Motion Picture Association

Submission to the Review of the *Trade Practices Act 1974*

Introduction

The Motion Picture Association ('**MPA**') welcomes the opportunity to submit to the present review of the *Trade Practices Act 1974* ('**TPA**').

The MPA is a trade association representing seven international producers and distributors of theatrical motion pictures, home video entertainment and television programming. Its members are:

Buena Vista International, Inc (Disney, Touchstone and Hollywood Pictures)
Metro-Goldwyn-Mayer Studios Inc. (MGM and United Artists)
Paramount Pictures Corporation
Columbia TriStar Film Distributors International, Inc. (Columbia Pictures and TriStar Pictures)

Twentieth Century Fox International Corporation
Universal International Films, Inc.
Warner Bros. (Turner, New Line, Castle Rock)

One of the objectives of the MPA is to eliminate unfair and restrictive trade regulations, trade practices and non-tariff trade barriers and to allow free competition in the international marketplace. The MPA also directs a worldwide anti-piracy program to protect, through copyright and other laws, its member companies' motion pictures and television programs in over 60 countries throughout the world. It works to enforce the copyrights in Australia of the MPA member companies and engages in extensive campaigns to prevent, detect and interdict infringements.

Executive Summary

The key aspects of the MPA's submission to this review of the TPA ('**the Review**') are:

(a) The importance of copyright industries to the Australian economy is steadily increasing.

(b) It is critical that the Review Committee addresses the special circumstances applicable to intellectual property rights when making recommendations on issues raised by the Review's Terms of Reference.

(c) The interface between competition and intellectual property laws has received a great deal of recent attention in Australia. This is evidenced in part by the recommendations of the Ergas Committee's review of Australian intellectual property legislation, and the increasing role of the ACCC in matters affecting copyright industries.

(d) The Government response to the Ergas Report will have significant implications for Australian intellectual property industries, as the majority of intellectual property licence arrangements will cease to be exempted by s.51(3) and will be subject to a substantial lessening of competition test, when proposed legislative amendments are enacted.

(e) The MPA submits that the Review Committee should recommend that:

(i) the ACCC develop as a priority guidelines outlining the Commission's approach to restrictive trade practices issues involving intellectual property (and in particular to s.46), and as directed in the Government response to the Ergas Report;

(ii) the ACCC be required to consult with intellectual property rights holders when developing these guidelines; and

(iii) any guidelines should take into account some internationally accepted core principles, which recognise that intellectual property is not inherently anti-competitive, that there is no presumption that the exercise of an intellectual property right creates market power, and that there should be a 'safety zone' established for conduct and arrangements involving intellectual property rights.

BACKGROUND

The importance of copyright industries to Australia

MPA member companies are international producers and distributors of motion pictures, television programs and other audiovisual products. These products are all subject to copyright protection in Australia and internationally. It is these copyright property rights - the right to exhibit to the public in theatres, to reproduce and sell video copies and to authorise the transmission of these works over cable, satellite and broadcast television - that underpins their audiovisual businesses.

The production of a motion picture, for example, is a complex enterprise involving many individuals and businesses in activities that usually stretch over several years and take place in many locations. Intellectual property licensing is a critical part of enabling these processes to occur. On completion of a movie, the production company may assign copyright in the motion picture to a distributor or may retain the copyright and license distribution rights for the motion picture to another company or to multiple companies for several areas or even for individual countries. These distributors in turn may enter into various distribution agreements for the motion picture in different media in those territories.

The distribution rights for cinema exhibition are likely to be administered by a different entity than the distribution rights for video distribution and those rights may be administered by different entities in different countries. The rights to duplicate the motion picture in a particular format (eg. video cassette, laser disc and DVD) may be separate from the rights to distribute that same format and both duplication and distribution may be the subject of separate agreements in each country.

