

THE SOUND RECORDING AND RECORD INDUSTRY93. Introduction and some General Matters

The Committee received submissions, both orally and in writing, from three distinct interest groups in the area of sound recordings. The first of these comprised companies engaged in the manufacture and/or distribution of records and audio tapes in Australia. They presented their case both individually and jointly through their association, Australian Record Industry Association Limited (ARIA) which is an association incorporated as a public company. The association's membership includes the major Australian record companies. These, as has been noted, are known in the trade as "the big six". They are C.B.S. Records, Thorn-E.M.I. , Polygram, W.E.A. Records, R.C.A. (now B.M.G./Arista/Anola Limited) and Festival " Records, Of these three, C.B.S., Thorn-E.M.I. and Festival manufacture black vinyl records and audio tapes. None manufactures compact discs. These are either imported or manufactured in Australia for record companies by Distronics Limited which operates the only Australian compact disc factory at premises at Braeside near Melbourne. The record companies were against any change being made to the sections. A second group of submissions came from the music publishers. Their case was presented by their trade association, the Australian Music Publishers' Association (AMPAL) and by the Australian Mechanical Copyright Owners Society Limited (AMCOS). The members Of these organizations are largely, if not

entirely, music publishers. Submissions made by AMPAL and AMCOS were also against any amendment of the sections. The third interest group consisted of a number of independent record retailers. These were small record shops which carry on business in a number of the capital cities. During the course of the public hearings some of them formed an association, the Australian Recordsellers' Association ("the Recordsellers"). This association was formed for the purpose of presenting a united case to the public hearings. The submissions made on behalf of the Recordsellers sought the relaxation of ss. 102 and 103 to enable the importation of limited quantities of sound recordings which were parallel imports. In addition to submissions from these interest groups, submissions were also received from the Office of Consumer Affairs, Actors Equity of Australia and the Musicians' Union of Australia. The Office of Consumer Affairs, as has been mentioned, made submissions supporting the repeal of the sections in their application to parallel imports. The two unions made submissions to the contrary.

94. The changes sought by the Recordsellers would involve their being able, without the licence of the copyright owner in Australia, to import limited quantities of sound recordings legitimately made overseas. Some of them would be prepared to pay a royalty to the owner of the copyright in the recording. Others regarded such a requirement as involving a double payment, a royalty having been paid in the country of manufacture. All said that by reason of
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the nature of the recordings which they expected to import, they did not expect that their imports would amount to more than five per cent of the total record market in Australia. The Recordsellers did not advocate any amendment which would allow importers to flood the market with recordings prior to the release of the locally produced pressings. They made it clear that they did not wish to deprive the Australian record companies of their market. The Recordsellers' submissions in this regard ought not to be seen as entirely altruistic. They are as conscious as the record manufacturers of the danger of opening up the market to unrestricted parallel imports. Such a move could lead to the importation of large numbers of sound recordings which were not authorised for distribution in Australia by the copyright owner. Those who may well take advantage of this situation are the large, retail and chain stores. No submissions at all were received from stores falling into this category. So far as the issues revealed by the submissions were concerned, the position was that no-one sought the repeal of the sections so as to enable the unrestricted importation of sound recordings which were parallel imports, as distinct from pirated articles. The last statement is to be read subject to the submissions made by the Office of Consumer Affairs which takes the view that the sections should be repealed in their application to parallel imports.

95. Before the submissions are examined in greater detail, it should be clear that two different copyrights are involved
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in the importation and sale of sound recordings. Firstly, there is "the mechanical right". This is the trade or industry expression for the right of the copyright owner in a musical work to reproduce the work in the form of records or tapes. In a similar category is the "synchronisation right" which is the trade or industry expression for the right of the copyright owner in a cinematography film to reproduce the work in the soundtrack of a film. The second copyright is the manufacturing copyright in the sound recording itself. The mechanical right is protected by s. 31, the manufacturing right by s. 85.

96. Prior to the 1912 Act the rights of an owner of copyright in a musical work did not include the making of a sound recording of that work. Rapid technological change resulted in Article 13 of the Berlin Revision of the Berne Convention in 1908 which provided that:-

"The authors of musical works shall have the exclusive right of authorizing (1) the adaptation of these works to instruments which can produce them mechanically; (2) the public performance of the said works by means of these instruments."

Article 13 of the Berlin Revision, by reserving to domestic legislation the determination of any reservations or conditions relating to the application of this exclusive right, allowed for the possibility of compulsory licences in relation to this right. As a result s. 19(2)

was included in the Copyright Act 1911 (UK) and consequently the Copyright Act 1912 (C'th). This section provided that any person could, without infringing copyright in any musical work, make records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if he could prove that such contrivances had previously been made by or with the consent or acquiescence of the owner of the copyright in the work and that he had given the prescribed notice of his intention to make the contrivances and had paid the prescribed royalties in respect of all the contrivances made by him. In the present Act the compulsory licensing scheme is set out in ss. 54-64. It takes the form of an exception from infringement. The owner of copyright in a musical work has control over the making of a first sound recording of that work, either by virtue of sub-para. 31(1)(a)(i), which, is the right to "reproduce the work in a material form", and sub-sec. 22(2), which provides that "material form" includes sounds embodied in an article or thing; or by process of implication from s. 55 which provides for the operation of the statutory licence after the first making. The conditions upon which the compulsory licence comes into operation are set out in s. 55.

97. The first condition is explained by Ricketson (op. cit., p. 282):-

"A record of the work must previously have been made in, or imported into, Australia

for the purpose of retail sale by or with the licence of the owner of the copyright in the work. Alternatively, this condition will be satisfied if a matrix (or record) for use in making other records for the purpose of retail sale has been previously made in Australia by, or with the licence of the copyright owner (this does not apply to the importing of a matrix). Finally, as a result of Australia's membership of the Berne and Universal Copyright Conventions, this condition will be fulfilled if a record of the work has previously been made in, or imported into, another member country for the purpose of retail sale and this has been done by or with the licence of the person who was, under the law of that country, the owner of the copyright in that work. . . . [I]f the copyright ownership of a work is divided up territorially, this may be satisfied by the making of a record in a Convention country by the copyright owner in that country even though the Australian owner may not have done or consented to the doing of anything in this country."

The second condition concerns the prescribed notice of intention to make a recording of a work to be given to the owner of the copyright. The third condition is that the manufacturer must intend to sell or supply for sale by retail the recording so made. The fourth and final condition is payment of a royalty to the copyright owner. As a matter of law, the copyright owner is theoretically free to negotiate the royalty for the first recording of a musical work. However, under s. 56(1) the royalty payable in respect of subsequent recordings made pursuant to the compulsory licence is fixed by regulation at 6.25 per cent (see reg. 15A of the Copyright Regulations) of the retail selling price of the record. Thus, as a matter of universal practice, a record manufacturer will not pay

more than 6.25 per cent statutory royalty for a licence to make a first recording.

98. The statutory licence to manufacture records as set out above does not extend to the importation of records. This is because of the operation of s. 64 which provides that, for the purpose of any provision of the Act relating to imported articles, in determining whether the making of a recording outside Australia would have constituted an infringement of copyright if the recording had been made in Australia by the importer, the compulsory licence provisions of ss. 55 and 59 are to be disregarded. Thus, an unlicensed importer of sound recordings infringes musical copyright despite the fact that he could have made the recordings in Australia pursuant to the compulsory licence. That is because he would be in breach of s. 37 of the Act if instead he imported them.
99. The second copyright involved in the import and sale of sound recordings is the copyright in the sound recording itself which is created by s. 85 of the Act. It is a manufacturer's right rather than an author's right. This right exists quite independently of the copyright in any literary, dramatic or musical work which is the subject of the sound recording. Under sub-sec. 10(1) "sound recording" is defined as meaning, "the aggregate of sounds embodied in a record", and "record" as "a disc, tape, paper or other device in which sounds are embodied". Section 24, in turn, defines "embodied". It provides:-

"For the purposes of this Act, sounds or visual images shall be taken to have been embodied in an article or thing if the article or thing has been so treated in relation to those sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing."

It is thus clear that sound recordings in which copyright exists include gramophone records, perforated rolls, cassette tapes, cartridges and discs. But sound tracks used in cinematographic films are not included, these being protected as part of the film, see sub-sec. 23(1). The owner of the copyright in a sound recording is the maker of that sound recording (sub-sec. 97(2)) who is defined in para. 22(3)(b) as being the person who owned the record at that time. In most cases this will be a record company because the maker of a sound recording is the person or corporation who has made the necessary financial investment to produce the recording. An unlicensed importer of sound recordings infringes the sound recording copyright under s. 102 unless he or she has the right to make copies of that recording within Australia.

