

CONCLUSIONS

190. As noted at the outset of this Report, the critical question which the Committee has had to consider is whether the importation provisions of the Copyright Act should be modified" 'so as to make it lawful to import articles which are parallel imports as distinct from articles which are pirate copies. The Committee has found the question to be a most difficult one. Considerations which support the repeal of the provisions in their application to parallel imports stem substantially from the current trend towards deregulation in most areas of commercial activity. In essence those seeking deregulation in this area rely principally on the following matters:-

- (a) The perception that in a great many cases it is the producer and distributor of the article (eg. publisher, record maker or film maker) who stands to gain by the present operation of the sections; not the author, composer or artist whose original work is managed and controlled, if not owned, by the producer and distributor.
- (b) The fact that the author, composer or artist will have received a royalty payment in respect of legitimate articles which nevertheless it is illegal to import. Thus , so it is said, he is not being deprived of payment.

- (c) Because of the matters stated in paras. (a) and (b), it is said that there is no reason to confer on those dealing in copyright articles any greater degree of protection than is provided to those dealing in other commodities (eg. motor cars, refrigerators or clothing). Such protection as there is in relation to articles which are not copyright articles stems from the operation of customs legislation. Exclusive licences to deal in and distribute goods ought not to be permitted unless they are permitted under restrictive trade practices legislation. So long as copyright articles are not pirated copies, they should be dealt with in precisely the same way.
- (d) Deregulation is likely to benefit the Australian consumer because of decreased prices and increased availability of, or access to, overseas publications, sound recordings and computer software. This will occur partly because importers will be able to deal with a variety of overseas suppliers and partly because the fact that they are able to do so will provide a spur to local companies to keep their own prices down, increase the variety of their stock-holdings, improve importing and indenting services, improve their local manufacturing techniques and make their deliveries and consumer services more efficient.

- (e) Australia is a net importer of copyright articles. Thus the sections operate, in large measure, to confer benefits upon the international publishers, record makers, film makers and computer software manufacturers rather than on Australian companies.

191. Those seeking retention of the sections in their present form rely on the following matters:-

- (a) No change to the law should be made which has the effect of prejudicing the protection which copyright owners (i.e. authors, composers and artists) presently have. The argument that authors will be as well off whether or not the sections are modified is wrong because:-

- (i) Assuming royalties to have been paid on the articles, i.e. the parallel imports, in their country of manufacture, the authors will nevertheless be worse off by the importation of those articles because they will lose what they would otherwise have received, namely, additional royalties on copies of their works legitimately imported into Australia by the owner (exclusive licensee) of the copyright in Australia.

- (ii) In many cases royalties will not have been paid on the parallel imports. This is

because they are likely to come, particularly in the case of books, from remaindered or other stock on which royalties are either not paid at all or are paid at very much reduced rates.

The sections, therefore, provide a very real protection for authors without which their own returns would be likely to be substantially less.

- (b) Australian manufacturers, publishers or record makers, are usually offshoots of international companies. Often their Australian operations are not particularly profitable. If they are exposed to the unlimited competition which repeal of the sections in their application to parallel imports will bring, it is likely that many will close their Australian operations altogether or substantially reduce them. This has been the experience of numerous other industries (not producing copyright articles) in the last 10 or 20 years. This will have serious effects on employment, developments in technology and technical skill and knowledge in this country. Furthermore, the availability in Australia of adequate stocks of books and records will be reduced and certain back-up customer services are likely to disappear. Publishers and record companies will also cease providing support and,

in *some* cases, subsidies to lesser known authors, composers and musicians.

- (c) Australian authors and composers will be disadvantaged in cases where their work is included in books or records exported to overseas countries and imported back into Australia from remaindered stock at cut-rate prices.
 - (d) Although this area of copyright law is not the subject of any treaty, Australia's present law is in conformity with the laws of a large number of countries with which it has an ongoing trade in copyright articles. Copyright law today is an international affair. It is undesirable that Australians copyright law should be out of step with the copyright laws of other countries in any substantial respect. Most of the countries with which Australia deals are also committed to deregulation, yet their copyright laws continue to be protectionist in relation to parallel imports. This is not so amongst members of the European Economic Community but the deregulation which exists applies only as between members of the community. As between a member and a non-member, the position is substantially the same as it is, say, between the United States and Australia.
 - (e) In many cases there is a substantial difficulty in
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distinguishing between parallel imports and pirated articles. This is particularly so in the case of sound recordings, films and computer software. The repeal of the sections in their application to parallel imports would be likely to have the effect in practice of allowing large numbers of pirated articles to enter Australia.

