



20 January 2009

Parallel Importation of Books Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

On behalf of the Australian Publishers Association we are pleased to lodge our submission to the Parallel Importation of Books Study.

The Australian Publishers Association (APA) is the peak industry body for Australian book, journal and electronic publishers.

Established in 1948, the Association is an advocate for all Australian publishers: large or small; commercial or non-profit; academic or popular; locally or overseas owned. The Association has over 180 members and represents 91% of the industry, based on turnover.

Kind regards

A handwritten signature in black ink, which appears to read "Maree McCaskill".

Maree McCaskill

Chief Executive Officer

Productivity Commission Study

Copyright Restrictions on the Parallel Importation of Books

Submission by the Australian Publishers Association

1 Summary

It is the formal recommendation of the Australian Publishers Association, on behalf of its members, that the Productivity Commission should recognise the benefits of the current territorial copyright arrangements and recommend retention of the status quo.

There is no credible evidence that consumers would benefit from a change to Intellectual Property (IP) rights. We are concerned that the losses to authors, publishers, printers, smaller booksellers and all those employed via Australian book publishing are so casually dismissed by the proponents of parallel importation.

The restrictions on parallel importation of books contained in the 1991 amendments to the Copyright Act are a shining example of successful industry policy in Australia. The consolidation of an Australian territorial copyright, coupled with a 'use it or lose it' regime created by the 30-day and 90-day rules, blew away the post-colonial British restraints that had been stifling Australian publishing and frustrating readers since the 1940s. They created a challenging new environment which simultaneously promoted Australian competitiveness and Australian creativity, to the great benefit of Australian readers.

It is the most efficient and creative territorial copyright regime in the world. Australian booksellers' flexibility is the envy of their US, UK or Canadian counterparts and Australia is the only English-speaking country with a dynamic and growing independent bookselling sector.

Australians enjoy access to one of the widest ranges of books in the world, at highly competitive prices. They like what is on the bookshelves, spending almost \$2 billion a year on just under 130 million books. And they like Australian books: 60% of the books they buy are Australian-originated — six times the proportion 50 years ago.

Serving this market is a publishing industry employing 5,000 people directly. With the investment security provided by the 1991 amendments, they publish 14,000 new titles (of a total of about 300,000 titles on sale) each year, and export intellectual property worth \$220 million a year now, and rising fast.

Publishers take the risks: on average, two of every 10 books are publishing successes and another three only cover their costs (booksellers get their supplies from Australian publishers on a 'sale or return' basis which drastically minimises their risk). Publishers incur the great bulk of book marketing costs: advertising, author tours and promotion. They develop, nurture and pay Australian writers and illustrators, and help the best reach world markets. They invest in editorial creativity. And in the education sector, they work intensely with Australian educators to provide textbooks and other supplementary teaching and assessment materials for Australian students and teachers.

Publishers also support an Australian book printing industry employing a minimum of another 1,000 people. With the security provided by the 1991 amendments, Australian printers have been able to invest heavily in new technology and plant to cut printing cost differentials with overseas competitors — despite smaller print runs — to a tiny proportion of book retail prices.

The competitiveness of Australian book publishing has been steadily increasing since the 1991 amendments and is now at a very high level. It has to be. The vast majority of books published around the world are not published here within 30 days of overseas publication. There are therefore no restrictions on importing them and selling them in Australia. Since 1991, booksellers have been able to import single copies of any book at a customer's request. Now with the internet used by almost 80% of Australians, books printed around the world are available with a few mouse clicks, GST-free — an instant 9% discount to prices at an Australian bookseller.

Together, Australian printers and publishers have faced and overcome the tyrannies of distance and scale. To take one example: the top 40 US tertiary textbooks sold in Australia are on average 30% cheaper here than in their country of origin.

Why then is this study under way? Australian publishers do not object to it: it will throw valuable light on an industry success story and, we hope, lead to

further improvements. But it is useful to understand the background. We believe there are two major factors behind this study, one important and one less so. The important factor is a general lack of understanding outside the publishing industry of the principle and workings of territorial copyright in Australia and globally. The other factor is a campaign by a few big retailers to try and increase their profit margin on overseas bestsellers.

The purpose of the 1991 copyright amendments was not to limit competition, but to balance the benefits conferred by copyright on authors with the needs of consumers. This was done by the introduction of the 30/90-day rules. Authors' rights remained but consumers got overseas books faster and cheaper. Abolishing parallel import restrictions outright is fundamentally different — it opens the risk of Australia becoming an international remainder bin; it diminishes authors' potential royalties; it reduces Australian publishers' ability to foster Australian writers; and it immediately shrinks the rights market in Australia.

Australian booksellers have a range of views in this debate — most warmly welcome the competitiveness and creativity the current arrangements promote. Some, however, have taken a different stance, arguing for abolition of the current arrangements on the basis of price. If it can be convincingly demonstrated that books published in Australia cost more than imported books (given the enormous variety of books on sale at any one time over a whole range of retailers, all with their own cost structures and marketing policies, and receiving discounts of varying levels from various publishers), then such arguments would obviously need to be considered seriously.

We do not believe that such arguments stand up to scrutiny. Isolated examples of books sold overseas at prices lower than in Australia can always be found, but so can the opposite. Once the costs of freighting these books to Australia and meeting other overheads (GST and no 'sale or return' provisions, for example) are factored in, apparent cost disadvantage is mostly shown to be a mirage.

The claim by some booksellers that abandoning territorial copyright allows cheaper books to be brought into Australia without undermining Australian publishing might gain greater credibility if those booksellers were willing to enter the market and purchase rights for books themselves. Otherwise, their claim boils down the hope that, by taking advantage of foreign remaindering and other dumping practices, they can replace local jobs and investment and increase their own profit margins.

In making this submission, the APA has a responsibility not only to bring to the Commission's attention the benefits that territorial copyright and the 30/90-day rules for books provide for Australians, but also to alert the Commission to the consequences of unwise changes to the pillars of a \$2

billion industry with significant intellectual and cultural impact on Australian life.

Territorial copyright and the 30/90-day rules have underpinned 17 years of investment by publishers, printers and their suppliers in people, facilities and technology. Without that security of investment, all these industries would have to alter their business models radically. Any changes which remove the security these arrangements provide would therefore create significant risks. They are reasonably self-evident and include:

- Job losses in Australian publishers and printers and their suppliers;
- Reduced investment in these industries, limiting Australian involvement in new industries such as digital publishing, as well as innovation generally;
- Reduced income and opportunities for Australian authors, editors, designers and illustrators, both in Australian and overseas markets;
- Changes in publishers' marketing practices including reduced discounts to booksellers and potentially the end of 'sale or return';
- Concentration of market power on big supermarkets, other general retailers and big booksellers, with reduced income for and investment by small-to-medium booksellers;
- An overall reduction in choice for consumers;
- Increased carbon emissions flowing from increased book imports;
- Damage to an IP export industry (including sales of territorial rights for publication of Australian books) worth \$220 million and rising;
- Reduced availability of Australian books — especially children's books and the supplementary teaching/assessment materials produced specifically for the Australian market and currently provided free to teachers and students (impacting on the Government's national curriculum policy and on education standards generally);
- A consequent reduction in the availability of books relating to Australian history and culture. This would have a further detrimental impact on the place of Australian history and culture in Australians' lives and limit the appreciation of the importance of this history and culture to our national development; and
- Reducing the amount and proportion of uniquely Australian vocabulary, idioms and perspectives in the Australian market with imported children's books, textbooks, fiction and non-fiction books contributing to increased lingual globalisation.

The Commission will need to consider whether such risks are outweighed by the advantages claimed by those who oppose the current system, and which are focused on the often anecdotal promise of 'cheaper books' — despite evidence to the contrary from open markets like New Zealand, Singapore, Europe and Hong Kong where books are not cheaper. Is it really necessary to throw a successful, thriving, creative industry out with the bathwater to

increase retail margins for some large booksellers with no guarantees that prices paid by consumers will drop?

We believe that the real risks of abandoning territorial copyright and removing the 30/90-day rules far outweigh any potential advantages, and this submission clearly demonstrates our contention.

2 History

a. 1945-91

The history of publishing in Australia since 1945 is one of increasing independence, increasing maturity and increasing Australian content. Australian publishing started from a low base in the immediate post-war period, when Angus and Robertson represented the high-water mark of the locally owned industry, worked through decades of overcoming the 'cultural cringe', and began to expand with the extraordinary flowering of self-confidence evident in the 1960s and 1970s.

The crucial 1970s witnessed the confluence of three major factors. The creation of the Literature Board of the Australia Council in 1973 not only reflected a growing confidence in the quality, viability and importance of a home-grown literary culture, it also began to pump-prime the whole system by allowing Australian writers a real opportunity to 'buy writing time' — putting aside their second jobs to concentrate on the work of literary creation. The first few rounds of grants — to writers such as Les Murray, Gwen Harwood, Frank Moorhouse, Dorothy Hewett, Christopher Koch, Jessica Anderson, Xavier Herbert, Thea Astley, David Ireland, Helen Garner, Rob Drewe, Ruth Park, David Malouf, Judith Wright, Rodney Hall, Mary Durack, Kenneth Cook, Patricia Wrightson, Murray Bail, Barbara Jefferis, Tom Keneally, Jennifer Maiden, Peter Porter, Blanche d'Alpuget and Louis Nowra — made it clear that Australia boasted considerable home-grown literary talent and simultaneously that the state was willing to back it. No longer would Australian writers need to have 'private means' or escape overseas to establish a literary career.

The post-war growth of the Australian book market and our increasing awareness of and pride in a distinct national culture determined an increasing trend toward the appointment of Australians to positions of real power within foreign-owned publishing companies. People like Brian Johns (Publishing Director at Penguin) and Richard Walsh (Managing Director and Publisher at Angus & Robertson which later became part of HarperCollins), realised that the companies they ran had to be more than just the outlier depots of London or New York, and that the local market was ready (in some cases desperate) to read about its own history, its own reality and its own character — in its own voice. Their decisions to publish more Australian stories and consolidate local distribution capacity laid the groundwork for the industry's post-1991 boom.

The rise of independent, Australian-owned publishers during this time acted as the catalyst for the cultural reactions fizzing throughout the industry. The locally-owned publishers, run by the likes of Hilary McPhee and Di Gribble, Kevin Weldon, Tony and Maureen Wheeler, Sue Donovan, John Gilder, John Iremonger, Morry Schwartz, Henry Rosenbloom, Lloyd O'Neil, Sally Milner, George Barber, and Peter Lothian pushed the boundaries of publishing practice — introducing new voices like Helen Garner, Peter Carey and Tim Winton into the Australian chorus, and even pioneering attempts to trade globally in the export and right-sales markets. Where these companies were successfully sold to multinational publishers, their executives influenced the direction of the acquiring corporation from within the larger enterprise.

During this time, the burgeoning growth in local publishing saw a concomitant growth in the number of Australian editors, designers and others (like production managers, sales and marketing and financial managers) whose skills are needed in-house in any publishing house, as well as a healthy increase in the number and expertise of people working in ancillary industries such as printers, typesetters, packagers, distributors. In 1990 a management buyout of the venerable UK firm Allen & Unwin created the basis for the largest of the Australian-owned publishers, which has since won the Best Publisher of the Year as awarded by Australian booksellers eight times since the inception of the award in 1992.

b. 1991-present

1991 was a pivotal year for Australian publishing. The Hawke/Keating Government's introduction in that year of amendments to the Copyright Act, variously known as the '30/90-day rule' or the 'use it or lose it' provisions, profoundly changed the financial and cultural profile of Australian publishing. These amendments were not only the culmination of the development of Australian publishing since 1945; they have acted as a focal point and trigger for the growth of the entire sector since. The 1991 amendments not only confirmed a distinct territorial copyright for Australia, they also created a partially opened market — one where publishers needed to adequately service local bookshops in a timely manner or risk losing exclusivity over a title.

The introduction of the 30/90-day rule reinforced the relationship between Australian publishers and local printers. Securing copyright over imported titles meant publishing a local edition within 30 days of its publication in English overseas. The global realities of freight and distribution meant an increasing number of books began to be printed onshore. One of the major book printers in Australia has estimated that as much as 45-50% of the volume of books it prints is comprised of UK

titles which, before the 30/90-day rule would have been printed offshore and freighted in.

Early statistics kept by the APA suggest total annual book sales of about \$110 million in the mid-1970s, of which less than 10% were of books first published in Australia. In 1989, total book sales were \$500 million of which 48.6% were first published in Australia. In 2003-4, the last year for which ABS statistics are available, book sales in Australia topped \$1.56 billion and Australian-originated books were 60% of the total. The APA estimates that before the global financial crisis, the Australian publishing industry would have seen sales of between \$1.7-2 billion per annum, and that the proportion of Australian-originated books would have been at least 60%.

The first-release trade paperback — an Australian innovation — is a direct outcome and a shining achievement of the Australian publishing and printing industries' engagement with the 30/90-day rule. The trade paperback format, which came into its own after 1991, allows Australian readers access to an affordable version of most books, at the time of their first publication. Consumers overseas can wait up to 12 months for the paperback release following the initial hardcover. The importance of the timely turnaround of print runs cannot be overstated, especially in the Australian trade publishing sector, where a bestseller can emerge unpredictably, and fast and repeated reprints are essential for satisfying demand.

The 30/90-day rule's creation of a secure home territory has encouraged significant investment and expansion by Australian as well as overseas-owned publishers in the Australian market. It has underwritten of a number of medium-sized Australian publishers (such as Text, Murdoch Books, and Hardie Grant) as well as smaller, more specialised enterprises (like Black Dog Books, Giramondo, and Black Inc). The make-up of the APA reflects this trend. Of the 185 current members of the APA, only the top 19 are companies with more than \$10 million in turnover. More than 87% of the membership is small-to-medium sized publishers. And *Bookseller and Publisher*, using ISBN-based analysis for the year 2007, estimates that there are just under 4,000 publishers in Australia, of which 19 (0.5%) published more than 100 titles per year, a further 260 (7%) publish between 6 and 100 books per annum, 876 (22%) publish between 2 and five books, and 2782 (70%) published only one book.

Australian publishers can now confidently enter into negotiations for the export of Australian books or the sale of overseas rights in a way that was unimaginable before 1991. This trade is currently estimated by the APA at around \$220 million per annum and was growing at the annual rate of about 20% between 1995 and 2003. The reason for this rapid growth is obvious. The 30/90-day rule secures an Australian territorial

copyright market, which allows Australian publishers to buy exclusive rights for overseas titles and publish them in that market. Publishing is a business based on personal relationships and selling rights is a two-way street — it is far easier to sell an overseas publisher the rights to an Australian work, if the Australian publisher has previously bought local rights for a foreign-originated book from that overseas publisher. Without the backing of territorial copyright, Australian publishers could not offer a secure market, and overseas publishers would be less interested in dealing with them.

