

THE FILM AND VIDEO INDUSTRYSubmissions by Film and Video Interests

139. The principal submissions in relation to films and videos were made to the Committee by the Motion Picture Distributors Association of Australia ("the Motion Picture Distributors"), the Video Industry Distributors Association ("VIDA"), the Australasian Film and Video Security Office and the Australian Film Commission. In addition, submissions were received on behalf of the Television Programme Distributors Association, the Film/Video Coalition, the Screen Production Association of Australia and one video retailer or library. The parties making these submissions were all vehemently opposed to the repeal ~~or~~ relaxation of the sections. A number sought the reversal of the onus of proof in relation to knowledge. There were also submissions seeking the amendment of s. 135 of the Copyright Act so as to include films and videos within its terms. The Committee received no submissions from any person or interest seeking the relaxation of the sections in their application to films and videos.

140. It is proposed to refer, in a summary way, to the submissions received from these various interests. The Motion Picture Distributors are Warner Bros. (Aust.) Pty Limited, Fox Columbia Film Distributors Pty Limited, which distributes Columbia pictures and Twentieth Century Fox pictures, and United International Pictures Pty Limited,
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which distributes pictures made by Metro-Goldwyn-Mayer, Paramount, United Artists and Universal. The pictures distributed by members of the Association are distributed for both theatrical and non-theatrical release. The submission said that, unless there were effective provisions governing parallel imports of films, substantial harm would be caused to the Australian theatrical and film distribution industries, with consequent damage for the Australian film production industry. The submission continued:-

"There is a careful release pattern for a motion picture film, consisting of a number of clearly-defined and spaced steps, known in the industry as 'windows'. These windows are as follows:

1. Theatrical exhibition: This is the most important window for motion picture films, in terms of providing the most appropriate venue for their screening, and significant returns to producers and investors. If a film has a successful theatrical run, this will assist its promotion at subsequent windows.
 2. Non-theatrical screenings. There are a number of clubs, hotels and like institutions, which hire 16 mm. prints of films screening to their members and patrons.
 3. Home video: Pre-recorded video cassette copies of films have recently been made available for in-home screenings. "
 4. Television broadcasting: Motion picture films are broadcast on 'free' television for in-home viewing. The permission granted to broadcasters may also include the right to have 'repeat' broadcasts. If 'pay' television was introduced into Australia, motion picture films would probably be released to pay
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television in advance of home video release."

141. The submission said that the producers of films determine the theatrical release dates and the subsequent release dates for their films. A number of factors are considered, such as school holidays, subject matter, success overseas, the season of the year and "typicality". It seldom happens that a foreign-made film has its theatrical release in Australia at the same time as it has its first ever theatrical release, wherever that may be. For this reason, the Australian release may lag behind the first release by a period as long as six months. In consequence the Australian release pattern for non-theatrical screenings, home video and television may have the same time lag. Thus pre-recorded video cassette copies of a motion picture may be available in some overseas countries either before, during or shortly after the Australian release. If these cassette copies were made available in Australia, they would cause substantial harm to the theatrical release of the film and to the plan for the subsequent release of it for home video and television. It was said that if a film were released prematurely for home video, the release could significantly damage potential box office returns. Thus the Motion Picture Distributors fear that, if it became lawful to import legitimate copies of cassettes made overseas without the consent of the Australian copyright owner or licensee, substantial harm would be done to the

theatrical distribution and exhibition industries. This would threaten, not only the viability of these industries, but also employment within them.

142. Another fear which the Motion Picture Distributors have, although not to the same extent as the video distributors, concerns the difficulty of distinguishing between video cassettes which are legitimate, although parallel imports, and those which are pirate copies. The problem is similar to that which exists in relation to sound recordings in the form of cassette tapes. Piracy in the industry is rife and often difficult to detect. If the maker of a film or his assignee or licensee had to establish that a copy was a pirate copy as distinct from a parallel import, the difficulty of proof in many cases would be very great.

