

Copyright (Parallel Importation of Films and Onus of Proof) Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the Copyright Act 1994 (“the principal Act”). It gives effect to the Government’s decisions to—

- introduce a ban on the parallel importation of films made primarily for public showing in cinemas (including copies of those films in other formats, such as DVDs, VHS videos, and video CDs) for 9 months after a title’s first international release. The ban is to remain in effect for a period of 5 years:
- amend section 9(2) and (3) of the principal Act to clarify the scope of the rental rights granted to owners of copyright in films, sound recordings, and computer programs with respect to parallel imported copies of those works:
- amend the principal Act in relation to sound recordings, films (including DVDs, VHS videos, and video CDs), and software products (such as computer programs in the form of recorded application programs, including electronic books and computer games) to shift the evidentiary onus in respect of whether the goods in question are infringing copies to the defendant in civil proceedings concerning the act of importation:
- amend the existing requirement in the principal Act that the defendant in civil proceedings concerning the act of importation “knows or has reason to believe” to a requirement that the defendant “knows or ought reasonably to know” that the imported object was an infringing copy in relation to sound recordings, films (including DVDs, VHS videos, and video

CDs), and software products (such as computer programs in the form of recorded application programs, including electronic books and computer games).

Parallel importing and the viability of cinemas

The Bill aims to address concerns that the parallel importing of videos and DVDs could threaten the financial viability of widespread theatrical exhibition of films, in cases where videos and DVDs of major films are imported from the United States ahead of the New Zealand release date. The availability of parallel imported copies of new release films for rental before or during the release of those titles in New Zealand threatens the viability of cinemas and the ability of local distributors to supply prints to cinemas for exhibition. This is seen as a concern particularly for rural and provincial theatres, with consequent detrimental impacts on these communities.

A ban on the parallel importation of film products for a defined period aims to manage these impacts. A sunset period of 5 years will provide an opportunity to assess whether the ban should be continued in light of developments in digital distribution of films and cinema projection technologies.

Clarification of rental rights

The principal Act is intended to give owners of copyright in films, sound recordings, and (subject to certain restrictions) computer programs the sole right to the rental of copies of those works to the public. Following the enactment of the Copyright (Removal of the Prohibition on Parallel Importing) Amendment Act 1998, however, some ambiguity has arisen concerning the application of rental rights, as provided under section 9(2) and (3) of the principal Act, to parallel imported copies of copyright works.

A decision of the High Court in November 2001 (*Video Ezy (NZ) Ltd v Roadshow Entertainment (NZ) Ltd* (2002) 7NZBLC 103, 524) confirmed that Parliament did not intend that the scope of the rental rights granted under the Act not apply to parallel imported copies of works protected under New Zealand copyright law. The Court held that rental of parallel imported DVD copies of 2 recently released film titles infringed the rental rights of the owner of the copyright in those films.

The Bill amends the principal Act to make explicit the intended meaning of this provision as confirmed by the High Court. This aims to address any remaining uncertainty concerning rental rights.

Measures to address piracy – changes to the onus of proof

The Government is committed to ensuring that copyright owners are able to effectively enforce their rights against acts of intellectual property theft that can seriously impact on their ability to supply their goods to New Zealand consumers.

In doing so, it is important that copyright law recognises that some copyright goods (films, sound recordings, and software products) are particularly susceptible to piracy. Owners of copyright in works that can be easily copied in large numbers at low cost are particularly concerned about the difficulties faced in taking civil proceedings in respect of suspected infringing copies imported into New Zealand, namely—

- proving that the goods in question are pirated; and
- proving that importers of such goods knew or had reason to believe that the goods were pirated (infringing) copies.

The Bill accordingly introduces changes to the onus of proof in civil proceedings concerning the act of importation to shift the evidentiary onus concerning whether the goods in question are infringing copies to the defendant. The Bill also amends the existing requirement in the principal Act that the defendant “knew or had reason to believe” that the imported object is an infringing copy by substituting the phrase “knows or ought reasonably to know”. These changes only apply in the case of sound recordings, films (regardless of their format, ie, including DVDs, VHS videos, and video CDs), and software products (such as recorded application programs, including electronic books and computer games).

