

Australian Copyright Council

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Second submission to Senate Legal and Constitutional Legislation Committee in relation to the Copyright Amendment Bill (No 2)

Following the Senate Committee hearing on 4 February, we make the following submission in response to some issues and questions raised by the Committee.

1. Article 27 of the Universal Declaration on Human Rights

We have been asked by the Chair of the Committee to comment on the “weight” to be given to Article 27(1) of the Universal Declaration of Human Rights. Article 27 provides:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) 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.

In our previous submission (29 January 1998), we quoted Article 27(2) in a footnote to a statement we made about the purposes of copyright.

Stewart, in *International Copyright and Neighbouring Rights*¹ comments as follows on Article 27:

Each copyright system has to strike a balance between two public interests, the rights accorded to the copyright owner and the reasonable demands of organised society. Both sides of the copyright coin are well set out in article 27 of the Declaration of Human Rights. The rights of organised society in paragraph (1) and the rights of the copyright owner in paragraph (2)...

The basic limitations which are peculiar to copyright flow directly from this balance between the interests of the copyright owner and the interests of the copyright users and the public as a whole. These limitations which, as copyright is a creature of statute, are statutory limitations, are of three kinds:

1. Copyright is of limited duration. After the stated term the work falls into the “public domain”.
2. Some uses of protected works are free. These are usually referred to in general terms as “fair use” or “fair dealing” in the common law jurisdictions. Other jurisdictions state the exceptions where the use of copyright works is free, specifically in the statute.

¹ SM Stewart, *International Copyright and Neighbouring Rights* (2nd ed), Butterworths, London, 1989 at para 1.11

3. In some cases the right owner is not given an absolute right subjecting all uses of the protected work to his prior authorisation, but only the right to equitable remuneration for each use. This is known as a “compulsory licence”.

In our view, parallel importation does not fall into any of these three types of limitation.

The extent to which copyright owners’ right may be limited is also set out in the TRIPS agreement and the Berne Convention. Article 13 of the TRIPS agreement says:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.²

In our view, allowing parallel imports is a limitation on the exclusive right of reproduction, as the effect of imported copies on the copyright owner’s exclusive right of reproduction is the same as the effect of copies made in Australia.

Purpose of the parallel importation provisions

The Chair of the Committee expressed concern about the fact that the report of the Gregory Committee, from which we quoted in our submission, was published in 1952. The Gregory Committee’s recommendations were the basis of the Copyright Act 1956 (UK). The Copyright Act 1956 (UK) was in turn the basis for the recommendations by the Australian Spicer Committee in its 1959 report, which led to the current Copyright Act 1968.³ The Spicer Committee’s recommendations about the parallel importation provisions were based on the provisions in the UK 1956 Act. Our purpose in quoting the Gregory Committee report was to provide some information about the reasons for the inclusion of the parallel importation provisions in the Copyright Act 1968 (although control over parallel importation dates back to 1709).⁴

² The same “3 step test” applies to the right of reproduction under Article 9(2) of the Berne Convention:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The 3 step test also appears in Article 10(1) of the WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonograms Treaty, adopted in December 1996 (but not yet ratified by Australia).

³ *Report of the Committee appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth*, Commonwealth of Australia, 1959. The Committee’s terms of reference were:

to examine the copyright law of Australia and to advise which of the amendments recently made in the law of copyright in the United Kingdom should be incorporated into Australian copyright law and what other alterations and additions, if any, should be made to the copyright law of Australia.

The Committee dealt with parallel importation at paras 92–105 and 303–304.

⁴ See the historical analysis of the parallel importation provisions in Appendix D of the Copyright Law Review Committee’s report, *The Importation Provisions of the Copyright Act 1968*, Australian Government Publishing Service, Canberra, 1988

More recently, the Copyright Law Review Committee made this statement in its 1988 report on parallel importation:

The philosophy underlying [the parallel importation provisions] is that it is just as illegal to import legitimately made copies for which there is no licence, as it is to import copies which have been made entirely without the copyright owner's authority. This is because the key to whether there has or has not been an infringement is the existence or non-existence of a licence from the Australian copyright owner authorizing the importation and subsequent commercial dealing with the copies in Australia. The importance to the Australian copyright owner of being able to prevent parallel imports, as well as unauthorized copies, arise from the fact that copyright ownership may be divided on a territorial basis. The remuneration the copyright owner receives from the locally made copies may be diminished by the importation of both unauthorized copies and legitimate copies made in a place where he is not a copyright owner.⁵

Extract from WIPO memorandum about territoriality of copyright

The Chair sought clarification about the "status" of a passage we quoted in our earlier submission from a memorandum prepared by the International Bureau of the World Intellectual Property Organisation. The memorandum was prepared in 1991 for the Committee of Experts on a Possible Protocol to the Berne Convention. As stated in our earlier submission, the proposed protocol developed into the WIPO Copyright Treaty. We assumed that the Committee was aware of that treaty, for example from its briefing by the Attorney-General's Department, and was aware that a proposal for an importation right was not included in the final text of the treaty.

At the Diplomatic Conference on the Draft WIPO Treaty in December 1996, member States of WIPO were asked to consider two alternative proposals for the inclusion of a right of distribution in the treaty: Alternative A included a right of importation and Alternative B did not. Alternative B (with some amendments) was adopted.

Alternative A originated in the memorandum prepared by the International Bureau of WIPO in 1991, from which we quoted in our previous submission. The passage we quoted preceded a proposal by the International Bureau of WIPO that the possible Protocol should include an importation right. We understand that the passage was included in the memorandum to provide background to the proposal put forward. The proposal was discussed at the second meeting of the Committee of Experts in February 1992, and similar proposals were discussed at subsequent meetings. The discussion by the Committee of Experts was focused on the proposal; the Committee was not asked to "adopt" the background statement. Similarly, at the Diplomatic Conference in December 1996, member States had to decide whether Alternative A or Alternative B, or neither, should be included in the final text of the treaty; they were not asked to "adopt" a statement about the practice of dealing with copyright on a territorial basis.

We would be happy to provide further information in relation to matters raised in our submissions or otherwise relating to the Bill.

⁵ Copyright Law Review Committee, *The Importation Provisions of the Copyright Act 1968* Australian Government Publishing Service, Canberra, 1988 at paragraph 9

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