

COPYRIGHT LAW REVIEW COMMITTEE

THE IMPORTATION PROVISIONS OF THE COPYRIGHT ACT 1968

THE REFERENCE

1. In August 1983 the then Attorney-General, Senator Gareth Evans. Q.C., referred the following questions to the Committee:

"(a) whether any changes should be made to the provisions in the Copyright Act which make it an infringement of copyright for a person knowingly, without the permission of the copyright owner, to import and distribute for various commercial purposes:

- (i) works (ss. 37 and 38), and
- (ii) subject matter other than works (i.e. records, films, broadcasts, published editions) (ss. 102 and 103);

(b) what streamlining amendments should be made to s. 135 which provides for customs seizure of printed works, the importation of which is objected to by the copyright owners;

2.

(c) whether s. 135 should be extended to cover subject matter other than works."

THE COMMITTEE'S RECOMMENDATIONS

2. The principal question which has concerned the Committee in this Reference is whether it should recommend the repeal of the importation provisions of the Copyright Act 1968 in their application to non-pirated articles, i.e. parallel imports. The Reference has involved the Committee in a lengthy consideration of submissions from a great many interests. The Committee's inquiries have covered a number of copyright areas, the principal being those of books, sound recordings, films and computer software. Additionally, it has considered the question of copyright in labels attached to articles which are not themselves the subject of copyright protection. The Committee has unanimously reached the conclusion that the sections should continue to apply to parallel imports, but that their application to" such imports should be relaxed in a number of respects.

3. The Committee's recommendations are:-

(1) The Copyright Act be amended so as to modify the provisions of ss. 37 and 102 (infringement by importation for the purposes of trade, for example, sale or hire) in the following respects:-

(a) The importation of a non-pirated copyright article by a person engaged in trade or commerce be permitted without the licence or other permission of the owner of the copyright if:-

4.

(i) The article is not available in Australia, and will not, within a reasonable time, be available in Australia, from the copyright owner or his or her licensee or agent; OR

(ii) Although the article is available in 'Australia, the importer has received a specific order in writing for the article signed by the person requiring it in which that person states that the article is not required for the purposes of trade or commerce.

[b) The onus of establishing the matters specified in paras. (i) and (ii) be upon the importer.

(c) For the purposes of para. (a)(i), an article shall be taken to be unavailable in Australia if the importer, after reasonable investigation, is satisfied that the article cannot be obtained in Australia from the copyright owner or his or her licensee or agent within a reasonable time. The reference to a reasonable time is included so as to take into account the time which is reasonably required in the industry in question for an Australian copyright owner to import or manufacture and market copies of the article. The Committee's objective is not to deprive the Australian copyright

5.

owner of the right to supply articles to the Australian market but to ensure that the Australian community is able to obtain access to copyright articles within a reasonable time of their becoming available overseas.

- (d There be included a provision along the lines of sub-sees. 109(3) and (4) of the Act empowering the making of regulations prescribing, in relation to all articles or to particular articles, the period or periods which is or are to be a reasonable time or reasonable times for the purposes of sub-para. (c).
- (e) An article shall be taken to be available in Australia if there is lawfully available here an article which is substantially similar to that which the importer proposes to import. The Committee is not able to suggest a more precise expression than 'substantially similar to". It will be for the courts to apply these words to the infinite variety of circumstances that may arise. The Committee recognizes that this may lead to some uncertainty, but the use of more precise language would be likely to create a different problem, namely, that the legislation would be too inflexible. Rather than attempt a more precise definition, the
-

6.

Committee has given some guidance as to the way in which its proposal is to be understood by reference to some concrete examples (see paras. 91 and 137).

- (2) The Copyright Act be amended so as to modify the provisions of ss. 38 and 103 (infringement by sale, letting for hire or otherwise by way of trade, offering or exposing for sale or hire articles known to have been imported into Australia in contravention of s. 37 or s. 102) so as to bring them into line with the provisions of ss. 37 and 102 as modified in accordance with para. (1) above.
- (3) There will be no infringement of the sections if an article is imported and copyright subsists only in a work comprised in a label or mark affixed or attached to the article or to its packaging provided that the owner of the copyright has consented to the use of his or her work on the label or mark.
- (4) Although the preponderance of submissions from those seeking the retention of the sections did not favour an amendment to the provisions concerning knowledge, the Committee is of opinion, because of the amendments which have been made to s. 132 by the Copyright Amendment Act 1986, that the knowledge provisions should be brought into line with the provisions of s. 132.

7.

- (5) The Committee considers that a person importing a non-pirated article ought not to be subject to criminal proceedings and sanctions. Civil proceedings only should lie against him ^{or her}.
- (6) Section 135 of the Copyright Act 1968 be amended to cover all works and subject matter other than works. In consequence subsets. (4) and (9) will need to be amended to remove the reference to printed copies so that the section will apply to reproductions of all kinds. The section should be amended to apply to exclusive licensees of copyright material as well as to owners thereof.

A suggested form of amendment of the relevant sections, other than s. 135, is attached as Appendix A. The amendment is not intended as a final legislative draft, but rather to indicate more precisely the ambit of the Committee's recommendations and that their implementation would be practical. No draft of an amendment to s. 135 is included because the alterations to it will be of a mechanical kind only.

