including court action, education and consultation, the ACCC helps individuals and businesses comply with the law.

With these priorities in mind and specifically in terms of consumer protection priorities, on 2 June this year [2003] the ACCC and its consumer consultative committee (CCC) launched a campaign that focuses on commercial and business practices that target or seek to exploit disadvantaged or vulnerable consumers. Characteristics that may, for example, suggest disadvantage include: low income, disability (whether intellectual, psychiatric, physical or sensory), illiteracy, indigenousness, homelessness, remoteness or chronic ill-health for example.

The ACCC regards the campaign as an important part of our consumer protection work. While not all disadvantaged or vulnerable consumers will be at risk in all market situations, it is fact that:

- the information asymmetry that is present between almost all consumers and traders is often greater between disadvantaged consumers and traders
- disadvantaged and vulnerable consumers have fewer tools with which to address the problems they may experience in the marketplace—whether through lack of mobility, lack of education, a language barrier or other reason
- unlawful conduct can have a disproportionate impact on this group of consumers.
  For example, a financial loss that may be relatively small for a consumer on an average income may be very significant for a consumer on a low or fixed income.

As we focus on this, it is the case that some unscrupulous players in the marketplace specifically set out to exploit the disadvantage or vulnerability of others. Some examples are unconscionable selling tactics directed at intellectually disabled, impaired or infirm consumers, 'miracle' cures marketed to people with serious or terminal illness, 'wonder, no exercise involved' weight loss solutions and metropolitan car dealers going into indigenous communities and offering unroadworthy vehicles for sale at inflated prices.

This campaign is an important initiative for the ACCC and we are actively investigating several cases at the moment.

So in summing up, I have spent a bit of time on compliance with the Act, and the whys and wherefore of our product safety work and the Act's priorities more generally.

I hope you will also take the long-term view on these issues so that we have a better compliance culture and better society as a result.

Intellectual property rights and competition law—making them co-exist

The following is an edited speech by ACCC commisioner John Martin at the 2003 Taipei international conference on competition policies/laws (The future development of competition framework) in Taipei, Taiwan on 28 October 2003.

Introduction

I would like to address the interaction of intellectual property rights with competition policy. The ACCC, particularly our former chairman Professor Allan Fels, has been influential in the debate and implementation of policy changes in this area. Underpinning my comments is an appreciation that the issues about the appropriate interface between intellectual property and competition laws are complex, and that a fine balance needs to be struck between important and sometimes competing principles.

I frame my discussion in the following way.

- Canvassing some of the conceptual thinking that underpins the notion of intellectual property rights and competition law.
- Discussing the ongoing policy debate in Australia about this complex topic.
- Outlining Australia's competition law, the *Trade Practices Act 1974*, and the role of the ACCC and identifying when the exploitation of intellectual property rights might conflict with Australian competition law.
- Reporting on a recent review of the competition aspects of Australia's intellectual property legislation and the government's response to that review. In particular I will canvass aspects of the government's decision that affect exemptions from the Trade Practices Act, s. 51(3)) and the operation of copyright collecting societies.

- Remarking on parallel imports, which has been a matter of policy discussion for some twenty years. A key issue from the ACCC's perspective is the effect of the removal of parallel importation restrictions on sound recordings in 1998. There has been a recent court case in Australia involving anti-competitive conduct by two major record companies to prevent parallel imports of CDs despite the lifting of legislative bans on such imports in 1998.

I will refer to historical ACCC price surveys which are also relevant to the recent lifting of the parallel importation restrictions on computer software and the continued restrictions that apply to parallel imports of books.

The ACCC has also been keeping a close eye on other recent developments that may affect parallel imports; namely, regional coding of DVDs and Sony Playstations.

Intellectual property rights and competition law

Intellectual property laws encourage innovation by granting statutory exclusive property rights. Without intellectual property laws, third parties might copy the goods produced through the application of intellectual property without making appropriate remuneration, thus reducing the incentives to create further intellectual property.

The possibility of success in the market place, attributable to superior performance, provides the incentives on which the proper functioning of a competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavours, these incentives would be much diminished.

Accordingly, intellectual property laws can contribute to a more competitive economy.

