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Copyright Amendment (Parallel Importation) Bill
2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 133 2001-02

Copyright Amendment (Parallel Importation) Bill 2002

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Law and Bills Digest Group
15 May 2002

Contents

Purpose	1
Background	1
History of the Bill	1
Copyright	2
Parallel importation.	2
The <i>Copyright Act 1968</i> and parallel importation	2
Books	3
Sound recordings	3
Packaging and labelling	4
The Copyright Amendment (Parallel Importation) Bill 2002.	4
Reviews and inquiries into parallel importation	4
Copyright owners.	5
Anti-Competitive?	6
Pricing.	7
Piracy	8
ALP policy position on parallel importation.	9
Senate Legal and Constitutional Legislation Committee Report	10
Main Provisions	11
Schedule 1 - Computer software	11
Schedule 2 – Printed books, periodicals and sheet music.	13
Schedule 3 – Other amendments	14
Concluding Comments	14
Endnotes.	15

Copyright Amendment (Parallel Importation) Bill 2002

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: Royal Assent, apart from:

- Schedule 2 (relating to printed books and music) that commences one year after Royal Assent
- items 1-3, 5 and 7 of Schedule 3 (involving technical corrections) that commenced immediately after commencement of the *Copyright Amendment (Digital Agenda) Act 2000* on 4 March 2001, and
- consequential items in Schedule 3 that commence immediately after the commencement of Schedule 1.

Purpose

To amend the *Copyright Act 1968* to allow:

- the parallel importing of computer software and computer games, and
- the parallel importing of books, periodicals and sheet music in both electronic and print form.

Background

History of the Bill

The substantive provisions of this Bill were initially introduced in the previous Parliament on 28 February 2001 in the Copyright Amendment (Parallel Importation) Bill 2001. On 28 March 2001, the Selection of Bills Committee recommended, and the Senate agreed, to refer that Bill to the Senate Legal and Constitutional Legislation Committee for consideration. The Committee tabled its report on the Bill on 23 May 2001. Although the

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Majority Report supported the Bill, it expressed concern about a number of issues.¹ Parliament was prorogued before debate on the Bill resumed and the Bill then lapsed. The Bill is written in exactly the same terms as the previous Bill.

Copyright

Copyright protects the way ideas are expressed – in the language of copyright the expression of an idea is known as a 'work'. 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 amongst other things 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.

Parallel importation

Parallel importing is the importation of works which have been legitimately purchased overseas (ie purchased without infringing the creator's copyright in the overseas country) by someone other than the authorised importer.²

It is said that the prohibition of parallel importing results in a segregated market:

The effect of prohibiting parallel importation is to facilitate geographical division of the market [used in a loose sense to refer to the demand for and supply of particular copyright material] for the copyright material in question. The copyright in particular material can be partially assigned along geographical lines. The assignee is then assured that when selling the copyright material within the geographical area described in its assignment that it will not be competing with the same material from a different source.³

The *Copyright Act 1968* and parallel importation

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.⁴

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In essence, the parallel importation provisions of the Copyright Act allow a copyright owner or exclusive licensee to control the importation into Australia of copyright material, even if the products have been lawfully acquired overseas. The restrictions allow rights owners to separate the world market into self-contained segments to secure the greatest return on the protected subject matter.

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.⁵

Books

In 1991 provisions were introduced into the Copyright Act to govern 'non infringing books' (ie those legitimately manufactured in their country of origin). Sections 44A and 112A, 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. Effectively, as long as foreign books are released in the Australian market within 30 days of being published overseas, they will be deemed to be 'first published in Australia', and parallel import restrictions will apply.

Parallel importation of books 'first published in Australia' is also 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.⁶

These arrangements are also referred to as the '30/90 day rule'.

Sound recordings

In 1998 the Parliament passed the *Copyright Amendment Act (No. 2) 1998* which removed the prohibitions on parallel importation of 'sound recordings'. Consequently copyright is no longer infringed by importing into Australia a 'non-infringing' copy of a sound recording.⁷

Under section 10AA of the Copyright Act a sound recording will be a 'non-infringing copy' only if:

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1. the copy is made by, or with the consent of the owner of the copyright in the 'copy country'
2. the making of a copy does not infringe copyright in the copy country, and
3. the 'copy country' is either a party to the Berne Convention, or a member of the World Trade Organization and complies with TRIPS.⁸

Packaging and labelling

Until recently, authorised importers were able to prevent the parallel importation of their products by relying on the copyright subsisting in the packaging and labelling. Importation of the packaging and labelling constituted an infringement of copyright under the Copyright Act.

