

Submission to the Productivity Commission

**Copyright Restrictions on the Parallel
Importation of Books**

Garth Nix

PERSONAL INTRODUCTION

I am a full-time author, with more than twenty books published since 1991. My books are published in Australia, the USA and the United Kingdom, and have been translated into more than 36 languages. In addition to being an author, I also worked in publishing for many years, in various roles including as a bookseller, an editor, a publicist and as a literary agent. I am still a shareholder and silent partner in Curtis Brown (Australia) Pty Ltd, Australia's oldest and largest literary agency, though I do not actively work as an agent.

In other words, I am immersed pretty much as deeply as anyone can be in the international business of books. I e-mail and talk on at least a weekly basis with Australian, British and American agents, editors and other authors, and over the last decade or more have toured Australian, British and American bookshops every year, and so have had considerable face-to-face contact with booksellers and readers in these three key English-language publishing territories.

My submission to this enquiry draws upon this experience.

EXECUTIVE SUMMARY

Australia may be an island, but our copyright laws — and the books written, published, printed and sold by Australians — are very much connected with the rest of the world. Copyright is a potential right of all Australians, who are already, or who may one day be, the creators, facilitators or beneficiaries of copyright material.

Changing our copyright laws so that Australians have significantly less control over their own copyright material than citizens of the UK, the USA or the European Union is a very serious step with far-reaching consequences. What is at stake is not just the domestic price of books, but how Australians and Australian industries will participate in the global intellectual property marketplace, and also raises questions on the future of Australian culture and identity.

In this submission, I will set out the very sound business, cultural and legal arguments **against** modifying the Copyright Act to allow the parallel importation of books or the establishment of an Open Market.

BUSINESS

Background

When an author writes a book, they own the copyright. When they come to an agreement with a publisher, they licence that copyright to the publisher, who gets the exclusive right to publish that work in a certain territory. Sometimes a publisher will secure World rights, which allow them to publish the book anywhere, or to sub-licence the book to publishers in other territories. However, the author and their agent usually will want to only sell a particular publisher the licence to publish a book in one particular territory and will separately sell the rights to other territories. This is economically much better for the author, as they will receive a separate advance and proper royalties in each territory.

Regardless of whether it is the publisher or the author (usually represented by an agent or agents) that sub-licences a book, the basic building block of all such deals is territorial copyright. This is a fact of how the international book business works. Individual copyright territories may be lumped together into blocs, such as combining the USA and Canada, or the so-called Britcom which covers the old empire, but whether there are blocs, or exclusions, or different amalgamations, book deals are done in territories.

For each of these publishing deals, there will be a contract, an agreement licensing the copyright in the work to that publisher, for that territory. The foundation for these agreements is always the copyright law of the country concerned, and the international agreements such as the Berne Convention and the more recent WIPO Copyright Treaty that establish the basic concepts of copyright.

The British and American copyright regimes, which **completely** restrict any foreign editions from competing with those of the domestic rights holder are the ‘normal’ and historical state of copyright. Restrictions against parallel importation are not “additional rights” as is suggested by the introductory paragraph of the Productivity Commission’s Issues Paper.

(That said, the 30/90 rule and the other 1991 amendments were and continue to be a sensible modification for Australia’s peculiar place in the world book market, being geographically distant but with a huge cultural overlap with the UK and USA. The modifications were also very important, because they forced behavioural change on the distributors of British and American books into Australia, but did not do so at the expense of Australian authors or publishers.)

Any agreement for the publication of a book is governed not just by the contract between author and publisher (which as in any commercial agreement can be a very fallible instrument), but also by the copyright laws of that country.

The **certainty** of territorial copyright — and not just unenforceable contracts between an author and all their various publishers and unconstrained distributors — provides the British or American publisher with complete confidence that they will be able to invest in the publishing, printing, distribution and marketing of a book (and in an author's career) without having to face the competition of other editions coming in from Australia, India, South Africa or any other country that produces English-language books.

An Australian publisher currently has a similar level of surety to their American and British counterparts, under our sensibly modified copyright laws. If they are efficient, and publish the book in a timely fashion, then they can also confidently invest in the author, the book, in printing in Australia, and supporting the book in Australian bookshops.

