SUBMISSION BY

AUSTRALIAN PUBLISHERS ASSOCIATION

COMMITTEE OF INQUIRY INTO THE
COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

The Australian Publishers Association

The Australian Publishers Association (APA) is the trade association representing book publishers in Australia. Based on the Australian Bureau of Statistics measurement of industry turnover, APA members comprise 85% of the book publishing industry.

The Publishing Industry

The book publishing industry in Australia is successful and competitive with a relatively large number of firms of significant size and many, many more small businesses. The APA represents over 100 book publishers. 70 per cent of members are small businesses with less than $2 million per annum in turnover. Nineteen firms have a market share of 1% or more, the largest firm has less than 15% market share by turnover.

Although the industry is competitive and no player has substantial market power, publishers are concerned that they unfairly run the risk of being held to be in breach of the competition provisions. This may result if the proper exercise of intellectual property rights is interpreted to be inimical to competition law. We ask the Committee members to consider the importance and public policy benefits of intellectual property protection in the context of the current Review.

Publishing is an important part of Australia's copyright-based industries and an important part of the developing information economy. The copyright industries are one of the fastest growing sectors of the economy with a value added contribution of 3.3% of GDP and employing 3.8% of Australia's workforce.[1]

Book publishing itself has grown 16% by turnover in the two years to 30 June 2000 (the most recently available ABS statistics) while exports in the same period grew by 36%.

The share of the market supplied by Australian published books has grown phenomenally in the last 30 years. Early statistics kept by the APA suggest that in the mid 1970s less than 10% of books sold were published in Australia. By 1989 about 49% of books sold were published locally and by 2000 this was over 60%.

The industry is currently threatened by an erosion of the core legal infrastructure underpinning it. The Government has introduced a bill that would put an end to Australia as a unique copyright territory. The Copyright Amendment (Parallel Importation) Bill 2002 is unlikely to be passed in the Senate but we have included in our submission to this Review a paper (Appendix A) on the likely changes in the character of the market were the Bill to become law. That paper addresses the net welfare outcomes involved in current vertically organised distribution channels and also argues that the control of copyright per se should not give rise to an inference of market power.

Response to selected Terms of Reference

(a) Do Parts IV and VII inappropriately impede the ability of Australian industry to compete locally and internationally?

Part IV inappropriately impedes the ability of the Australian publishing industry to compete locally and internationally.

There is a very real risk that the confusion surrounding the operation of s46 of the TPA (as set out in more detail below) will impede the ability of the Australian publishing industry to compete locally and internationally. This would be exacerbated if parallel importation into Australia were permitted as a result of the passing of the *Copyright Amendment (Parallel Importation) Bill 2002* (see Appendix A).

Publishers do not have a substantial degree of power in the market in the traditional sense contemplated by the TPA. No firm has as much as 15% market share and there are a large number of competitors. Nonetheless the reasoning in *ACCC v Universal Music*

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[1] Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries*, Australian Copyright Council and Centre for Copyright Studies, 2001

Australia Pty Limited[2] ("Universal Music" -note this case is subject to an appeal) would suggest that any owner or exclusive licensee of copyright in a popular title runs the risk of being held to have such power. Mr Justice Hill wrote:

> At the heart of the controversy is the concept of what Mr Ergas referred to as "temporary monopoly", an expression he uses to refer to the phenomenon apparent in the record industry (it would exist also in the market for books, magazines and films) that the popularity of a particular title gives to the record company which produces it temporary powers to act unconstrained by competition."[3]

In *Universal Music* evidence showed that consumers generally would not purchase a substitute album or single by a similar artist if the title they wanted was unavailable. Even albums of a similar style of music would be no substitute for a consumer. This is also the case for books. By way of example, an author exclusively licences a publisher to publish the author's book. Although in theory there are other books substitutable with the author's book (since there are different books available) in fact there is no book that is completely substitutable with the author's book.

We respectfully disagree with the interpretation in *Universal Music*, but if it continues to be applied, in our view competition law will serve to undermine important public benefits derived from adequate intellectual property protection. Further, it may impede the very competition section 46 is intended to promote as it would encourage relatively small firms such as publishers to fear pro-competitive conduct that may be illegal if exercised by a firm with "true" market dominance.

(d) Do Parts IV and VII provide adequate protection for the commercial affairs and reputation of individuals and corporations?

