

## **Australian Literary Agents' Association**

### **Submission to the Productivity Commission Inquiry into Copyright Restrictions on the Parallel Importation of Books**

The Australian Literary Agents' Association (ALAA) believes there can be no long-term growth for our clients, Australian writers, or for publishing and associated industries in Australia, if the present provisions with respect to the parallel importation of books are changed. The current system allows agents to maximise authors' income and exposure through the separation of rights and the worldwide licensing of their copyrights.

There is no need to reform the provisions of the 1991 Amendment to the Copyright Act. Since 1991 a successful yet delicate balance has developed between the needs of writers, the publishing of Australian books, the publishing and distribution of international books by local and international publishers, booksellers' requirements and consumer needs.

Australian writers are well published locally and internationally. Australian readers are assured of having local editions reflecting local idiom, culture and context as well as Australian taste in the book's packaging including cover design and book format. Readers are also well supplied with international books through their Australian bookseller or, for the more obscure and less popular titles, through on-line bookselling.

There are many parties involved in the publishing industry—writers, agents, publishers, printers, booksellers, and readers—each with their own agenda. Yet we work successfully together. We have a very lively publishing industry in Australia. It is efficient and nimble<sup>1</sup> and the envy of similar industries in the rest of the world. Let's keep it that way.

## **The Australian Literary Agents' Association and the role of the literary agent**

ALAA, founded in 2003, is a voluntary body, funded through annual fees from members<sup>ii</sup>, that provides a public presence and point of contact for Australian literary agencies to discuss and keep abreast of industry issues.

Each of our members has worked as an agent for a period of at least three years, or has executed more than ten publishing contracts on behalf of their clients. Members of ALAA are bound by a Code of Ethics.<sup>iii</sup>

Currently ALAA has 17 members.<sup>iv</sup> Most of our members are sole operators, that is they run agencies where they are the only agent. Some have an assistant but many work alone. Fewer than three of our members have more than one agent.

Literary agents work to protect, manage and optimise an author's copyright. They license the work of authors they represent and ensure that authors get a fair payment for all rights. They negotiate the contracts between authors and those who use their work—book and magazine publishers, film, theatre, radio and television producers, and others.

Agents need to be familiar with the legal issues involved in contracts and the laws of the country in which they operate. They also need to keep abreast of industry practices and new technologies. Electronic publishing, for example, is a new division of publishing. In each country the approach has been different, including what format is used for the electronic files, the machines books will be read on, and what royalties are payable to authors.<sup>v</sup> Agents need to be informed about all these developments.

Agents work on a commission basis. They do not charge reading fees or retainers. Neither do they bill authors for daily operating expenses. The income of an agent is derived solely from the sales they make on behalf of their clients.

As the worldwide representatives of primary producers ALAA is in a unique position to consider the benefits of the current parallel importation rules and the effect any changes might bring. We also have a clear idea of what it is possible to achieve for authors through their contracts.

While this submission is on behalf of all members of ALAA, it is not the place for individual industrial examples. This paper covers the general issues facing agents if the parallel importation rules change. Some members will be writing individual submissions for the Productivity Commission and it is more appropriate for examples to appear in these. Please note that when we refer to publishers in this submission we generally mean trade publishers.

### **Current Climate**

The robust and vibrant local market that currently exists here is a springboard for the sale of an author's foreign rights. The first thing foreign agents or publishers will ask when they are sent a book to represent or buy for their market is, "Who bought it in Australia?".

There has been a period of significant growth since the current parallel importation rules were introduced. This is reflected both in the number of agents in Australia<sup>vi</sup> and in the number of international sales made on behalf of our clients. Our clients, Australian writers, are much better placed than ever before to be published both locally and internationally.

Over the past decade Australian agents have been able to increase their authors' earnings significantly through the trading of rights. On a regular basis we are able to split rights and sell them into different territories. More than 50% of our authors are sold internationally.

