

September 15, 2000

Ms. Kay Collins  
Secretary  
Intellectual Property & Competition  
Review Committee  
Attorney-General's Department  
Robert Garran Offices  
BARTON, ACT 2600  
AUSTRALIA

**RE:** Intellectual Property & Competition  
Review

Dear Ms. Collins:

The Motion Picture Association is pleased to submit the attached supplemental comments in response to the IPCR Interim Report.

Sincerely,

William M. Baker

SUPPLEMENTAL  
SUBMISSION TO THE

INTELLECTUAL PROPERTY & COMPETITION  
REVIEW COMMITTEE

by the

MOTION PICTURE ASSOCIATION

Motion Picture Association  
May 31, 2000

## The Motion Picture Association

The Motion Picture Association (MPA) welcomes the opportunity to submit supplemental comments on the Interim Report of the Intellectual Property & Competition Review Committee. The MPA is a trade association representing seven international producers and distributors of theatrical motion pictures, home video entertainment and television programming. The MPA works to eliminate unfair and restrictive trade regulations, trade practices and non-tariff trade barriers and to allow free competition in the international marketplace. The MPA also directs a worldwide anti-piracy program to protect, through copyright and other laws, its member companies' motion pictures and television programs in over 70 countries throughout the world. In Australia, the Australasian Film and Video Security Office (AFVSO) represents the MPA. It works to enforce the copyrights in Australia of the MPA member companies and engages in extensive campaigns to prevent, detect and interdict infringements.

MPA submitted comments to the IPCR Committee in November 1999, in connection with this study. The comments presented now are intended to supplement those earlier comments in the area of protection against parallel imports.

### Supplemental Comments

MPA agrees with the Committee that parallel importation restrictions should be analyzed on an industry-by-industry basis. Interim Report at 13. However, MPA does not believe that the arguments and information submitted to the Committee justify the removal of parallel import protection from the motion picture and television industry.

The Interim Report favors an industry-by-industry weighing of the costs and benefits of parallel import protection to determine if this protection should be continued. Analysis of these costs and benefits in connection with the motion picture and television industry demonstrates that parallel import protection should be **retained** for these products. There would be no appreciable consumer or market benefits from removing this protection, but loss of parallel import protection **will** negatively impact the distribution of motion pictures and television programs in Australia.

The claimed benefits of removing parallel import protection all revolve around the supposition that this will result in increased competition and lower prices for consumers. Yet there is no evidence of a lack of availability, or overpricing, in the local video industry, which would justify the legalisation of parallel importing of motion pictures.

According to the Interim Report, the ACCC "rejects arguments that prices for copyright goods in Australia are significantly lower than those overseas." Interim Report at 20. The ACCC cites as evidence the studies of its predecessor, the Prices Surveillance Authority (now, effectively, part of the ACCC), in the areas of "books, recorded music, computer software and farm chemicals," for the proposition that prices are significantly higher in Australia than in other markets. Interim Report at 20.

Surprisingly absent from the ACCC list of pricing studies, and also absent from the Interim Report, is any reference to the PSA's study of pricing in the audiovisual industry, referenced in the MPA's initial submission. **This government study demonstrates that no reduction to audiovisual prices would be anticipated if parallel import protections are lifted for this industry.** In 1991, the PSA investigated Australian motion picture prices and concluded that the removal of parallel importation restrictions *would not be to the advantage of the Australian consumer*. Parallel importation restrictions in Australia on the industry were found only to affect the timing, not the price, of videos:

“Top titles sell for around \$US100 to the video rental market. The Australian price is similar. Video consumers in Australia would appear to gain little price advantage from removing the importation provisions. At best they would get access sooner to the occasional title whose cinema release and therefore video release had been delayed in Australia.”<sup>1</sup>

In addition, the AVSDA submitted a confidential report to this Committee that "stated that for both rental and sell-through sales categories, Australian wholesale video prices appear to be on a par with prices in the US, and unambiguously cheaper than comparable prices in the UK." Interim Report at 16-17. Finally, as the MPA pointed out in its initial submission to this Committee, the cost of motion pictures in Australia is similar to the cost of those same motion pictures in the United States or Britain. As indicated in that initial submission, following are comparative video retail prices, compiled in 1999, for several countries in South East Asia, the United States, United Kingdom and Australia.

