

House of Representatives Standing Committee on Legal and Constitutional Affairs

Terms of References: Inquiry Into Copyright Enforcement

Formal Submission of Music Industry Piracy Investigations

The Australian Music Industry welcomes this Inquiry as a positive step towards guaranteeing that intellectual property rights based industries flourish in Australia by effectively protecting and enforcing those rights.

This Inquiry presents a rare opportunity to establish policies and strategies for effective intellectual property rights enforcement now and into the future.

The music industry has sought to establish and develop world's best practices in intellectual property rights enforcement both here and internationally. Accordingly, remedies to compensate our own operational shortfalls are not sought. It is our intention to seek out the best possible system and structure for the legitimate stakeholders in intellectual property rights enforcement and protection.

Our submission attempts to deal with the overall picture of copyright enforcement. Presently the legal process favours the infringer and unnecessarily hinders the intellectual property rights owner, if they can afford to prosecute at all. It is one where even partnership policing cannot effectively exist as no national or co-ordinated intellectual property rights enforcement infra-structure exists within Australia.

A suggested model for co-ordinated intellectual property rights enforcement is provided together with suggested amendments or additions to relevant legislation.

The solutions offered are well within the reach of the Government, the executive and the judiciary. These solutions are likely to gain the best from and for the stakeholders, without discouraging or limiting legitimate trade and dis-benefiting only one group – the infringers.

The submission does nothing to impinge upon the civil rights of persons accused of infringements before the courts. It does however, attempt to redress the disadvantaged position intellectual property rights owners currently endure when attempting to protect themselves in this market place.

(A) **evidence of the types and scale of copyright infringement in Australia, including:**

(i) ***the availability and accuracy of data on copyright infringement.***

The identification of piracy statistics varies from industry to industry. The Australian record industry is conservative in its approach but it, like other industries, is hindered by the absence of official statistics relating to infringements.

The Australian sound recording industry estimates that piracy, in all its forms, is at present equivalent to 7% of the identified market. (This figure is likely to be much higher if Australian music publishers succeed in proving their assertion that the importation of sound recordings from territories where no mechanical royalties are paid, such as Indonesia, infringes copyright.)

These figures are arrived at on the basis of the annualized identified activities of offenders and suspects/targets only.

Given the nature and source of this data, this industry's piracy statistics are biased in the negative.

The majority of opportunities to capture and utilise data are lost to copyright owners and most of the other stakeholders in intellectual property rights enforcement.

Further, the following matters have not been factored into the statistics.

1. Piracy and Against End Users of Sound Recordings and Musical Works

The properly licensed commercial operations, which make compilation albums, servicing the disc jockey and juke box market have reported a decrease of approximately 50% in purchases from such operators whilst the industry has experienced an increase in the proliferation of venues and operators. This activity is difficult to empirically quantify due to its surreptitious nature and the nature of the market.

There are a number of sectors to the market in addition to retail. For example, the disco and dance market, music schools, broadcast (radio, television, and Internet) and background music for commercial premises. All of these suffer from varying degrees of unlawful exploitation.

2. Bootlegging. Infringement of Performers' Protection Provisions

While bootlegging is often seen as some innocuous counter culture it is in fact a relatively big business.

There are at least two global level bootleg operations based in Australia.

Bootleg items themselves can be incredibly expensive in this market. Price depends upon artist, significance of a performance, rarity and paraphernalia available from the original performance. For example, certain individual performances of major artists can cost between \$100 and \$500 (AUD) per album.

It is not uncommon for such bootlegs (and paraphernalia) to also be counterfeited also.

Operators trade on this aura of counter culture and eschew traditional retail outlets as their way of both charging high prices and avoiding detection.

Commercial level operations in Australia are generally export oriented. This product often reappears as imported product in the Australian market place. Accordingly, it is difficult to identify the full nature of this market and all of the principals behind infringements.

3. Piracy of Foreign Language Products

Cultural diversity is predominant in Australia and as our society becomes more sophisticated that diversity will, to some extent, drive market activities.

There has been a gradual increase in foreign language music and music related products in the Australian marketplace. However, it is invariably the case that the artist and/or the

original record company do not have a formal presence in this territory. As a result, piracy is usually detected accidentally or by the occasional concerned citizen.

It is, therefore, again difficult to accurately quantify this market and the evidence of piracy in this market. We can, however, make the following observations from our market surveillance programme:

Indian Music: the identified market is almost completely pirated.

Arabic Music: the identified market is almost completely pirated.

Greek Music: pirated product appears to be in the ascendancy in this market.

4. Piracy of Indigenous Products

Aboriginal artists/performers can, and are, targeted by unscrupulous operators who produce products, in particular, for the ambient music export market.

It is impossible to quantify this activity due to the nature of the market, the surreptitious nature of the illicit activity and lack of identifiable victims.

5. The Internet

Internet piracy generally falls into two categories and each will be dealt with hereunder.

5A. Infringements where the Internet is used as a medium for advertising infringing product or inciting infringements.

There appears to be consistent activity in this area, however, due to the very nature of the activity, its often surreptitious nature, and the almost amorphous nature of the Internet, it is difficult to paint any clear picture of infringements. This difficulty is exacerbated by the available means of detection which at present amounts to no more than manual surveillance conducted in real time. Effective and efficient identification is therefore impractical at best. This is so, due to the unlikely prospect of locating all advertisements for such infringing product and, secondly, there is no data available on the inflow of such product into Australia via mail delivery or other means.

5B. Infringing Material posted on the Internet

The most common forms of this activity are the posting of sound recordings, music and lyrics.

In relation to music and lyrics the comments in 5A apply.

In relation to sound recordings, the most common form of infringement is committed by use of the so called 'MP3' format.

It has been possible utilising automated search technology, together with a global manual surveillance project, to identify a substantial proportion of this activity.

It is estimated that there are, at any given time, in excess of 300,000 infringing 'MP3' files posted on the Internet. Each contains sound recordings posted without the consent of the

copyright owner. Given the nature of servers containing infringing files it is possible for more than 3,000,000 pirate sound recordings to be downloaded, world wide, every 24 hours.¹

Further, at the moment it appears that approximately 70,000 new infringing 'MP3' files are posted on the internet by approximately 500 new infringers each month.¹

While this data presents a clear picture for intelligence purposes, it can hardly be described as accurate for statistical purposes. This is so because of: the amorphous and dynamic nature of the 'Internet'; it does not capture data on infringements utilising other formats; it does not reflect the multiplicity of victims generally; it does not reflect the co-existence of multiple forms of copyright; and therefore multiple victims that can exist in singular infringements.

OTHER INHIBITORS TO THE COLLECTION OF ACCURATE DATA

There are many obvious impediments to the collection of data in an enforcement environment, because the information available to Government sectors is limited and, secondly, as industry is not part of the Government or traditional law enforcement infrastructure, the data is, therefore, not accessible.

In a partnership environment where a victim accepts, for whatever reason, part of the law enforcement burden, accurate data received in a timely fashion is even more crucial.

