



Submission of Associate Professor Kimberlee Weatherall

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The Author

I am an Associate Professor at the Sydney Law School at the University of Sydney, specialising in intellectual property law, in particular on digital copyright and the relationship between domestic IP law and international trade and other agreements. I have written and spoken extensively on international agreements relating to IP, including the Australia-US Free Trade Agreement, the Anti-Counterfeiting Trade Agreement and the proposed Trans-Pacific Partnership Agreement.

I make this submission in my own name. I am a member of the board of the Australian Digital Alliance, however this submission is not made on behalf of that organisation nor has it been discussed with that organisation.

I am more than happy to answer any questions that arise from this submission or which otherwise fall within my area of expertise.

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1 Introduction and Executive Summary

The Inquiry is concerned with 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. It is also concerned with the extent and impact of, and reasons for, any such difference, and what actions might be taken to help address differences that operate to the disadvantage to Australian consumers.

This is a hard and frustrating problem. Attempts to address differential pricing through regulation can operate only indirectly: government does not set prices for goods and services like books, movies, or music. And although intuitively, free trade agreements such as that between the US and Australia ought to ensure 'free trade', such agreements are targeted in general at reducing government or regulatory barriers to free trade – not restrictions imposed by private parties.

Government can however take actions designed to increase, or facilitate, competition which can in turn put downward pressure on prices.

My area of expertise is intellectual property (IP) law – one set of regulations that may impact on competition and reinforce (or undermine) strategies involving differential pricing across different countries. This brief submission addresses certain key areas of IP law that have been discussed in the course of the Inquiry: parallel importation rules, anti-circumvention law (law relating to the legal protection of TPMs), copyright law and the visually impaired. In all these areas I touch on both domestic law and Australia's obligations (and prospective obligations) under international treaties.

IP is not the only area of regulation relevant to the issues before the inquiry, and changes to IP law can only be a partial response to differential pricing I am unable to comment on other areas: in particular I am not a competition law expert.

The submission makes the following specific recommendations which the Committee might consider:

Parallel importation

1. That the parallel importation restrictions still found in the *Copyright Act 1968* (Cth) be lifted, and that the parallel importation defence in the *Trade Marks Act 1995* (Cth) be reviewed and broadened to ensure it is effective in allowing the import of genuine goods; and
2. That DFAT adopt the negotiating position, in the TPP and any other negotiations, that Australia will not agree to any restrictions on its ability to lift parallel importation restrictions in IP law.

Anti-circumvention law

1. That the government consider amending the definition of ACTPM in order clearly to exclude all measures used to geographically segment markets. At least, the region-coding exclusion should be extended to all copyright material;
2. That the government ensure that any anti-circumvention provisions in the TPP reflect a better balance between copyright owner and user interests than we saw in the AUSFTA, allow in particular for a broad discretion to make exceptions.

Copyright and the visually impaired:

1. That the Australian copyright exceptions relating to the making of accessible copies for the visually and otherwise impaired be considered for their effectiveness if this has not already occurred in the context of the ALRC copyright exceptions inquiry;
2. That other mechanisms for supporting the creation and dissemination of accessible copies of copyright content be considered on the basis that research suggests present copyright arrangements are not effective;
3. That Australian government representatives promote a binding international instrument in WIPO that will be effective in promoting access for the visually impaired and which does not, in particular, impose complicated procedures that will inhibit its usefulness;
4. That DFAT ensure that any IP chapter in the TPP must leave room for exceptions both to copyright and anti-circumvention law that will enable Australia and other TPP countries to implement exceptions agreed in WIPO to their fullest possible extent.

2 Parallel Importation

Parallel importation restrictions allow IP owners to prevent the importation of goods put on the market in another country by, or with the permission of, the IP owner. Parallel imports, in other words, are not infringements but genuine goods, sold with the permission of the rights holder in the country of export, but imported into Australia without the authority of the Australian rights holder.

Parallel importation restrictions in IP law have only limited and indirect impact on the issues being considered by the Committee. They do not impact, in particular, on issues around downloads (of software, music or movies). Parallel importation restrictions affect only the importation of physical goods (hardware, DVDs etc) by a party intending to sell/commercially distribute the goods.¹ They do not prevent individuals ordering goods and having them shipped to Australia.

