



Senate Legal and Constitutional Legislation Committee

**Consideration of legislation referred
to the committee**

Copyright Amendment (Importation of Sound Recordings) Bill 1999

August 1999

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

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FOREWORD

1.1 The Committee has considered the provisions of the Copyright Amendment (Importation of Sound Recordings) Bill 1999 and accepts that it will close a loophole in the *Copyright Amendment Act (No. 2) 1998* which presently prevents the parallel importation of “enhanced” CDs.

1.2 The Committee views these restrictions as being inconsistent with the spirit of the 1998 legislation, and recommends that the Copyright Amendment (Importation of Sound Recordings) Bill 1999 be passed without amendment.

Marise Payne

Chair

August 1999

CHAPTER 1

BACKGROUND

Referral of the Bill

1.3 On 28 June 1999, following a recommendation by the Selection of Bills Committee³, the Senate referred the Copyright Amendment (Importation of Sound Recordings) Bill 1999 to the Legal and Constitutional Legislation Committee for inquiry and report by 10 August 1999.⁴

Purpose of the Bill

1.4 The purpose of the Copyright Amendment (Importation of Sound Recordings) Bill 1999 is to ensure the parallel importation and sale of sound recordings, in particular compact discs, irrespective of whether they also contain, or are accompanied by, other copyright material.⁵

Submissions

1.5 The Committee wrote to a number of organisations and individuals on 7 July 1999 inviting submissions on the Bill. The Committee received 4 submissions, which are listed at Appendix 1.

Hearings and Evidence

1.6 The Committee decided not to hold hearings into the Bill due to the small number of submissions received and the significant number of hearings that were held into the Copyright Amendment Bill (No. 2) 1997 in February and March 1998.

Acknowledgment

1.7 The Committee would like to acknowledge those organisations that assisted the Committee with its inquiry, and to record its appreciation for that assistance.

3 Selection of Bills Committee Report No. 10 of 1999, *Senate Hansard*, 28 June 1999, p.1347.

4 Selection of Bills Committee Report No. 10 of 1999, *Senate Hansard*, 28 June 1999, p.1347.

5 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.1.

CHAPTER 2

ISSUES

Introduction

1.8 In 1998 the Commonwealth Government amended the *Copyright Act 1968* to allow for the parallel importation and sale of legitimate copies of sound recordings.⁶ The purpose of the *Copyright Amendment Act (No. 2) 1998* was to produce lower priced sound recordings by creating increased competition among distributors,⁷ and to provide the Australian consumer with a greater choice of music.⁸

1.9 Since this legislation was passed, some difficulties have arisen over the parallel importation of “enhanced” CDs, which contain copyright material additional to the sound recording. The Explanatory Memorandum to the Bill states that:

Some owners of Australian copyright have asserted that sound recordings to which other copyright material, such as film clips have been added, may not be imported without their consent. Contrary to the spirit of the 1998 amendments, they have forced numerous retailers, under threat of legal proceedings for infringement of copyright, to remove from sale such sound recordings, known as “enhanced CDs”. The assertion of control over parallel importation of, for example, film material, on an enhanced CD, in effect, enables holders of the copyright in the sound recording to restrain parallel importation of the sound recording.⁹

1.10 The Australian Competition and Consumer Commission, in its submission to the inquiry, stated that:

This use of the *Copyright Act 1968* to restrict trade is beyond the purpose of the Act which exists to protect intellectual property, not to maintain non-tariff barriers.¹⁰

1.11 Senator Ian Campbell, Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts, in addressing the difficulties encountered over the importation of “enhanced CDs” noted:

This Bill will close a loophole in the Copyright Act that currently allows sound recording producers to claim control, under the Act, of the importation of CDs by the inclusion of “film clips” or other copyright protected subject matter, such as a photograph, on or with a music CD. Parallel importation of films or artistic works

6 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.1.

7 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.1.

