

Submission to the Review of Copyright Restrictions on the Parallel Importation of Books by the Productivity Commission

19 January 2009

Introduction

The submission finds that

- the restriction on parallel book imports does not serve the objectives of the Copyright Act
- the restriction does amount to a restriction on competition, but not one that serves the public interest.

It recommends

- the removal of the parallel importation restriction on books
- the provision of directed subsidies in order to seed and support writers and venturous publishing, research grants, the extension of the public lending rights payments and libraries.

The submission takes an economic and cultural approach in evaluating the issues. As indicated in the Issues Paper (p.5 Box 2) analysis is hampered by the lack of recent data on the book industry. Moreover little information is available on the consequences of the removal of the parallel importation restriction on the other Australian industries, sound recordings and computer software. The submission serves to highlight those areas of data deficit and accordingly seeks correction or improvement to any quantitative estimates it makes.

The submission considers the extent to which the restriction promotes the objectives of the Copyright Act, whether it amounts to a restriction on competition, some benefits and costs to parties, and cultural arguments.

The extent to which the restrictions on parallel book imports promote and achieve the objectives of the Copyright Act

The Copyright Act provides for the recognition of the rights of creators of artistic works. The implicit intention may be taken as that of fostering, promoting and rewarding creativity in artistic works. The Australian government has recognized the need to balance protection of the rights of creators and the public interest in economic and cultural development through reasonable access to information.

The need for copyright arises because artistic works are not like the outputs of other types of production. They are characterized by 'market failure'. That is the acts of producing and consuming them have spillover benefits which affect others than those involved directly in the transaction relating to production and consumption of the work. The benefits from spillovers arising from writing and reading are also culturally determined.

Comprehension and appreciation of the work arises from culturally determined interpretation, which differs according to the cultural understanding of the writer and reader. In turn that cultural understanding may be altered or transformed by the acts of reading and writing. The production and consumption of written works plays a crucial role in learning and education.

In the case of books the parties involved directly in the production and consumption of the work include

- the individual writer (producer) of the creative work,
- the reader of the book (consumer), and
- those involved in the technology of the transaction between writer and reader: publisher/ distributor/ retailer / library / school / university. The last three are involved in the cultural transformation arising from the creative process.

The indirect benefits arising from the production and consumption process for the creative activity are technologically determined. In this case they pertain to the written word, in the activities of reading and writing. There are benefits from the creative activities of the individual writer which flow onto other artistic producers (including not only other writers) who may learn and develop artistically from the cultural influence surrounding those activities. This influence may be subject to network characteristics and be determined according to the attainment of a critical mass of the cultural activity. Once the artistic work (book) is produced (written) it may be consumed not just by a single individual (reader) but by many others without it being extinguished or used up, as the act of reading itself can be done without cost. Once it is produced it is consumed (read) potentially endlessly, and in such a way that tastes and ideas of other writers and consumers are influenced, feeding back in turn into the creative process (writing), and the appreciation of the work (reading, discourse and writing).

While these spillover characteristics are deemed desirable for artistic endeavour and disseminating works, the way is opened for the risk of copying and plagiarism. This involves theft of the creation which can occur without the recognition or reward of the original creator. The administration of copyright includes the moral right of recognition as the creator of the work, with application of sanctions for that breach. However the administration of copyright also extends explicitly or implicitly the notion of ownership and use of the work which is enabled technologically. In some cases further protections and reward pertaining to extended appropriation and ownership are specified, as in the licensing of aspects of copyright to parties other than the original creators of the work. The restriction on parallel importation is a case of this.

The need is to balance recognition and reward for creators and appropriate sanctions and restrictions on copying of works, with the maximum benefit from public exposure to those works. The difficulty lies in that restricting access to creative works too greatly would unnecessarily limit consumption and enjoyment of the works, and limit the cultural and creative input needed for new works. On the other hand allowing too much access allows exploitation of creators by allowing use or copying of their works without recognition or reward to them. It is argued that the parallel importation restriction on

books does not serve this balance. It restricts the consumption of works (reading) in Australia without supporting the production of new works (writing).

Parallel importation restriction as a restriction on competition

A complex set of commercial incentives and market structures have arisen from copyright arrangements and with the additional restrictions on parallel importation. These incentives and market structures determine the direct commercial transactions as well as affecting spillover costs and benefits to the parties involved in the production, distribution and consumption of the artistic works.