¹ Essentially this is because whether or not parallel importation is restricted depends on whether the local copyright law recognizes an exclusive right to import the copyright material: a specific right which Australia can choose whether or not to confer on copyright owners. When dealing with digital downloads, other, core exclusive copyright rights are exercised: the right of reproduction and the right to communicate copyright material to the public. Australia does and must recognize these exclusive rights, which means that in copyright law downloading from overseas is a different legal problem. See eg *Capitol Records, LLC*

Parallel importation restrictions are justified on the basis that they enable IP owners to exploit their rights to best effect (the same justification as applies for IP law generally). They also enable IP owners to charge prices adjusted to local wages and living conditions: for example, to charge a different price in India (where the average monthly earnings in 2012-13 was 5 729 rupees (Aus\$103)) from the price in Australia (where the average monthly earnings was 50 times higher at approximately Aus\$5 500).²

At the same time, particularly in smaller, richer countries like Australia, parallel importation restrictions have long been considered to be a competition issue, because they allow owners of IP-protected material to geographically segment markets and charge higher prices in Australia than in comparable advanced economies.³

Australia has some parallel importation restrictions in place, in particular in relation to books and movies, which could be removed to increase price competition in relation to IP-protected content. Lifting these parallel importation restrictions could have some benefit in enabling Australian retailers to compete more effectively with overseas websites that offer lower prices, in particular where the local wholesale price is considerably higher than the overseas price. If local retailers were able, by sourcing parallel imports, to charge a lower price (closer to cheaper prices being charged overseas) this could, indirectly, put pressure on high prices charged to Australians seeking to purchase online. Whether this would in fact occur would depend on all kinds of qualifications and complications (such as local retailer reluctance to source parallel imported goods in order to preserve relationships with suppliers).⁴

2.1 *Copyright*

No existing multilateral treaty to which Australia is a party requires Australia to restrict parallel importation of copyright material. The TRIPS Agreement explicitly it to individual members to decide whether IP owners have an exclusive right of importation,⁵ as do the various multilateral copyright treaties to which

v Redigi, Inc. (30 March 2013, SDNY), available at <http://www.scribd.com/doc/133451611/Redigi-Capitol>.

² Note, however, that there is evidence that many IP owners, particularly in the entertainment industries, in fact do not make significant downwards adjustments in price in low and median income countries: instead charging prices more comparable to prices charged in high income countries, perhaps to protect their market in high income countries and avoid companies engaging in arbitrage by purchasing in low income countries and importing into high income countries: Joe Karanagis et al, *Media Piracy in Emerging Economies* (Social Science Research Council, 2011).

³ Intellectual Property and Competition Review Committee Final Report (2000), 7.

⁴ This is discussed in the Report of the Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (2011), 162-164.

⁵ TRIPS art 6

Australia is a party.⁶ The Australia-US Free Trade Agreement of 2004 (AUSFTA) does not require restrictions on parallel importation of copyright material.⁷

Australian copyright law currently *allows* parallel importation of computer programs, (s 44E), electronic books and music (s 44F), and sound recordings (s 112D). Parallel importation is otherwise restricted (ss 37, 102), which means that it is not legal to parallel import genuine computer games, films (eg DVDs) or television programs (eg DVD box sets), physical books, plays, artistic works or musical works (eg sheet music).

The Australian government has been advised by inquiry after report after inquiry after report to relax or lift remaining restrictions on parallel importation of copyright material, which restrict competition and impose costs on Australian consumers which are not justified by the incentives provided to Australian creators.

It should also be noted that, as a result of a recent US Supreme Court decision, *Kirtsaeng v. John Wiley & Sons, Inc.* (US Supreme Court, 19 March 2013)⁸ parallel importation of legitimate copyright material from overseas in the US is legal. Thus in this area, Australian law is more protective of copyright owners than current US law.

2.2 *Patent*

Parallel importation of patented articles can be restricted by a patentee. In general, sale in another country of a product protected by patent, by a patentee, without any conditions attached, confers on the purchaser of the product a licence to import the product into Australia. However, the patentee can sell (overseas) subject to a condition that goods not be exported (or exported to Australia) in which case the patentee can prevent import into Australia. If goods are purchased overseas from a licensee, the purchaser only acquires rights equivalent to those of the licensee – thus if the licensee is not licensed to export to Australia, the patentee will be able to stop import into Australia.