The Submissions of the Record Companies and ARIA

100. Before going to the detail of the submissions, it is necessary to emphasize that, at the time the public hearings were held and the bulk of the submissions made, there was no manufacture of compact discs in Australia. In April 1987 Distronics Limited established its compact

disc factory near Melbourne. Compact discs had first been marketed in Australia in 1984. In 1986, the Committee had little information about market trends, particularly in relation to the impact of compact discs on the markets for vinyl records and audio tapes. Notwithstanding the passing of a further two years, the extent to which compact discs will eventually penetrate the market remains uncertain. Information recently given the Committee suggests that about 7 per cent of households now have a compact disc player, but many of these also have conventional record players and cassette players. The position is unlikely to clarify for some time, but the Committee has been furnished with current information concerning compact disc sales and a comprehensive table showing trends in sales of vinyl records and audio tapes. The whole area is one which is moving quite quickly. Further, developments may involve the introduction of digital audio tape (D.A.T.). Whether this will occur and, if so, when, is uncertain. What effect the introduction of D.A.T. would have on demand for other sound recordings is impossible to forecast. The Committee's assessment of the situation, however, is that each of the existing types of sound recording will continue in substantial demand for some years to come.

101. In its submission ARIA outlined the history of the record industry in Australia as follows:-

"The industry began in Australia in about 1910 with the production of records in the

form of cylinders. The production of records in the form of discs commenced in Australia in the early 1920's and the production of tapes began in the late 1960's.

Prior to the 1950's there was little local recording activity of Australian compositions or performers. The advent of rock-and-roll music in 1956 and the introduction of the 'single' provided considerable stimulus to the recording of contemporary Australian artists. This was an era of fast development of 'pop' music and the growth of commercial radio and television contributed significantly in this regard, particularly by the emergence of pop radio stations and television programs such as 'Bandstand' and 'Six O'Clock Rock'. In this way, popular artists emerged and Australian record companies increasingly recorded the work of local artists for local release."

The submission referred to ARIA's position within the industry:-

"ARIA is an Association of the major Australian record companies. Its current membership is as follows:-

AAV Australia Pty Limited
 AVAN Guard Music Pty Limited
 Big Time Phonograph Records co
 (Australia) Pty Limited
 CBS Records Australia Limited
 EMI Australia Limited
 Festival Records Pty Limited
 Hadley Records Pty Limited
 Hot Records
 International Direct Marketing Pty
 Limited
 J. & B. Records Limited
 K.G.C. Magnetic Tapes
 K-Tel International Australia Limited
 Midnight Records Pty Limited
 Polygram Records Pty Limited
 Powderworks Records
 RCA Limited
 Readers' Digest Services Limited
 Spotlight Music Pty Limited
 Virgin Australia Pty Limited
 WEA Records Pty Limited

WEA Retail Pty Limited
Wheatley Records Pty Limited."

At the public hearings ARIA amended this list by removing from it three companies, International Direct Marketing Pty Limited and K-Tel International Australia Limited because of doubts as to their present status and Hot Records which had been expelled for non-payment of dues. The submission then proceeded to describe the present structure and organization of the industry:-

"3.2 The record manufacturing industry is primarily located in Sydney and Melbourne and is comprised of six major record companies (CBS Records Australia Limited, EMI Australia Limited, Festival Records Pty Limited, Polygram Records Pty Limited, WEA Records Pty Limited & RCA Limited) who account for approximately 95 % of Australian production and approximately 15 relatively small companies, virtually all of whom are members of ARIA

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3.4 The members of ARIA are more than record manufacturers - they represent either directly or by licence agreements, almost all Australian performing artists who have made records. Thus independent companies such as Mushroom Records, Albert Records and Larrikin Records all have agreements with an ARIA member to manufacture, distribute, sell and promote records made by their artists. Almost every record played on radio is on a label represented by an ARIA member.

3.5 (i) EMI and Festival have their own recording studios. CBS, EMI and Festival have their own facilities for pressing discs in Australia. CBS, EMI and Festival also have their

own facilities for the duplication of recorded tapes. CBS and EMI have their own separately conducted printing plants for printing of record jackets and labels. Approximately 1,148 employees are currently engaged in the manufacture of records and tapes by these three companies.

- (ii) K-Tel International (Australia) Limited and J. & B. Records Limited specialise in the production of mid price or budget records and tapes. Readers' Digest Services Limited is exclusively concerned in the production of records sold by mail order, and a record club, International Direct Marketing Pty Limited, distributes by mail to its members. Carinia Company Pty Limited and Avan Guard Music Pty Limited are largely importers and distributors of classical and ethnic repertoire. The other independent members of ARIA are all Australian-owned record companies who have their products manufactured by the major record companies.

- (iii) Other Australian record companies include Larrikin Records, Mushroom Records, Gorilla Records, Pisces, Cherry pie, Rainbow Records, EMS Records, Hamnard Productions, Albert Productions, and Laser."

102. At the public hearings it was said that five of the six major record companies are wholly owned subsidiaries of overseas parent companies. Festival was said to be the only independent, Australian owned, major record company

having no connection apart from rights and obligations arising under license agreements with any overseas record company. The Committee was told that most of the non-Australian sound recordings of which each company is exclusive licensee are licensed to them through their parent companies. Festival has exclusive licences of copyright from overseas owners of copyright in sound recordings. The major source of income for the six major record companies is derived from the sale of products the subject of an exclusive licence from an overseas owner.

103. ARIA submitted that parallel imports, if legalised, would severely damage the Australian record industry. It said:-

"The Australian record industry has grown from being one which was totally unsophisticated and dealing solely with overseas product, to one which is increasingly sophisticated both in product and technology, employing large numbers of people and actively promoting, encouraging and fostering the talents of Australians. In so doing, it has spent vast sums of money developing its technology and marketing techniques to the point where it is estimated that approximately 2500 people are employed permanently in the business of manufacturing and marketing sound recordings other than at retail level. To maintain this position, the companies have also spent vast sums of money in obtaining licences of copyright of overseas material and in protecting their copyright."

ARIA submitted that this substantial investment in manufacturing plants, recording studios and printing plants had only been possible because of the profitable trading results which the companies had achieved. But it

was emphasized that the profits had come from no more than 15 per cent of each company's repertoire. This 15 per cent in effect carried the balance of the repertoire which was said not to "achieve a surplus over costs". Eighty to ninety per cent of the profitable repertoire is licensed product from overseas and most records which rise to prominence in Australia are made and first released in either the United States or the United Kingdom. Their overseas exclusive licences are the principal assets of the six major companies. It was said that it was important to ensure that the returns from the 15 per cent of repertoire which made money were maximized. This maximization depended on successful planning and the ability to plan was, in turn, dependent upon the market control afforded by ss. 102 and 103. Because of the different markets and marketing techniques which exist territorially, parallel imports could often be purchased overseas at reduced prices. Those speaking for the record companies said that the reduced prices might reflect, among other things, cheaper manufacturing processes and totally different systems of sale. For example, the large United States record companies distribute through intermediate distributors known as sub-distributors who, when the initial sales have died down, can offer large left over quantities of stock at reduced prices. Further, in the United States and the United Kingdom with their large markets, records are deleted from record company catalogues within a relatively short period of time following release. Once this happens, remaining stocks

are sold to wholesale operators who deal with deletions and sell such records for prices as low as 50c per record. In contrast, the Committee was told that records must stay on Australian catalogues for a much longer period. This is necessary, it was said, because the high cost of purchasing exclusive rights for Australia of overseas records and the high cost of producing records in Australia means that records released in Australia will not achieve a surplus unless they are sold in reasonable quantities. The Committee was told that this can take a longer time to achieve than it may in a larger country. Records released in Australia were said to need a longer period of time in which to make profits than records released into the much larger United States or United Kingdom markets. The overseas deletions might represent the most profitable part of an Australian company's operation and, so it was contended, were they able to be imported into Australia, that company's major source of income would be undermined and its current levels of employment and investment would be greatly diminished. This was said not to be just a potential problem. Mr. James Dwyer, the solicitor for ARIA, said that the import shops, contrary to what they had suggested, had been importing mainstream big sellers without permission. Furthermore, specific instances of large chain stores importing up to 50,000 records were given. Because the importation was illegal, the sale of the records could be restrained. If parallel importation were legalised, however, the fear was that the large chain stores would

purchase records in bulk from overseas. When asked at the hearings what would happen if the sections were repealed and the price of the exclusive rights were renegotiated at lower levels, Ms. Victoria Rubensohn, the then Executive Director of ARIA, claimed that the record companies would merely become import agencies as the turnover would not be sufficient to support the superstructure which has been built up. Large sums of money would no longer be spent on promotion if other importers, who spent nothing on promotion, were able to bring in large numbers of the same record and unjustly reap the benefits of such promotion. Similarly, present levels of retail store servicing, especially in country areas, would decline.