The evolution of the copyright provisions has historically determined how copyright ownership has come to be defined. Many of the rights in copyright can be transferred or sold and bought, so that the owner of those rights is not the creator. Accordingly the financial reward arising from that ownership and use does not flow directly to creators, nor may it offer support to them. Nor do those who own the copyright necessarily have the same interests in readership that the creators do, but may be motivated by profit in a manner that may not help the creators. Profits are determined by price and quantity sold after taking out costs of production which are technologically determined. The price of the book may be higher and the quantity lower than a maximum benefit to readers would suggest, yet not benefit writers in terms of income. The imperatives of the market then determine access to the book. The more that supply can be controlled and limited and profit increased through lack of competition, the more expensive and less available the book will be to readers. The incentive effect may be to spend a lot on marketing of particular books. Libraries serve to address writer and reader access and the internet is only beginning to intervene in various ways.

The parallel importation restriction adds a layer of complexity by introducing effectively a monopoly distribution of books within Australia, *wherever they have been produced*. Essentially the restrictions on parallel importation served to deliver a monopoly right to sell the work in Australia to the first purchaser of that work for commercial sale in Australia. The supplier for Australia determines who sells the book *whether it has been imported or published by it from a source within Australia*. Once a book has been imported or released by a publisher or distributor in Australia, that supplier effectively has the sole right to distribute the work there. Obtaining the work from any other source in Australia or elsewhere is illegal without the permission of the original supplier in Australia, even if that source is legal in its own jurisdiction. The amendments such as the 30 day rule or the 7/90 rule alter this situation little. The restriction affects the supply of books originated in Australia as well as those imported in that they can be priced at higher prices too in the absence of other suppliers.

The parallel importation restriction is a relatively unusual extension of copyright which most countries do not have. It is a legacy of Australia's colonial past and the needs of British publishers in terms of gaining revenue from their subsidiaries based in their colonies. This is indicated by the large value of 'books, magazines etc' imported into Australia from the globally large book exporters, the UK (\$337.8 million in 2007-08) and

the US (\$253.6 million), together making up 60% of total of those imports into Australia, an unknown proportion of which is affected by parallel importation restrictions.¹

Restriction on parallel importation is understood to benefit the exporting country rather than the consumers in the importing country as the price can be set by the seller in the importing country. It makes price discrimination possible, whereby the price for the same item is set differently in each separate market for maximum profit. Normally this price would be expected to be higher in a particular market where there is an absence of competition faced by sellers.² Earlier comparisons by the PSA and the ACCC of book prices have indicated that book prices are higher in Australia than in the exporting countries of the US and the UK, particularly for textbooks. The possibility of purchase on the internet appears to mitigate this little once shipping is taken into account.

There are three direct consequences to be expected of parallel importation restrictions:

- A higher price of books in Australia compared with other countries
- A smaller number of books read in Australia than in the absence of the restriction
- Most importantly, a smaller *range* of books readily available compared with other countries

Higher prices for books

Higher prices for books might not be such a loss for consumers if there is a trade off against benefits for writers. However it is not clear or transparent that Australian writers benefit from higher prices, nor that local publishers are more viable. Very few writers receive significant royalties in terms of income, so that any linkage between higher prices for books and payments to writers generally in Australia must be weak at best.

Earlier surveys have generally indicated higher prices for books in Australia than in the US or UK, particularly for textbooks. According to the most recent survey, the ABS *Book Publishers* 2003-04, of total book sales (including imports) in Australia worth A\$1353.2 million for 2003-2004, \$526.1 million or 39% was due to educational books, most of which were textbooks. Of the educational total, \$106.2 million is for 'professional and reference', including an unknown but probably small portion which is for original academic books. The crucial area of education can only benefit from lower prices for books.

A smaller number of books read in Australia

If a book is a normal good consumers purchase less if prices are higher. However it is by how much less that determines whether sales revenue falls or rises. Again this is difficult to measure in practice and there is little information available. Higher prices can increase publishers' revenue if the demand for books is inelastic that is the reduction in quantity purchased is smaller in proportion to the amount the price is raised by the seller. In a publishing market where competition is restricted to fewer publishers (oligopoly), revenue to individual publishers may be raised accordingly. However this does not

¹ ABS 2008 *Arts and Culture in Australia: A statistical overview* Cat 4172.0 (Second Edition)

² Where the seller faces competition, it will set prices lower to increase sales and obtain maximum profit in that market.

preclude the possibility that lowering book prices in Australia would result in not only an increase in the number of books read, but also in total revenue and potential gains to individual publishers. This could arise if demand response to price is discovered to be asymmetric and elastic for a price fall, but also because the discovery of more reading in turn stimulates the demand for books. The spillover is in terms of supply creating its own demand.

A smaller range of books available in Australia

A less commonly recognized argument in relation to restrictions is that they have led to a smaller range of books readily available in Australia in terms of the number of titles. This is partly a consequence of the Adam Smith's observation that the size of the market also determines the number of different goods available. However it is likely to be also a result of the limitations on competition under the restriction, in regard to offering a range of titles and the logistical difficulties in obtaining them. A more discerning and wider readership creates a critical mass of demand for different titles. The market failure present in artistic works means that globalization does not necessarily result in greater homogeneity of product but rather a wider variety available.