192. The Committee has not found any of the considerations raised in paras. 190 and 191 without force or merit. Each, so it seems to the Committee, is an appropriate matter to be weighed in the balance. That is why the choice of the two alternatives is so difficult. The Committee recognizes that ultimately the problem must be solved at the political level. If, contrary to the position which presently prevails, the trend were towards protection rather than deregulation of industry, the choice would pose less difficulty. What makes the choice so difficult is that the question has arisen in the context of a substantial move away from protectionism.

193. Other factors which make the choice difficult are the speculative nature of the propositions advanced on each side of the argument and the limited nature of the inquiry which the Committee has been able to conduct. On the one side of the argument it is asserted that repeal of the sections in their application to parallel imports will lead to cheaper prices and increased

availability of copyright material in Australia. That point of view is vigorously contested by the opponents of change. There is no way, even if a much more elaborate inquiry were held, in which the correctness or otherwise of each of these propositions could be determined. As was said by Fritz Machlup, "NO economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or net loss upon society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to those assumptions"; Machlup, An Economic Review of the Patent System, (1958 Sub Committee on Patents of the Senate Committee on the Judiciary, 85th Congress, Second Session (Study No. 15) at pp. 79-80. See also R.R. Officer, Parallel Imports: An Economic Perspective, Paper presented to The First National Conference of The Intellectual and Industrial Property Society, Canberra, 22-24 May 1987. Machlup was speaking of the patent system generally, but what he has said is as apt for the more particular problem of whether the importation provisions of the Copyright Act confer a public benefit or not.

194. Subject to the matters referred to in the preceding paragraph, the Committee's approach to the resolution of the problems which the Reference has raised has been to consider the evidence and make a value judgment on the likely effects of repeal, on the one hand, or retention

on the other. The Committee has earlier referred to the fact that it has had very little input from consumer protection organizations. On the other hand, it has had very substantial input from copyright interests. Thus the material before the Committee lacks the degree of balance which the Committee would have preferred it to have. Nevertheless, as the Committee has indicated in earlier paragraphs of the Report, the Committee prefers the propositions put forward by the publishing houses, record manufacturing companies, film and video companies and distributors and computer software interests that repeal of the sections would have a detrimental effect on a number of matters including:-

- (a) Australian manufacture, technology and technical know-how.
- (b) Support and subsidization of local authors, composers and performers.
- (c) The ready availability of a wide variety of books and, to a 'somewhat lesser extent, of sound recordings, films and videos and computer software.
- (d) Consumer back-up services.

The Committee has also reached the conclusion that the sections do provide very real protection and benefit to

authors, composers and artists whose work is internationally distributed. It is no doubt true to say that the principal beneficiaries of the sections in the way that they presently operate are the large multi-national organizations. But without their operations it would be difficult for any copyright owner to exploit his or her work to the extent necessary for the receipt of a proper return. As it is, there is concern that returns to authors and composers are insufficient. Without the wide-ranging marketing activities which the larger organizations are able to undertake, the authors and composers would be worse off than they are now.

195. A matter which has weighed heavily with the Committee is the desirability of preserving Australia's uniform position in relation to other nations who have similar copyright laws, although there is no treaty requirement to do so. It seems to the Committee that there are substantial dangers in Australia "going it alone". Not the least of these is the perceived threat to local authors and composers arising from the importation into Australia of copies of their works remaindered overseas at substantially reduced prices. The Committee refers to the examples given in para. 67 hereof, particularly the second example.