It was once thought that intellectual property laws gave the owners of intellectual property a legal or economic monopoly over a particular piece of intellectual property. This led to concern that the unrestrained application of competition law to intellectual property may undermine the intellectual property rights.

It is now accepted that, because they do not necessarily, or even very often, create legal or economic monopolies, intellectual property laws do not necessarily clash with competition laws because the goods and services produced using intellectual property generally compete in the marketplace with other closely substitutable goods and services.

In most instances, competition and intellectual property laws can be seen as complementary, seeking to promote innovation to the benefit of consumers and the economy. Only in particular cases will there be an apparent conflict between the two underlying policies. This might occur where intellectual property owners are in a position to exert substantial market power or to engage in anti-competitive conduct. In these instances, holders of intellectual property rights may seek to extend the scope of the right beyond that intended by the intellectual property statute.

The key issue therefore is finding an appropriate balance between intellectual property and competition laws. This raises a crucial question about the types of incentives that are needed to encourage innovation.

There are two unresolved aspects to this question: the first is whether providing greater proprietary rewards to the innovator or increasing competition is the best way to spur innovation efforts to the level that is optimum for society. The second is whether society benefits most if it rewards initial innovation through broad intellectual property protection, or if it fosters successive innovations by requiring access to the intellectual property of the initial innovator.

The necessity of patents to promote innovation is based on the agreement that without patents people cannot appropriate the returns to their innovation activity. However, it is a giant 'leap of faith' to the conclusion that the broader the patent rights are, the better it is for innovation.

The fallacy in such a conclusion is that we have an innovation system in which one innovation builds on another. If monopoly rights exist down at the base, this may stifle competition and innovation in markets that use those patents further down the chain. In these instances, the breadth and use of patent rights can be used not only to stifle competition, but also have adverse long-run effects on innovation.

Current interest in these issues arises in the context of antitrust enforcement to prevent anti-competitive combinations of research and development. It also involves newer kinds of intellectual output such as computer software and biotechnology. Intellectual property advocates have questioned whether antitrust

enforcers can make sound judgments without more information about how much competition is necessary to maintain innovation.[2] Future customers, by contrast, have stressed the importance of maintaining innovation efforts to ensure timely, high quality and competitively priced new products.

Strong enforcement of intellectual property rights is appropriate when a patent or copyright has the proper scope. However, innovators in biotechnology and software often receive very broad intellectual property rights that, when combined with strong enforcement, allow intellectual property rights to become tools for anti-competitive conduct.

Finally, there is also debate in the context of networks and the standards that networks require for inter-operability. Here, some argue that the initial innovation that built a network or standard to which access is desired would be deterred if access were required. The counter agreement is that successive innovation will be deterred if access is not required.

In summary, current evidence supports antitrust enforcement that is assertive in maintaining competition as a spur to innovation, yet cautious to avoid unwarranted interference with intellectual property incentives for innovation.

Australian intellectual property policy issues

One general outcome of the Australian policy debate about intellectual property is that there is a great deal of interest in the economic justification for intellectual property laws, an area previously neglected by economists and general policy makers. There has been a particular focus on the justification for statutory restrictions on parallel imports of copyright products.

The ACCC's views will be set out fully in the forthcoming draft intellectual property guidelines discussed later in this paper. The views expressed in my paper are only preliminary.

Australian competition law and the role of the ACCC

To put my comments in proper context, I will make a few comments about Australia's competition law and the role of the ACCC.

The ACCC is empowered by the Trade Practices Act which is the federal legislation that applies to the market behaviour of business entities. The objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and providing for consumer protection.

Intellectual property rights and the Act

The Act takes specific account of intellectual property rights and establishes an interface between those rights and conduct prohibited under the Act. In particular, s. 51(1) makes it clear that anti-competitive conduct permitted under IP legislation is not exempt from the Trade Practices Act.

But this is qualified by s. 51(3).

Section 51(3) of the Act exempts conditions of licences and assignments from agreements that substantially lessen competition (s. 45), exclusive dealing (s. 47) and mergers that substantially lessen competition (s. 50) to the extent that they relate to the subject matter of the relevant intellectual property, or, in the case of trade marks, only to the extent that they relate to the kinds, qualities and standards of goods bearing the trade mark.