THE LEGISLATION

4. Sections 37, 38, 102, 103, 132 and 135 of the copyright Act 1968 ("the Act") are set out in full in Appendix B. Although s. 132 is not one of the sections referred to in the Reference, it has been included because it makes some importations of copyright articles criminal offences. Sections 37 and 38 apply to "works", that is, to literary, dramatic, musical and artistic works. Sections 102 and 103 apply in relation to "subject-matter other than works", that is, to sound recordings, cinematography films, television and sound broadcasts and published editions of works. The owner of the copyright in a work, subject to certain exceptions, is the author; s. 35. The owner of the copyright in a sound recording, broadcast or film is the maker thereof; ss. 97, 98 and 99. The owner of the copyright in a published edition of a work is the publisher of the edition; s. 100. The Committee has taken the view that television and sound broadcasts need not be considered by it. This is because s. 91 of the Act specifies that copyright exists only in those broadcasts, which are made from a place in Australia by one of the organizations or persons stated. Paragraph 184(1)(f) provides for regulations to be made applying the provisions of the Act to broadcasts made from other countries. No such regulations have been made. Further, sub-sec. 22(6) of the Act, which was inserted by 6. 5 of the Copyright Amendment Act 1986, provides that where a broadcast is made from a satellite, that broadcast shall

be deemed to have been made from the place from which the material was transmitted from the earth and sub-see. 10(1), which was amended by the Statute Law (Miscellaneous Provisions) (No. 2) Act 1986, now provides that "broadcast" means "transmit by wireless telegraphy to the public". The result of these amendments is that the only broadcasts which are protected in Australia are those which are made by the organizations specified in s. 91 from a place in Australia and transmitted to the public. Any broadcast entering Australia via satellite and first transmitted from some other country is not protected until such time as one of the organizations specified in s. 91 may receive it and transmit it to the public.

5. Another matter referred to the Committee in October 1983 by the then Attorney-General was whether any changes should be made to the meaning of the word , "published", in s. 29 of the Act; see also s. 31. On 2 July 1984 the Committee, by majority, reported that it made no recommendation that the legislation be changed. Its view was that the rights conferred on a copyright owner by s. 31 were rights to publish the work for the first time. No further right to control publication was conferred. The Committee also considered that the provisions, construed in this way, were desirably what the law should be. The Committee's report was accepted by the then Attorney-General. The Committee did say (para. 6) that, to put the matter beyond any doubt, s. 31 could be amended by the addition of the words "for the first time" after

the word "work" in sub-paras. 31(a) (ii) and (b) (ii). The Committee went on to say that, given the relationship between ss. 31 and 38 of the Act, final consideration of any amendment of s. 31 should be reserved until work had been completed by the Committee on its reference on the importation provisions in ss. 37 and 38 of the Act. The Committee has now given the matter final consideration and adheres to its previous opinion that no amendment of the provision is necessary or desirable. For completeness a copy of the Committee's report of 2 July 1984 is attached (Appendix C).

6. It should be understood that, with the exception of s. 135, the importation provisions of the Act were not inserted therein pursuant to any treaty obligation. In the discussion paper there is reference to a suggestion that ss. 37, 38, 102 and 103 were enacted because of Australia's obligations under Article 5 of the Berne Convention and Article II of the Universal Copyright Convention. There is, however, no basis upon which this view could be supported. Section 135 relates to Australia's obligation under Article 16 of the Berne Convention which provides that infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection. The provisions of the Article apply to reproductions coming from a country where the work is not protected, or has ceased to be protected. The seizure is to take place in accordance with the legislation of each country. Australia's treaty
-

obligations under the two Conventions earlier mentioned in respect of recognition within Australia of copyright in works and in subject matter other than works originating in other countries are given effect to by s. 184 of the Act and the regulations made thereunder; see the Copyright (International Protection) Regulations. The importation provisions of the Act are taken from the United Kingdom Act, although the provisions are not identical with the United Kingdom sections. The United Kingdom provisions have a long history. Attached as Appendix D is an analysis which includes an account of the origin and history of those provisions.

7. In summary, ss. 37 and 102:-

W. . . . make it an infringement of copyright in any work or other subject-matter in which, "copyright subsists under the 1968 Act to import an article" into Australia without the licence of the copyright owner, for certain specified commercial purposes, where the importer knew that if the article had been made by him in Australia the making would have infringed that copyright. The purposes for which the article must be imported are, (1) the sale of the article, the hiring of the article, or the offering or exposing of the article for sale or hire by way of trade; (2) the distribution of the article for the of trade; (3) the distribution of the article for any other purpose to an extent that would affect prejudicially the copyright owner; or (4) the exhibition of the article in public by way of trade" (Intellectual Property "Australia: Copyright by Professor James Lahore (1977 Butterworths) para. 1169).

So far as relevant, 66. 38 and 103 make it an infringement

of copyright to deal commercially with an imported article where it is shown that, to the dealer's knowledge, the article would, if it had been made in Australia by the importer, have constituted an infringement of copyright. The sections also operate in relation to locally produced articles; that is not a matter relevant to this Reference.

8. It is to be observed that the sections, in prescribing when the importation of a work will constitute an infringement, select as the test for determining infringement the fulfillment of the three conditions set out, namely, (a) the absence of a licence from the owner of the copyright in respect of Australia, (b) the importation of the article for one of the prohibited purposes, and, (c) the knowledge that the making of the article, if it had been made in Australia by the importer, would have constituted an infringement. Thus, for there to be an infringement the importer must be shown to have had no licence from the owner of the copyright in respect of Australia and also to have known that the making of the article in Australia by the importer would have infringed that copyright. It may be possible to have an implied licence but it is clear that such an implication would not be lightly drawn by the courts; cf. Interstate Parcel Express CO. Pty Limited v. Time-Life International (Nederlands) B.V. (1977) 138 C.L.R. 534. Thus the fact that non-pirated goods, e.g. books or records, are for sale by wholesale in an overseas country will not assist an importer for sale unless he or she is licensed to sell

or deal in the goods in Australia. If the importer is not licensed, there will, subject to proof of knowledge, be an infringement, no matter that the owner of the copyright may not have determined one way or the other whether to market the goods in Australia.

