

## **AVSDA SUBMISSION IN RESPONSE TO THE INTERIM REPORT OF THE INTELLECTUAL PROPERTY AND COMPETITION REVIEW**

Members of the Australian Visual Software Distributors Association (representing the video and video games industries) were extremely disappointed in the Interim Report of the Intellectual Property & Competition Review Committee, not only with the recommendations made in the Report but also by the lack of analysis of the issues raised in our submission to the Committee.

While the Overview acknowledges that the Report does not “seek to set out at any length the analysis upon which the Committee will base its recommendations”, in fact there is virtually no analysis of relevant issues. Rather, there are repeated iterations of an economic theory with no demonstration that a problem exists i.e. the negative impact which the theory suggests “may” occur does not in fact occur in the Australian marketplace.

In the first instance we believe that the Committee’s interpretation of its Terms of Reference is flawed in that there is insufficient weight given to the benefits to the community as a whole of restrictions on parallel importation on film products and

computer games. This is particularly so regarding the impact on reducing piracy and in ensuring the effectiveness of the censorship system.

It is of major concern to the video and video games industries that, while the Committee states that it “recognises that not all of the arguments raised against the removal of parallel importation restrictions apply equally to all copyright industries”, its conclusions do not demonstrate that it has differentiated in any way the industries in its analysis.

Without any demonstration of a lack of competition in the video or video games industries, the Report asserts that “competitive neutrality” would be “enhanced” by allowing parallel importation in all copyright industries. It fails to indicate what these benefits would be.

In its Discussion Paper the Committee indicates that firms compete on quality, reputation, image and technology as well as on price. Nowhere has the Committee indicated that there is a lack of competition in any of these areas.

## **PRICE**

Of particular importance is the issue of price. The main proponent of change in parallel importing laws, quoted in the Interim Report is the ACCC. They are quoted as rejecting arguments that prices of copyright goods are significantly

lower than overseas based on earlier PSA enquiries. None of those quoted looked at either videos or video games. A PSA Inquiry into Cinema Admission Prices in 1991 concluded that the issue was one of timing rather than price. "The Australian price is similar [to that in the US]. Video consumers would appear to gain little from repeal in terms of product availability or price" (p.41). Regarding the price comparison of computer games contained in the ACCC's March 1999 report *Potential Consumer benefits of repealing the Import Provisions of the Copyright Act 1998 as they Apply to Books and Computer Software Access* economics has stated that "it is badly flawed and should not be relied upon".

AVSDA provided, as part of its submission to the Committee, international pricing comparisons for both industries, prepared by Access Economics. Only the video pricing comparisons were referred to in the Interim Report. Contrary to the statement in the Interim Report that these reports were confidential (only appendices to the reports which contained wholesale price details of individual titles were provided on a confidential basis) we are very happy for the pricing comparisons to be publicly known.

As indicated in our original submission the Access Economics study showed that prices for games software are 32% higher in the UK than in Australia and US prices are only 7% lower. It should also be noted that the average exchange rate for 1998 (the year for which prices were analysed) against the \$US was 0.6285

compared with the current exchange rate of 0.5807. For the pound sterling the exchange rate is roughly the same.

For videos, the price of rental product is lower in Australia than both the UK and US (by 3.2% and 14.9% respectively) and for sell-through videos the prices are within 1 or 2 per cent of the US and at least 20% lower than the UK. The exchange rate used in this analysis was for the average for 1998-99 of 0.6247 against the \$US compared with the current exchange rate of 0.5807. The exchange rate for the pound sterling was 0.3817 in 1998-99 and is currently 0.3820.

It should be reiterated that the comparable market for Australia is the UK (which is also a PAL territory) rather than the US (which is an NTSC territory).

