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Submission to the Ministry of Business, Innovation & Employment on "*Discussion document: Review of ban on parallel importation of films (February 2013)*"

31 March 2013

1 INTRODUCTION

- 1.1 The Creative Freedom Foundation ("CFF") is a charitable organisation that was founded in 2008 in response to changes in New Zealand law that risked undermining artists' interests and the public's rights in the name of protecting creativity.
- 1.2 We represent thousands of New Zealand artists including musicians, film makers, visual artists, designers, writers, & performers. The CFF currently has approximately 20,000 members, of whom more than 10,000 are artists.
- 1.3 Our primary goals are:
 - 1.3.1 the education of New Zealand artists about emerging issues within New Zealand that have the potential to influence their collective creativity
 - 1.3.2 advocacy to ensure that their views are taken into consideration, and
 - 1.3.3 the promotion and encouragement of activities that support and build the New Zealand arts community, positive relationships within that community and/or the positive well-being of that community.

2 ON PRINCIPLE

- 2.1 Creative communities in the 21st century are no longer limited by geography. The conversations that shape our culture now happen on a global level. Our networks now extend across borders, and they are more vibrant than ever before because of this diversity. We share common experiences, create new works, and engage in critical analysis to one another almost simultaneously, whether we are in Auckland or Amsterdam, Berlin or Blenheim, New York or New Plymouth.
- 2.2 The restriction on commercial parallel imports of films effectively limits New Zealanders' ability to participate in this conversation.
- 2.3 The restriction limits our access to legitimate copies of works that our peers in the rest of the world are already discussing, dissecting, and deriving new ideas from. It leaves us behind the curve, but without offsetting benefit to the New Zealand creative sector. As Kiwis, we already struggle for relevance on the global stage; only relatively recently has the internet enabled us to overcome the 'tyranny of distance'. If we are going to properly take part in global discourse in the 21st century, is it not sensible to have an idea of what everyone else is talking about?

3 INTERNATIONAL CONTEXT

- 3.1 There is no equivalent law in Australia relating to films. In 2009 the Australian Productivity Commission recommended that a parallel import restriction on books be repealed; this recommendation has still to be given effect¹.
- 3.2 Recently the United States Supreme Court upheld the First-Sale Doctrine yet again², refusing to encumber buyers of books legally purchased overseas with importation or commercial restrictions.

4 DISCUSSION DOCUMENT

- 4.1 As artists and consumers we note that questions in the discussion document are explicitly film-industry focused (questions 1-25). As an organisation we represent artists working in a variety of creative industries. The film-industry is one of these, and amongst our membership are directors, film makers and other artists. These artists are affected by the ban but would be unable to answer a majority of these questions. We trust that the focus on film-industry questions will not unduly overshadow the broader interests of all those affected by the ban.

5 SPECIFIC QUESTIONS

16. For the past five years, how many films, and what titles, were first screened in New Zealand either during or after they would have been available for legitimate import (i.e. on DVD) if the ban had not been in place? How long was each film showing in New Zealand cinemas while parallel imported copies would have been available?

- 5.1 A relevant example since the former 2008 parallel-importing review may be in the release schedule of the Academy Award Best Picture winner *The Hurt Locker*. This film was released in United States theatres on 26 June 2009, and on United States DVD (Region 1) on 12 January 2010. However, the movie wasn't available in New Zealand when it was nominated for the Oscars, or even when it won the Oscar for Best Picture. In fact it took another month to be released to cinemas in New Zealand and the DVD was eventually released in late 2010.
- 5.2 Physical film media (DVD and Blu-Ray) remain relevant to artists seeking to respond to modern culture.

6 NON-COMMERCIAL IMPORTING

- 6.1 New Zealand artists can import movies for non-commercial use, albeit at an additional cost that a commercial importer could avoid through economies of scale. This effectively prices many films out of reach, or it puts additional costs on New Zealanders who will send their money offshore (with a corresponding loss of tax revenue³ to the New Zealand government, which supports New Zealand artists through entities such as the New Zealand Film Commission).

1 <http://www.pc.gov.au/projects/study/books/report/key-points>

2 <http://creativefreedom.org.nz/2013/us-supreme-court-upholds-first-sale-doctrine/>

3 Both from company profits and GST from imports (as individual imports are typically below the GST threshold).

11. Will online movie services or changes in the television broadcasting sector affect the length of release windows in New Zealand or distribution and exhibition models more generally?

- 7 Licensing issues and bandwidth costs within New Zealand have hindered online movie streaming services.
- 7.1 Quickflix has accused SkyTV of uncompetitive licensing deals⁴ that may not be resolved within the next few years:
- "Retail service providers ... said their "reseller and retransmission agreements restrict RSPs' ability and incentive to partner with new entrants" ... and ... the content deals last several years, and mean RSPs can't charge for their own content, nor offer assistance to rival pay-TV operators.*
- 7.2 Parallel importing of films neatly avoids this particular licensing issue.
- 7.3 Netflix have said that New Zealand's internet infrastructure is a "significant deterrent"⁵. While the Ultra-Fast Broadband roll-out is expected to resolve some of these issues it is not due for completion until 2019⁶. There will remain a significant interest in physical media for some time.
- 7.4 While some may argue that cinemas need an exclusive film release window in order to maximise on public interest in a film, the issue of cinemas competing with commercially sold parallel imported DVDs will be diminished by simultaneous worldwide releases (which as noted in the discussion document is facilitated by digital cinema technology). Copyright holders can still have exclusive cinema screenings until they release DVDs. A lapse of the commercial parallel importing ban will encourage timely release of films to New Zealanders.

8 THE BIGGER PICTURE

- 8.1 Examples overseas have suggested that illegal downloading declines with the introduction of legal alternatives. In 2006 within the United States all torrenting (both legal and illegal) accounted for approximately 60% of residential bandwidth but since the introduction of Netflix (also in 2006) torrenting has reduced to 25% with Netflix rising to 33% of all residential bandwidth⁷.
- 8.2 If the public cannot, for example, legally obtain current material in a timely manner, then they may become skeptical of copyright law as a whole – if there are no suitable legal options then people will be more likely to use illicit channels. Maintaining a ban on commercial parallel importing decreases the supply of legal alternatives which affects all artists, not just individuals seeking to create market segmentation by controlling distribution.

4 <http://www.nbr.co.nz/article/mediaworks-quickflix-welcome-probe-sky-tv-content-deals-wb-118894>

<http://www.stuff.co.nz/business/industries/6894411/Quickflix-v-Sky-TV-continues>

5 <http://www.stuff.co.nz/technology/digital-living/6045189/NZ-internet-a-deterrent-to-online-TV>

6 <http://www.chorus.co.nz/ultrafast-broadband>

7 <http://edition.cnn.com/2011/10/27/tech/web/netflix-internet-bandwidth-mashable/index.html>

9 CONCLUSION

- 9.1 In the call for submissions it is noted that *The Law and Economics Consulting Group report* (2007) found that the argument for retaining the ban was “weak”.
- 9.2 Artists have a direct interest in encouraging public respect for their legal rights, including copyright. Any limitation on artist and public access to information should therefore have a strong justification or it risks undermining public respect for copyright in New Zealand. Copyright depends more than ever on public awareness of not only the obligations it imposes, but the reasoned justifications.
- 9.3 **We see no overwhelming justification to continue the ban on commercial parallel importing of films. We therefore support letting the ban lapse.**
- 9.4 We thank the Ministry of Business, Innovation & Employment for the opportunity to submit on the discussion document.