

## LAW REFORM

## Enemy at the gate?

BRENT SALTER reads between the lines, and hopes Australia retains restrictions on the parallel importation of books

In November 2008 the Productivity Commission commenced a six-month study examining whether current parallel import restrictions in the *Copyright Act 1968* (Cth) ('the *Copyright Act*') in relation to books are justified. Parallel import restrictions allow copyright holders to prevent the importation into Australia of their books that have been lawfully published in another country. In effect, these rights allow copyright holders to segment international markets – and allow them to charge different prices in different markets – without the risk of being undercut by cheaper imports of the same book from other markets. Opponents of the current restrictions argue the operation of these provisions results in higher prices and less availability of books to the disadvantage of Australian consumers. In light of price and monopoly concerns, the Commission proposes changes that will 'liberalise' the current framework. The majority of submissions made by Australian authors and publishers, however, strongly oppose the proposals.

### Background

An author or publisher may sell the rights to produce copies of a book to foreign publishers so that they may be sold in their local foreign markets. However, apart from limited exceptions, Australian booksellers cannot legally source their supply of Australian authored books from overseas.<sup>1</sup> Amendments to the *Copyright Act* in 1991 permit the parallel importation of lawfully published books where there has been a failure to supply the Australian market once the book has been published in another country. These changes were intended to address concerns about delays in obtaining copies of overseas books and fall into two categories:

#### 1. The 30 day release rule

Under section 29(5) of the *Copyright Act*, the holder of Australian copyright for a new book has 30 days to supply copies of the book to the Australian market after it has been released in a foreign market. If this does not occur, Australian booksellers are legally able to import foreign published non-infringing copies of the work from an overseas supplier. Prior to 1991 Australian publishers would often buy the Australian rights to these foreign titles and delay the release of it in Australia indefinitely. Since the 1991 amendments, Australian publishers have an incentive to release the work promptly in Australia in order to preserve the parallel import restriction on their title (as once a title is released in Australia within the 30 days foreign, and often much cheaper, copies cannot be imported).

#### 2. The 90 day resupply rule

Section 44A of the *Copyright Act* contains what is known as the '7/90' day rule. Under the provision, an

Australian bookseller may import a reasonable number of foreign copies of a book if an Australian publisher does not respond to a written request within 7 days to supply copies in 90 days, or cannot supply those copies of the book within 90 days.<sup>2</sup>

In addition, the *Copyright Act* also sets out other situations where parallel importation is allowed. For example, booksellers can import a single copy to satisfy a customer order,<sup>3</sup> or to supply books to a library.<sup>4</sup> Furthermore, the 1991 amendments do not affect a consumer's right to purchase books for personal use from overseas sellers – an issue of increasing importance in light of rapid expansion of online sellers such as Amazon.com.

### March 2009 Discussion Draft and proposals

The tone of the Commission's 2009 Discussion Draft<sup>5</sup> mirrored the general position of numerous studies conducted over the previous twenty years: despite the 1991 amendments going some way to freeing up the market, the restrictions are having an adverse impact on competition and ultimately consumers are paying for this in terms of prices and access.

After considering a number of reform models the Commission settled on a 'liberalising restrictions' option, which proposes to increase competition while still providing 'some support for local writing and publishing activity in recognition of the externalities that some of this activity generates'.<sup>6</sup> The Commission proposes that the parallel import restrictions should apply for 12 months from the date of first publication, as opposed to the full term of copyright,<sup>7</sup> thereafter importation is freely permitted. Second, the Commission recommends if a protected book becomes unavailable during that 12 month period, the restriction should be lifted until local supply can be re-established. The Commission also recommends that booksellers should be able to offer an 'aggregation service' for individual orders of imported books under the single use provisions (i.e. a greater degree of flexibility for booksellers to order multiple copies under the single use provision).<sup>8</sup> The Commission concludes by suggesting these recommendations should be reviewed in 5 years and, although advocating reform, make the extraordinary admission that due to the limited information currently available on the industry, the Australian Bureau of Statistics should conduct a comprehensive survey prior to the commencement of the review.

#### REFERENCES

1. Under s 37 of the *Copyright Act 1968* (Cth) ('the *Copyright Act*') it is an offence to import into Australia copies of a book that has been legally produced for an overseas market in order to sell them. And s 38 of the *Copyright Act* makes it an offence to sell an imported copy of a book, if that copy was imported without the permission of the copyright owner.
2. See Productivity Commission, 'Restrictions on the Parallel Importation of Books', *Productivity Commission Discussion Draft* (March 2009) 56.
3. *Copyright Act* s 44A(3).
4. *Copyright Act* s 44A(4).
5. Productivity Commission, above n 2.
6. Productivity Commission, above n 2, 7.7.
7. For example, for an author of a literary work the duration of copyright in an original work is 70 years after the death of the author: *Copyright Act* s 33.
8. See Productivity Commission, above n 2, 7.15–7.20.