Territorial copyright is a reality of the world book business. However it is sliced and diced (as in the USA and Canada being lumped together, or the UK plus portions of the Commonwealth), it only works when it is underpinned by copyright law. If Australia chooses to unilaterally surrender even more of its citizen's sovereign copyright than it already did in 1991 (for good reasons), and remove the restrictions on parallel importation, then the Australian copyright territory will effectively cease to exist in terms of international book business.

Contracts defining territories unsupported by Copyright Law are unenforceable

I'm going to expand on this a little further, because I have already read some submissions decrying this as nonsense — without of course offering any substance to back this up. The reason the Australian copyright territory would cease to exist is because any international publisher would not need to buy Australian rights, because they would already be included in *any* other deal.

For example, if a US publisher buys the rights to a book, the contractual language typically defines the USA and its territories and any "Open Market". If Australia is an Open Market, then those rights are included in the US deal. That US publisher has bought the rights to sell that book in Australia for nothing extra.

The other side of this is that an Australian publisher who sought to establish an exclusive Australian territory solely by contract with the author could of course include language to do

so, but it would be entirely unenforceable unless the contract actually prohibited the author from selling any other English-language rights to anyone else, in effect denying them success and probably their natural rights.

Why would establishing an Australian territory simply by contract be unenforceable? Because the author, even if they try and wall off Australia in every single deal they do with a non-Australian publisher, does not have agreements with the distributors, the wholesalers, and all the other myriad channels by which books are sold internationally. Say that Australian author manages to get an agreement that states their US publisher won't sell books directly to Australian shops and by some miracle it is honoured. But the US publisher does sell to a multinational chain that has a central warehouse that supplies their Australian shops. Or a wholesaler in Hong Kong, who supplies Australian shops.

In the case of remaindered or over-printed stocks, the situation is even more uncontrollable. Overstocks and remainders are sold to all kinds of different dealers, in many different countries. An open market is a *carte blanche* to sell any edition, no matter where it comes from, or what was paid for it, even if the author (as is usually the case) receives absolutely no income from the remaindered books sold.

Seeking to establish an Australian territory solely by commercial contracts is impossible. The world has failed to control arms shipments through end-user certificates and binding agreements between supplier and buyer. Thinking that international book sales could be constrained by author-publisher contracts, without the foundation of copyright law, is extraordinarily foolish.

A level playing field for the British and Americans, and a muddy pit for Australia

In summary, international book business is based on territorial copyright and the licencing of these copyrights. Australia has already modified its territorial copyright beyond the international norm. If it removes the parallel importation restrictions and adopts an open market, it is effectively giving up a sovereign intellectual property right without gaining any such reciprocal right with the world's largest book-producing nations, the USA and the UK. Rather than producing a level playing field, it would dig a very big hole for Australian authors, publishers and printers.

Negative Effects of an Open Market

- Fewer books published in Australia

As many of the most successful books tend to be published in multiple countries, in an open market an Australian publisher would have to be very wary of investing in any book likely to have international success! The more successful the book, the more it will have international editions coming back in to compete with the locally-produced edition. At a certain level of success, it will become economic for British, American, Indian or South African publishers to over-print their perfectly legal editions and sell them in Australia at cost or near-cost to cut their unit printing costs and boost their domestic profits. As Australian publishers lose the needed profits from their most successful books, they will be unable to invest in new authors or back success — a vicious circle of failure for an entire industry.

- Fewer books printed in Australia

The requirement to make international books available within 30 days of their first publication to secure copyright in Australia means that many books are printed here that, if there was no time requirement, would not be. Similarly, if an Australian author's books are being published in the USA or UK, it would likely be more economical for the Australian publisher (if there is one) to take copies from the US or UK print run and not print in Australia at all.

- Less income for Australian authors

It is a standard practice for both British and American publishers to only pay full royalties, based on the cover price of the book, in their own domestic markets. Outside their domestic market they pay an “Export” royalty, what was once known in the British trade as a “Colonial” royalty. The full royalty is typically between 6% to 12.5% of the cover price (depending on the format and deal). The export royalty is typically 10 per cent of the price received by the publisher from the Australian sister company, distributor or bookseller. This price received is usually a 60-80% discount from the cover price, so the Export royalty is effectively 2-4% of the cover price, a very significant diminution of the author’s income.

