

# Australian Copyright Council

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## Submission to Senate Legal and Constitutional Legislation Committee on CD prices

Thank you for inviting us to make a submission in relation to the Copyright Amendment Bill (No 2) 1997. We strongly oppose the provisions in the Bill which would allow the importation of sound recordings.

### 1. Australian Copyright Council

The Australian Copyright Council is a non profit company, largely funded by the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council's functions include giving information and free legal advice about copyright, research, and seeking changes to copyright law and practice which will benefit creators and other copyright owners. Further information about the Council is contained in the enclosed brochure.

A number of organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee.

### 2. Purposes of copyright law

We submit that the following are the purposes of copyright protection:

- a) to reward creative and intellectual endeavour;
- b) to provide stimulus and incentive to innovate or create; and
- c) to encourage respect for the value of intellectual and creative work.<sup>1</sup>

The mechanism used to achieve these purposes is the grant of exclusive rights by the Copyright Act to the owner of copyright.

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<sup>1</sup> See further: Sam Ricketson, "The Copyright Term" (1992) 23 IIC 753; Gillian Davies, "Underlying Principles Governing Copyright Legislation" in *Copyright and the Public Interest* (1994) IIC Studies, Max Planck Institute, Munich 1994; S M Stewart, "The Ideology of Copyright" in *International Copyright and Neighbouring Rights* 2nd Ed, Butterworths, London, 1989.

See also Article 27 of the United Nations Universal Declaration of Human Rights, which states:

*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

This principle is also stated in Article 15 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966.

### **3. The purpose of the parallel importation provisions**

The purpose of the parallel importation provisions is to ensure the effective exercise by Australian copyright owners of the exclusive rights granted to them under the Copyright Act. An exclusive right to reproduce a work in Australia is illusory if articles containing the work can be imported by others, such as people seeking to take advantage of the copyright owner's investment in creating or expanding a market for the work. The effect of imported copies on the Australian copyright owner is similar to the effect of unauthorised reproductions made in Australia – other people unfairly benefit from the copyright owner's investment in the work, and the copyright owner's return from that investment is reduced.

The purpose of the parallel importation provisions was explained by the UK Gregory Committee in its 1952 report as follows:

The question of infringement by importation is of importance by reason of the fact that, although as a result of international Conventions a copyright work may enjoy copyright protection in a number of different countries, it often occurs that copyright is owned by different persons in those different countries. Authors in the United Kingdom may, for example, enter into publishing agreements with British publishers under which they retain the United Kingdom copyright and grant a licence to the publishers; at the same time they may sell outright the copyright in the work so far as it exists in other countries. Similar arrangements may exist in respect of musical or artistic works. It would therefore be of considerable importance to the owners of the United Kingdom copyright or their licensees that they should be able without undue difficulty to prevent the importation of material which, though lawfully made in another country, would be an infringement if made in the United Kingdom and would compete with material made lawfully in this country.<sup>2</sup>

### **4. International practice of dealing with copyright on a territorial basis**

Although control over parallel importation is not required by international treaties, the practice of dealing with copyright on a territorial basis is clearly recognised in the treaties.<sup>3</sup> In a 1991 Memorandum relating to a proposed protocol to the Berne Convention, the International Bureau of the World Intellectual Property Organisation said:

The history and various provisions of the Berne Convention – particularly its provisions concerning national treatment – indicate that the rights granted under the Berne Convention have always been construed as territorial rights, that is, rights existing separately and independently country by country. It is evident, therefore, that the mere fact that a certain act (eg, reproduction) whose performance requires the author's authorization according to the law of one country has been authorised by the author of that country does not make the performance of that (or any other) act lawful in another country. This further evidenced (i) by Article 16 concerning seizure of infringing copies

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<sup>2</sup> HMSO, Report of the Copyright Committee, London, 1952, at para 280. The Gregory Committee's report was followed by the enactment of the Copyright Act 1956 (UK), on which the current Australian Copyright Act 1968 was closely modelled.

