



Submission to Senate Legal and Constitutional Legislation Committee on Copyright Amendment (Parallel Importation) Bill 2001

The Australian Copyright Council opposes the provisions in the Copyright Amendment (Parallel Importation) Bill 2001 which would allow parallel importation. We submit that the Government's reasons for allowing parallel importation are unconvincing, and that the Bill is likely to harm owners of Australian rights, including authors and publishers.

Australian Copyright Council

The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policies and legislation.

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

The purpose of the parallel importation provisions

In the 1959 Report which led to the introduction of Australia's current Copyright Act, the Spicer Committee said:

The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.¹

The means for achieving this end is the granting of exclusive rights in relation to certain uses of material which has resulted from creative and intellectual input. The main exclusive right is the right to reproduce the material.

Most other countries in the world also have copyright laws which comply with the

standards in the major international treaties relating to copyright – the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

In practice, copyright rights are traded on a territorial basis, so that the exploitation of those rights may be managed by an entity in the territory in which the exploitation occurs.

The purpose of the parallel importation provisions is to ensure the effective exercise by the copyright owners of the exclusive rights granted to them under the Copyright Act. An exclusive right to reproduce a work in Australia is devalued if articles containing the work can be imported by others. The effect of imported copies on the owner of Australian rights is similar to the effect of unauthorised copies 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.

According to the Copyright Law Review Committee, 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, arises 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.²

In its later 1995 report, *Computer Software Protection*, the Committee (reversing the recommendation in its draft report), recommended the retention of the parallel importation provisions. The Committee said:

In the Committee's opinion the right to control parallel importation of copyright materials serves the same purpose as copyright laws in general – to encourage and reward investment and creative endeavour. The parallel importation provisions recognise that copyright laws, despite the "harmonisation" which has occurred as a result of various international treaties, vary from territory to territory. They also recognise, as pointed out by the Law Council of Australia, that there is not a "single world market". The parallel importation provisions provide an incentive for copyright owners in one territory to market (and exclusively license others to market) their copyright, and articles incorporating their copyright, in other territories. This incentive is negated if others may import those articles from other territories without incurring the marketing and other costs incurred by the owner of copyright.³

Policy behind the Bill is flawed

The main reasons for the provisions in the Bill cited by the Attorney-General in his Second Reading Speech were:

- there is a prospect of cheaper prices; and
- there is a prospect of increased availability.

However, the Bill risks introducing changes that will benefit neither copyright owners nor consumers. Even if there is a “prospect” of cheaper prices and increased availability, we submit that these highly speculative benefits are outweighed by the likely harm to authors and publishers caused by the Bill.

Prospect of cheaper prices

The Government has been careful in its comments on this Bill not to promise that the Bill would result in lower prices, but rather that the Bill would enable the *prospect* of lower prices. The caution may be due to the inaccuracy of some of the predictions about the effect of the 1998 amendments on CD prices.

The Government says that the “concern with prices is not a simple price comparison”, and refers to the view of the Intellectual Property and Competition Review Committee (IPCRC) that the comparison should be “between prices as they are with import restrictions in place, and the level of prices which would prevail absent those import restrictions”.⁴

The Government, nevertheless, has referred to simple price comparisons, asserting that prices of books and software are currently higher in Australia than in other territories.⁵ However, the Government has relied on ACCC data which has now been superseded by more ACCC recent data, and there are conflicting views about what data should be used, and how that data should be analysed, to make findings relevant to the issue of parallel importation.⁶

Prospect of increased availability

The 1991 amendments allowing importation of books in certain circumstances were primarily intended to enable the importation of titles not made available in Australia by the Australian rights owner.⁷ The Explanatory Memorandum to the current Bill acknowledges that the 1991 amendments “appear to have improved the speed with which new best seller titles are made available in Australia and broadened the possible range of books that may be parallel imported”.⁸

The ACCC has referred to some evidence of confusion about the operation of the current provisions,⁹ but it is not clear why an open market is an appropriate response to that confusion as opposed to – for example – explanatory information for those affected by the provisions, or perhaps fine-tuning of the legislation to more effectively implement the policy behind it.

