

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COPYRIGHT AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(This is a revised replacement Memorandum for that
tabled in the Senate on 16 May 1991 and takes account
of amendments made by
the House of Representatives to the Bill as introduced)

(Circulated by authority of the Attorney-General
the Honourable Michael Duffy, MP)



COPYRIGHT AMENDMENT BILL 1990

GENERAL OUTLINE

The purpose of this Bill is to effect important changes to the Copyright Act 1968 which will -

- . enable unrestricted commercial importation of 'non-pirate' copies of books, other than those first published in Australia or published in Australia within 30 days of overseas publication;
- . allow importation of non-pirate copies of books where copies were ordered from a copyright owner and he or she has not indicated within at least 7 days that the order will be filled within 90 days;
- . otherwise suspend a copyright owner's control over importation of non-pirate copies of books first published in Australia, or first published simultaneously in Australia and overseas, when supply becomes unavailable for more than 90 days; and
- . allow the importation of a non-pirate copy of a book at any time to fill a documented order from a customer for his or her non-commercial use.

FINANCIAL IMPACT STATEMENT

The amendments effected by this Bill will have no direct impact on Commonwealth expenditure. However, the Bill is likely to lead to some reductions in prices of books supplied to Australian consumers.

NOTES ON CLAUSES

Clause 1 - Short title etc.

1. When enacted, this Bill will be cited as the Copyright Amendment Act 1991.

Commencement

2. The Bill does not provide for a specific commencement date. The Amendment Act will, therefore, come into operation 28 days after it receives the Royal Assent.

Clause 2 - Interpretation

3. This clause amends s.10 of the Copyright Act 1968 ('the Act') -

- (a) by adding at the end of the definition of 'infringing copy' in s.10(1) the words ', but does not include a non-infringing book whose importation does not constitute an infringement of that copyright under s.44A or 112A'. (The object of including these words is to provide a qualification to the definition for the purposes of the exemptions from copyright infringement being introduced by the new ss.44A and 112A); and
- (b) by inserting in s.10(1) a definition of 'non-infringing book'. That expression will be defined to mean a book made in a prescribed country whose making did not constitute an infringement of any copyright in a 'work' (see the definition of 'work' in s.10(1)), or in a 'published edition' of a work. That is, its making was legitimate in the country of manufacture. The amendment confines the countries in which non-infringing books may be made to countries prescribed under regulations under s.184(1) of the Act. Under s.184, regulations may extend the provisions of the Act to other countries. Section 184(3) requires such countries either to be

members of a copyright convention of which Australia is also a member or to be countries that give reciprocal protection to Australian copyright owners. The amendment also excludes from the definition of 'non-infringing book' books made under compulsory licence in another country, so that such books will not be able to be imported into Australia without the permission of the copyright owner.

Clause 3 - Infringement by importation for sale or hire

4. This clause, in effect, will make s.37 of the Act (which deals with infringement of copyright by importation of copyright materials for commercial purposes) subject to the exemption being introduced by the new s.44A.

Clause 4 - Infringement by sale and other dealings

5. Similarly, this clause will make s.38 of the Act (which provides for copyright infringement by undertaking certain commercial dealings with unlicensed imported copyright materials) also subject to the new s.44A.

Clause 5 - Importation etc. of books

6. Clause 5 inserts new s.44A into the Act which, along with s.112A, is the most important change being effected by the Bill. In summary, the new section provides three exceptions to the infringement provisions contained in ss.37 and 38.

7. Firstly, new s.44A(1) provides an exception to infringement where a non-infringing (i.e. a legitimate or non-pirate) book first published overseas is imported into Australia for a commercial purpose. The intention of this provision is to deny copyright owners of foreign books not simultaneously published in Australia the exclusive right to control the Australian market in those books. A book published in Australia within 30 days of its first publication

overseas is, under s.29(5) of the Act, treated as 'first published' in Australia as well. The expression 'overseas work' as used in new s.44A(1) is defined in new s.44A(7). The provision will apply to an overseas work first published on or after the commencement of the Amendment Act (see para.2 above).

8. Secondly, new s.44A(2) gives effect to the Government's decision to enable a person to import a non-infringing book into Australia for commercial distribution where the book was not able to be supplied by the copyright owner. The subsection applies to both hardback and paperback versions of a book first published in Australia whether before, on or after the commencement of the Amendment Act and an overseas work (ie, not also first published in Australia) published before the commencement date. It does not apply to books first published only overseas after the commencing day because they will be able to be imported under new s.44A(1). New s.44A(2) is subject to the operation of the other provisions in new s.44A and in particular new s.44A(5).

9. Further, a number of important conditions need to be fulfilled before the exception from copyright infringement under new s.44A(2) can operate:

- . the person importing the book must have ordered in writing from the copyright owner (or the copyright owner's agent or licensee) one or more copies of the relevant version of the book (note that 'version' is used rather than 'edition', so that if there are 2 different paperback editions of the same book, either would qualify as the paperback version of the book);
- . the copies ordered must not be second-hand copies or more in number than are needed to satisfy the person's reasonable requirements;
- . at the time the person orders an imported copy of the book, the written order to the copyright owner, licensee or agent must not have been withdrawn or cancelled by the person;

- . the copyright owner, licensee or agent had not notified the person who placed the order within at least 7 days that the order would be filled within 90 days of the placement of the order; or
- . the copyright owner, licensee or agent must not have filled the person's written order; and
- . at least 90 days must have elapsed since the person placed the order.