The Committee “notes that what matters is not the static comparison of Australian prices today with prices elsewhere; rather, it is the comparison between prices as they are with the import restrictions in place, and the level of prices which would prevail absent those import restrictions”. In the case of video, this situation has not altered since the PSA Inquiry of 1991 referred to above. In the case of video games, distributors advise that prices reduced significantly since they were first sold in Australia to their current internationally competitive prices.

The market which currently exists in Australia already provides low prices by international standards. Given the competition levels which already prevail to achieve these low prices, there is no indication by that Committee what benefit to the consumer is expected to be achieved as a result of deregulation.

## **CENSORSHIP**

The Committee fails to address the issue of censorship raised in AVSDA's previous submission. The current censorship regime relies for its success on the compliance of distributors in having their product classified. The extremely low level of enforcement which is provided is testimony to the high level of compliance which takes place under existing conditions. It would be naïve to suggest that a system which allowed parallel importing would achieve the same level of compliance.

While the responsibility for enforcement of censorship rests with the States and territories, there is in fact little enforcement activity by them. At the Commonwealth level, there are only two staff (the Community Liaison Officers) who carry out checks on censorship compliance for the whole of Australia.

As indicated in our initial submission to the IPCR, it is not uncommon for products released here to be adapted for the Australian market. A selection of recent titles where such changes have been made is attached.

DVD product, which contains material additional to the version classified for theatrical release or a previously released video (such as a director's cut and interviews with actors) is currently submitted separately for classification. As our earlier submission stated, illegally imported DVDs are already being sold in Australia before the title has been released theatrically and before it has been classified.

## **PIRACY**

The Report goes on to state that "the scope for continued effective protection against imports that are pirated or counterfeit underscores this conclusion". In the first instance, we would argue that the current enforcement of copyright protection is severely inadequate.

The fundamental flaw in the consultant's report to the IPCR, prepared by the Institute of Criminology (which only looks at CDs) is that it is based almost solely on information provided by the Australian Customs Service, the police and the Director of Public Prosecutions. For all of these bodies, copyright enforcement has a relatively low priority and this has not changed since the introduction of legislation allowing parallel imports of CDs.

The AIC report also focuses primarily on illegally imported product. With current tools for pirating these products so freely available (such as CD burners) the main danger will be an even greater domestic piracy rate. Because the identification of legitimate product will become so much more difficult, the ability to pass off locally pirated product as legitimate will increase.

The assertion by the ACCC that piracy “should” be tackled directly through specific sanctions and internationally through agreements such as TRIPS is based on the false assumption that these methods will work – however, they are not currently working and it is putting the cart before the horse for Australia to change its system under these circumstances. They also state that “technological developments are increasingly available to aid in the prevention of piracy”. In the experience of the video/DVD and video games industries, the interval between the development and use of such technologies and circumvention of these, is getting shorter and shorter.

For an industry such as video games with an estimated piracy level of around 20%, and the video/DVD industry where piracy levels are increasing, the complacent attitude that piracy is not really a problem is quite alarming. As stated in our previous submission, the control over pirated product which has been achieved is due to the large sums of money which existing distributors provide. This would not continue at current levels if the system was changed. Additionally,

the ability to identify illegal product would become significantly more difficult and further hamper enforcement.

The effective control over piracy would be compromised if the current system were to be changed, compromising Australia's ability to maintain its international treaty obligations – obligations which do not exist for non-intellectual property products.

## **INVESTMENT**

The Committee appears to take the view that the copyright industries have been granted favourable treatment compared to others because of the parallel importation restrictions. In its interim report, it states:

*“The scope for import restrictions to distort the allocation of resources as between industries makes careful examination of these restrictions all the more important. The current situation is one in which certain of the industries that produce copyrighted goods are favoured relative to most other forms of economic activity (which are not afforded a right to use the Commonwealth's coercive powers so as to ban competing imports). This raises the issue of whether such favoured treatment is justified, and whether any policy goals it may serve are best pursued by this means rather than by others.”*

In AVSDA's view, this passage reveals a failure to appreciate the particular nature of copyright industries. The primary asset which these industries rely on is ownership of intellectual property. It is misleading to state that laws which aim

to protect the value of these assets are in some way biased in favour of copyright industries. The Commonwealth does in fact use its “coercive powers” to protect economic interests in many other industries, such as quarantine laws, foreign investment restrictions, tariffs, and taxation laws to protect assets in other industries. It is not surprising, as the Committee notes, that few submissions address this issue. The reason is that an argument that parallel importation laws are particular to copyright industries is circular at best.