9.' The sections outlaw both pirated copies and what are usually referred to as "parallel imports". Parallel imports consist of copies of works and subject matter which have been made with the authority of the owner of the copyright in the place of manufacture. Pirated copies of works and subject matter, on the other hand, are those that have been made without the authority of any copyright owner, and thus, in a country in which the work is protected, unlawfully. In some countries a work, although regarded as pirated in countries which protect copyright internationally, may be lawfully made because the country of manufacture does not have copyright legislation at all or, although it has such legislation, does not recognize copyright internationally. The sections treat both pirated copies and parallel imports alike. The philosophy underlying the sections is that it is just as illegal to import legitimately made copies for which there is no licence, as it is to import copies which have been made entirely without the copyright owner's authority. This is because the key to whether there has or has not been an infringement is the existence or non-existence of a licence from the Australian copyright owner authorizing the importation and subsequent commercial dealing with the

14.

copies in Australia. The importance to the Australian copyright owner of being able to prevent parallel imports, as well as unauthorized copies, arises from the fact that copyright ownership may be divided on a territorial basis. The remuneration the copyright owner receives from locally made copies may be diminished by the importation of both unauthorized copies and legitimate copies made in a place where he is not the copyright owner.

10. It should be observed that the Act confers on copyright owners a number of exclusive rights, e.g. rights to reproduce a work, to publish the work and to broadcast it; see s. 31 and compare ss. 85 - 88 in relation to subject matter other than works. Section 196 empowers a copyright owner either to assign his copyright or to grant licences in respect of it. Assignments may be in respect of the entirety of the exclusive rights conferred on a copyright owner or in respect of only some or part of them; sub-sec. 196(2). Section 196 should be read in conjunction with s. 30:-

'30. In the case of a copyright of which (whether as a result of a partial assignment or otherwise) different persons are the owners in respect of its application to-

- (a) the doing of different acts or classes of acts; or
 - (b) the doing of one or more acts or **classes** of acts in different countries or at different times,
- the owner of the copyright, for **any** purpose of this Act, shall be deemed to be the person who is the owner of the copyright in respect of its application to the doing of the particular act or class

of acts, or to the doing of the particular act or class of acts in the particular country or at the particular time, as the case may be, that is relevant to that purpose, and a reference in this Act to the prospective owner of a future copyright of which different persons are the prospective owners has a corresponding meaning."

The assignments and licences may thus be limited in any way and may be made or granted in respect of some only of the exclusive rights which the copyright owner has. In some cases the copyright owner's ability to do this will give rise to a complex enough situation within Australia itself. Once the copyright owner embarks on dealing with his exclusive rights internationally, the position will become more complex still. In the fields, for instance, of literature and music, there will often be a mass of assignments and licences designed to provide for the optimum exploitation of the work throughout the world. The position was put this way by Quilliam J. in J. Albert & Sons Pty Limited v. Fletcher Construction Co. Limited [1976] R.P.C. 615, a New Zealand case, where his Honour said (p. 620):-

"The result is that an author of a work may assign virtually all his rights in all countries or he may assign some only of his rights or he may assign rights of certain kind in one country to a particular person and rights of the same kind in another country to another person, and so on. The combination of ways in which he may assign his rights is almost endless. Similarly, a person holding a right from an author may himself make further assignments. In these ways there may be a multiplicity of rights all stemming from the original

work but all different and all capable of separate assignment.

.....
It thus becomes a matter of some precision to determine which person is for the moment the owner in which country of which particular aspect of the copyright in a certain work. It seems clear, however, that the legislation is designed to set up means by which such a question may be answered and, moreover, to protect the right of the owner of that aspect of the copyright. It is also apparent that each of the rights conferred and protected by the Act is a matter of economic value to its owner."

Sections 37, 38, 102 and 103 proceed upon the basis. that an importation will be unlawful, subject to the proof of requisite knowledge, unless the importer is the owner of the copyright in the place of importation, i.e. Australia, or is a licensee of such owner. What has been said is an over-simplification because questions will frequently arise as to the "law which governs particular assignments and licences. That law will not always be the law of Australia.

11. Section 135 of the Act is the last of the sections referred to in the Reference. Essentially it provides that the owner of the copyright in a published literary, dramatic or musical work may give notice in writing to the Comptroller-General of Customs stating that he or she is the owner of the copyright in the work and that he or she objects to the importation into Australia, during a period specified in the notice, of printed copies of the work. Where a notice has been given under the section in respect

of a work, the importation of printed copies of the work for the commercial purposes specified in the section is prohibited and any such copies, if imported into Australia, for any such purpose, may be seized as forfeited to the Commonwealth. More will be said of this section in due course, but at this stage it may be noted that the section has been invoked on only a very few occasions. It is to be observed that s. 135 does not apply either to artistic works or to subject matter other than works. Nor would it appear to cover works which are not in printed form, for example, computer programs contained in magnetic discs.

12. It remains to mention s. 132 of the Act which, although not mentioned in the Reference, is relevant to the Committee's consideration of the matter because it makes certain importations of copyright articles into Australia criminal offences. In short the section, so far as relevant, provides that a person shall not, at a time when copyright subsists in a work, import an article into Australia for the purpose of trade if he knows, or ought reasonably to know, that the article is an infringing copy of the work. This section was amended by the Copyright Amendment Act 1986 which substituted for the words, "if he knows the article to be an infringing copy of the work", the words, 'if the person knows, or ought reasonably to know, the article to be an infringing copy of the work". The section applies both to copyright in works and copyright in subject matter other than works. The
-

copyright Amendment Act 1986 also effected substantial increases in the penalties for breach of s. 132 which are provided for in s. 133. Section 132 has been mentioned for two reasons. Firstly, the question arises whether the knowledge provisions in ss. 37, 38, 102 and 103, should not be brought into line with those of s. 132 as amended by the 1986 Act. Secondly, there is a question whether s. 132, which, because of the definition of "infringing copy" in s. 10 of the Act, presently applies both to parallel imports and pirated articles, should be amended to exclude parallel imports from its operation.