Part IIIA of the Act establishes an access regime regarding essential services. However, intellectual property is exempted from this regime.[3] This means that the access regime embodied in Part IIIA cannot be used to address situations where an owner or holder of an intellectual property right refuses to license the intellectual property for an anti-competitive purpose.

The Act will generally not require an intellectual property owner to license the intellectual property to another party. However, if certain intellectual property rights limit competition in a market, the refusal to license such rights might have an anti-competitive effect in certain circumstances. Similarly, a refusal to disclose confidential information relating to a product may also inhibit competition.

Many businesses are engaged solely in servicing another's product or in providing additional products or facilities to be used in conjunction with that primary product. If the manufacturer refuses to disclose information enabling competitors to supply, say, spare parts, or in the case of computer equipment, to interface components that provide additional facilities, competition in these dependent or subsidiary industries may be restricted. As such, refusal to license may infringe the section of the Act (s. 46) which deals with the misuse of market

[2] For a discussion of the dynamic issues associated with this debate see Michael E Porter, 'Competition and antitrust: towards a productivity based approach to evaluating mergers and joint ventures', *Antitrust Bulletin*, Winter 2001.

[3] In s. 44B the use of intellectual property is excluded from the definition of 'service' for the purposes of Part IIIA of the Trade Practices Act.

power.

Section 46 prohibits a business that has a substantial degree of power in a market from taking advantage of that power to eliminate, damage or restrict existing or potential competitors. Intellectual property rights have the potential to provide their holders with the means to achieve one or other of these ends. However, in all cases, conduct would only be prohibited by s. 46 if it was engaged in by an owner taking advantage of its substantial market power for one of the proscribed purposes.

Aside from a blanket refusal to license, licence terms and conditions may be applied to anti-competitive effect. A licence or assignment of intellectual property rights may make it possible for an owner to restrict the extent to which a licensee is able to compete with the owner or other right-holders. It is also possible for the owner to restrict competitive supply by third parties to the licensee. Provisions that substantially lessen competition may infringe s. 45 (unless exempted). Those that are imposed to deter or prevent an agent from engaging in competitive conduct may infringe s. 46.

The forms of such restrictions can be varied and could include: exclusive licensing; territorial restraints; price or quota restrictions; quality or minimum royalty/quantity requirements; sub-licensing restrictions; no challenge and non-competition clauses and leveraging.
The competitive impact of these restrictions depends on the characteristics of the market in which the licensing occurs and/or has effect.

Sometimes, owners of intellectual property rights may wish to pool their rights with those of other owners, maybe even their competitors and sell collectively the pooled intellectual property rights for a single price. Alternatively, intellectual property owners may wish to cross-license their intellectual property with that of another owner. In many, if not most instances, these pooling and cross-licensing arrangements facilitate access to, and the exploitation of, the intellectual property. So, in the main, they are pro-competitive. However, competition concerns may arise if the arrangements are used to exclude competitors in a market, or to raise prices in the direct or related markets.

Review of Australian intellectual property and competition law

In June 1999 the Australian Government established the Intellectual Property and Competition Review Committee (IPCRC) to review the competition aspects of intellectual property legislation in Australia.

The committee issued its final report in September 2000, and made a series of recommendations to change Australia's intellectual property laws, thereby improving the balance between those laws and competition policy.

The committee also made some recommendations for changing the way that the Trade Practices Act applies to intellectual property licensing and assignment, and suggested a role for the ACCC in the negotiation of terms and conditions of copyright licensing by copyright collecting societies.

In August 2001 the government announced its response to the final report. In the main, the government decided to accept most recommendations.

I will focus on the exemptions provision s. 51(3) of the Act and the ACCC's role in the activities of copyright collecting societies as these are of particular relevance and interest to us.

In passing, though, I would note that the government also decided to:

- add a competition test to the existing tests as an additional ground on which a compulsory licence for a patent can be obtained[4]
- amend the Copyright Act to allow decompilation of computer software for interoperability[5]
- retain the existing term of copyright protection
- amend the assignment provisions of the Trade Mark Act to prevent an assignment being used to prevent parallel importation of legitimately trademarked goods.

Refining the exemption provisions s. 51(3) of the Act

The Australian Government accepted the committee's view that intellectual property rights should continue to be accorded distinctive

[4] The IPCRC recommended that the Australian Competition Tribunal consider an application for compulsory licence in the first instance.
The government considered that all applications for compulsory licences should be considered by the Federal Court in the first instance.