The development of the audiovisual industry (which includes the motion picture, home video and television industries) is important to enable Australia to fully participate in the global information infrastructure or 'superhighway', and to benefit from the creation of jobs in this growth area. Adequate and effective copyright protection is the first step in achieving this objective, because it is essential to attract investment in the development and creation of diverse audiovisual works and ensure their wide dissemination to the public. Accordingly, adequate and effective copyright protection will benefit the Australia audiovisual industry and will enrich Australian culture and education.

The MPA is actively involved in the development and promotion of Australian copyright industries. MPA members distribute motion pictures via local companies, provide content for Australian theatrical industries and undertake an increasing amount of film production using Australian locations and crew.

In Australia, the production of motion pictures shows consistent growth.

In 2000/01 thirty four feature films and 62 TV drama programs were made in Australia and total expenditure increased by 6 per cent to $608 million. Spending on co-productions was $105 million. 27% of funding for films came from overseas.[1]

Distribution of motion pictures and television continues to grow in Australia, giving consumers more choice both of which work to view and where, when and over which medium. This is facilitated throughout the country by the thousands of Australian video distributors and hundreds of cinema exhibitors. The total number of cinema screens and patrons has continued to grow rapidly.

Australian Cinema Screens and Attendance		
Year	**Number of Screens**	**Admissions (millions)**
1988	712	37.4
1994	1028	63.6
1996	1251	73.9
1998	1576	79.9
1999	1748	88.0
2000	1817	82.0
2001	1855	92.5

The industry provides employment opportunities for over 17 000 people.
Similarly, television (in all its forms) and video continue to spread to more consumers, increasing consumer choice and competition:

[1] 'National Survey of Feature Film and TV Drama Production 2000/01', Australian Film Commission Nov 2001.

Australian Households				
Year	**TV**	**Video**[2]	**Cable**	**Satellite**
1994	5.7 million	4.3 million	N/A	N/A
1996	6.6 million	4.3 million	198 000	230 000
1998	6.8 million	5.5 million	550 000	412 000
1999	6.8 million	6.0 million	707 000	440 000
2000	6.8 million	7.0 million	800 000	520 000
2001	6.8 million	7.7 million	680,000	715,000

Achieving certainty for MPA members and local copyright industries in relation to TPA compliance and enforcement is therefore fundamental to the continued development and success of the Australian entertainment industry.

INTELLECTUAL PROPERTY AND THE REVIEW

Copyright and the Review's Terms of Reference

The Review's Terms of Reference ('**TOR**') recognise the importance of certainty for businesses about the requirements for compliance with, and authorisation under, the TPA. The Review Committee is required by the TOR to assess the competition and authorisation provisions of the Act to determine, among other things, whether they:

- provide adequate protection for the commercial affairs and reputation of business (paragraph 1(d)); and
- allow businesses to exercise rights and obligations under the TPA consistent with principles of certainty, transparency and accountability (paragraph 1(e)).

The TOR also require the Committee to identify improvements to the manner in which the TPA is administered to achieve a more fair, timely and accessible framework for competition law (paragraph 2).

The MPA submits that it is critical that the Review Committee has regard to the special nature of intellectual property rights when considering the issues to which it is directed under the TOR. Special circumstances apply to intellectual property products and licensing which do not apply to industry generally, and which must be factored into any findings made by the Committee. These special circumstances are brought about by the nature of intellectual property products, and the

[2] Video figures include both VHS and DVD. Households with both VHS and DVD are reflected twice.

role played by intellectual property rights in ensuring the efficient conduct of businesses that rely on these rights for their existence.

Competition policy and copyright

The special nature of intellectual property rights has been recognised internationally and in Australia. For example, the nature of copyright products makes the prevention of 'free-riding' extremely difficult (creating the need for exclusive statutory rights). They are most effectively commercialised and developed using a series of licensing or other contractual arrangements. It is also recognised that the existence of an exclusive intellectual property right does not of itself offend antitrust principles, nor constitute market power. Rather, intellectual property rights should generally be seen as efficiency-enhancing and pro-competitive.