The changes to the onus of proof are a departure from a fundamental rule of civil procedure (ie, that the onus of proof for an action lies with the plaintiff). The changes are, however, considered to be justified in the case of the products specified above because—

- these goods are particularly susceptible to piracy;
- importers, rather than copyright owners, are likely to have more ready access to information concerning lines of supply that can establish whether or not the goods are infringing copies.

The Bill provides that, in determining whether imported goods are infringing copies, the Court shall not require any person to disclose information concerning sources of supply if it appears to the Court that it would be unreasonable to do so. This is intended to manage the risk that the new provisions could be used to deter legitimate activities concerning parallel imported goods.

The Bill details in *new section 35* the specific goods to which the amendments apply. For the purposes of this section, a **film** is limited to a film produced principally for showing in public, or a copy of that film, or a copy of a substantial part of that film. The definition of **film** in the principal Act is very wide. The underlying policy intent of the Bill, however, relates to films made for exhibition in cinemas (whether these are first released in New Zealand in cinemas or for rental), and the provision of a limited period of protection for authorised distributors from competition from parallel imports during the first release of a new title. *New section 35(5)(b)*, therefore, limits the scope of the amendments in accordance with this intent.

The concepts of sound recording and computer program are technologically neutral. They recognise that such products may be provided in a number of formats (“in any material form”), such as, but not limited to, optical discs in compact disc or similar form. The concepts of sound recording and computer program are also limited to those products that are susceptible to piracy, by excluding sound recordings and computer programs that are incorporated in other goods or preloaded on to, or imbedded in, computers or other devices.

Exhaustion of rights granted under the Trade Marks Act 2002 (a Bill currently before Parliament)

Consequential amendments are made to the Trade Marks Act 2002 to ensure that registered trade marks cannot be used to frustrate legitimate parallel importing, in line with the Government’s parallel importing policy. For the avoidance of doubt, these amendments provide that a registered trade mark is not infringed by the use of the trade mark on parallel imported goods (including for the purpose of advertising) where a trade mark has been legitimately applied, whether that was in New Zealand or anywhere else in the world.

The amendment to the Trade Marks Act 2002 (a Bill currently before Parliament) is appropriate in the context of this amendment to copyright legislation. While parallel importation is more generally

perceived as a copyright issue in New Zealand, copyright goods may also be trade marked. It is therefore appropriate that a consistent approach towards parallel importation is taken in both copyright and trade mark legislation.

Clause by clause analysis

Clause 1 is the Title clause. The Bill amends the Copyright Act 1994 (“the principal Act”).

Clause 2 provides that the commencement date is the day after the date on which the Bill receives the Royal assent.

Clause 3 clarifies the scope of rental rights granted under section 9 of the principal Act. Copyright owners are able to exercise the rental rights granted under this section in relation to parallel imported copies of films, sound recordings, and computer programs.

Clause 4 substitutes a *new section 35* in the principal Act. This new section makes 4 substantive amendments that affect certain types of sound recordings, films, and computer programs. Those amendments are as follows:

- the reversal of 1 aspect of the onus of proof in relation to civil proceedings concerning the act of importation so that the burden of proof is on the defence to rebut the presumption that the imported work is an infringing copy:
- the introduction of an objective knowledge requirement requiring the plaintiff to prove in civil proceedings that the defendant knows or ought reasonably to know that the imported work is an infringing copy:
- a ban of 9 months on the parallel importing of new release film titles made principally for public exhibition in cinemas that will expire at the end of 5 years from the date of commencement of this Bill:
- protection for legitimate parallel importers by ensuring that sources of supply need not be disclosed in certain circumstances.

Clause 5 is a consequential amendment to the Trade Marks Act 2002 (a Bill currently before Parliament). It ensures that actions for infringement of a trade mark under this Act cannot be used to prevent the parallel importing of copyright goods that are also trade marked goods.

