26 May, 2015

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via electronic lodgment

Dear sir/madam,

RE: Comments on the Australian Competition Policy Review's Final Report of March 2015

BSA | The Software Alliance (BSA) appreciates this opportunity to comment on the Australian Competition Policy Review's (ACPR) Final Report of March 2015 (*Final Report*).[1] BSA is the world's leading advocate for the global software industry. Our members are among the most entrepreneurial and innovative companies in the world, creating software solutions that spark economic growth and improve modern life. [2]

BSA welcomes the ACPR's desire to strike an appropriate balance between "encouraging widespread adoption of new productivity-enhancing techniques, processes and systems on the one hand, and fostering ideas and innovation on the other."[3] In our view, the Government will be most successful in striking this balance—and incentivizing innovation by the private sector while enabling businesses to serve Australian consumers most effectively—by maintaining Australia's current framework of robust yet flexible intellectual property (IP) protections. We also agree that IP and competition laws serve complementary aims and therefore believe that IP protections should not be curtailed on competition grounds absent clear evidence of market failure and harm to competition. Upsetting this balance by intervening in the market for IP-based goods and services, without actual proof of market failure and harm to competition, will harm Australian consumers by restricting innovation and reducing choice in the supply of creative content, products, and services in Australia.

In contrast, a legal and policy framework that allows IP rights holders to offer their content, technologies, and services through a wide array of business and distribution models—which may include localizing products and services for the Australian market—will promote vigorous competition among suppliers and is the best long-term solution for meeting customer demand. This approach also will ensure that Australia remains an attractive and robust market for information technology, Internet, and content businesses.

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[1] Australian Competition Policy Review, *Final Report* (Mar. 2015), at:
http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review- report_online.pdf.
[2] BSA's members include: Adobe, Altium, ANSYS, Apple, ARM, Autodesk, AVEVA, Bentley Systems, CA Technologies, Cisco, CNC/Mastercam, Dell, IBM, Intel, Intuit, Microsoft, Minitab, Oracle, salesforce.com, Siemens PLM Software, Symantec, Tekla, The MathWorks, and Trend Micro.
[3] *Final Report*, *supra* note 1, at 40.

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These comments first discuss how the growth in online distribution and licensing models for software and other protected works has benefited Australian consumers. We then respond to two issues addressed in the *Final Report*: (1) whether Australia should adopt a digital "right of resale"; and (2) circumvention of technological protection measures.

The Importance of Flexible, Enforceable Copyright Licensing

Recent advances in online technologies and business models, together with expanding access to high-speed Internet connections, are providing Australian consumers with many new choices for accessing software and other protected works. Gone are the days when consumers that wanted a new software program needed to go to a bricks-and-mortar retailer and purchase a CD-ROM. Consumers today are able to access a wide array of software and other content anywhere and at any time, from the device of their choice. BSA members' customers now regularly to go online marketplaces to license and use software immediately (sometimes as a download, sometimes as a service), whenever and from wherever they choose. This is not just the case for software; music, films, and texts are now also available online and on-demand across a range of competing platforms and services.

In order to respond to these rapidly changing consumer expectations and to compete effectively, BSA member companies must have the flexibility to offer Australian consumers a wide range of choices and at various price points. This is particularly necessary in order to offer consumers attractive legitimate options for accessing protected works in place of the many options for accessing unauthorized content that are available online today.

BSA members rely on a range of licensing and distribution models to meet our customers' needs. Oracle's Cloud Computing services, for example, allow Oracle's customers to subscribe to cloud computing services in order to reduce their up-front IT costs and to unify their operations. Adobe's Creative Cloud service uses a subscription model to allow customers to use Adobe's creative software across devices, to store their works in the cloud, and to purchase only the software they need for only as long as they need it.

Exciting, innovative services like these, developed to meet the demands of the modern consumer, can only succeed with flexible, enforceable copyright licenses. Licensing allows rights holders to offer a much greater variety of access and use options for different customer needs and at varying price points than is possible under the traditional model of selling physical copies of works. If rights holders have the flexibility to offer different licensing options to online consumers, consumers will have a wide range of options and price points to choose from.