The benefits and costs to all affected parties of any restriction on competition resulting from the present provisions on parallel book imports

Payments to writers

It has been argued that removing the restriction will lower Australian writers' royalty payments. However the size of these payments are specified in untransparent contract arrangements with the publisher of the book, apparently mostly in advances. There is no reason to think those royalty payments are increased by restricting competition among suppliers of imported books. If it is argued that payments to writers are increased, it implies that they are linked positively to the price of the book and that price is higher than it would otherwise be. If that is the case, it would benefit a very few writers if at all, in that the volumes sold and exposure would be lower. There is no evidence that Australian based authors have generally benefitted from the restrictions in terms of numbers of authors or books published or the royalties generally received. Readers face a more limited range of more expensive books which may limit literary and cultural appreciation and potential writers.

It has been argued that the books of Australian authors would be imported [more cheaply] from countries where the royalty payments to authors would be less and the royalties of Australian authors would suffer. As above, the royalty payments do not appear to be dependent on much except the contract with the author, which is again not transparent, and in general few writers receive much in royalties. The PLR scheme appears to return more royalties to writers than any other source.

The position of this submission is that from the evidence available, the parallel importation restriction on imports of books does not promote the recognition or reward of writers for their works, nor does it promote writing, regardless of whether it is considered

to be Australian. Nor does it offer maximum access and exposure to readers, again whether Australian or otherwise.

Comparison with sound recordings and software

In the case of sound recordings, there is no evidence that removal of parallel importation restrictions has reduced the creation of musical works in Australia. There is no indication from composers that it has reduced their reward or capacity to get music released. The large global record companies have faced falling sales of CDs everywhere, with the dramatic rise in the use of the internet for creating and downloading music. This makes it difficult to evaluate the impact of removal of parallel importation restrictions *per se*. Here it is maintained that the relation between the internet and book reading is different than for music. Writers and readers do not regard the internet as a technological substitute form of delivery for a specific book in the same way as composers and listeners do for recorded music. The music is still heard more or less the same way whereas the physical act of reading a book is still experienced differently from reading from a screen. E-books have not made big inroads. The purchase of books over the internet is a different matter, and surveys would reveal the relative cost of this including postage, and the scale of it. But it remains that internet or electronic reading is not a direct substitute for a hardcopy book. This makes need for removal of the restriction all the more imperative for books. The internet does not provide a ready substitute access to literary and other books as it does for music.

The comparison with the removal of the parallel import restrictions on software is even more fraught due to the rapid technological transformation of that industry. Again surveys would determine what has happened to software prices. The proliferation of computer programs and freeware would not suggest that software development in Australia has been impeded by the removal of the restrictions.

Cultural arguments

It has been argued that Australia would be swamped by imported works in a globalised environment if the restrictions were lifted. A unique Australian identity and character as communicated through the discourse of its local literature would vanish when exposed to the winds of a homogenized global onslaught if the restrictions were abandoned. This would stifle the creativity of Australian writers and destroy the character of Australian culture. This argument was also used in relation to sound recordings, that musical artists would not thrive without the support from the music industry in Australia that would be lost if the restrictions were removed. However Australian music, however defined, appears to be distinct and thriving.

What is Australian?

The issue is further complicated by the difficulty of identifying what are Australian authors and Australian works. It is well recognized that much of Australian work is first published and / or sold in other countries, rather than being dependent on publication and sale in Australia, and some writers have clearly had to go overseas to get published. Authors from other countries are also published first in Australia. There is a continual flow of writers back and forth between Australia and other countries. An unknown but

huge number of academics of Australian background and / or training are working and publishing abroad. Many of these have indicated that they had to go overseas to get published and to get access to international markets for their works. It is not at all clear that income to 'Australian' writers would fall if parallel importation restrictions were removed; it may well increase.

It is not known how many original literary (including novels, poetry, plays, criticism, biography etc.) and academic and other non-fiction works are published locally, and the revenues, payments and royalty flows involved. Of the works taken to be original, how many could be judged to be those which support an independent culture specific to Australia is a judgement which is of its nature arbitrary. In fact only a small proportion of the 8602 'new Australian titles published' in 2003-04 reported in the *ABS Book Publishers 2003-04*, Table 15 (the most recent figures available) could be construed as original or artistic creations even by a broad definition. The majority of 'new Australian titles' includes how-to books, manuals, maps and directories, cookery books, and providers of local information. Of course some of these may be judged as having an original, creative or artistic component. Moreover a large proportion of 'new Australian titles' are updated editions of previously published works which are still counted in 'new titles'.