13. In order to put these various provisions of the Copyright Act in context in relation to other areas of the law relating to intellectual and industrial property, the Committee mentions the comparable provisions of the Patents Act 1952, the Designs Act 1906 and the Trade Marks Act 1955. There are no express provisions relating to importation in the Patents Act but it provides for the possibility of compulsory licensing and, eventually, revocation, where a patentee fails to meet the reasonable requirements of the public. The Designs Act permits parallel importation of all legitimate articles - that is, articles to which the design has been applied by or with the permission of the design rights owner. (The Industrial Property Advisory Committee has recommended that parallel importation be limited to permit only importation of articles to which the design has been applied abroad by the owner). The Trade Marks Act only
-

prohibits persons knowingly importing counterfeit goods , that is, goods bearing a forged or false trade mark.

THE COMMITTEE'S CONSIDERATION OF THE REFERENCE

14. On 19 and 21 November 1983 the Committee advertised the Reference and sought submissions from interested persons. Additionally, letters were written to persons or bodies who, it was thought, would be interested in making submissions. The deadline set in the advertisements was 31 March 1984. Many interests sought substantial extensions of time in which to make submissions. These extensions were granted. Submissions continued to come in well after the expiry of these extensions of time. In all more than 50 submissions were received. Appendix E is a list of those who made submissions.

 15. In 1985 the Committee decided to hold public hearings. It was essential that these be advertised and notified to those who had made submissions sufficiently far ahead to give interested parties an opportunity of preparing submissions, studying the submissions of others and being available to participate in the hearings. It should be understood that the Committee has no coercive power to compel the attendance of witnesses or the production of documents. Except in one major respect later to be
-

mentioned, the Committee has not found this has hampered it in its consideration of the Reference. It wishes to acknowledge the very substantial assistance and co-operation it has received from a large number of interests in a variety of areas. Without this assistance, it would have been very difficult for it to reach conclusions. The Committee also wished to record its thanks to two of the Secretaries to the Committee, Mr. Peter Treyde and Ms. Lauren Honcope, to the Chairman's Research Assistants, Mr. Roger Massey, Ms. Jane Forster and Ms. Margaret Ryan, and to the Chairman's Associate, MS. Susan Hutchison.

16. In order to assist those appearing at the public hearings, the Committee published a discussion paper in February 1986. This was made available to those who had made submissions and to any member of the public desiring a copy. The public hearings took place in Sydney during the week of 28 April 1986 and in Melbourne during the week of 5 May 1986. With the co-operation of the Court Reporting Branch of the Attorney-General's Department, a transcript was taken. The hearings were, for the most part, in public and the transcript (which exceeds 800 pages) is available from the Court Reporting Branch. During the course of the public hearings, the opportunity was taken of inspecting the offices, publishing operations and repository of Penguin Books Australia Limited at Ringwood near Melbourne, the premises of three Sydney record shops, namely, Ava & Susan's Records & Books Pty Limited,

Michael's Music Room and Red Eye Records, the record manufacturing factory operated by CBS Records Australia Limited at Artarmon near Sydney, and the recording studios of Thorn EMI (Australia) Limited in Castlereagh Street, Sydney. Members of the Committee also made informal inspections of a record shop in Melbourne, Central Station Records and Tapes Pty Limited, and a bookshop in Adelaide, Standard Book, which carries on business in the Rundle Mall. After the public hearings had concluded, two **members of** the sub-committee inspected the premises of James Bennett Pty Limited which carries on business as a library supplier at Collaroy near Sydney". The public hearings attracted considerable interest from members of the public. An association of import record shops organized a petition for their customers to sign. It urged the Committee to recommend the relaxation of the importation provisions. After the hearings, the petitions were sent to the Attorney-General who referred them to the Committee. In all, over 14,800 signatures were collected by the record shops. They also placed advertisements in newspapers asking members of the public to write to the Attorney-General or the Committee. As a result of this campaign the Committee received 167 letters. A further 25 letters were received from interested members of the public independently of the record shops' campaign.

17. The Committee appointed a sub-committee to conduct the public hearings. The sub-committee consisted of the Chairman and Messrs. Banki and Fielding. The Committee
-

asked for economic advisers to be appointed and has been fortunate, both during the public hearings and thereafter, in having advice from Professor J.McB. Grant, then a member of the Trade Practices Commission, and Messrs. R. Stockall and E. Cory, both of the Department of Industry, Technology and Commerce. The Committee wishes to acknowledge its gratitude for the help given it by its advisers. After the public hearings, the sub-committee and the advisers reported to the Committee itself on the outcome of the public hearings. It was not until then that the Committee was able to approach the task of coming to conclusions on what its response to the Reference should be. It should be mentioned that neither Mr. B.R. Cottle nor Ms. R. Durie took part in the Committee's deliberations because each of them represented persons or bodies that had an interest in the outcome of the Reference.