A number of matters merit attention.

a. Absence of National Intelligence Data Base

At present there is no national law enforcement data base or infrastructure for intellectual property rights owners to either rely upon or contribute.

This has a number of important ramifications.

- i) An almost cost neutral source of intelligence relating to illicit activities impacting on the community and the revenue of the Commonwealth is lost.
- ii) It limits pro-active law enforcement operations.
- iii) It diminishes the opportunities for authorities to verify information that might impact on law enforcement operations or legislation.
- iv) It diminishes the opportunities for forecasting social and economic trends; and
- v) It limits the opportunities to accurately apply quality assurance reviews on investigations (whether conducted by industry employees, Police or other Government employees).

This means that the advantages of an effective intelligence process are lost to both law enforcement agencies and copyright owners.

b. Insufficient Collection of Statistics by Government

At present there are no relevant statistics published by Government on piracy or assisting in the identification of pirated product.

¹ IFPI Secretariat – Enforcement Unit, Operational Statistics (1999)

The present ABS publications specify the amount of compact discs and audio cassette tapes imported into Australia see Attachment A however, it does not distinguish between pre-recorded compact discs and tapes and blank compact discs and tapes. This has a substantial impact on the accuracy of the scant information available.

c. Legislative Prohibition on the Dissemination of Information

Section 16 of the Customs Administration Act (Cth) 1985 has the effect of prohibiting the dissemination of certain information relating to importations and those involved in such importations where such disclosure would constitute a breach of confidence.

The reason most often cited for the existence of this provision is the protection of the commercially sensitive and therefore highly confidential information that comes into the possession of the Australian Customs Service. However identity of importers and limited provenance information could not be prejudicial to, or provide any trade disincentive to, anyone other than miscreants. It could not thereby create any barrier to legitimate trade. (This is not to say that the ACS should trade in this information, rather it should be available for investigation/enforcement purposes).

This information would, however, increase the efficiency of intellectual property rights surveillance and enforcement operations at many levels.

(ii) the scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners.

This industry has for some time attempted to collect this data (and other intelligence) on a local, regional and international level.

The Australian Music Industry, represented by the Australian Record Industry Association (ARIA) and the Australasian Mechanical Copyright Owners' Society (AMCOS) have membership of this project.

Accordingly, global data is provided in the submission of the Australian Record Industry Association.

(iii) the geographical spread of copyright infringement in Australia.

The spread of infringements is generally associated with product rather than geography. As such, infringements are located in the majority of locations, one way or another, throughout Australia.

Whilst the nature of product varies considerably the noticeable trends relating to geography are: the emergence of a substantial body of non traditional outlets, especially since 1998, and the emergence of domestic based counterfeiting such as 'cottage industry' or 'home factory' manufacturing.

Infringement is rarely concealed in the marketplace and appears to be responsive to market trends. Infringers are another matter. Infringers routinely disguise their identity and on occasions direct their activities from other jurisdictions.

(iv) the cost of infringement and impact on Australian business.

The value of losses due to identified infringements in Australia for the calendar year ending December 1998 is estimated to be in excess of \$67,000,000.

This does not generally include losses incurred by composers or publishers.

It does not include losses in revenue resulting from unpaid/undeclared taxation owed to the State or the Commonwealth.

It does not include losses in revenue resulting from diminished earnings to intellectual property rights owners.

It does not include losses in revenue resulting from diminished earnings to others in the production/distribution process such as retailers and other service providers.

There is no definitive research on the full socio-economic impact of piracy in Australia. It should be noted, however, that resources expended on enforcement are resources lost to creating, manufacturing, distribution and sale of products.

This must have a flow on effect to associated industries and service providers.

Once piracy becomes entrenched it, by its effects, adversely affects industry, trade and consumer confidence. For instance, when pirate copies are sold they displace sales of the legitimate copies at retail. The retailers in the vicinity lose sales and profitability. The composers and artists concerned lose royalties and the Commonwealth loses taxation revenue and so on.

Overseas information indicates there is a relationship between employment and piracy. It was recently estimated that piracy may be responsible for the loss of up to 100,000 jobs per year in the European Union and 120,000 per year in the United States, for the last ten years.²

(v) whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent.

In short there is evidence of organised crime groups involved in copyright infringement in the music industry.

Whilst details of this are given within this submission, it is important to note that this industry has previously provided relevant information to an appropriate Commonwealth authority and has, for some time, informally exhorted law enforcement professionals to make their own efforts to identify and assess this trend.

Prior to providing the further details, we must also draw your attention to the fact that the terms of this item are restrictive and have the potential to perpetuate a number of common misconceptions.

The first of the misconceptions relates to the definition and perception of organised crime. There are two definitions of organised crime provided in the glossary. The first is the more traditional and stereotypical, it is the one by which this industry collects relevant data. The

² Green Paper – Combating Counterfeiting and Piracy in The Single Market (1998)

second is a more contemporary one. Finally, the definition of ‘organised fraud’ is included as an offence that carries a maximum possible penalty of 25 years imprisonment in Australia and one which reflects, in part, the behaviour of professional or organised criminals.

Organised crime is often perceived as the province of gangsters and thugs generally tied to cultural, social or political circumstances. The reality is that organised crime is more akin to sophisticated business driven by economic objectives. It is a business diverse in interests, trans-national in nature and more likely to be dissuaded by difficulties in trade routes than the prospect of detection. Accordingly, members or employees of organised crime groups do not need to be detected in a territory for them to have had an impact.

As such, evidence of systemic, entrenched or indeed increasing involvement of organised crime in activities anywhere against a legitimate global industry, is indicative of a global impact or reach by organised crime and demands attention.

The second misconception is that any copyright infringement of itself is not necessarily an organised criminal enterprise. This misconception is generally associated with the cultural bias in law enforcement against intellectual property rights infringements often being viewed as not a crime at all. The simple facts are that intellectual property rights infringements require sophisticated and costly technology, sophisticated documentation, a network of participants - all items that are invariably in short supply to amateurs or opportunists.

It is a highly unusual course to ask victims to show evidence of organised criminal involvement in attacks against their property. This is likely to be due to the fact that law enforcement agencies are not sufficiently involved in this area (see section (g)). It is indeed difficult to locate a precedent. Also, it is highly unlikely that many victims could recognise “organised crime”.

ORGANISED CRIME GROUPS

International – a précis of overseas examples of organised crime involvement in the music industry will be found in the submission of the Australian Record Industry Association. This list will not be exhaustive but merely indicative.

Regional

CONFIDENTIAL ATTACHMENT B

Relates to recent South East Asian examples, which we would ask be kept confidential due to ongoing investigations and informant protection issues. We are of the belief that whilst some of this information is publicly available, public dissemination would create safety issues for certain investigators. Again this list is not exhaustive merely indicative.

Local

CONFIDENTIAL ATTACHMENT C

Relates to Australian examples which must be kept confidential due to ongoing investigations and informant protection. The identities of offenders will be made available under separate cover to the Chairman of the Inquiry if requested.