The big names we know about. But for each successful internationally published author there is a lesser known author whose book sells into two or three or more separate territories; generally it is essential to have

made a sale in the UK or USA before attracting the interest of these smaller translation markets. These sales might not be for large sums of money but together they provide significant additional income for authors who generally earn far less than the average Australian.<sup>vii</sup>

There is no way that these middle-rung Australian authors, especially those who are debut authors, could expect to command attention in the international market without first being published well in their home territory. Remember that they are competing with a huge number of international authors and their Australian sales histories, review coverage and awards and/or short-listings help international publishers to notice them. The efforts of the local team in terms of the book's blurb, packaging, marketing and so on contribute to an international publisher's interest.

When markets operate under the same rules local and international successes feed into each other, and territorial copyright makes this possible. Australian agents are regularly in contact with foreign agents, publishers and editors. News of hot new books—and their sale to local publishers—reaches foreign shores via these networks. If we didn't start with the Australian market we would struggle to make enough noise to get Australian authors noticed.

Without a flourishing local industry our authors would be without a launching pad; in turn, international success results in increased income and recognition for local authors and publishers. To eradicate the boundaries between these markets by removing the current copyright restrictions would undermine them both.

## **Copyright**

Copyright is all authors have to sell. Without it they have a creative output but no way of protecting their work or earning an income from it. Copyright allows creators to control the uses of their work and ensures that they are fairly rewarded.

The objectives of the copyright act are to provide incentives for creativity, for people to produce new works, which in turn benefit society as a whole.<sup>viii</sup> The current provisions in the Copyright Act achieve this basic objective. In addition they achieve the higher objective of copyright, which is the promotion and the expansion of knowledge, as books from various countries are vigorously traded to other countries.

Rights have been traded between the two major English language territories—USA and UK—for many years. It is common practice for books to be published by different publishers in each territory. Each country determines which books will be of interest to its population and licenses copyrights accordingly. In the past ten to fifteen years Australian writers have become an essential and successful part of this trade in rights, and this trade is continually increasing.

Although we live in a global economy, culture is not global. If we examine the best-selling fiction and non-fiction books to October 2008<sup>ix</sup> in USA, UK, Ireland and Australia, we have evidence of this. There is not one title that appears on all four fiction or non-fiction lists. There are only four books that appear on three different lists. The best-selling book in each country and each division is a different title. Culture, it would appear, varies significantly from one territory to another.

The Ergas Committee report of 2000 suggested that parallel import restrictions are not an inherent right attached to copyright. Perhaps on a purely theoretical level this is true, perhaps it isn't. Whichever is the case, on a practical level, Australian primary producers of copyright should be able to trade their copyrights on the same terms as those with whom we do most of our trading, namely the UK and USA. Both of these territories maintain territorial copyright, and have no intention of changing their position on it.

The splitting of rights, selling them separately into each market, allows that market to choose what its consumers will read. In addition it ensures

that a book is given every chance to succeed on its own terms in each market. Each publisher positions the book according to its market's tastes and expectations. This could not be achieved if British or American publishers were simply shipping books to Australia. Our authors—and readers—would suffer a terrible disservice.

### **The imagined future**

Any change to the current Copyright Act is likely to have a negative effect on authors' incomes and consequently that of agents.

There are a number of reasons this might occur. First, there is no doubt that Australian publishers will be deterred from publishing Australian authors under circumstances where they may have to compete with foreign editions. It is likely that to protect their investment in the production of a book they will demand world rights. Immediately the potential income of Australian authors will be threatened. Publishers take a greater percentage for executing a foreign deal than do agents, and they may even decide not to sell international rights to maximise their sales and income in Australia. One Australian publisher has already indicated that in the event that the restrictions are removed they will attempt to purchase world rights in books and then refuse to license English language rights outside Australia as a way of securing the local market. The use of such strategies to maintain control in a world where there is no territorial copyright would mean nothing more than the status quo for Australian book buyers and readers, yet would leave authors with significantly diminished ability to build an international career.

Agents could take a similar course of action, namely license ANZ rights locally and then wait for several years before selling other English language rights, again to ensure that the local market is free from imports. However the use of such strategies to manage territorial copyright, as noted above, would mean status quo for Australian readers, yet inhibit authors' immediate incomes. It would also have the effect of

making Australian authors look ridiculous within the international literary community. We have spent the past 15 years trying to coordinate more closely publication in Australia with publication in international territories. To change this now would be a return to the middle of the twentieth century.

