

**THE EXAMINATION BY THE PRODUCTIVITY COMMISSION OF THE PROVISIONS OF  
THE *COPYRIGHT ACT* 1968 THAT RESTRICT THE PARALLEL IMPORTATION OF  
BOOKS INTO AUSTRALIA**

**A PRELIMINARY SUBMISSION BY ZEPHYR MUSIC PTY LIMITED**

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**1.0 INTRODUCTION**

- 1.1 This preliminary submission to the Productivity Commission (“the Commission”) in respect of the examination of the provisions of the *Copyright Act* 1968 (“the Act”) is made by Zephyr Music Pty Limited [ACN 002 399 653] (“Zephyr”). That task to be undertaken by the Commission is referred to in this preliminary submission as “the Study”.
- 1.2 Zephyr is a major retailer and wholesaler of printed music in New South Wales. Printed music is the graphical notation of one or more musical works presented in book form. Zephyr’s customers include private and professional musicians, music students, music teachers, libraries, schools, P & C associations, universities, community bands, orchestras and other music organisations, professional orchestral and chamber groups, choirs, church music organisations and music conservatoriums. Zephyr imports printed music books for retail and wholesale sale, and also purchases printed music from other Australian importers for retail sale. Zephyr was founded in 1976.

**2.0 PURPOSE OF PRELIMINARY SUBMISSION**

- 2.1 The purpose of this preliminary submission is to request the Commission to reconsider its decision<sup>1</sup> that, for the purposes of the Study, it “*intends to interpret the term ‘books’ to exclude books whose main content is a transcript of musical works, as well as computer software manuals or periodicals*” (“the Decision”).

**3.0 ESSENCE OF ZEPHYR’S PRELIMINARY SUBMISSION**

- 3.1 In essence, Zephyr respectfully submits that, in making the Decision the Commission has misdirected itself concerning the nature of the Study required to be undertaken by it in accordance with the Terms of Reference issued on 7 November 2008 (“The Terms of Reference”) by the Hon. Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy & Consumer Affairs (“the Minister”).
- 3.2 Zephyr submits that an examination by the Commission of the provisions of the Act that restrict the parallel importation of books into Australia requires the Commission to examine, *inter alia*, whether or not, for the purpose of section 44A of the Act, the definition of the term “book” should exclude, *inter alia*, “*a book whose main content is one or more musical works, with or without any related literary, dramatic or artistic work*”<sup>2</sup>. Zephyr respectfully submits that the making of the Decision by the Commission, particularly prior to its receipt and consideration of submissions made as part of the Study process, constitutes an error of law on the part of the Commission.

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<sup>1</sup> Commission’s Issue Paper dated November 2008 at p.5.

<sup>2</sup> Section 44A (9) (a) of the Act.

#### 4.0 LIMITED NATURE OF THIS PRELIMINARY SUBMISSION

4.1 Having regard to the nature of Zephyr's commercial activities,<sup>3</sup> this preliminary submission addresses only the issue of books of the kind referred to in section 44A (9) (a) of the Act. It does not address books of the kinds referred to in section 44A (9) (b) or (c), however, it may well be the case that the submission applies *mutatis mutandis* to such books.

#### 5.0 THE TERMS OF REFERENCE

5.1 As noted above,<sup>4</sup> the Terms of Reference issued by the Minister require the Commission to undertake a study "*on (sic) the current provisions of the Copyright Act 1968....that restrict the parallel importation of books....*".<sup>5</sup>

5.2 In the Terms of Reference, the Minister specifies that the scope of study of the Study requires the Commission, when undertaking the Study, to have regard to "*identified options for reform, including non-legislative approaches, and any transitional arrangements.*"<sup>6</sup> It is clear from that aspect of the scope of the Study that the Commission, when identifying "*options for reform*", is to have regard to legislative approaches.

5.3 The scope of the Study, as determined by the Minister, also requires the Commission to have regard to "*whether the benefits to the community from the present provisions outweigh any costs from restricting competition*"<sup>7</sup> (the emphasis is Zephyr's). It is submitted that this provision of the Terms of Reference requires the Commission to consider all of the "*present provisions*" contained in Section 44A, including that contained in Section 44A (9) (a) for the purpose of determining whether or the benefits to the community from the exclusion of books "*whose main content is one or more musical works*" outweigh any costs from restricting competition. As noted above<sup>8</sup>, a failure to do so would constitute an error of law on the part of the Commission.

5.4 It also is submitted by Zephyr that, in outlining the scope of the Study in the Terms of Reference, the Minister did not limit the Study by stating that the use of the term "books" therein is to be restricted by the current definition of that term for the purposes of Section 44A of the Act. Indeed, as submitted in paragraph 5.3 above, the scope of the Study as specified by the Minister indicates that the reverse is the case.

5.5 It is submitted that the "Key Considerations"<sup>9</sup> specified by the Minister also indicate that, in conducting the Study, the Commission must have regard to the appropriateness or otherwise of continuing to restrict the meaning of the term "books" as currently provided in Section 44A (9) (a) of the Act. Those Key Considerations state that the Commission **shall** (the emphasis is Zephyr's) have regard to "*the impacts on all relevant industry groups including authors,*

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<sup>3</sup> See paragraph 1.2 above.

<sup>4</sup> See paragraph 1.1.

<sup>5</sup> Paragraph 1 of Terms of Reference.

<sup>6</sup> "Scope of Study" - 5<sup>th</sup> bullet point.

<sup>7</sup> "Scope of Study" - 4<sup>th</sup> bullet point.

<sup>8</sup> See paragraph 3.2.

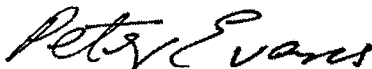
<sup>9</sup> Terms of reference at p.2.

*publishers, printers, distributors, retailers, consumers, libraries and educational institutions (including small and medium business)*<sup>10</sup>. As noted above<sup>11</sup>, many of the entities so identified by the Minister include customers of Zephyr and, indeed, Zephyr itself.

**6.0 WHAT RESPONSE DOES ZEPHYR NOW SEEK FROM THE COMMISSION?**

- 6.1 Having regard to the matters set out above, Zephyr requests that the Commission revisit and review the Decision with reference to the Terms of Reference issued by the Minister.
- 6.2 Zephyr submits that the Study should include an examination by the Commission of whether or not the current exclusion in respect of the definition of the term “books” in Section 44A (9) (a) of the Act should be retained and submits further that the Commission should determine so well before the closing date for the receipt of substantive submissions from interested parties.
- 6.3 If, contrary to this preliminary submission, the Commissions decides not to so vary the Decision, Zephyr requests that it be furnished with a statement to that effect as soon as possible giving reasons for the Decision.

DATED: 9<sup>th</sup> December 2008



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Peter Evans  
Managing Director  
Zephyr Music Pty Limited

<sup>10</sup> “Key Considerations” – 1<sup>st</sup> bullet point.

<sup>11</sup> See paragraph 1.2