[5] Implemented by *Copyright Amendments (Computer Programs) Act 1999*.

treatment under the Act. Section 51(3) will be amended so that intellectual property licensing would be subject to the provisions of Part IV, but a contravention of the per se prohibitions of ss. 45, 45A and 47 or of s. 4D would instead be subject to a substantial lessening of competition test. This largely reflects the committee's recommendation.[6]

The ACCC believes that this decision is a large step forward as the amendments will expose intellectual property licensing and assignment to the strictures of the Act to a greater extent than is currently the case. However, the ACCC remains of the view that intellectual property should be fully subject to Part IV of the Act, as are other forms of property.

To reduce uncertainty among intellectual property holders and their advisers as to how the ACCC will enforce the new provisions, the ACCC will issue guidelines outlining its enforcement approach to Part IV as it applies to intellectual property.

The guidelines will define:

- when intellectual property licensing and assignment conditions might be exempted under s. 51(3)
- when intellectual property licences and assignments might breach Part IV
- when conduct that is likely to breach the Act might be authorised.

The government expects the ACCC to consult with interested parties in the preparation of these intellectual property guidelines.

We expect to release the draft intellectual property guidelines over the coming year and call for public comment before finalising it.

While I expect that the guidelines will help to reduce uncertainty about the ACCC's enforcement approach on intellectual property licensing and assignments, I would like to stress two points.

First, the guidelines will outline the ACCC's enforcement approach and provide guidance as to when the ACCC is likely to take action against a potential breach of Part IV. However, as with all actions taken under the Act, it will ultimately be for the courts to determine whether there has been a breach.

Secondly, the guidelines will not provide any assurance that intellectual property holders will not be subject to private action for licensing and assignment conditions that may appear unlikely to breach the Act on the basis of our intellectual property guidelines.

Copyright collecting societies

Copyright collecting societies are an administratively efficient way for copyright owners to enforce their intellectual property rights and to collect and distribute copyright licence fees. However, as monopolies, they give rise to potential competition concerns including the potential abuse of market power to extract high licence fees from users.

While there is currently uncertainty about the scope of the s. 51(3) exemptions, the ACCC nevertheless has some experience in assessing the potentially conflicting competitive and efficiency effects of copyright collecting societies. In 1997 the Australasian Performing Rights Association (APRA) applied for authorisation of its input and output arrangements, involving exclusive licensing of copyright works by composers to APRA (the input arrangements) and the provision of blanket licences by APRA to users which enable users to broadcast the entire APRA repertoire (the output arrangements), its distribution arrangements and overseas arrangements. The ACCC took the view that there were both costs and benefits associated with the collective licensing of musical works. The ACCC considered that a better balance could be struck between the costs and benefits of the scheme if it allowed for direct dealing and blanket licence fees were appropriately adjusted. APRA would not agree to amend their licensing arrangements to meet the ACCC's requirements, therefore authorisation was denied for all but the overseas arrangements.

This decision was referred to the Australian Competition Tribunal for review. After reviewing the evidence, the tribunal considered that if APRA's input arrangements were modified to allow for the introduction of a non-exclusive licence-back scheme and a simplified dispute resolution scheme was introduced, authorisation should be granted for the applications which were not authorised by the ACCC. The matter was adjourned to allow APRA an opportunity to devise a non-exclusive licence-back scheme and a simplified dispute resolution scheme. On 20 July 2000 the tribunal made a determination granting authorisation to APRA, endorsing the agreed dispute resolution procedure and non-exclusive license-back scheme.

[6] The IPCRC recommended that an IP licensing or assignment condition should not breach Part IV of the Trade Practices Act unless it substantially lessens competition.

The tribunal also set aside the ACCC's notice under s. 93(3) to revoke the authorisation.

Returning to the review of intellectual property laws, the government accepted the IPCRC recommendation that the existing powers of the Copyright Tribunal to review output arrangements of declared collecting societies, which are licensing arrangements between the society and users or potential users of the copyright material so administered, be extended to cover the output arrangements of voluntary collecting societies not administered under a statutory licence. The government also outlined a role for the ACCC regarding the extension of the Copyright Tribunal's powers.