18. In the period which has elapsed since May 1986 when the public hearings were held, there have been developments and changes in a number of areas subject to copyright. Not the least of these have been the continued growth of the compact disc market and the establishment in 1987 by Distronics Limited of a compact disc factory in Melbourne. There have also been changes in relation to computer software. The Committee has endeavored to inform itself of these and other developments. Furthermore, it has received a number of submissions made after the public hearings by various interests. The dollar had fallen
-

before the public hearings commenced, but its continued comparatively low level has influenced markets for copyright articles in a number of respects. Obviously, the position is fluid and will remain fluid for the foreseeable future because of both economic and technological factors.

THE SUBSTANCE OF THE SUBMISSIONS MADE TO THE COMMITTEE AND THE COMMITTEE'S GENERAL CONSIDERATION OF THEM

19. Submissions were received in relation to works and subject matter other than works in five distinct areas. These were:-

- (a) books;
- (b) sound recordings (records, discs and tapes);
- (c) cinematography films, especially videos;
- (d) computer software;
- (e) 'Imported, liquor supplied in bottles to which are attached labels which are either artistic or literary works.

20. In each of these areas strong submissions were made by interests licensed to market these various products in Australia for the retention of the sections in their existing form. In the broad the submissions were based on the claimed need for orderly marketing, a principal consequence of which was said to be the ability to maintain adequate supplies of stock in Australia. This was because- of the certainty of those conducting such

importing businesses that their businesses would remain viable and unaffected by the spasmodic flooding of the market with imported goods. Thus capital expenditure on buildings and facilities including complex computer equipment was justifiable. This in turn led to the permanent employment of significant numbers of local people, as well as a substantial input into Australia of technical know-how. Furthermore, strict quality controls and customer service facilities could be instituted and maintained thus benefiting the consumer. The sporadic importer could provide no such services. The consumer with the faulty record or film would in many cases have no redress. A further benefit of orderly marketing was said to be the fostering of local writers, composers and artistes who would otherwise find it difficult to have their work published or produced here. In the publishing area, it was said that many local books were published, notwithstanding that it was recognized from the outset that this would result in a loss rather than a profit.

21. In three areas, those of books, records and software (the latter to a lesser extent) submissions were also based on the fostering and development by Australian companies (in many cases, but by no means all, foreign owned) of local industries. Over 160 local companies publish books in Australia. The printing of them is usually by sub-contract. In many cases the subcontractor is not in Australia. Most records and tapes bought by Australians are made here. And, although a substantial number of the
-

compact discs manufactured by Distronics Pty. Limited are now exported, the expectation is that its production will increasingly be for the Australian market as the years go on. Vinyl records and tapes are usually of Australian manufacture whether the music was composed and played overseas or in this country. Local recording studios and record and tape manufacturing plants enable this to be done. These are mainly operated by "the big six" - C.B.S. Records, Thorn - E.M.I., Polygram, W.E.A. Records, R.C.A. and Festival Records. Of these only Festival is an Australian company, it being a wholly owned subsidiary of News Corporation Limited. In addition there are a number of smaller record companies making records or tapes of locally composed and played music.

22. The fears of "the big six" are that any relaxation of the importation provisions of the Copyright Act will so open up the market that their local recording and manufacturing operations will be seriously jeopardised. As was the case with the publishers, *some* went so far as to suggest that any such relaxation would precipitate the end of their Australian recording and manufacturing operations. Obviously 'it is difficult to make a judgment about statements of that kind. But it must be said that the repeal of the provisions insofar only as they affected parallel imports, as distinct from pirated goods, could open the way for the importation of large numbers of books and records by the departmental and chain stores. Examples were given of this having happened in the past,

26.

particularly in relation to records. The examples were of isolated instances only. This tends to show that the importation provisions are having their intended effect. If this were not so, it might have been expected that there would have been evidence of many more importations of unlicensed material. No submissions were made to the Committee by departmental or chain stores which comprise the major outlets for records and, along with newsagents, for books also. No submissions were received from newsagents which, at the time of the hearings, had a collective voice through Associated Newsagents Co-operative Limited (ANCOL). The Australian Information Industry Association (AIIA) made submissions on behalf of their software members. The AIIA has as members some of the large suppliers including IBM Australia Limited and Apple Computer Australia Pty Limited. The software industry associations, Australian Software Houses Association and the Australian Computer Society's Software Industry Association, did not make any submissions to the Committee. The computer companies also claim that protection against parallel imports is necessary to foster a developing local manufacturing industry.

23. The submissions made by interests seeking changes in the existing legislation came in the publishing and record areas mainly from specialist bookshops and specialist record shops and users of personal computer software. The principal contention was that the sections needed relaxing in order to enable the importation of books, records and

personal computer software not available in Australia. Many of the representatives of bookshops and record shops making these submissions saw the danger to themselves of the repeal of the sections which would enable the importation of large quantities of goods by departmental and chain stores with the consequent danger of their much smaller businesses being swamped. The bookshops and record shops on behalf of whom submissions were made carry on small specialist personal businesses and like to be able to provide their customers with books or records not available in Australia. Their point is that the numbers which would be imported would be so small that the businesses of the publishing and record companies would not be affected. The publishing and record companies rejected this submission, saying, amongst other things, that collectively the specialist bookshops and record shops constituted a significant section of the market. If they were permitted to import even in small quantities, the totality of their imports must affect the companies' businesses. The publishing and record companies also said that they presently provide an indent service which enables the smaller shops lawfully to import books and records which they order. The bookshops and record shops complained, however, of the service so provided being inadequate and inefficient at least in relation to some of the companies. They also spoke of difficulty in ascertaining who was the Australian licensee for particular books or records. There was complaint by some record shops of the quality of Australian records and

their packaging.