The proliferation of Australian literary agents since 1991 — there has been at least a doubling in numbers since that date — is further evidence of the burgeoning rights and export market for Australian books. Literary agents report that a considerably increased part of their business is now the selling of overseas rights for Australian authors.

Since 1991, writers festivals have grown and spread throughout Australia so that now one exists in nearly every State/Territory capital city as well as in many regional centres. That this literary festival circuit is one of the most successful in the world is attested to by the comments of many of the overseas publishers and agents who visit Australia under the Australia Council's Visiting International Publisher program. The current list of literary festivals supported by the Literature Board of the Australia Council includes the following: Australian Poetry Centre Festival (Melbourne), Emerging Writers' Festival (Melbourne), Voices on the Coast (Sunshine Coast), Back to Booktown (Clunes), Eye of the Storm (Darwin), National Young Writers' Festival (Newcastle), Byron Bay Writers' Festival, Perth Writers' Festival, Queensland Poetry Festival (Brisbane), Somerset Celebration of Literature (Gold Coast), Sydney Writers' Festival, Watermark Literary Muster (Port Macquarie), Whitsunday Voices Youth Literature Festival, Mildura Writers' Festival, Adelaide Writers' Festival, Melbourne Writers' Festival.

The great affection of the Australian public for authors is shown by the growing attendances at all these events. But it also true that these festivals depend heavily on the marketing budgets of Australian publishers not only to tour Australian writers but also the international star attractions. The considerable expenditure needed to supply Australia's festival circuit with authors, like the great bulk of the marketing spend undertaken by Australian publishers, is predicated upon the knowledge that no competing editions of any works by the authors in question will be sold into the market and take a free ride on the Australian publisher's investment.

Australian bookshops are the envy of the world. The variety and market share devolved between chains, department stores and small independent bookstores, along with the current mix of Australian-originated and imported titles has no international rival. The generous

‘sale or return’ provisions and other marketing investments made by publishers help support this varied structure. It is a highly competitive market. Consumers have the right, at any time, to order any edition of any book either through a bricks-and-mortar bookshop or online (avoiding GST). Libraries can order two copies of any edition. All these conditions of the 30/90-day rule keep Australian publishers efficient, flexible and responsive to the market.

Australian authors and illustrators are increasingly well known internationally — there were an extraordinary number of Australians in the *New York Times* ‘100 Notable Books of 2008’ list: Nam Le, Tim Winton, Peter Carey, Clive James, Germaine Greer. Australians have won the Booker Prize (Peter Carey, Tom Keneally, and DBC Pierre) and the Pulitzer (Geraldine Brooks) as well as the IMPAC Prize (David Malouf), the Astrid Lindgren Memorial Award (Sonya Hartnett), and a long list of Commonwealth Literary Prizes. There is a growing dialogue between Australian publishers and their counterparts in New Zealand, Canada and Ireland as well as discussion about Australia being a future ‘focus country’ at the Frankfurt Book Fair (the most important rights sales fair in the world).

All of these developments are to some extent predicated upon Australia’s maintaining the integrity of its territorial copyright. And it will be almost impossible to fully exploit the opportunities presented by these developments in the future without Australian territorial copyright.

3 Copyright

a. Legal Basis

Globally, the principles of copyright were established by the Berne Convention for the Protection of Literary and Artistic Works, dating from 1886 and instigated by Victor Hugo. Australia signed the Convention in 1928. Copyright in Australia is established by Commonwealth legislation. The first Australian Copyright Act was passed in 1911. It has been successively amended since then.

b. Purpose

According to the Australian Copyright Council¹:

The primary purpose of copyright is to provide an incentive for people to produce new works for the benefit of society as a whole.

¹ ACC Website (www.copyright.org.au), December 2008

The incentive is created by the opportunity to be paid when other people use and disseminate those works. Copyright can also reward people who create works without expecting payment, when their works end up being used by others.

The government-appointed committee whose report led to the introduction of Australia's current Copyright Act said:

The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.

In copyright law, the objective of encouraging the creation of new works is balanced by the objective of making material available for socially desirable purposes such as research and education.

In the language of copyright the expression of an idea is known as a 'work'. Copyright protects the way ideas are expressed. It does this by giving the person who creates a work a monopoly over the way in which the work may be exploited. Exploitation of a work includes its reproduction, publishing, broadcast or performance. Creators can license different aspects of the exploitation of their work — for instance, the right to import into, and sell in, Australia, copies of their work. Protection of copyright is free and automatic and there is no system of registration required under Australian copyright law.

Proper copyright protection laws are beneficial to the economy as they protect the interests of creators and therefore encourage innovative activity. The existence of copyright allows creators to generate an income from their creativity by either receiving royalties or other payments for their work. Copyright similarly fosters investment in creative works by businesses.

Britain's Minister for Higher Education and Intellectual Property, David Lammy, wrote recently²:

The copyright system is of fundamental importance to the future health and prosperity of our creative industries and our economy. It is the framework through which we reward and recognise creative endeavour, incentivising people to create and innovate. It is also the backdrop against which decisions on investment and jobs are made in these important sectors.

c. Parallel Importation

² *The Future — developing a copyright agenda for the 21st Century, online issues paper* (www.ipso.gov.uk), December 200

Under the Copyright Act, it is generally an infringement of copyright to import an article into Australia for commercial purposes without the copyright owner's consent, where the importer knew, or ought reasonably to have known, that if the article had been made by the importer in Australia it would have infringed copyright. This general prohibition regarding parallel imports has been relaxed for certain categories of subject matter, and separate regimes have been enacted to govern the book and sound-recording industries. Also excluded from parallel importation control are works and other subject matter that are 'accessories'. The general rule against parallel importing still applies to literary works (other than books), dramatic, musical and artistic works, broadcasts and cinematograph films.

A book or magazine is 'parallel imported' when it is imported by someone other than the copyright owner or authorised distributor. The contents of books and magazines are protected by copyright. Under the Copyright Act, the copyright owner can, (subject to the 30-day rule), control who is allowed to import books for commercial purposes.

In 1991 provisions were introduced into the Copyright Act to govern 'non-infringing books' (i.e. those legitimately manufactured in their country of origin). Sections 44A and 112A of the Act, the two sections dealing with parallel importation, draw a distinction between a book 'first published' in Australia and a book published overseas. The Act imposes no restrictions on the importation of books first published in a foreign country and there is a partial relaxation of parallel import restrictions for books 'first published in Australia'. A book is deemed to be 'first published in Australia' if it is published in Australia within 30 days of being published overseas.

Parallel importation of books deemed 'first published in Australia' is allowed:

- to provide a single copy for a customer;
- to provide one or more copies for a non-profit library; and
- to satisfy local orders which have been unfilled for more than 90 days.

In introducing the *Copyright Amendment Bill (No.2) 1998*, which deregulated territorial copyright for sound recordings, the then Attorney-General noted:

At present, the provisions of the Copyright Act can be used by the owners of copyright in sound recordings to stop anyone else importing copies of their sound recordings. In this way the act can be used to control the Australian market for imported copies of

recordings. This is significant as imported recordings constitute the overwhelming percentage of recordings marketed in Australia.³

This argument is critical to distinguishing the questions being considered by the Productivity Commission in relation to books from those which were considered over a decade ago in relation to music.

The health of the Australian book publishing industry is very different to the health of the music publishing industry in 1997. By comparison, as data further on this submission indicates, there is both a large volume and large number of titles published in Australia, which was not the case for music, where in 1997, imported CDs constituted 'the overwhelming percentage' of CDs on sale.

More importantly, those books imported into Australia in commercial volumes which are not 'first published in Australia' are books for which there is not an exclusive territorial copyright, so there is no economic rent available from controlling a market for imported books.

We use this comparison to emphasise a substantially different situation which has arisen primarily because of the enlightened structure of Australian territorial copyright. Contrary to the copyright environment addressed in 1997 by Attorney-General Williams with respect to the CD industry — and in which the Commission is currently asked by various interested parties to find a compelling precedent — the territorial copyright regime regulating books is based on a 'use it or lose it' formula involving the 30- and 90-day rules.

This was summed up at its introduction via the *Copyright Amendment Bill 1990* by the then Attorney-General as follows:

The changes to the legislation will mean that, if the Australian rights holder of a new overseas title wishes to maintain his or her exclusive right to supply the Australian market, he or she will be required to publish simultaneously in Australia and to maintain adequate stocks of copies, including paperbacks. Otherwise, there will be an open market for the book, either generally after 30 days from overseas publication — if there is no publication in Australia in that time — or, for those booksellers whose orders the copyright owner has been unable to fill for more than 90 days, until supply from that source is restored. This will provide booksellers with speedier access to stocks and, in some cases, enable them to provide more cheaply priced books.⁴

³ Hon. Darryl Williams MP, Second Reading Speech, House of Representatives Hansard, 20 November 1997, p.10972

⁴ Hon. Michael Duffy MP, Second Reading Speech, House of Representatives Hansard, www.parlinfo.aph.gov.au

The motives here are clear: to provide a regime in which there is a balance between the expectations of consumers and booksellers for fast access to a comprehensive range of titles without compromising the economic property of copyright holders. There is no import restriction here on books which are not published and subsequently available in Australia. Nor is there any incentive to retain precedent publishing rights for titles which will develop only a very small market. There is no control over a market for predominantly imported product as in the case of CDs. Instead, there is an incentive toward efficiency and a balance between intellectual property rights and consumer interests which has led to the vibrant and varied publishing industry described in this paper.

d. Principles

The broad criticism of the current book copyright rules in Australia relies on a misapprehension that they are protectionist in nature: which is to say that they are generated to support an intent of prohibiting cross-border trade. There is no question that some market protection — at least against dumping — is a by-product of the copyright regime in Australia, but this is not its primary intent.

The true intent of these laws is to ensure that there is a fair balance between all of the interests associated with book production – including a balance between intellectual property rights and timeliness of availability – but with the property rights of the author at the top of the pyramid. Australia's 'use-it-or-lose-it' approach to book copyright is both practical, given the scale of our market, while also allowing the broadest operation of market mechanisms without price regulation.

e. Background

Although the Berne Convention dates from 1886 and Australia signed it in 1928, the path to signature by the two giant English-speaking markets was more tortuous. Wikipedia summarises:

The UK signed in 1887 but did not implement large parts of it until 100 years later with the passage of the *Copyright, Designs and Patents Act of 1988*. The United States initially refused to become party to the Convention since it would have required major changes in its copyright law, particularly with regard to moral rights, removal of general requirement for registration of copyright works and elimination of mandatory copyright notice. This led to the Universal Copyright Convention in 1952 to accommodate the wishes of the United States. But on March 1, 1989, in the US *Berne Convention Implementation Act of 1988* came into force and the United States became a party to the Berne Convention, making the Universal Copyright Convention obsolete.

Historically, market delineation was the intention of various international arrangements in copyright protection, most notoriously the British

Traditional Market Agreement which was formalised in 1947 and overturned (with first opposition coming from Australia) in 1975. The removal of the British Traditional Market Agreement (essentially via a US anti-trust action): ‘... preserved the principle of territorial exclusivity as sanctioned by copyright law but prohibited the use of umbrella agreements to predetermine the lines along which exclusive rights were licensed.’⁵ The 1991 changes in Australian copyright law followed these upheavals in international copyright law and practice.

This momentous change from a cartel agreement to a series of distinct territorial laws enshrining the principle of copyright provides the clearest illustration of the true purpose of copyright in Australia today. To understand the import of this decision, we need to consider the two essential forms of copyright which have most significance in book publishing:

- i. The author’s or creator’s copyright, which is the intellectual property right protecting a work as (typically) a text, similar to a composer’s or artist’s copyright; and,
- ii. The edition copyright, which is the right of the publisher by contract to develop, promote and profit from the author’s copyright within agreed parameters (including territory, timeframe and form of publication) for an agreed consideration.

It is a common error to regard these as two distinct forms of intellectual property, related only by contract. However, even the most cursory reading of the two reveals that they are much more intimately involved than this, and that the second form is a derivative version of the first. This is to say that the economics of authorship rely on the need to disseminate a text through the industry of publishing, which requires the existence of a complementary and linked edition copyright. Consequently, the territorial division of the first derivative copyright (the edition right) is an extension of the prime right of the artist to protect and share their property without infringement.

The alternative case presents a series of troubling propositions, five of which bear reflection:

- i. If we regard the contractually-established edition rights as having no territorial exclusivity, then they become solely a right to create and distribute a printed object in a given territory, rather than publishing rights which imply a more fundamental relationship with the author and their copyright. Such a right is much less valuable than exists under the current regime;

⁵ ‘English Language Publication and the British Traditional Market Agreement’, in *The Library Quarterly*, Vol.49, No. 4, University of Chicago, October 1979

- ii. In this case we are eroding the economic right of the author to profit from their copyright as much as we are eroding that of the edition rights buyer (the publisher);
- iii. This value of the shared copyright cannot credibly be regarded as fungible between territories. US and other foreign publishers will not pay authors an increment equal to the advances and royalties lost from the abandonment of Australian territorial copyright, for four reasons:
 - a) They are not strictly gaining the Australian market as part of their territory;
 - b) The scale of the Australian market is within the margin of error for US sales projections;
 - c) Many foreign territories use a remainder system, and will simply see Australia as a wasteground for their overruns – in this sense, parallel importation would present a welcome subsidy to foreign publishing markets; and,
 - d) They will not need to: the scale of a UK or US contract gives foreign publishers much greater market power with respect to their authors;
- iv. The unilateral proposition that Australia become an open market while the territories which will benefit from proposed deregulation retain exclusive rights arrangements compounds this effect, as the author loses a territorial right without having the opportunity to seek bids in a genuinely open market;
- v. There is an associated mockery of territorial copyright arrangements for an author in foreign markets, whereby the publisher in those markets cannot sell a book published under derived copyright into the Australian market, whereas a third-party wholesaler can. There is a further implicit restriction of the author's economic right to their property in such an imbalanced environment, where the novel opportunity to profit is available only to those external to the copyright agreement.

The purpose of copyright is to protect and reward the rights of the author as creator, and the view that territorial rights should be removed — particularly if done unilaterally — is an alienation and expropriation of the author's economic property.

It is notable that in introducing the new *Resale Royalty Rights for Visual Artists Bill 2008* on 27 November last, the Minister responsible said the proposed scheme was intended to recognise the copyright of visual artists which had not been developed '... to the same extent as those of our composers, authors and performers, who are able to earn copyright fees from their work, and thus have an ongoing financial interest in their

creative efforts'.⁶ By contrast, the removal of territorial copyright would destroy that 'ongoing financial interest' by creating what is essentially a second-hand market in new books, which would be fundamentally contrary to an author's economic interest, and which would place them in competition with a third-party non-holder of copyright. This imagines an unjust intellectual property system.