<sup>3</sup> The major treaties are the Berne Convention, administered by the World Intellectual Property Organisation, and the agreement on Trade Related Aspects of Intellectual Property (TRIPS), administered by the World Trade Organisation. The TRIPS agreement in effect incorporates the standards of the Berne Convention, as well as the standards set out in the TRIPS agreement itself.

which are not necessarily infringing copies in the country from which they are imported, (ii) by Article 13(3) on seizure of sound recordings imported without permission from another country where they have been produced on the basis of a non-voluntary licence, and by (iii) Article IV(4)(a) of the Appendix which forbids the exportation of copies made on the basis of a compulsory translation of reproduction licences.<sup>4</sup>

## **5. Problems with the policy behind the Bill**

### ***5.1. Questionable assumptions about the effect of parallel importation on competition and prices***

We have no special expertise in relation to pricing and competition issues. We are concerned, however, that the policy which led to the Bill is based on questionable assumptions that prices are affected by the parallel importation provisions of the Copyright Act, including an assumption that retailers would sell recordings sourced from overseas at cheaper prices.

Prices in Australia are said to be higher than those in the United States, but American copyright owners have the right to control parallel importation. Other countries where prices are said to be lower than in Australia, including Canada and New Zealand, also entitle copyright owners to take legal action against parallel importation.

### ***5.2. Many reasons for lower prices in other markets***

We do not think it is necessarily wrong that a sound recording may have different prices in different markets. There may be a number of legitimate reasons for a sound recording being available at a cheaper price in another country, where it would be unfair to permit its importation into Australia. For example:

- a) a copyright owner may elect to sell legitimate recordings at a low price in a country where piracy is rife, and/or where disposable income is low, as part of a strategy to establish a legitimate market; or
- b) a recording may sold as a “deletion” or cut out in another country, but still be selling at the normal retail price in Australia (for example, because it is a local artist).

The royalties paid to copyright owners for these cheaper recordings are diminished or non-existent.

### ***5.3. Uncertain benefits of lower CD prices outweighed by more certain damage to Australian music industry***

Even if the Bill would result in CDs being sold at lower prices, we submit that any benefits of lower prices would be outweighed by the damage to the Australian

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<sup>4</sup> World Intellectual Property Organisation, Questions Concerning a Possible Protocol to the Berne Convention Part II, BCP/CE/I/3 at para 131. The proposed protocol developed into the WIPO Copyright Treaty, adopted in December 1996.

music industry. Cheaper recordings would mean no royalties, or reduced royalties, to the creative contributors – the composers and the performing artists – and to the investors in the recording. Policies aimed at encouraging lower prices should not, in our view, be pursued at the expense of fostering the creation of new music and new recordings.

#### ***5.4. Effect of the Bill on the Australian music industry generally***

Most Australian composers and recording artists aim for international release of their recordings; in most cases it is difficult to recoup the investment in writing and recording songs by Australian sales alone. The local presence of multinational music publishers and record companies provides a gateway to international release of Australian recordings.

Removing the parallel importation provisions would remove the incentive for multinational music publishers and record companies to have a local presence. Australian composers and recording artists seeking international release would therefore be forced to travel overseas and attempt to get a deal with an overseas publisher and/or an overseas recording company. A composer or recording artist who has not already been successful in Australia has little chance of getting a deal with an overseas music publisher or recording company.

If the major companies have no presence in Australia, an Australian recording artist would need to start by getting a recording contract with a local independent record company; a composer would need a deal with a local independent music publisher. However, removing the parallel importation provisions is likely to have an adverse effect on local independent record companies and music publishers, with consequent loss of opportunities for emerging composers and recording artists. For example, many independent companies have distribution arrangements with the major record companies, which would be lost if the majors no longer have a local presence.