However from 1 February 2000, amendments to the Act establish that copyright is no longer infringed by the parallel importation of a product, if copyright subsists in the packaging and labelling alone (ie in the 'accessories').⁹ The Government's rationale for this amendment was that copyright in labelling and packaging should not be used as a backdoor means of protecting exclusive distribution arrangements.¹⁰

The Copyright Amendment (Parallel Importation) Bill 2002

On 27 June 2000, the Government announced its intention to lift restrictions on parallel importing of legitimately produced books, periodicals, printed music, and computer software products including computer-based games. The stated rationale for this decision was that the lifting of restrictions would

pave the way for future cost savings on these products for consumers and businesses' and they would eliminate the import monopoly of a small number of multinational software companies and book publishers, which has kept prices artificially high.¹¹

The Copyright Amendment (Parallel Importation) Bill 2002 ('the Bill') implements this decision.

Reviews and inquiries into parallel importation

Over the last fifteen years the issue of parallel importation has been a subject of numerous reviews and inquiry.¹²

The Copyright Law Review Committee, the Prices Surveillance Authority, the Industry Commission, the ACCC and various parliamentary committees have all dealt with this issue. More recently the Government requested the Intellectual Property and Competition Review Committee ('IPCR Committee'), chaired by Mr Henry Ergas, to inquire into and report on the interaction and appropriate balance between competition policy and intellectual property legislation. The Committee submitted its final report¹³ on 30 September 2000 and in relation to parallel importation recommended repeal of the parallel

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importation provisions of the Copyright Act, with a 12-month transitional period allowed for books.¹⁴

The IPCR Committee stated that such a move:

would enhance competitive neutrality, both as between types of copyright material and as between the industries and activities that rely on copyright protection and those that do not; it would enhance competition in the supply of copyright materials; and it need not compromise the efficiency of copyright enforcement or the goals of the copyright system.¹⁵

The following section summarises some of the issues raised in these numerous reports together with the arguments for and against parallel importation.

Copyright owners

It was put to the IPCR Committee that lifting restrictions on parallel importing would reduce the incentives for copyright owners to invest in creative effort. This is claimed to occur mainly because the restrictions facilitate territorial price discrimination and may increase the returns accruing to rights owners.

As the Australian Copyright Council told the IPRC Committee:

The Copyright Council opposes parallel importation. The purpose of the parallel importation provisions is to ensure the effective exercise by Australian copyright owners of the exclusive rights granted to them under the Copyright Act. The exclusive right to reproduce a work in Australia is effectively undermined if articles containing the work can be imported by others, such as people seeking to take advantage of the copyright owner's investment in creating or expanding a market for the work. The effect of imported copies on the Australian rights owner is similar to the effect of unauthorised reproductions made in Australia - other people unfairly benefit from the copyright owner's investment in the work, and the copyright owner's return from that investment is reduced.¹⁶

The publishing industry has also indicated support for the current arrangements. Text Publishing argued to the IPCR Committee:

The current regime [ie the 30/90 day rule] provides an incentive for internationally focussed Australian publishers to price their Australian editions competitively while also providing them with the same protection of territorial copyright that British and American publishers have. [...] It is reasonable to conclude that the effectively open market which we now have has permitted Australian publishers to flourish because the 30-day rule allows them to compete on equal terms with foreign publishers. It has permitted them to flourish not because they have resorted to publishing books without export potential but because they have used the fact of territorial copyright to increase their revenue by selling rights which in turn has allowed them vigorously to compete for new Australian writers.¹⁷

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Text Publishing also argued that Australian publishers would be vulnerable to remaindered foreign editions (from which the author either derives a minuscule royalty or no royalty at all) being sold in Australia at heavily discounted prices.¹⁸

IBM, in its submission to the IPCR Committee, suggested that parallel importation of computer software would disadvantage local businesses and consumers.

