

Dr Kay Collins
Director
Intellectual Property & Competition
Review Committee Secretariat
Attorney General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

23 June 2000

Dear Dr Collins

Please find following the AFC's response to the Intellectual Property & Competition Review Committee's Interim Report.

I greatly appreciate your assurance to our Policy Advisor that you would be able to present our comments to the Committee at this late stage. A change of policy staff delayed our response but the AFC is most enthusiastic to participate in the crucial debate relating to parallel importation and copyright.

The AFC is strongly opposed to the relaxation of restrictions on parallel importing of audio visual products for reasons explained in our response. We acknowledge that to appreciate our arguments, one needs a thorough understanding of the operation of film, television and multimedia marketing and distribution. The AFC has a large store of relevant industry data and we would happy to provide this to the Committee and also to meet with members in the future.

Yours sincerely

Kim Ireland

Director Policy, Research and Information

AFC'S RESPONSE TO THE INTELLECTUAL PROPERTY AND COMPETITION REVIEW COMMITTEE'S INTERIM REPORT

THE AFC'S INTEREST

1. The Australian Film Commission (AFC) welcomes the opportunity to provide a brief submission to the Committee concerning the importance of copyright protection for the Australian film industry.
2. The AFC has a statutory obligation to keep informed of and to encourage 'all aspects of making, promoting, distributing and broadcasting' of films, television and multimedia in Australia.
3. By reason of the AFC's statutory obligations, the AFC considers itself to be a 'stakeholder' within paragraph 3(b) of the Committee's Terms of Reference. The AFC would be pleased to assist the Committee in its future deliberations, especially by way of information provision on the structure and operation of the industry.
4. The AFC's Policy, Research and Information Branch is valued as a central resource for the film, television and multimedia industries. We compile, collate, analyse and publish a vast range of statistics, catalogues and other data, including industry 'bibles' such as *Get the Picture*. The attached report on the film and television production industry was written late last year in conjunction with the Australian Film Finance Corporation. It demonstrates the in depth analysis of the complex Australian industry regularly produced by the AFC and relevant agencies.
5. The AFC invests in the development of Australian film and in film production. The Committee's proposals will have a detrimental affect on our industry without any clear benefits to producers or consumers of Australian culture.
6. The AFC understands that the Committee is due to report shortly. For this reason, we have chosen to focus on some specific issues which appear to have been overlooked in the Interim Report:
 - (a) The important cultural effects of the Copyright Act on the production and distribution of Australian films and on the development of a vibrant and sustainable local production industry;
 - (b) The critical role of parallel importation in facilitating the currency of rights which underpins our industry. Restrictions on parallel importation sustain geographical markets into which Australian films and other programs can be distributed.
 - (c) The international nature of the Australian audio-visual industry which is increasingly reliant on ventures with other countries who have import restrictions. Worldwide sales and distribution occurs via 'windows' defined by territories.

THE NATURE OF THE AUSTRALIAN AUDIO VISUAL ENTERTAINMENT INDUSTRY

7. The AFC endorses the decision of the Committee to adopt an industry by industry approach in relation to analysis of parallel importing (outlined on page 13). Indeed we would emphasise that the audio visual entertainment

industry has attributes which should distinguish its treatment from that of other industries discussed in the report, such as book and music publishing. Some of these key distinguishing features include:

- (a) the small size of the Australian market and its need for government subsidy;
 - (b) the openness of the Australian market which is subject to very few restrictions and is closely linked to the rest of the world;
 - (c) the high cost and high risks entailed in production and distribution (whether by theatrical release, broadcast, or diffusion);
 - (d) relatively low costs to the consumer of the end product.
8. Prior to recommending the removal of parallel importation restrictions in relation to filmed entertainment, the AFC urges the Committee to conduct a review of the structure of Australian and international film production and distribution. There is no suggestion in the Committee's report that substantial industry analysis has taken place. The effect of parallel importation upon, say, feature films may be different from video footage contained, say, within computer games.
 9. The AFC expects that the 'lead time' proposed by the Committee for the variation of contracts is too short and fails to take into account the manner in which copyright rights are used for the purpose of obtaining funding. Financing arrangements in the film industry (for example) are based upon high risk and the likelihood of long-tail returns. The AFC urges the Committee to conduct a review of the manner in which film finance takes place both in Australia and overseas before making a recommendation as to transitional arrangements.