(vi) likely future trends in the scale and nature of copyright infringement

- The nature of infringements and the participants in intellectual property continues to diversify.
- There is an increasing involvement of organised or professional criminals in intellectual property rights infringement, at all levels.
- There is, and will be, an increasing body of infringers who are impervious to civil prosecution. This activity is not tied to specific levels of criminality.
- Piracy is likely to continue to increase in Australia under present circumstances.
- Production capacity continues to significantly outstrip the needs of the legitimate global market.
- The development and constant improvement of technologies is lowering the barriers to criminal involvement in infringement activity.
- The improvement in technology and diminishing costs therefore increases the opportunity for the manufacture of infringements generally.
- It is becoming easier for infringers to be responsive to market trends.
- Infringers are less likely to restrict themselves to one type of product/victim.
- Technology based crime will race ahead of the legislative and enforcement regimes' capacity to deal with it directly.
- Internet based infringements will continue in substantial numbers until infringers can be easily, physically identified and effectively prosecuted in their jurisdictions.
- Infringement is diversifying into other areas such as pornography and incitement to violence or racial vilification.

(B) options for copyright owners to protect their copyright against infringement, including:

(i) actions and expenditure undertaken, and that could be undertaken, by copyright owners to defend their copyright

The recorded music industry has a longstanding commitment to anti-piracy activity. It has taken cases against infringers on a regular basis.

The music industry funds and operates MIPI (see Glossary). This unit investigates pirate activity and assists copyright holders and the Police to prosecute piracy actions.

MIPI maintains a market surveillance in each State. In the last three years recorded music copyright holders have spent over \$2.5million in surveillance and prosecutions. This is a substantial and huge cost.

Other actions include educative projects - press releases and law enforcement lectures.

In terms of court actions it is presently possible and indeed is a regular practice for most commercial level infringers to profitably defeat the copyright regime of Australia by using common litigation techniques.

Intellectual property rights protection has become increasingly complicated resulting in actions more often than not becoming a contest to see if the intellectual property rights owner can prove their right to prosecute rather than dealing with the infringement.

The complexity of the law has also been responsible for the increasing cost of intellectual property enforcement/protection. The cost is now prohibitive and it is certain that no small business or individual could afford to become involved in protracted or defended proceedings.

This complexity provides many opportunities for delays in proceedings allowing infringers to dissipate offending products and the proceeds of their crime making enforcement actions generally ineffective.

The actions that copyright owners can take pursuant to the Copyright Act 1968 essentially fall into two categories:

- (a) civil proceedings for copyright infringement.
- (b) providing evidence in support of criminal prosecutions for copyright infringement.

The latter is addressed in paragraph (c) below. The commentary in this section will be limited to civil proceedings.

A non-exhaustive list of proceedings taken in the 1990s is set out in Attachment D.

All of the above matters commenced on the basis that the proceedings may have to be initiated and, if not settled, would require the matter to proceed through to final hearing, judgement and, if necessary, enforcement. A number of them resolved without the need for proceedings to be commenced, whilst others were settled during the course of proceedings. A significant number also proceeded through to final hearing. In the latter class of cases, the average cost to take the matter through to hearing from the commencement of proceedings was in excess of \$100,000, however some cost up to \$600,000. The cost of injunctions (eg Anton Pillars) averaged \$15,000 to \$47,000. Some matters cost considerably more, particularly if they were taken on appeal. The variables which impacted on the cost of the proceedings included the number of individual recordings that were the subject of the proceedings, the age of the recordings and, hence, the complexity in compiling the affidavit documents to those recordings.

When we say 'titles' we refer to each sound recording or song. Each is a separate copyright item. An album consisting of 10 recordings thus involves 10 titles. In piracy cases, proof must relate to the title infringed not the album.

In general, the more difficult a title is to prove, the more a defendant is encouraged to maintain its defence of the proceedings and to misappropriate the recording in the first place.

(ii) *Use of Existing Provisions of the Copyright Act 1968*

There are few, if any, provisions of the Act which provide the copyright owner with assistance in prosecuting infringers. The Act merely prescribes those facts which a copyright owner must establish in order to prove its title to the recording and to prove the infringement.

The particular difficulties that a copyright owner may face in pursuing an infringer are outlined under paragraph (d) below. However, in the context of this discussion, the only provisions which purport to provide assistance in some measure to sound recording copyright owners are:

- (c) Section 112D – The Parallel Import Defence. This section (in conjunction with section 130A) requires an importer, who seeks to rely upon this defence, to prove that the imported recording was made by or with the licence of the relevant owners of copyright. However, from the practice of importers that has already emerged in the market place, this provision (which was promoted as a major aid) is being traversed or simply ignored. In addition, the commencement of any proceedings under section 102 (to which a defence under section 112D would be raised) could be expected to be subject to intense scrutiny from the ACCC in the current political environment. That may act as a further disincentive for copyright owners to exercise their rights in respect of copies of recordings, particularly imported copies, which they reasonably consider to be infringing copies.
- (d) Section 126 – Presumptions as to Subsistence and Ownership of Copyright. This section provides that if subsistence and ownership of copyright are not put in issue, then copyright will be presumed to subsist and to be owned by the person claiming ownership. Whilst that presumption, strictly speaking, allows a plaintiff to avoid the necessity of proving subsistence and ownership of copyright if not put in issue, it has little practical consequence. The almost invariable practice of those infringing copyright is to put the subsistence and ownership of copyright squarely in issue. Many infringers, quite correctly at times, anticipate that the copyright owner will have great difficulty in proving subsistence and/or ownership. The mainstay of a typical infringement defence is to try to “break” the chain of title so that the copyright owner is precluded from proceeding with its action even though, quite clearly, the infringer does not assert any competing title to, or licence for, the recording.
- (e) Section 130 – Presumptions in Relation to Recordings. This section contains a presumption that, if the label or other mark contains one or more of the following statements, then those statements are presumed to be correct in the absence of evidence to the contrary:
- (i) that a person specified on the label or mark was the maker of the recording;
 - (ii) that the recording was first published in the year specified on the label or mark; or
 - (iii) that the recording was first published in a country specified on the label or mark.

At best, these presumptions are of extremely limited use and, more typically, are of no use whatsoever. It is almost the invariable practice of the recording industry worldwide to put a notice on the following terms on the label of a sound recording:

“(P)– 1999 XYZ Records Inc”

Although practice in the industry differs somewhat from country to country, the general meaning of that notation is that the recording was first published in that year and that the specified company is the owner of the copyright in that recording. Of course, that company may well be the maker of the recording (and often is). However, the notation is typically not inserted to identify the maker, but to identify the owner of copyright. As such, only presumption (ii) above could, in any sense, be said to arise from the notation which is typically contained on the label of a sound recording. That fact (the year of first publication) is, however, usually the easiest of the facts that must be proven. Accordingly, that presumption provides little real benefit to the copyright owner. Its utility is diminished in any event as even infringers utilise the system.