In its review of Australian intellectual property legislation, the Intellectual Property and Competition Review Committee ('**the Ergas Committee**') found that:

> "Harm to competition should not, and cannot, be inferred from the mere existence of an exclusive right, such as those conferred by the intellectual property laws. Incumbent firms whose intellectual property benefits from protection may be subject to rivalry from numerous sources, including from other firms supplying differentiated but substitutable products.
>
> The intellectual property protection, rather than undermining contestability, stimulates and channels it in directions that are usually socially beneficial … By setting out a clear framework of property rights, it also increases the ease with which intellectual property can be traded, most visibly through assignment and license. A well-functioning system of intellectual property rights therefore encourages efficiency both in the production and in the allocation of knowledge."[3]

That there is no inherent conflict between intellectual property laws and antitrust principles has also been recognised by the ACCC:

> "It is now accepted that intellectual property laws do not clash with competition laws because they do not create legal or economic monopolies … Only in particular cases

[3] Final Report at pp25-26

> will intellectual property owners be in a position to exert substantial market power or engage in anti-competitive conduct.[4]"

The MPA submits that in making any recommendations in relation to the operation, administration or enforcement of the TPA, the Review Committee should recognise the special circumstances applicable to intellectual property rights. This recognition is particularly important at a time when the ACCC is becoming increasingly active in political and media debates about intellectual property industries, and in particular, the exercise of copyright rights.

The MPA is concerned that the ACCC may have been adopting a stance that does not appear to give appropriate weight to the importance of intellectual property rights and the need for their protection.

For example the ACCC has expressed the view that regional coding of DVD's appears to be designed to artificially maintain higher prices for videos and DVD's in Australia. However, there is strong evidence that in fact the price of DVD's and videos in Australia is among the lowest in the world.

Average Retail Sell Through Price in $US for April 2000		
Country	**Video Cassette**	**DVD**
Australia	11.55	18.20
New Zealand	11.50	18.50
United States	12.85	24.95
United Kingdom	12.60	23.10

The ACCC has also chosen to intervene as amicus curiae on copyright issues in *Kabushiki Kaisha Sony Computer Entertainment v Stevens* and has adopted an aggressive stance in attacking the technological protection measures which Sony is attempting to use to protect its copyright rights.

We also are aware that the ACCC has successfully pressed the Federal Court to adopt an extreme view on market power, which has no precedent, as far as we are aware, anywhere else in the world. The Court's decision is presently on appeal to the Full Federal Court[5].

[4] Prof. Allan Fels, *The Role of Competition Principles in Intellectual Property* 22 July 1999
[5] ACCC v Universal Music Australia Pty Ltd; Warner Music Australia Pty Ltd [2001] FCA 1800 14 December 2001.

It is submitted that the approach exemplified in the above matters appears to be detracting from the efficient functioning of the Australian intellectual property economy to maximise output and to enable Australia to take its place in the international market place on the same basis as other participants.

COPYRIGHT AND THE TPA

The Ergas Committee

The interaction between competition policy and copyright came to the fore at a Government policy level with the release of the Ergas Committee's Final Report, and the Government's response to the Ergas Report announced in August 2001. Of particular relevance to this Review is the Government response to the Ergas Committee's recommendations regarding the role of the ACCC in enforcing Part IV of the TPA with respect to conduct and arrangements involving IP, the authorisation principles applicable to intellectual property licensing, and the scope of the existing IP exemption in s.51(3) of the TPA.

The MPA is aware that any direct consideration of s.51(3) TPA is outside the scope of the Review's Terms of Reference. However the TOR allow the Review Committee to take into account the recommendations of other reviews on this issue where relevant. The MPA will not comment directly on the Ergas Committee's recommendations regarding s.51(3). However we suggest that some aspects of the Committee's recommendations, and the Government's response to those recommendations, are critical to:

- the Review Committee's consideration of Parts IV and VII of the TPA in relation to copyright industries in Australia; and
- the ACCC's enforcement approach to Part IV matters involving copyright.

