "abuse" in the TRIPS Agreement. However, Article 40.2 of the Agreement provides examples of licensing practices or conditions "that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market". The examples include exclusive grantback conditions, conditions preventing challenges to validity and coercive packaging licensing. A WTO Member may adopt, "consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices ... in the light of the relevant laws and regulations of that Member".

Trans-Pacific Partnership Agreement

The Department of Foreign Affairs and Trade previously informed the Committee that Australia has raised the issue of IT pricing in the Trans-Pacific Partnership Agreement negotiations. I can confirm that AGD has been consulted on this.

IP Exemption under Trade Practices Act

The Department is not aware of any evidence that the provision referred to by the Australian Competition and Consumer Commission (i.e. subsection 51(3) of the *Competition and Consumer Act 2010* (the CCA)) is being used by content owners to charge different prices to Australian consumers through engaging in conduct that would otherwise be anti-competitive if subsection 51(3) did not exist.

However, the Department notes the ACCC's evidence provided to the Committee. I further note that the ACCC also raised this issue in their submission to the Australian Law Reform Commission's Copyright and the Digital Economy Inquiry. Specifically, the ACCC noted that while IP rights are subject to competition laws in the United States (where there is no such exemption) the nature of those rights has not been eroded. In addition, the ACCC considers that 'the authorisation and notification processes contained in the CCA provide a flexible means for IP rights holders to obtain statutory protection from Part IV of the CCA where public benefits resulting from the conduct outweigh any detriment from the lessening of competition.' The submission specifically refers to copyright collecting societies as an example in this regard.

Australia's obligations under the UN Convention on the Rights of Persons with Disabilities

The purpose of the Convention on the Rights of Persons with Disabilities ('CRPD') is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity.

The ratification of this Convention by Australia reinforced Australia's long-standing commitment to eliminate, as far as possible, discrimination against people with disability. Prior to signing, the Government undertook a national interest analysis in which it determined that Australia's Commonwealth, State and Territory legislation, policies and programs were in compliance with the immediately applicable obligations and substantially achieve implementation of the progressively realisable obligations under the CRPD.

Examples of laws and policies which implement Australia's obligations under the CRPD include:

- the *Disability Discrimination Act 1992 (Cth)* and State and Territory anti-discrimination legislation which fulfils the right to non-discrimination
- the development of a National Disability Insurance Scheme to provide long term, individualised support for people with permanent disability that significantly affects their communication, mobility, self-care or self-management
- Commonwealth, State and Territory Disability Services Acts which provide a legislative and funding framework for a range of specialist disability services, and
- the National Disability Strategy which is a ten year national policy framework aimed at improving the lives of people with disability, their families and carers in six priority areas, such as promoting inclusive and accessible communities (including access to digital information and communications technologies).

Australia's compliance with the CRPD is also monitored by the Committee on the Rights of Persons with Disabilities. Australia is required to report to the Committee every four years.

The Committee asked questions broadly concerned with the mechanisms available to individuals and the Australian Government under domestic human rights and international human rights law to redress disadvantage experienced by people with disabilities.

Domestic

The *Disability Discrimination Act 1992 (Cth)* provides that it is unlawful for a person or organisation to discriminate against a person on the basis of their disability in a range of areas, including in the provision of goods and services.

If an individual believes that they have been unlawfully discriminated against, they can make a complaint to the Australian Human Rights Commission ('Commission'). The Commission has the power to investigate and resolve complaints of unlawful discrimination through compulsory conciliation. If conciliation is unsuccessful, legal proceedings may then be initiated in either the Federal Magistrates Court or Federal Court of Australia.

International

Australia is a party to the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities. The Optional Protocol gives the Committee on the Rights of Persons with Disabilities (the 'Committee') the power to receive complaints from individuals and groups of individuals with disabilities who believe that their rights have been violated under the CRPD.

A complaint to the Committee can only be made against a State party (i.e. Australia) and only after all domestic remedies have been exhausted.

If the Committee considers the individual's complaint admissible, it seeks submissions from the Australian Government and then expresses a view as to whether or not there has been a breach of the CRPD. The findings of the Committee are not legally binding. However, the Australian Government takes the findings of the human rights committees seriously and carefully considers any adverse findings. The Government will respond to any adverse findings of the Committee.

Measures by the Australian Government

The Australian Government can also take measures under domestic and international human rights law to address disadvantage or discrimination experienced by people because of their disability.

Section 45 of the Disability Discrimination Act permits the taking of acts or special measures which are reasonably intended to ensure that people with disability have equal opportunities or to afford people with disability access to facilities, services or opportunities to meet their special needs. Article 5(4) of the CRPD also provides for the making of specific measures 'which are necessary to accelerate or achieve de facto equality of persons with disabilities'. Such measures under both instruments do not constitute discrimination.

In preparing this letter, I have consulted the Treasury, the Department of Foreign Affairs and Trade, the Department of Broadband, Communications and the Digital Economy and the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education.

Yours sincerely

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Civil law Division