

Copyright Infringement in Australia

- 2.1 There is a perception, widespread amongst industries that rely on creative endeavour, particularly the film, music and software industries, that copyright infringement in Australia is rife. Yet there is a lack of data on the form and extent of copyright infringement in Australia, and the little that does exist, suggests that by world standards, it is minor. The first task of the Committee, therefore, is to determine the nature of the problem that it is dealing with: the types and scale of copyright infringement in Australia.

Terminology

Piracy

- 2.2 It is useful at the outset to clarify the meaning of a term that is frequently used in referring to copyright infringement, namely 'piracy'. 'Piracy' is not used in the terms of reference nor in the *Copyright Act 1968* (the Copyright Act). 'Piracy' is not a legal term in this context but a colloquial one, and it has no legal significance in determining whether or not a particular act constitutes an infringement of copyright.¹
- 2.3 In submissions received by the Committee, the word 'piracy' was used to refer to different types of infringement. The Copyright Agency Limited (CAL) submitted that 'piracy' should be defined as:

any unauthorised reproduction of a copyright owner's work.
Piracy should not be limited to instances where there is large scale,

¹ Australian Digital Alliance (ADA), *Submissions*, p. S95.

systematic infringement of copyright works for the purpose of deriving a profit.²

CAL argued that this definition was consistent with those adopted by the International Intellectual Property Alliance (IIPA) and the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS).

- 2.4 The Australian Digital Alliance (ADA) and the Australian Consumers' Association (ACA) took the opposite view.³ In their opinion, 'piracy' should refer only to large scale commercial infringement operations. The Attorney-General's Department (AGD) agreed that 'piracy' should refer to:

the unauthorised copying or importation of copyright material for resale or distribution on a commercial scale, in the knowledge of the infringing nature of the material.⁴

- 2.5 It is in the latter, narrower sense that the word 'piracy' is used in this report. Thus 'pirated products' are infringing copies made in commercial infringement operations. It follows that 'piracy' represents only one form of copyright infringement, and that the terms of reference of this inquiry encompass more than just piracy. The inquiry is concerned with all forms of infringement, on all scales.

Software piracy

- 2.6 In its submission, the Business Software Association of Australia (BSAA) explained that piracy of computer software takes a number of forms. Two types of piracy that are unique to computer software are: end user piracy and hard disk loading.
- 2.7 'Hard disk loading' refers to a practice by some PC manufacturers and sellers, where infringing copies of software are loaded onto the hard disk of PCs. 'End user piracy' refers to a practice common in large corporations, where a person within the organisation makes infringing copies of a software application, for use by other people in the organisation. End user piracy avoids the need to purchase sufficient licences for every user in the organisation. End user piracy has traditionally been the business software industry's worst problem.⁵

2 Copyright Agency Limited (CAL), *Submissions*, p. S594.

3 ADA, *Submissions*, p. S96; Australian Consumers Association (ACA), *Submissions*, p. S160.

4 Attorney-General's Department (AGD), *Submissions*, p. S403.

5 BSAA, *Submissions*, pp. S332-333.

Bootlegging

- 2.8 The term 'bootlegging' has its origins in the Prohibition. In the context of copyright, it used to refer to a particular type of infringement, namely the sale of counterfeit merchandise at public events such as concerts and sporting matches. Counterfeit merchandise is a copy of merchandise which is intended to be so similar to the original as to be passed off as a genuine example.⁶

Data on copyright infringement

Statistics

- 2.9 There is no single or official body that compiles statistics on copyright infringement in Australia.⁷ In this regard Australian practice is not unusual; AGD stated that it knew of no government anywhere in the world which has independent statistics or analysis of the level of copyright piracy.⁸
- 2.10 The statistics that are available have been prepared by various industry groups, and each set differs in the method of its preparation.⁹ AGD and the Department of Communications, Information Technology and the Arts (DoCITA) submitted that the methodology is also in many cases untested, in the sense that it has never been fully explained.¹⁰ ADA submitted that for this reason industry statistics should be subjected to a 'high level of critical scrutiny'.¹¹ With these provisos in mind, the statistics cited in the evidence are set out below.