24. Strong submissions were made by companies engaged in distributing video films. These not only sought the retention of the sections in their existing form but an alteration to them so as to relieve copyright owners of the onus of establishing knowledge on the part of the alleged infringer. It is the Committee's impression that the problem which the video industry has is mainly one connected with the importation of pirated copies or with pirated copies made in Australia from legitimately imported copies. There was little or no evidence of the parallel importing of video films in substantial quantities. The Committee received no submissions in this area from any interest which suggested that the sections should be relaxed.

25. The submissions made in relation to the liquor industry raised an interesting question. Although a submission had been received in 1984 from Lindeman's Holdings Limited, the strong interest which was shown during the public hearings which the Committee held arose because of the recent decision of the Supreme Court of New South Wales (Young J.) in R.A. & A. Bailey & Co. Limited v. Boccaccio Pty Limited (1986) 4 N.S.W.L.R. 701; (1986) 6 I.P.R. 279. In that case the defendants had imported bottles of a liquor known as Baileys Irish Cream. Attached to the bottles were labels in which the plaintiffs claimed copyright. 'His Honour held that copyright did subsist in

the labels and that the defendants by selling or offering or exposing for sale the bottles with the labels attached to them infringed the plaintiff's copyright. His Honour rejected a claim for infringement of the plaintiff's trade mark. The bottles had been imported from the Netherlands and were genuinely bottles of Baileys Irish Cream which had been manufactured by the plaintiffs in Ireland. Submissions in support of the retention of the sections were received from the Australian agents of the Bailey company and from other agents of companies importing wine and liquor of various kinds into Australia. Submissions were also received from the defendant in the Bailey case seeking the relaxation of the provisions.

26. The submissions made by the liquor interests in support of the retention "of the sections were based upon considerations of orderly marketing. In this respect the submissions were similar to those made on behalf of publishing and record interests. Orderly marketing resulted in there being viable businesses holding adequate stocks, proper distribution facilities and customer servicing. Benefits to the Australian community were investment in premises and the employment of local people as well as a wide choice of imported liquor and wines. But the liquor submissions reveal a different kind of problem from that which exists in the other areas. In the case, for example, of a book or a record, it can readily be understood that the purchaser of such an article buys it to read or to hear. The purpose of the publication of
-

the book or the making of the record is to enable purchasers to enjoy the literary or musical work which is the subject of copyright. That is not the purpose of one who purchases liquor. In most cases it is to enjoy the product to which the label relates.

27. The label is a marketing device which serves to identify the product and, in some cases, to extol its virtues. In some cases what is written or depicted on the label will be a literary or artistic work. But in many cases that will not be so; see Exxon Corporation v. Exxon Insurance Consultants International Limited [1982] Ch. 119. In the Baileys case the label was found to be an artistic work because of what was shown on it. Countless articles are imported into Australia. As the law presently stands, if any article is imported in a container to which is affixed a label in which copyright subsists, the importer, if he has the requisite copyright licence, has the protection of ss. 37 and 38 of the Act to prevent others importing the article. It is to be emphasized this will not apply in every case; it will only apply where copyright subsists in the label. A serious question therefore arises whether importers of articles, which are not in substance truly copyright articles, should be able to gain the benefit of the sections simply by attaching to them a label in which copyright subsists.
28. The consideration of the submissions made in the liquor area raises a broader question. The question has proved

to be central to the Committee's consideration of the Reference. It may be thought that, at least in relation to works as distinct from subject matter other than works, the original purpose of copyright legislation was to protect the copyright of the author so that he or she might exploit the product of his or her intellectual labour. To this end s. 31 of the Act confers upon the author a number of exclusive rights which are the author's, subject to whatever licences are granted or assignments made. Understood in this way, the provisions of ss. 37 and 38, which apply in relation to works, but not ss. 102 and 103, which apply to subject matter other than works (e.g. in relation to records and films) and which vest the ownership of the copyright in the maker of the article (i.e. the record or the film), are to be seen as no more than sections designed to protect the copyright owner and reinforce his or her paramount position as the person having the exclusive right to exploit his or her intellectual work. In theory this sounds logical and compelling, but, as the historical analysis (Appendix D hereto) shows, the original purpose of early copyright legislation was to protect the English printing industry. In subsequent copyright legislation the emphasis changed towards the protection of the author, composer or playwright. But, although that be so, the fact remains that copyright legislation unquestionably operates to protect the book publishing, record manufacturing and film distribution industries throughout the world. Directly and indirectly they benefit from the rights conferred by

the Act and its international counterparts on authors, composers and other originators of works.

29. Nevertheless, it would be wrong to look at the interests of publishers, record manufacturers and film distributors separately from those of authors, composers and script writers. Each has an indispensable part to play in an enterprise which, for it to be properly understood, needs to be viewed in its totality. Without continuous access to new material, the publishing, record and film industries would soon begin to fail. Likewise an author without a publisher, a composer without a record company, a script writer without a film company and a playwright without a theatrical entrepreneur would find it impossible adequately to gain the reward for the product of their intellectual labour which is their due. This is particularly so in an age where the marketing of intellectual property has become a highly complex business. The Committee was given an example of this during the public hearings. It concerned the marketing of the film "Out of Africa". Careful thought was given to how long the film would run in cinemas before it was released, firstly, on video, and, secondly, on television. Superimposed on this was the question for the publisher, Penguin Books, of a reprint of the original book ("out of Africa", Karen Blixen (first published in 1937)) when, in relation to the release of the film, the reprint would be released for publication. All this is designed to yield the greatest possible return to all those who have
-

combined to compose, publish and market the work. It follows that copyright legislation has the effect of conferring rights and benefits directly and indirectly, not only on authors and composers, but also on a host of commercial undertakings whose existence is indispensable to the adequate exploitation by copyright owners of their work. The central and difficult question which has confronted the Committee is whether the sections, the subject of this Reference, operate to confer too much protection, not so much on copyright owners, but rather upon the undertakings which market and disseminate copyright material. The question is one of balancing two principal public interests, one in the community having access, as cheaply as possible, to the whole range of copyright material and the other in ensuring that copyright owners are not deprived of adequate protection.