If a book is remaindered or is an “overstock”, the author usually receives no royalty at all or in some circumstances, the same 10% of price received. The price received for a remainder may be as little as 1 or 2 cents per book. If Australia is made an open

market, then it is open to any remainders, which will compete with the full-priced editions. This would once again jeopardise the incomes of Australian authors, and is most threatening to books that while they are successful in Australia, have not done so well in the USA or the UK. This is likely to include books of particular Australian interest, such as Australian histories, biographies, political or social studies. It would be sadly ironic, if for example, a biography of the current Prime Minister was published in Australia and the UK and when the British edition failed to sell there, 5,000 copies were remaindered here and undercut the Australian edition and helped send the Australian publisher out of business.

- Less opportunity for Australian Authors, particularly beginning authors

It is never easy to be published, but an author usually finds it easier to be published in their own country, particularly if they have written a book that is about that country, is set there, or is concerned with matters that resonate in their own society or community.

However, in order to be published in one's own country, there must be successful publishers who are prepared to invest in publishing local books.

As I have discussed at length above, territorial copyright provides publishers with certainty to allow them to invest in Australian authors and Australian books. Without that certainty, the business case to invest in and publish Australian books is far weaker and consequently the opportunities for Australian authors to begin here would be fewer.

It is also the case that international careers are usually begun in the author's own country. A success in Australia helps sell the books elsewhere, and successes in each territory lead to other sales. But without that first step, in your own country, it is much more difficult to establish an international career.

POTENTIAL POSITIVE EFFECTS OF ALLOWING PARALLEL IMPORTATION

The sole potential benefit for sharply departing from the rest of the developed world's copyright foundations, appears to be that books might be cheaper and that Australian booksellers would be able to compete better with online booksellers, primarily Amazon.com.

On the first potential benefit, it is true that Australian books are often more expensive than American or British editions, particularly when bought online. One immediate reason for this is the GST.

If you really want cheaper books, remove the GST

If the Australian government was most interested in making books cheaper and more accessible to Australians, then removing the GST on books would be the first step. There is no VAT on books in the UK, and no Federal tax on books in the USA (though some states do apply a tax and online booksellers collect it for deliveries of books to customers in those states.)

Taking out the GST, the other major variation is the value of the Australian dollar. As it has dropped so dramatically in recent months, any comparison of book prices older than October 2008 is now invalid. It also makes it difficult to draw any firm conclusions from current price comparisons, since further fluctuation is likely.

That said, for an easy comparison, at least for me, let's look at the January 12, 2009 comparative prices of my most recent books in the USA, the UK and Australia (without GST), and the comparative price of a cinema ticket for purchasing value purposes. I have included the retail price and the typical discounted online price, not including shipping to Australia.

I have also included the estimated author royalty if those American and British editions were sold here, based on receiving an export royalty of 10% of price received from a 65% discount to a wholesaler. Note that if the books were sold to a sister company to distribute (as for example HarperCollins USA to HarperCollins Australia) the discount would probably be 75% and the income thus that much lower. As has been mentioned, if the books were remainders coming into Australia I would receive even less, possibly nothing at all, and every imported sale would likely mean the loss of the sale of an Australian edition.

SUPERIOR SATURDAY by Garth Nix

	Retail Price	AUD equivalent	Online Discounted Price exc. shipping	AUD equivalent		Est. Author royalty if sold in Australia*	AUD equivalent
US hardcover (released July 2008)	US\$17.99	\$27.67	US\$12.33	\$18.96		US\$0.62	0.95
US Paperback (not released till mid-2009)	US\$7.99	\$12.29	Est. US\$6.39	\$9.83		US\$0.27	0.41
UK paperback (released August 2008)	GBP5.99	\$13.31	GBP3.78	\$8.40		GBP0.20	0.44
Australian paperback (released June 2008)	\$AUD14.50	\$14.50	\$AUD11.60	\$11.60		\$AUD1.45	1.45
Cinema ticket USA	US\$7.20 ¹	\$10.19					
Cinema ticket UK	GBP5.25 ²	\$11.36					
Cinema ticket Australia	10.573	\$10.57					

¹ 2008, BoxOfficeMojo ² 2007, Cinema Distributors Assn ³2007, AFC

* Based on a 10% price received royalty on a 65% sister company/wholesaler discount

As can be seen from this comparison, the Australian edition typically retails from \$AUD14.50 to \$11.60. The US cover price is \$AUD27.67 but discounted to AUD\$18.96 plus delivery. The UK paperback's cover price is \$AUD13.31 or online \$8.40 plus delivery.

