

AL©C

Australian Libraries Copyright
Committee



Australian
Library and
Information
Association

ADA

Australian Digital Alliance

Productivity Commission Issues Paper:

*Copyright Restrictions on the Parallel
Importation of Books*

Joint submission of the
Australian Digital Alliance, Australian Libraries Copyright
Committee & Australian Library and Information Association

January 2009

Submitted by email: books@pc.gov.au

1. About us

This submission is made on behalf of the Australian Digital Alliance (ADA), the Australian Libraries Copyright Committee (ALCC) and the Australian Library and Information Association (ALIA). This joint submission of the ADA, the ALCC and ALIA represents a large constituency of Australian individuals and organisations, united in their call for book market reform.

We thank the Productivity Commission for the opportunity to comment on the Issues Paper “Copyright Restrictions on the Parallel Importation of Books” (the **Issues Paper**).

Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.

Australian Libraries Copyright Committee

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- National and State Libraries Australasia
- National Archives of Australia
- The Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Australian Library and Information Association
- Council of Australian University Librarians
- Australian Government Libraries Information Network
- National Library of Australia

The ALCC considers the impact of copyright law reform on Australian libraries and archives and provides advice to the Federal Government on how to maintain a balance between reasonable access to creative works for copyright users on the one hand and an incentive for copyright creators and owners on the other.

Australian Library and Information Association

ALIA is the professional organisation for the Australian library and information services sector. One of its objectives is to promote the free flow of information and ideas in the interest of all Australians and a thriving culture, economy and democracy.

ALIA believes Australian copyright and intellectual property policy must protect the interest of the public, education, research and library communities to promote the advancement and sharing of knowledge, innovation and creativity.

2. Cultural benefits of books

The Issues Paper queries the ‘precise nature of cultural benefits arising from books’¹. We submit that there are a few facets of the cultural benefits that should be considered.

We agree that it is important to our society to encourage the production of Australian books. All types of Australian books (including fiction, non-fiction, academic works) provide different slices of Australian culture, society, stories, research and knowledge.

The Discussion Paper also asks “Do cultural benefits arise from the existence and output of authors per se, or from the creation and dissemination of particular types of stories and writings”². We strongly believe that a thriving Australian book industry is of little use if those books are not readily accessible to the Australian public. We gain value from books by being able to access, read, discuss, and draw from those books. The creation of books is just one side of the coin; the other side is having adequate access to those books.

We submit the detrimental effect restrictions have upon Australians’ access to books, in the form of higher prices, should be considered by the Productivity Commission.

3. Copyright framework

These ‘two sides’ are evident when considering copyright policy. The Issues Paper asks if the ‘high level objective’ of the *Copyright Act 1968 (Cth)* is “the provision of ‘an incentive to appropriate forms of investment in creative endeavour’”³.

A central feature of copyright law is that it provides creators with a number of rights relating to their work. The *Copyright Act* allows creators to control copying, communication, adaption, publishing and performance of their work. These rights continue for the life of the writer plus seventy years. There are also rights that attach to the published editions of books. To reinforce these rights, there are civil and criminal enforcement provisions for copyright infringements. These rights exist with the intent of providing copyright creators and owners with an economic incentive to create and innovate.

In our submission, of equal, if not greater, importance is the counter-balance to these rights. There is a wide range of exceptions to copyright holders’ rights that aim to ensure adequate access to creative works because this is in the public interest. For example the exceptions that allow interlibrary loans and document delivery between

¹ Ibid, 9.

² Ibid.

³ Productivity Commission, *Issues Paper: Copyright Restrictions on the Parallel Importation of Books*, November 2008, 9.

libraries, ensure that people engaged in research or study in regional areas can gain access to materials in libraries across Australia.

We believe that the ‘high objective’ of copyright law is to optimise innovation and creation, and at the same time, to ensure that works are available to use and access for the public interest. Because of this, we see that copyright policy is about creating a balance between adequate access to materials on the one hand, and adequate incentives to create those materials on the other.