This could (if used and enforced by patent owners) affect IT hardware: it is possible for an owner of patents related, say, to mobile telephones, laptops or cameras to prevent parallel importation by commercial parties for sale in Australia. Purchase by an individual for his or her own use from overseas websites with delivery to Australia is legal.

The multilateral treaties to which Australia is a party do not require that Australia restrict parallel importation of patented items. AUSFTA however does require limitations on parallel importation of patented articles where the patentee ‘has

⁶ In particular, the Berne Convention 1886 and the WIPO Copyright Treaty (WCT) 1996 and WIPO Performances and Phonograms Treaty (WPPT) 1996.

⁷ AUSFTA Article 17.4.2, especially footnote 20.

⁸ The decision is available at http://www.supremecourt.gov/opinions/12pdf/11-697_d1o2.pdf.

placed restrictions on importation by contract or other means'.⁹ We have thus committed to keep the law as it currently is. Changing this position would require renegotiation of the AUSFTA.

2.3 Trade mark

Australia is not subject to any international law obligation to restrict parallel importation of trade marked goods. Parallel importation of hardware could also be impacted by trade mark law. The rules relating to parallel importation of trade marked articles in Australia are currently unclear. The Australian *Trade Marks Act* has a defence that applies where a trade mark has been applied overseas with the consent of the trade mark owner (ie, where the goods are legitimate goods).¹⁰ However, recent Australian case law narrowly interprets this concept of consent, so that if a brand owner has licensed the application of the trade mark to goods restricted to sale in a foreign market, that licence will not constitute consent for the licensee to manufacture goods for the Australian market (that is, a position similar to that pertaining in patent law).¹¹ In short, there are ways a trade mark owner can licence and apply their trade marks so as to prevent parallel importation. It is not clear how widely this is appreciated or used by trade mark owners in Australia.

2.4 International negotiations regarding parallel importation

The Committee has already been made aware that there have been proposals to restrict parallel importation made by the US in the current Trans-Pacific Partnership Agreement (TPP) negotiations. A US proposal dated February 2011 and leaked online contained a proposal which would require Australia to provide an exclusive right of importation to copyright owners for books, journals, sheet music, sound recordings, computer programs, and audio and visual works. The leaked US proposal did not include any provisions relating to parallel importation of patented articles, but the patent provisions in the proposal were incomplete and this may have changed.

Because the negotiating texts of the TPP are confidential, it is impossible to know what proposals are still on the table or how other parties have responded. It is also not possible to know whether the *Kirtsaeng* decision of the US Supreme Court has had any impact on the proposals (since under *Kirtsaeng* current US copyright law does not restrict parallel importation in the way envisaged in the original US proposal).

DFAT have stated that their negotiating brief in the TPP is to negotiate provisions on IP that do not extend beyond our present obligations already found in AUSFTA (which would mean no restrictions on parallel importation of copyright

⁹ AUSFTA Article 17.9.4.

¹⁰ *Trade Marks Act 1995* (Cth) s 123.

¹¹ *Paul's Retail Pty Ltd v Lonsdale Australia Limited* [2012] FCAFC 130

or trade mark materials but a commitment to retain existing patent law). At other times DFAT have affirmed that they will not agree to provisions that would require changes to Australian law – if that position were taken, Australia might agree to parallel importation restrictions in copyright for books, sheet music, journals and audio and visual works (ie films). This would be undesirable in that it would prevent Australia from winding pack the current restrictions on parallel importation, consistent with the various recommendations made to government over time.

In my view, DFAT’s negotiating position should be that Australia will not agree to any restrictions on its ability to lift parallel importation restrictions in IP law. This would be a stronger position than either position currently articulated by DFAT, since it would mean not only rejecting any provisions on parallel importation in copyright or trade mark, it would also mean rejecting a provision like that on patent in AUSFTA. This would better preserve Australia’s flexibility to change its current law. Although it might be possible (although difficult) to renegotiate aspects of AUSFTA with the US, if a similar provision regarding parallel importation of patented articles is included in the TPP it will effectively remove any chance of renegotiation and rule out any future change to patent law in Australia. Although restrictions on parallel importation in patent have attracted far less attention than those in copyright law, it is possible they could become more important in future.