Regulatory impact and compliance cost statement

Financial viability of film exhibition

Background

In 2000/01, the Government undertook a review of the implications of parallel importing for investment in the creative industries. In the course of that review, film and video distributors and film exhibitors expressed concern that the rental of parallel imported DVDs, in advance of the New Zealand theatrical release date, threatened the widespread theatrical exhibition of films. This in turn threatened the financial viability of film and video distributors and picture theatres, particularly in small communities and rural areas. (Their concern was based on the occurrence of declining box office takings for the first time in 10 years. Parallel importing was one of a number of contributing factors identified. Other identified factors included reduction in the drinking age, availability of other entertainment options (Internet, Playstation), and an increase in the cost of petrol and ticket prices.)

A particular feature of the motion picture industry is its window marketing system. Returns are maximised by passing each title through carefully temporally spaced format windows, from theatrical release in major centres and then in provincial and rural centres, to release as video/DVD for rental, followed by video/DVD sale, pay-per-view television, subscription television, and, finally, free-to-air television.

Statement of problem and need for action

DVD copies of new release films are being parallel imported from the United States, where theatrical release can occur up to 3 months ahead of New Zealand. There was evidence that many of these parallel imported copies were being rented to the public without the permission of the copyright owners, thereby infringing their rental rights in those titles.

Film and video distributors and film exhibitors considered that the availability of parallel imported copies of major new release film titles for rental in advance of the New Zealand theatrical release impacts on theatrical attendance. There was some suggestion that declining cinema box office takings were attributable to the availability of parallel imported copies. The Motion Picture Distributors Association (MPDA) claimed that parallel importing of new release

DVD titles was partly responsible for a 9% fall in box office takings in the January to October 2000 period over the same period for the previous year. The MPDA, which reported that this represented the first fall in takings in a decade, also attributed the fall to the lowering of the drinking age and increased Internet usage, but did not consider these to be long-term detrimental factors.

Declining theatre audiences could mean over time:

- distributors would theatrically release fewer films in New Zealand. Distributors would, if possible, have to release films earlier, in conjunction with, or closely following, the United States' release date and would therefore no longer have access to second-hand prints. This would increase costs, could result in increased ticket prices, and would create disincentives to make films available for theatrical release in New Zealand; and
- rural and smaller communities could face a loss of facilities (picture theatres) as a result of fewer films being available for exhibition in smaller theatres and audiences having to wait longer for a smaller number of prints to become available after exhibition in major centres.

Statement of public policy objectives

The objective is to ensure that the viability of cinemas is maintained and that New Zealand continues to benefit from wide-ranging availability of major film titles.

Statement of options for achieving desired objective

Non-regulatory measures

Changing technology (digital prints of films) will in time change the means by which films are distributed and, accordingly, will enable copyright owners to exercise greater control over their copyright. It should also reduce the cost of copies for theatrical exhibition, thereby removing the need to wait for second-hand copies to become available from the United States and therefore result in a greater number of copies being made available in New Zealand. The widespread uptake of the technology is, however, expected to take some time (indicatively, a 5-year time horizon at least) and is also dependent on the adoption of digital projection technology by picture theatres. The cost of the new projection technology, together with an

anticipated more limited working life of the equipment, may initially be prohibitive for picture theatres in smaller communities. Once digital technology becomes the norm, the need for the regulatory measures outlined below can be expected to decline.

With regard to the enforcement of rental rights, it would be possible to rely on existing case law as an alternative to introducing further amendments to the Copyright Act 1994 (“the principal Act”) (see discussion below).

Regulatory measures

Option 1: Amend principal Act to clarify rental rights

Section 9(3) of the principal Act defines the meaning of **issue to the public** in respect of films and sound recordings as including the rental of copies of those works to the public. A copyright owner has the right to issue copies to the public and can bring infringement proceedings against any person who issues copies of the copyright work to the public without the permission of the copyright owner. (Ss 29 and 31 of the principal Act.) The exercise of this right to bring infringement proceedings by copyright owners would directly address the substantive problem outlined above, ie, the availability of parallel imported rental copies of film titles prior to theatrical release. Copyright owners have, however, tended to underutilise this right, reportedly as a result of some ambiguity in the wording of section 9(3) and uncertainty over its application to parallel imported copies (ie whether the right attaches to parallel imported DVDs as well as those sold by the copyright owners in New Zealand).