Even if all of the above facts were stated on the label, they would provide useful presumptions in relation to subsistence of copyright, but virtually no assistance in establishing ownership of copyright (which is typically far more difficult to prove). That is because there is no necessary correlation between the maker of a recording and the owner of copyright (other than that the maker is presumed to be the owner of copyright at the time it was made unless there is an agreement to the contrary). In relation to older recordings, the ownership of those recordings has typically changed hands on more than one occasion and the identity of the maker provides no proof (and often no indication at all) as to the actual or likely owner of the copyright at present.

(iii) *Use of Legislative Provisions other than those of the Copyright Act 1968*

Other legislation upon which a copyright owner can sometimes rely in order to restrain the manufacture and/or distribution of infringing copies of sound recordings include the following:

- (a) The Commerce Trade Descriptions Act – This legislation requires goods, particularly imported goods, to contain certain information which must also be accurate. Relevantly, this includes an accurate description of the place of manufacture of the goods. Many copies of recordings imported from Asian territories either fail to identify the place of manufacture or, if identified, the place of manufacture is incorrect. However, this legislation is of limited benefit to copyright owners for the following reasons:
 - (i) it is difficult for a copyright owner to assert any rights under the legislation – typically the copyright owner needs to engage the assistance of the Customs Service or some other Government agency to enforce the obligations outlined in the legislation;
 - (ii) if such assistance can be enlisted, it is usually only a stop gap measure. The records will typically be released by Customs if and when the CDs are correctly relabelled. This will be so even if the copyright owner considers the recordings to be infringing copies. This is because it is left up to the copyright owner to pursue infringement proceedings.

- (b) Trade Marks Act – This is only of real relevance in circumstances where the infringer has copied the trade marks of the copyright owner. However, this is of little practical benefit as many infringers either use their own trademarks or no trademarks at all on the packaging of the infringing recordings.
- (c) Trade Practices Act – Sections 52 and 53 provide some assistance to copyright owners, but such assistance is typically not substantial. Again, they would only have any real relevance in circumstances where the infringer was copying the artwork or otherwise indicating that the recordings were made by the legitimate copyright owner or under the licence of that copyright owner. Most infringing copies do not contain any statements as to their purported origins and the most that could typically be argued in those circumstances is that a consumer would be misled or deceived into believing that a recording which appears on an infringing copy had, in fact, been licensed by the owner of copyright (even if the consumer had no idea as to who that owner of copyright may be). However, in order to establish any entitlement to commence proceedings for such a breach, the copyright owner would have to establish the true ownership position of that copyright or, at the very least, the absence of any licence on the part of the infringer.
- (d) State Fair Trading Acts – these are in similar terms to sections 52 and 53 of the Trade Practices Act and, of course, apply to individuals rather than corporations. Equally, the same limitations as to effectiveness apply.

(e) Certain Provisions of Criminal Codes

Offences such as: Conspiracy to cheat and defraud the copyright owner, Conspiracy to defeat the laws of the Commonwealth, obtain benefit/financial advantage by deception and make and use false instrument have or would prove their efficacy in this sphere. However, these offences are not likely to be considered by law enforcement agencies at present, more for cultural or policy reasons than in the search for effectiveness.

- (f) Federal Court Rules – The Rules contain a number of procedures which may be used to the advantage of a copyright owner, at least to preserve its position on the issue of costs:
 - (i) *Notices to Admit Facts* – a copyright owner can serve a Notice to Admit Facts (typically those facts upon which it relies in asserting subsistence and ownership of copyright). If the infringer does not, within 14 days of service of such a notice, dispute those facts, then they are deemed to be admitted for the purposes of the proceedings. If they are disputed, and the copyright owner is then required to prove those facts, then the costs of proving those facts will be borne by the infringer regardless of the outcome of the proceedings.
 - (ii) *Application under Order 33 Rule 3* – A copyright owner can make an application to the court to dispense with the strict rules of evidence in circumstances where any fact or issue is not bona fide in dispute. If a court is satisfied that, for example, the issues of subsistence and ownership of copyright are not bona fide in dispute, then it can either dispense with the requirement of proof altogether or, more usually, only require a more limited level of proof. That said, it is often difficult to persuade a court that subsistence and ownership of copyright are not bona fide in dispute and, in our

experience, the mere failure on the part of an infringer to lead evidence challenging subsistence and ownership of copyright will not, of itself, persuade a court that such issues are not bona fide in dispute. It typically requires the copyright owner to establish more than that – often to prove that the infringer knows or strongly suspects the assertions to be true, but nonetheless puts the matters in issue merely to prolong the proceedings. That is often a difficult hurdle to overcome and applications under order 33 rule 3 are not often made in copyright infringement proceedings.

(iv) *technological or other non-legislative measures for copyright protection*

The music industry utilises electronic ownership codes and source identification codes as anti-piracy measures. Their utility is diminishing as the time since their inception passes.

There are presently no effective technological measures, nor any on the horizon, capable of preventing infringement. The nature of such intellectual property rights creates this situation and this is further exacerbated by having no control over hardware (eg CD burners, cassette replicators).

It is impossible for legitimate commercial operators to compete with professional infringers and, as a result, there are few, if any, commercial opportunities to rehabilitate infringers.

At present, there is a real danger that improved education programmes are more likely to facilitate infringements than prevent them. Indeed, much of this document will serve as a template to infringers in their activities.

(C) *The adequacy of criminal sanctions against copyright infringement, including in respect of the forfeiture of infringing copies or devices used to make such copies, and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement.*

This paragraph focuses on two issues in relation to the criminal provisions of the Act:

1. adequacy; and
2. suggestions for amendment

Adequacy

A number of issues arise in relation to the effectiveness of the criminal provisions of the Copyright Act. Whilst the nature of the actions which attract criminal sanctions are sufficiently comprehensive, there are a number of substantial practical difficulties which significantly inhibit successful prosecutions:

- (a) Proof. Consistent perhaps with traditional criminal provisions, the prosecution in a copyright infringement case is required to prove, beyond reasonable doubt, all of the various elements of the offence, including subsistence and ownership of copyright and absence of licence on the part of the infringer. In practical terms, the burden of proof in relation to subsistence and ownership of copyright is so extraordinarily high that it prevents a successful prosecution being mounted against an infringer in most cases, even when it is clear that the

infringer asserts no licence or entitlement to manufacture the recordings (or at least no valid licence or entitlement). The cost of obtaining that evidence, which is typically borne by the copyright owner, can also be, in many cases, prohibitive. The DPP has typically taken the view that, in copyright infringement proceedings, the affidavit proving subsistence and ownership of copyright must be extremely comprehensive and, for example, must include the following:

- (iii) Evidence from a person (such as a record producer or record company representative) who was present during the making of each of the subject recordings who can depose as to the time and place at which the recordings were made and to the fact that the master recordings (which the DPP typically requires to be exhibited to the affidavit) are the very recordings which were made at that time.
- (iv) Direct Evidence. From all of those involved in the signing of the artist to the record company and each assignment of the recording from the original owner of copyright through to the present owner of copyright. It is typically the case, for example, that assignments from one company to another are merely by way of a catalogue assignment which does not specifically identify each individual recording that was the subject of the assignment. It therefore becomes necessary, through alternative evidence, to prove that the subject recording was, in fact, the subject of that assignment. This can often be extremely difficult to prove beyond reasonable doubt.
- (v) Evidence which proves absence of licence beyond reasonable doubt. It will typically not be sufficient for the deponent, even a deponent who holds a senior position with the relevant company, to simply review the company's records and confirm that no licence exists in favour of the defendant or a person through whom the defendant claims an entitlement. Again, it is necessary to prove an entire licensing regime to establish that all inquiries for licences would eventually come to the attention of the person who is giving the evidence.