2.5 Conclusions on parallel importation

On the basis that parallel importation has the potential to put downward pressure on prices for physical goods, and perhaps indirectly for digital goods, the Committee could recommend:

1. That the parallel importation restrictions still found in the *Copyright Act 1968* (Cth) be lifted, and that the parallel importation defence in the *Trade Marks Act 1995* (Cth) be reviewed and broadened to ensure it is effective in allowing the import of genuine goods; and
2. That DFAT adopt the negotiating position, in the TPP and any other negotiations, that Australia will not agree to any restrictions on its ability to lift parallel importation restrictions in any area of IP law.

3 Technological Protection Measures

Another copyright-related issue which has arisen before the Committee relates to anti-circumvention law and the legal protection of technological protection measures (TPMs). Australian copyright law makes it illegal to circumvent certain (access control) TPMs, to manufacture/provide/transmit a device for circumventing TPMs, or to provide or offer a service for circumventing TPMs (*Copyright Act*, Part V, Div 2A). Circumvention of access control TPMs for a commercial purpose is a criminal offence¹² — a provision that would not impact

¹² *Copyright Act 1968* (Cth) s 132APC.

on individual consumers but could (subject to the discussion below) impact on Australian businesses seeking lower prices for software.

A number of questions have arisen in hearings and evidence before the Committee in relation to anti-circumvention law and TPMs, in particular as this law relates to practices adopted by overseas suppliers to block Australian consumers entirely or divert them to local or Australia-specific, more expensive sites. Broadly, the key questions seem to be:

- Could such ‘geo-blocking’ be banned in any effective way by the Australian government?
- Is circumventing geoblocking prohibited under Australian copyright law?
- If circumvention of geoblocking is (or might be) illegal, is it possible to draft amendments to ensure that Australian consumers who do take steps to evade geoblocking are not acting in breach of the *Copyright Act*, and would such amendments be consistent with Australia’s international obligations?

As a point of general background, the law facilitates geographical division of copyright. Not only is copyright in fact a bundle of national rights (ie a copyright owner starts off with Australian copyright, US copyright, UK copyright etc) which may be separately owned or licenced, but Australian copyright law allows for a copyright owner to divide up their Australian copyright by geographic area: *Copyright Act 1968* (Cth) s 196. This can enable IP owners to exploit their copyright to maximum effect (thus presumably increasing the incentive effect of copyright) and can enable IP owners to charge prices commensurate with local incomes (although note the evidence cited above that this may not happen as effectively as it should).

On the other hand, the scope of copyright law is a matter of economic policy. It is open to the Australian government to take the view that the costs of giving copyright owners strong rights to enforce geographical divisions of copyright outweigh the benefits of any increased incentives. It is a matter for the government whether, on the basis of this cost/benefit analysis, it wants to take steps, consistent with its international obligations, that may enable customers to evade geographical barriers, take advantage of lower prices elsewhere, and hence put some downward pressure on wholesale and retail prices in Australia.

3.1 *Could Australia ban geo-blocking of this kind or otherwise take action against geo-blocking technologies?*

Whether Australia could ‘ban geo-blocking’ is not an IP question and so is beyond my area of expertise.

A number of questions arose during hearings before the Committee asking whether, perhaps, Australia could refuse to provide legal protection to geo-blocking technology. If the question is whether Australia can refuse to offer legal enforcement to geo-blocking, that question is addressed below. If the question was concerned with other legal systems and questions, such as whether Australia could refuse to grant patents on geo-blocking technology, the short answer is no. Australia is obliged to offer patents to all fields of technology without discrimination (TRIPS Article 27.1). Australia can refuse patents for inventions, ‘the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law’ (Article 27.2). Geo-blocking, however offensive and irritating, is not likely to raise issues sufficient to give rise to this exception. In any event, refusing patents to geo-blocking technologies would not prevent their use, and it seems likely there are more than enough incentives for the development of such technologies even without the patent system.

3.2 *Is circumventing geo-blocking prohibited under Australian copyright law?*

The Committee has received evidence from other sources suggesting that the question whether circumvention of geo-blocking is circumvention under Australian copyright law is unclear. I agree.

