Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

28th August 2013

Dear Secretary,

RE: Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013
SUBMISSION BY STUART ALEXANDER & CO PTY LTD

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3. Principles at play in relation to the Copyright Act 1968
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1. Introduction

With the expansion of the internet and the increasing ease with which Australians are able to access products sold online and overseas, there has been considerable public interest in the pricing differential between identical products in different jurisdictions. This concern has led to the initiation of a number of inquiries, including the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy, the House of Representatives Inquiry into IT Pricing, and this inquiry into the proposed amendment put forward by Senator Scott Ludlum.

In making this submission, SA will confine its comments to a discussion about the conflicting rights at stake when considering changes to the Copyright Act; and to the unique health and safety concerns that the food and beverage industry faces with regard to parallel importation.

While acknowledging that the *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013* will lapse at the formation of the new Parliament, SA wishes to place on the record its position and urges the Senate to consider the broader implications of legislative change which at first glance may appear to have no unintended consequences.

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About Stuart Alexander Pty Ltd

Established in 1884, SA is a leader in the Australasian fast moving consumer goods (FMCG) arena, and imports, markets and distributes premium brands across various categories including food and beverage, confectionery, snacks, chocolate and cigars. We are the trusted choice of international brand owners looking to launch and grow their brand in the Australian and New Zealand markets.

The long-term success of our business is built on the longevity of our relationships - with our brand owners, the trade, our suppliers, stakeholders and with our consumers. Many of our brand principals have been with us for over a decade and some much longer. They include privately-owned companies who value working with a local partner with similar values and heritage.

We pride ourselves on our ability to reach more customers than our competitors through our deep understanding of our brand consumers and market categories. Our dedicated in-house teams manage every step of the process from factory door to consumer including:

- Sales, field operations and merchandising
- Marketing and local brand management
- Importation and supply chain management
- Stock control and forecasting
- Consumer and retailer care

Headquartered in Sydney, Australia, SA has over 150 employees and branch offices in Brisbane, Melbourne, Perth and Auckland to assist in the delivery of quality service for which we are renowned. Our brand portfolio includes chocolate, confectionery, chewing gum, salty snacks, biscuits, beverages, sauces and syrups imported from Italy, Germany, Belgium, France and the USA.

After more than 125 years in business and as one of Australia's largest privately-owned companies, we are respected for our strength, capabilities, experience, expertise, relationships and world best-practice systems and structures. At the core of our business, and in everything we do, SA values respect and integrity, operates with transparency and flexibility, and strives always for excellence.

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1. **Principles at play in relation to the *Copyright Act 1968* (the 'Act')**

The competing principles with which Parliament has had to grapple in relation to the Act over the past fifteen years can be classified in the following way:

a) Facilitation of market competition as a way of driving lower consumer costs;
b) Protection of the intellectual property rights of producers;
c) Preservation of the trading rights of producers; and
d) In the case of food, beverage and consumables industry, ensuring Australian standards are maintained in relation to consumer health and safety.

a) Facilitation of market competition as a way of driving lower consumer costs

Prior to 1998, SA (and other companies operating in the industry) were able to take measures under the Act to prevent parallel importation of goods for which there exists the exclusive licence in Australia. The Act at the time allowed SA, as the owner of the copyright registration for the products it imported, to request Customs to seize goods breaching copyright at the point of entry, which provided a fast and cost effective means for SA to protect its legal rights.

Legislation passed in 1998 amended the Act to the effect copyright law could no longer be used to prevent the importation of a non-copyright item by virtue of the copyright held over the label on that product. The argument at the time of the introduction of the 1998 amendments was that the act prevented effective competition and led to higher prices for consumers.

SA argued then, and maintains today, that price is not the only measure by which products compete.