Proving those facts beyond reasonable doubt can be difficult enough in relation to recent recordings. However, it can be almost impossible to establish them to the requisite level of proof in relation to recordings which were made 20 or more years ago (which, perhaps not surprisingly, are the recordings which are more often the subject of piracy). In respect of those recordings, all of those who were involved in the making of the recording may no longer be with the company or as is often the case, the company may no longer even exist. The ownership of that recording may have changed several times during the intervening period and the current owner of copyright may have no relationship with, and even perhaps no knowledge of, the original owner of copyright. In relation to one current criminal investigation in respect of which the requisite proof could be obtained (because ownership had not fundamentally changed and the company kept extremely good records), one of the affidavits comprised a lever arch folder exclusive of exhibits. A further affidavit was still required from someone who was present at the recording of each of the relevant recordings.

- (b) Knowledge Requirement. It is not entirely clear as to the requisite level of proof that is required in order to establish (as required in respect of each of the

relevant criminal offences) that the defendant “knew or ought reasonably to have known” of its infringing conduct. The language suggests the civil standard (the balance of probabilities). However, given that it is contained within a criminal section, it must be presumed that actual or constructive knowledge must be proved beyond a reasonable doubt. It is, of course, extremely rare to have proof of actual knowledge on the part of a defendant (ie., that it knew that it was infringing the copyright in the particular recordings which are the subject of the prosecution). In nearly all cases, it is necessary for the prosecution to rely upon constructive knowledge, (ie., that in all the circumstances a person in the position of the defendant ought to have known that it was infringing copyright). Such evidence is invariably circumstantial in nature and that, of itself, makes it extremely difficult to prove beyond a reasonable doubt.

Performers’ Protection Provisions

There is a further aspect of the criminal provisions of the Act which requires consideration, namely, the performers’ protection provisions in Part XIA. In short, these provisions (and the criminal sanctions which are attached to them) focus on the requirement for the prosecution to establish that the making of a particular recording (as opposed to the exploitation of that recording) was unauthorised by the performer. This has led to substantial practical difficulties in mounting successful prosecutions as, in nearly all cases, it is impossible for the performer to identify the particular performance which was the subject of the recording (there is often no information on the bootleg record itself to assist) or the source of that recording.

Artists may undertake between 150 and 300 performances per year in as many venues. They may also undertake the same number of performances again in promotional circumstances. As such, a band might undertake many thousands of performances in a ten year career. These difficulties are exacerbated when professional bootleggers overlay different audience noises to conceal the location of the performance. In some circumstances, a performer may allow his or her performance to be recorded by, for example, a radio station for the purpose of broadcast on that station only. Many infringers will tape that performance off air and then release records of that performance. Clearly, that subsequent exploitation was not authorised by the performer. However, the fact that the original recording of it was authorised precludes the performer from any relief under these provisions. The rationale for this, no doubt, is that upon the making of an authorised recording, the appropriate remedies lie in the strict copyright provisions such that, in the above example, the radio station would own copyright in the recording and could then sue for infringement of that copyright. However, that rationale fails to address three fundamental problems – 1) it is often impossible to determine the actual source of the recordings, 2) it is difficult or impossible to establish that someone such as a certain radio station is the owner of the copyright in the relevant recording and 3) it is the radio station (not the performer) who has the right to proceed against the infringer. In other words, the performer, whose performance is the subject of the recording, will have no rights whatsoever to restrain the unauthorised exploitation of his or her performance.

Further, performers look to and expect that their record company will take action against such bootleggers. However, the record companies have no proprietary interest in such recordings and, as such, have no ability to prosecute in respect of such unauthorised use. Accordingly the artists’ record company cannot initiate the proceedings for the artist in its name.

Suggested Amendments

The current regime places an intolerably high burden on both the prosecution and the copyright owner, both financially and in terms of resources, in establishing an infringement of copyright. Cases become almost completely focused on the right of the victim to appear or commence proceedings rather than the behaviour of the pirate. This acts as a powerful disincentive for the Police, the DPP and the copyright owners to prosecute for copyright infringement notwithstanding the inclusion of criminal provisions in the Copyright Act (which should, theoretically, create a greater disincentive to piracy than civil proceedings).

This is particularly detrimental to the public interest in circumstances where it is clear to all concerned that the defendant has no right or entitlement to manufacture or distribute those recordings.

There is arguably a fundamental difference between the rationale behind the civil provisions and that which underlies the criminal provisions of the Act. In relation to civil proceedings, it is the copyright owner which is maintaining those proceedings and which, if successful, will obtain damages from the infringing party. In those circumstances, there is a clear public policy justification for the copyright owner to prove its title and, thereby, prove its entitlement to damages from the infringer. However, the same rationale does not apply in relation to criminal proceedings. In such cases, it is in the public interest that those who infringe copyright, regardless of whose copyright it may be, should be penalised for doing so. The identity of the copyright owner is, on the one view, irrelevant to that public policy consideration. In those circumstances, the need to establish beyond reasonable doubt that the copyright is owned by a particular person should be questioned. In order to meet the public policy objectives, it should be sufficient to establish that copyright subsists in the recording and that the infringer does not have any licence or authority to make or distribute those recordings in Australia. This is, in a real sense, the basis upon which section 112D and section 130A have been drafted.

The following for amendments ought to be considered:

- (a) Requiring the prosecution to prove only subsistence of copyright following which the infringer would be obliged to prove licence or authority to manufacture and/or distribute recordings;
- (b) Alternatively, require the prosecution to only prove subsistence of copyright and absence of licence on a prima facie basis before the infringer would be required to establish licence or authority.
- (c) The “reverse onus of proof” provisions do not work in practice. The provisions need clarification to give effect to the intention to make the importer/seller prove copyright and the chain of title in the product he is selling.
- (d) Alternatively, requiring the prosecution to only prove the current elements of each offence on a prima facie balance of probabilities basis before the burden then shifts to the infringer.
- (e) Consideration should be given to amendment of s116 of the Copyright Act. The amendment should remove the discretion presently held by judges not to award conversion damages in respect of copyright products such as CDs, movies and books. This discretion has limited the deterrent effect of the section and diminishes the

possibility that an intellectual property rights owner might generally be restored to his former position by taking action (against an infringer).