Local distributors and retailers will find that parallel imported products undermine their marketing and sales efforts. Then when consumers buy those products, service and support may not be available for them. Furthermore, consumers may not know at the time of purchase that their product will not be properly supported.¹⁹

Against this, the ACCC argued that:

Legislative restrictions on parallel importing are not justified by the traditional free rider concerns relating to intellectual property. These relate to the sphere of *production*, protecting intellectual property owners from unauthorised reproduction. By contrast, restrictions on parallel imports extend intellectual property into the sphere of *distribution*. While legislative restrictions on imports of pirate and counterfeit goods are a necessary adjunct to restrictions on reproduction, restrictions on imports of goods legally marketed cannot be justified. While free riding may occur in the sphere of distribution, for example on marketing and promotional investments or on pre and after sales service, this is nothing unique to, nor even a necessary feature of, intellectual property.

It should be emphasised that restrictions on parallel imports do nothing to protect domestic industry, they simply provide the domestic rights holder with an exclusive right to import. Whether they choose to invest and manufacture domestically are separate decisions which will be influenced by factors such as the likely international returns from investing in local R&D and the costs of local vs off shore manufacturing.²⁰

The ACCC presented the view that problems such as free riding in markets should be tackled through specific contractual arrangements, rather than by embodying geographical restraints in the Copyright Act. In the Commission's view, if these arrangements are likely to contravene the Trade Practices Act, their specific costs and benefits to the community can be considered under the processes of authorisation and notification.²¹

Anti-Competitive?

Those supporting parallel importing argue that the parallel import provisions in the Act are a restriction on competition and contrary to the criteria set down in the Competition Principles Agreement.

The guiding principle of the Competition Principles Agreement is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs, and

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- the objectives of the legislation can only be achieved by restricting competition.²²

According to the Government's Explanatory Memorandum, the power to control the distribution of imported copyright subject matter has enabled copyright owners to exercise market control. This in turn resulted in higher prices being charged to Australian consumers.²³

The ACCC argues:

Parallel import restrictions grant a 'monopoly' or exclusive right to import to intellectual property owners. By preventing international arbitrage, these import monopolies may be used to support international price discrimination by firms with market power (either unilateral or coordinated market power). Indeed, the very existence of these exclusive rights tends to create a climate conducive to coordination rather than competition, since intellectual property owners know they are not constrained by import competition.²⁴

Mr John Stonier, the dissenting member of the IPCR Committee, suggests that while the copyright owner's power to prevent parallel imports is a power that enables them to restrict conduct, not all restrictions on conduct are quantifiable restrictions on competition. He argues that unless an extremely narrow definition of the market is adopted, the power to prevent parallel imports does not constitute a restriction on competition except possibly in very particular situations. He concludes:

It is therefore not clear that the parallel import provisions restrict the competitive process, or that the costs of such restrictions exceed the benefits. It is also not clear that there are alternative cost-effective means of achieving the same goals.

This conclusion is particularly true for the book industry in Australia. There are over 250 publishers employing more than 4 000 people. In 1997-98 they sold more than 110 million books (60 per cent Australian) and published nearly 7 000 new Australian titles. Sales exceeded \$1 000 million, of which more than \$100 million were exported, mainly to the United States (\$40 million), New Zealand (\$25 million) and the United Kingdom (\$17 million). These figures are consistent with Australia having a thriving and competitive industry. They are also consistent with the view that parallel imports are not impeding or restraining the competitive process.²⁵

Pricing

Pricing is an argument used by both supporters and opponents of parallel importation.

The Attorney-General when introducing the Bill into Parliament said:

The Bill offers the prospect of cheaper prices and increased availability of products for all Australians, but especially for small businesses, parents and the education sector.²⁶

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The Attorney-General claims that since the lifting of restrictions on sound recordings, it is now possible for consumers to buy top selling CDs that are over 30 per cent cheaper than prior to parallel importation.²⁷

In relation to computer software the Attorney-General cites an ACCC report to Government showing that over the past ten years, Australian businesses have had to pay an average of 27% more for packaged business software than their US counterparts.

