

Productivity Commission
SUBMISSION COVER SHEET
(not for publication)

Parallel Importation of Books

Please complete and submit this form with your submission to:

Parallel Importation of Books Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

OR

By facsimile (fax) to:
Jill Irvine 02 6240 3311

By email: books@pc.gov.au

PLEASE PRINT CONTACT INFORMATION

Organisation: Australian Copyright Council

Street address: 245 Chalmers Street

Suburb/City: Redfern **State & P'code:** 2016

Postal address: PO Box 1986

Suburb/City: Strawberry Hills **State & P'code:** 2012

Principal contact: Libby Baulch

Position: Executive Officer

Phone: 02 8815 9797

Fax: 02 8815 9799

Mobile: 0419 995 177

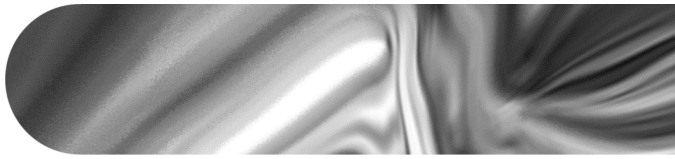
Email address: Libby.baulch@copyright.org.au

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AUSTRALIAN
COPYRIGHT
COUNCIL



***Submission to the Productivity Commission:
study on the parallel importation of books***

January 2009

About the Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Commonwealth Government's arts funding and advisory body. The Copyright Council provides information about copyright via its website, publications and training, provides free legal advice about copyright (principally to creators and arts organisations), conducts research, and represents the interests of creators and other copyright owners in relation to policy issues.
2. There are 23 organisations affiliated with the Copyright Council, each of which has members who are creators and/or owners of copyright material. Some of these affiliated organisations have made separate submissions to the Productivity Commission on parallel importation of books. These include the Australian Society of Authors, the Australian Publishers Association and Copyright Agency Limited.

Summary of our position

3. We oppose any amendments to the Copyright Act that would allow parallel importation of books in circumstances other than those already allowed. As acknowledged in the Commission's Issues Paper, there is no guarantee that such amendments would result in cheaper prices for consumers. In any event, such amendments are likely to result in lower royalties to authors by allowing the importation of books for which a reduced royalty, or no royalty, has been paid. The amendments would also be likely to reduce income to Australian publishers, and thus have a deleterious effect on Australian publishing.
4. In assessing the costs and benefits to the community of allowing parallel importation in additional circumstances, the price of books should not be the only issue considered. The range of titles available is also an important factor. These include titles by Australian authors, whose opportunities to be published are likely to be reduced if they can no longer sell separate Australian rights.
5. The 1991 amendments to the Copyright Act were aimed at increasing the range of titles available in Australia by providing an incentive to publish titles in Australia within 30 days of first publication overseas. If that incentive is removed – if copyright owners have no opportunity to maintain their territorial rights – then the range is likely to decrease.

Parallel importation and the objectives of the Copyright Act

Objectives of copyright

6. There are no objectives set out in the Copyright Act itself.
7. The introduction of the Act followed the 1959 report of the Spicer Committee, which said:

The primary end of the law on this subject is to give to the author of the creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.¹

8. Copyright is also intended to provide incentive for investment by publishers and others in the creation and dissemination of creative works. In his second reading speech on the Copyright Bill 1968, the then Attorney-General, the Honourable Nigel Bowen said:

... it is a prime purpose of copyright law to protect creative works so that authors, composers, artists and sculptors may, during the continuance of copyright protection, control the uses to which their works are put and get some return for the exploitation of their works ... Copyright also provides the basis for the publishing industries. Without this protection, it would not be likely that large sums would be invested in the production of books and magazines or the publishing of music ... the Government has been concerned to see that authors receive due payment for the use of their material.²

9. From an economists' point of view, copyright and other forms of intellectual property are intended to provide an incentive for new works by preventing the market failure that would otherwise result from free-riding.
10. While incentive to produce and invest in new works is an important objective of copyright, we submit that it is not the only objective. Copyright also rewards creators of works that provide education and enjoyment to others, whatever their motivation may have been for producing the work. The 1977 Whitford Report in the United Kingdom said:

Copyright protection finds its justification in fair play. A person works and produces something. The product of his skill and labour ought to belong to him ... it has long been recognised that only the original author ought to have the right to reproduce the original article and sell the copies this reproduced. If other people were free to do this they would be making a profit out of the skill and labour of the original author. It is for this reason that the law has long given to authors, for a certain term, certain exclusive rights ...³

11. The income generated by copyright results from the dissemination of works to the public – for example, as books, CDs, by broadcasting or by online publication. Copyright thus provides an incentive for the dissemination, as well as the creation, of new works.

Parallel importation provisions

12. An owner of copyright has exclusive rights, for a period of time, to do certain things with a work, such as reproducing it and making it available online. Anyone who wants to do something exclusively controlled by the copyright owner needs the copyright owner's permission, and the owner can, if it gives permission, impose terms or conditions such as payment.

1 Report of the Copyright Law Review Committee, 1959, para 13.

2 Second reading speech, undated typescript, at 1-2.

3 *Copyright and Designs Law: Report of the Committee to consider the law on copyright and designs*, (HMSO, London, 1977) at para 13.

13. In Australia, the legal right to control importation of articles containing copyright material is related to the exclusive right to *reproduce* a work. An importer can infringe copyright by importing a product to sell if it (the importer) would infringe copyright by making that product in Australia. The Copyright Act enables the person with exclusive reproduction rights for Australia to prevent the importation of books and other articles containing copyright material because the imported articles can free-ride on the rights sowner's investment in production, distribution and marketing in a similar way that unauthorised copies can do this.
14. The parallel importation provisions are thus not an *additional* incentive, as suggested on page 6 of the Issues Paper, but rather a means of maintaining the incentive provided by the exclusive right of reproduction.

Parallel importation of books under the current law

15. Since 1991, parallel importation of books has been allowed if:
 - the book is not published in Australia within 30 days of its publication overseas (in which case, any number of books can be imported); and
 - if the book was published within 30 days, but the copyright owner cannot now supply within 90 days (in which case, a reasonable number of books can be imported).
16. The 1991 amendments were principally intended to provide a greater range of available titles, but were also intended to encourage the early availability of paperback versions (which are cheaper than hardback versions).

Implications if parallel importation provisions widened

17. In our view the range of titles available in Australia should be a prime consideration. Widening the current provisions may – paradoxically – result in a *decreased* range of available titles, because the incentive for publishers to preserve rights by publishing within 30 days would be gone.
18. There is no guarantee that allowing parallel importation for all books will result in lower prices. Thus, widening the parallel importation provisions may have no effect on price, but may nevertheless decrease the range of titles available. Even if it did result in lower prices, that outcome must be weighed against the effect on availability.
19. Authors of books currently on the market would be at risk of having sales of the Australian edition of their work – on which a full royalty is paid – undercut by foreign editions on which a lower, or no royalty, is paid. Australian authors of future works may find it harder to get their works published because they would be unable to sell Australian rights separately from rights for other territories.

International treaty obligations

20. Australia is a party to a number of international treaties on copyright, including the Berne Convention, the Agreement on Trade Related Aspects of Intellectual Property,

the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. Each of these treaties includes a “national treatment” obligation: each party must treat nationals of other parties in the same way as its own nationals. This obligation excludes certain changes to the Copyright Act, such as allowing importation of books by foreign authors but not books by Australian authors.

Libby Baulch
Executive Officer
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