Part IV does not provide adequate protection for the commercial affairs of the publishing industry because it does not provide certainty with respect to the application of s46. For example, in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[4] *(" Melway")* exclusive dealing was acceptable yet in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[5] ("*Queensland Wire*") a failure to deal was not acceptable.

This inconsistency only leads to confusion and prevents publishers from being able to determine when they can use business rationale and when they will be penalised for taking advantage of any supposed market power.

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[2] [2001] FCA 1800

[3] *ibid*

[4] (2001) 178 ALR 253

[5] (1989) 167 CLR 177

(e) Do Parts IV and VII allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances?

Part IV does not allow the publishing industry to readily exercise its rights and obligations under the Act, consistent with certainty, transparency and accountability and use compliance or authorisation processes applicable to its circumstances.

This is because the application of s46 is not certain, not transparent and so the publishing industry can never be certain whether it is complying or not.

By way of summary s46 provides that a corporation that has a substantial degree of market power, shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor;

(b) preventing market entry; or

(c) deterring or preventing a person from engaging in competitive conduct.

But what does "take advantage" mean? In other words, where does business rationale and commercial decisions with respect to pricing, terms of trade and freedom to appoint selected distribution channels end and "take advantage" begin?

Business people (not just publishers) in Australia do not know what the rules are so far as the application of s46 is concerned and even the judges involved in s46 cases fail to set down the rules conclusively or with any consistency.

As one commentator points out,

> …virtually any decision taken by an entity having a substantial degree of market power can credibly, even if not ultimately successfully, be argued under s46…[and]… there are not yet any bright line rules of conduct and s46 is at the heart of the Trade Practices Act fog. [6]

As this commentator further points out,

> "Indeed, all judges in *Melway* believed that there are legitimate business purposes which excuse non-supply…Justice Kirby in dissent in the High Court holding against Melway, nonetheless concluded that the supply could be refused if it were adjudged that the purchaser was unable to handle a dangerous product; that it had a poor credit record or unacceptable business ethics; that it was unqualified to offer essential after sales service; that it was liable to damage the reputation of the supplier; that it was unable to

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[6] Pengilley, W *Misuse of Market Power in Australia: Are the Tests Now Those of Fairness, Efficiency or Business Justification?* Canterbury Law Review [Vol 8, 2001] at 70

> maintain accurate records; that it was prone to engage in deceptive or unfair practices; or if it were likely to breach the reasonable terms of a distribution agreement."[7]

These are all valid business reasons for non-supply. Why does s46 not allow for valid business reasons to be part of the test whether there has been a taking advantage of market power so that valid business reasons are excluded from the operation of s46?

We note that the situation would be worsened by the introduction of an "effects test" as advocated by the ACCC. Such a test would increase uncertainty and may catch innocent behaviour such as the proper exercise of copyright.

(f) Are Parts IV and VII flexible and responsive to the transition needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas?

Part IV is not flexible and responsive to the transition needs of industries undergoing regulatory change.

This is clearly demonstrated by the result in *Universal Music*.

There is a danger that, should parallel importation be introduced into Australia, the trading terms currently existing between distributors and retailers of books could come under scrutiny with respect to s46 on the reasoning in *Universal Music*. This is addressed in detail in Appendix A.

Proposed Legislative and Administrative Changes

The Australian Publishers Association asks the Review to recommend administrative and/or legislative steps to clarify the operation of sections 46 and 47(1), (2), (3) and (10) of the *Trade Practices Act* 1974 to:

1) provide greater certainty to firms;

2) ensure that consideration is given to the competitive efficiency effects related to the institution of any particular vertical structure or vertical restraint in the furtherance of interbrand competition;

3) acknowledge the public policy benefits of exercise of intellectual property rights; and

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[7] Ibid p86

4) ensure that the ownership of or exercise of an exclusive right attached to copyright (and intellectual property generally) does not of itself give rise to a finding of substantial market power.

Conclusion

Thank you for the opportunity to make this submission. We are available to provide further information or to expand on these issues for the Review.

Susan Bridge
Chief Executive
Australian Publishers Association
5 June 2002

APPENDIX A TO SUBMISSION BY AUSTRALIAN PUBLISHERS ASSOCIATION

DISTRIBUTION STRUCTURES, MARKET POWER AND THE AUSTRALIAN PUBLISHING INDUSTRY

David Brennan[*]

1 INTRODUCTION

This paper considers:

(1) Whether vertically organised distribution activities should be permissible under the *Trade Practices Act* 1974 within the Australian publishing industry, and

(2) The correct characterisation of market power in a copyright industry, such as publishing.