104. ARIA submitted that the repeal of the sections would have other consequences. Not only would investment in manufacturing and marketing operations decline, but the record companies' investment in Australian artistes would be jeopardised. ARIA explained that the record companies often make loans and advances to their contracted artistes which are repayable out of any royalty income which results from the sale of records. Contributions are also made to such things as the cost of tours, including overseas tours. CBS Records claimed to have invested \$10 million in local artistes over the last three years. It presently has 15 local artistes or groups of artistes on its roster plus rights in the recordings of si_x others. In the case of one band, Men at Work, that investment was extremely successful. However, CBS said its continued
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ability to invest money in most local artistes depended on CBS continuing to make profits from its international product. WEA, RCA and EMI also claimed to have invested heavily in supporting Australian artistes, not only by way of substantial advances paid to the artistes but also by way of time and effort in promotion. Mr. Turner of WEA stated that foreign recording companies would not entertain the prospect of releasing a recording of an Australian artiste until such time as that artiste had been successful in Australia. Festival, in its submission, claimed its contribution to the recording of Australian artistes is unparalleled. Festival commenced business in' 1952 and in that same year made its first local recording. Although it still has some artistes "directly signed" to it, Festival largely supports local artistes through its financial assistance to local recording companies such as Mushroom Records and Regular Records. one of Festival's licensors is the Australian Broadcasting Commission. As an example of its ongoing commitment to the recording of Australian artistes Festival has had a group called "The Venetians" signed on for three years and has spent over \$300,000 on recording costs alone, including the production and manufacture of two albums. This investment will not be recouped unless the Venetians are successful overseas. If SS. 102 and 103 were repealed, claimed Festival, its marketing and promotion of local artistes would become too great a financial risk and would cease. In short, the record companies claim that their investment in Australian

artistes is subsidised by the profits made on the sale of records originating overseas.

105. ARIA claimed that the continued success, even the survival, of the record industry depended on the retention of ss. 102 and 103 which have been used extensively to combat pirate imports. It was impossible, it was claimed, to consider parallel imports without considering pirated imports at the same time. This was because of the difficulty there is in distinguishing between sound recordings, particularly tapes, which are legitimate, that is, parallel imports, and those which are pirated. In consequence, any relaxation of the sections in their application to parallel imports would necessarily be accompanied by an increase in the importation of pirated copies. In 1977, when piracy was particularly rife, ARIA estimated that sales of pirate cassettes were costing its member companies between \$10 million and \$20 million in lost retail sales per annum. ARIA said the importance of the sections in combatting piracy stemmed from the following considerations:-

- (1) The limited manpower and other resources of the Federal Police to combat piracy meant that the industry depended heavily on the record companies' rights of civil action under ss. 102 and 103. The ARIA submission outlined the efforts taken by the record companies to combat the surge of piracy that took place in the mid 1970's. It said:-

"In a typical case a pirate Cassette or pirate cassettes would be purchased from a retailer, a letter of demand seeking undertakings to refrain from engaging in infringing conduct and delivery up of the infringing tapes would be delivered (in order to establish the 'knowledge' element) and if the infringer continued to sell the tapes beyond a deadline then proceedings were commenced against him immediately. In all cases where proceedings have been commenced, they have been successful. The importance of the ready availability of Sections 0 and 03 in the Supreme Courts of the States and Territories cannot be over-emphasized. It was always necessary to move quickly against retailers, distributors and importers. The commercial life of a new hit record was (and still is) limited and the number one priority was to get the illegal stock off the market, a priority which a court injunction could achieve. Pirate dealers had their own catalogues and distribution networks and they knew in advance of the overseas release date of an album expected to be successful. In December 1976 the Swedish group 'Abba' released 'Arrival' in Europe and within 48 hours pirate copies were available for sale in Singapore. Within 1 week of the European release, pirate copies were in Australia."

ARIA, claims that resort to ss. 102 and 103 resulted in the virtual elimination of pirate cassettes in this country. In the period since 1975 the recording industry identified in excess of 1500 instances of pirate activity which were responded to by the delivery of a letter of demand and/or commencement of civil proceedings. Further, ARIA claimed it had assisted the Australian Federal Police in providing evidence and legal assistance in eight prosecutions throughout Australia in which the Police have relied on the civil proceedings (or letters of demand and resultant undertakings) to prove the knowledge element of the relevant

criminal offence. ARIA submitted that because the manufacturers and duplicators of the pirate articles were generally based overseas, s. 101 of the Act did not apply. In substance it provides that copyright subsisting in subject matter other than works is infringed by a person who, not being the owner of the copyright nor a licensee of the owner thereof, does in Australia, or authorizes the doing in Australia, of any act comprised in the copyright. ARIA said:-

"Had sections 102 and 103 not been available under the legislation the industry would have been virtually helpless and almost totally dependent upon projections by the Federal Police. It is difficult to contemplate at what level piracy would be running today had Sections 102 and 103 not been a part of the Act. "

- (2) The quality of pirated articles is, these days, of such high standard that even experienced record company executives have difficulty in distinguishing them from legitimate articles. Because the sections prohibit all imports, except those that come in with the permission of the copyright owner or exclusive licensee, a check on all other imports - parallel and pirate - can be maintained. If parallel imports were legalised there would be an enormous burden imposed not only on the exclusive licensees, but also the courts.

requiring them to distinguish between parallel and pirated articles and to investigate the origins and legality of production in other countries as well as various other matters of foreign law. During the course of the public hearings an example of the difficulties faced in Sweden where the law does not prohibit parallel importation was given by Mr. Edwards of CBS Records. Mr. Edwards told how in Christmas 1984 a major Swedish retailer purchased its entire stock from an importer who had imported the stock from Malaysia. No action could be taken until the legitimate manufacturer could prove that the Malaysian imports were counterfeits. By the time this could be done the counterfeit stock had been sold. If there had been prohibition of parallel imports as well as pirated articles, action could have been taken immediately.

- (3) Australia's geographical location, close to the Asian countries in which many of the unauthorised articles are manufactured, increases the potential for the importation of pirated articles. ARIA submitted that for any control over piracy to be maintained, the importation of parallel imports as well as pirated articles must be kept within the control of the legitimate manufacturers.

106. Criticisms which the Recordsellers made concerning the quality of records made in Australia, the availability of

records and the efficiency of the indenting services offered by the record companies were contradicted by the submissions made by ARIA and its members.

107. In relation to quality, ARIA said:-

"Technical standards in both the manufacturing process and the recording process have improved to the extent that we are now, and have been for some years, on a par with international standards. Recording studios in Australia now attract proven American and English record producers who visit and produce recordings of local artists. As well, some foreign recording artists have chosen to make their 'latest album' in Australia, often using local session musicians for backing, and local engineers.

Whilst there may have been some validity in criticism ventilated 15 years ago about the quality of Australian made records, this is certainly no longer the case. Australian-made records are equal in quality to the best made in other countries. "

During the public hearings CBS submitted extracts from the Disc Record Quality Evaluation Report issued by the CBS Technology Center which regularly tests the quality of discs from all the CBS manufacturing subsidiaries throughout the world. An examination of a table listing the results of testing over the period 1981 to 1985 shows that Australia has consistently ranked highly (always in the top four), although the Japanese plant even more consistently ranked a few points above all the other plants. Festival, in claiming that the quality of its

records is second to none, outlined its stringent quality control which includes testing its recordings against overseas recordings. WEA claimed the quality of its locally manufactured recordings are as good as, and in many cases better than, the quality of recordings made overseas. It also is required to submit random samples of its Australian recordings to its technical people in the Warner Bros. Group based in Burbank, California, where those samples are tested to ensure that they are of the requisite standard. Although RCA's product is manufactured within Australia by other companies, it monitors quality control of its product and is satisfied that its Australian product is of a quality comparable with those of overseas products. Similarly, claims made by the Recordsellers concerning the poor quality of the packaging of Australian produced records were also rejected. Ms. Rubensohn explained that the cardboard covers used in some other countries (Japan was an example) are stronger than the covers used in Australia, but this was because records manufactured in those countries are placed in covers which are shrink wrapped. The cardboard must be strong enough not to curl under the pressure of the wrapping. Mr. Brian Smith of RCA admitted that packaging in the United States is often more lavish than in Australia, but this, he said, reflected the fact that the United States has a market of 200 million people as opposed to the Australian market of 15 million people. Further, he said that, if he used the "solid bleach board" which is used in the United States to make covers, the

cost of that board in Australia would be double the cost of the material presently used here and this cost increase would have to be passed on to the customer.

108. On the question of availability ARIA said:-

"Local companies endeavour to release on the Australian market recordings made by leading overseas artists as soon as possible after their initial release elsewhere. Most local companies provide simultaneous release for major artists (often as a result of contractual arrangements), if not for a larger proportion of the general catalogue. Where simultaneous release does not occur, records are released within 30 to 60 days of overseas release, depending on the company involved. Exceptions to this release pattern only occur in instances where there is doubt regarding the commercial viability of a record. Such instances occur infrequently and are insignificant in the context of the broader market choice made possible by enlarged catalogues of local companies which now provide approximately 19,000 separate titles."

In his submission Mr. Harper of EMI stated:-

"2.1 The EMI group of companies worldwide have rights to many tens of thousands of album titles. EMI Australia currently have over 2,500 album titles in stock in LP and Cassette configurations. I believe this is the largest number of album titles held in stock by any EMI company in the world and is in addition to 7" and 12" singles titles, extended and maxisplay records and compact discs held in stock by EMI. These latter titles number over 1200.