We wish to make the following submissions in relation to relation the restrictions, and their context within the Copyright Act:

The restrictions are not needed in order to provide creators with further incentive to create and innovate. As noted above, Australia already has provisions providing high levels of protection, in turn providing ample potential to commercially exploit works.

The restrictions are not needed in order to provide local publishers with incentive to invest in creative endeavour. It has been argued that the importation restrictions are necessary for publishers so there is a financial incentive for their investment in creative endeavour. As we discuss in further detail below, we submit that the financial incentive that publishers obtain through the importation restrictions is via monopoly profits gained at the expense of consumers.

Historically, the importation restrictions provided advantages to British publishers in the colonies (including Australia). International publishers continue to be significant beneficiaries of the current restrictions, as the subsidiaries or branch offices of international publishers in Australia can take advantage of a distribution monopoly that prevents retailers from sourcing cheaper books from overseas.⁴

Protectionist policy is a blunt tool for providing incentives for local publishers, and we strongly agree with the position outlined in the Issues Paper:

[I]f the government has the objective of assisting Australian book producers (whether authors, publishers or printers), direct subsidies or other policy instruments could achieve this objective at less cost to the community than is associated with parallel importation provisions.⁵

The restrictions should be considered as a competition issue, and not a copyright issue. Although situated in the Copyright Act, the parallel importation provisions are not a good fit with the high level objectives of the Copyright Act and would be more properly examined as a matter of competition and restrictive trade practices policy. We discuss the competition issues at heading 5, below.

⁴ This point was raised in a press release when the issue was revised in 2002: Senator the Honorable Richard Alston (Minister for Communications, Information Technology and the Arts) and the Honorable D Williams AM QC (Attorney-General), ‘Cheaper Books and Software,’ Press Release 13 March 2002. Archived copy available: http://www.richardalston.dcita.gov.au/Article/0,,0_4-2_4008-4_103988.00.html.

⁵ Ibid, 7.

4. Consistency

A brief point we wish to make is the lack of consistency in parallel importation provisions. For some subject matter like sound recordings, the restrictions have been lifted entirely, however there are still partial restrictions in respect of books, and the restrictions are still in place for other materials such as computer software.

The partial restriction on books is a compromise position, with the resulting provision being quite convoluted, and we submit, unworkable.⁶

5. Competition

Throughout the long debate on the parallel importation provisions, it has been noted numerous times that the restrictions are not really a question of copyright protection, but really just of Protection.

In the High Court case *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV*⁷ involving parallel importation of cookbooks, Murphy J observed:

The evidence... suggests that the Australian public will suffer if the respondents succeed, that the copyright is being used to manipulate the Australian market, and that the respondents will control the outlets and the price to the public will be almost doubled, and the Australian public will have delayed access to publications freely available in the United States.

This issue arose on numerous occasions during the period of the Hawke and Keating governments. In 1983 then Federal Attorney-General Gareth Evans referred the matter of parallel importation restrictions to the Copyright Law Review Committee. The issue was revisited in 1989 when then Federal Minister for Consumer Affairs, Senator Nick Bolkus, referred an inquiry into the price of books to the Price Surveillance Authority (PSA). This inquiry recommended complete removal of the restrictions, with transitional arrangements.

The debate over 1990/1991 that followed resulted in the enactment of a 'compromise' position⁸ on parallel importation. At the second reading of the Copyright Amendment Bill 1990, the Honourable Allan Rocher made a number of points that remain relevant to this debate:

The Government appears to have caved in to the demands of Australian publishers and Australian authors for protection against foreign competition, to the detriment of Australian readers. The Attorney-General (Mr Duffy) in his second reading speech claimed that the influx of cheap overseas books produced for much bigger domestic markets would threaten economic loss to both Australian publishers and Australian

⁶ The relevant part of the Copyright Act is set out at Annex 1 of this submission.