### An author's right to write: further encroachments on the individual author

The Commission has clearly indicated that the restrictions, in their current form, are no longer justified despite receiving only a handful of submissions from book consumers, and despite conceding there is a paucity of information available on the Australian book trade to be able to accurately quantify the effect of territorial copyright on books. The proposals are an incremental response that makes inroads into the restrictions while strategically avoiding wholesale abolishment. The proposals attempt to appease the majority of submissions received from authors, publishers and printers who argue for the maintenance of the current restrictions. A perusal of post draft responses to the proposals suggest this attempt to appease has been resoundingly unsuccessful.

It is of considerable concern that in proposing reform the Commission has generally neglected the vulnerable position of the author. Lifting restrictions increases that vulnerability. David Throsby and Virginia Hollister's 2003 Australia Council report, *Don't Give Up Your Day Job – An Economic Study of Professional Artists Working in Australia*,<sup>9</sup> provides sobering reading in terms of understanding the perilous position of the Australian writer. While writers earn on average some of the highest incomes amongst artists, this is not because writing as an art form itself is particularly well remunerated. The median income for writers is approximately \$35 000. Despite what would appear to be a modest salary, of this \$35 000 the median amount earned from their creative practice each year is only \$5000. Approximately \$6000 is earned from 'arts related' income, which is work obtained in the arts but not directly related to their creative practice, and the balance of \$24 000 is obtained from non arts related income.<sup>10</sup>

Growing income disparity is a significant issue for writers. One in four writers earn below the poverty line and approximately half earn less than \$4000 a year from their creative practice.<sup>11</sup> While the average income of writers has grown over the last two decades, this reflects wage increases in non-arts employment. In addition, while representation (actively working) has increased amongst writers over the 1990s it is well below that of many other arts occupations at 25 per cent.<sup>12</sup>

Restricting the protection period to 12 months risks compromising access to income royalty streams an author receives from subsequent editions of their original work. Furthermore, lifting restrictions is inconsistent with standards in other territories. Restrictions are commonplace throughout the world (including the UK and United States) and provide a critical function in the development and protection of cultural content. As Tim Winton writes in his submission, the restrictions reflect our book industry's progress 'beyond colonial status' and 'merely ensure that a creator is fairly remunerated at home and abroad for original work' as well as acknowledge 'the great individual labour and personal risk of the primary producer'.<sup>13</sup> This individual author narrative is often neglected in contemporary copyright commentary, focused on open access to content in an environment of rapidly evolving technology.

The Commission claims the 'liberalised option' is the most prudent way forward; but until more industry information becomes available, it is submitted that the most prudent way forward is to maintain the status quo. Why would the Commission propose reform, even in an incremental form, before undertaking a more comprehensive study of the industry? Considering that copyright in the original work is often all that an author has, after what is sometimes years of labour, forging ahead with reform in an environment of such uncertainty should not be the immediate priority. The 30 day rule should be retained without qualification to guarantee Australian authors, who choose to have their books published here first, full term copyright protection. Indeed, many of the submissions received suggest anecdotally that under the present 30 day release rule, amongst other factors, the Australian book industry is beginning to flourish. It is also critical that the ABS should measure the industry on a more regular basis. Any proposed reform that encroaches on the rights of the original author should only be considered once a more complete picture of the industry can be ascertained, shaped by representatives from all sectors of the industry.

**BRENT SALTER** is a researcher at Macquarie University Law School.

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9. David Throsby and Virginia Hollister (written on behalf of the Australia Council), *Don't Give Up Your Day Job – An Economic Study of Professional Artists Working in Australia* (2003).

10. *Ibid* 45–47.

11. *Ibid*.

12. Australia Council, 'Changing Income and Employment Circumstances of Individual Artists' (summary of Throsby and Hollister Report) [australiacouncil.gov.au/\\_\\_\\_data/assets/pdf\\_file/0020/32519/2003\\_Throsby\\_changing\\_income.pdf](http://australiacouncil.gov.au/___data/assets/pdf_file/0020/32519/2003_Throsby_changing_income.pdf) at 8 May 2009

13. Tim Winton, Post Draft Submission, Productivity Commission Study, 'Copyright Restrictions on the Parallel Importation of Books', <[www.pc.gov.au/\\_\\_\\_data/assets/pdf\\_file/0006/85731/sub204.pdf](http://www.pc.gov.au/___data/assets/pdf_file/0006/85731/sub204.pdf)> at 8 May 2009.