The ACCC will be required by statute to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration for copyright holders in negotiations between societies and users of copyright material.

The main purpose of the guidelines would be to facilitate licence negotiations and minimise recourse to the Copyright Tribunal for a determination. If negotiations failed and one or other party applied to the tribunal for a determination, recourse to the tribunal would not be restricted in any way. The ACCC's guidelines would be advisory, not determinative.

The *Copyright Act 1968* will be amended so that the Copyright Tribunal has the discretion to take account of the guidelines and to admit the ACCC as a party to tribunal proceedings.

The ACCC welcomed the government's decision as a means of improving the balance between the costs and benefits associated with collective licensing and therefore reducing the potential for such licensing to have anti-competitive effects.

Parallel imports

I now turn to the issue of parallel imports, which in Australia, has been a long and involved debate.

As background, the Copyright Act originally prohibited parallel imports except for personal use. In 1983 the question of whether the importation provisions of the Copyright Act should be reformed was referred to the Copyright Law Review Committee. It reported in 1988 but felt unable to evaluate the conflicting claims about the likely consequences of reform for prices. It was, however, concerned about problems in the availability of some copyright product, in terms of delayed release and range of products.

The report of the Copyright Law Reform Committee was followed by work by the Prices Surveillance Authority (PSA), which most notably investigated the prices of books, recorded music and computer software.

While availability was still an issue, particularly about books and to a lesser extent sound recordings, the PSA's main focus was on international price discrimination. It found that Australia was paying higher prices for all these products than consumers overseas, particularly in North America and that this was the result of the parallel import restrictions.

Changes to the law

In 1991 the Copyright Act was amended to allow limited parallel importation of books. Parliament then repealed the restrictions on parallel importing of sound recordings in 1998. It also amended the Copyright Act to prevent copyright in labels and packaging being used to control parallel importing of products with such labels and packaging.

In 2003 the government further amended the Copyright Act to allow parallel importation of computer software.[7] Parallel imports of the majority of book categories continue to be restricted.

Parallel importing of sound recordings

The removal of the restrictions on parallel imports of sound recordings in July 1998 has been the most well known recent development in Australian copyright law. Since there has been so much heat and noise generated over this issue, it is appropriate to review what has happened since the passage of the legislation.

Court cases

The ACCC has been successful in a very significant case in the Federal Court on the parallel importation of CDs. It was found that certain record companies engaged in anti-competitive conduct to discourage or prevent Australian businesses from selling parallel imported compact discs.

On 22 August 2003 the court handed down its decision. The court upheld that Warner and Universal had breached s. 47 of the Act and engaged in exclusive dealing when responding to the parallel importation of music by small business. In their judgment, the Full Court stated: 'Although short-lived, the purpose of that conduct was to snuff out the emergence of a form of competition opened up in the interests of consumers by the amendments to the Copyright Act'.

[7] *Copyright Amendment (Parallel Importation) Act 2003.*

The court did not affirm a breach of s. 46 although it did further clarify the law regarding misuse of market power.

The court increased the total penalties payable by Warner, Universal and company senior executives to a total of more than $2 million. (This case is covered in Journal 47.)

This case illustrates the point that the ACCC has a strong bias, not towards imports, but towards increased competition. In the sound recordings market, this means allowing music product legally produced and marketed overseas to be available to Australian consumers. This has already improved the supply side of the market with tangible benefits to music consumers, and few, if any, negative effects elsewhere.

Price surveys

Until recently the ACCC conducted periodic surveys of CD prices in specialist and non-specialist music stores in Australia. These surveys were not intended to give a comprehensive indication of actual prices, price movements or comparisons with overseas prices. They were, however, a useful guide to how the music industry was coping with deregulation.