The interpretation of section 9(3) was assisted in November 2001, when the High Court confirmed (*Video Ezy (NZ) Ltd v Roadshow Entertainment (NZ) Ltd* (2002) 7NZBLC 103, 524) that, in removing restrictions on parallel importing in 1998, Parliament did not intend that rental rights granted under the Act should not attach to parallel imported copies of works protected under the principal Act. This finding should assist copyright owners in the future and constrain the availability of parallel imported copies for rental in advance of theatrical release.

It would be possible simply to rely on this recent case law and any future determination by the Courts. Option 1, however, involves amending section 9(3) to clarify the scope of the Act and increase certainty for affected parties. While the concern to be addressed by

the amendment relates to the rental of copies of films, the amendment would equally apply to, and provide the same clarification for, the rental of sound recordings.

Option 2: Limited parallel importing ban

This option involves amending the principal Act to introduce a ban on the parallel importation of motion picture films, videos, and DVDs for a specified period from the date of a film's first international release. A range of sub-options relating to the length of the proposed ban were considered, ranging from 6 months to 2 years.

Films are generally released for theatrical exhibition in New Zealand 3 to 6 months after first international release. The 6-month option was therefore canvassed as providing an effective cover for the period up to theatrical release. Rental copies of a film are generally not released until between 4 and 9 months after the initial New Zealand theatrical release. The 9-month ban (the period agreed by Cabinet) is intended to provide cover for this intervening period. Providing a significantly longer period, such as 2 years, would not take account of the interests of parties such as retailers, consumers, and New Zealand society as a whole as a net importer of copyright products. Specifically, a longer period of time would restrict competition in the sell-through retail market.

Evaluation of options

Options 1 and 2 could be regarded as alternative approaches to addressing the problem identified above. Option 1 essentially limits the availability of products that could be made available for rental in contravention of section 9(3). Option 2 clarifies the scope of section 9(3) in order to remove any remaining uncertainty and protect the Court's finding against a contrary finding in any appeal. Cabinet determined to adopt both measures.

Statement of net benefits of proposal

The proposals will benefit cinema operators, particularly in rural and provincial areas, and, in turn, provide social benefits for the communities concerned. As noted above, the proposal is also expected to ensure that New Zealand audiences continue to have access to a wide range of motion picture titles.

Copyright owners will derive financial benefit from both the protection afforded by the ban and also the increased certainty provided by amending section 9 of the principal Act. The proposals could benefit distributors and exhibitors by removing the adverse effects that they claim parallel importing of new release titles has had on cinema box office takings, which the MPDA claimed contributed to a 9% fall from \$101.6 million to \$92.5 million for the January to October 2000 period. There is, however, no data that quantifies the degree to which parallel importing activities might have contributed to this fall, if at all.

This amendment will also increase certainty for retailers and video rental outlets in regard to their ability to sell and rent parallel imported copies of films. The proposal applies only to the commercial importation of film products and does not preclude private individuals importing copies of a film for personal use.

Statement of consultation undertaken

The Government has consulted widely with interested parties in the context of its review of parallel importing and the creative industries. Consultation was undertaken by means of a public discussion paper released through the Ministry of Economic Development in December 2000, as well as a questionnaire and targeted consultations with creative industry stakeholders in March and April that year. Submissions on the issues discussed above were received from film and video distributors, film exhibitors, and the Film Commission.

The following government departments were consulted: Treasury, Te Puni Kōkiri, Ministry of Justice, Ministry for Culture and Heritage, Ministry of Foreign Affairs and Trade, Department of the Prime Minister and Cabinet, and the New Zealand Customs Service.

Business compliance cost statement

Sources of compliance costs

Importers wishing to parallel import films may face some costs in determining whether particular titles are covered by the ban, which will require them to ensure that titles were first released at least 9 months prior to the date of importation (eg, to confirm the timing of first release, and possible legal advice on compliance with the ban). Parallel importers and retailers who might need to seek legal advice

on how the change in the law affects their operations could also incur compliance costs. Retailers and importers of parallel imported titles that are not covered by the ban may also experience some loss of revenue if the ban results in increased private purchases (eg, over the Internet) or film attendance substituting for the purchase of imported copies.

The clarification of the scope of copyright owners' rental rights could reduce compliance costs that arise from the need to obtain legal advice concerning the scope of the rights as currently provided in the Act and in case law.