2.2 In addition to the records and cassettes manufactured by EMI in

Australia a substantial number are imported. of the 3700 titles available, as indicated above, some 1800 are imported as stock items to be held in EMI'S warehouse. Further, licenses are granted to certain companies to import a limited number of titles into Australia."

The other major record companies also defended themselves on this issue claiming that those recordings which are not readily available in Australia are obtained from overseas within a reasonable time. Some delays in the release of records in Australia, it was said, were deliberate and due to marketing decisions; for example, the release of an album in Australia might be timed to coincide with a tour by the artiste or artistes involved, or with the release of a film with which the album is connected. A single is often released before an album as a way of introducing a new artiste to the Australian public. Sometimes a delay was caused by the time it took to produce and despatch the manufacturing materials (master tapes, etc.) to Australia to be used in manufacturing local pressings. It was claimed that if the importation restrictions were removed, the control of marketing strategy and the subsequent benefit 'to the majority of the retail sector, licensers and artistes would be lost.

109. The indent systems of each of the major record companies was described in the ARIA submission. Through the procedure of indentation the manufacturers make available, on request, records which have not been released locally.
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Some companies import these records themselves (Polygram, Festival, WEA). Others have arrangements with other companies whereby those companies will import products not available in Australia. CBS has arrangements with five Australian companies: Avan Guard Music Pty Limited, Colossal Records, Another Record Distributor, Minstrel Records and Larrikin Records. EMI has similar arrangements with Another Record Distributor, Monash Records, Caras Emporium and Con Zahar. RCA has an arrangement with Argus Music Pty Limited. In each case the importer pays to the Australian record company a royalty, thereby licensing the sale of such records in Australia. This royalty includes mechanical royalties which the record company pays to the owners of the musical works reproduced on the records. Mr. Turner from WEA explained at the hearings that imported records are supplied to him by overseas WEA subsidiaries royalty free. Royalties are thus not paid twice.

110. ARIA admitted that the manufacturers are faced with some indenting problems which are beyond their control. These were as follows:-

- "(i) Some overseas manufacturers refuse to indent below a certain number (usually 25-50).
- (ii) Small orders are not given priority by the overseas distributors."

WEA was one company which used to have minimum order

requirements of 25 records, but has now come to an agreement with its United States supplier so that single units will be supplied. When asked whether WEA could obtain records from different suppliers, Mr. Turner replied that he could not. The difficulty was in the extra royalty he would have to pay to a non-associated supplier. RCA is presently restricted to 25 box lot minimum orders by its United Kingdom office. In an attempt to overcome this problem Argus Music, which imports for RCA, has a sharing arrangement with a Hong Kong licensee. Mr. Smith of RCA said that the delay could exceed five weeks. Mr. Harper of EMI explained that under his company's indent system any retailer can order any record held by EMI anywhere in the world, providing the rights in the recording are available to EMI in Australia, and there are no minimum order requirements. Further, the deliveries are air freighted and usually take no longer than three weeks. CBS stated that it is willing to license the importation of CBS products on reasonable market terms where that importation would not interfere with its own marketing and release plans. Three proposed licences, resulting from litigation brought by CBS, are presently under negotiation. Festival has no minimum order requirements. Polygram stated in its submission that it had always operated a system of importing records from overseas so as to satisfy demand for particular records. The whole of the catalogue of music released by Polygram and its overseas affiliates in the United Kingdom and Europe are available within a matter of weeks or even

days of release in Europe. Polygram says that this efficiency is partly due to the fact that their catalogue is unusual in that it contains a vast repertoire of classical records of which only a few of each title will be required by the small market in Australia. Thus, Polygram imports much of its stock. Its import service, for those records not held in stock, benefits from the fact that Polygram is, within Australia, more an importer than a manufacturer of records. Polygram stated in its submission that in its experience those dealers who use its import service are extremely satisfied with it because:-

"(a) it is a convenient way of obtaining these titles from a single order point, (b) the delay in supply is minimal as we airfreight all stock, and subject to our suppliers being able to fill orders, we receive same within a maximum of four weeks from placing the order, (c) the prices are very competitive and dealers have the benefit of using their credit account with us rather than having to pay cash with order."

Polygram believes its system is fair because it makes repertoire available to the public which satisfies a genuine though tiny demand, and, at the same time, recognizes that as exclusive licensee in Australia for that repertoire, Polygram should receive reasonable remuneration by way of royalty for each record imported.

111. ARIA was unaware of the MCPS-BPI Joint Licence Scheme which operates in the United Kingdom (as to which see

paras. 114 and 118) until they received a copy of a submission from Anthem Records shortly before the public hearings. Only Mr. Edwards of CBS appeared to be aware of the scheme. He said the problem of considering the scheme in Australia was that, until the public hearings and the formation of the Australian Recordsellers Association, there' had been no-one representing record sellers with whom ARIA could discuss the matter. During the course of the public hearings the Committee was told by MS. Rubensohn that the record companies were certainly prepared to look at and consider the implications of the scheme. Nevertheless ARIA's conclusions, as stated in its submission, remained as follows:-

- "(a) That there should be no change to the importation provisions of the Copyright Act 1968; and
- (b) As presently drafted, s. 135 does not relate to sound recordings and ARIA makes no submission on whether its operation needs to be streamlined."

112. It remains to mention a submission made by Mushroom Records Pty Limited. Its Managing Director, Mr. Michael Gudinski, spoke at the public hearings. Mushroom Records is not a member of ARIA but Mr. Gudinski spoke in support of many of ARIA's submissions. He said he believes that without the profits Festival receives from distributing international products it would not be able to offer Mushroom the service it presently does in distributing Mushroom records. He does not believe his company would

be in business today but for Festival's support. Mr. Gudinski also expressed concern that, if the importation provisions were repealed, the situation could arise where Mushroom's records could be distributed in competition with it in Australia after release in other countries and importation into this country.

Submissions of the Music Publishers

113. The case for music publishers was presented in writing and orally by Mr. Brett Cottle. As earlier said, Mr. Cottle, although a member of the Committee, took no part in the Committee's deliberations on this Reference. Mr. Cottle is both the Executive Director of AMPAL and the Managing Director of AMCOS. . These two organisations were described in Mr. Cottle's written statement as follows:-

"2. AMPAL is the trade association for music publishers in Australia. Membership of the Association is open to any person or company carrying on business as a music publisher in Australia subject to the qualification that such person or company must be a publisher member of Australasian Performing Right Association Limited ("APRA"). There are 49 members of AMPAL, including all of the major music publishing houses such as Chappel Music, Castle Music, J. Albert & Son, Warner Bros. Music and so on.

3. AMCOS is a mechanical right collecting society. It operates as a non-profit clearing house of mechanical reproduction rights on behalf of its members and similarly constituted overseas organisations with whom it holds reciprocal contracts. AMCOS is organised as a company limited by guarantee and its members comprise 131 music publishers carrying on business in Australia and/or New Zealand, and AMPAL."

Mr. Cottle explained that the business of a music publisher today does not so much involve the reproduction of music in printed or 'published' form, as maximizing the use of musical works in recorded form, for it is in the use of recorded music that there is the greatest potential for royalty income. Today, when a musical work is used in a recording manufactured for retail sale in Australia, the owner of the copyright in that work receives a royalty of 6.25 per cent on the retail selling price. The present system of ownership of copyright in musical works was explained by Mr. Cottle as follows:-

"It is generally the practice of music publishers to enter into agreements with composers or song-writers providing for an assignment of copyright in musical works to the publisher. In some cases the agreements only provide for the appointment of the publisher as agent to collect and pay royalties as a licensee; those agreements are called 'Administration Contracts'. In both cases, however, the parties will agree to share any royalties accruing in respect of the subject compositions. Ten years ago almost all publishing contracts provided for a royalty split of 50/50, i.e. 50% to the writer and 50% to the publisher. In recent years there has occurred a radical change in that respect. Publishing contracts often provide for 65/35, 70/30 and 75/25 royalty splits in favour of the writer, while administration contracts can provide for the writer to receive as much as 95% of all royalty income."