The creation of a supposedly 'parallel' market into Australia will not take the place of the current territorial copyright, as it will be simply a market between wholesalers and booksellers. The likelihood that it will be predicated on the dumping of remaindered stock further reduces the author's royalty payments. It envisages a parallel market, but one which takes place without, rather than inside the current copyright regime. It does not address the purpose of copyright, rather diminishing it to the proposal that a book is legal as long as there is a contract for it in any international market.

For publishers, the economic purpose of copyright is indistinguishable from that of an author: it is the certainty that the market in which they are operating protects the right to share property without infringement, and where such property is consequently able to be given a credible market value.

f. Impact of abolishing parallel importing rules

Abolishing restrictions on parallel importation in Australia, in a global market where the major English-speaking countries maintain and in fact have strengthened their prohibitions on parallel imports, is fundamentally different from the steps taken in 1991.

Australian authors who win success on world markets are almost universally successful in Australian markets first. They achieve that success because of their own abilities and the willingness of Australian publishers, working under the 1991 copyright laws, to take risks with new authors and to invest time and money in developing their careers with reasonable certainty that if the author does achieve success, the publisher will get a return on investment as well, and that profit will cover the losses on investments in unsuccessful authors.

If Australian authors do go on to succeed overseas, it is highly likely that, for a number of reasons, there will be large quantities of the books published overseas unsold and that the overseas publishers will need to pulp or remainder them. Books by successful Australian authors are more likely to be successful in Australia than elsewhere, and a good number

⁶ The Hon. Peter Garrett MP, Second Reading Speech, House of Representatives Hansard, 27 November 2008, p.11645

are likely to find their way here as remainders (with little or no royalties for the author involved). This then undermines the local market for that edition and devalues the local publisher's backlist of that author. The rationale for the Australian publisher investing in that particular author is destroyed.

Abolishing restrictions on parallel importation will also affect the rights market. Currently, Australian publishers are able to foster Australian writing with the support of Australian publication of overseas books. The parallel import rules enable them to bid for such rights with security. Remove those rules and the equation changes. Australian print runs of overseas books can be undermined by booksellers importing competing editions — or overseas publishers can decide they can gain bigger margins by exporting their own editions. The risks for Australian publishers increase significantly, and the most likely outcome would be a smaller rights market and reduced capacity to foster Australian writing.

As Henry Rosenbloom wrote: 'Dymocks would be free to import whatever titles it wanted to. Everybody else would be free to wander a blasted heath.'⁷

4 Industry Structure

a. The Copyright Sector

Book Publishing and its associated sub-sectors (authors, agents, printers etc) form part of what the World Intellectual Property Organization has identified as the core class of copyright industries. In a recent report for the Australian Copyright Council⁸, PriceWaterhouseCoopers estimated that in 2006/07, Australia's copyright industries employed 8.0% of the nation's workforce and generated economic value equivalent to 10.3% of GDP and 4.1% of total exports.

Overall, the PWC report showed that copyright industries in Australia have had a real compound average annual growth rate of 4.7% from 1995/96-2006/7 (3.9% for press and literature). Australia is a significant net importer of copyright goods and services and the Australian economy appears to have a greater dependence on copyright industries than a number of comparable countries (in terms of the value they add and the employment they provide).

⁷ *Unleashed*, ABC Online 19 December 2008

⁸ *Making the Intangible Tangible*, PWC 2008

b. Book Publishing

The Australian book industry is a vibrant contributor to the economic, educational and cultural landscape of Australia. The best available figures on the industry show that:

- i. Retail sales total between \$1.7-2b p.a. — retailers and publishers sharing this income 50/50;
- ii. Over 300,000 different titles are sold in Australia each year, including new titles and the backlist (which comprises titles more than 12 months old that are still available);
- iii. Australian-originated books account for 60% of the total books sold in Australia each year;
- iv. More than 14,000 new titles are published in Australia a year — 8000 non-fiction, 1200 fiction, more than 1700 children's books, and almost 3000 educational, school and academic;
- v. More than 5,000 people are employed directly by publishers, 25% of whom are part-time or casual;
- vi. Export is active and successful, with over \$220 million per annum in export and foreign rights sales around the world;
- vii. Trade books are sold to retailers on a 'sale or return' basis (where booksellers can return unsold books 3-12 months after publication without penalty). Education books are also sold with generous return rights to retailers, distributors and schools.

Small book publishers form an important and energetic subset of the industry. Operating on scales ranging from break-even only and publishing one or two titles a year, up to 40 or more titles per year and a turnover in excess of a million dollars, they are a mix of established presses and new ventures, across all genres of publishing but with a strong representation of fiction, particularly poetry and short fiction. They perform a valuable role in supporting new voices and genres that larger publishers consider too risky or commercially unviable. Small presses feel the pressure of distribution and publicity difficulties far more acutely than publishers in the broader industry because of their lack of resources, both financial and human⁹.

⁹ *A lovely kind of madness*, report for the Small Press Underground Networking Community, Kate Freeth, November 2007

c. Printers

Australia's major book printers are McPherson's Printing Group (Maryborough, Vic), Griffin Press (Salisbury South, SA) and Ligare Pty Ltd (NSW). McPherson's employs 350 people, Griffin employs 170, and Ligare employs 100. Griffin and Salisbury have invested heavily in printing technology and personnel training to maintain their competitiveness. They effectively compete with printers in the US and UK to print overseas-sourced books for which local publishers have bought Australian rights as a result of the 30-day rule. Ligare is the largest specialist book printer in New South Wales and the largest educational book printer in Australia.

Australian publishers can have books printed overseas at a competitive price and freighted to Australia within 30 days. This has ensured that local printers are forced to be competitive on price and turnaround of print runs. As a result, the first-release format of choice for Australian publishers and printers has become the trade paperback, whereas in the US and UK markets it is the hardback. This enables Australian publishers and printers to use the computer files developed by the overseas publisher for hardback publication to print paperback versions for sale in Australia within the 30-day deadline set in 1991.

The impact of parallel importation on the educational book industry would be a reduction in services to the educational market of Australia with higher prices being paid for locally published time-sensitive educational books such as textbooks for primary, secondary and tertiary educational institutions. Importing educational titles published in other countries carries a lower risk than publishing them locally and the revenue gained by Australian publishers by importing these titles helps support the more risky enterprise of publishing local content specific to local courses. The reduction of Australian content publishing for Australian courses would have a negative impact on educational standards in Australia and well as the publishing and printing industries that support them.

In May 2007, McPherson's and Griffin announced that they were planning a joint venture, 50%-owned by each company, to operate a combined book-printing business. The ACCC conducted a merger assessment process under section 50 of the Trade Practices Act and blocked the transaction, stating it was likely to 'substantially lessen competition for the supply of mono (black and white) offset book printing. The ACCC has particular concerns in relation to the trade (fiction and non-fiction or "read-for-pleasure") segment of the market,' and 'The ACCC considers that the reduction in competitive tension in the market through the proposed joint venture will likely lead to higher book printing prices (or lower service conditions) for publishers, and, ultimately consumers.'¹⁰

¹⁰ ACCC news release 15 August 2007

Ironically, one potential (and we contend, highly likely) outcome of the abolition of territorial copyright would be the closure of either McPherson's or Griffin as a result of significantly reduced revenues from Australian printing of overseas-sourced books under the 30/90-day rule (together of course with major impact on suppliers). An outcome that those opposed to current copyright laws argue would reduce costs could instead, according to the ACCC, increase them.

This, of course, would create a vicious cycle because any increase in local printing costs will only serve to drive more Australian publishers to print offshore. This in turn would compound the difficulties for the industry in managing timely reprints, which would ultimately impact on the consumer in the form of higher prices or interrupted availability, or require a substantially increased carbon footprint as books are air freighted to satisfy demand.

d. Booksellers

The bookseller buys books at an agreed discount, which varies between 35-45% off the recommended retail price, according to the size of the retailer and the number of books purchased. Most new books are sold on a 'sale or return' basis — meaning they are held for at least three months and returned within 12 months of publication. In some instances, retailers can also purchase new titles on a 'firm sale' basis at a discount of between 50-55% depending on the volume. Some publishers also sell their back catalogue on a 'firm sale' basis. The situation is similar for education publishers, except the discount is only 30-40%. The bookseller is responsible for:

1. The retailing of the book to the consumer;
2. Marketing in terms of loyalty card promotions, window displays, catalogues and newsletters — although all these activities are subsidised by the publisher;
3. Having the knowledge of their customers (including their academic/teaching community) to whom they can target specific titles.

Retailers select and highlight, from the vast array of new titles published every month, the books they believe their customers will buy. They are the arbiters or managers of the books being made available.

5 Publishing industry economics: structure and confidence

Much of this section relies upon data collected within the University of Melbourne (UOM) Publishing Industry Survey. This is an independent economic survey of publishing data and strategy in Australia, and is the most

comprehensive sample of such data since the ABS ceased collection in 2004. It includes over 50 respondent publishers, including a substantial majority of the larger Australian publishers.

The APA has encouraged its members to cooperate with this study, and we understand its results will be finalised and published shortly and certainly within the timeframe of the Productivity Commission's review. We thank the authors for undertaking this study, and for providing the APA with an interim data set to assist in the preparation of this submission to the PC inquiry.

The UOM study provides a market estimate (by sales revenue) of some \$1.806 billion for the year 2007 showing an aggregate 34% growth in sales revenue since the last ABS statistics(2003-4), or an annual compounding growth of around 7% p.a. — an extremely healthy industry picture. We note that there is no implication of inflation within these data, as the number of books sold over this period has increased by close to 50%, or around 11% p.a. These total figures are based on the same treatment of sample as the older ABS data. As an example of supply-chain investment which flows from this, the contemporary estimate of printing expenditure for the past year is \$387million, up from just under \$317 million four years earlier.

The structure of the Australian industry (as a percentage of total firms) can be broken up in three ways:

1. By ownership, with at least 61% of publishing firms operating in Australia being locally-owned 'independents';
2. By purpose, with around three-quarters of books published and distributed in Australia coming from firms who have either a sole or principal purpose in the publication of books; and
3. By turnover, which will show not only the variety of Australian publishing, but the substantial investment in the local market by multinational publishers.

These are important data, because they emphasise that Australian publishing is particularly vulnerable to regulatory change. It is not globally integrated, nor horizontally integrated like the retail stores which would benefit most from the abandonment of territorial copyright.

Another way to look at the health of the industry structure is to consider the modal number of titles published by industry participants. Amongst survey respondents, we can see data that shows:

- Some 43.7% of the industry is in the very-small to small end of the portfolio range, publishing fewer than 20 books, and within this, 16.4% publish fewer than five books. This is an extremely high-risk model, unimaginable without the confidence to protect market rights

- 41.8% of publishers publish 50 titles or more, with the vast majority of these (32.7% of the total) publishing 100 or more titles. This is the counterpart of the industry, which provides the engine room for broad investment in Australian writing, printing, transport and distribution, and which relies heavily on a portfolio risk distribution and associated certainty as to rights to continue that investment.

This is a picture of a broad healthy industry, with significant variety underpinned by regulatory confidence. Beyond this, we note that respondents are headquartered in all of the mainland States and Territories, with the highest three headquarters being NSW (40%), Victoria (34.5%) and Queensland (9.1%).

The University of Melbourne Publishing Industry Survey asked publishers to rate threats to the industry, offering 11 options including the opportunity to nominate issues not included on the list. The survey found the following about the three highest threats (ranked as ‘number one challenge’) perceived by the industry:

- Threat to territorial copyright was the most common primary concern. We are advised by the directors of the study that there is a skew wherein this is a more significant concern amongst larger publishers, which emphasises the issue of portfolio risk management in the larger segment (and majority employment sector) of the industry;
- Competition from other media was the second most common concern. This demonstrates a particular concern about not only competing creative outputs (magazines etc.) but particularly the digital environment, which is already creating uncertainty for publishers;
- Industry concentration and consolidation came in third, possibly reflecting participants’ concerns about the copyright landscape following the Commission’s report.

These concerns together signify a general fragility of confidence in a highly competitive marketplace, which will be further eroded by an unnecessary change to the regulatory environment which allows and justifies such competition and risk-bearing behaviour. The level of primary focus on the threat to territorial copyright emphasises how critical it is to the continued confidence of the Australian publishing industry.

In terms of Australian titles — and using the historical ABS definitions — the University of Melbourne study finds publishers expect growth in industry-wide investment in Australian publishing over the next three years, including:

- Less than a quarter of publishers expect the annual output of Australian titles to decline in the current environment;

- 28.6% expect it to remain steady;
- 48.6% expect to increase the annual output, with 11.4% of total respondents expecting growth of greater than 10% per annum, and 14.3% expecting 5-10% growth.

Again, this is a picture of an ambitious industry dedicated to investment in Australian titles.

There is a curious, but encouraging set of comparison figures here where publishers are asked about their own intentions regarding Australian titles, as opposed to their view of industry-growth in this category. In response to this more direct question, we find that:

- Only 4.4% expect decline of Australian title output in their own business, and only half this expect a decline of greater than 5%;
- 57.8% of respondents expect growth in their annual output of Australian titles compared to their expectations of the industry as a whole, with almost twice as many (24.4%) intending annual growth of more than 10%.

The conclusion is that individual business confidence in the current regulatory and economic environment is higher than confidence about the broader industry. This is extremely positive for the whole of the supply chain in the Australian book market, from author to consumer, as it shows such a strong willingness to invest in Australian publishing.

The Productivity Commission has asked some APA members as to what is meant by 'Australian-originated.' This is a description historically used by the Australian Bureau of Statistics, and essentially captures Australian-published books, with an Australian ISBN. In order to address this question further, we have spoken with the researchers at the University of Melbourne Book Industry Study, and have also surveyed large Australian publishers. Two data points which emerge from this survey are:

- Over three-quarters of new Australian-originated titles come from larger, typically multi-national publishing firms;
- While there is a variety of business strategies, modally amongst large publishers, around 80-85% of new Australian-originated titles are by Australian authors.

These figures emphasise not only that there is a healthy market for Australian authors, but that there is significant international investment into the Australian publishing market. This enhances competition and ensures the

largest range of books available in this market. This investment is only sustainable under the current territorial copyright rules.

In terms of total sales of books in Australia, the Melbourne University study shows strong confidence amongst publishers, with only 17.6% of market participants expecting status quo sales over the next three years, and only 8.6% expecting a fall in sales. In contrast, 73.5% of publishers expect total sales growth over the next three years, with 44.1% of the total expecting growth greater than 10%, and over a quarter of others expecting growth in the 5-10% range.

Given that all these data have been collected since the start of the global financial crisis, this is a remarkable level of confidence for any industry. However, it is radically undermined if publishers are asked to comment on investment in a scenario without territorial copyright. In this environment, publishers will change their strategy, with some 40% indicating that they would need to reduce their annual output of new Australian titles, including 17.8% of total respondents indicating a reduction of 10% or more.