I have been asked to address these issues for the Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974 ("the Inquiry") and in light of the *Copyright Amendment (Parallel Importation) Bill* 2002[8] ("the 2002 Bill") currently before the Commonwealth Parliament. If enacted, the 2002 Bill would largely remove the existing limited right of Australian copyright owners in the publishing industry to prevent the commercial importation into Australia of books sold offshore.[9]

The primary conclusions that this paper makes are that the Inquiry should be sensitive to the net welfare outcomes involved in the protection of distribution channels of Australian publishers, and that control of copyright per se should not give rise to an inference of substantial market power.

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[*] Research Fellow, Faculty of Law, University of Melbourne, <d.brennan@unimelb.edu.au>. This paper has been highly informed by the insights contained in the excellent recent article: Daniel Clough, "Law and Economics of Vertical Restraints in Australia" (2001) 25 *Melbourne University Law Review* 551. This paper was commissioned by the Australian Publishers Association for use before the *Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974*, 2002.

[8] Introduced to the House of Representatives on 13 March 2002.

[9] Copyright Amendment (Parallel Importation) Bill 2002, schedule 1, item 8 and schedule 2.

2 VERTICAL STRUCTURES

2.1 AUSTRALIAN BOOK PUBLISHING AND COMPETITIVE EFFICIENCY

Australian publishers form a large part of the supply side of the wholesale market for books in Australia. On the other side of that market are book retailers. At present Australian publishers who control the relevant copyright have limited rights to prevent the commercial importation into the Australian market of copies of books sold in offshore markets.[10] If the 2002 Bill is enacted, the market will alter in character. As defined under Australian competition law, "a market is the field of actual and *potential* transactions between buyers and sellers among whom there can be strong substitution, at least in the long run, if given sufficient price incentive".[11] Under the terms of the 2002 Bill:

(1) Publishers located in any of the 149 countries that are party to the Berne Convention; and

(2) Publishers located in other countries that are TRIPS-compliant members of the World Trade Organization,

will immediately form part of the potential supply side to satisfy Australian wholesale demand for books.[12] As such, they will enter the concept of the market. In these circumstances, in addition to the interbrand competition that already exists between Australian publishers, there will be interbrand competition between Australian publishers and their offshore rivals.[13] It is in this setting that it is useful to consider the legitimate interest an Australian publisher has in either maintaining or entering into vertical distribution arrangements with its retailers.[14] This is especially relevant given the first criterion against which the Inquiry is asked to assess trade practices law is whether that law may "inappropriately impede the ability of Australian industry to compete locally and internationally".[15]

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[10] *Copyright Act* 1968, sections 44A and 112A.

[11] *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169, 190 (emphasis added) This approach was approved by the High Court in *Queensland Wire Industries v BHP Ltd* (1989) 167 CLR 177.

[12] Copyright Amendment (Parallel Importation) Bill 2002, schedule 1, item 8 and schedule 2.

[13] The concept of "interbrand competition" is explained below.

[14] A vertical arrangement is one between economic agents at different levels in the chain of distribution – such as between manufacturer and wholesaler. It is to be contrasted with a horizontal arrangement between economic agents on the same level in the distribution chain – for example an agreement between two retailers.

[15] Competition Provisions of the Trade Practices Act 1974, Inquiry Terms of Reference, 1(a).

Modern law and economics literature, starting with the 1937 Ronald Coase article "The Nature of the Firm", has recognised that industry may organise itself into vertical structures (that is, firm-like structures) in order to reduce transaction costs and to allow for efficiencies in distribution to be realised.[16] Coase observed that within vertical structures, there exists coordination and organization to achieve efficiencies outside the direct governance of the market. As Coase noted: "If a workman moves from department Y to department X, he does not go because of a change in relative prices, but because he is ordered to do so".[17] However this coordination, in turn, occurs as an aspect of competitive market behaviour between vertical structures. More recently this form of competition has been termed "interbrand competition".[18] As such, a relevant inquiry in any case should be whether a particular vertical structure serves to enhance collective welfare by enabling an industry to organise itself in such a way that interbrand competition can be conducted most efficiently and with minimum transaction costs. If so, competition is likely to be conducted in a manner that collective welfare is likely to be maximised.

