

Submission to the Productivity Commission on the Economic Structure and Performance of the Australian Retail Industry

A major issue affecting the growth and success of Australian retailers is the parallel import restrictions of artistic works placed on branded clothing and footwear. The restriction is contained in the *Copyright Act 1968*, which deems even a genuine parallel imported article may be an infringement of copyright under the *Copyright Act 1968*.

The parallel importing restrictions are a substantive reason why Australian retailers of branded goods are paying higher prices for goods than overseas internet resellers and overseas retailers. As a result, Australian retailers cannot compete on price against an internet overseas retailer in branded goods.

Restrictions on Parallel Importation

Parallel imports are legitimately produced goods imported into another country. The goods are manufactured with the authorisation or consent of the intellectual property owners and subsequently imported into another country by an unauthorised distributor. Unlike pirated (counterfeit) goods, parallel goods are genuine and manufactured by the intellectual property owners, or licensee of the owner.

The benefit of parallel imports is it hinders international price discrimination and abuse of market power promoting free trade and competition. Without parallel imports an intellectual property owner can separate markets without fear of competition and charge different prices in each country. The intellectual property owners can also restrict supply preventing a range of available products to consumers in specific countries. The most important beneficiaries of parallel imports are consumers who receive the advantage of genuine goods at lower prices.

One of the main incentives for Australian retailers to trade in parallel imports for resale in Australia is in most cases the local wholesale price is considerably higher compared to the overseas prices.

Despite recent legislative changes, Australian retailers are facing serious issues when parallel importing genuine goods. Generally, genuine branded goods are marked with a registered trade mark indicating the goods originated from the owner of the trade mark. The goods may have labels and packaging accompanied with it, which would if proved to subsist in copyright, be copyright material protected under the copyright regime. Under the *Trade Marks Act 1995* and *Copyright Act 1968* Australian retailers could parallel import these goods without infringement. However, the current copyright law is failing to protect Australian retailers from litigation by brand owners in the instance where a trade marked good bearing copyright material, which does not meet the definition of packaging or a label, will infringe the owner's copyright. For example, if an Australia retailer parallel imports branded goods bearing a decorative graphic found to subsist in copyright that is printed on the surface of clothing and footwear, this act will be an infringement of the owner's copyright.

Generally a trade mark owner is also the owner of copyright artistic works affixed to branded goods. A registered owner of a trade mark is protected under the trade mark regime for unauthorised infringement of its trade mark. The *Trade Marks Act 1995* provides that an owner of a mark who registers its trade mark has the exclusive right to use the trade mark. However, if goods have been applied a trade mark with the consent of the registered owner then the owner cannot prevent further resale in Australia of those goods. Consequently, the existing copyright and trade mark regimes are contradicting each other with the copyright legislation preventing parallel importing, and the trade marks legislation allowing parallel imports to be sold to Australian consumers.

Another concerning issue with respect to the current copyright regime in relation to braded goods is that a person who sell parallel imported goods has no means of ascertaining whether an item contains copyright material. Unlike the trade marks regime and design registrable under the *Designs Act 2003*, an owner of artistic works subsisting in copyright does not need to register a copyright work to receive protection. Consequently, a retailer can breach the *Copyright Act 1968* without even realising that it is committing an Act of infringement of copyright in an artistic work.

Support for Parallel Imports

i. The Productivity Commission, *Economic Structure and Performance of the Australian Retail industry Draft Report*, at page 145 states:

According to the Australian National Retailers Association:

"... Members also report that some international manufacturers use different pricing policies that can mean Australians pay higher prices than in other markets. These practices leave Australian retailers that are operating within traditional supply- chain frame works at a competitive disadvantage."

ii. The *Draft Report* at page 146 states:

"... the higher prices for books that underpin parallel import restrictions [PIR] are intimately paid for principally by consumers and there are attended effects on activity and employment elsewhere in the economy."

and at page 147:

"The Commission thus recommends the repeal of Australia's PIR on books in Australia and deems their removal would generate net benefit for Australia as a whole:"

iii. The *Draft Report* At page 148:

"It is clear that international price discrimination is being practiced against some Australian retailers and, as a result, to the detriment of Australian consumers."

iv. The Victorian Employer's Chamber of Commercial and industry Article, 1999, *Parallel Importing* at page 5:

"Restrictions on parallel imports have been used by firms supplying copyright products to segment international markets, charging higher prices to those countries in which price elasticity of demand is low and/or domestic competition is limited and lower prices in countries where demand is more price elastic and/or competition more vigorous. In other words, they have been able to charge what each market will bear because the possibility of international arbitrage has been eliminated. Independent traders are not able to move goods from low priced countries to high priced countries, hence the price discrimination can be sustained. The high prices affect consumers directly and may also undermine the international competitiveness of user industries. Consumers are further disadvantaged in terms of the range and availability of goods covered by these restrictions"

and at page 9:

"The ACCC advocates repealing the importation provisions of the Copyright Act. It is to be hoped that the Government will maintain the momentum of reform it has started in relation to sound recordings and trade marks."

v. The Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement 2000* at page 8:

" Removing the restrictions on parallel importation does not undermine the efficacy of copyright as a stimulus to creativity. Already, there are no restrictions on parallel imports within the European Union. This ensures that even the smaller economies in Europe can benefit from the intense competition, low prices and wide product availability associated with large, integrated markets. In contrast, Australia, as a relatively small, isolated economy, is exposed to segmentation of its market from international competitive pressures, as long as the parallel importing restrictions remain in place. Removing the restrictions will provide to Australia the same benefits as other economies secure through their far larger internal markets.."

Proposed changes to the Copyright Act

With parallel importation, the consumer enjoys a broader price range and wider variety of goods. It is in the interest of the public to regulate parallel importing.

Parliament has recently legislated to exempt other types of goods from the *Copyright Act 1968*, i.e. ss 44A and 112A (books); ss 44C and 112C ("accessories" to imported articles); ss 44D and 112D (sound recordings), s 44E (computer programs) and ss 44F and 112DA (copies of electronic literary or music items).

We propose a similar change to artistic works in branded goods containing a trade mark.

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