

Australian Copyright Council

3/245 Chalmers Street Redfern NSW 2016 Australia
Tel (02) 9318 1788

Fax (02) 9698 3536

ACN 001 228 780
email cpright@fl.net.au

Submission to Inter Departmental Committee on CD prices

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 provision of information and free legal advice about copyright. The Copyright Council also conducts research into copyright issues, and lobbies for law reform.

Focus of our submission

Our main concern is with proposals for the total or partial repeal of the "parallel importation" provisions in the Copyright Act. We strongly oppose such proposals.

The purpose of the parallel importation provisions, in our view, is to ensure the effective exercise of the other rights granted to copyright owners (in particular, the right to make reproductions). An exclusive right to reproduce a work in Australia is illusory if articles containing the work can be imported by others. The effect on the Australian copyright owner or exclusive licensee is similar to unauthorised reproductions being made in Australia – the exclusivity is destroyed. The removal of exclusivity may diminish or remove the incentive to market and promote the recording.

Need to ensure an environment of increased price competitiveness

We have no special expertise in relation to pricing and competition issues. We are concerned, however, about assumptions that prices are affected by the parallel importation provisions of the Copyright Act. We query whether there is any evidence to support this assumption. Prices in Australia are often said to be higher than those in the United States, but United States has parallel importation rights.

We are also concerned that cheaper recordings may mean lower, or no, royalties to the creative contributors – the songwriters and the performing artists– or to the investors in the recording. Policies aimed at encouraging lower prices should not, in our view, be pursued without consideration of the need for an environment in which new music and new recordings will be encouraged.

Developments since the PSA's 1990 report

As the Committee is aware, the World Intellectual Property Organisation has convened a number of meetings since 1991 in connection with two proposed new international treaties. One relates to "literary and artistic works" (including music), and the other relates to sound recordings and performances. A Diplomatic Conference has been convened for December 1996 to consider the draft texts which have been prepared for each of these treaties.

Each of the draft texts contains two alternative Articles dealing with distribution and importation. The first alternative in each case would require countries party to the treaty to provide an importation right in its legislation.

The inclusion of this provision in each of the draft texts, and the reports of the meetings leading to the draft texts, indicate significant international support for an importation right to be adopted as an international standard of copyright protection.

The other major development at the international level has been the finalisation of the General Agreement on Tariffs and Trade (the GATT), which includes the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). One of the two main reasons for TRIPS was the absence of international standards on enforcement of intellectual property, including piracy of sound recordings. TRIPS includes such provisions, which have been implemented in many countries, but implementation in developing and least developed countries is slow.

Prices in other markets

Again, we have no special expertise about prices of sound recordings in other markets. However, we do not think it is necessarily wrong that sound recordings may have different prices in different markets.

There may be a number of legitimate reasons for a sound recording being available cheaply in another country, where it would be unfair to permit its importation into Australia. For example, a copyright owner may elect to sell legitimate recordings at a lower price in a country where piracy is rife, and/or where disposable income is low. A recording may also be available in 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). In most cases the royalties paid to copyright owners for these cheaper recordings are diminished or non-existent.

Inability to control imports from countries where records may be remaindered, or where they are sold at a lower price, may create a disincentive to export. Allowing parallel importation thus seems inconsistent with policies to encourage exports of Australian music.

Competition policy in Australia

In our view, the Copyright Act is not an appropriate place for attempts at reforming competition policy.

Flow-on effects of possible reforms

We understand that removal of the parallel importation provisions would make it more difficult to prevent the importation of pirate sound recordings, because of the difficulty of differentiating pirate recordings from legitimate recordings.

International relations and obligations

We have referred above to the provisions dealing with importation in the draft texts of the proposed treaties to be considered at the Diplomatic Conference convened by the World Intellectual Property Organisation in December.

One of the proposals in the past has been to allow importation of recordings from countries with "comparable" levels of protection to Australia, but not from other countries. In our view, provisions in the Copyright Act to implement such proposals are likely to contravene the "national treatment" requirements of various international treaties, and may contravene the "most favoured nation" provision in TRIPS.

Need for adequate return to Australian copyright holders in sound recordings

In our view, copyright provides an incentive for the production and marketing of creative work by granting exclusivity in a territory to copyright owners. A record company which invests in the manufacture and marketing of a sound recording in Australia is more likely to receive adequate return for that investment if others are prevented from making that sound recording in Australia, or importing it. If parallel importation is allowed, copyright protection, and thus the incentive for investment in production and marketing, is diminished.

Vibrant Australian music industry

If Australian record companies and publishers cannot ensure proper returns for sales in the Australian market, then there is no incentive for Australian artists and songwriters to deal with Australian based companies. More successful artists and songwriters who have the ability to make deals with foreign record companies and publishers covering Australian sales may not necessarily be disadvantaged. It is difficult however for an unknown artist or songwriter, without having previously made an Australian deal, to do this. Allow parallel importation may mean that the opportunities for artists and songwriters are diminished, because the incentive for Australian based record companies and publishers to invest is removed or reduced.

Effect on artists

In its 1990 report, the PSA made the point that most artists in Australia are not receiving income from sale of their records because the recording costs are unrecouped. The PSA said that artists would therefore not be affected if the repeal of the importation provisions resulted in a lower royalty. There are some inconsistencies in this position. First, the PSA stated on page 64 of its report that 30% of artists are in a recouped position. This is a significant percentage. Secondly,

artists who are in an unrecouped position would take longer to reach recoupment because a lower royalty would mean it would take longer to pay back advances. The PSA did not suggest that recording costs would be lowered as a result of its recommendations.

Effect on songwriters

In its 1990 report, the PSA said that if its recommendations would result in lower royalties to songwriters, most songwriters would not be affected because they have unrecouped advances. Again, the PSA glossed over the fact that recoupment will take much longer if a smaller royalty is paid. More importantly, the PSA did not consider publishing agreements which will be made in the future. Publishing advances are calculated according to expected returns – if the returns are lower, so will the advances be lower. Such advances are often the only source of income for a songwriter. In addition, songwriters who are also performing artists often share their publishing income with other members of their band.

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
17 October 1996