Sound recordings

- 2.11 Music Industry Piracy Investigations (MIPI) stated that the Australian sound recording industry estimates that piracy amounts to 7% of the identified market. This figure was calculated on the basis of the identified

6 Attorney-General's Department (AGD), *Submissions*, p. S403.

7 AGD, *Submissions*, p. S419; Music Industry Piracy Investigations (MIPI), *Submissions*, p. S169.

8 AGD, *Submissions*, p. S419.

9 MIPI, *Submissions*, p. S166.

10 AGD, *Submissions*, p. S420.

11 ADA, *Submissions*, p. S94.

activities of offenders and suspects, and for this reason, is likely to be conservative.¹²

Software

- 2.12 In 1998 the BSAA commissioned a study which revealed that on average 33% of all software programs in use in Australia were illegal copies.¹³ DoCITA criticised the basis on which this figure was arrived at, noting that the OECD has described the basis as 'difficult to accept'.¹⁴ DoCITA suggests that the BSAA figure may be inflated.

Film

- 2.13 The Motion Picture Association (MPA) reported that piracy of films is currently at 4%, having been reduced from a record 20% in the late 1980s.¹⁵ The basis on which this figure was calculated is not known.

Observations

- 2.14 In addition to the statistical data, various witnesses made observations about the level of copyright infringement in their industries. The Australian Copyright Council (ACC) submitted that over the past 5 years, between 6% and 11% of the inquiries dealt with by their legal staff involved infringement issues.¹⁶ The Arts Law Centre of Australia (ALCA) reported providing a similar proportion of advices on infringement issues.¹⁷ The National Indigenous Arts Advocacy Association (NIAAA) stated that it receives between 20 and 30 inquiries each week from indigenous artists relating to copyright infringement.¹⁸
- 2.15 The Australian Customs Service (Customs) stated that in the one year period May 1998 to May 1999, it seized more than 60 consignments of goods for the infringement of copyright.¹⁹ The Anti-Counterfeiting Action Group (ACAG), an association of manufacturers and wholesalers of clothing and other goods, reported that it detects each month

12 MIPI, *Submissions*, pp. S166–167.

13 Business Software Association of Australia (BSAA), *Submissions*, p. S334.

14 DoCITA, *Submissions*, p. S640.

15 Motion Picture Association (MPA), *Transcript*, p. 139.

16 Australian Copyright Council (ACC), *Submissions*, p. S478.

17 Arts Law Centre of Australia (ALCA), *Submissions*, p. S101.

18 Mr Francis, National Indigenous Arts Advocacy Association (NIAAA), *Transcript*, p. 329.

19 Australian Customs Service (Customs), *Submissions*, p. S153.

approximately 2 000 breaches of copyright in markets and souvenir and discount shops around Australia.²⁰

2.16 Although most copyright groups expressed concern over copyright infringement, not all considered it a problem. The West Australian Music Industry Association stated that it was not aware of any significant cases of copyright infringement amongst its members or the wider music community.²¹

International comparison of infringement

2.17 International comparisons of rates of copyright infringement are dependent on industry figures.²² In its submission, AGD referred to figures prepared by the International Intellectual Property Alliance (IIPA), the body in the USA that represents the major copyright industries. The figures are shown in the table below.

Industry estimates of piracy

Country	Film piracy estimated for '98	CD piracy estimated for '98	Business software piracy estimated for '98
Australia	4% (and 4% in '95-'97)	7% (4% in both '95 and '96)	31% (35% in '95, 32% '97))
Canada	(5% in '96)	?	(42% in '96)
Germany	20% (22% in '97)	N/A (3% '95)	28% (33% in '97) 52% for entertainment software
Italy	30%	20%	44% (43% in '97) 50% for entertainment software
Singapore	25% (15% in '97)	19% (30% in '97)	54% (56% in '97) 73% for entertainment software
South Africa	16% (10% in '97)	40% (20% in '97)	50% (48% in '97)
Spain	5% (7% in '97)	5% (5% in '97)	59% (59% in '97)
Indonesia	90%	12%	92%

NB % figures are estimated percentages of total unit sales for the period.

Source: *Attorney-General's Department, Submissions, p. S420.*

The Chairman was also briefed on copyright infringement, including organised criminal involvement, by US government representatives.