2.2 A VERTICAL STRUCTURE IN PUBLISHING: "SALE OR RETURN"

One example of such a vertical structure in the wholesale market for books in Australia is currently found in the trading relations between Australian book publishers and their retailers commonly referred to as "sale or return". This provides a useful, illustrative case-study in vertical organization in Australian publishing. Under that trading relationship, a retailer is permitted to return to a publisher unsold copies of certain, new-release book titles, and to only pay for those copies sold. Essentially it is a form of profit sharing and may be compared to "firm sale" arrangements, whereby a publisher enter into a concluded contract of sale with a retailer in respect of the stock at the time of supply. Under a "sale or return" contract, publisher and retailer operate cooperatively as a vertical distributional structure. Under a "firm sale" contract, publisher and retailer operate as quite separate economic entities in a chain of supply.

Why does the organisational behaviour of "sale or return" occur? Is it an aspect of overall competitive and efficient market behaviour?

In answer to the first question, "sale or return" arrangements are instituted by a publisher simply because of the objective to increase its own book sales, and thereby enhance its own interbrand competitive position. The publisher's motives are to create what are termed technical efficiencies (explained in answer to the second question) and not to

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[16] Ronald Coase, "The Nature of the Firm" (1937) 4 *Economica* 386. The original article together with papers presented at a symposium on the 50th anniversary of its publication are published in Oliver E. Williamson and Sidney G. Winter, *The Nature of the Firm – Origins, Evolution and Development* (1991) .

[17] Ronald Coase, "The Nature of the Firm" (1937) 4 *Economica* 386, 387.

[18] Daniel Clough, "Law and Economics of Vertical Restraints in Australia" (2001) 25 *Melbourne University Law Review* 551, 559-561.

restrict output. Indeed, rather than restrict output, a "sale or return" vertical arrangement has the effect of ensuring an ample retail supply of recent, popular titles. In this respect it is a vertical arrangement that entirely coincides with the interests of consumers.[19]

In answer to the efficiency question, a book publisher has an interest in encouraging its retailers to invest capital and labour in the marketing of the publisher's book titles. This investment helps to protect and enhance both the publisher's goodwill, and the goodwill of the publisher's titles. The profit-sharing nature of the "sale or return" arrangements provides an incentive for the retailer to behave in a way so as to enhance the goodwill of the publisher's titles. Furthermore, the promotional incentive effect of creating such a vertical structure is particularly important in the book industry. It is an industry where recent titles usually have a very short period in which they are in high demand. The transitory nature of such titles' marketability means that vertical arrangements such as "sale or return" are critical in permitting those titles to be established.[20]

It is instructive to consider the efficiency question in a future in which the 2002 Bill becomes law. In such an environment, there will be an increased likelihood that some book retailers will source product offshore, almost certainly on a "firm sale" basis, and then seek to appropriate some of the benefits from the local promotional investment.[21] For an Australian publisher to engage in interbrand competition with its offshore rivals, a vertical structure such as "sale or return" may be critical, as will the ability to offer those terms on an exclusive basis to retailers willing to continue to undertake the promotional effort. This is because it will be the ability to offer to some - but not necessarily all - retailers such vertical profit-sharing arrangements that will provide the necessary incentives to retailers to not only to continue to source the Australian publisher's titles from that publisher, but also to continue to invest in the marketing and promotion of those titles. That incentive would not exist if such arrangements were not capable of being entered into on an exclusive basis.

Moreover, if such vertical arrangements can not be offered exclusively, they will probably not be offered at all. For any distribution system necessarily involves a degree of exclusion for it to function.[22] This is because it is only through the exclusivity of such arrangements that they hold any long-term value to publishers who institute them and retailers who participate in them. If there was no exclusivity, a retailer would be free to acquire some of its stock of a particular title from an Australian publisher on a "sale or

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[19] George Hay, 'Vertical Restraints after Monsanto' (1985) 66 *Cornell Law Review* 418, 437.

[20] F M Scherer and David Ross, *Industrial Market Structure and Economic Performance* (3rd ed, 1990) 553.

[21] Clough, above note 11, 572-574.

[22] A similar observation was made by Heerey J in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 169 ALR 554, 562: "any distribution system necessarily involves such deterrence or prevention of competition".

return" basis, and some of its stock of the same title from an offshore publisher on a "firm sale" basis. Such a retailer will have a clear incentive to first sell the stock sourced from the offshore publisher, and to hold the stock sourced from the Australian publisher as reserve in the event of unexpected demand. In the absence of some ability to control the retailer participants to a vertical distribution structure, the likelihood of opportunistic behaviour destroys the efficacy of the vertical structure altogether. Such behaviour can only be prevented through a degree of exclusivity in the vertical relationship. In the present case, this might be achieved through a contractual requirement that the supply of copies of a book title on a "sale or return" basis is conditional upon the retailer not obtaining the same title from an another supplier. If such a vertical restraint was considered to be unlawful it would seem likely to have a deleterious effect upon the ability of Australian publishers to compete with any future offshore rivals.