- (f) In relation to the performers' protection provisions, it is submitted that the performers should also have a right (and the criminal provisions ought to mirror this right) to prohibit the unauthorised exploitation of their recordings irrespective of whether or not the making of the original recording was authorised by the performer. Such an amendment would accord with the way in which most performers view their performances and the exploitation of recordings of their performances.

Of course, an alternative approach that merits attention is the replacement of all specified forms of infringements (including the performers' protection provisions) with a singular offence.

This offence would be 'the unlawful exploitation of copyright'. The definitions for this offence could be drawn, but not limited to, the current matters identified as infringements.

This singular offence could even run parallel to the present offences.

The offence could be proved by: i) proving a specified activity and; ii) the creator or the creator's representative showing the accused had no right to deal in the intellectual property.

The matter could still be taken in both the civil and criminal jurisdictions.

The accused would retain the right to demand the prosecution prove its case and also the right to defend himself. It would however focus on the unlawfulness or otherwise of the activity rather than on the victim's right to take action.

The focus on the victim's right to prosecute is undesirable at best and more often than not ludicrous. For example: Attachment E is a patently obvious infringement. It is an album containing the sound recordings from 10 legitimate albums belonging to various copyright owners. These are compressed onto the one album with depictions of each of the legitimate albums slicks on the cover. The album sold for less than 10% of the cost of all the legitimate albums. The offending album is sold by a company unknown to the music industry. Despite this, the copyright owner, at present, would have to provide at least one affidavit to prove each infringed album at a cost of between \$10,000 and \$20,000 (AUD). At this basic level the copyright owner would be precluded from conversion damages and would not be able to prevent the infringement of others tracks from the album continuing. Achieving an effective level of enforcement/protection in this case at present would increase the costs to the victim exponentially.

On the other hand, if the seller/maker of this illicit product had to tender as step 1 of a case its evidence of the products lawful creator and licence documents, the prosecution time and costs would be a mere fraction of what it would be today.

An offence of this nature would simplify matters for law enforcement professionals and thereby reduce the expenditure of resources in investigation and prosecuting matters. It would also minimise the cultural resistance to law enforcement practitioner involvement that is attributed to the complexity of this area of law.

The Internet

The Internet by its very nature adds another dimension or jurisdiction to law enforcement. It is both a vehicle for traditional illicit behaviour and the breeding ground for a new class of criminal. These criminals will be fully fledged “netizens”, limited by imagination who will spawn illicit enterprises hitherto unknown. This class of offender will be, for many reasons, better trained, better resourced and more imaginative than either his predecessors and law enforcement professionals.

It is at present relatively easy to conceal one’s true identity and location on the Internet. Further, there are few Internet specific offences or legislative facilitations that overcome the jurisdictional issues.

At present, the only effective means of preventing infringements on the Internet is obliging the Internet service provider to remove an infringing site.

It may well be that, even in the future, the most effective means of dealing with Internet crime will be neutralisation or disruption rather than use of traditional enforcement/prosecution methods.

This area of enforcement merits urgent multi-disciplinary review and research.

It is difficult to make further comment in relation to this aspect of enforcement until the issue of the Copyright (Digital Agenda) Bill is finalised. We would reserve the right to make a further submission on this matter, once the issue of the Bill is resolved.

(D) ***the adequacy of civil actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement including the adequacy of provisions for costs and remedies.***

As is the case with criminal proceedings, proving ownership of copyright (even on the balance of probabilities) can often be a time consuming and expensive task which, on one view of it, is unnecessary in circumstances where the infringer clearly does not assert any right or entitlement to manufacture and/or distribute the recordings. As mentioned above, in relation to the discussion of paragraph b(ii), the Act does not contain any useful presumptions in relation to subsistence and ownership of copyright.

This means that, in effect, an owner of copyright needs to establish all elements of subsistence and ownership of copyright even where the infringer does not allege any competing title or even intends to lead evidence against the assertion by the Plaintiff of its title.

In addition, the requirement of a plaintiff to prove actual or constructive knowledge on the part of the infringer for the purposes of sections 102 and 103 creates an additional and unnecessary burden on a copyright owner. The Act already contains sufficient protections for “innocent infringers” under section 115(3) and 116(2). These sections provide, in effect, that where an infringer can establish that it did not know and ought not reasonably to have known of the infringement, the plaintiff will not be entitled to recover damages.

There seems to be no reason why, if the plaintiff can establish that the infringer has imported or distributed infringing copies, the plaintiff also needs to prove the knowledge requirement. This is particularly so given that actual knowledge or the facts

upon which constructive knowledge will be based, are more likely to be within the knowledge of the defendant rather than the plaintiff.

The requirement to prove all of these elements, even in the absence of no case from the defendant, results in substantial cost to the copyright owner. Typically, copyright infringers are either shell companies (with few if any assets) or individuals (with few if any assets) to their name. This means that, typically, a successful copyright owner will have little prospect of actually recovering damages or costs from the infringer.

(E) **the desirability or otherwise of amending the law to provide further procedural, evidential or other assistance to copyright owners in civil actions for copyright infringement.**

A number of other possible amendments should be considered:

- (a) Amend section 130 so that the presumptions in that section accord with established practice in the record industry in terms of notifications which appear on labels.
- (b) Remove the knowledge requirement from sections 102 and 103. There is a particularly compelling argument in relation to section 102 as the importers are really standing in the shoes of a manufacturer (indeed, the Trade Practices Act expressly gives importers that status) and there seems to be no reason why any distinction should be drawn between someone who manufactures (or commissions the manufacture) in Australia as opposed to someone who purchases from offshore manufacturers.
- (c) Procure amendment to the Federal Court Rules such that:
 - (i) if a defendant specifically denies the plaintiff's assertions of subsistence and ownership of copyright, then the defendant should be required to particularise the facts and circumstances upon which it relies in making that denial; or
 - (ii) if the defendant does not admit subsistence and ownership of copyright (ie. merely puts the plaintiff to proof on that issue), then the defendant should be required to give security to the plaintiff for the costs of proving those issues.
- (d) Give a copyright owner the right or option to merely seek an injunction (rather than damages or on account of profits) against an infringer. If that option is exercised, then the copyright owner should be relieved of the obligation to establish ownership. On that basis, the plaintiff would only have to establish that copyright subsists in the recording. The infringer should then have an obligation to establish licence or authority. If such licence or authority is not established, then an injunction should be granted. This would be consistent with the policy approach discussed in paragraph (c) – Suggested Amendments above.
- (e) Give successful copyright owners a secured creditor status which would enable them to recover out of the assets of an infringer ahead of unsecured creditors.

At present, copyright cases struggle to two possible conclusions. Unfortunately, any success is often a hollow one with infringers ‘scorching the earth’ and dissipating or concealing assets as part of their normal infringement strategies.