143. The Motion Picture Distributors further submitted that the Copyright Act should be amended by providing in s. 135 for the inclusion of cinematography films, as well as other works. This submission was supported by the other interests. None suggested that, if the section in the past had applied to films, it would have been invoked on very many occasions. But it was felt that its presence in the Act might act as some sort of deterrent and that there might be a case in the future where it would be appropriate to invoke it. Nevertheless, the practical difficulties about the invocation of the section were recognized by all.

144. The Video Industry Distributors Association is made up of the nine major video distribution companies in Australia. These are C.B.S./Fox Video (South Pacific) Pty Limited, Publishing and Broadcasting Video, R.C.A. Columbia/Pictures Hoyts Video Pty Limited, Rigby CIC Taft Video, Roadshow Home Video, Syme Home Video, Thorn E.M.I. Video Australia, Video Classics, and Warner Home Video. VIDA is an organization the members of which are engaged in or concerned with the local manufacturing, distribution and promotion of pre-recorded video cassettes and video tapes of motion pictures. The home video business was first established early in 1981 as the result of the availability of domestic video cassette recorders and players. Prior to their becoming available, video cassette copies of films were not available for domestic use. This development added a further medium through which motion picture films became available to the Australian public.

145. The members of VIDA obtain, either by licence or assignment, the right to exercise the reproduction right in a film. It is the only right which they obtain; they do not obtain a public performance or broadcasting service right. The companies do not often obtain exclusive licences of the reproduction right. This is because other companies or organizations may need to have the reproduction right for the purposes of providing copies of films for theatrical and non-theatrical screenings and broadcasting on television. With few exceptions, all

pre-recorded video tapes released in Australia have been manufactured locally, either by the members of VIDA or by "duplication houses" under contract to those members. Master tapes are provided by the relevant Australian or overseas producer for this purpose. The pre-recorded video cassettes are supplied to video outlets, usually libraries located in shopping centres throughout Australia. It is estimated that the number of outlets at the present time is of the order of 2,500. Usually the transaction is one of loan, but copies may be sold if they are required. Sold product is referred to as "sell-through". It is estimated that "sell-through" products account for less than ten per cent of the market.

146. The fact that the home video industry provides an additional means for members of the public to have access to films distinguishes the industry from other copyright industries, for example, the publishing and sound recording industries, where, more usually, a member of the public gains access to a book or a record by purchasing it, although it is recognized that both books and records may be borrowed from libraries.

147. The VIDA submission, like that of the Motion Picture Distributors, referred to the well-established release pattern for films. It was said that the pattern is followed throughout the world and is designed to maximize the returns to film producers. The process is described in the submission in much the same way as it is described

in the submission from the Motion Picture Distributors. The submission mentioned that there has been debate as to whether there should be a mandatory minimum period before a film may be released on video after its exhibition in theatres. Theatre exhibitors maintain that, as a result of premature release of films on video, many people await the video release rather than go to the cinema to see the film. Furthermore, broadcasters have indicated that as a result of the release of films on video, they are not prepared to pay the same broadcast licence fees for television rights. Yet another problem arises because of the high incidence of home taping of films shown on television. Television broadcasters are not prepared to pay substantial fees for the right to broadcast repeat showings of films. The submission says that the copyright owner must make decisions as to when his film will be released to the various distribution levels, so as to maximize his return from each. Premature release of a film at any level after its theatrical release has the potential to damage all levels at which it may be released. If the theatrical industry is damaged, the subsequent distribution levels will in turn be damaged because, so the submission says, the theatrical industry is "the premier showcase" for films. At the moment the film producer has the right to control his product in different countries in that it is for him to decide when and how he should license it.