2.3 The importance of the *Melway* decision

The recent High Court decision in *Melway Publishing v Robert Hicks*[23] recognises the socially desirable role of the vertical organisation of distribution in what was, essentially, a copyright industry − street directories. Melway (the publisher of street directories) segregated its target retail markets into five separate segments, and appointed five exclusive wholesale distributors to service each segment.[24] In this setting, Melway refused to supply a prospective wholesale distributor who wanted to supply across all five market segments in competition with the existing distributors. This refusal was primarily in order to maintain the publisher's existing (and highly successful) segmented distribution system. The High Court found the refusal to supply to be not an unlawful "taking advantage" of its market power (Melway held 80-90% of the retail market for street directories in Melbourne) for the purpose of damaging competition.[25] This was because the High Court saw as legitimate the publisher's decision to create and maintain the vertical structures through which it distributed its directories. The vertical organisation of its activities was consistent with interbrand competition (competition between vertical structures) and would occur regardless of whether or not the publisher had a substantial degree of market power.[26] This was evident in the observation made by Justice Heerey's dissent in the Full Federal Court that the publisher had adopted the exact same vertical structures in the Sydney market in which it clearly had no market dominance.[27] In its decision, the High Court explicitly recognised the efficiencies that

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[23] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253.

[24] They were newsagents and bookshops; service stations; office stationers; authorised car dealers; and automotive parts retailers.

[25] Proscribed by the *Trade Practices Act* 1974, section 46.

[26] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253, 269.

[27] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 169 ALR 554, 559 where Heerey J notes that in Sydney, Melway held only a 10% market share.

were outlined at the commencement of this analysis − in terms of overall competition and consumer welfare − will support the legitimacy of the vertical organisation of industry where competition occurs between vertical structures.[28] Hence, the case stands for the proposition that a refusal to supply except on terms compatible with a competitive and efficient vertical structure can not be said to be for the purpose of damaging competition.

2.4 Vertical structures and policy considerations

The lesson from a law and economics analysis of the vertical structure of "sale or return" in the Australian publishing industry is that the law should be slow to break open such vertical organisation of industry in order to impose a blunt competition policy solution.[29] In the *Melway* decision, if competition law had required the publisher to supply, the law would have effectively dismantled the vertical distribution structures which had provided the publisher with competitive efficiencies for over 30 years. In its place competition law would have imposed a court-imposed mandatory injunction to supply to any would-be wholesale distributor.[30] It appears highly undesirable as a general matter of policy in a free market economy for the coordination and organisation of economic activity to be decided in this way, rather than as a matter internal to a firm. A very compelling cost-benefit analysis would need to be set out by those who put forward the contrary. For they would propose replacing private industrial organisation with public-policy imposed, central organisation.

3 MARKET POWER AND COPYRIGHT REPERTOIRE

A separate issue which the Inquiry might wish to consider is the extent to which a copyright owner has market power under section 46 by virtue of their ownership of copyright *per se*. This is especially so in light of the logic applied by Justice Hill in the decision of *ACCC v Universal Music*.[31] In that judgment because it was considered "necessary for retailers to stock CD's from all the major record companies to meet consumer demand", that necessity imbued a record company holding a 15% market share with "a substantial degree of power" in the wholesale market for recorded music

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[28] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253, 258-259.

[29] Clough, above note 11, 621-622. See also Maureen Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation" (1990) 18 *Australian Business Law Review* 86, 122 where the normative choices is well expressed: "Under what circumstances ... would the potential for transactions not exist? Answer: when there are such efficiencies of vertical integration ... that market co-ordination between buyers and sellers is superseded by in-house co-ordination. There would, in such a case, be no functional split to create market transactions between stages of production".

[30] The trial judge (Merkel J) proposed an "order prohibiting Melway from refusing supply where the purpose, or the substantial purpose, of the refusal is to prevent Auto Fashions from engaging in competitive conduct with distributors of Melway directories in the wholesaling of such directories to retailers": *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 644.

[31] [2001] FCA 1800.