20 Anti-Counterfeiting Action Group (ACAG), *Submissions*, p. S369.

21 West Australian Music Industry Association, *Submissions*, p. S43.

22 AGD, *Submissions*, p. S421.

- 2.18 The IIPA figures indicate that the level of piracy in Australia is low, both globally and within our region. Based on evidence given by Microsoft to a US Senate Committee in April 1999, DoCITA concluded that the scale of software piracy in Australia is comparable with that in the USA.²³ The ACA pointed out that Australia has one of the lowest film and video piracy rates in the world,²⁴ as has been acknowledged by the relevant industry body, the Australasian Film and Visual Security Office (which is the agent of MPA in Australia).²⁵
- 2.19 After reviewing the literature, AGD concluded that most pirated products are mass produced in Australia rather than being imported.²⁶ There is, however, no data available as to where pirated products found in Australia are made. Customs reported that the most common imports objected to under the Copyright Act include pirated CDs, video tapes, computer software, clothing and footwear.²⁷ The Australian Visual Software Distributors Association (AVSDA) gave evidence of over 17 000 infringing copies of computer games being imported into Australia.²⁸ BSAA confirmed that the vast majority of counterfeit computer software in Australia is imported from Asia.²⁹ The Committee concludes that a substantial proportion of pirated products in Australia are imported, even if the majority are produced domestically.

Geographical spread of infringement

- 2.20 DoCITA submitted that anecdotal evidence suggests that music and software infringements occur primarily in urban areas, reflecting both larger population densities and larger networks of software and music distributors.³⁰ AGD confirmed that on the limited data available, infringements are not confined to the major metropolitan areas, although they are concentrated there.³¹
- 2.21 Tress Cocks & Maddox (TCM), solicitors who act for manufacturers of licensed merchandise, submitted that the geographical spread across
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23 DoCITA, *Submissions*, p. S641.

24 ACA, *Submissions*, p. S160.

25 DoCITA, *Submissions*, p. S641.

26 AGD, *Submissions*, p. S422.

27 Customs, *Submissions*, p. S148.

28 Mr Ephraim, AVSDA, *Transcript*, p. 308.

29 BSAA, *Submissions*, p. S338.

30 DoCITA, *Submissions*, p. S641.

31 AGD, *Submissions*, p. S422.

Australia of copyright infringement is now complete.³² Mr Stephens of Stephens Lawyers and Consultants agreed that copyright piracy of software is widespread throughout Australia.³³ MIPI also reported that infringing sound recordings are located in the majority of locations throughout Australia.³⁴

Cost of infringement

Direct costs

- 2.22 The AGD concludes that a 'sizeable amount of revenue' results from copyright infringement.³⁵ AVSDA conservatively estimated that visual software piracy results in losses of \$30 million annually.³⁶ The BSAA estimates retail losses caused by software piracy in 1998 to be \$295 million.³⁷ ACAG estimated that copyright infringement costs the textile, clothing and footwear industry in excess of \$300 million per annum.³⁸ MIPI estimates the losses to the music industry from identified infringements in 1998 to be in excess of \$67 million.³⁹
- 2.23 The loss of income caused by copyright infringement naturally has a flow on effect in the copyright industries. It causes the industries to contract, as creators are unable to sustain themselves from their incomes.⁴⁰ This in turn deprives the industries of ingenuity and innovation, especially that contributed by the small-medium business sector.⁴¹ In this regard it is important to bear in mind the relative scale of loss caused by copyright infringement. For a small business, infringement of the copyright in its products can spell financial ruin. The Committee received a submission from one individual, part of whose business was destroyed through infringement.

32 Tress Cocks & Maddox, *Submissions*, p. S49.

33 Mr Stephens, Stephens Lawyers, *Transcript*, p. 49.

34 MIPI, *Submissions*, p. S170.

35 AGD, *Submissions*, p. S421.

36 Mr Ephraim, Australian Visual Software Distributors Association (AVSDA), *Transcript*, p. 306.

37 BSAA, *Submissions*, p. S334.

38 ACAG, *Submissions*, p. S367.

39 MIPI, *Submissions*, p. S171.

40 William Thomas Productions, *Submissions*, p. S2.

41 Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submissions*, p. S488.