These benefits then flow primarily to foreign rightsholders while the corresponding costs are borne by Australian consumers and industries such as the domestic software industry.²⁸

The Australian Visual Software Distributors Association (AVSDA), in evidence to the IPCR Committee, suggested that the ACCC discussion of pricing is incomplete and flawed.²⁹ AVSDA argued that Australia already has comparatively lower prices by world standards and the importation of legitimate products through other channels will not change this.³⁰ AVSDA also referred to a study carried out by Access Economics which looked at 97 per cent of all computer game sales in 1998 and showed that prices in the UK were 32 per cent higher than Australian and US prices were only 7 per cent lower than in Australia.³¹

Microsoft, in evidence to the IPCR Committee, also claimed that surveys conducted within the software industry in the past two years indicate that the price of most high-volume packaged software products sold in Australia is presently competitive with, and in some cases cheaper than, the price for the same products sold in the US, Europe and other countries.³²

On the other hand, Australia's e-commerce industry opposes the current restrictions arguing that they prevent Australian retailers from obtaining goods at the same price as their competitors, thus inhibiting their online competitiveness.³³

Piracy

Some industry groups argue that there is a link between parallel importation and the importation of pirated³⁴ or infringing material. This is because parallel importation weakens the ability to identify the importation and distribution of pirate copies.

The issue of piracy and parallel importing was raised in a recent parliament committee inquiry into copyright infringement.³⁵ The Committee received evidence citing the New Zealand experience. The Anti-Counterfeiting Action Group. stated that when New Zealand changed its parallel import laws recently, there was a major increase in counterfeit merchandise.³⁶

The Australasian Performing Rights Association questioned the wisdom of amendments allowing for parallel importation generally when there has been concern over the Australian Customs Service ability to detect infringement at the border. However Customs

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told the Committee that the relaxation on parallel importation would not affect its operations significantly and the Committee considered this observation significant.³⁷

The IPCR Committee recently commissioned a report from the Australian Institute of Criminology on parallel importation and piracy.³⁸ The report, which uses compact discs as a case study, found that in the period since mid-1998 when restrictions on importation were lifted, there is little evidence of an increase in CD piracy.³⁹

The Institute of Criminology's report did acknowledge that insufficient time may have elapsed to make a realistic assessment of the effect of the parallel importing amendments. However it also suggested that other events, such as changes in economic conditions and technological advances, may be responsible for any increase in CD piracy which does eventuate.⁴⁰

ALP policy position on parallel importation

On 24 August 2000 the Hon Duncan Kerr, Shadow Minister for the Arts, and the Hon Bob McMullan, MP, Shadow Minister for Industry and Technology launched the ALP's Policy Statement on Parallel Importation and indicated it would not support the complete removal of parallel importation restrictions.

Such a move will not benefit Australian consumers. It will severely hurt our local industries, and in the long term it will deprive Australian consumers access to locally produced cultural goods.⁴¹

As an alternative to the Bill the ALP proposes a 'Use It or Lose It' policy, based on the parallel importation regime currently existing for the book industry. The ALP would extend this regime to apply to the video games, computer software and music industries. Under this arrangement the importation of a good for which there is a local copyright owner would only be permitted if:

- the copyright owner does not release the good on the local market within 30 days after its publication or international release, or
- the good, although released locally, is unavailable for purchase within Australia, or
- the good is unavailable within Australia at an internationally competitive price, within 90 days of being requested.

The ALP claims that this approach would place pressure on importers to make products available to Australian consumers faster and at a better price. According to the Opposition the 'use-it or lose it' rule will provide security to Australian copyright holders and give Australian consumers access to the most up-to date music, books, computer software and video games.⁴²

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Senate Legal and Constitutional Legislation Committee Report

On 28 March 2001, the Copyright Amendment (Parallel Importation) Bill 2001 (the version of this Bill introduced in the previous Parliament) was referred to the Senate Legal and Constitutional Legislation Committee ('the Committee') for consideration. The Committee reported on that Bill on 23 May 2001. It is not possible to traverse all the comments made in the report, however, some of matters raised by or with the Senate Committee are mentioned briefly.

The Committee in its report supported the broad directions of the Bill, however it emphasised its concerns about a number of issues. In particular, the Committee concluded that while a number of outcomes appear to be promised by this legislation, the extent to which such expectations may be realised is unclear.

The Report stated:

As the proposed benefits are conditional, the Committee believes that departments must make this fact clear, rather than suggesting a guaranteed result. Quite apart from the issues of relying on evidence which is questionable, or has been used inappropriately, there is too much dependence on general but not very satisfying statements in the Explanatory Memorandum.⁴³

The Committee was critical of the evidence generally provided and in particular had major reservations about the evidence given by the ACCC

The Report stated:

Those opposing the changes were able to provide considerably more detail about the cost of products across a broader spectrum of items than was the ACCC. If there is to be dependence on such material in the support of substantial change, it is the responsibility of the relevant departments to ensure that it is of the highest quality, and it is certainly incumbent upon the ACCC to provide sustainable data.