Determining whether geo-blocking is prohibited turns on deciding whether technologies used to enforce geographical market segmentation fall within the definition of an ‘access control technological protection measure’ (ACTPM) under s 10 of the Australian *Copyright Act*. This is far from straightforward for a number of reasons:

- It depends to some extent on the particular way the technology works. Given that more than one kind of technology could be used to enforce geographical segmentation of markets, we are trying to answer in the abstract a question that could vary depending on the technology;
- It depends on how Australian courts interpret the provisions of the *Copyright Act*. There have been no cases so far on the meaning of an Access Control TPM (ACTPM) or on how the anti-circumvention provisions should be interpreted following their amendment in 2006.¹³
- The language of the definition is complicated and opaque.

The difficulties may be illustrated by some attempt at application of the law. An ACTPM is defined in the *Copyright Act* as:

¹³ Earlier High Court authority on the law preceding the 2006 Amendments suggested that anti-circumvention law should be narrowly interpreted: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193. However, that case concerned older law and the approach the Court would take might be influenced by the fact that the legislature deliberately broadened the reach of anti-circumvention law following the High Court’s decision (albeit only because required to do so by AUSFTA).

- 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*
 - (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.*

It seems unlikely that requiring a US credit card or US mailing address could ever be considered an ACTPM: such measures are too distant from the exercise of copyright rights. However, another form of geo-blocking technology that has been discussed in the Committee is filtering website visitors on the basis of IP address, and blocking or diverting visitors who have an IP address that is identified as being Australian.

A filtering system of this kind would appear to fall within the broad concept of a 'device, product, technology or component (including a computer program)'. Does it 'control access to' the copyright material? That may depend on the way filtering is implemented and how the phrasing is interpreted. Does the filtering control access to particular copyright content (for example, can you browse the website of the BBC but when you click on a particular video it refuses to show it to you)? If so perhaps it does control access to as envisaged in the definition. But what if the filtering technology simply diverts an Australian visitor to a dedicated Australian site where the same content can be viewed but a different price is charged? Is it now 'controlling access to' the content or merely managing web traffic (after all, access can still be obtained to the same material, just in a different way)? Is it sufficient that the measure 'controls access to' the copyright content on the website as a whole (eg, the text and pictures on the home page) or does the technology have to control access to some particular item (such as a software download)? A further issue arises whether a measure to 'control access' must determine whether access can be obtained at all, or whether it is sufficient that it creates differentiated access (eg, for different prices or from different sites). These are questions of legal interpretation for which we have no guidance from the legislative history or court decisions.

Even if we are satisfied that the technology controls access to copyright material, it is still unclear if it is being ‘used in connection with the exercise of the copyright’. According to the Explanatory Memorandum of the *Copyright Amendment Act 2006* (Cth) which introduced the definition, a measure is used in connection with the exercise of copyright ‘when a measure is applied to a work by a copyright owner where they are communicating the work to the public’ – which presumably is the case when a copyright owner has placed material (the website, or downloads) online and where the technology affects who can receive a communication of the copyright content. But again, it is not entirely clear whether the use of the measure must be related to the enforcement of copyright (for example by preventing access altogether without payment) or just connected to an act that constitutes a copyright owner’s exclusive right (although some phrasing in the Explanatory Memorandum suggests the former).

If we are satisfied that these aspects of the definition apply, and it is prima facie an ACTPM, we would also have to be satisfied that it is not excluded by the removal of devices etc that ‘control[] geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia’. Since this exclusion was written with physical DVDs subject with region-coding, it is not well-suited to the situation of online IP address filtering. This is obvious through the use of terms such as ‘playback’ and the requirement that matter be ‘acquired outside Australia’. Suffice it to say that in many cases such IP address filtering would likely not ‘prevent playback’ of a ‘non-infringing copy’ (the language seems inapt for streaming or first download), nor is it clear that material being viewed online or downloaded from a website would count as being ‘acquired outside Australia’.

