

Jacinta diMase Management

16 April 2009

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

Dear Ms Irvine,

This letter voices my opposition to the proposed changes to Australia's Parallel Import Restrictions (PIRs) for books, detailed in the draft recommendations of the Productivity Commission's (PC) study on this issue. In particular I strongly oppose the recommendation that PIRs should apply for only 12 months from the date of first publication of a book in Australia and that after that time parallel importation should be freely permitted.

I am a Literary Agent with more than fifteen years experience in the publishing industry, including experience as a bookseller and as a sales and marketing assistant for Macmillan Education Australia and Pan Macmillan Australia.

Currently I represent thirty Australian authors whose works include picture books, fiction and non-fiction for children and young adults (both trade and educational titles), and fiction and non-fiction for the adult trade market.

Given the current lack of accurate statistical information and comprehensive data on the book sector, the PC has found that making informed assessments and gauging the impact of the current PIRs and proposed changes to the PIRs is "inherently difficult". The fact that the PC still intends to recommend changes that could drastically affect the livelihood of hundreds of Australian authors is a great concern both to me and to the authors I represent. In particular, I am completely opposed to the notion that authors should be policy "guinea pigs" given that the PC believes that an "ancillary benefit of the proposed changes is that the ensuing outcomes should shed light on the likely benefits and costs of further liberalisation of the market at a later date". Surely a better course of action given the lack of information available would be to recommend a review that includes the consideration of the effects of technological and market developments in the next five years as well as a new ABS survey on the publishing sector. That way, any changes to PIRs could be made on a more informed basis and under less stringent time constraints.

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With due respect to the work undertaken by the PC in drafting these recommendations, this proposed change to the length of PIR protection demonstrates how little the PC has been able to learn about the way the trade publishing market in Australia works and how effectively the current PIRs provide Australian *authors* with a secure financial incentive for the creation and the dissemination of their works.

It is true that Australians are avid readers and *buyers* of books. The PC found that: "reading books also improves literacy, which is fundamental to individual wellbeing and to the smooth running of society and the economy".

An objective of the grant of copyright is to encourage the production of literary works in the public interest and although the PC has argued that PIRs are not part of the *grant* of copyright, it can be demonstrated that all additions and amendments to the Copyright Act (including the introduction of the PIRs) have been made in order to strengthen the intent and objectives of the Act, to protect authors' Copyright, and to maintain the balance between copyright protection and the flexibility to allow innovation, derivation, and competition in the market.

The recommendation that PIR protection be reduced to only 12-months from the date of first publication will be as effective as abolishing PIR protection entirely.

For my client Myfanwy Jones, author of the recently published trade-paperback edition of *The Rainy Season* (Penguin Books), the abolition of PIRs after 12 months would coincide with the release of the (cheaper) B-format paperback edition of her novel. Similarly, a non-fiction book by Myfanwy and her co-author Spiri Tsintziras called *Parlour Games for Modern Families* (Scribe Publications) will be released in trade-paperback in time for Christmas 2009. The publisher plans to release another (cheaper) edition the following year in time for Father's Day and Christmas 2010. The release of the new edition/s provides authors with another burst of marketing and promotion that builds on the campaign of the first publication period as well as growing word of mouth for the book. More importantly it generates more sales and maximises potential for an author to financially benefit from their ability to license copyright. Trade authors rely on royalties as the only financial incentive for their creative works. Unlike authors of educational works, who often assign copyright entirely in lieu of a one-off fee, trade authors will be adversely affected by the loss of PIRs after only one year because it will drastically endanger their potential to earn ongoing royalties.