8 Senate Legal and Constitutional Legislation Committee, *Copyright Amendment Bill (No. 2) 1997*, April 1998, p.25.

9 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.1.

10 *Submission No. 3*, Australian Competition and Consumer Commission, p.1.

is not permitted under the Copyright Act. These are different types of protected subject matter under the Act to sound recordings. They are not, therefore, subject to the 1998 amendments.¹¹

1.12 The actions of some owners of Australian copyright in preventing retailers from selling “enhanced CDs” was not envisaged at the time the 1998 amendments were passed.¹² This situation has already resulted in litigation in the Federal Court and the Commonwealth Government has introduced the current Bill to ensure that the intention of the *Copyright Amendment Act (No. 2) 1998* is fulfilled.¹³

Response by the Government

1.13 The Commonwealth Government has moved to close the loophole in the Act that presently prevents the parallel importation of “enhanced” CDs. Senator Ian Campbell, in the Second Reading Speech, stated:

Whilst “enhanced” CDs have existed for some time, these were considered to be multimedia products, like CD-ROMs. However, it is plain that they are presently being sold and marketed primarily for their music content.

...

This Bill amends the Copyright Act to specify that where ancillary copyright material, like a film clip, is included in or with a sound recording, this material is taken to be “accessory” to the sound recording and cannot, under the Act, be used to prevent the parallel importation of the sound recording.¹⁴

1.14 Accordingly, the Bill achieves its objective by establishing that “enhanced” CDs are classified as sound recordings, and by deeming other copyright material incorporated within an article in which a sound recording is embodied, to be an “accessory” to the sound recording. The Bill also deems other copyright material that is either with or in the container or packaging of the article, to be an “accessory” to the sound recording.¹⁵

Issues arising from the Bill

1.15 The purpose of the *Copyright Amendment Act (No. 2) 1998* was to benefit consumers by promoting competition in the distribution of CDs in Australia.¹⁶ The Senate Legal and Constitutional Legislation Committee’s report on the 1998 Bill stated that:

A more competitive Australian market is expected to result in conditions which better reflect the costs of production and the needs of consumers. This is expected to result in lower prices for CDs in Australia, so addressing the central conclusion

11 Copyright Amendment (Importation of Sound Recordings) Bill 1999, Second Reading Speech, *Senate Hansard*, 26 May 1999, p.5392.

12 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.2.

13 *BMG Music Pty Ltd & ors v Much More Music Pty Ltd* (currently before Justice Hill).

14 Copyright Amendment (Importation of Sound Recordings) Bill 1999, Second Reading Speech, *Senate Hansard*, 26 May 1999, p.5392.

15 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.2.

16 *Explanatory Memorandum*, p.12.

of the PSA inquiry in 1990 that “the prices Australian consumers pay for records are too high”.¹⁷

1.16 The Australian Consumers Association (ACA) supported the amendments to the *Copyright Act 1968* because they believed the amendments would bring significant benefits to consumers in relation to price and greater choice of music.¹⁸ The ACA supports the current Bill for similar reasons:

The intent and result of the original parallel import legislation was to improve value for the customer. The amendment, by establishing a presumption that enhanced CDs are sound recordings and deeming other copyright embodied in an article in which a sound recording is embodied as an “accessory” to the sound recording, will increase the level of certainty in the market place about how this improved value can be delivered to customers.¹⁹

...

Therefore the Australian Consumers Association supports this amendment.²⁰

1.17 The ACA goes on to state in its submission that:

It is apparent that trends of price reductions and non-price competition have emerged since the amendments were passed. At the same time, the domestic CD industry has not collapsed as prophesised by some.²¹

1.18 The Australian Competition and Consumer Commission (ACCC) also supports the Bill and notes that:

It appears that the recent situation has developed because a ‘non-infringing accessory’ in the Copyright Amendment Act (No. 2) 1998 was defined as a label, packaging or a container. In recent months, the claim of copyright over material embodied in the second recording medium, or accompanying the sound recording, has been used to deter importers from sourcing some overseas product. In the view of the ACCC, such actions are inconsistent with the spirit of the 1998 legislation.