⁷ [1977] HCA 52; (1977) 138 CLR 534 (29 September 1977). Available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1977/52.html>.

⁸ Section 44A Copyright Act (1968)Cth, set out at Annex 1.

authors if the PSA's recommendations were adopted. If this situation were to eventuate, it would be highly desirable from the standpoint of many consumers.

In the case of publishers, the economic loss referred to is the loss of monopoly profits that are gained at the expense of consumers. In the case of Australian authors, the Minister's anticipation of losses can only be considered as something of an insult to their literary talents. It implies that their work is of an inferior quality that needs to be protected by higher prices for imported books by foreign authors. Admittedly, Australian authors, to the extent that they are accurately represented by the Australian Society of Authors, share the Minister's sentiments. These writers apparently have no confidence in their ability to compete with overseas authors.⁹

In November 1995 the Prices Surveillance Authority reviewed these 'compromise' provisions and once again recommended the complete dismantling of the provisions, given evidence that the 1991 amendments lead to no reduction in book prices.

Later, in the 2000 *Review of intellectual property legislation under the Competition Principles Agreement* Henry Ergas and Professor Jill McKeough also recommended the removal of restrictions, saying "Removing the restrictions on parallel importation does not undermine the efficacy of copyright as a stimulus to creativity... Removing the restrictions will provide to Australia the same benefits as other economies secure through their far larger internal markets."¹⁰

The practical implications of competition problems in the Australian marketplace for books have also been raised by former New South Wales Premier Bob Carr in *The Australian* newspaper¹¹:

A new edition of the young adult bestseller *Twilight* sells for \$24.99 in Australia but only \$16.90 in the US and \$16.52 in Britain. I have converted to Australian dollars for this and following comparisons. The winner of the 2008 Booker Prize, *The White Tiger*, sells for \$32.95 in Australia, \$21.53 in the US and \$30.70 in Britain. Without the present restrictions, a parallel import edition of Harper Lee's classic *To Kill a Mockingbird* could be sold in Australian bookshops for \$13.95. But the protected Australian edition sells for \$21.95. A parallel import edition of Ian McEwan's *Atonement* could be sold for \$13.95, yet the present Australian edition sells for \$24.95. A parallel import edition of *Memoirs of a Geisha* could be sold for \$13.95, whereas the Australian edition sells for \$23.95.

For over twenty years, from the Hawke and Keating governments through to the Howard government, this issue has continued to arise, with review after review discussing the detrimental effect of the restrictions upon competition, and consequently, the affordability of books in Australia.

⁹ Commonwealth, Parliamentary Debates, House of Representatives, 14 May 1991, 3695 (Hon. Allan Rocher).

¹⁰ H Ergas and J McKeough, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, 8. Available at <http://www.ipaustralia.gov.au/pdfs/ipcr/finalreport.pdf>.

¹¹ Bob Carr, "Bob Carr on the Case for Cheaper Books" *The Australian*, 13 December 2008, 5.

6. Parallel Importation and Amazon.com

The use of the Internet to sell goods and service has led to the emergence of an international market place with direct consumer-distributor dealing ... This new technology has drastically reduced the effect of parallel importation bans within Australia, primarily due to the development of e-commerce industry.¹²

In more recent times, there are compelling reasons for dismantling the restrictions. It has been argued that importation restrictions are necessary to ensure that Australia is not flooded with cheap versions of books from the UK and the US, with which Australian publishers would be unable to compete. However, regardless of the current importation restrictions, any Australian consumers with an internet connection have for some time been able to access these cheaper books via book suppliers such as Amazon.com (and Amazon.co.uk).

The restrictions upon parallel importation simply have the result of excluding Australians who are less 'internet savvy' from obtaining more competitively priced books, and putting Australian brick-and-mortar book sellers in a less competitive position than online UK and US bookstores. In our globalised, connected world it seems illogical to continue to maintain these importation restrictions.