The Committee was surprised at the lack of evidence presented on specific links between legislative change and the availability of cheaper legitimate items to consumers. In particular, it noted that:

although there is general support for the 30 day rule in book publishing, including from those who had been opposed to it, little effort seems to have been made to collect information on the ongoing effects of certain substantial changes.⁴⁴

With respect to items such as printed books, journals, and sheet music,⁴⁵ the Committee argued that, as these are exempt from parallel importation for one year, it is essential to obtain accurate data about the current costs to consumers of such items as a baseline against which to measure future change. For this reason, the Committee recommended that the relevant departments allocate funding to an independent body such as the Australian Copyright Council to ensure that comparable data is collected and maintained on all industries affected by Schedule 2 of the Bill, particularly periodical publications and sheet

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music. This data should be the subject of a report to be completed and made publicly available prior to the commencement of Schedule 2.

Minority reports opposing the legislation were tabled by Labor and Democrat Senators.

Main Provisions

Schedule 1 - Computer software

Schedule 1 makes amendments to the *Copyright Act 1968* (the Principal Act) to allow the parallel importation of computer programs,⁴⁶ and electronic literary and music items. Electronic literary or music items are books, periodicals or sheet music in electronic form, regardless of whether there is a printed form (**item 3**).

Items 1-7 make amendments to subsection 10(1), the definition section of the Principal Act.

Central to the parallel import regime is the term ‘non-infringing copy’.

Item 6 repeals and replaces the existing definition of ‘non-infringing copy’. The new definition of a non-infringing copy will be:

- a ‘non-infringing sound recording’ as already defined in section 10AA
- a ‘non-infringing computer program’ as defined in **new section 10AB**, and
- a ‘non-infringing electronic literary or music item’ as defined in **new section 10AC**, or
- a ‘non-infringing printed literary or music item’ as defined in **new section 10ACA**.
(Note: this is added to the definition by **item 3** of Schedule 2).

Item 8 inserts **proposed sections 10AB** and **10AC** which define ‘non-infringing computer program’ and ‘non-infringing electronic literary or music item’ respectively. Essentially these will be copies made in a qualifying country and which do not breach copyright law in their country of manufacture. A ‘qualifying country’ is a country that is either party to the Berne Convention⁴⁷ or a member of the World Trade Organization with a copyright law consistent with the TRIPS Agreement (**item 7**).⁴⁸

The practical effect of the definitions in **new sections 10AB** and **10AC** is that pirated copies, which are made without the copyright owner’s consent, are excluded by these definitions.

Item 8 also inserts **proposed section 10AD** which deals with accessories to imported articles. ‘Accessory’ is already defined in subsection 10(1) of the Copyright Act to mean, amongst other things the packaging or container for an article, or a label on an article, a

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written instruction or other information provided with an article, or a record embodying an instructional sound recording, or a copy of an instructional cinematograph film, provided with the article.

Under **new section 10AD** computer programs or electronic literary or music items that are part of or combined with imported articles are taken to be ‘accessories’ to the imported article. These accessories do not include a feature film, defined as a cinematograph film of more than 20 minutes length for exhibition to the public in cinemas or by television. The note to **new section 10AD** refers the reader to sections 44C and 112C. Under these sections copyright is not infringed by virtue of a work containing accessories.

According to the Explanatory Memorandum this provision is a response to the issue of convergence of technologies and will enable the parallel importation of computer software products such as interactive games and other multimedia.⁴⁹

Item 12 inserts **proposed sections 44E and 44F** into the Principal Act. It is one of the main changes proposed by the Bill. **New section 44E** provides that the copyright in a computer program that has been published in Australia or a qualifying country is not infringed by a person who imports into Australia an article that has embodied in it a non-infringing copy of the program. Such items may also be imported for commercial purposes without infringing copyright.

Effectively this will allow the parallel-importation of computer programs and software for commercial purposes. There is no change to the permissibility of importing a computer program for personal use.

Proposed section 44F provides identical arrangements for the parallel importation of electronic books, periodicals and sheet music.