Allowing a complete open market may in fact have an adverse effect on availability, by removing the incentive for local publishers to acquire and exploit the rights in foreign titles. Consumers may be less likely to become aware of titles in the absence of local promotion, and booksellers may have no incentive to import them in the absence of a sizeable demand.

Other factors cited by the Government in support of the Bill

“Rigorous” assessment of effects of parallel importation

The Government says that there been a “rigorous” assessment of the effects of the provisions in the Bill on the book publishing, printing and software industries.¹⁰

There has been no assessment, to our knowledge, of the effects of the Bill on other industries. The Government justifies the exclusion of feature films from the Bill on the basis that it has not fully assessed the impacts of parallel importation of cinematograph films on the Australian film and television industry.¹¹ Had there been such assessments of other industries, the Government would presumably have referred to them.

Thus, the effects of the Bill on products such as sheet music (in print and electronic form), periodical publications (in print and electronic form), CD-ROMs (other than those whose principal content is computer programs or games) and films other than feature films (eg films released direct to video) have not been assessed. We thus submit that the Government’s reason for excluding feature films from the Bill applies equally to these other products.

Bill not “an attack on copyright”

The Government contends that the Bill “is not an attack on copyright as an appropriate means of compensating, rewarding and encouraging copyright owners”.¹²

The Bill would undoubtedly diminish the rights of copyright owners – it would decrease the value of the reproduction right for Australia and remove the basis for trading in rights for Australia as a separate territory.

The Bill is thus inconsistent with Australia’s efforts to encourage better standards of copyright protection in other countries. It would also create a disincentive to export – inconsistently with other Government policies to increase exports of cultural and intellectual products.

Remuneration via contract

The Government has said that copyright owners “will continue to be remunerated through their contractual arrangements regardless of where their product is published or manufactured, or how it is remunerated”.¹³

Copyright owners’ contracts provide for remuneration based on the value of the copyright which is the subject of the contract. If the value of the copyright is decreased, then their remuneration pursuant to the contract is decreased. In addition, copyright owners – particularly authors – are unlikely to be able to prevent, by contract, the importation of foreign editions, including remainders.

Authors who sublicense overseas rights usually receive lower royalties for the sublicensed territory than the primary territory. Thus, even if the imported editions

have had royalties paid on them, authors usually receive less for these foreign editions than they do for local editions.

The main opponents of the Bill are “multinational” publishers

The publishers most at risk from the Bill are Australian publishers seeking to export, and Australian publishers which acquire rights in foreign titles for publication in Australia. Most of the publishers in each of these categories are not subsidiaries of foreign-owned multinational companies.

The Bill is also strongly opposed by authors.¹⁴

Piracy is not a real and serious problem in Australia

Piracy may not be a serious issue in Australia for printed material such as books, but it is for material in electronic form, including recorded music, audiovisual material, computer programs and CD-ROMs. The contention by the Attorney-General that piracy is not a real and serious issue in Australia¹⁵ is inconsistent with the finding of the House of Representatives Legal and Constitutional Affairs Committee’s report *Cracking Down on Copycats* that “copyright infringement is a real problem affecting Australia’s economy” and that infringement of copyright is likely to increase in the future.¹⁶

Parallel importation of CDs

The Government says that prices of CDs are lower, and that there have been no adverse effects from allowing parallel importation of sound recordings.

There are differing views about what effects parallel importation has had on prices of CDs since parallel importation has been allowed.

There are also differing views about other effects of parallel importation, including the effect on piracy. In relation to piracy, the Government has accepted the findings in the report commissioned from the Australian Institute of Criminology by the IPCRC. As we submitted in our June 2000 response to the IPCRC’s Interim Report, the AIC report is internally inconsistent and flawed in other ways.¹⁷

In addition, the Government has said it is taking an industry-by-industry approach to the issue of parallel importation. On this approach, even if CD prices are lower now than they were in 1998, and this is attributable to parallel importation, parallel importation may have different effects in other industries – on price and on other aspects of those industries. Past experience must also be considered in the light of other factors likely to affect prices in the future, including technological developments and exchange rates.