If, by contrast, the legal regime fails to facilitate rights holders' uses of new technologies and business models to satisfy their customers' needs, the resulting market inefficiencies will decrease consumer welfare. Rights holders will find it more difficult to build the businesses that meet customer needs, and customers will find it more difficult to take advantage of what modern technology allows: the ability to enjoy authorized copies of works when they want them, at attractive prices, on the devices they choose.

1. Digital Resale Rights

As noted in the Final Report, the House of Representatives Standing Committee Report on IT Pricing in Australia (IT Pricing Report) recommended that the Government consider the creation

of a "'right of resale' in relation to digitally distributed content."[4] BSA members oppose this recommendation. Expanding Australia's existing resale right, which today applies only to physical copies of works, would materially increase risks of infringement, particularly for digital works like software. The reasons supporting a right of resale for copies of works embodied in physical objects, such as books or videotapes, do not apply to works distributed digitally, and imposing such a limitation on rights holders' IP protections in Australia would have significant negative effects on consumers and competition.

In 2001, the United States Copyright Office addressed this same issue and, after careful consideration, opposed a proposal to extend the right to resell physical copies of works (known in U.S. law as the "first sale doctrine") to digital transmissions. The Copyright Office reasoned:

> "In applying a digital first sale doctrine as a defense to infringement it would be difficult to prove or disprove whether that act had taken place, thereby complicating enforcement. This carries with it a greatly increased risk of infringement in a medium where piracy risks are already orders of magnitude greater than in the physical world. Removing, even in limited circumstances, the legal limitations on retransmission of works, coupled with the lack of inherent technological limitations on rapid duplication and dissemination, will make it too easy for unauthorized copies to be made and distributed, seriously harming the market for those works."[5]

These reasons for rejecting a digital resale right apply with equal force today. If the owner of a physical copy of a work, like a book or phonorecord, sells that copy, the owner no longer possesses a copy, and the copy itself tends to degrade over time. Neither of these facts is true with respect to digital transmissions of works. The original copy of a digital transmission, such as a software program or an MP3 file, can remain on the original customer's device even after the copy is redistributed. Even if that original copy is considered to be infringing after the original customer transfers that copy to a subsequent user, enforcement authorities and customers alike would find it exceedingly difficult to determine which copy is genuine and which is infringing. Ensuring that the original customer's copy was destroyed would also be nearly impossible. Accordingly, extending the right of resale to digital transmissions would invariably lead to an escalation in infringement, depriving developers of revenues and leaving them with less to invest in innovation and to serve their customers.

Extending the resale right to digital transmission would also undermine the substantial consumer benefits inherent in the licensing models that apply to nearly all copies of works distributed digitally today. Copyright licenses for digital copies provide consumers with a clear and explicit bundle of rights—including, in many cases, rights that are more extensive than those a consumer would receive when purchasing a physical copy of a work. Licenses also establish a relationship between rights holders and customers that often continues long after the initial transaction takes place, as when software licenses entitle customers to patches, security fixes, and software updates and upgrades that may improve functionality and fix security vulnerabilities. In these cases, licenses typically also authorize developers to install these updates on the customer's device—conduct that might be forbidden absent such authorization—and afford developers with

[4] *Id.* at 354.
[5] U.S. Copyright Office, *A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act* 83-84 (2001), at:
http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

reasonable limitations on liability that ensure they are not deterred from making these benefits available to their customers.

Licenses also enable software developers to offer multiple different versions and rights that respond to a wide range of customer needs. For instance, software licenses allow developers to offer different features and charge appropriate prices to different types of customers (e.g., students, home users, and businesses), and for different customer needs (e.g., per-use, per-user, per-device). All of these features allow software companies to serve modern markets and customers, and all rely on flexible, enforceable licensing regimes.

Extending the resale right to digital transmissions could also cause confusion by frustrating settled expectations on the distinction between licenses and sales. For instance, it is far from clear whether a subsequent acquirer of a licensed digital copy—who would not have contractual privity with the original licensor—would be entitled to the same benefits as the original licensee, such as patches, updates, customer support, and other services. In the face of this uncertainty, developers might be deterred from offering these post-transaction benefits to customers, leaving them worse off and without the array of options they have today. Developers might be particularly averse to offering customized options to different types of customers if they faced the risk of having lower-cost, less sophisticated versions of their software (e.g., limited student versions) displace more sophisticated versions intended for business or commercial settings (e.g., full-featured enterprise versions).