114. Mr. Cottle went on to explain that music publishers also generally obtain Australasian rights to musical works originating in other countries. These rights, he said,

are obtained under 'sub-publishing' contracts which take the form of assignments or exclusive licences granted to the local publisher for the territory of Australasia. There is in existence an agreement between ARIA and AMPAL and AMCOS (The ARIA/AMPAL Agreement) which facilitates the payment of the musical (mechanical) royalty to the Australian music publishers who own the Australian copyright in most musical works reproduced on record. Further, under the terms of this Agreement the members of ARIA have agreed to, and do, pay the Australian mechanical royalty to the relevant Australian publisher on all records containing copyright music that they import into Australia. This approach, said Mr. Cottle, stands in stark contrast with the approach adopted by the 'independent' record importers. Mr. Cottle explained that the policy of the publishers whom he represents, in regard to imported records, is that any person wishing to import into Australia for retail sale records containing musical works, the copyrights in which are controlled by such publishers, is permitted to do so subject to payment of the Australian mechanical royalty. In other words, the policy is to license importers rather than to prevent them importing. Mr. Cottle said that apart from Avan-Guard Music, AMCOS has not, in the past five years, been approached by any of the independent record importers to obtain a licence to import records containing musical works owned by AMCOS members. The essence of Mr. Cottle's submission is that the publishing industry depends on protection against unauthorized importation to maximize

the returns from its investment in the acquisition of rights to musical works, the major source of income from which is the use of those works in sound recordings. Insofar as the right to acquisition of local rights is concerned, he said composers are often rewarded in advance and Australian composers rely very heavily on these advances, not only to continue composing, but also to buy instruments and to pay for demonstration recordings, video clips and tours. Because the policy of the music copyright owners is to license importers rather than to prevent importation, Mr. Cottle thought the United Kingdom MCPS-BPI Joint Licence Scheme could work quite well. He said:-

"Insofar as Australian music publishers and AMCOS are concerned, we are quite prepared to implement a scheme along similar lines in Australia and indeed stand prepared to spend the money to establish the necessary infrastructure for such a licensing system."

This matter is referred to in more detail in para. 118.

115. Mr. Cottle voiced his support for the arguments relating to 'piracy that ARIA put forward in support of retaining the sections. He spoke of the difficulties copyright owners would face if they were required to establish the illegality of manufacture of imported articles. He expressed concern that this problem would be exacerbated in relation to some overseas countries where the distinction- between legitimate recordings and pirate
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recordings is blurred. For example, he referred to the Philippines where, because it is a Berne Convention country, a mechanical reproduction right is granted, at least in theory, to Australian composers. The reality, he said, is that virtually no mechanical royalties are payable in the Philippines for two reasons: firstly, the copyright infrastructure is not sufficiently developed and, secondly, the system of administration of justice makes it impossible for a foreign copyright owner to enforce his or her copyright in the Philippines. Should parallel importation be allowed, he said, these recordings, which are regarded as 'legitimate' in the Philippines, could be dumped on the Australian market without the Australian musical copyright owner, or indeed, the original copyright owner, wherever he might be resident, ever receiving anything.

The Submissions of Actors Equity and the Musicians' Union

116. No submissions were made to the Committee by individual artistes. The Musicians' Union of Australia sent in a written submission and the Federal Secretary of Actors Equity of Australia, Mr. Michael Crosby, spoke at the public hearings. The Musicians' Union submission can be summed up by reference to the following extract from it:-

"It is not uncommon in the case of popular sound recordings for an album (ten or more tracks) to cost an amount in excess of \$100,000. Since no one can predict with certainty the way in which recorded music will be received by the consumer public, we acknowledge that the production of a sound recording involves the investment of

substantial sums of money which could be described as risk capital or investments of a speculative kind. In the case of the Australian recording industry the funding for recordings of Australian talent is sourced from the major record companies. Those record companies carry a diverse and extensive range of recordings most of which are made outside Australia. It is recognised that the capital investment by recording companies in Australian recordings is only possible because of the volume sales' which are for most part achieved from the overseas product.

The Union submits that the Copyright Law Review Committee should not recommend any change to the importation provisions of the Copyright Act."

Mr. Crosby, in his oral submission, expressed a similar view. Mr. Crosby said he thought that the removal of the restrictions would totally undermine the local manufacturing industry and consequently the demand for the creative products of his members. He did not see the major companies as having a monopoly on the development of Australian culture, but he thought that even the independent recording companies depend on the facilities, such as recording studios, provided by the major companies. Mr. K.T. Dwyer, of Messrs. K.T. Dwyer and Associates, Solicitors, submitted that a performer's interests coincide with the interests of the record company with which he or she is associated. He too expressed concern, on behalf of performers, that records sold overseas, with usually a lower royalty base than that negotiated within Australia, could be purchased cheaply overseas and imported back into Australia. Mr. Dwyer has a large number of clients who have entered into contracts

to perform and compose musical works with companies in the record industry.

The Submissions of the Recordsellers

117. The detail of the submissions made on behalf of the Recordsellers may be summarized as follows:-

(a) At the present time the Copyright Act has been a catalyst of much bitterness in the relationships between manufacturers and retailers. The current legislation should be altered to allow a much wider dissemination within the Australian community of every aspect of musical culture in the world today, in an environment free of harassment.

(b) This alteration should take into account' the different aspects of the recording industry in Australia and in particular the problems associated with (1) the importation of product unavailable or out of stock in Australia; (2) parallel importation; and (3) piracy and counterfeiting.

(c) A very distinct and separate alternative record market exists in Australia in which people demand material that is not generally available from the ARIA catalogue. There are 'approximately 100,000 listings in the

catalogues available in the U.S.A. and the U.K., whereas the Australian companies only have about 19,000 records on catalogue. Records not manufactured in Australia cover a host of minority interest music. The demand for these items in Australia is not great, but it is a demand which ought to be met. The smaller record shops are well able to meet it, if they are allowed to import.

- (d) A second aspect of the import record market concerns recordings which, although available in Australia, differ from versions of those recordings produced overseas. Purchasers in Australia are interested in overseas versions of records for a number of reasons including:
- (i) the technical quality of a record which can vary from recording company to recording company. In Australia records are rarely if ever made from the original master tape and the major audiophile releases (very high quality) are neither pressed nor available in Australia;
 - (ii) the particular mix of a record which can differ between recording companies;
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(iii) the cover of the record which can differ between countries, for example, an American album may have a gatefold cover while the German version may have a glossy shine;

(iv) other differences which may exist including the number of tracks on a record or the colour of a disc and so on.

Some people like to collect all the different versions of the one recording, whether there be nine or, in some cases, as many as 32 versions. They like to have them all. They are prepared to pay an additional \$6.00 to \$9.00 above the price of a locally pressed recording for the imported version.

(e) In total, the market serviced by the import record shops constitutes not more than 5 per cent of the total recording market.

(f) This market, contrary to the ARIA submission, is not adequately serviced by the major recording companies in Australia. This is not only because the importation of small orders is unprofitable but because the companies often do not have sufficient knowledge of the catalogues

of their overseas parents or licensors or the ability to draw on sources other than their main overseas company supply . The owners and managers of the import record shops have the expert knowledge in varying musical fields and in the sources of supply needed to service the specialised musical markets involved. The specialised music shops depend on this knowledge to keep their businesses going. For example, to sell classical music, the record seller must know the difference between Arthur Schneider's performance in 1935 of Beethoven piano sonatas and Glen Gould's performance of them in the 1960's. The customers expect this type of service. The customer wants to be able to choose from all the versions of a work that may be available either here or overseas. This is the market serviced by the import record shops .

- (g) Thus, what the Recordsellers are seeking is the right to import recordings in a variety of specialist areas. They are not troubled about price, and they do not intend to deprive the Australian recording companies of their mainstream music market. Nor is it their intention to import pirated or counterfeit records.
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118. The Recordsellers' proposal was that the Act should be amended to confer on them a statutory licence to import up to 25 copies of an article at any one time. As part of their scheme, and in order to address "the perceived need to compensate the Australian exclusive licensee for any loss of sales which it would reasonably expect to be entitled to by virtue of its copyright", the Recordsellers proposed adoption of a royalty stamp payment system for imported records payable to the local copyright owner similar to the system which is presently operating in the United Kingdom. Details of the system which operates in the United Kingdom, the Mechanical-Copyright Protection Society Limited (MCPS) - British Phonographic Industry Limited (BPI) Joint Licence Scheme, (the scheme referred to by Mr. Cottle; see para. 114) were sent to the Committee by Mr. K. Stafford, the Manager of Anthem Records, a record shop in Sydney. Mr. Stafford suggested the scheme as a solution to enable the import shops to continue to service the specialist record market without the constant threat of litigation under ss. 102 and 103. The scheme was devised in order to simplify the grant and administration of import licences by MCPS (representing music copyright owners) and BPI (representing sound recording copyright holders). The scheme allows the import and sale of many records without infringement of either copyright provided that the imported product bears royalty stamps which are provided by HCPS, subject to the terms and conditions stated in the Joint Import Licence Agreement. Under the Agreement one licence is granted to

cover the two copyrights. It licenses importers to import the following products:-

- (a) My record lawfully manufactured outside the EEC which is not, at the time of entry, in the catalogue of any BPI member company.

- (b) Any "special format of a record" which is in the current catalogue of a BPI member company provided that the prior written permission of that company is obtained and the MCPS is notified before importation takes place. "Special format" is said to include any record where the contents are different from the U.K. version; or where there is "a premium of pressing" or sound laboratory reprocessing to produce a superior sound.

Under the scheme there is no limitation on who can apply for an Agreement. Attached as Appendix H is a copy of the agreement which is used. The Recordsellers do not seek the adoption of this exact scheme. Rather, their submission seeks an amendment whereby they would have a statutory licence to import up to 25 copies of an article at any one time and provision for a scheme whereby royalties would be paid on the imported articles.