Australian publishers affirm that this is a very real strategy decision. As with the experience of the music industry, publishers will simply not consider development of authors, where their ability to cover that risk through a portfolio or more predictable rights is taken away. Similarly, developing Australian authors to the export point is of little interest where the first 'tipping-point' book into the remainder-structured US market will see dumping which will destroy the risk-underpinning Australian market.

This is further supported by a set of responses which show that slightly over 50% of respondents would expect a reduction in their revenue from overseas rights sales if unfettered parallel importing is permitted, including 34.4% who would see a reduction in revenue from rights sales of greater than 10%.

On employment, the picture is one of steady growth and investment in human capital across the publishing sector, but with some paring to recognise the tightening economic environment. Highlights of these figures are:

- The only area in which there is a greater intention to reduce staff than increase it is in administration. This balance between a reduction in administrative staff and simultaneous increases in book development and sales staff suggests increasing levels of industry efficiency under the current regulatory regime;
- There is significant intent to invest in increased creative value-adding staff, including editing staff, acquisition editorial staff, and illustration and image-sourcing workforce; and
- Sales, co-investment (marketing) and distribution (supply chain) staff investment are also expected to increase. These are essentially the jobs which are most vulnerable to the free rider problem which would arise through copyright deregulation.

The APA is advised by publishers that since the Melbourne University data was provided, there has been some decrease in the outlook for Australian publishing and consequently Australian employment. While there was only a small amount of staff downsizing prior to Christmas, it is expected that soft sales figures in the first quarter of 2009 will lead to more substantial shedding of staff in some businesses.

At a time when the Australian Government and Governments around the world generally are looking at industry investment and bail-outs to maintain employment, it seems remarkable that any consideration would be given to further increasing uncertainty in an industry which is already seeing the initial signs of a downturn.

Elsewhere, publishers were asked what changes in government policy they would see as of greatest positive value to their businesses. Some key data from this section of the survey are:

- 22.2% would like to see tax concessions for publishing Australian books and 42.2% would like to see direct public subsidies for the same;
- 31.1% would welcome Australian Government support for Australian publishers, and 22.2% would like to see State Government support. This is a telling differential given the different capabilities for assistance available to the various Governments; and
- 22.2% support even tighter copyright law.

It is not the purpose of this submission to argue for other public sector support for Australian publishers and authors, but this mix of preferences for direct and indirect financial support, as well as increased rather than decreased regulatory restraints is particularly interesting, illustrating two key points.

The first of these is that the publishing industry has managed to maintain its market growth in the absence of the sort of direct and indirect state investment which has — for example — benefited the film industry, and this is only possible because of territorial copyright. The second is that there is the maximum focus in the publishing industry on support for Australian books, rather than publishing in general, which highlights the greater risk associated with developing local titles. Again, managing this risk is only possible at the moment because of the certainty provided by territorial copyright.

We note that it is possible that public finance of the various kinds mentioned above is (most imperfectly) substitutable for the more robust market confidence which the regulatory regime provides by ensuring territorial copyright.

In such an approach, the notional public good of ‘cheaper books’ is available through a normal public good structure of broad-taxation-based subsidy. The alternative, as imagined by the proponents of parallel importation, is that authors and publishers should privately subsidise this public good through removal of their property rights without recompense (and supposedly without cost). It remains our view that the current regulatory balance walks the best line between IP protection, timeliness, range and price competition.

6 Publishing Process

a. Trade Publishing

The publisher is responsible for the book until it passes into the hands of the consumer. The process starts with an idea by the publisher or a proposal by an author, either directly or through a literary agent. The publisher will discuss the proposal with the author/agent and mock up a scenario — estimating format, retail price, print run and other costs involved in bringing the book to market. The author then writes the manuscript and submits it to the publisher, who organises and oversees:

- Structural editing, where an editor works closely with the author, looking at the pace and tone of the work, breaking it down into chapters, and editing out material to tighten the structure. The time this takes varies, depending on the experience of the author and the complexity of the work;
- Copy editing, focusing on the fine detail: grammar, punctuation, spelling, and consistency. This is also collaborative and the time varies according to the standard of the original manuscript;
- A designer will then be briefed to begin the internal design concept and cover design;
- Once the design is agreed upon, the book is laid out into page proofs. Depending on the complexity of the book, there may be several rounds of these;
- A final proof reading occurs before the book is sent to the printer;
- If a book is predominantly text-based and is being printed in Australia, the time taken between electronic files being sent to a printer and the book being ready for release is relatively short — two to four weeks depending on the size of the run and the urgency of the job;

- If a book is fully illustrated and being printed overseas, however, the time taken (after editing and proofing) is three to five months, allowing sufficient time for colour correction work;

While the physical book is being created, the publisher's sales and marketing team will be working on the pre-sales material — including advance proof copies for booksellers, the design of point-of-sale material, the marketing/advertising campaign if appropriate, and the sales strategy.

Books are sold to retailers at least three months before publication and publishers pay the cost of freighting books to stores. The majority of advertising (in retailer catalogues and large window display space) is paid for by publishers. The publisher is responsible for the publicity for the book, including soliciting review coverage, author interviews and tours, competition giveaways, etc. Any advertising for the title — bus backs, billboards, television/radio advertising, and so on — is paid for by the publisher.

b) Educational and Scientific

The Publisher/Acquisitions Editor consults with teachers, academics, curriculum groups and other experts. Once the concept for a new textbook (or content for a digital platform) has been tested and rigorously researched, the AE will commission leading academics. The whole process (from concept, consultation and market analysis to delivering a book) takes 2-3 years of significant investment.

In the development phase, a Publisher/Development Editor (DE) manages specific detail, including:

- Establishing and meeting timelines for research, writing and peer review;
- Helping content and pedagogical design fit market needs;
- Producing supplementary digital material — student and professor websites, PowerPoint slides, test banks, study guides, etc — used for teaching or student assessment; and
- Consulting on cover and internal design.

Authors create copyright material that the publisher protects on their behalf. There is usually also a significant amount of other textual/illustrative material for which permission must be sought before it is used. A Permissions Editor applies for, collects and clears any such permissions.

The Project Editor (PE) assumes responsibility once the complete manuscript has been accepted by the Acquisition and Development Editors. The PE co-ordinates a range of internal resources or expert

freelancers — including copy editors, proofreaders, designers, typesetters and indexers; ensuring the book is running to budget and will be printed in time to launch. The textbook is printed locally or offshore depending on its design, complexity and time needed to get to market. Most textbooks are peer reviewed by the beginning of the semester when they will be ‘adopted’ by academics or teachers.

Once the book is in production, the sales and marketing team starts promoting it direct to school teachers, academics and (often) retailers. After supplying them with a complimentary copy of the textbook and supplementary materials, the team demonstrates how students will benefit from the text and materials. The sales team collaborates closely with the campus retailers or distributors, often providing additional promotional materials to help sell the textbook to students — an important but little understood part of their work.

For example, if a publisher spends \$1 million on researching, developing and producing a biology textbook over 10 years, then 15-25% of this investment would be spent on supplementary teaching and learning materials for both teachers and students. This latter expenditure often goes unidentified, yet it is usually state-of-the-art technology, often involving web-based aids. The efficacy of the textbooks and other supporting materials produced for instructors and students plays a pivotal role in the successful running of most courses, but especially those at first year level.

The capability of Australian educational and scientific publishers to invest in supplementary teaching and learning materials will be vital in the development of the National Curriculum, as part of the Education Revolution to which the current Federal Government is committed. This investment would not be feasible on the scale required were Territorial Copyright to be abolished.

c) Children’s

Of all publishing sectors, children’s books are probably the most consistently demanding in terms of investment in author (and illustrator) development. This is the gate to the world of literacy. Getting it right is not simply important — it is critical.

Australia has an outstanding children’s book publishing sector. It provides Australian children, their parents and their schools with a range of books second to none in the world, at highly competitive prices — despite the fact that GST is an impost which UK and US readers do not face. Australian children’s book sector publishes Australian books with Australian stories, which set a cultural reference point for life, as well as

the latest books from overseas, very often before they become available in their home markets.¹¹ Continuation of effective territorial copyright is vital to maintaining this position.

The market is complex (starting with books introducing the simplest concepts and finishing with books for young adults), there are complicated issues of taste which if judged wrongly can be disastrous, and although the final products will be read by (or to) children, parents and other adults, particularly teachers, will be the vast majority of buyers. The product itself is also complex, very often bringing together a writer and an illustrator, with a major demand for editing and design skills, and finally, a complex colour printing job.

One significant issue is cultural relevancy. Imported titles (especially those aimed at small children) frequently require editing to ensure the use of language is consistent with Australian spelling, idiom and nomenclature — colour for color, muster for round-up, and supermarket for drugstore, for example. This is not a trivial issue. Young minds absorb a great deal of information, unfiltered. The frequent confusion in Australia caused by US films and television programs in which characters dial 911 in an emergency is evidence of some of the practical consequences for Australian society. Another is an observation by the Australian arm of a UK publisher that the only two books it has *never* imported from its parent encourage children to pick up spiders to overcome their fear of them!

The editor, art director and publisher immerse themselves in a process which may require more than three drafts and frequently require many hours of face-to-face discussion. The level of investment of time in developing authors and illustrators tends to limit the size of advances — the advance is very often the time spent in development.

The publisher is responsible for bringing together all the individuals involved, spending extensive time developing their talents and facilitating their productive collaboration to produce a manuscript and illustrations which will have market appeal, and then producing and marketing the final product. This will involve author/illustrator tours and appearances at festivals and conferences. It is common for children's book publishers to also provide free information for schools, libraries and children and parents, utilising their websites, all enhancing and encouraging literacy at home and at school.

There are many successful children's book publishers in Australia, producing books not only for the local market but exporting extensively.

¹¹ Many major overseas titles are printed in South East Asia. Shipping to Australia is much quicker than to North America or Europe.

They have flourished not only as a result of the skills and commitments of the people involved, but also because the 30/90-day rule has provided the security for them to invest heavily in creative development. Having made that investment, they can be reasonably confident that they will earn a reasonable return.

Many children's books fail to meet expectations, of course. Those which succeed can do well. Exports are a key because of the relatively small local market. One South Australian project¹², which took two years to develop and involved hundreds of hours of editorial input, has been exported to the US, UK, Canada, Germany, France, Spain, Denmark, Italy, Romania, Taiwan, Czech Republic and Slovakia. Audio and film rights have been sold in five countries, and total royalties are more than \$1 million.

Without the potential to sell into as many markets as possible and at the same time protect its Australian market, the publisher simply could not have invested the time in developing this project. Without the protection of the 30/90-day rule, the investment could not have been made.

The investment security provided by the 30/90-day rule not only supports the involvement of Australian-owned publishers in the industry. It also allows multinationals to set up local publishing on the back of Australian sales of overseas titles, fostering competition and a wide range of choice for consumers.

Without effective territorial copyright, the range of titles available in Australia would be reduced. Book chains will import only bestsellers at the cheapest price. Overseas educational suppliers will sell their own titles directly. Remainder suppliers will dump their books here. In this environment, Australian publishers will have to focus on low-risk, high-profit titles. The resources available for author and illustrator development and for marketing and educational programs will necessarily be reduced. And more and more Australian children will start their reading lives ignorant of the stories, voices and landscapes of their own nation.

d) Distribution

Historically the multinational publishers established offices in Australia in order to have an efficient distribution system for the books supplied by their parent companies, often UK based. This system flourished and in combination with the opportunities offered by territorial copyright, the general growth in population and publishing and bookselling, the

¹² *Monster Blood Tattoo* series, published by Omnibus Books

distribution business in Australia today is renowned for being efficient, effective and at world's best practice.

It is additionally important to acknowledge that without the multinational publishers and others in Australia, investing in and growing the book distribution business, most independent publishers would have no mechanism of supplying their books efficiently and effectively to market.

The cost of distribution within the Australian publishing industry and its effect are complex issues and require a detailed assessment.

Publishers create and market books; they do not write them; they do not print them and mainly, they do not sell them to consumers. Increasingly in Australia and elsewhere, they do not distribute them, leaving this to specialised fulfilment houses or to the large consolidated distribution centres of those large multinationals which have decided to stay in distribution. In relation to this, we may witness the recent closure of several publishers' distribution networks in New Zealand (as they were folded into their associated Australian operations). This has led to much gloom in New Zealand, particularly given resulting job losses.

Australia does not have a third party wholesaler (as opposed to distributors) because our population cannot support the vast geographic spread and the freight costs involved in getting books to consumers quickly and efficiently. Australian freight costs are at best double that of the UK. In the US, freight costs are borne by the bookseller from the distribution point to the bookshop.

So, when considering the cost of delivering a book in the Australian market, two extremely important factors must be considered:

1. Is the product from
 - (i) Trade Publisher;
 - (ii) Education/Academic Publisher; or
 - (iii) School Publisher?
2. Is the product from
 - (i) Publisher distributor; or
 - (ii) Specialised distributor?

Within both 1 and 2, measurement of cost is interpreted differently by various publishers — some include customer service within distribution, and some don't; some include credit control and some don't. Amortisation and allocation of IT expenses vary. Also, remaindering of stock may be seen as a separate profit centre on either the distributors' or publishers' P & L, or may be absorbed into overall costs. As such we are not quite comparing apples with apples.

Obviously publishers/distributors benefit from economies of scale by providing outsourcing facilities and can (i) reduce the cost of their own

operation, (ii) make a profit, (iii) reduce the cost to the client, (iv) improve service standards and (v) invest in logistical enhancements.

Specialised distributors need to incorporate an increased level of profit into their quote to make their operation financially viable. As a generalisation, a mix of trade/academic/education probably within a publisher/distribution operation will often provide most efficient costs in Australian conditions. A raw set of numbers — while remaining mindful of the variety of what is included in costs — could look like:

1. Trade Publisher
 - 8-12% gross turnover (10-15% net turnover)
 - higher costs (lower RRP, higher returns)
2. Education/Academic/School
 - 6-9% gross turnover (7-12% net)
 - lower costs (higher RRP, lower returns)

Obviously, this varies as a cost to the publisher/distributor as distinct from a publisher client. It also depends on whether the distribution facility is incorporated as a stand-alone business or incorporated into the overall business. A publisher would most likely incur the 10% of net turnover cost whereas the publisher client would incur the 15% of net turnover cost (as a fee).

As a comparison, the cost of distributing a book on a 'per book' basis (including freight, remainders and returns) can vary enormously: from \$0.80 to \$2.00. As a stand-alone cost, freight is approximately 2-4% of net publisher turnover (or 20-40% of distribution cost). Any of the five major distributors — UBD, Random House, ADS, Pan Macmillan or HarperCollins - would despatch between 15-40 million books per annum, receiving as returns around 15%.

Publishers talk in terms of net sales, whereas distributors refer to gross sales, hence the importance of returns in calculations.

7 Amazon as a competitor

It is commonly claimed by some supporters of copyright deregulation that Amazon.com and similar online booksellers (a) present a de facto parallel importation regime and (b) that Amazon is a competitor to Australian booksellers.