#### ***5.5. Artists and composers get lower royalties for records first sold overseas***

Artists and composers get lower royalties for records first sold overseas because:

- a) in some cases, the industry standard is lower – for example, the percentage of the sale price of a recording paid to a composer in the United States is much lower than the percentage paid in Australia; and
- b) generally it is difficult for a composer or artist to negotiate separate deals for separate territories. It is more common for a composer or artist to make a deal for world-wide rights with a record company or publisher in one territory, whereby the record company or publisher enters sub-licensing agreements with record companies or publishers in other territories. Royalties for records manufactured outside the territory are lower, largely because the sub-licensee takes a percentage, and so does the primary record company or publisher.

### ***5.6. Royalties for records made overseas are harder to monitor and take longer to arrive***

In addition to royalties for records released overseas being generally lower than those made in Australia, it is much more difficult for an Australian composer or recording artist to check that royalties are being properly collected and paid – for example by audit – where the company is overseas. In addition, royalties from records made overseas take longer to reach the Australian composer or recording artist, as the royalties are held by the sub-licensee for its accounting period before being paid to the primary record company or publisher, which then holds the royalties for its accounting period before paying the composer or artist.

### ***5.7. Artists and composers would get lower advances***

In an agreement with a music publisher, a composer will usually negotiate an advance based on the expected returns from the songs the composer has written, or has agreed to write. A recording artist will similarly negotiate an advance in a recording contract with a record company. These advances would be lower if parallel importation is allowed, as the expected royalties would be lower.

### ***5.8. Disincentive to export***

Inability to control imports from countries where records may be sold as “deletions”, or sold at a lower price for other reasons, may create a disincentive to export. Allowing parallel importation thus seems inconsistent with policies to encourage exports of Australian music.

### ***5.9. Piracy more difficult to detect***

We understand that removal of the parallel importation provisions would make it more difficult to prevent the importation of pirate sound recordings, because it is difficult to differentiate pirate recordings from legitimate recordings. We doubt that the 10% increase in penalties in the Bill would have an additional deterrent effect on importers and sellers of pirate recordings, particularly if the perceived risk of being caught is small.

### ***5.10. Importation of recordings not available in Australia***

One of the Government’s reasons for the Bill is to allow the importation of recordings not currently available in Australia.<sup>5</sup> The following points can be made:

- a) it is not clear that Australian importers and retailers are impeded by the importation provisions from importing and selling titles not currently available in Australia, or whether this is caused by other factors;
- b) if it can be shown that Australian importers and retailers are impeded by the importation provisions from importing and selling titles not currently

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<sup>5</sup> Explanatory memorandum pp 5, 8.

available in Australia, the Bill goes much further than is necessary to respond to this issue; and

- c) even if Australian importers and retailers could import recordings not currently available in Australia, it cannot be assumed that they would.

### ***5.11. Undermines efforts to encourage improved copyright protection in other countries***

The Bill – which reduces copyright protection – is inconsistent with Australia's efforts to encourage better standards of copyright protection in other countries.

## **6. Problems with the Bill**

### ***6.1. The Bill would allow the importation of CDs made in countries without any copyright law***

The Copyright Amendment Bill would allow copies made in a country with no copyright law (such as Papua New Guinea) to be imported. The requirement is that the owner of copyright in the sound recording in the “original recording country”, or the “maker” of the recording, consented to the making of the recordings. There is no requirement that the owners of copyright in the songs recorded consent to the copies being made. If an original recording is made in a country with no copyright protection, the owners of copyright in the songs recorded receive no income.

### ***6.2. The Bill would allow the importation of CDs made in a country which has a copyright law, but does not protect foreign rights owners***

The Copyright Amendment Bill would allow the importation of copies made in a country which has a copyright law, but which does not give national treatment to rights holders from all WTO countries. Taiwan is an example. As with a country which has no copyright law, the requirement under the Bill is that the owner of copyright in the sound recording in the “original recording country”, or the “maker” of the recording, consented to the making of the recordings. There is no requirement that the owners of copyright in the songs recorded consent to the copies being made. If an original recording is made in a country which has a copyright law, but does not give copyright protection to foreign rights holders, the owners of copyright in the songs recorded may receive no income. For example, a karaoke recording made in Taiwan could be imported without payment to the owners of copyright in the songs.