Similarly picture book illustrators and authors such as Nina Rycroft and Phil Cummings will be adversely affected by the proposed 12-month protection period. The sale of theatrical rights to Nina and Phil's recent hardback picture book *Boom Bah!* (Working Title Press) allowed the work to be performed as a stage play in Adelaide, Canberra, Brisbane, and is soon to tour Singapore, Shanghai, Korea, and New Zealand. The release of a paperback edition of a hardback picture book is usually within 12-to-18 months after its first publication – just at the time that the title's PIR protection would cease. That could mean that the creators would have cheaper imports of their own title available for sale at the box office of his forthcoming Melbourne and Sydney and repeat Adelaide shows – editions that would deliver them little if any royalty. *The Night Garden*,

written and illustrated by Elise Hurst (ABC Books) was a shortlisted title in the 2008 Children's Book Council of Australia (CBCA) awards. The direct result of that shortlisting was a large increase in sales of the hardback edition, three publisher reprints in 2008, and the sale of the theatrical rights. *The Night Garden* was published in 2007 but had a cheaper import edition of *The Night Garden* been made available in 2008 (12 months after publication) that edition would have coincided with the announcement of the CBCA shortlist. The author royalty from retail sales of the Australian edition of the book could have been jeopardised by the availability of a cheaper version and Elise would have been forced to return to illustrating fee-based educational texts to help pay her mortgage rather than freeing her up to continue working on more complex concepts and ideas such as *The Collector*, an innovative picture book that will be published by Omnibus Books in 2011 (after more than five years in the making). As it is, demand for the hardback edition of *The Night Garden* has not slowed so the publisher has decided to delay publication of a paperback edition until September 2009, thereby allowing both the author and the publisher to reap the rewards of taking the risk on that title.

In addition this proposal to drastically reduce PIR protection could signal an end to the hardback publishing programs of many picture book publishers. The hardback edition has important cultural significance as publishers produce a hardback primarily to supply the public library and schools market – our literacy heartland. But what incentive could there be for a publisher to release a hardback edition when it could be wiser to go straight to paperback in order to compete with “cheaper” imports of the same title in a brief 12 month's time.

I am not entirely opposed to a defined period of certainty for local authorship, but 12 months is nowhere near long enough to provide any incentive for publishers to take the risks involved in publishing new authors, release both hardback and trade-paperback editions followed by B-format paperback editions or to take on the expense of picture books with so little certainty of return.

Currently trade authors are paid an advance against royalties, which is in theory is recoupable by the publisher if a book does not sell enough copies to “earn out” its advance. With only a 12-month window in which to have the protected opportunity to earn out an advance I can immediately predict that publisher advances will be considerably less than they are now. It's a simple calculation: multiply the retail price of a book by the proposed print run, multiply that figure by the 10% author royalty and offer approximately half of that “predicted” royalty to the author as an advance. So a book priced at \$25.00 (rrp) with a print run of 5000 copies would generate an author royalty of 12,500 if *every single* copy were sold at full price. However, take away the possibility that full-priced copies of the book can be sold after the initial 12-month period and it is unlikely that a publisher could offer even half of that potential royalty as an advance. In addition, there will be no incentive for publishers to release new editions of a title after the initial 12-month period, as they would do so into an entirely unprotected and unrestricted market.

Authors of series such as David Harris: *Time Raiders* series (ABC Books); Moya Simons: *Walk Right In Detective Series* (Walker Books); Michael Pryor: *The Laws of Magic* series (Random House) and highly successful newcomer Kathy Helidoniotis author of eight books in the *Totally Horse Mad* series (HarperCollins) are other examples of authors whose livelihoods would be drastically effected by the proposed changes to PIR protection. Currently publishers of series adopt a "wait and see" approach after the publication of the first books in each series. Publishers wait to gauge the sales and market reaction to each book before making the commitment to publishing more books in a series. Without the certainty of PIR protection, would there be an incentive to publish a new book in a series each year? Especially if earlier books in a series are already being sold as "remainders" or coming into Australia from sources that bring no payments back to either publisher or author? How can a publisher continue to spend money on promoting new books in a series when another party (neither the original copyright owner nor the licence holder of the work) is reaping the rewards of that effort, expertise, and expense?

Another detrimental effect that remainder copies of books have is that they "degrade" the value of a series brand. That is, once a book is offered as a remainder, there's a perception that it mustn't be any good – it didn't sell therefore the publisher has to "off-load" it. 12 months is not long enough for a book to be considered backlist or "remainder" – especially a book that is part of a series. The contracts I negotiate on behalf of my authors stipulate that there shall be no remaindering of any book in a series until *two* years after the first publication of the last book in a series. However, the proposed change to the PIR law would render that clause useless.