196. For these reasons the Committee, on balance, has reached the conclusion that it should not recommend the repeal

of the importation provisions of the Copyright Act so as to enable parallel imports, as distinct from pirated articles, to be imported here. The Committee, however, has been disturbed by some of the material which has been placed before it concerning absence of competition, inefficient practices and possible over-pricing of copyright material. The evidence of over-pricing has been overtaken, to a degree, by the fall in the value of the Australian dollar which occurred after the Committee embarked on the Reference. The fall in the value of the dollar has probably led to licensed importers of copyright material and local manufacturers needing to ensure that prices charged for articles are as low as possible. There was some evidence that, if this were not done, there would be a danger that the Australian market would take the view that many of the articles were too expensive so that buyer resistance would discourage sales. One of the matters which concerns the Committee, notwithstanding its agreement that the Australian market is, generally speaking, well supplied with a substantial variety of literature and music, is that there are revealed in the material before it a number of inefficiencies which probably exist because of the protected position of the exclusive licensees. This is particularly so in the area of what may be described as specialist books and specialist records. These matters were dealt with extensively when the publishing and sound recording industries were being considered. The evidence about this matter which there is has

persuaded the Committee that there ought to be some relaxation of the sections to enable importations for the purposes of trade to take place if articles are not available in Australia or if the importer holds a written order for the article or articles from the person or persons proposing to use them, that is the consumer. The Committee believes that the proposals are practical and provide a satisfactory compromise of the difficult problem which the Reference has posed.

197. The Committee has had a particular problem in relation to computer "programs and semi-conductor chips. Some members of the Committee consider that there may be a case for removing computer products from the operation of the sections provided they are parallel imports and not pirated articles. Other members of the Committee do not perceive the need for this and regard the proposal as undesirable because it would lead to inconsistent treatment of different copyright articles. These members of the Committee consider that the problem will be overcome if Parliament accepts the Committee's proposal that articles which are unavailable here may be imported notwithstanding that the importer has not the licence of the Australian copyright owner. In the section of the Report dealing with computers there is reference to a case involving a company, D-Tech. If proposals such as are suggested by the whole Committee for all other copyright articles were implemented, the problems raised by D-Tech in its submissions, which

appear to the Committee to be quite serious, would not have arisen.

198. In the circumstances the Committee's primary recommendation is that the provisions of the importation sections remain as they are but be modified in accordance with the proposal set out in paras. 2 and 3 and Appendix A. If the modifications are not thought to be suitable, the Committee would simply recommend that the sections remain as they are subject to the knowledge provisions of them being brought into line with the current provisions of s. 132.

199. In relation to s. 135, the Committee is unable to recommend any streamlining alteration to the section. It is plain to it from its consideration of the matter aided by submissions it has had from a variety of copyright interests and from the Comptroller-General of Customs that the section does not work as it was intended. But no suggestion has been made which would result in its improvement. The practical difficulties are too great, particularly bearing in mind the fact that most imports of copyright articles are now in containers, many of which contain a number of products, some protected by copyright and some not. The Committee considered whether it should recommend the repeal of the section, but considers that it may have some deterrent effect a-rid that there may occasionally be a case where its provisions can usefully be invoked. It is for those

reasons that it would leave it as part of the Act, but recommend its amendment so as to include all works and subject matter and all manner of copies, whether printed or not. The section should also be able to be invoked by an exclusive licensee of copyright as well as by the owner of it.

200. It remains to make further mention of s. 132. The Committee was not asked to make any recommendations relating to this section. But the Committee is of opinion that the section should be amended so that it will apply only to pirate articles and not to parallel imports. The Committee considers that a person dealing in parallel imports is not guilty of misconduct of sufficient heinousness to warrant his or her being guilty of a crime. It is enough to confer on persons affected by such importation rights which they may enforce civilly. However, it should be clear that the Committee would not be in favour of decriminalizing parallel importation unless the onus were placed on the importer to show that the imported articles were not pirate copies. To compel the prosecution to prove that they were would, in many cases, place upon it an onus which would be impossible to discharge. This is because of the substantial difficulty of distinguishing many pirated articles from legitimate products.

201. For the reasons given in these concluding paragraphs and the more detailed reasons given in relation to each of

the major areas of copyright protection, the Committee makes the recommendations summarised in para. 3 of the Report.

SEPTEMBER 1988

I.F. SHEPPARD,
CHAIRMAN.