148. The foregoing considerations provide the principal basis

for VIDA'S submission that ss. 102 and 103 of the copyright Act should not be amended so as to permit unrestricted importation of legitimate copies of video film cassettes from overseas. Such a change would have a serious effect on the orderly marketing in the industry which presently occurs. It said that before the Australian home video industry was established, there were instances of copies of films being imported from the United Kingdom, its television system being similar to the Australian system. The position was otherwise in relation to cassettes manufactured in the United States and Japan because of a different television system in use in those countries. The submission said that the experience of the VIDA members suggested that it would be unlikely now that an importer would import large quantities of legitimately made video cassettes to meet demand. He would be more likely to import a small number of tapes, thus reducing his financial risk, and test the demand for particular titles in the market. If there were a demand, one of the imported tapes would be used as a "master" from which pirate copies would be made. The reason why it was not thought that large quantities of legitimate cassettes from overseas would be imported principally stemmed from the fact that the interval between the first release of a film on video cassette in the United Kingdom and its first release in Australia had been substantially reduced. In the words of the submission, this meant that there was little or no commercial opportunity for an importer to ship a container load of tapes made in the United Kingdom

in time to reach Australia ahead of its Australian release. This would be likely to remain the position if the sections were amended to permit unrestricted parallel importations of films. So, at least in the submission of VIDA, the principal problem which would arise from the repeal of the sections in their application to parallel imports would be that such a move would facilitate piracy. The piracy would not be committed overseas but in Australia by using as a master tape a legitimate one which had been the subject of parallel importation.

149. At this point it should be said that, whilst the significant increase in penalties for piracy in 1986 does appear to have resulted in a decline, piracy is unlikely ever to be entirely eliminated, given the ease of copying and the constant demand for new titles. Irrespective of what copies may, be obtained overseas, piracy can be carried out by the use of locally manufactured tapes obtained in Australia. Moreover, a person is entitled to import any tape, legitimate or pirated, otherwise than for commercial purposes. Undoubtedly such tapes are brought into Australia ostensibly as tapes required for personal use when they are in fact required for copying. Breaches of the Copyright Act in this respect are extremely difficult to detect.
150. The submission said that video piracy in Australia took approximately 20 per cent of revenue from "the legitimate industry". The submission made a plea for increased
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penalties for breaches of s. 132 of the copyright Act in its application to video films and changes in the provisions of the Act relating to the requirements that a prosecutor establish guilty knowledge and prove the subsistence of copyright in the complainant. These submissions were in part given effect to in the Copyright Amendment Act 1986. The matters dealt with did not apply only to importations, but also to sales and other dealings in pirated product which took place entirely within Australia. The knowledge provisions were relaxed, but the prosecutor still bears some onus of proof. The suggestion that the onus of proof in relation to knowledge should be reversed was not adopted. Nothing was done to change the need for the prosecutor to prove the subsistence of copyright.

151. The final paragraph of the VIDA submissions was as follows:-

"In essence, VIDA members submit that in order that:

1. The copyright owners in motion pictures retain their right to decide on territorial exploitation of product,
2. That the orderly market structure be preserved,
3. That piracy already at high levels in Australia be curbed,

the existing provisions of the Copyright Act relating to parallel importation of cinematograph films be maintained."

152. The submissions made by the Motion Picture Distributors and VIDA were strongly supported by the Australasian Film and Video Security Office ("the Security Office"). The Security Office was established in September 1982 as part of "a worldwide offensive against the pirating of films and pre-recorded video tapes". In 1975 the Motion Picture Association of America began to set up film security offices throughout the world. The Sydney office is part of a network that includes similar security offices in Los Angeles, New York, London, Paris, Rome, Amsterdam, Singapore, Hong Kong and Johannesburg. The Sydney office is in constant contact with this network and has ready access to its information. It is able to draw on the records and experience of the other offices.
153. The submission from the Security Office emphasizes the growth of piracy and the damage which it does to the Australian film and video industries. It is said that, in addition to damage being suffered by owners, assignees and licensees of copyright in films, the activities of a number of other classes of people are adversely affected. These include distributors, retailers, cinema operators and numerous businesses which provide ancillary services. Reference is also made to lost revenue by governments who receive no sales or other taxes in relation to transactions involving pirated films.
154. The submissions made to the Committee establish that there is difficulty in distinguishing between legitimate copies