The livelihood of local authors would be the casualty of the proposed recommendation and this livelihood would be further jeopardised if their publishers were forced to extend the period of local protection from parallel imports by the only means available: namely the holding back of a book's release in foreign markets. Given that foreign publishing deals are already difficult to secure, this added complication or restriction to sales would further erode the possibility of a book's potential foreign rights income and resulting author royalty. Books in the series by Moya Simons and Kathy Helidoniotis have already been sold into the UK, Germany, Canada and the US, Japan, Korea, Taiwan, Czechoslovakia, and The Netherlands. If Walker, for example, had been forced to hold off selling the UK rights to Moya Simons' series in order to protect her Australian territorial rights Moya's royalty income would be affected. And it's unlikely that Walker would be able to sell the rights at a later date as the window of opportunity for shared origination and printing costs would be lost making it very unlikely for a UK edition to be profitable. Similarly, the European rights to Kathy Helidoniotis' books have been made possible due to the success of the works in Australia – overseas publishers are more likely to take the risk on the *Totally Horse Mad* series when they can see that eight books have been commissioned. I doubt the same confidence would be felt if HarperCollins Australia had only been able to publish one or two books in the series before the open market increased the risks in marketing and promoting more books in the series.

"Go and get a day job" Is that the advice I should give to the authors that I represent? What kind of creative output can we demand of our authors as they "burn the midnight oil" working two or more jobs in order to "fund" creative endeavour.

I often wonder if book buyers, when answering "yes" to the question "would you like to be able to purchase cheaper books?" would still say yes if they knew that cheaper books may be made available at the expense of the author who wrote them.

Many of the children's authors I represent spend months of the year touring Australian schools to promote their books and to supplement their income. These authors would be completely undercut by cheaper editions of the books they are out working so hard to promote. Book buyers are not aware of where a book is published, or who has published it. Buyers know a book's title and an author name – they do not know that an author royalty can be lost completely on a cheap edition of a book.

Currently book clubs such as Scholastic book club do offer cheaper books to schools and to parents via the Bookclub and Scholastic at Home systems. And although the author royalty on these sales is much less (usually 10% of a net figure), authors and agents regard these kinds of sales as a bonus as book clubs can access a market that is separate to the traditional book retail market.

In fact, all book buyers are able to source cheaper books if they so desire. They can legally "by-pass" bookshops and purchase online, or borrow from a friend or library or purchase books second-hand. Consumers do have a choice about which trade books they buy, whether based on price, convenience, authorship, or a pretty cover.

The educational market is where consumers may have less choice: The PC identified that prescribed textbooks, can be more susceptible to monopolistic pricing practices and that textbooks produced in Asia could be imported for half-price in some cases. So perhaps a recommendation for the removal of PIR protection on educational/text books *only* could be more carefully explored? Given that most authors of educational/text works are paid non-recoupable *fees* rather than royalties for their work, they do not have to rely on retail sales of their book in order to earn royalties. Their income is fixed, known, and assured. Removal of PIR protection on these books would not adversely affect the authors.

The Mechanics of the PIRs

Because the rights holder is the party that qualifies for PIR protection, the PC argues that parties other than local publishers and authors benefit because local Australian are able to choose to license their copyright to publishers, whether Australian owned and independent, the Australian arms of larger foreign companies, or direct to foreign companies. Therefore, the PC argues, the benefits of PIRs are often "sent offshore" as though in these cases there is no further benefit of PIR protection for a local author who has licensed a work to a foreign-owned company. The fact is that in all of these cases the author is still paid a royalty based on retail price in his or her own territory and they are published by

the Australian staff of those companies with local expertise and knowledge that enables considerably more sales to be made than if the book were merely published overseas and distributed or "dumped" in Australia.