Australia wide.[32] This outcome was arrived at, notwithstanding the finding that the record company in question was "unable to fix prices in the overall market above the competitive level".[33]

Market shares of such low levels, coupled with a status as a price-taker, have been typically regarded as evidence of not having a substantial degree of market power. The reason Justice Hill chose to characterise the record company as having such market power seemed to relate largely to the copyright-based nature of the industry in question. Because each record company's repertoire of copyright works was regarded as unique, each record company with a market share above a certain (unspecified) level was seen as having market power by reason of observed consumer behaviour. This behaviour was that approximately half the retail consumers had a particular title in mind upon entering a retail outlet and would not purchase a substitute title. If the title were not available at that retail outlet, they would seek it at an alternative outlet.[34]

The approach applied by Justice Hill to the issue of market power seems flawed. Its essential logic was that because each title was unique, each constituted a separate market in which the title's copyright owner was a monopolist. This treatment of copyright interests in competition law mistakes *products* for *markets*. It has been long recognised that most competitive markets display a degree of imperfect or "monopolistic" competition, such that competition exists in circumstances where there are many firms each producing products that are close, but not perfect, substitutes.[35] The exercise of exclusive rights attached to copyright (or other types of intellectual property) should not, in and of itself, constitute a "substantial power in a market", but rather an instance of monopolistic competition. To characterise the exercise of rights in copyright with substantial market power is to confuse an ephemeral and static state in respect of a single commodity, with a dynamic and long-term state in respect of a wider market.[36]

Moreover, inherent in the nature of a copyright (or any property right) is the right to "exclude". Property rights exhibit a right of exclusion not for the sake of exclusion, but to permit the market to do its job to allocate resources to industries and activities most highly valued.[37] This is because all market exchanges depend absolutely on the existence

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[32] [2001] FCA 1800, [425]. It might be noted that as presently advised no Australian publisher member of the Australian Publishers' Association has – expressed as a percentage of industry turnovers − an existing market share of greater than 15%.

[33] [2001] FCA 1800, [425].

[34] [2001] FCA 1800, [160]-[167], [426] and [429]

[35] Edward Hastings Chamberlin, *Theory of Monopolistic Competition* (1933) and Joan Violet Robinson, *Economics of Imperfect Competition* (1933).

[36] Janusz A. Ordover and William J. Baumol, "Antitrust Policy and High-Technology Industries", (1988) 4 *Oxford Review of Economic Policy* 13.

[37] Ronald A. Coase, "The Problem of Social Cost" (1960) 3 *The Journal of Law and Economics* 1.

of exclusive right in respect of a valued resource. If there no ability to exclude in some form, there would be no market provision. To equate the mere control of an exclusive property right as an exercise of market dominance overstates the reach of competition policy in respect of such private rights. When this approach is applied selectively in respect of copyright industries, it runs the risk of damaging the critical role played by copyright within the Australian economy to allocate resources to creative activities which are valued by consumers. It is this allocation of resources which promotes dynamic and long-term efficiencies. A fetter upon this allocative function may be in the short-term private interests of particular individuals or firms, but this should not override the net collective welfare benefits of an effective copyright system. The conclusion on market power in *ACCC v Universal Music* reflects an approach that is hostile to the effective market function of private rights in intellectual property.[38]

4 Desirable Trade Practices Law Settings

In light of this discussion of vertical structures and market power in copyright industries, there appears to be two primary aspects of the impact of competition law on Australian publishers that the Inquiry might wish to consider − particularly in light of the possible future removal of all parallel importation controls:

1. The clarification of the operation of sections 46 and 47(1), (2), (3) and (10) of the *Trade Practices Act* 1974 to ensure that consideration is given to the competitive efficiency effects related to the institution of any particular vertical structure or vertical restraint in the furtherance of interbrand competition.

2 The clarification of the operation of section 46 of the *Trade Practices Act* 1974 to ensure that the ownership of or exercise of an exclusive right attached to copyright (and other species of intellectual property) does not of itself give rise to a finding of substantial market power.

[38] Compare the approaches in both New Zealand in *Tru Tone Ltd v Festival Record Retail Market Ltd* [1988] 2 NZLR 352 and Canada in *Canada (Director of Investigation and Research) v Warner Music Canada Ltd* (1997) 78 CPR 3d 321. In both cases, the copyright interest in competition law was recognised and protected in a manner quite contrary to that undertaken by Hill J in *ACCC v Universal Music*.