> "Effective competition requires both that price should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers."
>
> *Trade Practices Tribunal* in **Re Queensland Co-operative Milling Association Limited (1976) 8 ALR 481**

These words form the basis for consideration of competitive conduct in every Trade Practices case. For SA, the exclusive licence we have over our products gives us the ability to encourage further competition in the markets in which we operate. Our business relies on:

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- Our ability to make substantial up-front investments on new products. This enables us to achieve market penetration of these goods and re-coup those initial investments over the long-term.

- Quick to market. SA appreciates that one of the key goals of the amendments Senator Ludlum is proposing is to ensure that those with special needs or sight problems are not excluded from access to braille books by virtue of copyright legislation. We certainly would not want to see people with disabilities discriminated in such a way. In the markets in which SA operates, we are a leader in bringing new products to market quickly - this is one of the ways we maintain a competitive advantage over our rivals.

- Inter-brand competition. The food industry is one of the most competitive in Australia, particularly in the products SA specialises in. For example, with both chocolates and alcoholic beverages, where the brands themselves are highly differentiated, there is a wide range of easy substitutes for our products. This competition, both price and non-price is something we cannot afford to ignore.

The brands SA represents face a market quite dissimilar to the market for books (which, due to the unique nature of their content, limits the substitution aspect of the good). Our exclusive licence arrangements allow SA to introduce products which would otherwise not be imported to Australia, thus introducing more competition to the market for this sector of goods than would otherwise be the case. The changes to the Act in 1998 have lessened the value of those licences and allowed parallel importers to free ride on the significant brand investment we have made.

SA would like also to address the competitive disadvantage that companies like SA, as well as local manufacturers, face in relation to compliance and enforcement costs which are not faced by parallel importers. Like local manufacturers, and because SA is listed as the importer on our product labels, under the Trade Practices Act we are deemed to be the manufacturer of the product and as such are subject to the (rightfully so) higher standards demanded under Australian law. Parallel importers are not subject to the same scrutiny and are therefore able to compete on price due to less stringent quality control.

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b) Protection of the intellectual property rights of producers

In the inquiry into the 1998 amendments, the Australasian Soft Drink Association submitted that the idea underpinning those changes, namely that there is a distinction between the brand, which is copyrighted, and the product, which is not, was fundamentally at odds with a commercial understanding of how value is created in an individual product[1]. The protections afforded previously under the Act were not simply about stopping others selling a product but about the investment in creating a market for that product. SA argues that the brand (or label on a product) cannot be separated from the product itself and that on this basis, the 1998 changes to the Act were fundamentally flawed.

Turning to the Bill currently before the Senate, SA has some sympathy with those authors who are set to suffer financial loss as a result of the reversal of the onus on consumers to prove that their use constitutes 'fair use'. The 'fair use' doctrine is currently under consideration by the Australian Law Reform Commission and it would be premature for the Senate to pass legislation before a consideration of its recommendations is complete.

c) Preservation of the trading rights of producers

In relation to the proposed amendments by Senator Ludlum directing the removal of geocodes from IT products sold over the internet, SA would like to make two points. First, we question whether it is even possible for Australian law to implement such a measure on a product sold by a company in another country – surely Australian law cannot reach into other jurisdictions to force a producer to charge the same price to Australians? The kind of price discrimination that may be occurring here is different in principle to variations in price or access as a result of the state placing restrictions on trade (where Australia would quite legitimately be entitled to push for change under a free trade policy).

Second, SA would ask whether it is an appropriate goal of public policy to be directing companies as to what price they should charge for their products. While every consumer would surely like to pay less for goods they consume, and on the face of it, there does not appear to be any direct cost reason for IT companies to charge Australians more for their products than in other countries, the proposed amendments seem to be an extraordinary government legal and regulatory intervention. One of the basic rights (and incentives to create) a producer has is the power to determine the price of its own products. That the Australian market for online goods at present is willing to bear a higher price is not a reason in and of itself for government intervention.

d) In the case of food, beverage and consumables industry, ensuring Australian standards are maintained in relation to consumer health and safety

[1] Hansard, Senate Legal and Constitutional Committee, 19 August 1997, 91-92

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A large portion of SA's business involves food products where goods brought into Australia by a parallel importer are often of a lower quality and do not meet the labelling and food standard requirements set down by Australian law.