30. The submissions to which reference has been made have chiefly come from commercial interests concerned with maintaining copyright protection or with relaxing the sections to enable the marketing of parallel imports to take place without any breach of the Act. The Committee sought submissions from consumer protection organizations. Notices of the reference and requests for submissions were sent to the Australian Federation of Consumer Organizations and the Office of Consumer Affairs (now the Federal Bureau of Consumer Affairs). A submission dated 17 June 1986 was received from the Office of Consumer Affairs. No submission was received from any other

consumer organization. The submission from the Office of Consumer Affairs was received after the conclusion of the public hearings, in which no consumer organization took part, and after most of the submissions to which reference has been made had been received and considered by the Committee. Nevertheless, the Committee regards the submission as of importance to its consideration of the reference. Paragraphs 3 and 4 of the submission are as follows:-

- "3. The reference before the Committee raises some difficult issues which, in the opinion of the Office, require a balance to be struck between consumers on the one hand, and creators and industry on the other. A need exists to consider short and long term effects of proposals upon the various interested parties, and also to place requests for protection by industry and others in a broad economic context, including government assistance policy.
4. The importation provisions of the Copyright Act 1968 have an impact on the availability of, and the price consumers pay for, copyrighted goods. While the non-availability or high price of copyrighted works is not a matter regularly raised with this Office by consumers, it may be an acute problem for some consumers. It may well be that consumers are not aware that the importation provisions in fact mean that they pay a high price for copyrighted works, and for this reason few complain."

The submission went on to draw a distinction between parallel importing of legitimate copies (i.e. copies made in a foreign country with the permission or licence of the

copyright owner) and the importing of pirate copies (i.e. copies made without permission and without payment of a royalty to the copyright owner) . The submission did not support the legalizing of pirated copies.

The submission then continued:-

- "6. This Office believes that consumers' interests would be served by providing that the parallel importation of legitimate copies of a copyrighted work does not infringe the copyright of the Australian owner or licensee. The Office considers that such a step would increase the availability of copyrighted goods for purchase in the Australian market-place. This would give the Australian consumer a greater choice, and the greater competition created by the importation of legitimate copies would likely reduce prices in many instances, or at least facilitate the setting of competitive prices.
 7. Under the present Act,. the copyright holder in Australia has an absolute monopoly over the supply of the work in Australia, and can therefore choose whether or not to supply the work. The maintenance of monopolies often threatens consumers' interests. If importation of legitimate copies was allowed, the range of available works in Australia should increase, because the decision whether to supply would no longer rest solely with the Australian copyright holders. It would be open for importers who, like local industry have a profit motive, to supply the Australian market with copies of the work . In this way, the consumer would find that a greater range of copyrighted works would be made available, facilitating a greater choice.
 8. Australian copyright holders can presently set their own price (having
-

regard of course to the price of other works supplied to the market by other copyright holders), but if importation of legitimate copies were allowed the Australian copyright holder would have to compete with imported copies.

-
11. In summary, the Office would support amending the Copyright Act 1968 to allow for the parallel importation of legitimate copies of works, as it would increase the range of goods in the market available and would reduce the price of available goods, to the benefit of consumers. The Office notes that the Copyright Act 1968 does not exist to protect the interests of exclusive licencees of copyright owners (which are often huge multi-national companies with bargaining power commensurate to their size) but rather it exists to protect the copyright owner (that is, the creator of the work) from unauthorised use of his works. Allowing parallel importation of legitimate works is consistent with the policy of the Act."

In passing the Committee notes that it may be said, contrary to the words of the submission, that the Copyright Act does in fact afford protection to exclusive licensees. Whether it should do so or not may be open to question. But if it were to be amended so as to omit or modify such protection, Australia's law would, in a significant respect, become out of step with the copyright laws of a great many nations. No amendment of the law in this respect ought to be recommended without close consideration of the international implications which would be involved.

The Office of Consumer Affairs next turned its attention to the questions of industry preservation, the book industry, the record industry, international treaty obligations, the provisions of the sections requiring proof of knowledge, s. 135 of the Copyright Act and the scope and relevance of the Trade Practices Act 1974. The submissions on these matters need to be read as a whole but the following paragraphs are quoted:-

"14. Generally, if other importers can import 'legitimate' copies at a lower price than the existing exclusive licensee then this should be seen as fostering healthy market competition leading to greater efficiency and cheaper prices for consumers - perhaps the existing licensee should have sought out these cheaper sources.

15. The Office would agree with the argument that the importation provisions have had the effect of allowing some organizations to charge unreasonably high prices because of the monopoly created by exclusive licences."

31. It was unfortunate that the submission from the Office of Consumer Affairs was made after the public hearings. The whole idea of the public hearings was to enable an interchange of views. As earlier said, the Committee has no coercive power to compel the attendance of witnesses or the production of documents. It has had to rely on the co-operation of the variety of people making submissions to it and attending its public hearings. The public hearings were designed to enable factual allegations of

38.

the kind mentioned in the Office of Consumer Affairs' submission to be tested. There is no indication in the submission that any of the statements is based upon a full investigation of the facts or any economic analysis of the industries affected. Indeed, some of the statements in the submission indicate that no such investigation or analysis has been carried out. After the Committee received the submission, it would have been possible for it to reconvene the public hearings. It decided not to do so because there was not sufficient particularity in the claims which were made to warrant the public and private expense which would have resulted.