Secondly, if the agent and author decided from the outset to sell rights to an overseas publisher it is likely that the author would earn export royalties on copies sold in their home territory, Australia.<sup>x</sup> Do not underestimate the dire impact that this would have on an author's overall earnings. In publishing, *home royalties* are the royalties an Australian publisher would pay on copies of the work published in Australia. These are calculated on the book's recommended retail price. *Export royalties* are the royalties a US publisher would pay on copies they sell into Australia and these are calculated on the publisher's net receipts. Net receipts are the amount the publisher receives *after* discounts to the buyer and shipping costs are deducted.

It is not only authors whose income would suffer from such arrangements. The sale of each foreign edition of an Australian work will direct income to foreign publishers, printers, designers and warehouses rather than flowing back into our own industry where it could be providing employment and growth.

In addition to these two situations, if the market were opened and there were no substantive number of publishers buying Australian works, in the long term most Australian agents would not be able to deal directly with publishers in other English language territories. Initially current knowledge of international markets would assist our members for a number of years but as those markets change—laws, trade regulations, habits, industry practice, personnel—agents here would be disadvantaged and not able to negotiate in the best interests of their clients.

Let us have no doubt: the tyranny of distance is a reality even in this electronic age. Where there are fewer than thirty trade publishers in

Australia who our members deal with regularly, in both the UK and the USA there are hundreds. It would be impossible on a daily basis for Australian agents to keep up with any changes within these publishing houses, or indeed meet any personnel in new publishing houses. Few Australian agents can afford regular international trips to keep in touch with both London and New York.

When the current Copyright Laws were implemented in 1991 there were no more than ten Australian literary agents. As noted above, we now have almost double that number just within ALAA. The current system is so productive that we actually need more agents in Australia if Australia's primary producers of copyright are to be properly represented in their own country<sup>xi</sup>. If an open market were established in Australia there is no doubt some agencies would close.

### **Contractual Arrangements**

There are some strange and common misconceptions, even within the publishing industry, that (1) the biggest threat to Australian authors is the dumping of remainders but this can be stopped contractually, (2) that copyright owners, Australian authors, would be able to prevent parallel importation through their contracts with international publishers and (3) that Australian authors would be able to negotiate home royalties for sales in Australia.

### ***Remainders***

Authors get no royalties from remainders no matter what price the consumer pays for them. For example a remainder of an American or English edition of an Australian book can end up in an Australian bookshop selling for any amount that booksellers choose—with no payment of any kind to the author.

Let us be clear about this: 99% of the time publishers will not agree to a contract in which there is no clause allowing them to remainder copies of a book they have published. Perhaps on very rare occasions, and for a



very well known author, an agent might be able to achieve this, but for the majority of authors it is now a basic clause in their contracts.

This will not change if the copyright laws are changed. Publishers believe that as they have invested in the book by editing it and publishing it and marketing it and storing it in their warehouse then it is completely up to them what they do with their stock.

### ***Wholesalers***

In America publishers sell their books via wholesalers. Under US Federal Law trade regulations once a book is sold to a wholesaler the publisher can have no oversight of resales by that wholesaler. So, although the contract might only be for the territory of the United States the American publisher cannot agree not to sell books into Australia because it would be a violation of their Federal Law.

Wholesalers can sell books to whomever they please regardless of the contract between the Australian writer and the American publisher.

### ***Royalties***

Because it is the norm in publishing to licence a book to another territory when you can, it is difficult to say what is attainable in relation to licences and contract. With UK publishers it is probable that if the author were important enough agents might be able to negotiate a home royalty in Australia.

In the USA the situation is more complicated and less clear. American publishers do not depend on other territories to make their budgets work.<sup>xii</sup> Consequently they are less likely to have systems in place to be able to offer home royalties in Australia. One of our members was recently told by a US publisher that the computer system for their royalties only differentiates between sales in the USA and sales elsewhere so they would have no way of being able to track Australian sales.<sup>xiii</sup>

And if the head contract were with a publisher who is not part of a multi-national and thus sells their books through a distributor in Australia—this would apply to many genre books—it would be impossible for them to pay a home royalty because of the discount they have to give the distributor.