To address the first claim, it is pertinent that Australian publishers, who are at the fulcrum of the industry (from author to bookseller) which requires territorial copyright, do not in the broad sense regard Amazon-type businesses as parallel importers. Instead, we view these online sales as more equivalent to Australian travellers overseas buying from foreign bookshops — there is no

wholesaling into the Australian retail sector, and no direct competition with the sales of books from Australian retailers' shelves.

Australian publishers regularly test the Amazon system to check whether books can be purchased in commercial volumes, and are confident that this cannot easily be done. To order from Amazon presents costs to Australian readers above and beyond the stated retail price of the book, including freight costs and delays, and requires faith that the book will arrive in an adequate edition, and in good condition.

To address the second claim (that Amazon is a competitor to Australian booksellers), we contend that, because of the different circumstances of purchase, Amazon is not a significant competitor to the core business of Australian booksellers in novels or popular non-fiction books. Similarly, in the education sector (at least at high-volume textbook level) students are more likely to benefit from local volume-discounts on Australian school- and university-specific editions.

There is very little substantial data regarding the size and profile of Amazon and other online sales into Australia, and estimates appear to vary in line with the prejudices of claimants. However, we note one piece of data relating to Amazon sales that: '... a quarter of Amazon's book sales come from outside its top 100,000 titles.'¹³ This is indeed a long-tail business, and very distinct from the Australian bookselling model: we wonder how many Australian bookshops even have a 'top 100,000'. We would also (fairly, we believe) assume that sales to Australia will be even more specialised, given the absence of overnight delivery which is a feature of Amazon in the US.

We would also suggest that, given the nature of Amazon's business as a matcher of small buyers and sellers, its pricing is not a fair basis upon which to claim similar potential discounting in the Australian marketplace. Amazon is not replicable for the Australian market, and there is no evidence that its pricing is comparable to the prices in US bookstores.

We do share and support the concern of Australian booksellers that the GST on books is not levied for sales via Amazon, and would urge the Government to investigate methods to ameliorate this imbalance, especially given the fact that Amazon has readily developed procedures for levying US State-based taxes when required to do so.

8 Competition policy

The Australian Government's triennial *National Competition Policy Report 2005-07* notes that the achievements (and by implication the guiding principles) of national competition policy are:

¹³ Chris Anderson, *The Long-Tail: Why the Future of Business is Selling Less of More*, Century, 2006, p.23

Competition reforms have reduced barriers to market entry and exit, improving anti-competitive regulations and exposing government-owned businesses to market forces in a competitively neutral manner. Competition provides incentives that promote productivity growth and address excessive investment in some sectors and under-investment in others, poor service delivery and inefficient pricing.¹⁴

Although Australia's trade practices legislation tellingly regards copyright as a separate matter from general competition regulation, it is notable that the publishing industry does not suffer from any of the broad deficiencies at which industry competition principles have been aimed over the past 20 years.

Publishing is an industry with a broad variety of business sizes and models, and for which the presence of a large number of small participants shows there is very little by way of barriers to entry. There are no anti-competitive regulations protecting existing industry players, and the 'use it or lose it' provisions of the current copyright regime are clear incentives to provide productivity growth and appropriate investment levels.

Nonetheless, the most substantial recent review of copyright and other intellectual property in light of national competition principles by the Intellectual Property and Competition Review Committee (the September 2000 'Ergas Report') drew some interesting conclusions about copyright and National Competition Policy, including that:

Removing the restrictions [presumably of the 30/90-day rule] is one effective means of integrating the Australian market into larger, more competitive markets such as the United States, and bringing the advantages of strong competition to the Australian market.¹⁵

Although the report goes on in the following paragraph to note that: 'it would be completely inaccurate to suggest that the changes we are proposing involve eliminating the right of copyright owners to a legitimate return,'¹⁶ it is the above indented quote that is most often cited as the report's conclusion. That is a disturbing conclusion; in that it openly brooks the proposal of using the much greater-scale US market to deluge and replace the Australian market for publishing. It is not clear in this proposal how competition will be enhanced in Australia except that it becomes a 51st State market. It does not appear to imagine that books will be published in Sydney for sale in Cincinnati.

¹⁴ See at www.ag.gov.au, p.1

¹⁵ *Review of intellectual property legislation under the Competition Principles Agreement: Final report by the Intellectual Property and Competition Review Committee, September 2000*, p.73

¹⁶ *Ibid.*

What is less often cited from the Ergas Report is the dissenting report by one of the three Committee Members — David Stonier — which accompanies these conclusions, and makes two key points. First it quotes Professor Allan Fels's insightful comments that:

It is now accepted that intellectual property laws do not clash with competition laws because they do not create legal or economic monopolies. Intellectual property laws create property rights and the goods and services produced using intellectual property compete in the marketplace with other goods and services.¹⁷

The import of this is self-evident.

And second, the Stonier dissent identifies a crucial feature of the effect of the 30/90-day rules, that they '... restrict only intra-brand competition but not inter-brand competition',¹⁸ recognising that for the purposes of competition review, it might be better to consider books separately from commodity markets.

This is a crucial distinction, and one which is often lost in the rush to an open market for copyrighted material. If we accept that the primary brand for a book is composed of its title (unique material) and author (trusted sub-brand) rather than the imprint of its publisher, it is reasonable to say that control over the distribution of that brand through market-segmenting contracts (which may include the defining of territories) is a critical feature of the copyright owner's expectation of a 'legitimate return'.

By comparison with historical tariff or prohibition-style market protections, the restrictions inherent in territorial copyright do not allow one brand creator to restrict or inhibit the intellectual property of a competing brand creator. Rather, they are consistent with the notion of a private property right, and with the associated right to license the use of one's property without infringement.

9 Risk Allocation

Publishing is by its nature risk-laden. For every book accepted or commissioned for publication, publishers are taking the risk not only that the net return from sales will not cover fixed costs and advances, but that the resources expended on a given title would have been more profitably allocated to another book.

There are no guarantees that a new title will sell to expectation. Indeed, most new titles fail to find their market in the way the publisher would have hoped. For every 10 titles published, on average two succeed, by meeting or

¹⁷ Prof. A. Fels, Chairman, ACCC, *The Role of Competition Policy in IP*, Speech to the Victorian Branch of IPSANZ, 22 July 1999

¹⁸ Intellectual Property and Competition Review Committee, *Op.Cit.*, p.75

exceeding expectations, a further three may cover costs with a small margin, and the other five fail to find a market and end up being published at a loss.

Publishers contribute significant value-add beyond the fundamental author's copyright, by providing editing, illustration, book design, supply chain management and marketing support. These are expenses which are undertaken to enhance the prospective sales of a book, to the benefit of all industry participants, from the author to the bookseller.

It is critically important to note here that publishers' investments are the drivers and engines of book production. The business of publishing is therefore akin to a manufacturing enterprise, wherein a portfolio of products, protected by a range of intellectual property mechanisms, is assembled to aggregately maximise the prospect of profit. It is sensibly not assumed that all individual products will be profitable, but rather that the portfolio overall — with the application of the business operator's expertise — will be.

As a business model, this is fundamentally different from retailing, where it has never been assumed — whether we are looking at a supermarket, car dealer or bookstore — that the retailer will be a participant in the intellectual property values attached to its stock. The risk profile of retailers — and particularly of generalist booksellers — is profoundly different from that of publishers. There is generalised risk of business failure, broadly mitigated by good corporate and brand management, but this is related to customer attraction and service, and does not as a rule involve speculation on copyrightable product.

Crucially, booksellers, although not immune to the broader vagaries of business — such as poor location choice, over-gearing and economic downturn — are at least spared exposure to the risk inherent in funding author's advances, employing designers, illustrators and editors, advertising and promotion, paying printers and managing a complex distribution network (i.e. the costs of publishing). The predominant model of 'sale or return', whereby the risk on wholesale book price is borne entirely by the publisher, facilitates an effectively costless inventory for Australian booksellers.

There is, of course, a symbiotic relationship here. At the same time as booksellers benefit from a consignment-type model, publishers benefit from the opportunity to present a larger number of books to the market than would otherwise be possible if booksellers were required to speculate on likely levels of sales. This is an important framework underpinning the portfolio approach to publishing. Similarly, it is an important fillip to market competition, allowing smaller booksellers to manage their risk in competition with Australian and international chains and department stores.

This structure is intricately interwoven with the current territorial copyright provisions, in the form of the 30/90-day rule. There are two key matters to consider here in terms of market risk structure.

The first of these is that a publishing portfolio involves a broad range of titles, of which the less successful are subsidised by those which outperform expectations. These high sellers will by their very nature be those which face competition from externally-copyrighted editions: the cost of sea or air freight inevitably means that only books with demonstrated demand will provide the returns to scale to make the freight cost bearable, while delivering the desired profit to retailers. Consequently, the balance of a publishing business will be critically undermined.

The second and corollary concern is that it is commonly speculated in publishing that the absence of a territorial copyright provision would make the 'sale or return' model untenable, requiring a shift to a firm sale or remainder environment. The consequences of this change would be highly damaging to competition in the Australian book market on four fronts:

- a) Only larger publishers have the minimum market power required to insist on firm sale (which will present beneficial terms to publishers with substantial finance and scale) rather than sale or return;
- b) Similarly, only larger booksellers, preferably those who operate across a portfolio of locations, will have the finance to accept an inventory on firm sale. It is notable here that imported books are not and will not be brought in by booksellers except on a firm sale basis, which confers further advantage on larger booksellers;
- c) There is a limited range of established authors, titles and genres sustainable in a firm sale environment. Booksellers will be naturally unwilling to take all the risk previously borne by a large number of publishers, and this will necessitate a reduction in the number of titles published. This compounds the effect of undermining publishing portfolios, which in itself makes already speculative titles inconceivable; and diminishes the entire industry; and
- d) Although there is likely to be a long-run equilibrium with substantially reduced competition in both publishing and bookselling, the three effects above will reinforce each other in multiple cycles to introduce damaging medium-term uncertainty.

The only potential winners from this sequence are large-scale retailers and chain booksellers, though there may be a form of winner's curse here. Despite the argument that removing territorial copyright will subdue prices, it is more likely that this is a transitory event, facilitating market concentration amongst all industry participants, which provides no expectation of longer-term lower prices.

This is unquantifiable in prospect. What is incontrovertible though, is that territorial copyright permits a level of risk-taking (and consequently

employment and other economic investment) which will not be acceptable to any participant in a deregulated market. The current level of competition from publishing to bookselling, with the entire supply chain in between, is predicated upon the expectation by publishers that their risk appetite is justified by intellectual property protection through the maintenance of territorial copyright. The alternative proposition does not justify maintenance of this appetite.

10 Prices

a. Introduction

Price is the most contentious issue in debate on territorial copyright for Australian publishing. Opponents of the current copyright regime are adamant both that books published in Australia are more expensive than imported books, and that territorial copyright is the cause. The reality is more complex.

The cost of printing a book in Australia can be (but is not necessarily) higher than printing the same book overseas, because of potentially larger print runs overseas against which variable costs can be amortised. There are many other factors feeding into the price equation, notably the cost of freight, and printing costs, although significant, are not critical. What can look like solid evidence of higher prices for books published in Australia frequently evaporates under the glare of close scrutiny.

Once books printed in Australia or overseas are delivered to the publisher, their distribution chain is practically identical. If books published in Australia are costlier than imported books, there are four possible explanations: their production cost is higher; the payments to their authors are higher; publishers' margins are higher; or booksellers' margins are higher.

b. Printing costs

The investment in technology by Australian printers, flowing from the investment security provided by the 1991 Copyright Act amendments, has enabled them to reduce the cost differential with UK printers, despite lower print runs, to about 1% of the RRP of a typical trade paperback.

c. Other inputs

There is no evidence of which we are aware that other production costs or author royalties are significantly different across the range of books published in Australia and overseas. Obviously there will be some books which require additional editing or design input. Equally obviously, proven

bestselling authors will be paid more than lesser lights, but this applies equally in both cases.

Clearly, there will be times when both publishers and booksellers will want to maximise margins. Blockbusters may present such an opportunity when they first go on sale (and there are times when both publishers or booksellers, or both, suffer setbacks as well). Normal commercial logic, however, indicates that this takes place in a market with or without parallel importing rules. We note here the increasing incidence of major Australian retailers selling books (both new and backlist titles) at up to 10% more than the recommended retail price set by the publisher.

(It could be argued that the 30/90-day rule reduces the competitive pressure on Australian publishers by allowing them to block out the market for a particular book to which they have purchased Australian rights. Against that, firstly, Australian publishers bid in a free market for those rights and overseas publishers can and do bid in the same market and can make their own decisions; and secondly, there are only so many rights for which Australian publishers can afford to bid.)

d. The Carr Basket

The difficulty of accurately comparing book prices in Australia and overseas has been illustrated by a recent article on the issue by former NSW Premier, now a Director of bookseller Dymocks, Bob Carr. Writing in *The Weekend Australian* on 13 December, Mr Carr made a number of claims, listed below and followed in each case by an analysis.

Claim 1: in 1993 Mr Carr wrote to the then Prime Minister ‘because our copyright laws then forced Australians to buy British editions of Australian books’ and when he wanted a biography of Eleanor Roosevelt by Blanche Wiesen Cook, ‘I was told I had to wait until an English publisher got around to printing it and putting it in Australian shops, and at a higher price than the Americans could.’

Analysis: Territorial copyright was introduced in 1991. No Australian publisher bought the rights to this book and so there was and is no restriction on parallel importing for it. The US edition of the book was in stock at an independent Sydney bookseller¹⁹ in 1993, and still is.

Claim 2: a new edition of a young adult, bestseller, *Twilight*, sells for \$24.99 in Australia but only \$16.90 in the US and \$16.52 in the UK.

¹⁹ Name withheld by request.

The 2008 Booker Prize winner, *The White Tiger*, sells for \$32.95 in Australia, \$21.53 in the US and \$30.70 in the UK.²⁰

Analysis: There is no restriction on parallel importation of any edition of either of these titles as they were not published in Australia within 30 days of overseas publication. As with the Roosevelt biography above and the PD James book below, the fact that these books are not selling in Australia at the prices Mr Carr advocates, is therefore not a question publishers need to respond to, but one that should be asked of booksellers. In his calculations, Mr Carr has not added GST to the US or UK prices. Nor has he included the cost of freight or other import charges,²¹ which would bring the Australian price of a US version of *The White Tiger* to at least \$30.80 at the exchange rate applicable at the time of writing (the UK version is more costly than the Australian when GST alone is added). Additionally, it is worth noting that neither of these two titles would have originally been available on Australian bookshelves if Australian publishers had not taken the commercial risk of bringing them to Australia without the security provided by territorial copyright. Booksellers, of course, took no such risk.

Claim 3: Without territorial copyright, parallel import versions of *To Kill a Mockingbird*, *Atonement* and *Memoirs of a Geisha* could be sold in Australian bookshops for \$13.95, but the current Australian editions sell for \$21.95, \$24.95 and \$23.75 respectively.