Item 16 inserts **proposed section 112DA** that deals with published editions. In particular a person who imports published editions of electronic books, periodicals or sheet music that have been published in Australia or a qualifying country will not be infringing copyright. Similarly other published editions containing or embodying such electronic items may be imported without breach of copyright.

Proposed section 130B reverses the onus of proof in regard to proceedings concerning the unlicensed importation of pirated copies of computer programs. Once a person, claiming that their copyright has been infringed, has proved that a copy of a computer program has been imported and offered for sale or trade etc, then the onus falls on the defendant to prove that the imported item is a ‘non-infringing copy’ (**item 17**). This section is modelled on section 130A which reverses the onus of proof in relation to ‘non-infringing’ copies of sound recordings. The Government’s rationale is that this will give procedural assistance to copyright owners in civil actions involving the importation of pirated products.⁵⁰

Proposed section 130C provides an identical arrangement for electronic literary or music items.

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Item 19 inserts **new section 198A** that deals with the parallel importation of computer software and electronic literary and musical items containing trademarks. The section provides a number of conditions whereby a person can use a registered trademark.

Item 20 stipulates that the amendments described in the Schedule will only apply to computer programs and electronic books, periodicals and music imported into Australia after the commencement of the Schedule.

Schedule 2 – Printed books, periodicals and sheet music

Schedule 2 makes amendments to the Principal Act to allow the parallel importation of printed books, music and periodicals. Note that the Bill draws a distinction between electronic and printed books, periodicals and music and deals with them into two separate Schedules. Schedule 1, dealing with electronic material, commences on Royal Assent whereas Schedule 2, dealing with printed material, commences 12 months after Royal Assent. According to the Explanatory Memorandum this 12 month delay is to assist the publishing and printing industries and authors to make the necessary adjustments in their business practices and legal arrangements.⁵¹

Items 1-3 of Schedule 2 make amendments to the subsection 10(1) of the Principal Act.

As mentioned above, **item 3** of Schedule 2 adds to proposed new definition of non-infringing copy' the term 'non-infringing printed literary or music item' as defined in **proposed section 10ACA**.

Item 4 of Schedule 2 inserts **proposed section 10ACA** which defines 'non-infringing printed literary or music item'. These will be printed books, periodicals or sheet music which were made in a 'qualifying country' and do not breach copyright law in that country. A 'qualifying country' is a country that is either party to the Berne Convention⁵², or a member of the World Trade Organization with a copyright law consistent with the TRIPS Agreement (**item 7**).

Item 6 repeals and replaces section 44A of the Principal Act. It is one of the key changes proposed by the Bill.

Existing section 44A contains the current regime regulating the parallel importation of books. In short it contains the 30/90-day rule and stipulates that the right to control importation of books is lost if the book is not published in Australia within 30 days of publication overseas.⁵³

New section 44A provides that copyright in a work that has been published in Australia or a qualifying country is not infringed by a person who imports into Australia a 'non-infringing' printed book, periodical or piece of music. Such items may also be imported for commercial purposes without infringing copyright.

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Effectively this will allow the parallel-importation of books, periodicals and printed music for commercial purposes.

Item 9 repeals and replaces section 112A. Existing section 112A deals with the current arrangements for the parallel importation of published editions of books. In short these arrangements consist of the '30/90 day rule' discussed above at page 3.

Proposed section 112A contains the new arrangements for the parallel importation of published editions of printed books, periodicals and music. A person who imports editions of printed books, periodicals or sheet music that have been published in Australia or a qualifying country will not be infringing copyright. Such items may also be imported for commercial purposes without infringing copyright.

Proposed section 130D reverses the onus of proof in regard to proceedings concerning the unlicensed importation of pirated copies of printed books, periodicals and music. Once a person, claiming that their copyright has been infringed, has proved that the particular copy has been imported and offered for sale or trade etc, then the onus falls on the defendant to prove that the imported item is a 'non-infringing copy' (**item 10**). This section is modelled on section 130A which reverses the onus of proof in relation to 'non-infringing' copies of sound recordings. The Government's rationale is that this will give procedural assistance to copyright owners in civil actions involving the importation of pirated products.⁵⁴

Item 13 stipulates that the amendments described in the Schedule will only apply to printed books, periodicals or sheet music imported into Australia after the commencement of the Schedule.