We believe the importation restrictions raise an equity issue, in that it is people without access to the internet (or without the necessary skills) who are more likely to be paying the price of the parallel importation restrictions. In many cases this will be the people who can least afford to be paying higher prices for books.

We submit that dismantling of the restrictions upon parallel importation should be supported where the benefits of wider range, access, and cost differentials of books are of value to the community. In our submission, the benefits flowing from greater competition in the form of increased access to book outweigh any benefit obtained in continuing protectionism.

7. The New Zealand Experience

It has been argued that Australia, as a smaller English speaking country would be in a more vulnerable position should the restrictions be removed, as the book industry comes into competition with the US and the UK. In contrast, the removal of parallel importation restrictions within Europe is said to be a very different experience, as language differences mean the competition between smaller European countries and the larger US and UK industries is not so marked.

It is therefore useful to consider the New Zealand experience, due to the large similarities with Australia. We are both English speaking countries, with (relatively)

¹² Julia Windsor, "Parallel Importation and its Effect on Information Technology", 2003, *Digital Technology Law Journal* 3, Para 18. Available at: <http://www.austlii.edu.au/au/journals/DTLJ/2003/3.html>.

small populations. The restriction upon parallel importation of books was removed in New Zealand in 1998 with, apparently, large benefits flowing from the removal.

A report prepared for the NZ Minister of Economic Development in 2004 summarised its favourable findings, which are worth reproducing in some detail:

On the one hand, there was no evidence of any substantial detriment to the financial performance or investment activity of these three industries [book publishing, music recording and computer software] following liberalisation. Indeed, **in the case of book publishers, income earned by publishers has risen substantially** from 1998 to the present while export growth in this sector since liberalisation has exceeded overall export growth.

On the other hand, there is evidence of lower retail pricing in these three industries following liberalisation. For instance, **New Zealand book prices are now lower than Australia's despite Australia having the lower price advantage before New Zealand's liberalisation of parallel imports.**

...

Furthermore, **there is evidence that parallel importing, at least in the book publishing and music sectors, has promoted greater choice and availability of products to consumers** and other users of copyright-protected works. For instance, book retailers have reported improved speed in filling customer orders, improved availability and access, and earlier release of new titles since liberalisation.

...

However, generally speaking, the impression that can be gained from retailers is that the incidence of parallel importing itself is not particularly high. It seems that the main impact of liberalisation is that by legalising parallel imports, those imports have been strengthened as a real competitive threat to incumbent and authorised distributors and wholesalers. Faced with this threat, suppliers have improved their performance in providing more competitive terms and conditions of supply and therefore reduced the need to engage in any substantial volume of parallel importing. Taken together, the above considerations suggest that New Zealand should maintain its current liberal treatment of parallel importation as the gains to society as a whole exceed any observable detriments.¹³ (Emphasis added)

We believe that where the parallel importation restrictions to be removed in Australia, our experience would be very similar to that in New Zealand.

8. Conclusion

We strongly support removal of the restrictions upon parallel importation of books. We believe greater competition will lead to an increase in the variety of books available and more competitively priced books, increasing their accessibility for Australians.

We thank the Productivity Commission for the opportunity to comment.

¹³ *The Impact of Parallel Imports on New Zealand's Creative Industries Final Report*. Network Economics Consulting Group, October 2004, 6-7. Available at: <http://www.med.govt.nz/upload/11982/negc.pdf>.

Annex 1

COPYRIGHT ACT 1968 - SECT 44A

Importation etc. of books

(1) The copyright in an overseas work first published on or after the commencing day is not infringed by a person who, without the licence of the owner of the copyright, imports a non-infringing book into Australia for a purpose mentioned in paragraph 37(1)(a), (b) or (c).