Parties likely to be affected

Importers of films, videos, and DVDs. The numbers of parties who will be affected have not been quantified.

Estimated compliance costs of proposal

No estimate of costs is available. Interested parties did not provide financial data. For major motion picture titles, the first release is most likely to be a well-publicised international event. The costs of ascertaining such information are therefore likely to be small. It might, however, be more difficult to ascertain the first international release dates of smaller release films, such as 'art house' and foreign language films.

Longer term implications of compliance costs

No longer term issues are foreseen. The proposed ban is to be instituted for a period of 5 years, thus mitigating any longer term effects. A review is to be undertaken at the end of 2004 on the effects of the ban.

Level of confidence of compliance cost estimates

No estimate of costs is available as the interested parties did not provide financial data.

Key compliance cost issues identified in consultation

The key compliance cost issue identified concerned the manner in which parallel importers could determine whether a particular title was no longer covered by the ban, ie, that its first international

release was more than 9 months before the intended date of parallel importation.

Overlapping compliance requirements

There are no overlaps.

Steps taken to minimise compliance costs

As noted above, it is proposed that the ban be established for a 5-year period. The Ministry will include reference to the ban in a new copyright information publication.

Copyright policy

Background

Optical disk piracy is an issue of growing concern internationally. Copyright products such as sound recordings, films, and software are particularly susceptible to piracy in that perfect copies can be easily produced at low unit cost and easily imported by itinerant traders. High numbers of unauthorised optical disc copies can be shipped around the world in small consignments that are difficult to detect and track.

As a country that relies heavily on international trade, and as a net importer of entertainment and technology products, New Zealand needs to ensure that it has a robust intellectual property rights regime in place. This includes ensuring that intellectual property rights (which are privately held rights) can be effectively enforced.

Statement of problem and need for action

Owners of copyright in sound recordings, films, and software consider that they are unable to take successful action against the importation of pirated goods under the existing provisions of the principal Act, on the basis that there is difficulty in—

- (a) proving that the goods in question are pirated; and
- (b) proving that importers of such goods knew or had reason to believe that the goods were pirated or “infringing” copies.

Difficulties arise in relation to (a) above as copyright owners have to track the objects to the country of origin, prove they were made there, prove that they were made without the permission of the

copyright owner, and prove that doing so infringed copyright in that country.

In terms of (b), copyright owners considered that the current test can be subverted by the importer stating that he or she thought that the copies were legitimately made. Before taking legal action, copyright owners must therefore formally notify the importer that the copies in question are infringing copies. This may, however, result in the products simply being withdrawn from the market. While this may temporarily constrain the sale of pirated goods, it does not achieve the stronger deterrent effect of a successful prosecution.

Copyright owners did not provide any information that quantified the losses they had suffered as a result of the problems outlined above. The Ministry of Economic Development did not have an opportunity to undertake any analysis of copyright owners' views or the extent of the perceived problems.

Statement of public policy objectives

The Government's objective is to constrain copyright piracy and, in particular, to ensure that effective action can be taken against copyright infringement in relation to copyright works that are particularly susceptible to piracy.

Statement of options for achieving desired objective

Non-regulatory measures

Non-regulatory measures were not fully considered. Such measures typically include providing information to the public (targeted, for example, at consumers, importers, or retailers) on matters such as the law relating to copyright and the implications of copyright piracy. The music industry already has an educational campaign in place to heighten consumer awareness of the implications of piracy.

It is unlikely that such non-regulatory measures would in themselves achieve the necessary outcomes, given the ease of copying and the difficulty of tracking infringing imports. Itinerant importers are difficult to target, and it is assumed that many are aware that they are infringing copyright. Consumers may not be well placed to recognise illicit products that are being sold commercially.

Regulatory measures

Option 1: Status quo, plus reliance on new measures in Trade Marks Bill

This option would make no changes to the principal Act. Some reliance would be placed on increased criminal penalties for piracy-related offences provided in the principal Act, which were introduced through the Trade Marks Bill (currently before Parliament). The Bill amends the maximum term of imprisonment in section 131 of the principal Act from 3 months to 5 years. While this increased penalty may have a deterrent effect, it would not address the issues discussed above, relating to difficulties copyright owners face in proving infringement in civil proceedings concerning imported objects.