New Zealand experience

The Government says that the experience in New Zealand supports the Government’s position.

The New Zealand Government has recently issued a discussion paper on parallel importation, and sought submissions on its proposal to introduce a ban on parallel importation of creative products for up to two years.¹⁸

Onus of proof

The Government claims that the Bill “shifts to the defendant the onus of establishing that a parallel imported copy is not an infringing copy”.¹⁹

The new provisions relating to onus of proof are based on the existing provision relating to sound recordings (section 130A). There are different views about the effect of section 130A, and its interpretation is currently the subject of proceedings before the Federal Court.²⁰

If the copyright owner still has to prove all elements of sections 37 and/or 102 to make out a prima facie case, including that the defendant knew, or ought to have known, that making the imported article in Australia would have infringed copyright,²¹ then we submit that section 130A makes no difference to the onus of proof that would apply in the absence of the provision.²² If, on the other hand, the effect of the provision is to require the importer to prove that the imports are non-infringing copies once the applicant has proved absence of licence to import, then section 130A would make a difference to the onus otherwise applying.

The Bill would more clearly reverse the current onus of proof if it amended sections 37 and 102 so that the importer had to prove that he or she did not know that, and had no reason to know, that the imported CDs would infringe copyright if made by the importer in Australia.²³

Costs of allowing parallel imports

Allowing parallel importation diminishes the value of Australian rights. For example, sales of the local edition of a book, on which a full royalty is paid, may be adversely affected by the importation of foreign editions on which a lower, or no, royalty is paid. The incentive for a publisher to invest in the book is thus decreased.

The ACCC asserts that most Australian authors publish solely for the Australian market.²⁴ Even if this is so, a significant – and increasing – number of authors are successfully selling rights in other markets.²⁵ The Bill is thus inconsistent with the Government’s policy in other areas to increase the sale of rights in other territories, for example through the Australia Council.

Remainders

The ACCC, in its April 2001 report on prices for books, software and sound recordings, argues that authors may be able to prevent competition from remainders by using buy-back or no remainder clauses in contracts, or by switching to up-front contracts. The first two proposals relate to a contract to publish in a foreign territory, and the last relates to a contract to publish in Australia.

A buy-back clause enables the author to buy copies of a book from the publisher at cost price. The author's income from the protected Australian sales is thus effectively decreased by the amount he or she has to spend to buy back the remaindered copies of the foreign editions. The ACCC's 1999 report refers to the submissions of the ASA and Text Publishing that such clauses are not cost-effective and thus not sought by authors.²⁶

A clause requiring a publisher to never remainder is difficult for an author to negotiate as it requires the publisher to absorb the cost of books which it could otherwise recoup by selling them as remainders. The publisher may thus seek to reduce its payments to the author, for example by negotiating a lower royalty rate.²⁷

An author has no opportunity to negotiate either of these provisions if the sale of foreign rights is negotiated by a publisher who has acquired world rights, or rights for a number of territories. The author could require the primary publisher to include these requirements in any sub-publishing contracts, but may have no recourse against a sub-publisher which doesn't meet the requirements.

Up-front payments are calculated with reference to the projected income to the publisher. If that projected income is lower – for example, because of parallel imports – then the up-front fee will be lower.

Foreign editions other than remainders

Owners of Australian rights are also at risk from importation of non-remaindered foreign editions.

If the edition is published by a foreign publisher sub-licensed by the Australian rights owner, then the Australian publisher may be able to negotiate an undertaking by the foreign publisher not to supply to Australia, as has been suggested by the ACCC. Importers could still acquire books from sources other than the publisher. The author – who generally receives a lower royalty for overseas sales under a sub-publishing contract – has no opportunity to negotiate for, or enforce, such an undertaking.