Indirect costs

- 2.24 Copyright infringement causes losses to people other than the copyright industries and owners. The entity that suffers most in this group is the government. In its submission, the BSAA argued that reducing software piracy by 6% would generate an additional \$140 million in tax revenue.⁴² The AVSDA estimated the annual loss in tax revenue due to visual software piracy to be \$20 million.⁴³
- 2.25 Copyright infringement also causes losses to those involved in the distribution process, such as retailers⁴⁴ and other service providers, as well as to the wider community, through lost employment.⁴⁵ MIPI noted that there has been no definitive research done into the full socio-economic impact of piracy in Australia.⁴⁶
- 2.26 The BSAA argued that the protection afforded to intellectual property rights directly affects economic development, income levels and foreign investment in Australia. The BSAA suggested that copyright infringement has an adverse effect on all these aspects of the economy.⁴⁷

Involvement of organised crime

- 2.27 The Committee received conflicting evidence on the question of whether, and to what extent, organised crime groups are involved in copyright infringement. Most government bodies stated that they were not aware of the involvement of any organised crime groups.⁴⁸ By contrast, several industry bodies reported that they knew of organised criminal groups, some operating internationally, which were involved in copyright infringement.
- 2.28 One reason for the conflict may be the definition of 'organised crime' that is used. Officers from the Commercial Crime Agency of the NSW Police Service (NSW Police) stated that when they applied the accepted criteria for organised criminal activity, they were surprised to discover that

42 BSAA, *Submissions*, p. S336.

43 Mr Ephraim, AVSDA, *Transcript*, p. 306.

44 Australian Music Retailers Association, *Submissions*, p. S476.

45 Mr Ephraim, AVSDA, *Transcript*, p. 307.

46 MIPI, *Submissions*, p. S171.

47 BSAA, *Submissions*, p. S337.

48 AGD, *Submissions*, p. S423; Customs, *Submissions*, p. S154; Australian Federal Police (AFP), *Submissions*, p. S361.

copyright infringement satisfied most of them.⁴⁹ MIPI argued that if organised crime is understood as a sophisticated illegal business driven by economic objectives, it is not difficult to view copyright infringement as an example.⁵⁰

- 2.29 The Australian Federal Police (AFP) stated that in the course of its investigations it had uncovered no significant evidence to substantiate the involvement of criminal groups within Australia. It added, however, that the prospect of organised criminal activity should not be discounted because of the interaction between Australia and countries in South-East Asia.⁵¹ In this regard, MPA reported that since 1987 there have been indications of large scale piracy operations in Asia, although there has been no hard evidence of the involvement of Australian groups.⁵² Customs stated it has not been presented with any evidence of organised criminal activity in relation to infringement.⁵³
- 2.30 NSW Police submitted that based on intelligence reports, it believes organised crime groups to be involved in copyright infringement. One report suggested that certain CD pirates were also drug dealers.⁵⁴ Simpsons Solicitors indicated that they had referred one matter of video piracy to the National Crime Authority on the basis of known associations with organised crime figures.⁵⁵
- 2.31 Mr Stephens of Stephens Lawyers described a large scale software piracy operation involving citizens of the People's Republic of China and a manufacturer in Melbourne.⁵⁶ The BSAA stated that it had strong suspicions that organised crime was involved in counterfeiting software products in Australia.⁵⁷
- 2.32 The International Federation of the Phonographic Industry (IFPI) submitted that music piracy is an organised crime in many territories, including those in South-East Asia. In its submission, IFPI does not refer specifically to Australia. On the basis of submissions such as IFPI's, AGD

49 Sgt Shepherd, NSW Police, *Transcript*, pp. 164-165.

50 MIPI, *Submissions*, p. S172.

51 AFP, *Submissions*, p. S361.

52 MPA, *Submissions*, p. S267.

53 Customs, *Submissions*, p. S154.

54 New South Wales Police (NSW Police), *Submissions*, p. S527; Sgt Shepherd, NSW Police, *Transcript*, p. 164.

55 Simpsons Solicitors, *Submissions*, p. S743.

56 Mr Stephens, Stephens Lawyers, *Transcript*, pp. 48-49.

57 BSAA, *Submissions*, p. S337.

concluded that it was unclear whether there is any evidence indicating a link between organised crime and piracy in Australia.⁵⁸

- 2.33 MIPI reported that in relation to bootlegging at musical performances, there are at least two global level operations based in Australia.⁵⁹ TCM submitted that in their experience, bootlegging at concert, sporting and similar venues around Australia was carried out by a highly organised group.⁶⁰
- 2.34 ACAG gave evidence of syndicates in which counterfeit clothing is sold at parties in private homes to individuals, particularly in lower socio-economic groups.⁶¹ Trade Mark Investigation Services reported similar 'party plan' schemes.⁶² Such syndicates are organised criminal groups, operating through untraceable pagers and mobile phones.