Schedule 3 – Other amendments

Schedule 3 contains consequential amendments to the proposed parallel importation amendments plus technical amendments to correct and clarify changes in the *Copyright Amendment (Digital Agenda) Act 2000*.

Concluding Comments

The differing views regarding the lifting of parallel importation restrictions reflect the basic tension between intellectual property rights and competition policy. The closed market provisions of copyright law sit uneasily with the trend to liberalise trade and investment in a global economy.

However, despite this basic tension between intellectual property and competition policy it would appear that this Bill has not attracted the same amount of controversy that surrounded the lifting of restrictions on the import of sound recordings. There could be

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many reasons for this but it may be that the amendments in the Bill are seen as having been overtaken by the increasing effects of the Internet.⁵⁵ It has been argued that the Internet is the greatest single threat to copyright protected material today and as a consequence of its accessibility more consumers are purchasing both software, music and books direct from overseas suppliers.⁵⁶

Finally, it is observed that the Copyright Act as amended will contain frameworks for the parallel importation of both print and electronic books, recorded music, computer software and computer games but not 'cinematographic films' (for instance, in the form of DVDs).

The Attorney-General has said that the Government has not fully assessed the impact of allowing the full parallel importation of 'cinematograph film' on the Australian film and television industry and therefore considers it would not be appropriate to alter the arrangements for imported film products without a cost benefit analysis specific to the industry, together with careful analysis of the likely effects on consumers.⁵⁷

The IPCR Committee report, on the other hand, suggested that the film industry had not provided the Committee with convincing evidence that parallel importing would have a detrimental impact on the Australian community.⁵⁸

As the author of a recent research study states:

The piecemeal approach adopted in the past to reform parallel importing item-by-item (books, sound-recordings and packages) cannot be justified on economic grounds. It might be preferable to reform in one step the entire copyright law.⁵⁹

It could be said that to exclude films and DVDs from the impact of parallel importation is less than a full commitment to the economic principles underlying the Bill.

Endnotes

- 1 A discussion of the Senate Committee Report is found at pp. 10–11.
- 2 J. McKeough and A. Stewart, *Intellectual Property in Australia*, 1991, p. 140.
- 3 M. J. Davison, 'Parallel Importing of Copyright Material in a Digital Age: Why it Should be Lawful and Why it May Never Be', *Federal Law Review*, v. 25, 1997, p. 264.
- 4 Sections 37 and 102.
- 5 Intellectual Property and Competition Review Committee, 'Review of Intellectual Property Legislation under the Competition Principles Agreement', *Final Report*, September 2000, p. 46.
- 6 *ibid.*, pp. 46–47.
- 7 Sections 44D and 112D.

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- 8 Agreement on Trade-Related Aspects of Intellectual Property Rights set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, done at Marrakesh on 15 April 1994.
- 9 These amendments were in Schedule 2 of the *Copyright Amendment Act (No 1) 1998*.
- 10 Intellectual Property and Competition Review Committee, *Final Report*, p. 47.
- 11 Attorney-General, Minister for Communications, Information Technology and the Arts, and Acting Treasurer, 'Consumers the Winners from Reforms to Import Laws', *Joint News Release*, 27 June 2000.
- 12 The Explanatory Memorandum gives an overview of these reports on pages 4–5.
- 13 Intellectual Property and Competition Review Committee, 'Review of Intellectual Property Legislation under the Competition Principles Agreement: Final Report', September 2000. Note that the Committee prepared an Interim Report in April 2000.
- 14 One Committee member presented a dissenting opinion.
- 15 IPCR Committee, *Interim Report*, April 2000, p. 23.
- 16 *ibid.*, p. 14.
- 17 *ibid.*
- 18 Intellectual Property and Competition Review Committee, *Final Report*, p. 54.
- 19 Intellectual Property and Competition Review Committee, *Interim Report*, p. 15.
- 20 Intellectual Property and Competition Review Committee, *Final Report* pp. 49–50.
- 21 *ibid.*, p. 50.
- 22 Subclause 5(1) of the Competition Principles Agreement.
- 23 *Explanatory Memorandum*, p. 1.
- 24 Intellectual Property and Competition Review Committee, *Interim Report*, p. 20.
- 25 Intellectual Property and Competition Review Committee, *Final Report*, p. 75.
- 26 Hon D. Williams, MP, Copyright Amendment (Parallel Importation) Bill 2001, Second Reading, *Parliamentary Debates (Hansard)*, House of Representatives, 28 February 2001, p. 24578.
- 27 *ibid.*
- 28 *ibid.*
- 29 Intellectual Property and Competition Review Committee, *Final Report*, p. 52.
- 30 Australian Visual Software Distributors Association Ltd (AVSDA) in evidence to the IPCR Committee, p. 52.
- 31 Intellectual Property and Competition Review Committee, *Final Report*, p. 52.
- 32 IPCR Committee, *Interim Report*, p. 16.