Analysis: Mr Carr does not appear to have added GST or freight and import costs (see below for a comparison with real 'free market' prices).

Claim 4: Australians can buy P.D. James's *The Private Patient* from Amazon for \$23.26 or from a UK website for \$28.86, but the same book costs \$32.95 in Australia.

Analysis: There is no restriction on parallel importation for this book. Mr Carr's prices, however, do not include freight. The freight charged by Amazon for this book is \$15.12, bringing the landed cost to \$38.85, 18% more than the Australian sale price (and also requiring several weeks' wait).

²⁰ The figures quoted in this and following comparisons by Mr Carr were converted by him to \$A

²¹ One publisher has written that booksellers multiply US prices by a factor of about two to get an approximate Australian RRP (including GST).

Mr Carr referred favourably to the New Zealand experience of an open market. APA took the opportunity at the time to compare advertised prices at a number of NZ outlets with the price quoted in Australia by Mr Carr for the books he mentioned in his article. The results are below (all NZ prices converted to \$A at the exchange rate around 13 December):

Book	New Zealand				Australia
	Dymocks	Whitcoulls	Borders	Unity	RRP
Atonement	23.05	25.53	25.53	23.07	24.95
Mockingbird	18.94	21.42	21.01	22.24	21.95
Geisha	23.08	25.55	25.55	23.08	23.95
White Tiger	31.40	32.20	34.70	31.40	32.95
Twilight	24.80	24.80	20.70	24.80	24.99

Using the figures quoted by Mr Carr and noting New Zealand's GST is 12.5%, there is no evidence of significant diminution of price in the open New Zealand market. Furthermore, the reality is that the Australian RRP is regularly discounted in Australia by retailers as they do in New Zealand.

Mr Carr wrote that parallel import versions of *To Kill a Mockingbird*, *Atonement* and *Memoirs of a Geisha* could be sold in Australian bookshops for \$13.95 if parallel import restrictions were abolished. New Zealand, as Mr Carr points out, has had no parallel import restrictions since 1998. The company on whose board he sits, however is selling *To Kill a Mockingbird* there for 36% more than the price he claims it should be sold for, and *Atonement* and *Memories of a Geisha* for 65% more.

The New Zealand figures could support a cynical expectation that if there are any cost savings from abolishing parallel import rules they do not reach book buyers, or the simpler proposition that Mr Carr's calculations are wrong. Either way, they prove his argument is empty.

e. Bestseller price comparison

The table below illustrates prices of the highly popular 'Twilight' saga in Australia, the UK and UK:

Stephenie Meyer Twilight Saga Editions Currently Available						
Australian Editions	ISBN	FORMAT	EXTRAS	Aus \$ ex GST	2008 Average AUS Sell PRICE incl GST	
Twilight Special Edition	9781905654345	TPB-Demy	Contains exclusive short story Midnight Sun	22.50	20.48	
Twilight FILM TIE IN	9781905654413	TPB-Demy		22.50	19.70	
NEW MOON Special Edition	9781905654352	TPB-Demy	Contains exclusive author interview	27.00	24.58	
Eclipse Special Edition	9781905654369	TPB-Demy	Contains first chapter of Breaking Dawn	27.00	24.25	
Breaking Dawn	9781905654291	TPB-Demy	n/a	27.00	22.84	
The Host	9781847441843	TPB-Demy		29.70	28.18	
UK Editions	ISBN	FORMAT	EXTRAS	UK £ PRICE	Aus \$ ex GST	2008 Average AUS Sell PRICE incl GST
Twilight	9781904233657	B PB	n/a	6.99	15.53	20.48
Twilight FILM TIE IN	9781905654413	TPB-Demy	n/a	6.99	15.53	19.70
New Moon	9781904233886	B PB	n/a	6.99	15.53	24.58
Eclipse	9781904233916	B PB	n/a	6.99	15.53	24.25
Breaking Dawn	9781905654284	HB	n/a	12.99	28.69	22.84
The Host		HB		14.99	32.96	28.18
US Editions	ISBN	FORMAT	EXTRAS	USD \$ PRICE	Aus \$ ex GST	2008 Average AUS Sell PRICE incl GST
Twilight	9780316015844	B PB	n/a	10.99	16.63	20.48
Twilight FILM TIE IN	9781905654413	B PB	n/a	7.99	12.09	19.70
New Moon	9780316024969	B PB	n/a	10.99	16.63	24.58
Eclipse Special Edition	9780316160209	HB	Contains first chapter of Breaking Dawn	19.99	30.27	24.25
Breaking Dawn	9780316067928	HB	n/a	22.99	34.81	22.84
The Host	9780316068048	HB	n/a	25.99	38.98	28.18
NB. Breaking Dawn is the new book (ie, the latest in the series), and The Host is a new book. Both are cheaper in Australia.						

f. Christmas book bundle

Appendix A lists comparative prices for books listed on bestseller lists in Australian, the US and the UK leading up to Christmas last year.

g. Educational and scientific books

A recent APA survey of Australian and US prices for the best-selling US textbooks sold in Australia (see following pager) demonstrates a price advantage from buying them in Australia rather than through Amazon:

Price of US Higher Education textbooks in Australia 28/10/2008									
Author	Title	Publisher	AUD RRP (incl GST)	AUD less discount	USD (Amazon)	Exchange rate	AUD converted	Var \$	Var %
Alberts	Molecular Biology of the Cell 5e	Garland Science	\$ 150.00	\$ 135.00	\$ 110.85	0.7	\$ 158.36	-\$ 23.36	-15%
Alberts	Essential Cell Biology	Garland Science	\$ 109.00	\$ 98.10	\$ 110.00	0.7	\$ 157.14	-\$ 59.04	-38%
Applegate	Corp Info Strat & Mgmt 8/E	McGraw-Hill	\$ 144.95	\$ 131.77	\$ 159.38	0.7	\$ 227.69	-\$ 95.91	-42%

Barlow/Durand	Abnormal Psychology: An Integrative Approach, 5e	Cengage	\$ 119.95	\$ 107.96	\$ 111.40	0.7	\$ 159.14	-\$ 51.19	-32%
Belch	Advert & Promo 8/E	McGraw-Hill	\$ 139.95	\$ 127.23	\$ 143.00	0.7	\$ 204.29	-\$ 77.06	-38%
Berk	Child Development 8e	Pearson	\$ 127.95	\$ 115.16	\$ 113.04	0.7	\$ 161.49	-\$ 46.33	-29%
Berk	Development Through the Lifespan 4e	Pearson	\$ 133.95	\$ 120.56	\$ 98.59	0.7	\$ 140.84	-\$ 20.29	-14%
Bradley	Program Visual Basic 7/E	McGraw-Hill	\$ 129.95	\$ 118.14	\$ 82.57	0.7	\$ 117.96	\$ 0.18	0%
Breedlove	Biological Psychology 5e	Sinauer	\$ 122.00	\$ 109.80	\$ 87.81	0.7	\$ 125.44	-\$ 15.64	-12%
Cateora	Intl Marketing 14/E	McGraw-Hill	\$ 134.95	\$ 122.68	\$ 160.63	0.7	\$ 229.47	-\$106.79	-47%
Cengel	Fluid Mechanics 1/E	McGraw-Hill	\$ 146.95	\$ 133.59	\$ 139.80	0.7	\$ 199.71	-\$ 66.12	-33%
Cengel	Fund Thermal-Fluid Sci 3/E	McGraw-Hill	\$ 146.95	\$ 133.59	\$ 149.40	0.7	\$ 213.43	-\$ 79.84	-37%
Egan	The Skilled Helper, 8e	Cengage	\$ 97.95	\$ 88.16	\$ 90.18	0.7	\$ 128.83	-\$ 40.67	-32%
Feldman	Ess Understand Psychology	McGraw-Hill	\$ 119.96	\$ 109.05	\$ 90.00	0.7	\$ 128.57	-\$ 19.52	-15%
Giancoli	Physics 6e	Pearson	\$ 137.95	\$ 124.16	\$ 157.79	0.7	\$ 225.41	-\$ 101.26	-45%
Gravetter	Statistics for the Behavioural Sciences, 7e	Cengage	\$ 124.95	\$ 112.46	\$ 122.37	0.7	\$ 174.81	-\$ 62.36	-36%
Horngren	Cost Accounting + MyAccountingLab 13e	Pearson	\$ 132.95	\$ 119.66	\$ 177.57	0.7	\$ 253.67	-\$ 134.02	-53%
Howell	Statistical Methods for Psychology, 6e	Cengage	\$ 119.95	\$ 107.96	\$ 132.76	0.7	\$ 189.66	-\$ 81.70	-43%
Hull	Fundamentals of Futures & Options 6e	Pearson	\$ 135.95	\$ 122.36	\$ 132.26	0.7	\$ 188.94	-\$ 66.59	-35%
Kerin	Marketing 9/E	McGraw-Hill	\$ 154.95	\$ 140.86	\$ 140.48	0.7	\$ 200.69	-\$ 59.82	-30%
Laudon	Management Information Systems 10e	Pearson	\$ 119.95	\$ 107.96	\$ 143.57	0.7	\$ 205.10	-\$ 97.15	-47%
Lodish	Molecular Cell Biology 6e	W.H. Freeman	\$ 150.00	\$ 135.00	\$ 109.82	0.7	\$ 156.89	-\$ 21.89	-14%
Mankiw	Macroeconomics 6e	Worth Publishers	\$ 132.00	\$ 118.80	\$ 117.76	0.7	\$ 168.23	-\$ 49.43	-29%
Marieb	Human Anatomy & Physiology 7e	Pearson	\$ 150.00	\$ 135.00	\$ 145.06	0.7	\$ 207.23	-\$ 72.23	-35%
Marieb	Essentials of Human Anatomy & Physiology 9e	Pearson	\$ 127.95	\$ 115.16	\$ 108.36	0.7	\$ 154.80	-\$ 39.65	-26%
Martini	Fundamentals of Anatomy & Physiology 8e	Pearson	\$ 154.95	\$139.46	\$ 139.96	0.7	\$ 199.94	-\$ 60.49	-30%
McMurry	Organic Chemistry, 7e	Cengage	\$ 129.95	\$ 116.96	\$ 162.77	0.7	\$ 232.53	-\$ 115.57	-50%
Moore	Basic Practice of Statistics 4e	W.H. Freeman	\$ 110.00	\$ 99.00	\$ 93.64	0.7	\$ 133.77	-\$ 34.77	-26%
Myers	Psychology 8e	Worth Publishers	\$ 125.00	\$ 112.50	\$ 93.40	0.7	\$ 133.43	-\$ 20.93	-16%
Nelson	Lehninger Principles of Biochemistry 5e	W.H. Freeman	\$ 145.00	\$ 130.50	\$ 144.39	0.7	\$ 206.27	-\$ 75.77	-37%
Passer-Smith	Psychology 8/E	McGraw-Hill	\$ 110.95	\$ 100.86	\$ 111.80	0.7	\$ 159.71	-\$ 58.85	-37%
Raven	Biology of Plants 7e	W.H. Freeman	\$ 136.00	\$ 122.40	\$ 105.40	0.7	\$ 150.57	-\$ 28.17	-19%
Schwalbe	Information Technology Project Management, 5e	Cengage	\$ 94.95	\$ 85.46	\$ 79.15	0.7	\$ 113.07	-\$ 27.62	-24%
Shelly/Cashman	Discovering Computers 2008: Complete	Cengage	\$ 99.95	\$ 89.96	\$ 93.95	0.7	\$ 134.21	-\$ 44.26	-33%
Sherwood	Human Physiology: From Cells to Systems, 6e	Cengage	\$ 124.95	\$ 112.46	\$ 148.57	0.7	\$ 212.24	-\$ 99.79	-47%
Silberberg	Chemistry 5/E	McGraw-Hill	\$ 124.95	\$ 113.59	\$ 142.12	0.7	\$ 203.03	-\$ 89.44	-44%
Stewart	Calculus 6e	Cengage	\$ 129.95	\$ 116.96	\$ 154.79	0.7	\$ 221.13	-\$ 104.17	-47%
Thompson	Craft & Execute Strat 16/E	McGraw-Hill	\$ 129.95	\$ 118.14	\$ 130.79	0.7	\$ 186.84	-\$ 68.71	-37%
Weiten	Psychology: Themes and Variations, 7e	Cengage	\$ 109.95	\$ 98.96	\$ 150.87	0.7	\$ 215.53	-\$ 116.57	-54%
Young & Friedman	University Physics Pack 12e	Pearson	\$ 147.95	\$ 133.16	\$ 144.37	0.7	\$ 206.24	-\$ 73.09	-35%

h. 2001 Study

A study by the Printing Industries Association of Australia²² of average price differentials for best-sellers from 1988-89 to 2000-01 showed a

²² Submission to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Copyright Amendment (Parallel Importation) Bill 2001*, May 2001

general downward trend since the introduction of territorial copyright. From 1998-99 to 2000-01, prices for all bestsellers were on average cheaper in Australia than the US for two out of the three years, and cheaper than the UK for all three years.

i. Elasticity

Many who argue for copyright deregulation claim that the price of books is an impediment to consumption, and consequently to cultural engagement, education and self-improvement. This is a convenient prop to a partisan commercial interest, but we do not believe it has merit.

If price were the limit upon consumption, then excess demand for library lending would be much more prominent, and public investment in libraries would be not only increased, but would be a much better solution than removing territorial copyright.

In the absence of a broad data set to address the question of demand, we refer to an observation from the September 2000 Ergas Committee report, which notes in passing: ‘...the relatively low demand elasticity of Australian consumers for copyrighted material ...’²³

We believe this concurs with prior work undertaken by the ACCC. Although as noted elsewhere we concur more strongly with the minority rather than the majority view of the Ergas Committee, we do not doubt the underlying observation regarding elasticity of demand.

If this is correct, then it flies in the face of claims that price reductions will lead to increased consumption of books. One cannot have it both ways: that publishers benefit from low elasticity of demand; but that parallel importation will open the floodgates to fill Australian homes with books.

Naturally the demand equation for books is substantially more complicated than this, relying on education, inherited tradition of reading, and fashion.

On the latter, we note that the establishment of demand for a book such as one of the Harry Potter or Twilight series, and the associated spike in reading by children and young adults shows that it is individual titles which are the key to demand. These are of course the sort of titles which will maximise the free rider opportunity and transfer of power in the marketplace from risk-takers to retailers.

There will always be variations in price between books sold in Australia and overseas, but those variations need to be studied carefully to ensure apples are compared to apples. There are a host of factors to take into account, including book format and quality, freight and import charges,

²³ Ergas, op. cit. Pp 64-65

and the marketing policies of individual booksellers. Available evidence demonstrates that territorial copyright, coupled with the 30/90-day rule, creates a strongly competitive market for both publishers and printers, and book prices accurately reflect that.