THE 'WINDOWS' SYSTEM OF DISTRIBUTION

10. The Interim report refers (page 16) to the sequential 'window' marketing structure described by the Motion Picture Association. However there is no response in the recommendation on page 23, nor elsewhere, to the inevitable damage threatening the local industry in by-passing the internationally established distribution regime.
11. The 'window' marketing system applies internationally. The removal of import restrictions would severely impair Australia's capacity to do global business, especially as our contracts would be incompatible with those of our trading partners. In distinguishing production from distribution, the ACCC overlooks their inter-dependence and fails to take account of film financing mechanisms (page 20). Distribution is arranged not only title by title, but territory by territory and often right by right. Distribution advances or presales are also the mechanism which underpins the financing structures of most film and television projects.
12. Without the ability to control distribution 'windows', the financial return to an Australian film would be seriously compromised, for the reasons expressed by the Motion Picture Association. Moreover, the valuation of distribution rights may depend upon the success of an Australian film at earlier stages of the window. The AFC suggests that the ability to obtain international 'arbitrage' may be of benefit as much to Australian originated films, as to films from other countries.

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13. Any film relies on the control of windows. Any Australian film more so, because of our great competitive disadvantage against the United States. Relaxation of parallel import restrictions may increase this disadvantage because of the high purchasing power of US film. The effect would be to diminish the market for Australian film, while making it easier for countries like the United States to market here.

THE INTERNATIONAL ARENA

14. The Australian film, television and multimedia industries are very much linked with the global economy. Such are the costs of production that it is increasingly necessary to seek finance abroad through co-productions and deals with overseas operators. It is critical to note that the countries with which Australia does business have parallel import restrictions in place. There are strict controls in the United States, the completely dominant player in terms of audio-visual production. The European Union, Canada and the majority of developed western countries have some form of import control. It would be a huge impediment for Australia's development in the international audio-visual arena if our copyright regime became completely out of step with that of our potential partners.
15. The Australian film production industry benefits from the production of international films in Australia. The employment of talented Australians on international films provides vital opportunities to increase our reputation as a source of creative innovation and a location for quality productions. This activity takes place within and because of the existence of intellectual property protection.
16. The continued existence of the Australian geographical market makes it possible for smaller entrants to produce and distribute local product. Competition from large-budget international release films or output deals are prone to swamp the Australian market and make it difficult if not impossible for an Australian production to obtain profitable distribution arrangements.

IMPACT OF THE INTERNET AND CONVERGENCE

17. The report refers to suggestions made by various parties *'that the development of the Internet may mean that the parallel importation debate will be made irrelevant by technological developments'* (page 21). The AFC disputes such assertions by reference to several recent studies that indicate the pace of convergence is not at all matched by the hype. This is made clear for instance in the Convergence Review released in May 2000 by DCITA. The Review stresses that convergence has scarcely begun in terms of broadcasting, that current structures are likely to persist for many years and the corresponding legislation is therefore predicted to remain sound in the foreseeable future.
18. Of particular relevance is the fact that the quality of audio-visual material on the Internet is still poor without high level broadband access. This level of access may never be available to the majority of the world's population. It is inevitable that the more traditional means of distribution and marketing will continue to operate alongside the expanding e-commerce environment.

CULTURE AND COMPETITION

19. Supposed benefits arising from the report's recommended major change to the Copyright Act appear to be framed almost exclusively around the goal of competition. The Committee's theoretical approach has defined import restrictions as anti-competitive without recognition of the practical realities of what is already a competitive industry. Enhanced competition is not in itself sufficient justification for jeopardising the property rights of filmmakers and other artists.
20. The AFC suggests that the Committee is also required to consider the more diffuse effects of the copyright regime, apart from the hip pocket effects upon the ultimate 'consumer' of 'product'. Moreover there is no evidence that the price of cinema admission, nor video rentals and sales would decrease if import restrictions were lifted. The cost to the consumer is not problematic in relation to audio-visual products.
21. The development of a unique Australian identity through filmed entertainment is recognised both by Australia's reputation abroad and by consumer surveys. The consumption of filmed product is the foremost cultural activity of Australians. The AFC urges the Committee not to thwart its further development by unnecessarily interfering with copyright legislation.
22. The Government provides a range of subsidies and assistance to the industry in recognition of film being the most pervasive cultural medium of our time, connecting with all Australians. To remove parallel import restrictions on audio-visual material would undermine the Government's fundamental objective of supporting our vibrant and high quality film, television and multimedia industries.