of video tapes and pirated copies. But the submissions made do not suggest that parallel imports present a substantial problem because of this matter. That is because there is no substantial importation of legitimate product. To the extent that there is the importation of articles which contravene ss. 102 and 103, the importation is of pirate copies rather than parallel importation. Furthermore, as has been indicated, the Committee's impression is, that although piracy is a very great problem in the industry, the bulk of the piracy is committed in Australia by the illicit copying of legitimate copies of tapes purchased here or imported with the consent of the copyright owner or his assignee or licensee.

155. The submissions made by the Motion Picture Distributors and VIDA were supported by another association known as the Film/Video Coalition. The Coalition was formed early in 1986 to represent its members on copyright law reform issues. The Coalition has amongst its members both the Motion Picture Distributors and VIDA as well as Actors Equity of Australia, Association of Video Retailers, Association of Motion Picture Exhibitors, the Screen Production Association of Australia and the Television Programme Distributors Association.

156. To the same effect as the submissions already referred to are submissions from the Australian Film Commission and the Screen Production Association of Australia. The

Australian Film Commission is a statutory authority constituted under the Australian Film Commission Act 1975. Its duties are to encourage, whether by the provision of financial assistance or otherwise, the making, promotion, distribution and broadcasting of Australian programs. The Commission is said to be "the Government's authority for industry support in all areas of production, promotion and distribution and the national production house". In essence the Commission's views concerning ss. 102 and 103 were expressed in the following paragraphs:-

- " . They ensure the viability of the theatrical exhibition of imported films. They therefore contribute to Australian exhibitors' economic base, on which Australian producers depend'.
- . They ensure a sound video manufacturing **base** in Australia. Any trend to off-shore manufacturing would disadvantage Australian producers who rely exclusively **on** the services of Australian video manufacturers and distributors.
- . They act to establish an Australian video release date for films, thereby providing requisite information for the detection of piracies."

In broad outline the Commission's submission followed closely the approach of the Motion Picture Distributors and VIDA. Again, there was an emphasis on the serious threat which piracy posed to the film industry. There is a difference of degree in the Commission's submission in that it said that, if parallel importation of films became

lawful, video retailers "would naturally look to foreign markets as a

source of supply". The concluding paragraph of the submission was as follows:-

"The Commission recognises that in the event the parallel importation provisions were repealed the decline in the value of the Australian dollar would preclude in the short term massive importation of video cassettes of an order that would jeopardise the continued operations of Australian video manufacturing and distribution. However, we are seriously concerned that video 'block busters' would be imported to the immediate detriment of the Australian theatrical market. We also believe that there would be considerable scope for the importation of 'sell through' titles, which would also affect the theatrical market. In our view these activities would undermine the economic base of exhibitors in Australia to the clear detriment of Australian producers."

The Committee has the impression that the Commission believes that the ability of video retailers to import legitimate product without the license of the copyright owner would be likely to have a most adverse effect on the Australian industry generally. The other interests have not put that fear forward with the same degree of emphasis. It is always difficult to make an assessment of the validity of fears of this kind. All the Committee can say is that it appears to it that there is a reasonable foundation for the anxiety which the Film Commission has expressed.

157. The Screen Production Association of Australia supported the earlier submissions. It said that Australian

television program production and cinema film production companies rely on revenue from overseas sales to recoup part of their production costs. The Association estimated that 60 per cent of the returns earned by Australian feature films come from the export market. It said that it feared that the repeal of ss. 102 and 103 in their application to parallel imports could bring about a situation in which an Australian film producer might find imported copies of his film on sale to the public prior to the release of the film in Australia. This would come about in cases where the release of the film overseas preceded its Australian release. It was said that in some overseas countries - Hong Kong, Japan, Germany and Italy were given as examples - the video rights of Australian films were sold with the cinema or television exhibition rights. Assuming an early release of the film on 'video overseas, the importation of videos before the release of the film on video in Australia would upset the promotion of the film in Australia and thus affect the amount of revenue received by the copyright owner and those who had invested in the film.