119. The Recordsellers consistently expressed disappointment with the indenting services offered by the major record

companies. Their lack of confidence is expressed in the following comment taken from one of the submissions:-

"If the indenting services described in the ARIA submission worked effectively and catered for specialised interests then why would there be any need for import shops?"

The Recordsellers' submission contained an overview reflecting their claimed experience of the indent services offered by the major companies. This has been annexed as Appendix I hereto. More recently there was produced to the Committee a letter from one of the major record companies which referred to a schedule of recordings and indicated whether it claimed ownership of the copyright in them or not. In a number of cases it was unable to say whether it claimed copyright in particular records; in other words this information was not known to any of the company's employees in Australia. The Recordsellers claim that this lack of information, one way or the other, makes it impossible for them safely to import records in this category; yet the copyright owner, if he or she could be found, might readily consent to the importation. The position would be different if a company, ignorant of whether it owned the copyright or not, were prepared to say that, because of its lack of knowledge, it would not treat any importation as an infringement. But there is no indication in the letter that this would be the company's attitude. The Recordsellers said that the small import or specialist record shops specialise in small orders and

speedy delivery. One member said that he had 40 different suppliers in America alone from whom he could obtain records within a week. Another said that he had used an import service run by one of the major companies for a year, but then given this up as it proved "too unreliable" and generally took a few months to obtain a record, whereas he could, through his own resources, obtain records within a few weeks at the most.

120. Although the Recordsellers stated they were prepared to pay a specific import royalty on imported records to the person or organisation entitled to that royalty in Australia, they nevertheless expressed misgivings about the validity of the territorial principle and the payment of these import royalties in situations where the exclusive sound recording copyright licensee in Australia (to whom the import royalty would be paid) was a subsidiary or offshoot of an overseas company which owned the copyright in the country of manufacture and to whom a royalty had thus already been paid. Of this matter the Recordsellers said in their written submissions:-

"2.4 The buttressing of the international licensing system by the importation provisions enables artificial partitioning of the world market which provides a means of maximizing profits to the licensor and the licensee and sometimes at the expense of availability of recordings to the public in domestic markets. It is implicit in the judgment of Stephen J. in Time-Life that the importation provisions permit this to eventuate to the detriment of

the public interest and he cites Canadian and New South Wales authority to support this contention (138 C.L.R. at p. 555).

- 2.5 The objection of ARIA members to parallel imports on the basis of evasion of royalties is transparently wrong: as royalties form a component of the price which is exacted from the importer at the point of sale it is difficult to understand this objection unless the payment of 'double royalties' is the object.

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- 2.9 The 'unfettered power of copyright owner to prohibit importation' is a source of market power with strong monopolistic overtones. The developments in the law of copyright outlined above stress the 'monopolistic' nature of copyright in its modern application and raise the question of whether it is appropriate or desirable to use copyright as an artificial support to an industry. It is submitted that it is not. We would however suggest that the Trade Practices Act has great potential to curtail monopolistic activities which adversely affect the public interest in free access to material the subject of copyright protection without detracting from the rights traditionally held by its owner."

The Committee notes in passing that the remarks attributed to Stephen J. in the Time-Life case do not appear to be an accurate reflection of what he said. The Recordsellers also expressed concern with the perceived situation whereby Australian subsidiaries take action to prevent importation while, on the other hand, their parent companies overseas freely, and with knowledge, sell

articles for export.

121. In the course of their oral submissions at the public hearings the Recordsellers pointed out what they claimed to be some false assertions made by ARIA in its submission. ARIA claimed that the major record companies employ sales staff who visit each retail record store to play new releases to retailers and to collect orders from them. This claim was vigorously refuted. ARIA's further claim that retailers generally look to the record companies for guidance as to what orders should be placed was also resisted. On the contrary, the Recordsellers claimed that the reverse is the situation and that the specialist record shops "break" (i.e. introduce) new records so that the large companies glean marketing information from the indent orders received from the retailers. In a written submission one record seller claimed that record company personnel from all the major record companies regularly contact his shop to see what products are new on the market and to seek advice on what is selling well and is commercially viable. The Recordsellers also refuted an ARIA claim that some record companies have a policy of singles being supplied on a sale or return basis. They said that only 5 per cent of the average shop stock would be supplied on this basis.

122. Although it was not mentioned at the public hearings, some of the written submissions from the Recordsellers raised the issue -of second-hand records. One Western Australian

submission outlined action taken by one of the major record companies over the sale of three second-hand record imports which did not have that record company's own label sticker intact upon them. The record seller wrote:-

"As a second hand dealer and licensed to trade in used and new Records, Books, Tapes, Magazines, Compact Discs etc., it would be very much appreciated by your Committee's enquiries and findings to elaborate on the nature of the Second Hand Dealers Act in connection with the rights to buy and sell used goods (Records etc.)."

The situation with regard to the sale of records including second-hand records is outlined 'in Copinger and Skone James on Copyright (supra, para. 1200, pp. 531-2) :-

"... the right of selling the material object is not part of the copyright conferred upon an author by the Copyright Act 1956. Copyright is infringed by reproduction of a work, not by sale of it unless such sale amounts to publication. It is true that a person who sells a work, which to his knowledge infringes copyright, is, by section 5 of the Act of 1956, exposed to an action for infringement of copyright. But no person can, it is thought, be sued for selling a work which has been lawfully made, save only in the case of a work lawfully made in another country, but improperly imported into this country . . ."

This is the situation as it exists also in Australia. Under s. 103 of the Act any subsequent unlicensed sale of an improperly imported article is, subject to proof of the requisite knowledge on the part of the seller, an

infringement of the copyright in that article.

123. The Committee received much information from various record sellers complaining of litigation which had been commenced against them by the record companies. The record companies did not deny this. In fact, Ms. Rubensohn, speaking for all the record companies, stated that they made no apology whatsoever for having enforced their rights under the Act. Mr. James Dwyer, the solicitor for ARIA, attached a list to his written statement showing the large number of sound recording titles which had been the subject of copyright infringement proceedings brought by him on behalf of record companies against import retailers over the last 10 years. The list numbered over 100 instances. At the hearings Mr. Dwyer stated that to his knowledge there were no cases in which action had been taken where records were not available locally or where there was no intention to release such records. The Recordsellers, on the other hand, stated that the records which they import are ones they have difficulty in obtaining through the record companies and that those companies are therefore often "frivolous" in their litigation. In a submission made by Messrs. Jamieson, Johnston & Associates, Barristers and Solicitors of Perth, who have represented Western Australian record retailers in disputes involving alleged breaches of the importation provisions, the following points are made:-

- "(i) The substantial evidence presented to this firm which indicates the selective and discriminatory enforcement by a particular record distribution company of the importation provisions of the Copyright Act. Each of our clients involved in such disputes has been able to establish that illegally imported records are able to be purchased at will from larger Perth record retailers which appear to have the tacit approval of the record distribution company in question to trade in infringement of the legislation in question.
- (ii) The failure of record distribution companies to adequately inform all record retailers of the record labels of which they are possessed of exclusive distribution rights.
- (iii) The curious propensity of a record distribution company to litigate in circumstances where the quantum of damages in issue is insignificant in comparison with the legal expenses incurred by the parties to such disputes.
- (iv) The failure of the existing provisions of the Copyright Act to distinguish between new and used or second hand records.
- (v) The failure of record distribution companies to supply record retailers with the product of which such record distribution companies are possessed of exclusive distribution rights. If record distribution companies were to more diligently fulfil the contractual obligations of their agency agreements, the demand for illegally imported product would be greatly reduced.
- (vi) One effect of the legislation in its current form is that a record distribution company possessed of exclusive distribution rights which chooses not to supply product which is otherwise only available overseas, is able to apply the importation provisions
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of the Copyright Act against any entity which responds to such consumer demand by supplying the product in question. In such a monopolistic situation neither artist, consumer, record retailer or distributor benefit."

In summary then, the Recordsellers sought relaxation of the provisions to enable them to import sound recordings where the recordings were unavailable in Australia, or where, because of uncertainty as to who was the owner of the copyright in a recording, a record shop could not ascertain within a reasonable time the identity of the person or company with whom an order could be placed. The Recordsellers' preferred solution was the right to import limited quantities of unavailable records. At the public hearings it seemed not unlikely that some commercial solution to the problem might be reached through the implementation of a licence scheme to be entered into between ARIA and the Recordsellers' Association. Although the parties remained optimistic about this proposal for a period after the public hearings concluded, it would seem, on the best information that the Committee has been able to obtain, that the negotiations have not proceeded as well as might have been hoped. Furthermore, the Recordsellers' Association has not attracted a large membership and some members appear to have lost interest. In those circumstances it seems unlikely that anything will come of the negotiations. In any event, the negotiations would not have provided a solution for all cases. Accordingly, the question of whether there should

be some change in the legislation remains to be considered.