(2) Subject to this section, the copyright in:

(a) an overseas work first published before the commencing day; or

(b) a work first published in Australia, whether before, on or after the commencing day;

is not infringed by a person who, without the licence of the owner of the copyright, imports a copy (in this subsection called the imported copy) of a hardback or paperback version of a non-infringing book into Australia for a purpose mentioned in paragraph 37(1)(a), (b) or (c) if:

(c) the person had ordered in writing from the copyright owner, or the owner's licensee or agent, one or more copies of that version of the book (not being second-hand copies or more copies than were needed to satisfy the person's reasonable requirements); and

(d) when the person ordered the imported copy, the original order mentioned in paragraph (c) had not been withdrawn or cancelled by, or with the consent of, the person and:

(i) at least 7 days had elapsed since the person placed the original order and the copyright owner, licensee or agent had not notified the person in writing that the original order would be filled within 90 days after it was placed; or

(ii) at least 90 days had elapsed since the person placed the original order and the copyright owner, licensee or agent had not filled the order.

(3) The copyright in a published work (whether first published before, on or after the commencing day) is not infringed by a person who, without the licence of the owner of the copyright, imports a single copy of a non-infringing book into Australia if the importation is for the purpose of filling a written order, or a verifiable telephone order, by a customer of the person and:

(a) in the case of a written order, the order contains a statement, signed by the customer; or

(b) in the case of a telephone order, the customer makes a verifiable statement;

to the effect that the customer does not intend to use the book for a purpose mentioned in paragraph 37(1)(a), (b) or (c).

(4) The copyright in a published work (whether first published before, on or after the commencing day) is not infringed by a person who, without the licence of the owner of the copyright, imports 2 or more copies of a non-infringing book into Australia if:

(a) the importation is for the purpose of filling a written order, or a verifiable telephone order, placed with the person by or on behalf of a library, other than a library conducted for the profit (direct or indirect) of a person or organisation; and

(b) in the case of a written order--the order contains a statement, signed by the person placing the order, to the effect that the library does not intend to use any of the books for a purpose mentioned in paragraph 37(1)(a), (b) or (c); and

(c) in the case of a telephone order--the person placing the order makes a verifiable statement to the effect referred to in paragraph (b); and

(d) the number of copies so imported is not more than the number of copies so ordered.

(5) Without limiting the ways in which a telephone order under subsection (3) or (4), or a statement under paragraph (3)(b) or (4)(c) relating to such an order, may be verified, such an order or statement is, for the purposes of this section, taken to be verifiable if the person who takes the order, or to whom the statement is made, makes a written note of the details of the order or statement when, or immediately after, the order is placed, or the statement is made, as the case may be.

(6) Where:

(a) a book is imported into Australia for a purpose mentioned in paragraph 37(1)(a), (b) or (c); and

(b) the importation does not, under this section, constitute an infringement of copyright in a published work;

the use of the book for any such purpose does not constitute an infringement of the copyright in the work and subsection 38(1) does not apply to the book.

(7) Subsection (2) does not apply to the importation of a copy of a hardback version of a non-infringing book into Australia if the copyright owner, or his or her licensee or agent, is able to supply in Australia enough copies of a paperback version of the book to fill any reasonable order.

(8) For the purposes of paragraph (2)(d), a copyright owner, licensee or agent is not taken to have filled an order by a person for one or more copies of a version of a book unless and until the copyright owner, licensee or agent sends the copy, or all of the copies, as the case requires, to the person.

(9) In this section:

"book" does not include:

(a) a book whose main content is one or more musical works, with or without any related literary, dramatic or artistic work; or

(b) a manual sold with computer software for use in connection with that software; or

(c) a periodical publication.

"commencing day" means the day on which the Copyright Amendment Act 1991 commences.

"overseas work" means a work:

(a) that was first published in a country other than Australia; and

(b) that was not published in Australia within 30 days after its first publication in that other country.

Note: A work may, for the purposes of this Act, be first published in Australia if it is published in Australia within 30 days of an earlier publication elsewhere. For the meaning of first publication, see section 29 and, in particular, subsection 29(5).

Laura Simes | *Executive Officer* | Australian Digital Alliance
T: 02 6262 1273 | F: 02 6273 2545 | E: lsimes@nla.gov.au