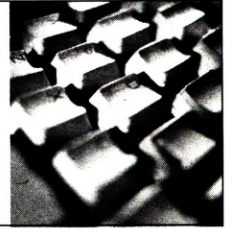


# Parallel Importation of Computer Software Products



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**Parallel importation refers to the importation of copyright material that is parallel to or alongside that of the copyright owner.<sup>1</sup> It is the importation of products made by or with the consent of the relevant intellectual property rights holder in the jurisdiction where it was made, but without the consent of the relevant rights holder in Australia (often an exclusive distribution).**

Until recently, the *Copyright Act 1968* (Cth) ("the Act") prohibited the importation of software products without the licence or authority of the Australian copyright owner. This meant that software products could only be imported by an authorised distributor, which in most cases was the local subsidiary of the overseas software company.<sup>2</sup>

Parallel importation of sound recordings and branded goods is already allowed in Australia, following amendments to the Act in 1998 and 2000. The most recent amendments to the Act sought to further remove restrictions in relation to books, periodicals, enhanced CDs, sheet music, computer software and some electronic games. The relevant bill was originally introduced into Parliament in 2001, but lapsed at the last federal election. It was reintroduced in March 2002 on the same terms. The Senate did not adopt the whole of the bill, removing the schedule relating to printed books, periodicals and music.

## Amendments to the Copyright Act

The *Copyright Amendment (Parallel Importation) Act 2003* (Cth) came into force on 15 April 2003. The amendments to the Act allow the parallel importation of computer software and computer games from any legitimate source, without the permission of the Australian copyright owner.

The amendments replace the existing definition of "non-infringing copy" in s 10(1) of the Act with a new definition that includes non-infringing computer programs. A copy of a computer program is a non-infringing copy if:

- (a) it is made in a qualifying country; and
- (b) its making did not constitute an infringement of any copyright in a work under a law of that country.

A "qualifying country" is defined as a party to the International Convention for the Protection of Literary and Artistic Works, or a country that is a member of the World Trade Organisation and has laws consistent with the TRIPS Agreement.

The central amendment relating to parallel importation of software is the insertion of a new s 44E into the Act, which states that copyright in a literary work is not infringed by a person who imports a computer program embodying a non-infringing copy of that material, or who commercially distributes the software following importation.

Other new provisions to be inserted into the Act include the following:

- Increased penalties for importation of infringing goods.
- New presumptions in relation to the subsistence of copyright and copyright ownership in civil and criminal proceedings.
- Criminal penalties for advertising unlawful copies of copyright material.
- Stronger provisions for damages in civil cases.
- Jurisdiction to the Federal Magistrates' Court to deal with civil copyright cases.

## Impact of amendments

The amendments to the Act will allow the parallel importation of computer programs, including CD-Roms, computer games and sheet music in electronic form. This means that distributors, retailers and wholesalers will be able to choose where they buy their software, whereas previously they may have been obliged to purchase from the Australian distributor.<sup>3</sup>

The Australian Competition and Consumer Commission ("ACCC") has welcomed the amendments to allow the parallel importation of computer software. The ACCC believes that it will reduce software prices for Australian consumers and small businesses by removing the "monopoly" which multinational firms have on the importation of software.<sup>4</sup>

The Business Software Association of Australia ("BSAA") and its members, while not opposing the lifting of parallel importation restrictions, have called for measures to reduce business software piracy which they argue could increase with the removal of parallel importation restrictions.<sup>5</sup> BSAA believes that more measures to reduce piracy should be introduced. These include:

- Introducing a criminal offence for business end user piracy (currently illegal copying of software is only a criminal offence if the goods are sold).
- Increasing resources for the federal police to bring criminal prosecutions.
- Introducing statutory damages in civil cases.
- Guideline judgments for judges in criminal cases.
- Easing of onerous proof of ownership provisions for copyright owners.<sup>6</sup>

The Office of the United States Trade Representative has criticised Australia's removal of restrictions on parallel imports and Australia's legislative position on copyright piracy issues.<sup>7</sup>

## Conclusion

The amendments to the Act will potentially offer business and domestic consumers software products at reduced rates and improve the range of products available.

It remains to be seen just how much competition in the importation and distribution of software will increase after removing these restrictions, how much prices will drop and what impact, if any, the changes will have on software piracy. ■

<sup>1</sup> Explanatory Memorandum, *Copyright Amendment (Parallel Importation) Bill 2002*, 13 March 2002.

<sup>2</sup> David Crowe, "Industry: change 'pathetic' piracy laws", *Financial Review*, 10 April 2003.

<sup>3</sup> ACCC Media Release, "Consumers and small business set to gain from lower software prices", 26 March 2003.

<sup>4</sup> Note 3 above.

<sup>5</sup> Business Software Association of Australia, Media Release, "Government software piracy initiatives 'ineffective'", 9 April 2003.

<sup>6</sup> Note 5 above.

<sup>7</sup> Office of the United States Trade Representative, *Foreign Trade Barriers*, April 2003.