The last survey was conducted for the September 2002 quarter. The ACCC found that the average tax-exclusive retail price in September 2002 was $2.02 or 7.9 per cent less than the tax-exclusive price that prevailed immediately before deregulation.[8] The ACCC's surveys indicated that average nominal tax-exclusive top 40 prices have been lower at all times post-deregulation than the price prevailing immediately before deregulation. The surveyed average tax-adjusted Australian price for September 2002 was 17.2 per cent **lower** than the surveyed tax-adjusted US price and 28.1 per cent **lower** than the surveyed tax-adjusted UK price, but 12.9 per cent **higher** than New Zealand's tax-adjusted surveyed price.[9]

The ACCC's surveys confirmed that Australian nominal tax-adjusted prices (excluding the impact of the switch to the New Tax System which was expected to cause a fall in retail prices of CDs) have, in fact, fallen since deregulation despite the upward pressures exerted by general inflation and the exchange rate. In September 2002 average Australian tax-free retail prices were $5.72 or 19.3 per cent lower than would be expected if CD prices had risen in line with inflation of 14.2 per cent since August 1998.

Apart from price effects, we have also seen attempts by Australian suppliers to differentiate their product from imported supplies. Australian-made product is now often enhanced by the inclusion of a CD ROM feature, foldout booklets, bonus tracks or bonus CDs. This is good, but the ACCC is still interested in seeing head-to-head competition—it may be that consumers want the standard music product at reduced prices instead of the enhanced product at higher prices.

Only market competition can resolve this.

Retailers have reported that advertising and promotional spending is continuing and the indent services provided by producers have improved. Very little has been heard about damage to artists' incomes from parallel imports. Few Australian artists sell their music overseas, so it was no surprise that this did not become an issue. While the industry predicted rampant piracy, the available reports are that the incidence of piracy is low and arises mainly from Australian and electronic sources. This latter point even seems to be conceded by the industry.
I note that Mr Michael Speck, manager of Music Industry Piracy Investigations, has been reported as saying that in the past 18 months there has been a shift in music piracy away from industrialised techniques to using PCs.[10]

I note also that Universal Music Group has recently announced that it will reduce the wholesale price of CDs by up to 25 per cent in the US and Canada. This is reportedly in response to declining sales because of a switch to electronic distribution of music.[11] The ACCC would hope that this price cut is delivered to Australian consumers of CDs.

The situation continues to evolve but these are all important developments.

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[8] Taxes are excluded because in August 1998, sound recordings were subject to a wholesale sales tax whereas current prices are subject to a GST. Tax-inclusive prices from August 1998 to the present are therefore not directly comparable. Furthermore, the retail price of CDs was expected to fall because of the New Tax System (NTS). Removing taxes from the historic price comparison removes the price effect of the NTS.

[9] Using 3-month average exchange rates.

[10] Kirsty Needham, 'Escapologist Williams ducks CD pirates', *Sydney Morning Herald*, 16 November 2002, p. 3.

[11] Kirsty Needham and agencies, 'CD prices tumble—now that's music to your ears', *Sydney Morning Herald*, 5 September 2003.

Parallel imports of books and computer software

By way of background, in December 1998 the government asked the ACCC to report on the potential consumer benefits of repealing the importation provisions of the Copyright Act as they apply to books and computer software.

The intention was to provide the government with up-to-date and rigorous comparisons between book prices and computer software prices in Australia and those prevailing overseas.

The ACCC also considered the likely impact of an open market on producers, distributors and retailers of books and computer software.

The ACCC identified that the likely benefits of repeal included lower prices and improved availability of these products. We noted that the importation provisions grant an import monopoly to the local copyright holder, which cut out competitive supply channels.

Books

In 1989 the PSA found that the lack of international competition in the book trade had resulted in price discrimination, poor availability and high costs.

Following the release of this report, amendments were made to the Copyright Act in 1991 which enabled copyright holders to retain exclusive distribution rights provided they can guarantee supply within a specified time frame.

The PSA was asked by the government to monitor and report on the effects of the 1991 reforms on the price and availability of books.

In 1995 the PSA held a full public inquiry.

It concluded that, while the 1991 amendments had resulted in an improvement in distribution efficiencies and improved the speed with which most new releases became available in Australia, prices of some books continued to be high relative to overseas, particularly in the technical and professional and mass market paperback areas.

Booksellers had also found the 1991 amendments difficult and costly to implement.

The PSA considered that only an open market, with no restrictions on parallel imports, could deliver competitive prices over the long term and overcome the administrative difficulties inherent in the 1991 reforms. The PSA recommended that the importation provisions be repealed in full, or as a fallback position that the 1991 reforms be simplified and streamlined.