Taking the general category in 'new Australian titles published' in 2003-04 of around 3700 titles³, a large but unknown proportion of titles which may be considered as original literary works are first published in the hardback format which numbers nearly 600 titles. It is not known how many of these are sooner or later released in trade (large format) paperback and / or mass-market (small format) paperback. There were 135 hardback fiction new titles and 149 hardback children's new titles released in 2003-04. Hardback non-fiction titles numbered 307, an unknown proportion of which would not qualify as original works but rather are for instance instruction manuals. An unknown number of these hardback titles may be from writers from other countries who succeed in getting published first in Australia. The number of original works which are released first in format other than hardback is also unknown. From this the number of 'new Australian titles published' in the general category which may be original works is estimated to be in the order of 600 at the most.

³ *ABS Book Publishers 2003-04*, Cat 1363.0 Table 15. Note that the estimates are subject to some uncertainty.

Estimate of the number of original works out of new Australian titles published', based on ABS data

	1999-2000		2000-01		2003-04	
	New Australian titles published	Original works, estimate	New Australian titles published	Original works. estimate	New Australian titles published	Original works. estimate
Education:						
- professional and reference	489	450	675	550	414*	400
-textbook	4421*	150	3202		4196*	100
General						
-hardback, of which		550		550		550
--fiction	36		82		135	
--children'	210		146		149	
--nonfiction	349		395		307	
-large format paperback	1352	100	1358		1638	150
-small format paperback	1812	100	1534	100	1495	100
Total	9755	1350	8447	1300	8602	1300

* 'estimate has a relative standard error of 25% to 50% and should be used with caution' (ABS Table 15 Cat 1363)

Source: derived from ABS *Book Publishers* 1999-2000 and 2003-04, Cat 1363.0

In the case of educational books' 'new Australian titles published' numbered around 4600 in 2003-04, some 4200 of which were textbooks. Many of these 'new titles' are versions of textbooks published elsewhere and modified sometimes very little for local consumption, for instance US business textbooks which are edited locally for Australian purposes. A high but unknown proportion of 'new titles' released of textbooks in fact are updates of earlier publications which occur every year or every few years and may be little different from the previous edition. If we are considering publication of new academic works in Australia, these are likely to be included in professional and reference category of around 400 new titles, and are probably only a small proportion of these, with the remainder being updates of reference books or professional manuals. This leaves us with an estimate of say around 500 new, original works released in the educational category.

From the above, a maximum estimate of 1300 new titles out of the 8600 'new Australian titles published' in 2003-04 could be judged to be original creations, about 15 per cent annually. It is emphasized that correction or improvement to these estimates is needed. Moreover we do not know how this compares with other countries on a per capita basis.

There is no data available on the sales value specifically of 'new Australian titles published'. ABS provides data on dollar sales value on total 'new titles' (\$719.8 million in 2003-04) and 'back list' (\$633.4 in 2003-04)⁴, but these two categories are not each broken down between locally published items and imports, or by category of book. The ABS also reports total sales of Australian titles of \$811.9 million in 2003-04.⁵ The proportions of those Australian titles sales which were due to sales of *new* titles as distinct from *backlist* of Australian is not reported, however if the assumption is made the proportion of new titles in total Australian titles sold is similar to that of 53.2 per cent in total sales from all sources, the worth of total new Australian titles published and sold was \$432 million in 2003-04. Assuming most of the Australian title hardbacks sold were new titles, these sales were worth \$116.3 million or 27% of the total, of which \$18.4 million was for hardback fiction, for 900,000 books.⁶

We simply do not know from this information what kind of income is derived from the sale of new creative works in Australia, domestic or imported. The related flow of income to authors from sales of new works would be small and there is no reason why the lifting of restrictions would make it smaller, and may indeed increase it. However information about this is not likely to provide support for maintaining parallel import restrictions.

As the numbers of new works in question are small, and writing is such an uncertain activity, the numbers are likely to be volatile from year to year.⁷ It is difficult to see how lifting the parallel importation restrictions would limit the flow of new works emanating from Australia, or the support or income to authors. Ready availability of a wider range

⁴ Table 12, source as above

⁵ Table 13, source as above

⁶ Table 14, source as above

⁷ The figures for aggregates over the decade from 1994 – 2003-04 given in Table 17 reflect this volatility

of works would improve the environment for writing and reading. Support for writers needs to come from an equitable source which is prepared to take a risk on new writers and researchers. Accordingly targeted subsidies which are paid direct to new writers and / or to small and innovative publishers is far more efficient for delivery of cultural outcomes. This would include increased writing and research grants with better attention to arts and social science areas, and support for libraries, including the PLR scheme.

Recommendations

The submission finds that

- the restriction on parallel book imports does not serve the objectives of the Copyright Act
- the restriction does amount to a restriction on competition, but not one that serves the public interest.

It recommends

- the removal of the parallel importation restriction on books
- the provision of directed subsidies in order to seed and support writers and ventures publishing, writing and research grants, the extension of the public lending rights payments and support for libraries.