### **Benefits and Costs**

The Terms of Reference of this enquiry suggest that it is the parallel importation restrictions that cause higher book prices in Australia and these restrictions also cause “less availability of books to the disadvantage of Australian consumers”. It is worth noting that these debates and arguments have been around for many years. As the Issues Paper points out there have been five studies since 1988 that have examined the parallel importation of books.<sup>xiv</sup> None of these has resulted in a change to the Copyright Act, which suggests that none of the Governments of the day felt the benefits to the community from the Act were outweighed by any cost to consumers.

There is little concrete evidence that Australian consumers find books too expensive. Book sales in Australia are increasing, not the reverse. Discounting in the chains – and some independents - has become the norm for new books so for the consumer books are cheaper than ever before.<sup>xv</sup> Our independent booksellers are the best in the world and the envy of publishers and agents in the USA and the UK, particularly the latter where they lament the market dominance of the supermarkets. Furthermore in the UK where price has become the focus of the industry, the choice of books offered to the consumer is not as great as the choice available here.

There is also an assumption that Australian consumers are disadvantaged by the availability, or lack of availability, of books. In fact Australian consumers are advantaged compared to consumers in other English language territories because bookshops are able to sell books from both the UK and USA. This suggests, as does the previous point about price,

that the higher objectives of the Copyright Act are being better met in Australia than in other countries.

Rupert Murdoch said in his recent Boyer Lectures, “Although a number of industries today are facing stiff competition from the internet—banks, retailers, phone companies, and so on—these sectors also regard the internet as an extraordinary opportunity”.<sup>xvi</sup>

Should then what can be seen as a technological challenge for the bookseller be the undermining of an entire industry? ALAA believes that this change is not significant enough to suggest that there should be any reform to the Copyright Act.

### **Subsidies**

ALAA is very concerned by the suggestion in the Issues Paper that perhaps subsidies could “provide similar benefits for Australian authors/publishers as the parallel import restrictions”. The very notion that a successful, energetic and efficient industry would be disbanded and funded by the taxpayer is bizarre and would not be a positive outcome of this study either for the publishing industry or the general community.

Furthermore at the *Australia 2020* Summit in April 2008, where long-term strategies for the nation’s future were discussed, one of the stated ambitions of the group tackling the issues around creative Australia was “We aim to double creative output by 2020”.

Any change to the Copyright Act would seriously hinder such an aim. If the industry is allowed to continue to operate as it currently does it is probable that we will make good progress towards that ambition.

**Conclusion**

ALAA understands that the Government has a statutory obligation to review the parallel importation rules. We appreciate this opportunity to express our satisfaction with the current law, which we believe has been a successful compromise balancing consumer demands with local supply and importation of works.

Since the introduction of the current scheme there has been no material change to the business or economic factors that in our view necessitates any amendment to the current system. Indeed the current system has achieved such a careful balance that any change to it will only have a detrimental impact upon that balance of interests.

## Attachment 1: Bestseller Lists



### UK FICTION (SOURCE: BOOKSCAN UK TCM)

Pos	Title	Author	Imprint	Volume
1	A Thousand Splendid Suns	Hosseini, Khaled	Bloomsbury	605,940
2	No Time for Goodbye	Barclay, Linwood	Orion	507,078
3	On Chesil Beach	McEwan, Ian	Vintage	360,131
4	Book of the Dead	Cornwell, Patricia	Sphere	321,796
5	The Forgotten Garden	Morton, Kate	Pan	296,782
6	The Book Thief	Zusak, Markus	Black Swan	275,196
7	The Secret Life of a Slummy Mummy	Neill, Fiona	Arrow	267,552
8	The Kite Runner	Hosseini, Khaled	Bloomsbury	262,318
9	The Outcast	Jones, Sadie	Vintage	255,115
10	Notes from an Exhibition	Gale, Patrick	HarperPerennial	254,304