Patricia Bernard, a local author whose book, *With The Kamasutra Under My Arm* was first published in India by Srishti Publishers and Distributors has also been published locally by the small independent publisher, East Street Books. That local publication allowed Patricia to be paid a modest advance and to earn a royalty based on the Australian retail price. Had Srishti simply be able to "dump" cheap copies of the Indian edition here Patricia would not have been able to earn anything, let alone the close to \$10,000 dollars that she has earned through local sales in the three years since it was first published.

The PC also argues, the PIR protection extended to foreign authors whose books are published in Australia is also "leaking" money into foreign pockets implying that local authors and publishers don't benefit in these cases. The fact is that the whole Australian publishing industry benefits from these protections in myriad ways. Local authors benefit from having a vibrant, diverse, and solvent publishing industry in which to offer the rights to their works. The Australian offices of foreign publishing companies, employ Australians, and for most trade titles, print locally. In addition to their foreign list titles they publish local authors with verve and passion and most importantly with success. Local publishers who publish (rather than distribute) the works of foreign authors encourage a system of royalty payments to *all* authors (rather than a small percentage of a net figure, which is the import-distribution payment model). The profits earned in selling books such as the Harry Potter series benefit local authors in obvious ways: Allen & Unwin maintains a diverse, vibrant, and extremely successful local publishing list with thanks to the huge profits generated by the successes of imported titles. Those profits have enabled me to sell the work of first time author Nathan Mullins, whose book *How to Amputate a Leg* will be published by Allen & Unwin in September 2009.

The Debate About Restrictions

Booksellers argue that PIRs prevent them from importing "better value-for-money" editions of books. However, we get what we pay for: cheaper editions are most often a result of cheaper production costs: maintained by a poorly paid workforce (Asia and India), cheap paper (that yellows quickly), poor quality design and production resulting in books with weak binding, small font, heavy leading and shallow gutters. These books are difficult to read without glasses, fall apart with repeated reading, and rely on unsustainable work practices for their production. And they are produced by non-Australian labour – isn't that a system that "leaks" money offshore and takes Australian jobs?

Given that the Rudd Government's mandate is to stimulate the economy and preserve local jobs it seems outrageous that the PC should be recommending a course of action that will quite plainly send jobs offshore. There will be far more than a "leakage" to foreign owned companies – it will be a flood!

Booksellers who are agitating for this kind of change must have forgotten local publishers' ability to provide timely release of quality product, backed up by

sales, marketing, and promotional support, and who offer *sale or return* terms. Currently booksellers can and do negotiate higher discounts from publishers on a firm sale basis. Then it's up to the booksellers whether they want to pass on the discount to consumers in the form of cheaper books or keep the profit. The opportunities for booksellers to offer consumers cheaper books is already available to them and exist within a system that does not rob an author of royalty.

Scope and Approach of Study

If the likely behaviour of the market participants in the face of change is uncertain, why make authors the guinea pigs in testing the possibilities of a 12-month PIR protection period?

If it's true that a major concern of the PC is the "wellbeing of the community as a whole", then surely making books slightly cheaper at the cash register is not going to deliver that outcome. I fail to see how slightly cheaper books can contribute to or increase community wellbeing especially when the likely consequences of the change in PIR protection will so adversely effect the income of Australian authors and the publishing companies they rely on to publish their works.

Price Impacts

It is a great concern to me that such far-reaching changes to the PIR protections are being recommended when the PC, by its own admission, has had to draw upon qualitative evidence, theory, and a little quantitative evidence in order to determine possible effects and that they cannot "put a figure on them". Yet the law is going to be tampered with in order to "trial" possible outcomes and allow some booksellers the chance to "cherry pick" cheaper editions. This "trial" comes at the cost of author livelihood and the diversity of the publishing industry.

The PC did note that "import remainders" of backlist trade titles are much cheaper for the consumer, although the PC did think it relevant that authors receive little or no royalty for these consumer bargains. Is this result what we want in exchange for cheaper books? Is this change to the law really working towards a balance of incentives that ensure the creation and diffusion of creative works?

I beg the Productivity Commission to re-think the proposed change to the length of Parallel Importation Restriction from 12 months to no fewer than 5 years from the date of first publication of *each new edition* of a book.

Yours sincerely,

Jacinta di Mase