32. The submission from the Office of Consumer Affairs was submitted to a number of the interests which had appeared at the public hearings. As a result, further submissions were received from the Australian Book Publishers Association and from Penguin Books Australia Limited. Both submissions complained vehemently of the lateness of the submission from the Office of consumer Affairs. Although the submission from Penguin Books Limited goes to some of the detail of the submission, no new material was raised in it. The Office of Consumer Affairs submission was also referred to the Department of Arts, Heritage and Environment, which is now the Department of Arts, Sport, Environment, Tourism and Territories. The Department's response of 23 December 1986 concluded that the removal of the existing restrictions on parallel importation of books might have "some negative effects on Australian authors".

Amongst the matters raised by the Department were the following:-

- "4. First, in response to the proposition that parallel importation leads to increased availability of cheap remaindered books and thus greater competition in the marketplace you should note that the President of the Australian Society of Authors, among others, already refers frequently to the competition for book-buyers' purchasing power between works by Australian authors and overseas remainders. Furthermore, competition is being exacerbated by the recent devaluation of the Australian dollar which has increased the cost of both imported books and Australian books which are largely printed offshore.
 5. The second point to note is the possible detrimental effect on the economic viability of publishing in Australia which could in turn affect the viability of Australian authors. In 1982, the Australian Book Publishers Association (ABPA) put the view to the then Minister for Home Affairs and Environment that copyright is of vital importance to their industry. With reference to the sections under review, the ABPA stated that publishers' investments in stock, staff and warehousing in Australia will be in jeopardy unless these provisions are upheld.
 6. You referred to the fact that exclusive licencees are often huge multi-national companies. However we would like to emphasise that these companies are significant in **publishing** works by Australian **authors**. For example, 18% of Penguin **turnover is** Australian literature. Moreover, there are often specific benefits to Australian authors in publication **by** multinational companies. A striking example was Rodney Hall's prize winning novel Just Relations which was published in Australia by Penguin and published and promoted in the USA by Viking, a sister company."
-

33. On 27 November 1986 the Office of Consumer Affairs was asked whether there was any material of a specific nature such as complaints, investigations or findings, which could be provided in support of the submission earlier made by the Office. Additionally, the letter received from Penguin Books Australia Limited was sent to the Office for comment: On 4 December 1986 the Office of Consumer Affairs replied saying that the Office was not aware of any complaints or investigations "in this general area". It also said that limited inquiries made of the Prices Surveillance Authority and State Consumer Affairs agencies produced a similar response. The Office of Consumer Affairs continued:-

3. However, it can clearly be the case that a state of affairs can exist in a market giving rise to a significant disadvantage to consumers in terms of price and/or availability of goods without this leading to numerous complaints to bodies such as this Office or State/Territory Consumer Affairs Bureaux. It is our considered opinion that the book and record markets are just such markets.
 4. It is well known, including from research conducted in North America, that consumers who experience some degree of dissatisfaction with the purchase of a good or service often do not, for a variety of reasons, complain formally either to the seller or to government bodies. Absence of complaints does not therefore necessarily indicate satisfied consumers. It is submitted that the absence of formal complaints about the products in question is due mainly to limited knowledge on the part of the public of the structure of these markets and the effect that this structure has on prices, and that, secondly, a process of
-

conditioning over a period of decades has caused most of the public to accept the high price of books and records in Australia as a fact of life that must be simply endured. If independent booksellers had petitioned the buying public, in the same way as it is understood that independent record importers have done, then a large number of signatures in support of the repeal of s. 37 would likely have been obtained'."

Reference was then made to the Time-Life case (see above) and to some of what has been written by some commentators. What has been said by these commentators will be referred to later when dealing with the relationship between the importation provisions of the Copyright Act and Part IV of the Trade Practices Act 1974. The Office included a particular response to the letter from Penguin Books but the Committee does not find it useful to set out a detailed account of what is there said. In summary then, the more recent material from the Office of Consumer Affairs does not add very much to the state of affairs as it existed at the public hearings. For whatever reasons, there have not been received by the office of Consumer Affairs any substantial numbers of complaints concerning the high price of books or the anti-competitive effects of the importation provisions generally. From what is said in the Office's letter of 4 December 1986, it would seem that the experience of other consumer agencies has been much the same. Nevertheless, the Committee has taken the submission from the Office of Consumer Affairs into account and has weighed the statements in it against the

other submissions it has and the matters which were put to it during the public hearings.

34. It should be said at this point that it is clear to the Committee that one of the underlying misgivings which a number of people in the community have about the operation and effect of the sections is that they believe publishers and record companies maintain prices at too high a level. Statements to this effect are made in a number of submissions from book shops and record shops. In some cases the statements were backed up by tabulations purporting to show the prices at which books could be purchased overseas and the prices charged for the same or similar books in Australia. Particularly in some specialist areas, these tabulations showed a differential adverse to the book purchaser in Australia. The sub-committee conducting the public hearings raised the question of pricing with some publishers and record companies. Claims of excessive mark-ups were refuted. On a confidential basis some publishing companies submitted to the Committee material designed to show that prices were not excessive. Because of the nature of the Committee, it was not able itself to conduct an investigation to check the validity of material which was put before it. So the position is that claims have been made by the Office of Consumer Affairs and others of excessive prices being imposed in respect of some articles and these claims have been disputed by the organizations concerned. More will be said about the problem which this

43.

has created when the Committee comes to consider the recommendations which it should make in respect of the legislation. The matters discussed in this and the preceding paragraph provide a convenient bridge to the next matter to be considered which is the relationship between the Copyright Act and the Trade Practices Act. The Committee turns to that matter.