...

The ACCC strongly believes that competition provided by imports increases consumer choice and puts competitive pressure on local prices. This outcome is best achieved when obstacles to parallel importing are removed. The ACCC therefore supports the new Amendment.

17 Senate Legal and Constitutional Legislation Committee, *Copyright Amendment Bill (No. 2) 1997*, April 1998, p.25.

18 *Submission No. 1*, The Australian Consumers’ Association, p.1.

19 *Submission No. 1*, The Australian Consumers’ Association, p.2.

20 *Submission No. 1*, The Australian Consumers’ Association, p.2.

21 *Submission No. 1*, The Australian Consumers’ Association, p.1.

Definitions

1.19 The only opposition to the Bill was provided in a joint submission to the Committee by the Australian Record Industry Association (ARIA) and the Australasian Mechanical Copyright Owners Society (AMCOS). One of the main concerns raised by ARIA and AMCOS is that:

A CD with music and film or CD Rom or both is not a music CD – it is a multi-media product which is sometimes called an “enhanced CD”. It is a different product in the market and at law. Some enhanced CDs are comprised mostly of music, yet the Bill does not really distinguish between such enhanced CDs and other types of CDs.

...

This was specifically recognised, distinguished and endorsed by the government in the 1998 amendments. Indeed the government provided a clear unequivocal statement of this fact to all music retailers in Australia in its book entitled “CDs Information for Music Retailers, The New Business Environment” written and published by Ministers Alston, Williams, Reith and Truss.²²

1.20 In the government’s booklet *CDs Information for Music Retailers, The New Business Environment*, it was stated that:

Under the new law, you can import:

- recorded music; and
- material associated with the copy or the recording such as booklets, packaging and posters.

This does not include music on enhanced CDs where there is video material, Digital Video Disks (DVDs), or on CD-ROMS.²³

1.21 This statement highlights the difficulties that can be encountered with definitions. When the government issued this booklet, an “enhanced” CD was regarded as a multimedia product, like a CD-ROM.²⁴ It was always the intention of the government to exclude these types of items from the 1998 amendments.²⁵ However, when it became evident that some sound recordings were being “enhanced” by the addition of other copyright material such as film, the nature and definition of what had originally constituted an “enhanced” CD changed.

22 *Submission No. 4*, ARIA and AMCOS, p.1.

23 Department of Communications and the Arts, *CDs Information for Music Retailers, The New Business Environment*, August 1998, p.9.

24 Copyright Amendment (Importation of Sound Recordings) Bill 1999, Second Reading Speech, *Senate Hansard*, 26 May 1999, p.5392.

25 Department of Communications and the Arts, *CDs Information for Music Retailers, The New Business Environment*, August 1998, p.9.

Consequently, some owners of Australian copyright were able to assert that such items were not subject to Australia's parallel importation laws.²⁶

1.22 The effect of altering the nature of a sound recording, and creating an "enhanced" CD (by the addition of other copyright material), has resulted in the 1998 amendments being circumvented. The government therefore, in an attempt to redress this problem, has introduced the Copyright Amendment (Importation of Sound Recordings) Bill 1999 to ensure that the intension of the *Copyright Amendment Act (No. 2) 1998* is maintained.