The Government response to the Ergas Report announced that the ACCC will be directed to issue guidelines outlining its enforcement approach to Part IV TPA as it applies to intellectual property rights. In particular, these Guidelines will be required to address:

- when intellectual property licensing arrangements might be exempted under s.51(3);
- when conduct and arrangements involving intellectual property might breach Part IV of the TPA; and

- when conduct that is likely to breach Part IV might be authorised.

For the reasons set out below, the MPA submits that guidelines should be drafted without delay. However ACCC guidelines will become even more important as the full implications of the Government's proposal in relation to s.51(3) is recognised (ie, the majority of copyright licensing arrangements will no longer be automatically exempt from many provisions in Part IV, but will instead be subject to a 'substantial lessening of competition' test ('**SLC Test**'). Under the present Part IV, IP licences have never been subject to a SLC Test due to the operation of s.51(3). Following the proposed amendments to s.51(3), only conduct or arrangements which would breach ss.50 and 50A would be exempted by s.51(3). All other conduct or arrangements will either have no exemption (ss.46, 46A and 48), or be subject to a SLC Test (ss.45, 45A and 47).

The practical result of the proposed changes, that will subject virtually all intellectual property licensing to a SLC Test, has significant consequences for copyright industries. Licensing and other contractual arrangements are the primary means by which copyright material is produced, commercialised and distributed. It is imperative that clear and transparent guidance be provided as to when these arrangements may be considered to breach Part IV, when an authorisation or notification may be required, and the ACCC's approach to enforcement of these provisions.

ACCC guidelines on competition policy and intellectual property

Guidance on the operation of a SLC Test to copyright licensing and other conduct will become increasingly important as copyright and other intellectual property industries address the ramifications for their licensing practices by the new regime for the treatment of intellectual property licensing under Part IV. A clearly articulated policy regarding the circumstances in which intellectual property licensing arrangements may require ACCC authorisation under Part VII is also critical.

In a speech to the Intellectual Property Society of Australia and New Zealand, Professor Allan Fels has indicated (referring to similar ACCC guidelines recommended by the National Competition Council in its review of ss.51(2) and (3) TPA) that the ACCC will not issue any guidelines regarding intellectual property and restrictive trade practices issues until amendments to Part IV are passed by Parliament[6].

[6] Prof. Allan Fels, *The Role of Competition Principles in Intellectual Property* 22 July 1999

However the MPA submits that in the light of the current approach of ACCC to copyright licensing matters, a version of the guidelines should be published without delay, even if they require revision as a result of the Government's proposed amendments to the TPA arising from the Ergas Report. The current urgent need for guidelines arises out of the uncertainty created by the ACCC in its apparent opposition to some forms of intellectual property arrangements. In particular, any guidelines should address the issue of how s.46 of the TPA applies to intellectual property industries.

The MPA submits that it is appropriate for the Review Committee to recommend some key principles which the ACCC should be directed to take into account in preparing any guidelines on intellectual property licensing and antitrust principles. These key principles should recognise the importance to Australia of strong copyright industries, and reflect international experience in the creation of similar guidelines. Further, the MPA submits that the Review Committee should recommend that any guidelines be developed in consultation with copyright and other intellectual property industries.

International approaches to antitrust and intellectual property

Paragraph 4 of the TOR requires the Review Committee to take into account overseas experience. The United States and Canada have both issued guidelines outlining the approach taken by competition regulators to the interface between antitrust and intellectual property laws[7]. These guidelines recognise several key principles in relation to when a regulator does not need to intervene on competition grounds in relation to conduct or arrangements involving intellectual property:

- Intellectual property is essentially comparable to other forms of property for the purposes of antitrust analysis
- Intellectual property licensing allows the combination of complementary factors of production and is generally pro-competitive and welfare-enhancing[8]
- The mere exercise of an intellectual property right is not an anti-competitive act
- There is no presumption that intellectual property creates market power

[7] US Department of Justice and Federal Trade Commission *Antitrust Guidelines for the Licensing of Intellectual Property* 1995, Canadian Competition Bureau *Intellectual Property Enforcement Guidelines* 2000. The MPA notes that the US Guidelines are currently under review in relation to their application to patent licensing.
[8] The ACCC has stated that intellectual property laws are not harmful but helpful to competition, Press Release 7 December 2000

- Market power (or even a monopoly) that is solely a consequence of a superior product, business acumen or historical accident does not violate antitrust laws.