Consideration of the Competing Submissions on Sound Recordings

124. There are substantial questions concerning a number of matters, particularly the quality of Australian records and their covers, the availability of overseas records, and the adequacy of the services provided by the major record companies in relation to the importation of records in which they' own or control the copyright, including absence of knowledge in some cases of whether they, or their associated companies overseas, have the copyright in particular records. The Committee has done its best to develop views about issues of this kind, but what it has said must be understood against the background of what has been earlier said about the nature of the Committee, its powers and its manner of going about its task.
125. Although the competing submissions relied upon by the various interests in the record industry necessarily differed in detail from those made in relation to books, they gave rise to similar issues and suggested solutions. On the one hand, the record manufacturers, the music publishers, and the musicians' and actors' unions, like the book publishers, all wish the sections to remain as they are. On the other hand, the Recordsellers, like the
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booksellers, desire a relaxation of the provisions of the sections so as to enable them to import legitimately made copies of articles which are unavailable in Australia. Only the Office of Consumer Affairs advocated an amendment of the sections which would allow the parallel importation of all legitimate copies.

126. The benefit which the Recordsellers state they wish to obtain is the ability to service, without fear of prosecution or civil action, specialised musical markets which, in all, do not account for more than 5 per cent of the total record market. This small percentage of the market, they said, is not being adequately serviced by the licensed suppliers. Their main concern is the availability of records. Generally speaking - and this should be emphasized - they were not concerned with the price of records in Australia. The hope was expressed that a relaxation of the sections would stimulate competition amongst the record manufacturers and overseas suppliers resulting in increased efficiency in the indent services offered by the major record companies.

127. The reasons which the record manufacturers advance for the retention of the sections in their present form follow closely those relied upon by the book publishers in relation to books. These are summarised in paragraph 78 of this Report. It is not proposed to repeat the general matters there referred to. But, specifically in relation to records, it is claimed by those seeking the retention

of the sections:-

- (a) Because of the protection which the sections afford, the record companies have been able to establish and maintain record production, manufacturing, importation and associated operations providing a large supply of high quality titles. The repeal of the sections would result in the cessation of these operations with the result that the local companies would become mere import agencies. The numbers of people employed would be drastically reduced.

- (b) Record production by the six major record companies is not the only recording done in Australia. There are other recording companies which have no connection with any overseas record companies or licensors. These companies also benefit from the protection which the sections afford in the use that they make of the recording, promotion and distribution facilities owned by the larger companies.

- (c) The viability of the local record manufacturing industry has meant that the record manufacturers and publishers are often prepared to take a financial risk in relation to music written and performed by Australian musicians and artistes. If the sections were repealed, it is the record manufacturers' and music publishers' case that their capacity to

promote and foster the Australian music industry would be substantially reduced.

- (d) The repeal of the sections would not increase the availability of records in Australia. On the contrary, fewer records and titles would be held in stock when the record companies reduced their operations. Many more records would have to be imported pursuant to specific orders with consequent delays in their availability when they were required.
- (e) Of considerable importance is the fact that, if the sections were repealed or relaxed so as to permit the importation of legitimately made copies, the ability to control pirate imports would be seriously affected.' Most pirated recordings (mainly "tapes) are manufactured outside Australia. Because the sections do not presently require evidence of unauthorized manufacture, action against pirated goods can be taken very quickly. In addition, the lack of resources which the police authorities can allocate towards the control of pirate activity, means that legitimate copyright owners rely very heavily on these sections in their present form to restrain and inhibit the piracy of sound recordings. If an applicant for relief had to establish that the recording was a pirate copy, rather than a parallel import, he would, in most cases, have great

difficulty in discharging the onus of proof because of the high quality of pirate articles and their close similarity to legitimately made articles.

128. In the Committee's opinion, the most contentious issue is the question of the availability of records. The Recordsellers assert that the record companies do not have readily available many of the titles with which they deal and that the companies operate in an inefficient manner in their attempts to make these titles available upon request through their indenting services. The record companies deny these assertions. They variously claim that their range of titles rivals those held in any other country, that any faults with their indenting systems arise because of external factors, and that in the context of broader availability, loss of protection from parallel importation will result in a narrowing of the choice of titles held and/or manufactured locally. They gave reasons for some delays in releasing records in Australia including deliberate marketing decisions, and the time taken to manufacture and despatch manufacturing parts to Australia. However, ARIA did admit some indenting problems, namely, difficulties in ordering small quantities and the time taken to fulfil requests. Some of the companies do have minimum order requirements forced upon them by their overseas suppliers. At the same time, the Committee notes that some of the companies have overcome this problem and accept single orders. Although Polygram said it can fulfil orders within a matter of weeks or even days of a
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request, other companies admitted it often takes them over five weeks to fulfil an import order. The Committee has reached the conclusion that overall the record companies are not providing adequate importing service for small specialty record retailers, although it must be noted that there are wide variations amongst the record companies in the level of service they provide. The Committee is persuaded that the specialty record retailers service a market which requires a high level of knowledge and expertise on their part, and which is not, at least at the present time, being serviced in an equally knowledgeable or efficient manner by the record companies.

129. Other questions at issue concern the quality of records manufactured in Australia, and other differences which are said to exist between records which are manufactured in different places, for example, the number of tracks, the colour of the vinyl, and the design and quality of the record cover. The Committee accepts that there is a market within Australia for records which, although in one sense are available in Australia, in another sense are not, because of differences of this sort which may exist between them and records manufactured overseas. The Committee received no evidence which persuaded it that the quality of Australian manufactured records was below standard. Limited numbers of records are produced, although not in Australia, with a very high technical quality. These are called audiophile records and are more expensive than records which are manufactured in the usual
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manner. The Committee accepts that these and other differences, which are important to some consumers, do exist between records manufactured in different countries and those made here, and that the availability of such records in Australia is linked to the general question of availability of records in Australia.

130. As with the book industry, the Committee does not think that Australia, generally speaking, suffers greatly from unavailability of record titles in any absolute sense. Again, as with books, no submissions were received from those who sell large numbers of records such as the departmental and chain stores. The complaints came from record sellers who are concerned to provide various specialist customer services and who wish to be able to supply all the needs of often equally knowledgeable customers. The, Committee believes that it was frustration on the part of the Recordsellers at not being able to obtain certain non-mainstream records through the record companies that led them to make the submissions they have. Most, but not all, of the Recordsellers said that they do not wish to import the mainstream big sellers and recognised that flooding the market with parallel imports would be harmful to the record companies and their levels of investment in the production of local product and the promotion of local talent. To prevent this occurring the Recordsellers suggested an amendment to the Act which would allow them to import limited quantities of recordings purchased from licensed sources in the country
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of origin. They emphasized that the amendment they propose does not contemplate importation of either pirate recordings or significant quantities of records readily available in Australia.

131. Another matter relied upon by the Recordsellers was that when they purchased records overseas the composer and artiste concerned, as well as the record company, were paid a royalty; they also said that these records were sold to them knowing they were to be exported. The Recordsellers claimed the object of ARIA's objection on this basis must be the payment of double royalties. The acceptance of the Recordsellers' submission would involve the repeal of the importation sections of the Copyright Act in their application to parallel imports leaving them to apply only in relation to pirated articles. It is not clear to the Committee that the Recordsellers appreciated that this was the consequence of their submission. If they had, it seems unlikely that they would have put as their firm proposal that the sections be relaxed, but not repealed altogether, so as to enable them to import limited numbers of overseas records not available in Australia. They put this proposal knowing that any greater relaxation might prove detrimental to their own interests because it would open the door to the importation of unlimited quantities of overseas recordings, something which, it might be expected, would soon be taken advantage of by the departmental and chain stores with their very large turnovers and ability to buy

large quantities of remaindered stocks.

132. There was no evidence given to the Committee that records are being sold at unreasonably high prices. Indeed the Committee was told, both by the Recordsellers and the record companies, that it is more expensive to import records. General reference has already been made to the submission from the Office of Consumer Affairs; see paras. 30-33. More specifically with reference to records the Office had this to say:-

"Assuming that the majority of records sold in Australia are locally pressed but are made from foreign recordings and, further, assuming that records pressed overseas could be imported more cheaply it is valid to say that the system of exclusive licences is fundamental to the local industry. However, the inevitable consequence of this system is higher prices and (probably) of a smaller range of works, both of which are contrary to the consumer interest. Nevertheless, on the assumptions above that the existence of the Australian industry may well depend upon some form of protection and the assumption that it is worthwhile to maintain the local industry despite this, the Office of Consumer Affairs would prefer to see such essential protection provided by way of duties imposed on imported records rather than by continuing parallel importing of legitimate copies as an infringement of copyright. Again, the Office considers that these protection arguments, and assumptions, could usefully be the subject of a reference to the Industries Assistance Commission."