Future trends

- 2.35 Most copyright owners and industry groups predict that the scale of copyright infringement will increase in the future. MIPI submitted that piracy is likely to increase in Australia under present circumstances. MIPI also argued that there will be an increasing body of copyright infringers who are impervious to civil prosecution.⁶³ TCM expressed the view that bootlegging will increase over time.⁶⁴ ACME Merchandising agreed that infringements would continue to grow.⁶⁵
- 2.36 The BSAA noted that in contrast to most other countries, software piracy in Australia is increasing, and that it is likely to continue to do so, as counterfeit software is imported into Australia from Asia.⁶⁶
- 2.37 NSW Police argued that the ease of distribution, the lesser penalties and the smaller level of risk were possible reasons why criminal enterprises may expand their activities from the importation of drugs to copyright infringement.⁶⁷

58 AGD, *Submissions*, p. S423.

59 MIPI, *Submissions*, p. S167.

60 Tress Cocks & Maddox, *Submissions*, p. S48.

61 ACAG, *Submissions*, p. S371.

62 Trade Mark Investigation Services, *Submissions*, p. S50.

63 MIPI, *Submissions*, p. S173.

64 Tress Cocks & Maddox, *Submissions*, p. S50.

65 ACME Merchandising, *Submissions*, p. S25.

66 BSAA, *Submissions*, pp. S335 and 338.

67 NSW Police, *Submissions*, p. S527.

- 2.38 In its submission, AGD focussed on the likely increase in infringement due to digital technology, including the Internet.⁶⁸ CAL also expressed concern about the growing potential for infringement as a result of the burgeoning use of the Internet.⁶⁹ BSAA echoed this concern in its comments about Internet piracy.⁷⁰

Infringement of indigenous art

- 2.39 NIAAA submitted that while contemporary indigenous art is big business, indigenous people often do not benefit from the exploitation of their culture.⁷¹ This is because indigenous art and cultural expression is wrongly seen as being in the public domain.⁷² The market for indigenous art and crafts has been estimated as being worth almost \$200 million per annum.⁷³ Copyright infringement in this market is carried out largely in the tourism industry.⁷⁴
- 2.40 For indigenous Australians, copyright infringement causes special cultural loss. This is because art is a cultural identifier, linking the artist to their people, community, spirituality and provenance.⁷⁵ The protection of Aboriginal and Torres Strait Islander intellectual property is fundamental to the protection of indigenous cultural integrity and heritage.⁷⁶ This issue will be revisited in considering the adequacy of civil remedies (Chapter 5).

Infringement through private copying

- 2.41 One type of copyright infringement thought to be widespread in society is private copying of audio and visual recordings. As the ACC pointed out, home taping of sound recordings and television programs is virtually impossible to detect. However, based on data from countries in which levies for home taping is collected, the ACC suggested that private