These are not huge price differences and has been said, the differential depends to a large degree on the relative value of the Australian dollar. If the AUD drops below US0.60 or GBP0.38, as it quite likely, then the Australian edition will be cheaper.

But there are some real book pricing issues

However, this is one isolated comparison and there are much greater price differentials, particularly for some scientific, technical and academic books. Booksellers I have spoken to have pointed out huge price differences between the local distributor's price and the wholesale or retail price in the USA or the UK, and are understandably aggrieved that they cannot bypass the local distributor and source these books more cheaply..

However, surrendering Australian territorial copyright is a massive over-reaction to the over-pricing of some books by some local distributors, which surely can be addressed in a more surgical fashion.

Removing the GST on books is the first and most obvious step.

Fighting off Amazon.com

Much of the enthusiasm some booksellers appear to have for abolishing Australian territorial copyright appears to be based on the assumption that online booksellers, and Amazon.com in particular (as the strongest and most dangerous competitor), competes solely on price with Australian booksellers, and that if Australian booksellers could offer the books at the same price then they would increase their market share, taking sales from Amazon.

I believe this is wishful thinking and that even with price parity, Amazon will continue to make inroads into the Australian market. This is because Amazon has a deep and wide competitive advantage that comes from:

- Technology — its website, shopping tools, and fulfilment are far superior to any other online booksellers, including Australian ones. Customers don't just buy "online", they go to the online destination that will serve them best.
- Its size and established customer base — Amazon has far greater buying power than any Australian company could hope to have, allowing it to make large scale deals with publishers that are simply not possible for smaller competitors.
- It isn't just a bookseller. Because of its wide offerings in many different product areas, it is able to selectively sell books as loss leaders.

Again, surrendering Australian territorial copyright to source cheaper books in order to compete better with Amazon makes no sense. A great deal would be given up by Australian authors, publishers, printers and citizens (who are potential creators), but it's unlikely

Australian booksellers would compete more effectively with Amazon solely on the basis of price.

THE CULTURAL ARGUMENT

The cultural argument against an open market has been made very effectively by many of the other authors who have made submissions to the Commission, and by the Australian Society of Authors.

It is a very real issue, and the long-term effects of having Australian works that have been “translated” to make them more palatable for an American or British audience are likely to be profound.

It is perhaps worth noting that when talking about Australia becoming an open market for books, American and British publishing professionals are astounded, as they are very aware of the detrimental effect it would have on our national publishing industry, both in terms of business and the cultural impact. One American editor I talked to about this in November 2008 said, “That’s unbelievable. Even our government wouldn’t be that stupid.”

INTERNATIONAL LEGAL ISSUES

While I am not a lawyer, I believe it is worthwhile directing the Commission’s attention to the provisions of the international copyright treaties that Australia is a signatory to, including the Berne Convention and most particularly the WIPO Copyright Treaty which contains the following clause:

Article 10

Limitations and Exceptions

1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

It could, I suspect, be argued that denying Australian authors the ability to fully protect their copyright interests in their own country would indeed “unreasonably prejudice the legitimate interests of the author” and put Australia in breach of this and other international treaties.

CONCLUSION

Under the existing modified copyright regime, which is already more open than our major competitors in the world marketplace, Australia has grown a thriving and vibrant local publishing industry; we have nurtured and launched many new authors into the world; and we have supported a printing industry that would otherwise have long since gone offshore. Booksellers have also benefited from the 30/90 copyright modifications, but as in all other countries, face difficult competition due to technological change and the rise of international online competitors.

Removing the parallel importation restrictions, while it *might* make some books cheaper, would not significantly alter the competitive challenges technology has brought to Australian booksellers, and would *definitely* come at a great cost to Australian authors and potential authors, and to the publishing and printing industries as a whole.