In short, extending the resale right to digital transmissions would increase infringement risks and harm consumer welfare in ways that simply do not arise with respect to resales of physical copies of works. It would undermine the legal foundations on which software developers (and increasingly other rights holders) rely when licensing their works online and thus would likely lead to fewer consumer choices, less competition and higher prices. For these reasons, BSA urges the Government to retain existing limits on the resale right and not extend this exception to digital transmissions of works.[6]

2. Circumvention of Technological Protection Measures

Although the ACPR recognizes the consumer benefits of international price discrimination,[7] it supports measures to "ensur[e] that consumers are able to take lawful steps to circumvent attempts to prevent their accessing cheaper legitimate goods."[8] While BSA agrees with this statement insofar as it emphasizes "legal" steps to access "legitimate" goods, we urge the

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[6] Although in *UsedSoft v. Oracle*, Case C-128/11, the European Union (EU) Court of Justice held that EU copyright law does not prohibit the "resale" of software in certain narrow circumstances, it is important to note that this is a judicial decision based on an interpretation of the 1991 EU Computer Programs Directive. The EU has not, however, concluded as a matter of policy that licensees of digitally transmitted copies of works should be free to convey those copies to third parties. To the contrary, the European Commission filed a submission in the *UsedSoft* case arguing that the resale right should *not* apply to software licenses. Moreover, the Court's decision is clear that its scope is limited to a unique set of circumstances (*e.g.*, only where the license is of unlimited duration and supplied in exchange for payment of a fee reflecting full economic value of the copyrighted work, and where other factors exist suggesting that the transaction was a "sale" rather than a license). Many commentators have criticized the decision, and BSA members have already witnessed significant consumer and marketplace confusion about the decision's reach and impact.

[7] After surveying arguments for and against international price discrimination, the Final Report notes that a prohibition on this practice would "undermine consumer welfare" by "limiting consumer choice" and introduce "significant implementation and enforcement complexities." (Final Report at 63) As a result, the Final Report recommends "encouraging the use of market-based mechanisms to address international price discrimination, rather than attempting to introduce a legislative solution." (Final Report at 353) BSA agrees with this recommendation.

[8] *Id.* at 354.

Government not to permit the circumvention of technological protection measures (TPMs), including where TPMs are used to enforce product or service localization and pricing.

For the reasons already discussed, licensing-based distribution models and product localization provide substantial consumer benefits. Because these practices can be difficult to enforce, companies often adopt TPMs as a means to protect the integrity of their licensing and product localization efforts. Rules that prohibit users from circumventing such TPMs give businesses greater confidence that their licensing and localization efforts will be respected, and thus promote greater flexibility and choice in licensing-based business models and greater consumer access to online content and services. If users are free to circumvent TPMs, many of these consumer and economic benefits would disappear.

Similarly, TPMs that prevent unauthorized access to or copying of protected works are vital to ensuring that consumers get the quality and value of genuine copies that they expect. Allowing consumers to circumvent TPMs runs the risk of dramatically increasing the prevalence of infringing copies and making it much more difficult for consumers to know if they are obtaining a genuine copy.

The net result of rules making it easier to circumvent TPMs would be less innovation, fewer choices, and higher prices—the opposite result of what the Government seeks. Indeed, Australia's recognition of the benefits to TPMs are reflected in various international trade agreements to which Australia is a party, including the U.S.-Australia Free Trade Agreement[9] and the WIPO Copyright Treaty.[10]

BSA therefore opposes measures that would permit or encourage circumvention of TPMs. Although one can imagine scenarios in which a dominant supplier used TPMs to foreclose competition, the *Final Report* cites no evidence that TPMs are being used in this manner in Australia or, if they were, that Australian competition law would be unequipped to remedy such conduct.

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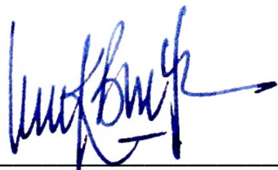
Thank you again for the opportunity to share our views on these important issues.

Sincerely,



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[9] *United States – Australia Free Trade Agreement*, art. 17.4.7, 43 I.L.M. 1248 (18 May 2004).
[10] *WIPO Copyright Treaty*, art. 11, 36 I.L.M. 65 (20 Dec. 1996).