Option 2: Amend principal Act to change the onus of proof

This option involves amending the principal Act to shift the evidentiary onus concerning whether sound recordings, films (including VHS videos, DVDs, and video CDs), and software products are infringing copies to the defendant in civil proceedings concerning the act of importation (ie, create a rebuttable presumption that suspected imported goods infringe copyright). This option addresses the perceived difficulty copyright owners face in obtaining evidence to prove that the goods in question are infringing copies.

Option 3: Change the knowledge requirement for copyright infringement in the principal Act

This option involves changing the current knowledge requirement placed on the plaintiff under the Act from “knew or had reason to believe” that the imported object was an infringing copy to “knows or ought reasonably to know”. This higher test seeks to address the perceived difficulty discussed above of proving knowledge under the current provisions of the principal Act.

The preferred option is to adopt both options 2 and 3 in order to address both of the perceived difficulties currently faced by copyright owners. Although these options could be considered as alternatives, either measure by itself would not fully address the concerns of copyright owners.

Statement of net benefits of proposal

The proposed amendments will benefit owners of copyright in sound recordings, films, and software products by strengthening their ability to take civil proceedings to enforce their copyright and reducing the costs of such action. Copyright owners may also derive benefits from a possible reduction in the need to take legal proceedings (ie infringing importers may be more prepared to settle or to desist from importing infringing goods if it is apparent that copyright owners face fewer constraints in proving infringement). The proposed measures will benefit consumers by reducing the amount of infringing material that is imported and sold as genuine. There will be some costs to legitimate importers in having to prove that imported goods are legitimate when faced with legal proceedings. There is also a risk that some copyright owners may take harassing action against parallel importers, with associated legal costs for legitimate parallel importers. The extent to which vexatious claims and resulting litigation may arise has not been quantified.

The proposed changes endeavour to balance the interests of copyright owners and legitimate importers in such a way as to minimise compliance costs. Defendants will not be required to bear the entire burden of proof: the plaintiff will still need to prove a number of elements, including—

- copyright ownership; and
- that the defendant has imported an object into New Zealand; and
- that the defendant did not have the permission of, or a licence from, the copyright owner to import the goods; and
- that the object was not imported for private use.

The type of information that would be required from importers to prove the legitimacy of alleged infringing goods is that which an importer would be reasonably expected to maintain as a matter of good business practice. Protection is accorded to sources of supply in that the proposed amendment provides that the Court must not require a person to disclose any information about his or her sources of supply if it appears to the Court that it would be unreasonable to do so. Although the High Court already has certain powers concerning unjustified or vexatious claims, this new measure is considered necessary to ensure that copyright owners do not use copyright

infringement proceedings to force parallel importers to reveal their trade sources.

New Zealand society may gain a net benefit if the measures significantly deter piracy (which ultimately could affect the availability of imported copyright goods on the New Zealand market and could result in consumers inadvertently purchasing lower quality products). If, however, the effect of the proposed measures were to deter legitimate parallel importing of sound recordings, films, and software, this could have potential effects on consumer welfare by reducing the potential for intra-brand competition. This could lead to increased prices and/or a reduction in the range of titles available.

Statement of consultation undertaken

The Government has consulted widely with interested parties in the context of its review of parallel importing and the creative industries. Piracy issues, including the onus of proof, were discussed in a discussion paper released by the Ministry of Economic Development in December 2000, and a number of submissions received on that paper from stakeholders in the sound recording, film, and software industries addressed this issue.

The following government departments were consulted: Treasury, Te Puni Kōkiri, Ministry of Justice, Ministry of Foreign Affairs and Trade, Department of the Prime Minister and Cabinet, and the New Zealand Customs Service.

Business compliance cost statement

Sources of compliance costs

Compliance costs will arise for parallel importers of sound recordings, films, and computer programs through the need to—

- obtain legal advice concerning the effects of the legislative changes on their business operations; and
- maintain records to substantiate the legitimacy of imports; and
- obtain legal advice in the event that copyright owners see incentives to take harassing action to deter parallel importing; and
- potential loss of sources of supply of parallel imported products.