- (f) Recourse to order 33 rule 3 should succeed where the applicant can prove it is the originating record company and independent corroborative records such as Australian Record Industry Association cataloguing or Australian Electronic Retail Ordering System cataloguing can be produced.
- (g) A right of subrogation should be incorporated into the Act to allow the record company, to which the artist is signed, to bring an action against the unauthorised use. This will:
 - i) give effect to the practical realities of the market place ie, that generally the record companies monitor, prosecute and pay for actions against unauthorised uses of their contracted artists’ performances or recordings; and
 - ii) provide a quicker and more efficient procedure for initiating and taking action in Australia (as often the artist will be overseas).

(F) **whether the provisions for border seizure in Division 7 of Part V of the Copyright Act 1968 are effective in the detention, apprehension and deterrence of the importation of infringing goods, including counterfeit goods.**

The border seizure provisions could be the most efficacious component of Australia’s copyright regime when the prevailing notions of public sector resourcing and the nature of modern international trade are taken into consideration.

The provisions should remain, as they constitute an adequate reflection of the diversity of infringements intellectual property rights owners need to protect themselves from.

There are, however, a number of efficiencies that could be achieved quite readily that would assist both the Australian Customs Service (ACS) and copyright owners alike.

Even if Customs was properly resourced, the border seizure provisions prevent the ACS from taking pro-active action against counterfeits. Here, ACS action is tied to the objector and their capacity to take action. In any event, action is slow and costly to all concerned in the seizure. Considerably less Government resources would be expended if counterfeits were simply made ‘prohibited imports’. This would send the clear and desirable message to the world that illicit material will not be tolerated here and enhance community confidence.

The ACS frequently suffers from a notion held by some intellectual property rights owners that a notice of objection enacts some full time operation or devotion of resources to their particular issue. This expectation is not realistic. However, it exists and can cause difficulties for all stakeholders and the ACS alike. Perhaps an industry education or liaison campaign might be considered.

The border seizure provisions, at an operational level, are intelligence driven. Intelligence is dealt with elsewhere however, in this sphere, most copyright owners do not gain the necessary intelligence until the infringing material is imported and in the

Australian market place. Once in the market place, establishing provenance can for many reasons be difficult and, on occasions, impossible therefore inhibiting intelligence collection.

The ACS is prohibited by Section 16 of the Customs Administration Act 1985 from divulging certain information to copyright owners. This, in itself, provides an imbalance where intelligence is available in that one of the legitimate stakeholders (in the intelligence process) maybe left unaware of other intelligence available and therefore not in a position to re-assess their own intelligence. Having regard to the seven intelligence functions any inhibition on re-assessment can only diminish the efficiency of operations. This restriction would therefore diminish confidence in the process. Amendment of Section 16 would remedy this situation.

The barrier is the last point where the Commonwealth appears to **effectively** comply with the TRIPS agreement on enforcement.

(G) **The effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright, including:**

(i) ***the role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement***

The most attractive crime in Australia must be intellectual property crime.

There is no national or coordinated policy on intellectual property crime within Australia.

The Australian Federal Police's attitude in the past can best be crystallised as: intellectual property rights crime is not a priority, this is so because the AFP operates in accordance with a Ministerial Directive and even if intellectual property rights crime were given some priority, there are only limited resources available. This is best evidenced by the letter of Mr M Kelty, General Manager Operations, to The Australian Film and Video Security Office. See Attachment F. Further, the AFP has been able to deliver innovative solutions to other customers satisfying their increasing needs (for Police intervention) against the diminishing resources of the AFP – for intellectual property rights industries no effective dialogue has commenced.

Accordingly, it is unlikely that a proper intelligence or risk management assessment has been undertaken in relation to this issue.

There has, in the past, been a protocol relating to the investigation of intellectual property matters, however, it was not comprehensively adhered to or adopted.

This approach has become self-fulfilling. Intellectual property matters are not accepted as crimes to be investigated – there are, as a result, no accurate statistics on intellectual property crime – there is, as a result, no foundation for law enforcement agencies to advise their executives or Government of an emerging trend – executives or Government, as a result, have no foundation for directing resources to the area and the cycle continues.

At an anecdotal level, the AFP appears to expend more resources avoiding intellectual property rights crime than it does dealing with it. The AFP is often seen

as a benchmark for law enforcement activities in Australia and this is particularly so with intellectual property matters. It is appropriate to note that avoidance is not part of the mosaic that is law enforcement best practice.

As a result of this lack of policy and acceptance, there is no standardized training available for investigators (Police and intellectual property rights owners investigators), and no operational performance benchmarks or quality assurance reviews for independently supplied briefs of evidence.

Consequently, any AFP Agent saddled with an intellectual property rights matter can anticipate a difficult task.

It may well be that the AFP cannot deal with all intellectual property rights crime that should be investigated, but by taking the stance it has, its assistance will continue to be sought out by intellectual property owners. This is so, in part, because there is no clear definition of what it will investigate in the first instance, decisions appearing to be made on an *ad hoc* basis.

Further, given there is no national co-ordinated enforcement approach with Australia to mesh with border protection operations, the stance of the AFP tends to inhibit or discourage the involvement of other law enforcement agencies. This tends to consolidate intellectual property owners' focus on the AFP as both the solution and problem.

Finally, this absence of a national co-ordinated approach would tend to significantly inhibit extra territorial investigations or prosecutions.

The Queensland Police Service has a policy of referring all reports of intellectual property crime to the AFP. We understand that this decision was arrived at after consultation with the AFP. Now given that it is plausible the AFP cannot investigate all intellectual property rights crime, (indeed only some of the high end criminality matters) if the AFP played any positive role in the establishment of this policy, there is evidence of an intention not to have intellectual property rights matters investigated or criminally prosecuted in that State. Beyond the law enforcement implications, how can investors in intellectual property rights have any confidence in investments in that State?

The Tasmanian Police Service has a policy that it does not investigate matters proscribed under Commonwealth legislation without advice from the Commonwealth Director of Public Prosecutions. This effectively means that intellectual property crimes are not investigated in Tasmania.

The West Australian Police Service has, in the past, declined to undertake intellectual property rights investigations on the basis that they are "Federal" matters, and should go to the AFP. (It might be noted that this approach conflicts with the approach taken in relation to other Federal matters).

The remaining Police Services do not appear to have policies directed specifically at intellectual property crimes and appear to undertake appropriate matters (more generally where the victim presents with a brief of evidence).

No State Police Service provides or accesses intellectual property rights training for staff, yet other Police services in this region do.

There is no Memorandum of Understanding between Australian Police Services relating to intellectual property rights crime issues and, as a consequence, there is no national intelligence data base or standardized/co-ordinated investigative approach.

All Police Services have provided skilled investigators when matters are accepted for investigation and those people operate effectively when provided with the appropriate assistance from intellectual property rights owners. Notwithstanding this, they invariably have no appropriate internal support structure, no inter-departmental support structure or mechanisms and are rarely able to access impartial experts.

Further, consistent re-training of investigators assigned to intellectual property rights issues creates considerable operational difficulties and costs.