The MPA submits that these principles form an appropriate basis for any guidelines developed by the ACCC resulting from the Government response to the Ergas Committee's recommendations regarding the interaction of intellectual property arrangements and the restrictive trade practices provisions of the TPA.

In addition, both the United States and Canadian guidelines include the concept of an intellectual property 'safety zone', where conduct or licensing practices involving intellectual property will not generally be challenged. In the United States, licensing arrangements involving intellectual property will fall within the safety zone when any restraint in the licence is not facially anti-competitive, and the licensor and licensee collectively account for no more than 20% of each market significantly affected by the restraint[9]. In Canada, the Competition Bureau will not ordinarily challenge the conduct of firms that possess less than 35% market share. In addition, a licence must create horizontal effects before the Bureau will conclude that it is anti-competitive[10].

The Review Committee's TOR state that one of the principal concerns of Australian business is the need to have reasonable certainty about compliance with, and the need for authorisation under, the TPA. The MPA submits that the proposed amendments to the TPA following from the Ergas Report have the potential to significantly undermine this certainty in the absence of clear and appropriate guidelines regarding when intellectual property licensing may be seen to infringe Part IV, or may be authorised under Part VII.

The MPA submits that an intellectual property 'safety zone' is an appropriate way to balance several competing concerns:

- the need for certainty for copyright industries recognised in the TOR;
- allowing copyright industries to structure their business arrangements with a clear understanding of when arrangements may be in danger of breaching the TPA;
- reflect the principle adopted in Australia and internationally that the mere exercise of an intellectual property right is neither anti-competitive nor an exercise of market power;

[9] US Guidelines at 4.3
[10] Canadian Guidelines at 5.2-5.3

- minimise the impact on intellectual property industries of the practical impact of the Ergas Committee's recommendations, which is that virtually all intellectual property licensing will be subject to a SLC Test.

There is no inconsistency between the creation on an intellectual property safety zone and the Government's intention to subject the majority of intellectual property licensing arrangements to a SLC Test. Rather, a safety zone would provide clear guidance to intellectual property industries on the types of licensing practices which will not be found to have substantially lessened competition. A safety zone would enable intellectual property industries to conduct their business affairs with an appropriate level of certainty.

The creation of an intellectual property safety zone would also be consistent with the approach taken by the ACCC in establishing Merger Guidelines, which contain certain thresholds based on market share. For example, the ACCC will give close consideration to any merger that will result in 40% of the market being supplied from a single source. The Merger Guidelines recognise that establishing acceptable market share thresholds is a low-cost mechanism for screening out many mergers which are not likely to result in a substantial lessening of competition.[11].

Such an approach would provide certainty to intellectual property industries and is consistent with practice both in Australia and overseas. The MPA therefore submits that the Review Committee should recommend that any ACCC guidelines should also create a safety zone for conduct and arrangements involving intellectual property that:

- are not on their face anti-competitive; and
- are between parties with a combined market share of less than 35%.

Conclusion

The MPA submits that the Review Committee must:

1. appreciate the significance of the Government response to the Ergas Report in relation to intellectual property licensing and the impact on Australian copyright industries;

2. consider the impact on copyright industries of any recommendations made in response to the issues raised in the TOR;

[11] ACCC Merger Guidelines p44

3. in making recommendations, stress the need for appropriate guidelines to be developed regarding intellectual property rights, in conjunction with copyright and other intellectual property industries to ensure transparency and accountability;

4. recommend that the core principles suggested above should be recognised by the ACCC in developing guidelines for copyright and other intellectual property industries in relation to when conduct or arrangements may contravene Part IV, require authorisation or notification, and the approach taken by the ACCC in relation to enforcement.

Motion Picture Association
21 June 2002