

ACAG

Anti Counterfeiting Action Group

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**The House of Representatives
Standing Committee
On Legal and Constitutional Affairs
Parliament House
Canberra**

Re: Inquiry into the Enforcement of Copyright in Australia

INTRODUCTION

The Anti Counterfeiting Action Group (A.C.A.G.) is an association of manufacturers and wholesalers of clothing and other goods who are concerned with the sale of counterfeit products throughout Australia. The members of the A.C.A.G. are :-

- Acme Merchandising (Harley-Davidson)
- adidas
- Billabong
- Country Road
- Esprit
- Jim Beam
- Levi Strauss (501)
- Liquid Culture (Bad Boys)
- OshKosh
- Pacific Brands
- Palmer Corp (JAG)
- Quiksilver
- Reebok
- Rip Curl
- Sportscraft (Sportsgirl)
- Top Heavy

Copyright Infringement in Australia

When the ACAG was formed in 1991 there were approximately 75 markets operating in Australia. Most of these were large markets such As Queen Victoria Market in Melbourne and Paddy's Market in Sydney. Today there are in excess of 1,000 markets operating across Australia. These range from small country markets run for fundraising to the large commercially operated markets in the cities. At these markets we regularly detect breaches of our members' copyright throughout the year. We have surveyed the markets. The following table reflects our findings: -

State	Total Markets	Total Surveyed	Est. Annual Sales
ACT	29	10	32,237,676
NSW	359	163	1,283,484,025
NT	11	4	12,193,866
Qld	222	106	528,217,501
SA	58	30	138,061,189
Tas	22	10	34,802,064
WA	37	11	253,349,090
Vic	272	139	1,228,937,680
	<u>1010</u>	<u>473</u>	<u>\$3,511,283,091</u>

Many of these sell clothing and footwear and accessories. We estimate these markets turnover approximately \$3.5 billion dollars per annum. We estimate that the breaches of copyright cause losses to the Textile, Clothing and Footwear Industry and our members in excess of \$300 million per annum. This loss affects the ability of the industry to develop new products, employ Australians and to generate export earnings.

In addition to markets there has been an increasing trend toward discount shops selling cheap merchandise. These shops sell cheap imported copies of goods that breach our members copyright. The problem is only kept in check by our use of Private Investigators to warn sellers of their actions and possible breaches of the Copyright Act and to seek their co-operation to stop selling the offending products. When importers are identified the information is passed to the ACS. Without this, the sale of copies of our products would be far greater and the losses more extensive.

We enclose a list of markets in Australia. There have been breaches of copyright in approximately 70 % of these markets. In some cases there are breaches occurring continually and our actions only move the illegal actions from our properties to other companies!

ENFORCEMENT

Civil Remedies

Civil remedies under the Copyright Act work well against traditional established sellers engaging in relatively large scale infringement activities, but they are hopelessly inadequate to redress the majority of copyright infringements.

Civil remedies for breaches of Copyright are a very expensive exercise. If an intellectual property owner wins a case there is very little if any chance to recover any of the costs or damages awarded. It can cost \$15,000 to \$20,000 and more to run a civil action against a single counterfeiter. In many cases there are multiple counterfeiters who are individual persons who have no business registered, selling and buying everything for cash, paying no taxes and operating at various markets mainly during the weekend to avoid authorities. Winning the judgement may stop the person for a short time but they make no effort to pay costs or damages awarded against them. When one copyright owner sues, the infringer stops breaching that copyright and switches to one they have not been sued for. Then another company has to spend the same money to get the problem resolved. Records of previous litigation don't appear in court as criminal convictions would and each case may be dealt with as the first against that defendant.

In 1997 the ACAG funded civil cases against 7 stallholders at Parklea Market in Sydney. All cases were ruled in favour of our members with costs and damages awarded against the defendants. The case cost \$80,000 to run and we were awarded costs and damages amounting to a further \$80,000. We have only ever received \$15,000 of these costs and damages. To recover any more will involve further legal action with more costs. Two of the stall holders, once judgement was handed down, immediately left Australia to return to China. Two others moved to prevent our pursuit of the debt.

The civil process is also very slow. From filing to judgement can take many months. In the interim the activities continue. The time delays are unacceptable. The system requires streamlining and expeditation. Arrest by Police is immediate.

Criminal Process

The Copyright Act, is a Commonwealth Statute and intended to be enforced by the Australian Federal Police (AFP). AFP procedures as defined in Section 13 of their directives gives Intellectual Property offences no priority. AFP resources are directed to crimes against the Commonwealth, Drugs and Organised Crime. As such, the AFP have informed us that they have no resources to devote to this area. This is a clear breach of the Federal Government's commitment under Article 61 of the TRIPS agreement.

T.R.I.P.S.

Article 61 of Part III, Enforcement of Intellectual Property Rights, in the TRIPS Agreement requires:

“SECTION 5: CRIMINAL PROCEDURES

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trade mark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

(a) *“counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trade mark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;*

(b) “pirated copyright goods” shall mean any good which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.”