11 Cultural Issues

Publishers are important for the long term economic and cultural well-being of Australia. Given the overwhelming evidence that the price benefits for Australian consumers of abandoning Australian territorial copyright are, at best, uncertain if not unfounded, then the focus should shift to what are the threats to Australian culture of such a move.

The question boils down to what kind of a culture we want to imagine for a future Australia. (By 'culture' we understand both Australian culture in the broader sense and Australian publishing culture.)

We estimate Australian publishing to be an approximately \$2 billion industry. By far the major drivers of investment and long-term growth in the industry are the publishers. And in a high-risk, low-margin business such as publishing, the security of investment provided by Australian territorial copyright is crucial.

Australian Culture

Publishing is a transformative industry — not only in the sense that an author's or commissioning editor's ephemeral idea is transformed into a physical object, but also because, unlike most other commodities, the content of a book itself has the power to transform the lives of its readers.

Other industries such as the film, television and advertising industries regularly rely on Australian books for their inspiration. Such classic Australian movies as *Wake in Fright*, *The Night*, *The Prowler*, *Don's Party*, *Monkey Grip*, *The Year of Living Dangerously*, *Picnic at Hanging Rock*, *The Chant of Jimmy Blacksmith*, *Careful*, *He Might Hear You*, *The Getting of Wisdom*, *Head On*, *That Eye, the Sky*, *In the Winter Dark*, *Candy*, *Puberty Blues*, *Three Dollars*, *Caddie*, *Bliss*, *Rabbit-Proof Fence*, *The Monkey's Mask*, *The Man from Snowy River*, *Romulus My Father*, *Shine*, *The Well*, *Breaker Morant* and *Rabbit-Proof Fence* had their genesis in Australian fiction; as have internationally produced films like *Schindler's List* and *Oscar and Lucinda*. The rise in cultural self-confidence of Australians generally since the 1960s and 1970s was substantially catalysed by Australian books — all Australians appreciated being able to read our own stories, told in our own accents.

The proliferation of Australian fiction, drama and poetry is only hinted at by the above list, but it is in non-fiction that the importance of having a healthy and vigorous indigenous publishing industry is particularly evident. It is almost inconceivable that a publisher based in New York or London would commission such quintessential Australian stories as *Kokoda*, *Tobruk* and

Nancy Wake by Peter FitzSimons, or *Vietnam: The Australian War* and *Kokoda* by Paul Ham, or Helen Garner's *The First Stone* and Joe Cinque's *Consolation*, or David Marr's *Barwick, Dark Victory* and *Patrick White: A Life*, or Bill 'Swampy' Marsh's *Great Australian Flying Doctor Stories*, or Sara Henderson's *From Strength to Strength*, or Sally Morgan's *My Place*, or *A Fortunate Life* by AB Facey, or *Great Australian Working Dog Stories* by Angela Goode and Mike Hayes, or Don Watson *Recollections of a Bleeding Heart*, or *Fletch* by Hugh Lunn.

It is vitally important for Australians' sense of self for us to read our own stories as told by Australians. Competing as we do in an English language market with the two biggest story-telling machines on Earth, Australian publishing is especially important culturally because it allows us, as a people, to talk to ourselves clearly and unaffectedly.

Ditching Australian territorial copyright would also threaten the unique Australian idioms and vocabulary in which our books are currently written. When an Australian book is accepted for US publication, the American publisher will almost always require that changes be made to the text (and sometimes, the illustrations of a children's book). No Australian author can afford to ignore the most lucrative English-language market in the world, so most of the changes are agreed to. These Americanised versions of Australian culture will be among the most likely books to be dumped back into Australia if the 30/90-day rule is abolished. As the popular Australian novelist Nick Earls commented recently:²⁴

It's common for changes, sometimes substantial changes, to be made before an Australian book is published in an export market, particularly the US. Many Australian references are lost and idiomatic language is altered. These are compromises we make to be published in the US and to communicate specifically with US readers, but it is highly unlikely potential purchasers here would be made aware of them if the US editions ended up in Australia. These books are not the same as local editions, but they would be sold as if they were.

I'm not sure that people realise how extensive the changes can be. With my novel *Perfect Skin*, a photocopy of the Australian edition arrived from my New York editor with hundreds of sticky notes. Working through them took two five-hour phone calls. In the end, I think close to 200 changes were made, beyond Americanising the spelling. Uni became school, med school or college, depending on the circumstances. The Brisbane suburb of St Lucia had to go because it might confuse American readers as it's also an island in the Caribbean ... Indooroopilly had to go because, as my editor said, 'We don't have Indooroopilly.' She asked if Indooroopilly Shoppingtown could move to West End. I told her if she knew West End, she wouldn't ask.

²⁴ *The Australian*, 13 September 2008

Personalised plates became vanity plates. Bitumen became asphalt. Colloquialisms had the red pencil run through them. The role of pikelets in the US edition was played by a jelly ring. And I think the US version includes a line about female gym teachers, which my editor wrote and told me would be very funny there. It replaced an entirely different line that, I hope, was funny here.

I consented to these changes for the North American market. I hope that book reads well there and maybe the changes have helped. All those changes, though, are compromises I simply wouldn't have made if I'd had Australian readers in mind.

Setting aside the loss of royalties if it were dumped here at a bargain price because the US might have excess stock, and setting aside the undermining of the local edition, it's a different read from the Australian edition. For an Australian reader, it would be full of jarring references that would feel un-Australian (in the literal, and not overused, sense of the word). There's hardly a better way to put someone off reading a book than to do that. If something stands out as inauthentic, it pushes you out of the story and spoils the reading experience. Some changes also have potential for confusion; for example, changing 'when I was at uni' to 'when I was at school': they're simply not interchangeable in Australia.

The situation is even more insidious in the case of Australian children's books where the Australian edition's mum, pavement and nappies would morph into the US edition's mom, sidewalks and diapers. Australia's children's books and literacy materials are world-class but the sheer size of the US market would ensure that over time, this last bastion of Australia's unique way of writing and speaking would be overwhelmed.

This is not just an argument about cultural 'purity,' it has long-term economic implications as well. In an increasingly wired and globalised world, it will be those economies that maintain their cultural distinctiveness and creativity that will remain vital and flourish.

Publishing Culture

There is another sense in which Australian culture will be diminished if the 30/90-day rule is abolished. Since 1991, Australian publishers have developed a new entrepreneurial business culture — balancing the risks of local production, selectively importing overseas titles, and actively seeking international markets for Australian books. This has required a heavy investment in editorial and marketing infrastructure, in training and in skills development. Most Australian publishing houses are dramatically different from their antecedents. That investment and that evolution will be wound back

if the current regulations are removed. The older, safer business models will re-surface, and a golden opportunity will have been lost.

Publishers are at the creative forefront of the innovative, knowledge-based information society of the future. Investment in new modes of production and dissemination of information and culture continue to come from the publishing industry. In the education sector, Australian publishers have been devising new web-based solutions to the delivery of supplementary materials for students and teachers for years. Across all sectors, publishers are collaborating with printers and with aggregators of copyright materials like Google to find workable solutions to the age-old problems of getting the consumer what they want quickly and at a competitive price.

Australians are in no way excluded from the flows of globalised culture. About 40% of the books sold in Australia originate overseas, and a cursory look at any list of the most popular movies, CDs, DVDs and television programs in Australia show that overseas interests are not barred from the Australian market. Conversely, the uniqueness of Australian cultural expression combined with our familiarity with globalised forms allows more and more Australian cultural producers to inhabit and communicate on a worldwide stage.

The current copyright regime does not set up barriers to overseas culture, but instead encourages and nurtures our own cultural identity while at the same time defending us from the dumped shards of overseas culture in the form of remainders and overruns. To do otherwise would be to abrogate a basic responsibility of any government regulation to help maintain and nurture the uniqueness of identity of its citizens.

Copyright is fundamental to the ongoing economic development of Australia. Australia's future is highly dependent on creativity and innovation, and we need to encourage Australian creators to produce and exploit more home-grown copyright material – not head the other way by abolishing territorial copyright. The Miles Franklin- and twice Booker Prize-winning writer Peter Carey put it this way, the last time the possibility of parallel importation was mooted in Australia:

Of course, parallel importation will strike a serious blow against the best Australian publishers ... who are aggressively and selectively buying Australian territorial rights for the works of foreign writers. In this way they are already increasing Australian production, and lessening imports ...

If the government abolishes territorial copyright ... our literary culture would be the poorer for it.

I can't think of another nation on the planet who would consider removing territorial copyright from its artists. Can you imagine the French doing it? We know it's impossible, because we know that the French value their culture. I am shocked and ashamed to think that we

may not. This proposed legislation seems to prefer to have our culture shaped by distributors.

Nothing has happened since 2001 to make this opinion any less pertinent.

In 2001, the Australian Society of Authors ran a quick poll of the major Australian literary agents. They confirmed that there had been a steady rise in overseas exposure for Australian authors since the introduction of the 30/90-day rule. Eighteen years ago, Professor Alan Fels's throwaway comment that 'most Australian authors publish solely for the Australian market' may have been largely true, but nowadays more and more Australian authors are securing US and UK contracts.

According to the agents, somewhere between 0 and 5% of their clients had UK and US contracts in 1990. In 2001 that proportion was, on average, around 20% and growing. And today there has been a further redoubling so that around 50% of their clients have secured an overseas contract. What's more, many Australian authors do not have agents — their publishers sell their overseas rights for them — which would increase the figures even more. Authors with this increased overseas exposure range across all genres and ages, and include many established as well as many emerging writers.

No significant overseas markets are loosening their copyright regimes at the moment — in fact, the trend is in the opposite direction. Whereas at the moment Australian authors and publishers can effectively control their copyrights in the same way as their British or American peers do, if Australian territorial copyright were removed, Australian authors and publishers would be the poor cousins of their overseas counterparts.

Any move that weakens the position of copyright creators now will be seen as incomprehensibly short-sighted in a few years' time. At a time when Australia is striving to get back into step with the burgeoning knowledge-based economies of the world, it will be seen as remarkable that we should have even contemplated undermining our home-grown copyright-creating industries.

Australia is a net importer of information and copyright content. Only by encouraging more Australian stories to be published and exported can we create the basis for a truly independent and flourishing indigenous culture into the future — a culture based on the creation of wealth through the production, development and dissemination of our own intellectual property, rather than an impoverished, derivative culture based on importing and exchanging other people's creativity.

The territorial copyright regime rewards Australian publishers if they imaginatively exploit the work of Australian authors both here and overseas. Removing territorial copyright will discourage Australian publishers and agents from looking overseas for rights sales, and encourage the local industry to revert to the days and ways of being a passive 'import culture'.

Australia's authors and publishers, seen as cultural producers, are as important to the national interest as our primary producers and manufacturers. Publishers should be seen as a strategic resource that enhances our ability as a nation to speak to ourselves authentically, and to represent ourselves as culturally unique to the rest of the world.

To unwind the current territorial copyright provisions would be to admit that Australia accepts a view of itself as a passive consumer of the leftovers of overseas cultural producers, rather than a vibrant creator of its own stories. Almost 20 years of remarkable cultural self-expression and the growth of an entrepreneurial, globally focussed publishing culture will have been threatened — and for no good reason.

12 Industry Case Studies

a. New Zealand

In 2007, consultants LECG released a report²⁵ on the impact of the New Zealand Government's policy on parallel importing on the country's four creative industries: books, sound recordings, computer software and films. Sectors of the LECG report's findings on the book and music industry are particularly relevant to this inquiry.

The inquiry shows that the New Zealand publishing industry is structured similarly to Australia's, with domestic publishers (many of which are subsidiaries of foreign companies) supplying 60% of locally-sold books, along with a large number of specialist publishers. Notably, there are three major types of booksellers: large book retail chains, non-specialist discounters, and independent book retailers.

The table below shows the origin of imported books from 2000 to 2006. (What we see here is that parallel importation has not truly occurred in NZ since deregulation. What has occurred, other than an increase in prices, is a withdrawal of investment from the NZ market.)

Country of origin	2000	2001	2002	2003	2004	2005	2006
Australia	176	162	180	190	187	190	190
United	84	84	76	70	72	65	83

²⁵ *MED Parallel Importing Review: impact on creative industries* LECG (Cr David Moore, Dr Michale Volkerling and Bastian van der Scheer), November 2007.

Kingdom							
USA	84	98	67	65	58	60	63
China	7	8	9	12	18	20	26
Germany	3	38	3	3	3	3	3
Other countries	55	22	47	43	43	45	58
TOTAL	409	412	382	383	381	383	423

The report's authors interviewed publishers and booksellers. Publishers, inter alia, said:

- Sales of parallel imported titles are increasing;
- Large publishers are moving from warehousing in New Zealand to stocking books from Australia;
- The domestic market is not big enough for continued growth and the domestic industry is increasingly export-focused;
- A wider range of titles has come at the cost of depth of stock
- Parallel importing is reducing the revenue they would otherwise receive from the importation and sale of backlist titles, which will compromise the viability of some publishers if it continues;
- Educational and technical publishers are concerned that the resources they spend promoting titles to education providers are jeopardised by providers importing the same books directly.

Booksellers said:

- Their main issue is direct purchase online from overseas publishers (estimated at up to 40% of total sales);
- Sales have increased in volume and value;
- Retail chains and discounters buy end of line books and discounted titles overseas by the container load;
- Domestic book releases have moved from being three to six months behind the UK to one to three weeks;²⁶

²⁶ That is, the delay in NZ release of an overseas bestseller with no restriction on parallel importations is close to the delay in Australia with the 30-day rule.

- Prices for new release titles have increased over the past few years;
- But bulk parallel imports have allowed them to serve a new market at lower price points

The LECG report was generally benign on continuing unrestricted parallel importation of books. The applicability of its findings to Australian conditions, however, needs to be tempered by the fact that New Zealand is a smaller market (producing 2,266 new titles a year compared with more than 14,000 in Australia) that is even more isolated than Australia. That makes it a less attractive target than Australia for overseas publishers looking for a market for remaindered books. It is also worthwhile noting, despite New Zealand booksellers remarks about bulk parallel imports that prices for new titles have *increased*.

There are also several warning signs in the New Zealand experience for Australian publishers. One is the establishment of non-specialist discounters, and the imports by them and large retailers of container loads of effectively remaindered books (in conjunction with the almost fourfold increase in imports of books from China from 2000 to 2006). Another is the threat to the viability of some New Zealand publishers from parallel importation of their backlist title. And a third is the impact on scientific and educational publishers of parallel imports of titles they have marketed to local educational providers.

On sound recordings, the LECG report has a different tone. It is worth quoting at length:

‘The New Zealand market for manufactured sound recordings (both domestic and international artists) is only \$96m per year. The margins have got to the point where there is not enough money being made by recording companies to invest in infrastructure and less is spent on the promotion of both domestic and foreign artists. The industry reports that it is now 25% smaller than it was five years ago, and expects to be 25% smaller again in five years if current trends continue.