1.23 Furthermore, the joint statement by ARIA and AMCOS noted:

This Bill, regardless of deeming provisions, is about films and copyright in films. Yet the government has made no policy decisions in regard to parallel import rights in cinematographic films ("films"), computer software, and literary works such as books.²⁷

1.24 The *Copyright Amendment Act (No. 2) 1998* provided for the parallel importation of sound recordings. The Copyright Amendment (Importation of Sound Recordings) Bill 1999 does not change this. Clause 10AB refers to certain cinematograph films, but only in the context of it being an accessory to the sound recording. The Bill does not enable the parallel importation of cinematographic films. Clause 10AB of the Bill clearly states:

- (1) If:
 - (a) an article has embodied in it a sound recording; and
 - (b) a likely use of the article is to play it by using a machine that, as ordinarily used, is not capable, whether with or without the aid of some other device, of causing visual images to be seen;then, for the purposes of sections 44C, 44D, 112C and 112D, but without limiting the meaning of *accessory* in relation to a sound recording, the article is taken to be a sound recording, and the following are taken to be accessories to the article:
 - (c) a copy of any cinematograph film, work or other subject-matter that is also embodied in the article;
 - (d) a copy of any work or published edition included with or in the packaging or container in which the article is packaged or contained.
- (2) In determining whether or not paragraph (1)(b) applies in relation to an article, the following matters may be taken into account:
 - (a) the nature of the article;
 - (b) the way in which the article is marketed;
 - (c) the nature of any descriptive material in or on the article, or associated with it;
 - (d) the nature of the sounds embodied in the article;
 - (e) the nature of any cinematograph film, work or other subject-matter embodied in the article.

26 Copyright Amendment (Importation of Sound Recordings) Bill 1999, *Explanatory Memorandum*, p.1.

27 *Submission No. 4*, ARIA and AMCOS, p.2.

1.25 The Committee has carefully considered the joint submission by ARIA and AMCOS. However, it has not been persuaded that the Copyright Amendment (Importation of Sound Recordings) Bill 1999 does anything more than close a loophole in the 1998 legislation, thereby maintaining the original intention of the 1998 amendments to allow for the parallel importation of sound recordings.

OPPOSITION MINORITY REPORT

This Bill is based on the value principles and concepts underlying the Copyright Amendment Act (No2) 1978 with which the Committee dealt in a report presented to the Senate in April 1998.

That report is entitled:

“Copyright Amendment Bill (No2) 1997.”

We refer to the matters set out in that report. Our position has not changed.

We note that the existence of “enhanced CD’s, the subject of this Bill was known to the Government at the time it moved the Copyright Amendment Bill (No2). “Enhanced CD’s were specifically excluded from the scope of the Bill because they contain multimedia context.

The Government has not resolved how it will deal with other multi-media context. Accordingly it is premature to deal with this issue at this time.

We consider the Bill we are now considering to be flawed. It should be rejected.

Jim. McKiernan

Senator for Western Australia

Barney Cooney

Senator for Victoria

DEMOCRATS MINORITY REPORT

The Australian Democrats opposed the Government's Copyright Amendment Bill (No 2) 1997 on the grounds set out in detail in our minority report (presented to the Senate by Senator Natasha Stott Despoja in April 1998). Our position is unchanged.

While we accept there is a need to resolve copyright issues involving multimedia, the proposals in this bill deal with only a small part of the required broader policy framework. We do not believe that the Government has given sufficient consideration to an appropriate and comprehensive copyright regime for multi-media and digital materials.

The Australian Democrats do not believe that this Bill is a fair solution to the problem that it is intended to resolve. In particular, we wish to draw attention to the Government's previous position on this material, as outlined in the joint submission by the Australian Record Industry Association (ARIA) and the Australasian Mechanical Copyright Owners Society (AMCOS). The Government has made clear in materials circulated to music retailers that these multi-media materials were not to be regarded as being equivalent to recorded music. This Government's claim that technology has subsequently developed beyond the scope of legislation is not a sufficient response to this contradiction.

Accordingly, we believe this bill should be rejected.

Brian Greig

Senator for Western Australia

Natasha Stott Despoja

Senator for South Australia

APPENDIX 1

ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

Organisation	Submission No
The Australian Consumers' Association	1
Music Industry Piracy Investigations	2
Australian Competition and Consumer Association	3
Joint submission by ARIA and AMCOS	4