There are further layers of uncertainty. *Liability* for circumvention requires that an individual ‘knows, or ought reasonably to know’ that their conduct will result in circumvention of an ACTPM. Knowledge might depend on the way a person operates: if they adopt technology that will always indicate they are from the US whatever they do online, they might be generally aware some ACTPMs will be circumvented, but are they fixed with sufficiently specific knowledge for liability in any given circumstance?

Officials from the Attorney-General’s Department have given evidence that geo-blocking technologies are not TPMs or ACTPMs. Similarly the Australian Copyright Council has stated in a submission to the Attorney-General’s Department that ‘applying a lock [*sic* – perhaps should be ‘block’] 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.’¹⁴

I agree that these interpretations are open and perhaps consistent with legislative intention, although it is not clear that situations such as that being discussed were

¹⁴ Submission of the Australian Copyright Council to the Attorney-General’s Department, *Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968* (Cth), Round 2 Submission, available at <http://www.ag.gov.au/Consultations/Documents/AustralianCopyrightCouncilsubmission2.pdf>.

considered specifically by the legislature. They are also arguably consistent with the past approach of the High Court to anti-circumvention law, which has been to give such provisions a narrow interpretation.¹⁵

Nevertheless, given the breadth of the concept ‘access’, and the fact that copyright rights are exercised whenever an item is viewed online or downloaded, and that material on a website (including pictures, text, and underlying code) are all copyright-protected material, ‘access’ to which is ‘controlled’ by an IP address block, there is some risk that such technologies do fall within the concept of an ACTPM. Further, even such evidence as the Attorney-General’s Department officials or the Australian Copyright Council have given appears to be confined to technology that is *only* used for geo-blocking. It is unclear how courts would apply the legislation to technologies that serve a ‘dual purpose’ of controlling the exercise of copyright rights *and* enforcing market segmentation.

I am aware that I am raising more questions than I am answering. The point is that the law in this area is plagued by uncertainty. Thus submissions suggesting that the legal status of circumvention of geo-blocking mechanisms is a grey area are correct.

One final point is worth making: Australia currently excludes from the definition of ACTPM technologies for region-coding of DVDs and computer games. With the rise (subsequent to these amendments in 2006) of e-books in particular and the potential for region-coding to be applied to e-books, it seems to me that, at the very least, the existing exclusion should be extended to any form of copyright material.

3.3 *Is it possible to draft amendments to ensure that Australian consumers who do take steps to evade geo-blocking are not acting in breach of the Copyright Act?*

In my opinion it would be possible to draft an exclusion to ensure that Australian consumers who take steps to evade technical measures used to enforce market segmentation on the basis of geographical location are not at risk of infringing the *Copyright Act 1968*. Such measures should be excluded from the definition of ACTPM. This would protect consumers, although individual consumers are unlikely to be sued. More importantly it would have the effect of ensuring that commercial providers of services for evading geo-blocking do not risk liability under the *Copyright Act 1968*: either civil liability under the manufacturing or services provisions of anti-circumvention law,¹⁶ or accessorial liability for assisting others to undertake a criminal act.

I have read in draft a submission made by the Australian Digital Alliance regarding possible drafting options. I agree that the drafting options set out in that submission could be adopted consistent with Australia’s international obligations

¹⁵ See above n 13.

¹⁶ *Copyright Act 1968* (Cth) ss 116AO, 116AP.

and would have the effect of removing any doubt (as outlined above) regarding the potential liability of consumers for circumventing geo-blocking technology.

Given the breadth of the domestic discretion under the WIPO Copyright Treaty, the question of international consistency arises under the more specific obligations of AUSFTA. In my view, an exclusion of measures used to enforce geographic market segmentation is not inconsistent with article 17.4.7 of AUSFTA. Australia is required to impose liability on a person who ‘knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter’. However, that obligation is included 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’ – that is, it is connected to the enforcement of copyright. As noted by then Trade Minister Vaile at the time AUSFTA was negotiated, the provisions are designed to assist copyright owners to enforce copyright and target piracy, not to stop people from doing legitimate things with legitimate copyright material.¹⁷

I note that officials from the Attorney-General’s Department suggested in an earlier hearing of the Committee that drafting an exclusion could have the unintended effect of suggesting that prior to the exclusion such a measure was within the definition of an ACTPM and have the more general effect of broadening the definition. There are drafting options to avoid this impact, including noting, either as a legislative note or in the Explanatory Memorandum or in the legislative text that the exclusion is inserted ‘for the avoidance of doubt’. In addition, the fact that there are *already* certain exclusions from the definition in s 10 means that the law may *already* be broader than might have been originally intended.

