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A Note in Support of the Regulation of Book Imports

Commissioner Mike Woods
Deputy Chairman, Productivity Commission
Parallel Importation of Books
GPO Box 1428
CANBERRA ACT 2601
Australia

Dear Commissioner Woods,

I am writing to you on behalf of my colleagues, authors, and friends in the Australian publishing and writing community in support of their efforts to prevent a policy change that will cause irreparable harm to what is internationally recognized as one of your country's most vital industries. The current discussions and investigations concerning a removal of copyright protection for Australian writers and publishers have great similarities to what took place in Canada nearly twenty years ago, when we were dealing with many of the same issues for many of the same reasons. Because of those similarities, I hope that a short overview of our experience here in Canada will illuminate your discussions.

To give you some perspective on my opinion, my publishing company, HarperCollins *Canada*, is the proud publisher of many of your finest and most celebrated authors, including Lily Brett, Richard Flanagan, Tim Flannery, Kate Grenville, Donna Hay, Eva Hornung, John Marsden, Christos Tsiolkas, and Tim Winton. Last month, I was honoured to make the trip to Sydney as a guest of your Arts Council's Visiting International Publishers program. Because of this honour, I had the chance to spend a great deal of time with Australian publishers and writers there, and to hear Richard Flanagan's impassioned and incisive speech in defence of Australian copyright. I do not claim to speak for the Canadian publishing industry, or for any other publishers around the world. I have spent forty years in this industry, working in Canada and the US with strong international connections, and I was surprised and concerned to depart from Australia with the impression that your nation's writers and publishers are given far greater respect and value outside of Australia than within. I believe that your national literary culture is an invaluable

treasure, but one that is greatly endangered by the current proposed change to legislation.

Canada and Australia have shared cultural histories and geographic and economic challenges. At issue, both twenty years ago in Canada and currently in Australia, is a balance between the protection of copyright and the economics of the book industry. This balance must serve consumers, retailers, publishers, and authors alike, and is therefore an incredibly difficult one to achieve. While there is rarely a perfect solution to such problems, there are precedents and experiences in other countries and industries that may contribute to the best possible solutions.

My suggestion is that the Canadian solution may work for Australia. A Canadian publisher, in agreeing to represent the publishing list of a foreign-based company, obtains an exclusive right of distribution for that agency for all of Canada, one of its regions, or an applicable sector of the market. Thus, no other Canadian publisher or seller/user of books is allowed to import those titles directly into the specified market. This implementation of the Exclusive Distribution Right has cost publishers some money but has saved them infinitely more—it saved them a marketplace.

Amending the Copyright Act to include these regulations required the political will of the Canadian Government but did not cost taxpayers a single dollar. The cultural and economic contribution it created for Canadian publishing, however, was immense. The current discussions and investigations concerning the removal of copyright protection for Australian writers and publishers have great similarity to what took place in Canada nearly two decades ago, as so many of the business and cultural challenges are shared by our two nations and cultures. It is my hope that I can add another perspective on this current discussion, as many of the same arguments—both the accurate ones and the uninformed and fallacious ones—have been a part of our experience for two decades.

Distribution Rights in Canada under the Copyright Act

Canada's historical ties to British publishers, our relatively small population, and our proximity to the United States had undeniably been the major reasons for Canadian publishers' inability to enjoy primacy in our own market. Australia has the same problems of complex interconnection to the British publishing industry and small population, and yet the opposite problem of a great distance geographically. Australian publishers, however, now have the opportunity to be granted relief from buying around and to be positioned as the predominant suppliers in their own market by the continued legislative protection of their right of distribution.

In Canada, the right of exclusive distribution is specifically granted in section 27.1 of the Copyright Act and further defined in the Book Importation Regulations (SOR/99-324). It gives rise to injunctive relief under sections 44 and 45 of the Act. Publishers obtain protection that guarantees in practice the theoretical exclusivity of their distribution agreements with foreign-based publishers. No other book-selling, book-buying, or book-lending entity can legally import those titles covered by an exclusive Canadian distribution agreement.

The inclusion of a right of distribution in the Canadian Copyright Act does regulate but does not inhibit the flow of books into Canada, and it has allowed Canadian publishers to maintain our primacy and competitiveness in our domestic marketplace. No fewer books cross our border; no

access is denied our customers. We are able to provide better and more efficient service relative to imported titles, and most importantly, Canadian-originated publishing has become more economically viable.

