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Intellectual property price controls take new hit in digital environment

Anyone who has ever arrived home with a DVD purchased in a foreign country only to discover that it does not play in U.S. players, or tried to order digital content from a foreign site only to be told that delivery is not allowed to their location, knows the frustration that today's market segmentation creates.

Market segmentation in copyright is supported by a wide array of legal tools in the form of domestic laws that prohibit the importation of gray market goods. (Gray market goods, often referred to as "parallel imports," are lawfully produced abroad but are imported without permission of the copyright owner.)

These importation limitations are further enforced through the use of regional coding and other "geoblocking" technologies that make such imported works largely unusable or unavailable to consumers in other countries. Regional coding technologies are, in turn, protected through international obligations to impose civil and criminal liability for hacking.

This carefully crafted protection edifice has been crumbling for years. The final death blow may have been delivered this summer by the Australian Parliament.

For the past year, the Australian government has been investigating why Australians were paying significantly higher prices for electronic goods than Americans or Brits. Although distance might explain higher shipping costs for tangible works, digital works, such as e-books, e-music and software, pose no such delivery obstacles.

The potential significance of the study was underscored by the number of high-tech companies who refused to testify until being forced to do so under subpoena. These companies included Microsoft, Apple and Adobe.

The statistics contained in the newly released final report of the investigation, "At What Price: IT Pricing and the Australia Tax," available at aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=it/pricing/report.htm, provides

chilling support for long-standing consumer fears that market segmentation generally results in monopoly prices. Of 150 products studied, Australian consumers paid on average 50 percent more for the same products.

The IT pricing report goes beyond merely outlining the existence of this "Australia Tax" on digital works. It outlines a detailed plan for eliminating global differential pricing altogether. Most of these steps aim directly at a copyright owner's ability to control the digital distribution of his or her works once they have been placed lawfully into digital commerce anywhere in the world.

Among the recommended changes is the elimination of gray market protections under domestic copyright law (Recommendation 4); amendments to "secure the consumers' right to circumvent technological prevention measures that control geographic market segmentation" (Recommendation 5); and the creation of a resale right for "digitally distributed content" (Recommendation 7). These changes alone would virtually recreate the digital market into a more consumer-friendly, inexpensive-access market, even in the most economically developed countries.

In addition, the report further recommends, somewhat surprisingly, that the government educate consumers on how to actually avoid the "geo-location" techniques that content owners use to control foreign distribution (Recommendation 7).

Even more Draconian, the report recommends that if the market fails to resolve the problem despite these recommended revisions to existing copyright laws; "as a last resort," geo-location should be banned completely.

While a parliamentary recommendation is not the same as a legislative amendment, the aggressive legal revision envisioned in this report sets the tone for future debates in a wide variety of domestic and international settings, including the on-going negotiations between Australia, the United States and Vietnam

GLOBAL IP



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(among others) to establish the Trans-Pacific (Trade) Partnership (TPP).

This latest challenge to an intellectual property holder's ability to control the pricing structure for IP-based products is part of an ongoing erosion of distribution rights internationally. The summer also saw the signing of the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (VIP Treaty).

Under this treaty, access to copyrighted works is achieved by allowing the creation and distribution of "accessible formats" of those works for visually impaired individuals. In late night sessions, a dispute over the role of the "reasonableness" (affordability) of prices on existing accessible works nearly collapsed the negotiations.

Early drafts of the VIP Treaty emphasized a flexible regime that would permit considerations regarding the reasonableness of such prices based on "national economic realities." These references were ultimately replaced in Article 4 with the right to consider whether accessible works could be "obtained commercially under reasonable terms for beneficiary persons in that market."

Ultimately, however, this change seems to represent a face-saving gloss as opposed to strengthening copyright holders' ability to exercise effective price controls for their works. "Commercial reasonableness" arguably still allows countries to consider the local reasonableness of any pricing policy in determining whether others should be allowed to provide competing versions.

An IP holder's right to control pricing has been under fire internationally in virtually all areas of intellectual property. From the Australian IT pricing report to the U.S. Supreme Court's decision in *Kirtsaeng* earlier this year that established international exhaustion as the new standard for protection under U.S. law, copyright holders face increasing pressure to create a single pricing regime for their works.

Yet, as patent owners learned from the *Natco Ltd.* case in India last year, a single global price may still fail the commercial reasonableness test where such prices make patented medicines effectively unavailable to local consumers. (See my March 30, 2012, column for an in-depth discussion of this case.)

Content industries have been notoriously slow to respond to the new demands of the digital marketplace — and for many companies, price controls represent the last bastion of protection. U.S. law still protects the regional codes and other technological measures copyright owners presently use to enforce market segmentation. But this "safe harbor" is rapidly becoming a mirage, giving U.S. copyright holders a false sense of security.

There are still opportunities to halt the global erosion of IP price controls, most effectively through participation in the TPP process (see ustr.gov/tpp) and in upcoming efforts before WIPO to establish new "fair use" copyright treaties (see wipo.int/copyright/en/sccr). But these are only temporary solutions. The tough choices about rational global pricing need to be made now before the choice is taken out of IP owners' hands.