Legislative drafting is a complex matter and I would expect that any amendment would be subject to further feedback, and discussion, during the legislative drafting process; there may be reasons to prefer or amend the drafting options already before the Committee. The point at this stage is that I believe the existing exclusion, tailored to the region-coding of DVDs, could be broadened to clarify the law.

3.4 *What is the potential impact of the TPP on anti-circumvention law?*

As noted in the first submission made by the Australian Digital Alliance, the US initially proposed in the TPP to include anti-circumvention provisions which would be more stringent than those agreed to in the Australia-US Free Trade Agreement. Even the provisions in AUSFTA were considered by a Committee of

¹⁷ House Standing Committee on Legal and Constitutional Affairs, *Inquiry into technological protection measures (TPM) exceptions*, Final Report (March 2006),

Members of Parliament to be seriously problematic, with aspects that verged on absurdity.¹⁸

Because the negotiating texts of the TPP are confidential, it is impossible to know what proposals are still on the table or how other parties have responded.

In my view, the usual stance of DFAT that Australia will negotiate provisions consistent with existing law and international obligations is unsatisfactory, particularly in this area. Locking in absurd provisions at a regional level would be a very undesirable outcome. Australia should certainly not agree to provisions more stringent than those in AUSFTA, but given the flaws in that Agreement, Australia should seek provisions that more clearly reflect the balance between copyright owner and user interests in copyright law – modelled on the more open-ended provisions of the WIPO Copyright Treaty.

3.5 *Conclusions on anti-circumvention law*

Clarifying the law concerning circumvention of ACTPMs is, again, only a partial answer to the issues before the Committee, but it could clear up a grey area, which could have an impact in particular on businesses which wish to offer technologies or services for circumventing ACTPMs. This will not actually prevent geo-blocking but will perhaps encourage the rise of services for circumvention which may indirectly discourage geo-blocking and/or differential pricing. The Committee could therefore recommend:

1. That the government consider amending the definition of ACTPM in order clearly to exclude all measures used to geographically segment markets. At the very least, the region-coding exclusion should be extended to all copyright material;
2. That the government ensure that any anti-circumvention provisions in the TPP reflect a better balance between copyright owner and user interests than is found in AUSFTA, and in particular allow for a broad discretion to make exceptions.

4 *Copyright and the Visually Impaired*

The Committee has received evidence regarding the disproportionate impact of some price differentials on access to cultural materials for the visually impaired. Access for this part of the population is a very significant issue. Disability Discrimination Commissioner, Graeme Innes has estimated 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%.

The issues outlined above relating to price differentials across regions appear, according to evidence from ACCAN, to have a significant impact on the visually impaired. It should be noted that the various ‘fixes’ referred to above depend on

¹⁸ Ibid [3.118].

the indirect effect of competition or circumvention putting pressure on suppliers to decrease prices. It seems doubtful that such indirect measures are going to work for highly specialised forms of software (or hardware) such as those used by the visually impaired. Other solutions may therefore be necessary such as policies of IT procurement (as discussed by ACCAN), subsidies or other such measures.

Copyright exceptions have some impact on the availability of copyright material (such as books) in accessible formats. The copyright provisions referred to below impact on the availability of accessible books and similar, not the availability, at a reasonable price, of specialised software or hardware used by visually impaired persons to access content.

This submission is not the place to delve into exhaustive detail on the issues around Australian copyright law and the visually impaired. A number of short points are nevertheless worth making.

First, published research suggests that Australian copyright law does have a system to allow the making of copies for the visually impaired – a system which although framed as a statutory licence (for which remuneration may be payable) presently involves no charge to the organisation making the copy and has some good aspects such as the creation of a database of accessible copies by the relevant collecting society. The research however also suggests that the system has not been much used and Australia has not developed, to date, the kind of large-scale database of accessible materials as has been seen in the US and Canada (although the work perhaps needs updating).¹⁹ The authors suggest that a combination of funding issues and the complexity of the system may be to blame. If the system is not working to increase accessibility, this suggests that revision of the statutory licence (which may occur in the context of the current ALRC inquiry into copyright exceptions) is needed. It may also be that other steps are needed – for example, using the Legal Deposit system to require publishers to provide accessible copies or copies that can be converted to accessible form (I note that the Legal Deposit system is presently under review by the Attorney-General's Department although these issues were not specifically raised in those consultations).