### UK NON-FICTION (SOURCE: BOOKSCAN UK TCM)

Pos	Title	Author	Imprint	Volume
1	Delia's How to Cheat at Cooking	Smith, Delia	Ebury	491,624
2	The Official Highway Code	-	TSO	252,063
3	Jordan: Pushed to the Limit	Price, Katie	Century	224,351
4	Jamie at Home	Oliver, Jamie	Michael Joseph	223,461
5	The Innocent Man	Grisham, John	Arrow	205,643
6	Shakespeare: The World as a Stage	Bryson, Bill	HarperPerennial	204,590
7	Call the Midwife	Worth, Jennifer	Phoenix	188,762
8	My Booky Wook	Brand, Russell	Hodder	161,828
9	Blood River	Butcher, Tim	Vintage	152,770
10	Not Without My Sister	Jones, Kristina et al	Harper Element	148,581



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Pos	Title	Author	Imprint	Volume
1	A Thousand Splendid Suns	Hosseini, Khaled	Bloomsbury	605,940
2	No Time for Goodbye	Barclay, Linwood	Orion	507,078
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4	Book of the Dead	Cornwell, Patricia	Sphere	321,796
5	The Forgotten Garden	Morton, Kate	Pan	296,782
6	The Book Thief	Zusak, Markus	Black Swan	275,196
7	The Secret Life of a Slummy Mummy	Neill, Fiona	Arrow	267,552
8	The Kite Runner	Hosseini, Khaled	Bloomsbury	262,318
9	The Outcast	Jones, Sadie	Vintage	255,115
10	Notes from an Exhibition	Gale, Patrick	HarperPerennial	254,304

### UK NON-FICTION (SOURCE: BOOKSCAN UK TCM)

Pos	Title	Author	Imprint	Volume
1	Delia's How to Cheat at Cooking	Smith, Delia	Ebury	491,624
2	The Official Highway Code	-	TSO	252,063
3	Jordan: Pushed to the Limit	Price, Katie	Century	224,351
4	Jamie at Home	Oliver, Jamie	Michael Joseph	223,461
5	The Innocent Man	Grisham, John	Arrow	205,643
6	Shakespeare: The World as a Stage	Bryson, Bill	HarperPerennial	204,590
7	Call the Midwife	Worth, Jennifer	Phoenix	188,762
8	My Booky Wook	Brand, Russell	Hodder	161,828
9	Blood River	Butcher, Tim	Vintage	152,770
10	Not Without My Sister	Jones, Kristina et al	Harper Element	148,581



### AUSTRALIA FICTION (SOURCE: AP3 CONSUMER PANEL)

Pos	Title	Author	Imprint	Volume
1	Breath	Winton, Tim	Hamish Hamilton	100,791
2	Change of Heart	Picoult, Jodi	Allen & Unwin	97,801
3	This Charming Man	Keyes, Marian	Michael Joseph	86,175
4	People of the Book	Brooks, Geraldine	HarperCollins	83,892
5	7th Heaven	Patterson, James	Century	71,647
6	Atonement	McEwan, Ian	Vintage	54,945
7	A Prisoner of Birth	Archer, Jeffrey	Macmillan	48,688
8	Sail	Patterson, James	Century	47,434
9	Nothing to Lose	Child, Lee	Bantam Press	47,319
10	A Thousand Splendid Suns	Hosseini, Khaled	Bloomsbury	46,595

### AUSTRALIA NON-FICTION (SOURCE: AP3 CONSUMER PANEL)

Pos	Title	Author	Imprint	Volume
1	4 Ingredients	McCosker & Birmingham	4 Ingredients	200,994
2	Underbelly: The Gangland War	Silvester & Rule	Floradale	162,939
3	Eat, Pray, Love	Gilbert, Elizabeth	Bloomsbury	87,865
4	A New Earth	Tolle, Eckhart	Michael Joseph	72,644
5	4 Ingredients: 2	McCosker & Birmingham	4 Ingredients	48,672
6	Leadbelly	Silvester & Rule	Floradale	33,883
7	The Secret	Byrne, Rhonda	Atria	30,805
8	Girl Stuff	Cooke, Kaz	Viking	27,748
9	Jamie at Home	Oliver, Jamie	Michael Joseph	25,561
10	The Last Lecture	Pausch, Randy	Hachette	25,420