<b>Average Sell Through Prices in \$US During April 1999</b>			
<b>Country</b>	<b>VHS</b>	<b>LD</b>	<b>DVD</b>
Australia	13.53	22.30	20.00
Hong Kong	16.50	N/A	30.00
Singapore	11.00-17.00	28.50	23.00-29.00
Japan	25.00	38.00	28.50-39.50
Thailand	9.10	60.00	32.00-36.00
United States	12.85	40.00	24.95
United Kingdom	15.50	N/A	28.87
New Zealand	13.35	N/A	21.35

There also is no evidence that parallel import protection has limited consumer choice in the motion picture and television market. To the contrary, distribution of motion pictures, home video and television continues to grow in Australia, giving consumers more choice of what, where and when to view these products and on which medium. These trends have continued since the MPA’s initial submission, based on 1999 full-year figures now available.

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1. *Inquiry into Cinema Admission Prices*, 24 October 1991 (Report No. 38 Prices Surveillance Authority), p. 41.

The total number of cinema screens and patrons have continued to grow rapidly.

<b>Australian Cinema Screens and Attendance</b>		
<b>Year</b>	<b>Number of Screens</b>	<b>Admissions (millions)</b>
1988	712	37.4
1994	1,028	63.6
1996	1,251	73.9
1998	1,576	79.9
1999	1,747	88.0

Similarly, television (in all its forms) and video continue to spread to more consumers, increasing consumer choice and competition in Australia:

<b>Australian Households</b>				
<b>Year</b>	<b>TV</b>	<b>Video</b>	<b>Cable</b>	<b>Satellite</b>
1994	5.7 million	4.3 million	N/A	N/A
1996	6.6 million	4.3 million	198,000	230,000
1998	6.8 million	5.5 million	550,000	412,000
1999	6.8 million	5.8 million	680,000 <sup>2</sup>	510,000

These increases reflect the continued substantial investment in the local legitimate distribution networks for motion pictures and television in Australia, *with parallel import protection*. The recommendation to remove that protection threatens to disrupt this healthy, growing, local market.

In sum, there is no justification for removing parallel import protection from the motion picture and television industry. However, there is substantial justification for retaining that protection.

In its Interim Report, the Committee placed great emphasis on the issue of piracy. The effect on piracy of the removal of parallel import protection was and is only one aspect of the MPA's submission to the Committee. There are other pressing reasons why parallel import protection should be retained. While piracy is not the only reason for retaining parallel import protection, we again submit that piracy continues to be a serious concern for this industry. Yet, the Interim Report treats piracy as of minor importance. For example, the ACCC is quoted as having said that "restrictions on parallel imports are a blunt means to clamp down on piracy" and urges simply that "[p]iracy should be tackled directly." Interim Report at 18. However, the report by the Australian Institute of Criminology clearly points out that removal of parallel import protection "must make more difficult the detection of pirated material" and that, without this protection, pirated material must be detected based on "physical inspection." Interim Report at 19. It cannot be denied that parallel import protection provides an effective means to identify and to stop importation of pirate copies into Australia, without requiring the expenditure of

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2. Figures for cable and satellite subscribers in Australia in the "1999" row were compiled in March 2000.

significant government or private resources to check and identify each suspect shipment as pirate products. Removing parallel import protection would allow pirates to freely enter the country with their products and would require the government and police to then ferret them out from every corner of the continent. This is clearly not an efficient means to protect a legitimate market.

Piracy of audiovisual works is growing in Australia, largely from sources outside of the country. In the first half of 1999, AFVSO, working with Australian authorities, seized *more than three times as much pirate material as in the whole of 1998*. The threat to legitimate distribution of audiovisual works continues to be especially ominous in Asia, as the result of the development of new, *largely pirate*, technologies. In recent years, the MPA, working with local law enforcement officials, has seized *millions of illegal video CD (VCD) copies* of motion pictures and television programs in Asia. There is no legal VCD distribution in Australia. Yet, these pirate VCDs continue to be distributed widely in Asia and increasingly are appearing in Australia, where they are now seized at three times the rate as in 1997. Parallel import protection in Australia provides an important bulwark against the spread of this VCD piracy into Australia, protecting the substantial investments in the local distribution of these copyrighted works.