10. Therefore, the importer may import books from elsewhere without waiting 90 days in circumstances where the copyright owner, licensee or his or her agent cannot, within 7 days of placement of the order, confirm ability to supply within the 90 days.

11. The importer may continue to import copies of the relevant version for so long as those conditions prevail, ie, the person's written order to the copyright owner, licensee or agent remains on foot and unfilled. As to what constitutes 'filling' an order, this is dealt with in new s.44A(6).

12. The third exception is contained in new s.44A(3) which will provide that the copyright in a published work is not infringed by a person who imports a single copy of a non-infringing book into Australia if -

- (a) the importation is to fill a written order from the person's customer; and
- (b) the order contains a signed statement by the customer that the book is not intended to be used for a commercial purpose.

13. The purpose of new s.44A(3) is to give effect to a recommendation of the Copyright Law Review Committee which reported in September 1988 on the importation provisions of the Act.

14. New s.44A(4) will affirm that once a book has been imported in accordance with new s.44A(1),(2) or (3), it will not be an infringement to sell or otherwise commercially deal with the book in Australia.

15. New s.44A(5) provides an exception to the operation of new s.44A(2). It prevents the importation of copies of a hardback version of a book pursuant to new s.44A(2) in circumstances where the copyright owner, licensee or agent, although unable to fill an order for copies of that hardback version, can supply copies of the paperback version.

16. New s.44A(6) provides for an interpretation of 'filling an order' for the purposes of new s.44A(2). By virtue of new s.44A(6), a copyright owner, licensee or agent will have filled an order only when he or she has sent to the person who placed the order the full number of copies ordered (bearing in mind the requirement for reasonableness in new s.44A(2)(c)).

17. New s.44A(7) provides for the interpretation of 'commencing day', 'book' and 'overseas work' for the purposes of new s.44A. The expression 'commencing day' will be defined to mean the day on which the Amending Act commences. (In effect, this will be 28 days after the Act receives the Royal Assent). 'Book' will be defined to exclude 3 types of material, namely, books consisting mainly of one or more musical scores even though including some text and illustrations, manuals sold with computer software and periodical publications. The definition of 'overseas work' will ensure that the right under new s.44A(1) to import copies of new titles published overseas does not arise until the expiration of 30 days from first publication overseas or at all if the title is published in Australia within that period.

Clause 6 - Infringement by importation for sale or hire

18. New s.112A (inserted by clause 8 of the Bill) introduces an exception to infringement by importation of books for commercial purposes in the case of published edition copyright (s.102) which is, essentially, a publisher's copyright in the typographical arrangement of his or her particular edition of the work.

19. Clause 6 of the Bill, therefore, will make s.102 of the Act (which makes unlicensed importation of copies of a published edition an infringement) subject to the exception effected by new s.112A.

Clause 7 - Infringement by sale and other dealings

20. Similarly, clause 7 will make s.103 of the Act (which provides for copyright infringement by undertaking certain dealings with, among other things, published edition copyright) also subject to the new s.112A.

Clause 8 - Importation and sale etc. of books

21. Clause 8 of the Bill inserts new s.112A into the Act. The new section provides the same exceptions to copyright infringement by importation and sale of published editions of works as will apply to underlying works under the new s.44A.

22. Accordingly, new s.112A(1) will provide that the copyright in an overseas edition of a work first published on or after the commencing day is not infringed by the importation into Australia of a non-infringing book for commercial purposes. This provision will mirror new s.44A(1) (see para.7).

23. Similarly, new s.112A(2) will mirror new s.44A(2) and provide an exception to copyright infringement of Australian published editions where a person imports into Australia a hardback or paperback version of a non-infringing book for

commercial purposes. The same conditions which will need to be fulfilled under new s.44A(2) with respect to works will also need to be complied with under new s.112A(2) in relation to published editions (see paras.8-11). As with new s.44A(2), new s.112A(2) is subject to the operation of new s.112A(5) concerning the importation of hardback copies when paperback copies are available in Australia.

24. New s.112A(3) will provide that a published edition copyright will not be infringed by a person who imports into Australia a single non-infringing book if -

- (a) the importation is to fill a written order from the person's customer; and
- (b) the order contains a signed statement by the customer, that the book is not intended to be used for a commercial purpose.

Again, new s.112A(3) will mirror the provisions of new s.44A(3).

25. New s.112A(4) will mirror the provisions of new s.44A(4) and provides an exception to copyright infringement in the case of a non-infringing book whose importation into Australia does not constitute an infringement under new s.112A.

26. New s.112A(5) provides an exception to the operation of new s.112A(2). It prevents the importation of copies of a hardback version of a book pursuant to new s.112A(2) where the copyright owner, licensee or agent, although unable to fill an order for a copies of that hardback version, can supply copies of the paperback version.

27. New s.112A(6) will mirror the provisions of new s.44A(6) and provides an interpretation of 'filling an order' for the purposes of new s.112A(2) (see para.16 above).

28. New s.112A(7) will provide the same definitions of 'commencing day' and 'book' as are contained in new s.44A(7) (see para.17 above). It also inserts a definition of 'overseas edition' to ensure that the right under new s.112A(1) to import copies of new editions published overseas does not arise until the expiration of 30 days from first publication overseas or at all if the edition is published in Australia within that period.