### IRELAND FICTION (SOURCE: BOOKSCAN ICM)

Pos	Title	Author	Imprint	Volume
1	This Charming Man	Keyes, Marian	Michael Joseph	46,646
2	Thanks for the Memories	Ahern, Cecelia	HarperCollins	30,838
3	Forgive and Forget	Scanlan, Patricia	Transworld	26,236
4	Lessons in Heartbreak	Kelly, Cathy	HarperCollins	25,057
5	A Thousand Splendid Suns	Hosseini, Khaled	Bloomsbury	22,949
6	The Kite Runner	Hosseini, Khaled	Bloomsbury	20,524
7	Bad Behaviour	O'Flanagan, Sheila	Headline Review	18,428
8	Take a Look at Me Now	Notaro, Anita	Transworld	18,285
9	Lessons in Heartbreak	Kelly, Cathy	Harper	16,132
10	The Gathering	Enright, Anne	Vintage	15,437

### IRELAND NON-FICTION (SOURCE: BOOKSCAN ICM)

Pos	Title	Author	Imprint	Volume
1	The Secret	Byrne, Rhonda	Simon & Schuster	30,967
2	The Official Driver Theory Test	-	Prometric	17,764
3	Angels in My Hair	Byrne, Lorna	Century	16,260
4	Eat, Pray, Love	Gilbert, Elizabeth	Bloomsbury	13,226
5	Ruinair	Kilduff, Paul	Gill & Macmillan	12,109
6	Not without My Sister	Jones, Kristina et al	Harper Element	11,943
7	South Dublin: How to Get by...	O'Carroll-Kelly, Ross	Penguin	11,889
8	Benedictus: A Book of Blessings	O'Donohue, John	Bantam Press	10,953
9	Rules of the Road	-	OPW	10,746
10	Irish History: Minipedia	-	Parragon	8,944

Charts on this page were compiled using data from Nielsen BookScan. US Charts contain year-to-date data to 21 September 2008, UK charts to 20 September, and Ireland and Australia charts to 13 September.

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<sup>i</sup> The Australian market is small, which brings about its own problems, but it has meant we have all had to work more efficiently than our international counterparts.

<sup>ii</sup> CAL has funded ALAA to help us provide some education and training programmes for our members but other than that we receive no funds aside from memberships.

<sup>iii</sup> <http://www.austlitagentsassoc.com.au/code.html>

<sup>iv</sup> There are also other people who work as agents who are not members of ALAA either through choice or because they do not fit the criteria for membership; we think this number may be around twelve.

<sup>v</sup> It is worth noting that those developing new electronic technologies approach new industry developments from the position of territorial copyright which is a given in the major territories. This is the case with any new technological developments in the trade.

<sup>vi</sup> See section called "The Imagined Future".

<sup>vii</sup> The current average salary in Australia, announced in August by the ABS, <http://www.news.com.au/heraldsun/story/0,24179559-5006922,00.htm>, is around \$58,000. The average income of authors, according to the Australian Society of Authors, is around \$11,400.

<sup>viii</sup> Australian Copyright Council <http://www.copyright.org.au/information/introduction/intro-2.htm>

<sup>ix</sup> The Frankfurt Book Fair Daily, 15 October 2008, attachment 1.

<sup>x</sup> See "Contractual Arrangements" for further discussion.

<sup>xi</sup> A growing number of Australian writers have agents in London or New York. They have stated they have done this because there are not enough agents in Australia. Others say that the market here is so small they can represent themselves here but have an agent in the UK or the USA. There are probably many other reasons as well.

<sup>xii</sup> As a hangover from colonial days publishers in the UK remain dependent on the market in Australia to make their budgets work. It is regularly the case that they will not buy a book simply because ANZ rights have already been sold. The Australian industry has made terrific inroads into this attitude. To change the copyright law would be a huge boost for the UK market.

<sup>xiii</sup> Whether this is true or not is another matter but the publisher involved does not have a serious presence in Australia so it may well be the case.

<sup>xiv</sup> Page 4, Productivity Commission Issues Paper, November 2008.

<sup>xv</sup> Perhaps too cheap, for the ACCC's discovery that both A&R and Borders sell backlist titles above the recommended retail price suggest that perhaps these discounts are actually a burden on the bookshops.

<sup>xvi</sup> Murdoch, R. A Golden Age of Freedom, ABC Books, 2008, page 45.