There are also significant free rider concerns that are not accounted for by the recommendation to remove parallel import protection. The ACCC has taken the position that "traditional free rider concerns" do not justify parallel import protection. Interim Report at 20. It considers that these free rider concerns relate solely to the "sphere of *production*" and notes that "restrictions on parallel imports extend intellectual property into the sphere of *distribution*." Interim Report at 20. Such an analysis does not reflect the long-accepted scope of intellectual property protection, which extends not only to prevent unauthorized copying, but also includes the right to authorize the distribution and exhibition of motion pictures and television programs. Copyright Act, Sections 86, 103; Berne Convention (1971 Paris Text) Articles 14, 14bis. Plainly, the free rider concerns that parallel import protection addresses are not restricted to reproduction, the unauthorized -- pirate -- copying of motion pictures and television programs. Parallel importers act as distribution free riders, benefiting from advertising by local distributors, while reducing legitimate local revenues. Parallel importers typically do not invest in promotion, but "cherry pick" the top grossing motion pictures after seeing which titles are popular, ignoring the broader selection of motion pictures, and do not contribute to the growth of the local industry in any way. Parallel import protection is intended to limit "free riders" in the distribution of motion pictures and television, protecting the copyright holder's distribution rights and promoting the development of a healthy local distribution market.

The ACCC also suggests that free rider problems "should be tackled through specific contractual arrangements," rather than parallel import protection. Interim Report at 20. The Committee accepts this, Interim Report at 22, without suggesting what type of contractual provision would be effective to protect local investment in Australian distribution, beyond suggesting that contracts "with overseas suppliers" could be amended "so as to take account of the changed environment, and notably so as to impose explicit restrictions on imports or re-imports." Interim Report at 23. How mere changes in local supply contracts could protect local distributors against the effect of parallel importation is not clear. Motion pictures and television programs are

broadly distributed to the public in many countries and can be resold to exporters in those countries without the knowledge or control of the copyright holder. A contract entered into in Australia could not control parallel imports of videos sold elsewhere, regardless of its terms. Nor can producers and distributors hope to prevent such parallel imports into Australia by entering into restrictive contracts in other countries. Video copies of motion pictures are distributed too widely and are too easy to ship internationally for any contractual arrangement to prevent their exportation to Australia. The ability to parallel import videos is increasing as motion pictures are distributed on DVDs and VCDs, which are small and light, can be shipped in large numbers, and do not deteriorate during shipment.

Finally, the recommendation to remove parallel import protection from the motion picture and television industry fails to account for the typical distribution patterns for motion pictures in Australia and worldwide. Throughout the world, including Australia, motion picture release takes place in a series of media and in a staged process, known as “windows,” which provides for motion pictures to be released in different formats in sequential order. The appropriate window for each picture in each medium is best determined by the distributor, on a picture-by-picture basis, in each country, in response to market forces. The distribution rights for a motion picture often are administered by a different entity for each medium and by different entities in each country. The timing of each of these arrangements is interrelated, in accordance with the overall worldwide distribution plan for the motion picture.

The windows system promotes the development of theaters, video outlets, Pay TV operations and broadcasters, while maximizing returns in each medium. Parallel import protection merely concentrates competition locally between one motion picture and another. As distributors rely on revenue from each of these sequential media to ensure the profitability of each motion picture, the disruption of distribution in one medium by unauthorized distribution in another medium can have a significant negative impact on the overall profitability of the picture at each level of distribution.

The windows system of distribution enables the sequential release of pictures at the times most suited to each picture in each country. Parallel importers damage the local market for the motion picture in media -- most commonly cinemas and video -- that they sell in advance of. While authorized local licensees are required by contract to release the picture only at the time that the distributor believes best fits the sequential release pattern for that picture, parallel importers are not. Protection against parallel imports provides authorized local distributors, many of which are small businesses, the necessary protection to justify this investment and risk.

The diversion of audiences and revenues from licensed local distributors by the availability of parallel imports discourages long-term business investments by local licensees and the copyright holders in the market. Effective protection against unauthorized parallel imports benefits the local economy by encouraging the growth of businesses related to the distribution of motion pictures, such as local advertising companies and promotional merchandise suppliers, local video duplicators, dubbers, and dubbing studios.

This 'window' system for the staged release of motion pictures through the world is of particular importance to the motion picture industry, because of the many formats in which its products are made available to the public. For this reason, parallel import protection is especially important to the efficient operation of the audiovisual industry.

In summary, the MPA submits that there is a significant public benefit to the continuation of protection against parallel imports in the motion picture and television industry. These benefits include encouraging capital investment, fostering business efficiency, providing employment opportunities and promoting local small businesses. On the other hand, there is no evidence before the Committee that the removal of these protections would provide any public benefit whatsoever. The MPA submits that the balance of public interests is strongly in favor of preserving the protection against parallel imports for the motion picture and television industry.