The details of legal deposit or other possible remedies (such as anti-discrimination law) are beyond my expertise and I offer no further comment on them.

Second, negotiations are currently going on in the World Intellectual Property Organization. The goal of these negotiations is the conclusion of an *International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*. At present, a Diplomatic Conference to negotiate/conclude an agreement is scheduled for 17-28 June, 2013. The draft instrument includes provisions for exceptions to copyright to the making and distribution of accessible copies, and exceptions to anti-circumvention law to ensure that digital 'locks' can be avoided by authorised bodies seeking to make

¹⁹ Nicholas Suzor, Paul Harpur and Dilan Thampapilai, 'Digital Copyright and Disability Discrimination: From braille books to bookshare' (2008) 13 *Media and Arts Law Review* 1.

accessible copies. It also includes provisions to facilitate cross-border provision of accessible copies (ie, if an accessible copy of a book has been made in the UK then it could be provided to an institution assisting the blind in Australia). This last provision in particular could assist in addressing some of the issues before the Inquiry (although unfortunately, over the course of negotiations, the copyright content to which any instrument will apply has been limited to literary and artistic works and does not include music or audio-visual works.

If access on reasonable or equal terms for the visually impaired is to be achieved it is important that these negotiations are successful. It is also important that any gains made in the WIPO negotiations are not effectively negated by provisions in the TPP. In other words, any IP chapter in the TPP must leave room for exceptions both to copyright and anti-circumvention law that will enable Australia and other TPP countries to implement exceptions agreed in WIPO to their fullest possible extent.

Although Australia has been engaged in the WIPO negotiations, I understand in a constructive way, there have been concerning reports in very recent times that the US is adopting a less constructive, narrowing approach to the negotiations that could frustrate its effectiveness. Concerns have been expressed that the coverage of the treaty will be so limited and the procedures it requires so burdensome as to radically reduce the effectiveness of the treaty.

Depending on the timeframe for reporting, it could be useful for the Inquiry to note the negotiations and encourage Australian representatives to push for a useful treaty that will increase access to the world's knowledge and culture for the visually impaired.

Thus on the basis that differential pricing and access disproportionately affects the visually impaired and those with print/reading difficulties, the Committee could:

- recommend the Australian copyright exceptions relating to the making of accessible copies for the visually and otherwise impaired be considered for their effectiveness if this has not already occurred in the context of the ALRC copyright exceptions inquiry;
- recommend other mechanisms for supporting the creation and dissemination of accessible copies of copyright content be considered on the basis that research suggests present copyright arrangements are not effective;
- urge Australian government representatives to promote a binding international instrument in WIPO that will be effective in promoting access for the visually impaired and which does not, in particular, impose complicated procedures that will inhibit its usefulness;
- urge DFAT to ensure that any IP chapter in the TPP must leave room for exceptions both to copyright and anti-circumvention law that will enable Australia and other TPP countries to implement exceptions agreed in WIPO to their fullest possible extent.

4.1 *More general points regarding the TPP negotiations*

A further and final general comment regarding the TPP negotiations is also appropriate. I note that representatives of DFAT gave evidence that they had raised the question of price differentials in the context of the TPP negotiations, asking the question of the negotiating parties whether there were ways this might be discussed in the negotiations and perhaps addressed. I would suggest that the negotiators might usefully look to initiatives in Europe which has been grappling with the need to reduce intra-European barriers to trade including in digital and cultural goods.

This could be useful. What this submission also suggests, however, is that addressing pricing differentials and geographical market segmentation raises issues across a broad range of areas and requires consciousness of the ways that regulations can be changed to impose indirect pressure on private firms to reduce prices. It will not be sufficient to think only in terms of a specific provision or chapter seeking to address pricing differentials. Rather, a consciousness of the issue needs to be brought to a range of negotiating areas, including negotiations on competition law, intellectual property, and e-commerce.