68 AGD, *Submissions*, pp. 423–425.

69 Copyright Agency Limited (CAL), *Submissions*, pp. S596–598.

70 BSAA, *Submissions*, p. S338.

71 NIAAA, *Submissions*, p. S566.

72 Ms Janke, NIAAA, *Transcript*, p. 327.

73 Aboriginal and Torres Strait Islander Commission (ATSIC), *Submissions*, p. S730.

74 NIAAA, *Submissions*, p. S568.

75 Ms Janke, NIAAA, *Transcript*, p. 333.

76 ATSIC, *Submissions*, p. S730.

copying cheats Australian copyright owners of millions of dollars annually.⁷⁷

- 2.42 In 1989 the *Copyright Amendment Act 1989* introduced a scheme that sought to raise a levy on the sale of blank cassette tapes, to be paid to copyright owners in the music industry, as compensation for the fact that blank tapes are used to make infringing copies of sound recordings. The legislation was held by the High Court to be invalid for technical reasons.⁷⁸ In its submission the ACC advocated that the government reintroduce a blank media royalty scheme in order to compensate for income lost through private copying.⁷⁹
- 2.43 In the Committee's opinion the prevalence of private copying is partly attributable to community attitudes towards copyright. Many people are not aware that home taping from the radio and television constitutes an infringement of copyright, or if they are aware, they dismiss it as trivial. As will be seen in Chapter 3, the Committee recognises the need to raise community awareness and understanding of copyright. The change in public attitudes that will hopefully result should lead to a decrease in the amount of private copying.
- 2.44 In addition, the Committee notes that in the future, private copying will predominantly take place in the electronic environment. The use of traditional media (blank video and audio cassettes) in copyright infringement will be minor in comparison. The ACA expressed concern that the digital economy not be used for increasing pursuit of consumers.⁸⁰ The ADA pointed out that there is in any case a public policy debate over whether private copying constitutes infringement.⁸¹ For all these reasons the Committee recommends against reintroducing a blank media royalty scheme.

The Committee's findings

- 2.45 The Committee finds that copyright infringement is a real problem affecting Australia's economy. Although the available data is piecemeal in nature, the Committee has been able to make the following general observations:

77 ACC, *Submissions*, p. S480.

78 See *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

79 ACC, *Submissions*, p. S481.

80 ACA, *Submissions*, p. S161.

81 ADA, *Submissions*, p. S95.

- Infringement of copyright on a commercial basis, including piracy and bootlegging, is a significant and costly burden to many Australian industries that rely on creative endeavour. This is so even though, by international standards, the level of infringement in Australia is low. Within Australia, commercial infringement of copyright is spread throughout the country.
 - Infringement has a substantial impact, both economically and culturally, on indigenous peoples.
 - Although there are few documented cases in which organised crime has been linked to copyright infringement, there is sufficient evidence from industry to support such a finding.
 - Infringement of copyright is likely to increase in the future. A large proportion of infringement is likely to occur through the Internet.
- 2.46 DoCITA advocated establishing a copyright task force whose functions would include measuring the scale of copyright infringement in Australia and the extent of actual economic loss caused to industry.⁸² AGD on the other hand argued that the government has neither the resources nor the expert knowledge to be able to collect information about copyright infringement.⁸³ AGD suggested that such information may in the future be more readily generated by technology.⁸⁴
- 2.47 While more data about infringement is obviously desirable, the Committee refrains from recommending that they be collected as an end in itself. In the Committee's view, intelligence about infringement is a more important focus for resources than statistical data. In Chapter 6, the Committee recommends the establishment of a co-ordinated enforcement task force, one of whose functions would be the gathering, analysing and utilising of industry intelligence about copyright infringement. The Committee considers this to be a more effective goal.

Parallel importation and infringement

- 2.48 An issue that emerged during the course of the inquiry concerned the relationship between parallel importation and levels of copyright infringement. Parallel importing is the importation of copyright works

82 Department of Communications, Information Technology and the Arts (DoCITA), *Submissions*, p. S658.

83 Mr Fox, AGD, *Transcript*, p. 67.

84 Mr Fox, AGD, *Transcript*, p. 66.

which have been legitimately purchased overseas (purchased without infringing copyright in the overseas country) by someone other than the authorised importer.⁸⁵ Until recently, authorised importers were able to prevent the parallel importation of their products by relying on the copyright subsisting in the packaging and labelling. Importation of the packaging and labelling constituted an infringement of copyright under the Copyright Act.⁸⁶

- 2.49 On 1 February 2000, Schedule 2 of the *Copyright Amendment Act (No 1) 1998* commenced. The amendments establish that copyright is no longer infringed by the parallel importation of a product, if copyright subsists in the packaging and labelling alone. This means that authorised distributors have lost the protection they had in the packaging and labelling of their products, so that other people can now import the products.
- 2.50 Some industry groups argued that there is a link between parallel importation and the importation of pirated or infringing material. This is because parallel importation weakens the ability to identify the importation and distribution of pirate copies. Mattel Inc (Mattel), a large toy manufacturer, argued that the more parallel importers there are, the easier it will be for pirated copies to be imported into Australia.⁸⁷
- 2.51 An example that supports this argument was given to the Committee by ACAG. It stated that when New Zealand changed its parallel import laws recently, there was a major increase in counterfeit merchandise.⁸⁸ In its submission, MPA confirmed that in jurisdictions where parallel importation is allowed, the importation of pirated products increases dramatically.⁸⁹
- 2.52 The Australasian Performing Rights Association questioned the wisdom of amendments allowing for parallel importation generally when there has been concern over Customs' ability to detect infringement at the border.⁹⁰ Customs stated that the relaxation on parallel importation would not affect its operations significantly.⁹¹ The Committee considers this observation significant.
- 2.53 In its submission AGD indicated that the parallel importation of products in which copyright subsists (opposed to merely subsisting in the
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85 J. McKeough and A. Stewart, *Intellectual Property in Australia*, 1991, p. 140.