We note in this part, which is headed “Criminal Procedures”, there is requirement, in appropriate cases, for “ ... seizure, forfeiture and destruction of the infringing goods ...”.

We believe the Australian Federal Government is failing, in respect of this part, to honour its commitment to the treaty. The section says, “Members shall provide for criminal procedures and penalties ...”.

We submit that “procedures” are “... a series of actions ...”. That process or action at law is “... summons or writ...”. It is not sufficient for the Government to create the legislation alone. This is an agreement to allow for “Criminal Procedures ...”. The Government must make the criminal process work. We have been advised by the Australian Federal Police there are no Police resources dedicated in this direction. Whilst this is obviously a budgetary constraint, the legislation should provide suitable workable alternatives that are economically available to the copyright / trade mark owners whether they are wealthy long term established companies or newly developing.

Under the present system, a civil criminal procedure is virtually impossible without arrest, search and seize powers. Evidence cannot be gathered satisfactorily and the Trade Mark owner is left with no remedy.

Whilst State police do have the power to act in these matters they have little or no knowledge of them. In many cases when reporting a breach the State Police Officer has not heard of the Act let alone understanding what is required. In addition, because this is a Federal statute they have to operate under the Federal Criminal code which has vastly different procedures and rules for arrest, interview and detention. This then creates more confusion. They also do not have the resources to undertake work which is outside of their jurisdiction. In the cases where we have managed to get State Police to act this has been done by special squads or support groups not operating out of any particular station and not undertaking day to day

activities. This is very rare and is only normally done after a great deal of persuasion on our behalf.

In summary there is very little possibility of Police assistance or criminal prosecution for copyright breaches. Those people undertaking these crimes also realise that and proceed in these activities as if with immunity. As we stated this is a clear breach of the government's requirement under TRIPS.

Organised Crime

Politicians and Police talk about organised crime in the context of drugs, extortion and money laundering. In NSW a syndicate operates in which counterfeit clothing is sold as authentic product to lower socio-economic folk in Sydney's Western suburbs, South West and South Coast around Wollongong – Warilla.

The organisers use counterfeit embroidered labels, iron on transfers and screen printing techniques to make the clothing. The brands most frequently abused are those popular with children (surf and street wear labels) who put pressure on parents to buy them. The inferior quality goods are sold at parties in private homes. The customers, many single parents, are shown samples by a host/hostess belonging to the syndicate. The attendees place orders and the householder receives a commission. 7-14 days after the party the goods are delivered by another person and the householder hands over the money. When the goods are unwrapped they are inferior quality. The whole network operates via pagers and cellular telephones.

In the four (4) months before Christmas 1997 we were aware of over 130 parties selling an estimated \$1,800 each in value of counterfeit clothing on the NSW South Coast alone.

Only two arrests were effected by NSW Police and very small fines resulted. We estimate the syndicate has a floating involvement of 7-12 people. These activities lead to major consumer discontent with the brand owners who constantly advertise warnings to the public.

Evidence

We have video, photographic, data and physical evidence that we can produce to the Inquiry in support of this submission.

Australian Customs Service

The most effective measure we have found in the fight against counterfeiters has been the Australian Customs Service. This organisation has been extremely co-operative in stopping the importation of goods that breach copyright. We have a successful relationship with them which has yielded excellent results especially in Sydney and Melbourne. However as approximately 60% of the illegal clothing is made in the “sweat shops” here in Australia there is an enormous volume of illegal product that they do not get to see.

Whilst the ACS is effective, they too only have limited resources to check an ever increasing volume of imported goods entering the country. More resources need to be devoted to the ACS in order to control Australia’s growing imports.

Comments

Police action is difficult to obtain and resources are scarce.

When offenders are charged and convicted they are given very small penalties. It is imperative the Judiciary in Australia understands the problem and the damage it causes. There should be minimum fines rather than just a maximum fine as is the current case. This minimum fine should be of sufficient deterrent to stop offenders from re-offending. The chance of a prosecution or fine is so slim the offenders treat it as a business expense.

The ability to conduct a private/civil criminal prosecution as allowed under the Trade Marks Act should be reviewed, streamlined and included in the Copyright Act. We have attempted to run a case in this manner under the Trade Marks Act and found that the AFP and Commonwealth DPP were reluctant. Eventually we dropped the case because of the procedural issues. The people targeted in this matter are still committing the offences on a wide and organised scale. Because the problem is occurring in more than one NSW Police area and it is not an AFP priority no assistance can be obtained. The offences continue.

Recommendation

The government should make Federal Police resources available, whose sole responsibility is to investigate people breaching Copyright and Trade Mark rights and committing offences against Intellectual Property. The ACAG and other industry associations would be able to supply the squads with sufficient information to enable charges to be laid.

Australian Business needs Government Assistance to create an environment where achievements in technology and design can be rewarded. At the moment it is one where Research and Development are not encouraged and Copyright thieves can profit overnight without fear of prosecution.

Submitted for discussion and your consideration.

Anti Counterfeiting Action Group.

(Prepared by J. RAMSDEN, S. STANDEN & K. TAYLOR)