What Canadian publishers developed is an “agency system” that simply re-routes the flow of imports so that they are controlled by Canadian publishers who, in agreeing to represent the publishing list of a foreign-based company, obtain an exclusive right of distribution. Thus, no other Canadian publisher or seller/user of books (retailer, wholesaler, library, educational institution, or government department) is permitted to import those titles directly—they must purchase through the exclusive distributor. Many publishers—foreign-owned subsidiaries and Canadian-owned houses alike—represent and distribute US- and UK-published books on this agency basis in Canada in the same way as do Australian companies. The agency system allows non-resident houses, as well as smaller local publishers, to retain the services of these companies to stock, market, sell, and supply their titles.

The indigenous publisher and the indigenous publishing program both benefit from the added volume of goods that distribution allows, since generally slim operating margins are improved because internal costs, such as the employment of sales representatives and promotion personnel, are distributed more widely. This lowers the per-ISBN overhead for all titles—including Canadian-originated books. The Canadian author and book benefit from the Canadian-controlled distribution of imports, and Australian publishers benefit from a similar arrangement. The sales and distribution costs related to the Canadian or Australian book are effectively reduced by virtue of the increase in saleable inventory and, thus, in overall sales. As these costs decrease, the author is more likely to be given greater exposure, as money is freed for advertising, catalogues, promotion, and publicity tours.

Addressing Concerns about Freedom of Access

The Canadian system, which regulates the route of book imports, has worked to the advantage of the Canadian publishing industry and thus, ultimately, to the benefit of all of its customers. Initially, however, there was opposition. This opposition, which took a position similar to that of Australia’s two dominant retailers, stemmed from resistance to change, from the perception that imports rather than routes of importation were regulated, from fallacious reasoning that buying direct from offshore entities routinely saved money and/or time, and from the perception that “freedoms” of access were being infringed.

At the time of the initial discussions with Canadian government, the Canadian publishing trade associations met with booksellers representing the Canadian Booksellers Association to ensure that legislation would protect the rights and interests of all parties—including consumers. Through these consultations, a series of agreements were reached to help allay fears about availability of titles. Among many other issues, publishers and booksellers agreed that if it became necessary to obtain a small percentage of titles outside Canada, publishers and booksellers would negotiate that percentage provided that retailers agreed to random audits of their imports, and that Canadian publishers would allow retailers to import titles represented exclusively in Canada under emergency (out of stock) conditions provided that the bookseller contacted the publisher in advance of the importation.

At no time did publishers demand that booksellers or any of our other customers be prohibited from importing any and all titles *not* represented in Canada on an exclusive basis. There are hundreds of thousands of international titles available that are not currently represented in Canada by domestic publishers/exclusive agents. As long as the Canadian copyright for those titles is clear, our customers have right of access to those books and, in reality, agency representation of most of those titles would never be financially viable. In this manner, any concerns about access to international titles not represented in Canada have been addressed.

The Impact of Exclusive Distribution Rights in Canada

The repatriation of business previously transacted outside our borders greatly added to the viability of our wholesale community. As our costs were reduced by virtue of repatriated business volume, we were better able to support the development of a proper Canadian wholesale network. Canada has no true national book wholesaler, primarily due to challenges that are similar to those in Australia, i.e., the size of the domestic market, the distances between our major cities, and the basic lack of economies of scale. There are substantial costs within the agency business, and those costs can outweigh the benefits when publishers are left to market only the less saleable titles in an imported list. Foreign-based wholesalers skim the revenues by concentrating on the “lead” or potentially bestselling titles in those lists, without taking on the overhead costs for promoting those titles within the territory. Before the Act, our regional wholesalers were never able to compete with offshore wholesalers. Canadian and Australian customers needed more full-service book businesses to stock, sell, and distribute books and service our domestic markets, and the repatriation of our business did ultimately contribute to the economic development of our publishers and the domestic market in general. This is not to say that profitability necessarily flows from agency business; rather, that creating a critical mass of goods over which all costs may be allocated allows the Canadian and Australian book a fighting chance for an acceptable level of distribution and penetration in its own market, despite each country’s unique challenges of population and geography.