The State Fair Trading Departments discharge their obligations here by referring consumer complaints to the intellectual property rights victims for attention. This can only be seen as an abrogation of responsibility.

(ii) *the relationship between enforcement authorities and copyright owners*

Given the lack of a co-ordinated national approach, this relationship is often in a state of friction and sometimes distrust. Even when intellectual property rights owners adopt law enforcement best practices, they are frustrated by the approach of the Police. This has created an environment where many stakeholders fight to maintain their roles or primacy but do little or nothing to genuinely solve the problem.

(iii) *the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement*

This has already been dealt with above in (f).

The ACS does not appear to have a true investigative capacity and must therefore refer matters to the AFP or the victims. Its capacity to disclose matters has been dealt with elsewhere. We further note that the organisation appears to need more resources.

Given that there now exists, for the music industry an open border, the diversity and dimensions of importations of musical products is likely to have changed. This must have had an adverse impact on the risk and case management assessments. Accordingly, increased inspections of imported musical products is merited. However, this industry is not likely, at present, to be able to access the relevant Customs statistics to comment further.

(iv) *co-ordination of copyright enforcement*

There is a complete absence of co-ordination at any level. This industry has established a global, co-ordinated investigative infrastructure and its utility is without question. The efficiency of this industry's operations is dissipated by the lack of infrastructure to mesh with here in Australia.

We submit a law enforcement/industry co-ordination committee be established. Given the diversity of the matters it would attend to, it might report to the Minister for Justice, Copyright Law Review Committee and perhaps the respective Commissioner of Police. It may well prove timely to oblige the Committee to promote the development of law enforcement experts, in this area, providing world leadership in the development of strategies to combat new crime or emerging crime trends.

This would be a positive first step towards a co-ordinated and unified enforcement of intellectual property rights.

The Committee would serve as both the engine and the focus of the continuing development of law enforcement best practices relative to intellectual property rights investigations.

A structural model is provided in Attachment G showing the inter-relationship of stakeholders. It acknowledges the place and value of stakeholders in a co-ordinated environment whilst providing a solid foundation for an effective operational model.

It is clear that this model could exist within the existing structures of stakeholders to a large extent and in any event there would be little additional cost offset by tremendous advantages.

This could occur quite simply by the use of memoranda of understanding between stakeholders, liaison officers and trained staff.

The model would also provide an effective template for law enforcement agencies to deal with most technology driven crime.

It is submitted that adoption of this model, together with the other changes set-out herein, would create the real prospect that Australia would not only achieve law enforcement best practice, but also become a world leader in intellectual property rights protection and enforcement.

GLOSSARY

MP3

MP3 is short for MPEG-1 Layer 3 (Moving Pictures Expert Group), a format for storing digital audio. It uses an advance type of audio compression which reduces the file size with little reduction in quality. MP3 is used particularly for music distribution over the Internet, but is also used for other purposes such as real-time digital audio transmissions over ISDN (used by reporters). MPEG-1 has been around since 1992, but during the last few years (1998/99) it has started to get widespread attention from regular media and ordinary users.

An MP3 file (or simply “an MP3”) is a file that contains MP3-compressed sound data. It is played using an MP3 player. You can recognise MP3 files by their file-extension (the end of the file name), which is “.mp3”.

Compressing an uncompressed audio file (for example, a WAV created from a track on an audio CD) to MP3 can decrease the file-size to less than a tenth of the original file with minimal loss in quality. This means that an original 50 MB wave file (about 5 minutes of CD quality audio) will end up as an MP3 file using only about 5 megabytes of space with little or no audible loss in quality. The size depends on the length of the song and the bitrate quality). The data is automatically decompressed while the MP3 is being played.

Music Industry Piracy Investigations (Pty Ltd) – MIPI

MIPI is an anti-piracy unit jointly funded by the Australian Record Industry Association (ARIA) and the Australasian Mechanical Copyright Owners Society (AMCOS).

MIPI undertakes its activities for, and on behalf of, these organisations and their members.

MIPI’s functions include: to conduct investigative, preventative and educational activities in relation to:

- (i) piracy of sound recordings and musical works;
- (ii) counterfeiting;
- (iii) bootlegging;
- (iv) intellectual property fraud; and
- (v) associated matters

and to provide timely and professional advice or intervention in relation to those matters.

Organised Crime (1) A structured, continuing, conspiratorial enterprise, conducted for economic gain and which relies upon the threat or use of violence, intimidation or corruption to achieve its criminal objectives in legal and illegal markets.

Organised Crime (2) Any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption.

Organised Fraud (1) Section 83, Proceeds of Crime Act (Cth) 1987

A person who engages in organised fraud is guilty of an offence against this section punishable, upon conviction, by:

- (a) if the offender is a natural person – a fine not exceeding \$250,000 or imprisonment for a period not exceeding 25 years, or both; or
- (b) if the offender is a body corporate – a fine not exceeding \$750,000.

(2) A person shall be taken to engage in organised fraud if, and only if, he or she engages, after the commencement of this Act, in acts or omissions:

- (a) that constitute 3 or more public fraud offences; and
- (b) from which the person derives substantial benefit.

(3) Where a person is charged with an offence against subsection (1) in relation to a number of public fraud offences and the jury is not satisfied that the person is guilty of the offence against subsection (1) but is satisfied that the person is guilty of one or more of the public fraud offences, the jury shall acquit the person of the offence against subsection (1) and may find the person guilty of that public fraud offence or those public fraud offences and the person is punishable accordingly.

(4) In this section: “public fraud offence” means an offence under any of the following provisions:

- (a) sections 29D and 86A of the Crimes Act;
- (b) sections 5, 6, 7 and 8 of the *Crimes (Taxation Offences) Act 1980*.

Piracy will cover all products, processes and services which are the subject matter or result of an infringement of an intellectual property right (trade mark or trade name, industrial design or model, patent, utility model and geographical indication), of a copyright or neighbouring right (the rights of performing artists, the rights of producers of sound recordings, the rights of the producers of the first fixation of films, the rights of broadcasting organisations), or the “*sui generis*” right of the maker of the database and includes the following specific activity.

- a) Counterfeiting – a complete clone (or copy) of the original product. That is, both the sound recording and the packaging.
- b) Pirate – this is where the sound recording is copied, however the packaging (and descriptions) are changed to make the product look like it has come from some other source.
- c) Bootleg – an unauthorised recording of a performance.
- d) Licensing Fraud – this occurs where infringers manufacture false licensing documents, or fraudulently tamper with a legitimate licence or breach the terms of a licence by misrepresentation.
- e) Ambush Marketing – this type of fraud is often referred to as ‘look alike’ or ‘sound alike’. Here the offenders set about to create the impression that their product is either the same as a legitimate product or related to it. This usually involves the use of substitute artists re-creating performances of similar artwork. (NB: this fraud often constitutes a breach of Trade Practices or Fair Trading legislation. When the behaviour does not breach this legislation the conduct may still constitute a fraud upon consumers and merit Government intervention.).