### ***6.3. The Bill would allow the importation of recordings made under compulsory licence***

The provisions in the Copyright Act which allow the importation of books do not apply to books made overseas under compulsory licence (that is, without the consent of the copyright owner). This is consistent with the Berne Convention, which allows developing countries to translate and reproduce printed material for

certain purposes without the consent of the copyright owner, provided certain conditions are met, but prohibits the export of such copies.

Under another provision of the Berne Convention, a country's copyright law may allow a person to make a sound recording of a musical work without the consent of the owner of copyright in the musical work, provided the owner of copyright in the musical work receives equitable remuneration. Many countries, including Australia and the United States, have such provisions in their copyright law.<sup>6</sup> The Berne Convention allows countries to seize imported copies of recordings made under compulsory licence.

We understand that the provision in the Singapore Copyright Act which allows parallel importation does not apply to articles made under compulsory licence.<sup>7</sup>

The Copyright Amendment Bill would allow the importation of recordings made under compulsory licence, without the consent of the owner of copyright in the musical work in the country of manufacture.

#### ***6.4. The Bill would allow the importation of works protected by copyright in Australia, but in the public domain in the country of manufacture***

The Bill would allow the importation of a recording of a work in the public domain in the country of manufacture, but still in copyright in Australia. For example, in the United States and the United Kingdom, copyright in a musical work expires 50 years after the death of the author, irrespective of whether or not the work was published in the composer's lifetime. In Australia, however, copyright in a work first published posthumously lasts for 50 years after publication, rather than 50 years after the composer's death.

#### ***6.5. This Bill does not "change the onus of proof"***

The Bill does not "change the onus of proof" as claimed in the Government's press release of 8 October 1997. As with other infringements, the copyright owner would have to prove all elements to make out a prima facie case, including that the copyright owner had not licensed the act alleged to be an infringement. In an action for unauthorised importation, the copyright owner must also prove that the defendant knew, or ought to have known, that making the imported article in Australia would have infringed copyright.

The Bill would shift the onus of proof to the defendant only when a prima facie case had been made out. This is no different to the onus of proof in relation to existing exceptions and provisos in the Act, including the provisions which allow the importation of books. The Bill would not remove any of the elements which a copyright owner currently has to prove.

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<sup>6</sup> A proposal to effectively phase out these provisions was not eventually included in the WIPO Copyright Treaty, adopted in December 1996.

<sup>7</sup> Tan Bok Hoay, "Intellectual Property in Singapore" Anti-Counterfeiting Report for 1994, [1995] EIPR 163; "Singapore: Green light for importation of copyrighted products", (1994) 43 Copyright World 13.

There would be a change in the onus of proof if, for example, the Bill amended sections 37, 38, 102 and 103 so that the defendant had to prove that he or she had no knowledge that the imported CDs would infringe copyright if made by the importer in Australia.<sup>8</sup>

#### **6.6. *Non-compliance with the TRIPS agreement***

The Bill does not appear to comply with the TRIPS agreement. The TRIPS agreement requires members of the World Trade Organization to empower Customs officials to seize “pirated copyright goods” on notice by a copyright owner (Part III, Section 4). “Pirated copyright goods” are goods made without the consent of the right holder in the country of production. In our view, recordings, or copies of a recording, made under a compulsory licence is not made with the consent of the right holder, and are thus pirated copyright goods for the purposes of the TRIPS agreement. Pirated copyright goods would also seem to include:

- a) a recording, or a copy of a recording, made in a country which does not give copyright protection to musical works and/or sound recordings; and
- b) a recording, or a copy of a recording, made in a country which has a copyright law but does not give national treatment to rights owners from all other WTO members.

If you would like further details or information in relation to any of the matters raised in this submission, please let me know.

Libby Baulch  
Executive Officer  
29 January 1998

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<sup>8</sup> This was actually recommended by the Spicer Committee in its 1959 report, at paras 94 and 304: Commonwealth of Australia, *Report of the Copyright Law Review Committee*, Canberra, 1959.