If the foreign edition is published pursuant to a direct contract between the author and a foreign publisher, the author may be able to negotiate an undertaking by the foreign publisher not to supply to Australia, but again this would not prevent importation from other sources. Authors generally receive lower royalties on exported copies. The Australian publisher loses income it would otherwise expect to receive in return for its investment in the book.

Schedule 3 of the Bill

We support the proposed amendments in Schedule 3 of the Bill.

Schedule 3 includes an amendment to section 53, to replace references to “copy” with reproduction. There are two other provisions relating to libraries in which the Digital Agenda Act did not replace the term “copy” with reproduction: subsections 50(7A) and 51A(4). Section 50 deals with supply of material by one library to

another. Section 51A deals with preservation and replacement of material in a library's collection.

We referred to the retention of the term "copy" in these subsections in our submission of August 2000 to the Attorney-General's Department on the Digital Agenda Bill. As there has been no explanation by the Government for retention of the term "copy" in these provisions when other references to "copy" in the library provisions have been replaced with "reproduction", we assume that the retention was an oversight, as for section 53.

We ask the Committee to recommend that Schedule 2 be amended to also include amendments to these sections.

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Executive Officer
April 2001

Endnotes

- 1 *Report of the Committee appointed by the Attorney General of the Commonwealth to consider what alterations are desirable to the Copyright law of the Commonwealth*, AGPS, Canberra, 1959 (the "Spicer Report") at p8, para 13.
- 2 Copyright Law Review Committee, *The Importation Provisions of the Copyright Act 1968*, Australian Government Publishing Service, Canberra, 1988 at para 9
- 3 Copyright Law Review Committee, *Computer Software Protection*, Commonwealth of Australia, Canberra, 1994 at para 11.18.
- 4 Explanatory Memorandum to Copyright Amendment (Parallel Importation) Bill 2001, p 25
- 5 Attorney-General's Second Reading Speech; Explanatory Memorandum p26
- 6 For example, in the submission to the Committee by the Australian Publishers Association (APA).
- 7 The amendments were also intended to enable the availability of certain titles at cheaper prices – that it, titles only made available by the Australian rights owner in hardback format can be imported in paperback format, the paperback format usually being cheaper than the hardback format.
- 8 Explanatory Memorandum to Copyright Amendment (Parallel Importation) Bill 2001, at p 26
- 9 April 2001 and March 1999 reports on prices of books, software and sound recordings.
- 10 Second Reading Speech
- 11 See Second Reading Speech. The Government thus takes the view that the IPCRC did not conduct a sufficient analysis.
- 12 Second Reading Speech
- 13 Second Reading Speech
- 14 See submission to the Committee from the Australian Society of Authors
- 15 see Second Reading Speech
- 16 at para 2.45
- 17 There is a detailed analysis and response to the AIC report in the response by Music Industry Piracy Investigations (MIPI) to the IPCRC Interim Report.

- 18 See Ministry of Economic Development, "Parallel Importing and the Creative Industries", December 2000, available from www.med.gov.nz
- 19 Second Reading Speech
- 20 *BMG v Much More Music*
- 21 Other matters an applicant needs to prove are chain of title and that the copyright owner had not licensed the importation.
- 22 That is, the onus would be on the defendant to prove that the imported copies were non-infringing copies, as is the case for importation of books under section 44A and for other defences to copyright infringement such as fair dealing.
- 23 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.
- A similar amendment would need to be made to sections 38 and 103 to require a distributor of imported articles to show that it did not know, and had no reason to know, that the imported articles would have infringed copyright if made in Australia.
- An importer or distributor of certain articles may thus have two defences:
- that it did not know, and had no reason to believe, that the articles would have infringed copyright if made in Australia, and
 - that the imported articles were non-infringing articles.
- 24 ACCC's report, *Price Updates for Books, Computer Software and Sound Recordings*, April 2001, p20.
- 25 Submissions to the Committee from the APA and ASA.
- 26 See footnote 50
- 27 It may be possible for an author to negotiate for no remainders for an agreed period of time. This is recommended by the ASA in relation to Australian contracts.