In 2002 the Australian Government introduced a bill to amend the Copyright Act to allow for parallel importation of books and computer software.
In 2003 the bill was passed. However, following amendments to the bill, restrictions on the parallel importation of books were not lifted. The ACCC is disappointed with this result, particularly as our book price comparisons, updated in anticipation of the parliamentary and public debate associated with the Bill, demonstrate that:

- for the 14 years from 1988 to June 2002, Australians have been paying, on average, 41.9 per cent **more** for best selling paperback fiction than US readers, and 7.3 per cent **more** than UK readers[12]
- for the period 1994 until June 2002, Australians have paid on average, around 16.5 per cent **more** for all best sellers than US readers[13]
- Australians paid, on average, 8.5 per cent, or $27 **more** than US readers in May 2002 for certain medical titles and 9.1 per cent **more**, or $31, than readers in the UK.

The findings indicate that there are still substantial differences in the sectors that have consistently been highly priced in Australia, namely best selling paperback fiction relative to the US, and technical and professional book titles. This suggests that there would be immediate gains from parallel importing for consumers in those areas. Some books in Australia are currently priced competitively with their overseas counterparts. For those books, repeal of the importation provisions would ensure that that situation continued.

The ACCC's price survey focused primarily on price rather than availability. The data underlying the surveys suggest, however, that availability of some books remains of concern. In particular, it

[12] For the twelve months to June 2002 the Australian price for best selling paperback fiction exceeded the US price by 16 per cent, higher than the differential for 2000–01 of 11.1 per cent. In relation to the UK, prices in Australia for best selling paperback fiction were, on average 8.6 per cent below prices in the UK. In 2000–01, Australian prices were, on average, 6.2 per cent less than in the UK.

[13] For the twelve months to June 2002, the Australian price for all best sellers were broadly the same (0.7 per cent below) prices in the US and 13.1 per cent less than comparable prices in the UK. For the period 2000–01, Australian prices were, on average 3.3 per cent higher than in the US and 8.3 per cent lower than in the UK.

appears that some titles are only made available in Australia in the large format paperback version whereas there is a hardback version available overseas. Other titles may not be available at all.

It is difficult to see how, after 13 years of debate, the discredited argument that allowing parallel imports of books may result in significant dumping of books written by Australia's highest profile authors could be accepted as a reason for the continued prohibition on parallel imports of books, the monopoly benefit to multinational publishers and the ongoing harm to consumers.

Computer software

While restrictions on parallel imports on books remain in place, the Copyright Act has been amended to permit the parallel importation of computer software.[14] This allows computer software to be imported in to Australia from any legitimate source and it means that distributors, retailers and wholesalers can choose where they buy their software whereas previously they have been obliged to buy from the Australian distributor.

Competition in the supply of computer software will no longer be restricted, allowing lower prices to be realised. ACCC price surveys have shown that prices advertised on Australian websites for popular business and games software items have been consistently higher than prices on US, UK and New Zealand websites over the last few years. Earlier time series data indicated that prices of business computer software in Australia have been persistently high compared with the USA since at least 1988–9.

The findings about business software are significant because such software is used as a business productivity tool. The savings to be made from allowing parallel imports are greater than the direct reduction in price arising from greater competition. Lower prices would also encourage greater usage of business software which should boost the productivity of both households and businesses that use the product.

The surveys suggest that one consequence of parallel import restrictions is that prices of some computer software in Australia are too high and consequently the ACCC welcomes the government's amendment to the Copyright Act to remove parallel import restrictions on computer software.

[14] *Copyright Amendment (Parallel Importation) Act 2003.*

Regional playback control systems

Manufacturers of DVD players are required by the DVD Copy Control Association in California (USA) to incorporate the regional playback control (RPC) system. The RPC effectively divides the world into six regions for DVD distribution. It employs digital encryption to prevent a DVD produced for one region from being played on a DVD player manufactured for another region. It is justified by the industry as an anti-piracy device.

The ACCC is investigating two aspects of this arrangement. First, the ACCC is concerned that Australian consumers who buy DVDs from other regions may be unaware that these authorised copies may not be playable on DVD players bought in Australia. Secondly, the ACCC is concerned that the RPC system may enable copyright owners to practice international price discrimination by artificially creating regional barriers. The RPC system may be used to prevent cheap imports in countries where domestic price competition is limited, such as Australia.