158. In support of their submissions that s. 135 of the Copyright Act should be amended to include films, the Motion Picture Distributors, through their solicitor, Mr. Kench, said that, although the amendment was sought, it was recognized that the only advantage would be in the deterrent value which the section would have to the film industry. Mr. Kench went on to say:-
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"It is well recognised that it is quite impractical in practice to go to the customs office and say: We apprehend that a shipment's coming. My understanding it is that you have to go to the customs office and be able to tell them either the name of the ship, the consignee, and be quite specific about the particular shipments. They just do not have the resources to be able to go and search everything that comes through all available ports. You have got to have good, hard intelligence about the shipments.

But we would maintain, well, those cases will come up from time to time. They may come up from time to time. We will have the evidence. We have got to be able to stop them at point of entry if at all possible rather than try and chase them around the countryside. So that if it exists in the armoury then we would like to have - we would certainly like to have it there, and we would certainly like to have it retained."

What Mr. Kench said appeared to reflect the views of others seeking the amendment of s. 135 to include films.

Conclusions on Films and Videos

159. The Committee's conclusions in relation to these submissions are as follows:-

- (1) There is no demand from any source for the repeal of ss. 102 and 103 insofar as they apply to the parallel importation of films or video tapes. Not one submission to this effect was received by the Committee except the general one from the Office of Consumer Affairs.
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- (2) Nor was there any submission from any source seeking the revision of the sections to enable some parallel imports to be made.
 - (3) The film and video companies, along with the Australian'' Film Commission, are, with justifiable cause, seriously concerned about the inroads which piracy continues to make on their profits. But, most of this piracy takes place within Australia so that the problem is not the importation of vast quantities of pirated material.
 - (4) There is a difficulty in distinguishing between parallel imports and pirated articles. Because the number of parallel imports is small, this does not give rise to the same problems as exist in the case of sound recordings.
 - (5) A parallel import could be used to facilitate piracy, but pirates do not necessarily import into Australia any copy of a video tape which is not legitimate product. There is evidence that false statements are made to customs on the importation of these tapes in that it is said that they are for personal use when that is not the case. That is something which is impossible to police.
 - (6) There is a case for the amendment of s. 135 so as to extend its operation to films and video tapes, but
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it is unlikely that such amendments will have any substantial effect or area in which to operate.

(7) Strong submissions were made to the Committee in relation to the knowledge provisions of ss. 102 and 103. These submissions were made before the amendments to s. 132 effected by the COPYright Amendment Act 1986. The Committee has already said that the knowledge provisions of ss. 102 and 103 should be brought into line with those of s. 132 as amended in 1986.

160. The Committee considers, notwithstanding the fears expressed by the Australian Film Commission, that parallel importations of films and video tapes do not pose the same threat to the orderly marketing of films in Australia and to the Australian film industry which unrestricted importations of sound recordings would pose to the record industry. Nevertheless, in the absence of any submissions at all seeking the repeal of the sections in their application to parallel importations of films, the Committee considers that the sections should continue to apply in most cases. However, it considers that there would be some advantage to the Australian consumer if amendments were made to the sections in their application to films which were similar in effect to those proposed in relation to sound recordings. This would enable importers for commercial purposes, the video retailers in particular, to import tapes of films which are unavailable

in Australia or in respect of which the importer has a written order from a person who states that the film is for his personal use and not for the purposes of trade. The onus of establishing the matters of exception which the Committee recommends should be upon the importer. It remains to repeat that the Committee accepts the submission that s. 135 of the Copyright Act should be amended to include films.

161. That concludes the Committee's consideration of the film and video industry. The next matter to be discussed is that of computer software.