The considerable value which copyright owners place on the protection of their rights is evidenced by expenditure on enforcement and investment in distribution networks in Australia. The Committee’s proposed repeal of the parallel import restrictions would have two relevant effects:

- (a) to deprive current owners and licencees of a fair return on their investment to date; and
- (b) to reduce incentives for future investment in Australian distribution of copyright materials.

In regard to the first issue, AVSDA notes that most Australian licencees of copyright materials in videos and video games are required to provide “minimum guarantees” to the foreign owners of the copyrighted material. In many cases, the contracts under which the minimum guarantees are provided last for several years and the upfront investment made by the Australian licencees is premised on being able to obtain a return on that investment in an efficient manner (such as through the use of the “windows” system). A repeal of the parallel importation restrictions would effectively involve an acquisition of property by the

Commonwealth. In the absence of any transitional provisions or compensation to address these concerns, that acquisition may be on unjust terms.

In regard to future investment, it is AVSDA's belief that the removal of the parallel importation restrictions would be itself sufficient to remove much of the incentive for foreign copyright owners to invest in distribution systems in a small market such as Australia.

The Committee states investment in market development can be protected through contractual means. In the case of the video and video games industries, it is not apparent how they have reached this conclusion. Whatever contractual restrictions rights owners might seek to apply by contract, it is not possible to enforce them in the case of videos, DVDs or video games. These products can be imported from overseas wholesalers (despite contractual undertakings to the contrary). If there is no exclusivity of distribution then there is no contract to enter into.

While international companies may be better able to control importation of their products, Australian distribution companies (who currently purchase distribution rights for Australia) would not. As they contract their operations, or withdraw from the market, the level of competition which currently exists would diminish and the domination by international companies would increase. The competition provided by parallel importers would be on a very limited range of titles.

Again, given the competitive international pricing of these products, the main threat which we see is not from legal product imported from overseas, rather it is from illegal product which will become increasingly difficult to detect.

While many companies are moving closer to simultaneous release of films around the world, this is not always possible or most suitable for Australian consumers. Delays in getting copies of the film and the time taken to classify product by the Office of Film and Literature Classification can make this impossible. Different holiday seasons from the northern hemisphere also mean that Australian consumer needs are better met by different release times.

Already in New Zealand the parallel importation of titles before their intended release there has meant that some films have not been released theatrically because it was not commercially viable to do so (see attached list provided by Roadshow Entertainment). This reduction in consumer choice can also be expected to occur with video and games product. Parallel importers tend to bring in the most popular titles. Current distributors provide a choice of a wide range of product to satisfy retailer and consumer demand for choice. It is only possible to supply this range because of effective cross subsidisation of some titles by sales on the better selling titles. Over time, this choice would diminish.

## **CONCLUSION**

The interaction between parallel importation and piracy provisions of the Copyright Act and the classification legislation works well to ensure that our international treaty obligations regarding copyright protection are met as well as providing the Australian consumer with a censorship regime they can have faith in. From our own research, it would be a grave error to underestimate the Australian public's comprehension and value of the censorship system. We believe that the current regime achieves these aims in the most cost effective and efficient way.

Given that the Committee has not demonstrated any negative impact on the consumer from the current regime, nor has it demonstrated that other negative outcomes (such as increased piracy or the undermining of the classification system) will not occur, we do not believe that the benefit in changing the current regime has been shown.