Court case

In a related matter, Sony Computer Entertainment produces and distributes its PlayStation console incorporating region coding. The effect of this coding is to create three mutually exclusive geographic regions for distribution. As with the RPC system, region coding means that Australian consumers who buy legitimate PlayStation games overseas may not be able to play those games on consoles distributed in Australia. The PlayStation region coding means that while you can make a copy of a PlayStation game, you cannot play it on the PlayStation console. However, the RPC restrictions in PlayStations can be overcome by installing a mod chip in a PlayStation console. The ACCC is concerned that the main purpose of the RPC restrictions is to prevent parallel imports, not to prevent infringement of copyright as alleged by Sony.[15]

Under the new anti-circumvention provisions of the Copyright Act the manufacture and supply of devices or the provision of services which override

[15] RPC in DVD players can also be chipped to overcome zoning arrangements. The ACCC is not aware of any action taken by movie studios or equipment manufacturers to prevent such chipping. However, there is a new form of technology, known as region code enhancement, being applied to some DVD movies which prevents a movie from being played if it detects that the DVD player has been modified.

copy control measures is outlawed if the copyright protection measures have no commercially significant purpose other than to prevent infringement. Sony Computer Entertainment sought in the Federal Court to have these provisions of the Copyright Act applied in such a manner as to prevent consumers from having a mod chip installed in their PlayStation console, therefore preventing them from playing legitimate games bought overseas, as well as copies made for legitimate backup purposes under the Copyright Act.

In September 2001 the ACCC was granted leave to be heard as amicus curiae in Sony's action in relation to whether modifying PlayStation consoles infringes the Copyright Act.

The ACCC submitted to the court that RPC does not protect against copyright infringement. It prevents the use of imported games and backup copies authorised by statute. Under the current legislation it is not illegal to play either imported or copied games although the act of importation or of copying may constitute an infringement in some circumstances. The act of simply playing a disc does not constitute a breach of copyright.

In July 2002 the Federal Court ruled that Sony PlayStation owners have the right to have their consoles 'chipped'. In doing so, the court agreed with the ACCC's submission that the RPC system goes beyond having the single purpose of preventing copyright infringement. The court accepted that the effect of RPC is to restrict the playback of certain games, noting that the Copyright Act does not make it illegal for consumers to play computer games, only to copy them illegally. The court further noted that RPC does not serve the purpose of preventing or inhibiting the copying of games and was therefore not worthy of protection under Australian copyright laws.

Sony appealed the court findings. The ACCC was granted leave to be heard as amicus curiae in the appeal.

In July 2003 Sony was successful in its appeal. The Full Federal Court interpreted the new anti-circumvention provisions of the *Copyright Act 1968* to outlaw the sale of the modification chips which overcome region coding restrictions. The court's judgment confirms that region coding exists to prevent or inhibit copyright infringement and therefore that the sale of modification chips breaches the Copyright Act.

The ACCC supports copyright holders' right to crack down on sales of pirated products. However, the ACCC believes that region coding is detrimental to consumers as it severely limits their choice and, in some cases, access to competitively priced legitimate goods. The ACCC is disappointed that technology which can overcome these unfair restrictions will not generally be available for consumers' use. The ACCC hopes that the court's decision does not have the unintended consequence of eroding the potential competitive benefits of parallel importation of computer software.

Conclusions

In conclusion I note that in most instances competition and intellectual property laws can be seen as complementary, seeking to promote innovation to the benefit of consumers and the economy. In particular cases there might be an apparent conflict between the two underlying policies. The key issue therefore is finding an appropriate balance between intellectual property and competition laws.

In Australia the debate about the relationship between intellectual property and competition laws, especially in relation to the impact of parallel import restrictions, continues to follow on from the important reports of the eighties and early nineties.

The Intellectual Property and Competition Review Committee also raised a wide range of important issues. The government's response to that committee's final report has changed, and will continue to change, the interface between the intellectual property laws and the Trade Practices Act. It will also greatly enhance the ACCC's role in ensuring that the underlying complementary policies of both sets of legislation are realised; that of enhancing innovation to the benefits of consumers and the economy.

Technological developments also continue to raise new and complex trade practices issues.

However, I am confident that both the Trade Practices Act and the ACCC are well placed to face all of these new challenges.