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- 33 Intellectual Property and Competition Review Committee, *Final Report*, p. 53.
- 34 A pirate copy is a reproduction of a copyrighted work manufactured without the permission of the copyright owner.
- 35 House of Representatives Standing Committee on Legal and Constitutional Affairs, *'Cracking down on copycats: enforcement of copyright in Australia'*, 2000.
- 36 *ibid*, para 2.51.
- 37 *ibid*, para 2.52.
- 38 G. Urbas, 'Parallel Importing and CD Piracy, Australian Institute of Criminology, Report Prepared for the Intellectual Property and Competition Review Committee', 26 January 2000.
- 39 Intellectual Property and Competition Review Committee, *Final Report*, p. 59.
- 40 *ibid*.
- 41 Hon D. Kerr, 'Copyright, Culture, Cops and Cybercrime; Address to the Australian Publishers Association Annual General Meeting', *Press Release*, 15 March 2001.
- 42 *ibid*.
- 43 Examples of these provided at para 5.2 of the Committee Report are:
- (a) Increased competition between wholesale suppliers **would ensure** that Australian business, household and government consumers of software have **improved access** to computer programs at prices comparable to the lowest prices available in the world.
 - (b) Amendments to the Copyright Act...have been effective in lowering the price of popular compact discs for Australian consumers.
 - (c) Amending the Copyright Act would enable consumers to realise these benefits identified by the ACCC of an open market.

Note that the Explanatory Memorandum to the 2002 Bill is written in exactly the same terms as the 2001 Explanatory Memorandum.

- 44 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Provisions of the Copyright Amendment (Parallel Importation) Bill 2001* Para 5.14
- 45 These are affected by Schedule 2 of the Bill.
- 46 Section 10(1) already defines a 'computer program' to mean a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.
- 47 International Convention for the Protection of Literary and Artistic Works concluded at Berne on 9 September 1886.
- 48 According to the Explanatory Memorandum (p. 47) this will ensure copyright owners are able to rely on a minimum level of copyright protection in regard to parallel imported material.

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This requirement of qualifying country is modelled on the provision from the Principal Act regarding parallel importation of packaging and labelling. It is of interest that TRIPS does not determine the issue of parallel imports. Rather it allows each WTO member to regulate parallel imports in the manner it feels appropriate. (Article 6, TRIPS Agreement).

- 49 p. 49.
- 50 Hon D. Williams, MP, Copyright Amendment (Parallel Importation) Bill 2001, Second Reading, *Parliamentary Debates (Hansard)*, House of Representatives, 13 March 2002, p. 1115.
- 51 *ibid*, p. 2.
- 52 International Convention for the Protection of Literary and Artistic Works concluded at Berne on 9 September 1886.
- 53 This provision is described in more detail at page 3.
- 54 Hon D. Williams, MP, Copyright Amendment (Parallel Importation) Bill 2001, Second Reading, *Parliamentary Debates (Hansard)*, House of Representatives, 13 March 2002, p. 1115.
- 55 Suggested in evidence to the IPCRA Committee, *Final Report*, p. 56
- 56 Peter Knight, 'Australia to scrap parallel import restrictions' *Australian Intellectual Property Law Bulletin*, v. 13, no. 3, September 2000, p. 32.
- 57 Hon D. Williams, MP, Copyright Amendment (Parallel Importation) Bill 2001, Second Reading, *Parliamentary Debates (Hansard)*, House of Representatives, 28 February 2001, p. 24578.
- 58 Intellectual Property and Competition Review Committee, *Final Report*, p. 68.
- 59 J. Revesz, *Trade-Related Aspects of Intellectual Property Rights*, Staff Research Paper, Productivity Commission, May 1999, p. 51.

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