86 See *R A and A Bailey & Co Ltd v Boccaccio Pty Ltd* (1986) 6 IPR 279.

87 Mattel, *Submissions*, p. S219.

88 Mr Ramsden, ACAG, *Transcript*, p. 370.

89 MPA, *Submissions*, p. S264.

90 Ms Faulkner, Australasian Performing Right Association, *Transcript*, p. 245.

91 Mr Gulbransen, Customs, *Transcript*, p. 97.

packaging and labelling) remains a criminal offence.⁹² This is, however, unlikely to assist toy and other manufacturers whose products are often protected by trade marks rather than copyright.

- 2.54 Two groups did not accept the link between parallel imports and piracy control. In correspondence to the Committee, the Australian Competition and Consumer Commission (ACCC) argued that parallel importation and piracy were separate issues requiring separate policies. The ACCC did not expect the recent relaxation on parallel importation to increase piracy.⁹³ It pointed out that the importation of infringing copies remains illegal.
- 2.55 The second group that refuted the link was the ACA. It argued that the link is not supported by experience: there has been no convincing evidence of any increase in commercial music piracy since parallel importation of CDs has been allowed.⁹⁴ It also argued that parallel importation results in greater competition and lower prices.⁹⁵ The ACCC used this to argue further that parallel importation discourages pirates because the profits available from piracy are less.⁹⁶
- 2.56 Finally, the Committee notes that the Intellectual Property and Competition Review Committee has recently commissioned a report from the Australian Institute of Criminology on parallel importation and piracy. The report, which uses compact discs as a case study, found as follows:
- The period since mid-1998 reveals little evidence of the increase in CD piracy predicted by opponents of liberalisation.⁹⁷
- The report acknowledged that insufficient time may have elapsed to make a realistic assessment of the effect of parallel importing amendments. However, it also suggested that factors other than legislative amendment, such as changes in economic conditions and technological advances, may be responsible for any increase in CD piracy which does eventuate.⁹⁸
- 2.57 In the opinion of the Committee, the link between parallel importation and the importation of pirated products is weak. While the Committee accepts the evidence from industry that parallel importation may increase the importation of pirated products, the Committee does not consider this

92 AGD, *Submissions*, p. S441.

93 Ms Arblaster, Australian Competition and Consumer Commission (ACCC), *Transcript*, p. 150.

94 ACA, *Submissions*, p. S161.

95 *Ibid.*

96 Ms Arblaster, ACCC, *Transcript*, p. 160.

97 G. Urbas, *Parallel Importation and CD Piracy*, Australian Institute of Criminology, 26 January 2000, p. 1.

98 *Ibid.*

a reason to revisit the decision to open up parallel importation. In the Committee's view, more appropriate solutions to the problem of the importation of pirated products can be found. The Committee recommends below the adoption of a system whereby importers have to certify the legitimacy of the material they are importing.

- 2.58 Mattel questioned whether Schedule 2 of the *Copyright Amendment Act (No 1) 1998* has put at risk Australia's commitment to TRIPS.⁹⁹ Although article 61 of TRIPS requires member states to outlaw copyright piracy on a commercial scale, it is silent on the topic of parallel importation. The Committee does not consider that the parallel importation amendments jeopardise Australia's commitment to TRIPS.