Parties likely to be affected

Parallel importers of sound recordings, films, and computer programs. Conversely, copyright owners may derive some cost benefits as they will no longer face the costs of obtaining evidence relating to chains of supply, in order to prove infringement and possibly from a reduced need to take legal action (see discussion above on net benefits of the proposal). The numbers of parties who will be affected have not been quantified.

Estimated compliance costs of proposal

Information on estimated compliance costs was not obtained. The nature and detail of the procedures parallel importers would be required to follow to ensure that imports are legitimately made and not pirated have not been determined.

Longer term implications of compliance costs

The costs identified above may act as a disincentive to some importers to continue parallel importing, with consequent reduction in choice of goods and increased prices for consumers.

Level of confidence of compliance cost estimates

See above.

Key compliance cost issues identified in consultation

The key compliance cost issues identified in consultations were from importers, namely that—

- they could face substantially increased costs in maintaining the necessary documentary evidence to defend infringement proceedings in which the onus of proof was on the defendant, rather than the plaintiff; and
- sources of supply could be affected if disclosure of suppliers were required in order to defend infringement proceedings; and
- the measure might create an incentive for copyright owners to take harassing action, with consequential legal costs to importers.

Overlapping compliance requirements

There are no overlaps.

Steps taken to minimise compliance costs

The Ministry of Economic Development will include reference to the ban in a new copyright information publication.

Hon Judith Tizard

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Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act **2002**.
- (2) In this Act, the Copyright Act 1994¹ is called “the principal Act”.

¹ 1994 No 143

Part 1

Commencement and amendments to principal Act

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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3 Meaning of issue to the public

- (1) Section 9(2) of the principal Act is amended by inserting, after the words “programs to the public”, the words “and rental subsequent to those works having been put into circulation”.

(2) Section 9(3) of the principal Act is amended by adding the words “and rental subsequent to those works having been put into circulation”.

4 New section 35 substituted

The principal Act is amended by repealing section 35, and substituting the following section: 5

“35 Importing infringing copy

“(1) A person infringes copyright in a work if—

“(a) that person imports into New Zealand an object that is an infringing copy of the work and,— 10

“(i) in the case of a work that is a sound recording, film, or computer program to which **subsection (5) applies, that person knows or ought reasonably to know that the object is an infringing copy; or**

“(ii) in the case of other works, that person knows or has reason to believe that the object is an infringing copy; and 15

“(b) the object was imported into New Zealand without a copyright licence; and

“(c) the object was imported into New Zealand other than for that person’s private or domestic use. 20

“(2) In civil proceedings for infringement of copyright under **subsection (1), in the case of a work that is a sound recording, film, or computer program to which **subsection (5)** applies,—**

“(a) an object is presumed to be an infringing copy in the absence of evidence to the contrary; and 25

“(b) the Court must not require any person to disclose any information concerning the sources of supply of the object if it appears to the Court that it is unreasonable to do so. 30

“(3) In civil proceedings for infringement of copyright under **subsection (1), in the case of a work that is a film to which **subsection (5)** applies, an object is an infringing copy if it is imported into New Zealand within 9 months after the work is first made available to the public (as set out in section 23(2)) by any authorised act whether in New Zealand or elsewhere. 35**

“(4) **Subsection (3) expires with the close of the period of 5 years beginning on the date of commencement of this Act.**

- “(5) This subsection applies to the following sound recordings, films, and computer programs:
- “(a) a sound recording stored in a material form that is separate from any device or apparatus capable of playing sound recordings: 5
 - “(b) a film produced principally for showing in public, or a copy of that film, or a copy of a substantial part of that film:
 - “(c) a computer program stored in a material form that is separate from any device or apparatus capable of executing computer programs.” 10

Part 2

Consequential amendment to Trade Marks Act 2002

5 Consequential amendment to Trade Marks Act 2002 15

The **Trade Marks Act 2002 (2002 No 00)** is amended by inserting, after **section 97**, the following section:

“97A Exhaustion of rights conferred by registered trade mark

A registered trade mark is not infringed by the use of the trade mark (including use for the purpose of advertising) in relation to goods that have been put on the market anywhere in the world under that trade mark by the owner or with his or her express or implied consent.” 20