Legislation has not yet completely solved the issue in Canada, though. The most current Canadian statistics value the English-language domestic book market at approximately \$1.635 billion. Canadian Publishers’ Council members can account for about \$1.090 billion of these sales. The difference, about \$600 million, is a mix of books that are bought around the exclusive Canadian agents, imported by Canadian travellers on their person, imported by mail from internet vendors such as Amazon.ca, or incorrectly categorised by Customs and Excise at point of entry—i.e., automotive maintenance manuals, appliance guides, etc. Also included in that number, of course, are all sales of Canadian and imported works made by Canadian publishers who are not members of the Canadian Publishers’ Council.

If only one-third of that difference (or \$200 million) represents purchases that bypassed exclusive Canadian agents, then the problem is huge in proportion to Canadian publishers’ total business—approximately one-fifth of current business. But before the protection of the right of distribution, that ratio was unsustainably higher. If import laws were to be changed, as proposed in Australia, you could expect a similarly negative impact on the Australian market.

Why Is Buying Around Still a Problem in Spite of the Regulations?

The reasons vary. Some customers claim that they save money by buying around. Others claim

that they avoid out-of-stock situations. Still others claim that they obtain faster service. Those who buy from foreign-based wholesalers in the US and UK (Baker & Taylor, Ingram, and Blackwell's, to name a few) maintain that they prefer the ease of one-stop shopping from a wholesaler that stocks and supplies a range of books from many publishers.

Some of these reasons may occasionally be accurate. More often than not, however, the reasons and the actions are both unjustified and inaccurate. Many customers buy around because they have "always done so." Some choose to ignore our successes on their behalf despite their absolute documentation: several years ago, the Canadian Publishers' Council produced a "Pricing and Service Survey" that backed the assertion that habitual offshore purchasing results in losses for the purchaser rather than savings.

Canadian and Australian publishers have worked both hard and successfully to maintain good levels of inventory; to improve standards and speed of service; and to offer US- and UK-originated titles to their customers at competitive prices—often at better prices than can be obtained by buying around. Many of our customers have acknowledged these facts and have further acknowledged that where it costs more (within reason) to support the Canadian publisher, it is warranted. Canadian librarians, for example, have formally agreed that, after currency conversion and freight costs, an additional 15% difference in price is acceptable.

Buying around does, at certain times, save our Canadian customers money, but it costs publishers money and so hurts the health and competitiveness of the industry. Customers' criticisms about price and service would be alleviated if the dollars currently spent buying around were repatriated. Stability in the domestic marketplace ensures better service and better prices overall. We have learned that in a market where Canadian houses had secure rights of distribution, Canadian readers have greater access and greater selection, and that Canadian-authored and/or produced books are a more affordable commodity.

Final Thoughts

Before the enactment of the Canadian Copyright Act's protection of distribution rights, the set of problems outlined in this paper threatened the structure and the economy—and thus the future—of the Canadian book publishing industry. So, as a publisher, my concern about the Australian market stems from first-hand knowledge of just how destructive a book market without territorial protections can be for indigenous publishers. Historically, no amount of effort, public relations campaigning, moral persuasion, or negotiation resolved this critical and stubborn issue in Canada. Currently, Canadian and Australian publishers are operating in more complex and less stable domestic markets than at any time in recent memory. To compound that instability with a near-certain loss of revenue could be catastrophic, and so protecting territorial rights of distribution through a more secure means such as legislation is key.

There are only two retailers who support making Australia an open market, but they are large, well-financed, and vocal businesses who look to dominate the landscape. As policy developers, your choice is between supporting these few businesses whose only goal is their own profit, or protecting a critical cultural industry. I sincerely hope it will be the case that the strengthening of an indigenous cultural industry will be the clear and logical choice. Passage of regulatory policies always invites struggle. However, I firmly believe that, as in Canada, Australian

publishing cannot continue to withstand the economic pressures at home and from abroad without stability in its own market. Weakening and/or eliminating territorial rights can only severely cripple what has been for many years a successful, growing, and thriving business, and one in which all Australians should take great pride. I urge your government to support and safeguard, as do all other English-speaking governments, one of your greatest natural resources.

Sincerely,

David Kent
President & Chief Executive Officer, HarperCollins*Canada*

cc: The Honourable Kevin Rudd, Prime Minister of Australia