Parallel importation, pirated products and safety standards

- 2.59 In relation to pirated products such as toys, Mattel raised another concern which strictly does not fall within the terms of reference but which the Committee considers appropriate to address. Mattel pointed out that pirated products often do not comply with the relevant Australian safety standards. This puts the consumer at risk, and by virtue of section 65 of the *Trade Practices Act 1974*, exposes the manufacturer to liability, even if the manufacturer is not the importer.¹⁰⁰
- 2.60 In practical terms this means the manufacturer remains liable for their product even when it is imported by someone else, from a country with inferior safety standards. In the case of a pirated version of the product, the manufacturer must prove that the product is counterfeit in order to avoid liability. Mattel Pty Ltd, the Australian Toy Association and Hasbro Australia Limited (Mattel et al) urged the Committee to deal with this problem.¹⁰¹

Stopping the importation of pirated products

- 2.61 Two ways to help curb the importation of pirated products were suggested to the Committee. The first way is to ease the task of the authorised importer or manufacturer in proving infringement. This is done by reversing the onus of proof so that the parallel importer must establish that the product is legitimate. The reversal of onus already applies in respect of sound recordings (which may be parallel imported):

99 Mattel, *Submissions*, p. S223.

100 Mr McDonald, Mattel, *Transcript*, p. 3.

101 Mattel Pty Ltd, Australian Toy Association & Hasbro Australia Limited (Mattel et al), *Submissions*, p. S674.

see section 130A of the Copyright Act. Mattel et al argued that the same reversal of onus should apply to all types of material.¹⁰²

- 2.62 The ACC submitted that section 130A in fact does not reverse the onus of proof as intended.¹⁰³ MIPI reported that section 130A is being traversed or simply ignored in the marketplace.¹⁰⁴ The Committee will consider suggestions as to how to ease proof of civil infringement in Chapter 5.

System of certification

- 2.63 The second suggested way to curb the importation of pirated products is to introduce a system of certification. The Committee broached the idea of a certification system with a number of witnesses. Mattel et al submitted that Australia should adopt a certification mark similar to the 'CE' mark used by the European Union. Unless the certification mark appeared on the import forms, the products would not be allowed into the country. Mattel et al identified a number of advantages in a certification system, including making Customs' task of identifying infringing imports easier, and ensuring compliance with Australian safety standards.¹⁰⁵
- 2.64 In principle, the Committee favours the introduction of a system of certification for imports. In the course of its inquiry the Committee became aware of practical issues that must be resolved before a system can be implemented. A key issue is when, and by whom, the mark should be affixed to a product. One possibility is that the manufacturer or copyright owner affixes the mark as a badge of its legitimacy. Yet Mattel et al gave evidence of certification marks themselves being counterfeited.¹⁰⁶
- 2.65 Another possibility is that a mark be affixed at the point of entry. If this were done by the copyright owner, AGD expressed concern that the copyright owner would be unfairly given market intelligence about their competitors.¹⁰⁷ Mattel et al suggested that an accredited—and presumably independent—agency should affix the mark.¹⁰⁸ Alternatively, the importer could affix the mark, to vouch for its legitimacy and safety. The same objective could be reached by requiring the importer to submit to Customs a certificate declaring that the product was legitimate and safe.

102 Mattel et al, *Submissions*, p. S667.

103 ACC, *Submissions*, p. S484.

104 MIPI, *Submissions*, p. S175.

105 Mattel et al, *Submissions*, p. S678.

106 Mr McDonald, Mattel et al, *Transcript*, p. 353.

107 Mr Fox, AGD, *Transcript*, p. 70.

108 Mr McDonald, Mattel et al, *Transcript*, p. 354.

- 2.66 The Committee considers that, of all the options described above, the last is the most feasible. As Mattel et al point out, to require an importer to attest to the legitimacy of their product prevents them from relying on the defence of innocent infringement. In other words, having signed a certificate of legitimacy, an importer can no longer argue that they did not know that their product infringed copyright.¹⁰⁹
- 2.67 The Committee recognises that requiring an importer to sign a certificate of legitimacy, that then may be used in legal proceedings against the importer, may be 'post the event'¹¹⁰ in the sense that it does not ensure the safety of the product. Nevertheless, it ensures that authorised importers will not be held liable for consumer and safety issues relating to all copies of a product.

Recommendation 1

- 2.68 **The Committee recommends that the documentation required to be completed by commercial importers when importing a product into Australia include a declaration to the effect that**
- **had the product been made in Australia, the making of the product would not constitute an infringement of copyright; and**
 - **the product meets the applicable Australian safety standard.**

109 Mr McDonald, Mattel et al, *Transcript*, p. 354.

110 Mr Anderson, Mattel et al, *Transcript*, p. 355.