The statement of the Office of Consumer Affairs that the inevitable consequence of the present system may be higher prices for recordings pressed in Australia may be correct

but, as mentioned, the Committee has no direct evidence that this is the case. If it is, the view could be taken that the Australian community would be advantaged if recordings pressed overseas became freely available in Australia, notwithstanding that this may cause serious harm to local industries, and also lead to the major record companies not providing the assistance to local composers and orchestras or bands which they presently provide. The Office of Consumer Affairs suggests that "these protection arguments" could usefully be the subject of a reference to the Industries Assistance Commission. The Committee sees the force of this suggestion. Plainly, present policy is in favour of deregulation generally. This could be carried through into the copyright area, but at the expense of locally established industries and local composers and performers, and also at the expense of the general philosophy underlying copyright legislation which is the protection of the integrity of copyright works. There are some other considerations, as what is said in the next two paragraphs will indicate. On balance, the Committee is of the view that there ought not to be the freeing up of the market which the Office of Consumer Affairs would propose.

133. The additional considerations referred to in the last paragraph are as follows. The Committee was told that records are produced very cheaply in the Philippines but that this is partly due to the fact that few if any mechanical -royalties are paid. The Committee was also

told that records are made available at very cheap prices in the United States and the United Kingdom after they have achieved their initial sales targets, but once again without the payment of mechanical royalties. Furthermore, the record buying community has been used to the ready availability in Australia of new releases. In the case of the more popular music sufficient quantities are available to meet the demand. To await the remaindering of stock overseas would turn much of the industry in Australia into a second-class supplier. Polygram, which imports most of its classical products, submitted prices which show that locally manufactured goods are in fact cheaper. In his written statement (May 1986), Mr. John Derry, the Import Manager of Polygram, stated:-

"Attached .. is a letter that I sent to all retailers using the PolyGram import service together with a revised price list for 5 December 1985. (At the present time a full-price locally manufactured LP in Australia retails for \$12.99). It will be seen from the list that the prices of an LP bought through PolyGram Import Services will vary according to the source country. That is partly a reflection of the exchange rate of the Australian dollar, partly a reflection of the recommended retail price in the country concerned, upon which royalties for the relevant record are paid, and partly caused by varying rates of air freight. It will be seen that a full price pop LP coming from the UK ought to be retailed in Australia for \$15.00, and a pop LP from France, Germany and Holland for \$18.00. In the case of classical repertoire, the prices would be \$15.00 for an LP coming from Germany or Holland, and \$18.00 for an LP from France. I am acquainted with the prices charged by so called 'independent record stores' for parallel imports and I am aware that they are in the range of \$18.00 and upwards."

The Recordsellers were in agreement that the cost of importing records is more expensive than the cost of purchasing locally manufactured records, but this may be due, at least in part, to the existence of the controlled market. As has already been stated, the Committee has not been in a position to conduct an inquiry in which the material supplied to it could be adequately tested, although the Committee does not question the good faith of those supplying the material. All the Committee can say is that no evidence has been placed before it which would warrant the conclusion that prices charged for records in Australia are unreasonably high.

134. Whatever the position about the level of prices for records may be, there are other reasons why the Committee does not recommend the repeal of the sections in their application to the parallel importation of records. These considerations are similar to those which apply in the case of the book publishing industry. They relate to the levels of investment in plant, equipment and technology dedicated to recording and record making, and the employment of large numbers of persons, some highly qualified, in the industry. The record industry in Australia is obviously a viable one and represents a significant degree of capital investment and employment. It would be unfortunate if a change led to any adverse effect on this situation. As earlier mentioned, uncertainty surrounds the extent of the future demand for vinyl records and conventional audio tapes because of the

Australian music industry. The current marketing of recorded music permits the record companies to maximize the revenue from each musical work because it can only be imported by or through the local copyright owner. In the case of an international hit substantial profits can be made by the record company which in effect subsidises those records which are not profitable. Should the degree of profitability of the successful records be reduced, it is likely that the major record companies would cut back their involvement in local music. They would do this for two reasons, namely:-

- (1) local music is expensive, as it has to be 'found', developed, recorded and promoted;
- (2) imported music comes with a track record already developed, and it requires a minimal investment for it to be profitable.

On the other hand, there is a fairly strong demand for local music which offsets to some extent its risk and cost. Nevertheless, it would be unfortunate if a change in the sections led to a significant decrease in the promotion by the record companies of local music.

Conclusions on Sound Recordings

135. As has been stated earlier, the central question before the Committee is whether the sections operate to confer too much protection, not so much on copyright owners, but

rather upon the undertakings which market and disseminate copyright material. The copyright owner of a sound recording is the maker of it. The maker is usually a corporation which markets and distributes the sound recording. What the Committee's investigation into the record industry has shown is that, because of the ease with which audio tapes can be copied, their worldwide popularity and the lack of language and other cultural barriers in many recordings, the potential for abuse of copyright, and consequently the need for protection, is magnified. The extent and potential for worldwide piracy was stressed by ARIA. This is a matter of which the Government and members of Parliament on both sides of politics are only too well aware as witness the debate in 1986 when the Copyright Amendment Bill was introduced into Parliament; Hansard, House of Representatives, No. 9, 1986, pp. 3667 and following. The Recordsellers also recognized the extent of this danger. The difficulties which the industry has faced in having piracy dealt with through the use of the criminal sanctions provided for in the Act and the consequential importance to it of the sections prohibiting all unlicensed imports have persuaded the Committee that no change should be made which would make it more difficult to discover and deal with this problem. This alone provides a strong reason why great care should be taken in formulating the amendment of the sections to give effect to any recommendation for their relaxation. One safeguard which the Committee recommends to deal with this problem is to require an importer of a

parallel import, relying on the exceptions to the operation of the sections, to prove that the imported recording is a parallel import and not a pirated article. It is recognized that the importer may have difficulty in discharging this onus, but it is considered to be preferable to place him in that disadvantageous position rather than to create a situation under which the importation of pirated articles may be greatly facilitated.

136. The Committee's recommendations in relation to sound recordings are as follows:-

- (1) Subject to the modifications mentioned in para. (2), Ss. 102 and 103 continue to apply to parallel importations of sound recordings as well as to the importation of pirated sound recordings.
- (2) The sections be modified by the introduction of sections along the lines of the draft sections 102A and 103C set out in Appendix A to this Report. Those sections would allow the importation and sale of imported sound recordings without the licence of the copyright owner in Australia where either:-
 - (a) The importer is satisfied after reasonable investigation that the recording, or a recording substantially similar thereto, is - not available in Australia from the copyright

owner or his or her licensee or agent and will not be available here within a reasonable time.

or

(b) The importation is upon the written order of a person who states in writing that he requires the recording otherwise than for any commercial purpose.

(3) The onus of establishing that the recording is legitimate and not pirated and that the importer was satisfied of its unavailability, and of the unavailability of a recording substantially similar thereto, or that the recording was imported pursuant to a written order, be upon the importer or other person relying on the sections.

The Committee is conscious that the language it has used is imprecise. It refers to the expressions, "reasonable investigation", "reasonable time" and "substantially similar to". The Committee considers that it would be undesirable to attempt to be more precise. The situations which may arise are capable of such infinite variety that the use of more precise language may make the legislation too inflexible. The courts will need to apply it in the light of the facts of each case. The Committee appreciates that this may occasion parties a degree of

expense and delay, but the approach which it advocates is in line with principle because it indicates to the community and the courts the broad outline of what it wishes to achieve and leaves it to the courts to work out matters of detail in the light of the experience of cases which come before them. Much of the language which has been used derives from language already used in the copyright Act in another connection, namely, the terms of sub-sec. 53B(5) which is one of the provisions dealing with the copying of material used for educational purposes.

137. The Committee thinks it may be helpful if, by reference to some examples, it gives more precise guidance as to the way in which the words it suggests be used, be interpreted in certain circumstances. Although the words used will apply to all areas of copyright, their application in each area may lead to different results. So the approach to the question of the availability of sound recordings will be different from that which applies in relation to books. The printed word, no matter what the edition, will always be the same and will convey the same meaning to the reader. On the other hand, sound recordings, for instance, of the same musical work, will vary substantially if music is played by different musicians, bands or orchestras, or, although played by the same musicians, is differently arranged. Furthermore, there can be a substantially different sound to the listener if music, particularly modern music, is differently mixed.
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It follows that a recording of a musical work by musician A will never be substantially similar to a recording of it by musician B. Hence there would never be substantial similarity unless there is, or will be within a reasonable time, available within Australia a copy of the same recording which is the subject of a proposed importation. On the other hand, differences not relating to the musical sound will not lead to the sound recording being substantially different from recordings available in Australia. For example, if the colour of the disc or the get-up of the cover of the sound recording differs from locally available articles, there will not be a substantial difference between the imported product and that which is locally available. A question may arise if there is a sound recording of music available only on, say, vinyl or tape, but not on compact disc. In the Committee's opinion the recording should be regarded as not available in Australia' on compact disc. The need of the collector or enthusiast who wishes to own a disc pressed in a different country or with a different cover will be met either by the collector personally importing the disc, as is at present allowed, or by written order as recommended in para. 136(2)(b) above.

138. That concludes the Committee's treatment of sound recordings. The next subject matter which is discussed is that of films.
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