‘Interviewees state that it is hard to ascertain the effect of parallel importing, due to the huge impact of piracy ... the general feeling in the industry is that parallel importing is now occurring, and we will follow the Australian experience of rapidly increasing levels of parallel importing. This will depress the benchmark national price for albums from both international and domestic artists to unsustainable levels and domestic music infrastructure and investment will be ‘destroyed’ as a result.’²⁷

²⁷ Ibid, p25

The report continues:

‘... several musicians who have had international releases following their domestic successes have been negatively affected by the parallel importation of their titles from countries in which they receive reduced or no royalties for sales. Their local promoters are also out of pocket. The bigger an artist is offshore, the more open they are to harm from actual parallel importation.’

And for those who argue that dumping of intellectual property can be prevented by contractual provisos:

‘This parallel importation is because a lot of the recorded titles are sold by different companies in different territories. They will promote certain titles and artists to different levels depending on local circumstances. If the right to a New Zealand music title is sold in one territory it may be produced, not promoted, and then parallel imported for sale in New Zealand (even in some cases concurrently with its release in New Zealand in order to take advantage of domestic promotion by other companies.’²⁸

Clearly, the New Zealand music industry has been severely hit by piracy, as it has around the world. Equally clearly, parallel importation has contributed significantly to exactly the kind of major problems that Australian publishers fear under an unrestricted parallel import regime for books in Australia.

b. Canada

Australia’s 30/90-day rules, balancing territorial copyright with simple “use-it-or-lose-it” provisions to ensure quick and comprehensive access to titles published around the world, contrast favourably with Canada’s complex regulatory requirements, which came into operation in 1999.

Canada takes a similar approach to Australia in stating that publication in Canada is deemed “simultaneous” if it occurs within 30 days of overseas publication. To claim the benefits of the legislation, however, copyright holders (called exclusive distributors) must give notice of the fact that they hold the rights to a book by advising booksellers (if they are a publisher) or registering that fact in a nominated national catalogue, and in their own catalogues supplied to booksellers and libraries (if they are a bookseller).

When an order for books is received by an exclusive distributor, there is a hierarchy of duties imposed on the distributor depending on the origin of the book and the language in which it is written.

²⁸ This and section quoted above *ibid*, p28

For books imported into Canada and in stock in Canada, distributors must ship orders within three days of receipt for English language books and within five days from French language books. For books imported from the US and not in stock in Canada, distributors have 12 days to ship the order. For books imported from Europe and not in stock in Canada, they have 30 days to ship orders for English language books and 60 days for French language books. For books imported from any other country and not in stock in Canada, they have 50 days to ship orders.

Prices are controlled. Exclusive distributors importing US books can only add a margin of 10% to US list (sticker or catalogue) price, and for books imported from elsewhere, 15% to the list price in the country of origin.

If requested, exclusive distributors have to confirm whether an order can be fulfilled within two days (if by phone), five days (mail for fax) or one day (email).

Exclusive distributors of a paperback book are only subject to these requirements 12 months after the book becomes available in North America, but they trigger the requirements if they supply the book in paperback in that period.

Additionally, exclusive distributors can seek court orders preventing the importation of overseas-printed copies of books to which they own the rights – effectively a mechanism to limit the importation of remainders. Remainders can still be imported, but not sold in Canada until 60 days after they were first offered for sale, as remainders, in their country of origin.

Copyright holders can claim exclusive distributorship for books they import from overseas publishers, or books from overseas which they reprint in Canada (which must be identified as such on the cover or jacket).

Genuine new or used textbooks are exempted from all these regulations, and as in Australia, booksellers can import single copies of any book at the request of a customer.

The Canadian system is an example of a much more regulated environment, which seeks to replace competition within a copyright sector with a much more onerous set of price controls and other interventions. The APA believes it shows the benefits of the simple set of requirements and incentives embedded in the 30/90 day rules.

We note in passing the Canadian Government's extensive and intensive support for its domestic publishing industry. Canada's book publishing is

a CAN\$1.5B industry (very similar in size to Australia's), and locally produced books comprise about 59% of the books on Canadian retail shelves. Canada also has operational territorial copyright legislation keeping its market a closed one, which the Government boasts about on its website in the following terms:

Another federal measure designed to support the book industry includes the parallel importation regulations which, through the Copyright Act protect agreements for the distribution of books in the Canadian market.

The Canadian Government maintains that the principal objective of its Book Publishing Industry Development Program (BPIDP) is to ensure 'choice of and access to Canadian-authored books that reflect Canada's cultural diversity.' The program aims to foster a strong and viable Canadian book industry, publishing Canadian-authored books and has four components (listed below with the amounts, in Canadian, dollars allocated by the Canadian Government in 2007-8):

- Aid to Publishers (\$27,055,404)
- Supply Chain Initiative (\$738,500)
- Collective Initiatives (\$2,814,407, with a further ongoing commitment of \$1,392,277)
- International Marketing Assistance (figures unavailable)

That the Canadian Government is serious about supporting a home-grown publishing culture can be seen in the level of public investment made through this program: a total of more than CAN\$30, 608,311 in direct industry assistance in 2007-8, without taking into account International Marketing Assistance and the work of the Canada Council.

As the Canadian Government's website explains:

This support is premised on the belief that Canadians must have access to Canadian voices and Canadian stories.

Of further interest is the fact that two provincial governments — Ontario and Quebec — also operate tax credits schemes for Canadian publishers who publish the work of Canadian authors.

c) Lessons from the music industry²⁹

²⁹ This section draws on consultations by APA and its advisers with representatives of the Australian music industry.

Before passage of the *Copyright Amendment Bill No.2 1998*, music CDs were subject to an even more exclusive national exhaustion principle than books are currently. Until that time, there was essentially a ban on imports of sound recordings other than by the copyright holder, rather than the 'use it or lose it' provision now governing book copyright. This significantly limited the range of recorded titles available in Australia, a key factor (alongside price) in Parliament's decision to permit comprehensive parallel importation of CDs and other recordings.

(It is notable here that despite some peculiar assertions to the contrary, there is no aspect of the current Australian copyright law which parallels the old sound recording restrictions by preventing the importation of books which either have no Australian publisher, or which are not readily supplied by an Australian copyright holder).

Similarly, of particular concern to the Government in the late 1990s was that the Copyright Act was being used as a protection of rents from exclusive importation: we note here the concern of then Attorney-General Williams that: '... the act can be used to control the Australian market for imported copies of recordings. This is significant as imported recordings constitute the overwhelming percentage of recordings marketed in Australia.'³⁰

This concern, while it takes a questionable position on the extended value of a creator's rights, presents a different picture for CDs in 1997 than prevails for books in 2009. In particular, the complete restriction on imports without any requirement for copyright holders to meet the market offers, the capability to generate rents while limiting the publisher's risk. In contrast, the requirement for a copyright holder to establish precedence and continue supplying the market as established by the 30/90-day rules presents substantial risk to the publisher and confers significant benefit to consumers in terms of choice — particularly given the current terms of trade for books.

Since the deregulation of territorial copyright for sound, there has certainly been some reduction in price. This is variously estimated, but international research suggests that the removal of national exhaustion to permit parallel importation of CDs regardless of circumstance is associated with a 7.2-7.9% reduction in the retail price of music CDs.³¹ It is, of course impossible to adequately separate the effect of Australian copyright law changes from the overlapping phenomenon of digital downloads, though the article cited above uses some data which precedes this event.

³⁰ Second Reading Speech, 20 November 1997

³¹ See Chen, Yeh-Ning & Png, Ivan, *Parallel Imports and Music CD Prices*, January 2004

There are three notable anecdotal observations relating to the impact of digital delivery upon demand:

1. 95% of album sales are still CDs;
2. 95% of individual track sales are digital downloads; and,
3. The ability to select a preferred track rather than a third-party-selected 'single' has substituted track sales for album sales, radically changing demand patterns.

These features are not typically relevant to books, even in the event of digital serialisation, as most books are by their nature indivisible entities. These observations emphasise how multi-driver changes to demand structure bring into question anecdotal assessments of the impact of copyright deregulation on retail CD prices.

Perhaps the most telling aspect of current copyright arrangements pertaining to sound recordings is that digital delivery, unlike CD sales, is territorially restricted. So, for example, we cannot in Australia legally purchase US-delivered (and priced) downloads over the web. The rationale behind this arrangement appears to be that a digital version of a sound recording — while it has production value-adding — remains a version of the creator's copyright. That is, because it has not been physically packaged, it is not fair game for international (as opposed to national) exhaustion.

Critically, this takes the primary form of an export restriction (though there may be matching import restrictions). This is important because it bears such a strong similarity to the contracts which contemporary authors have with their book publishers. As noted earlier, it is typical of a book publishing contract that a national publisher may not make its edition available for sale in any foreign territory, or is excluded from making the book available for sale in specific territories where the author has a separate national contract.

The proposal to remove territorial copyright from the Australian statutes will not affect these contracts, but will allow wholesalers to act as go-betweens to change an illegal export into a legal one with no value-add. In the case that this is done with digital data in music (or indeed in video or text) it is recognised as piracy, whether done for profit, or without profit for trade or even altruistic file-sharing — and is prosecuted accordingly. This is because it is a clear appropriation of elements of the author's copyright. Nonetheless this is exactly the arrangement suggested by some Australian booksellers.

This suggestion may however simply be a blind. It is the experience of the Australian music industry that there is limited genuine importation of CDs except by the rights holder, particularly in the case of non-top-20 discs. Instead, the changes to the law are used by large-volume retailers as a threat to music publishers, along the lines of: 'drop the price or we'll buy offshore'. There is a clear transfer of market power here to retailers, without an accompanying transfer of risk. This phenomenon is compounded by department stores, who commonly loss-lead on top-20 CDs, without stocking significant range, thereby taking advantage of the 1998 law changes without delivering on a core aim to increase availability.

In recent years, this has not led to a healthy music industry in Australia. Observations from within the industry include:

- A reduction of employment across the industry of 30-40% in the past decade;
- Fewer bands getting recording deals, and a radical reduction in investment in individual albums; and
- A clear example of free riding, where the local music publisher does all the marketing for a new recording, but has neither the capacity to expect participation in the market for a successful product, nor the ability to set the price for their CDs.

This last point is extremely telling, as it is compounded by evidence against the laughable claim by some Australian booksellers that copyright deregulation will increase the availability of titles. There is simply no incentive for a retailer to take the risk of importing a book until clear demand is established.

For music publishers, this exacerbates an already high-risk business where on average one in 10 albums become profitable, and that profit must at least compensate for the other nine. This is comparable to the portfolio approach to book publishing, and the suggestion that the fruit of a successful publication should be the incentive to import an alternative edition, or the emergence of a predatory retailer is genuinely frightening.

It is recalled by music publishers who were active in the 1997-98 campaign that this was very poorly understood by the Government of the time, which also laboured under a range of misapprehensions, failing to understand for example that:

- Australian independent labels were often rights-buyers in the international market, paying significant advances, or selling at fixed margin — as is the case for Australian publishers;

- Australian 'subsidiary' publishers still need to operate on a distinct and profitable balance sheet, and are in any case crucial conduits to exporting Australian music overseas;
- As with books, not only is the one-in-10 successful album the one which will be parallel-imported, but it may represent the fourth or more in a multi-record deal. This is an extension of the free rider problem: not only will the retailer take advantage of marketing investment, but it will contribute nothing to long-range career development. This undermines the incentive to build a market for developing musicians (or writers); and,
- As a corollary to the previous point, this situation is unusually cruel: when an Australian artist produces his or her 'tipping-point' album and the rights are sold overseas, there is an inevitable overrun in the US market, which will then be dumped into the Australian market, destroying domestic profitability. As with books, this is simply a matter of scale.

The focus in 1997-98 — emphasised in the Minister's second reading speech — was on a comparison between Australian and US prices. However, much music industry publishing is currently undertaken in Asia, which is both a cheaper production region, and closer, presenting lower freight costs.

Historically, it did not matter that CDs were printed in China or similar, because it was illegal to import an alternative copy of a CD, as it is currently illegal to import an alternative copy of a book which has a domestic copyright holder meeting the 30/90-day rules. Consequently, illegal distribution was simple to police, as there was only one licensed distributor at a time.

Despite the best intentions of the Government of the day, which focused heavily on penalties for illegal importation, the current regime has presented a range of unintended consequences, including:

- The need to contend against titles which have no licence anywhere in the world (e.g. unofficial compilations of otherwise licensed artists);
- Fakes which are perfect copies of a legitimate CD, down to reproduction of the copyright information, and which would not require identification if there were a territorial copyright regime;
- Simple factory overruns, which are then distributed internationally without paying the per-unit licence fee to either the creator or publisher (these are all matters where enforcement is substantially

a cost to music publishers, but also presents some cost to the public purse); and

- The returns problem. On a sale-or-return model, a music publisher must invest time and effort to identify whether each individual disc is actually the Australian product or an extremely similar import. The blending of stock by retailers is one of the most compelling arguments why Australian publishers would need to shift to a firm-sale arrangement in the case of parallel importation.

These are all factors which help depress price, but which are rarely referred to by the proponents of copyright deregulation as contributors to a market discount. None of these activities creates jobs or rewards copyright holders: instead, they compound the finessing of regional labour markets and other factors of production which export Australian jobs overseas, and which is the hidden infrastructure of copyright deregulation.

For the moment, printing of books in Asia is of no concern to the Australian publishing industry. However, given the experience of the music industry, it would be of perhaps greater concern than the threat of remaindered US editions. Alongside all of this, the music industry in Australia loses an estimated \$200 million per annum through illegal digital downloads.

These issues are just as real for books: we would cite a recent article from the US which noted that Hachette Book Group has withdrawn its titles from key e-book retailers: “over longstanding concerns about the enforcement and verifiable reporting of territorial rights provisions to the publisher.”³²

At the moment, we are in the early days of digital delivery for books, and it is notable that the imminent explosion of such delivery is regularly cited by some booksellers as a need for the risk-taker’s profits to be legally appropriated by them.

It is axiomatic that books and sound recordings are different things: both in length and intensity of engagement; in use (difficult to drive while reading); and in cultural impact. Nonetheless, digital delivery will come, and will present a difficult transitional environment for publishers and booksellers alike.

The shape of that environment, and the dominant form and pricing of the digital delivery is unclear, and there are few clues from sound downloads. Until we have a clearer idea of this, it seems a questionable argument

³² “Book Trade News Digest”, January 16, 2009

toward dilution of our copyright provisions. Similarly, as noted above, given the territorial restriction of digital delivery, it would be somewhat bizarre to regulate a component of book sales which delivers few local jobs, while deregulating and undermining a component which produces so many.

Overall, the lesson from the music industry is not that wholesale deregulation is a good legislative choice, but rather that the book industry's use it or lose it provisions might be sensibly applied across other copyright areas.