Example – Hazardous Additives

Stuart Alexander commenced importation of a new product manufactured in the United States. That product contained an additive identified by Australian food laws as carcinogenic and therefore not permitted in the product. Stuart Alexander had the manufacturer alter the ingredients in the product to exclude that additive only in products imported into Australia by Stuart Alexander.

Subsequently, Stuart Alexander identified a parallel importer who was importing the same product with the illegal additive included in the product.

Parallel importation of these products causes significant issues for both consumers and our company as the exclusive licence holder. These include:

- Over-stamping of the 'use-by' date on chocolates sold, combined with incorrect storage led to a number of quality complaints to SA. At the time, court proceedings were commenced under the Copyright Act and judgement entered by consent in favour of SA. This option is no longer available to us.

- Exposure to product liability actions – A significant number of SA's brands are supplied within the manufacturer's 'export range' and as such, have SA's name printed on the packaging (often alongside the names of exclusive importers in other countries). In cases where product liability issues have arisen in the past, SA has had claims made against it from consumers seeking damages where their injury arose from the consumption of product introduced to the market by a parallel importer. Within extreme difficulty, SA has been able to satisfy the consumer that it was not the importer of the defective goods. This has often led to the incurrence of significant sums in legal costs.

  In some product lines, it is simply not possible to prove, from an evidentiary point of view, that SA was not the importer. Under Part V of the Trade Practices Act 1974, SA, as the importer listed on the label, is deemed to be the manufacturer of the product.

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- Damage to reputation – the investment that SA makes in the individual brands is significant, and it is maintaining high standards that has created a market for these goods in the first place. Parallel importers free ride on this investment and are able to damage that reputation and image without facing further consequences.

- Inadequate enforcement by state health inspectors, and the Australian Quarantine Inspection Service (currently facing funding pressure), has left SA with few options to maintain the brand reputation of its products. A 'slap on the wrist' approach by authorities has meant that there is little disincentive for parallel importers flouting the law.

4. Proposal for Protecting Health, Safety and Property Rights

SA was disappointed that the amendments in 1998 failed to take into account the unique nature of the food industry, and the health and safety implications that poor quality imported goods could have on the public. The Act had provided a low cost and efficient means for companies such as SA to maintain those standards.

SA appreciates that is unlikely that the Act will be restored to its previous position and understands that the current amendments only touch on the principles at play, rather than directly impacting its industry. We would, however, like to take this opportunity provided by the Senate to put forward an alternative proposal for consideration.

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Key Recommendations

One option which may resolve some of the challenges our industry faces is the issuance of a 'certificate of authenticity' to accompany branded food imports into Australia. This certificate would state that the product is fit for purpose and based on the advice from the importer meets Australian food and safety standards at time of shipping, also the original manufacturer of the good has approved the distributor to sell into Australia.

Proposals to consider and further develop include:

- The original manufacturer or Australian copyright holder could be responsible for issuing the certificate. This would reduce the bureaucratic burden on government.
- The certificate would have to be sighted by Australian Customs with Bill of Lading etc.
- In order to ensure a 'light touch' with the legal and regulatory aspects of the certificate, the certificate may only come into force in cases where product liability actions have been brought or where the counterfeit of goods is at issue. In those cases, instead of the licence holder, the retailer or distributor who failed to produce a certificate of authenticity would be liable.

The management of SA would be happy to discuss this proposal and the challenges facing our industry with interested Senators. In particular, I am available, at the number listed below, and also to specially travel to Canberra, to discuss this issue in person.

Yours sincerely

Garry Browne
Chief Executive and Managing Director
Stuart Alexander & Co Pty Ltd

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