

## **Article for *Copyright World***

### ***Interim report released on competition review of IP laws***

Ian McDonald, Australian Copyright Council, 5 May 2000

As noted in the August 1999 issue of *Copyright World*, the Federal Government has appointed a committee to review intellectual property in light of competition principles.

The Committee published an issues paper in September 1999, and in April 2000 made available an interim report for public comment. The interim report was accompanied by an advice by the Australian Government Solicitor on section 51(3) of the Trade Practices Act, dealing with intellectual property licensing arrangements, and a report by the Australian Institute of Criminology into CD piracy in Australia.

The interim report examines firstly what it terms “major” areas of competition impact (parallel importation, section 53(1) of the Trade Practices Act, and the patent system), and then “other areas” (the Copyright, Designs, Trade Marks and Patents Acts, and trademarks and domain names).

The Committee reported that, at this stage, it had yet to be shown convincing evidence that parallel importation makes a substantial contribution to either the goals of copyright or of the intellectual property system more generally, or that, if it did, these could not be achieved in ways that were more cost-effective. The Committee thus stated its interim recommendation that restrictions on parallel importation in the Copyright Act should be repealed, but that such repeal should only come into effect after a twelve month delay to allow companies to adjust contractual arrangements.

The Committee also made a number of recommendations in relation to section 51(3) of the Australian Trade Practices Act. Under that section, many dealings with intellectual property are exempted from the application of certain aspects of competition and consumer protection law. While the interim report noted that intellectual property has important features that differentiate it from other forms of property, the Committee indicated, *inter alia*, that section 51(3) should be repealed and the relevant intellectual property statutes, including the Copyright Act, be amended “to ensure that a contravention of Part IV of the Trade Practices Act, or of section 4D of that Act, shall not be taken to have been committed by reason of the imposing of conditions in a licence, or the inclusion of conditions in a contract, arrangement or understanding, that relate to the subject matter of that intellectual property statute, so long as those conditions do not result, or are not likely to result, in a substantial lessening of competition”.

The Committee’s interim report also discussed submissions relating to the operation of the Copyright Act in the digital environment, particularly the submissions arguing that the scope of the exceptions within the Copyright Amendment (Digital Agenda) Bill 1999 will damage the development of digital markets, and that therefore these provisions will ultimately lessen competition. The Committee, however, did not accept that the drafting of the Bill, and, in particular, the drafting of the library exceptions, would impede online markets.

Insofar as collecting societies are concerned, the Committee noted concerns expressed to it as to whether collecting societies provide an effective way of distributing funds, particularly under the statutory licensing schemes, and whether distribution was effectively being made to smaller rightsholders. The Committee also expressed support for the Copyright Law Review Committee's recommendation in a draft report on the jurisdiction and procedures of the Copyright Tribunal that *all* licensing arrangements administered by collecting societies (including voluntary licences) should be subject to the Tribunal's jurisdiction. The Committee also stated its preliminary view that, whatever position it finally adopts in relation to section 51(3) of the Trade Practices Act, the activities of collecting societies should be subject to authorisation by the Australian Consumer and Competition Commission.

The Committee also stated that it was inclined to make a number of other recommendations, including that:

- the period of copyright protection not be increased to life plus seventy years as it has been in, for example, the United States and the European Union;
- the Crown ownership provisions be amended to leave the Crown in the same position as, for example, other commissioning parties;
- the 1% fee cap in relation to the amount that broadcasters should pay for the use of sound recordings under section 152 of the Act be removed in relation to commercial broadcasters;
- amendments be considered to reverse the decision in the *Data Access* case insofar as compression tables are concerned (see (1999) 95 *Copyright World* 6)

The final report was due by the end of June 2000. However, we understand that a twelve week extension to the time-frame has been sought and granted.

The interim report, together with copies of the advice by the Australian Government Solicitor on section 51(3) of the Trade Practices Act, and the report by the Australian Institute of Criminology into CD piracy in Australia, are available at the Committee's web site at <http://www.ipcr.gov.au>. Submissions to the Committee will also generally be placed on that site.