

2 June 1999

Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Inquiry into the Enforcement of Copyright in Australia

Thank you for the opportunity to make a submission on the Standing Committee's *Inquiry into the Enforcement of Copyright in Australia* (the "Inquiry").

The Arts Law Centre of Australia

The Arts Law Centre of Australia is the national community legal centre for the arts, a source of legal and financial information and advice to creators in all sectors which gives ongoing assistance to its subscribers. In addition to the provision of legal and financial advice the Centre produces sample contracts for industry wide use; offers a national lecture and seminar program on legal issues in all arts sectors; provides referrals to arts and entertainment lawyers in private practice; publishes a quarterly newsletter *Art+Law*, and a journal, *Artlines*, dealing with art and the law in the digital age.

Unlike other community legal centres, the Arts Law Centre of Australia does not deny access to anyone. Its commitment is to encourage professional practices in all sectors of the arts, and by all who participate in them. It does not represent people in negotiations, or conduct litigation. In 1998 Arts Law advised on 2,500 arts related legal queries.

Scope of submission

Our submission will focus on paragraphs 1(a)(i),(iii), (iv), (b)(i) (d) and (e) of the Terms of Reference, which relate to statistics about copyright infringement, the cost of copyright infringement to Australian businesses and the need of legal reforms to reduce these costs, with particular reference to small business. The following points are drawn to the Inquiry's attention in regard to our submission.

- The aim of Intellectual Property rights is to prevent "free riding" by persons who did not contribute to the original Intellectual Property(IP) investment. Without an

effective IP regime, it would be impossible for those who invest in IP to recover the commercial costs of investment. This would act as a market disincentive for such investments.¹

- Arts Law does not routinely deal with large-scale copyright infringements affecting major industry players.
- The majority of art practitioners that Arts Law advise operate as sole traders or small firms whose main income deriving asset is their intellectual property. Almost none have the resources to bring a Federal Court action even in the case of clear and blatant infringements. Legal aid is not available for such cases, which are regarded as commercial disputes.
- The Government has stated that it is committed to promoting a fair regulatory regime for small business. In our view small business is not being served by existing copyright enforcement measures. In our view the costs of copyright enforcement to small business is equally vital to Australia's economic growth as costs affecting large industry players.

RECOMMENDATIONS

Arts Law recommends that the Inquiry consider measures which provide cost effective and timely remedies for copyright infringement to small businesses in the arts sector. In particular, we recommend that the Copyright Tribunal's powers be extended to resolve a range of copyright enforcement disputes in an efficient, cost effective and just manner. Expansion of the Copyright Tribunal's powers could assist in providing access to justice for small business.

Although we have not had the opportunity to undertake detailed research in pursuit of appropriate models, we make the following recommendations for the Inquiry's exploration of these issues:

- the Inquiry should investigate the unfair dismissal conference procedures in the New South Wales Industrial Relations Commission as a possible analogous model for quick "up-front" resolution of many copyright infringement disputes. Arts Law understands that employees are able to file proceedings themselves, without the need for legal representation, at a nominal fee. The matter then swiftly proceeds to informal conciliation hearing before a Commissioner, who urges the parties to delineate their grievances and solve the dispute. The parties cover their

¹Trade Related Aspects of Intellectual Property Right, Staff Research Paper for the Productivity Commission, John Reeves, May 1999.

own costs of representation, if any, at this hearing.

- ▶ The Inquiry should investigate the feasibility of using informal mediation to solve copyright infringement claims. Exceptions would include, of course, cases where urgent injunctive relief is being sought. Once again, this procedure would be aimed at reducing up-front legal fees and complex legal procedures and resolving copyright infringement issues as quickly as possible. Arts Law runs a mediation service which is modelled on that used by the Law Society of New South Wales.

General Comments

1. Availability and accuracy of data on copyright infringement (Paragraph 1(a)(I))

Statistics on total advices given by Arts Law and advices relating to copyright infringement 1996-to date are as follows:

| COPYRIGHT STATISTICS | 1999 1/1-25/5/99 | 1998 | 1997 | 1996 |
|-------------------------------|-----------------------------|-------------|-------------|-------------|
| Total advices | 1168 | 2449 | 2476 | 3444 |
| Copyright infringement | 82 | 187 | 229 | 144 |

This data should not be seen as an indicator of the number of copyright infringement cases affecting small businesses Australia-wide.

Geographical spread of copyright infringement (Paragraph 1(a)(iii))

Arts Law has significant national coverage in its legal advice service. Many callers are from remote or rural areas without access to legal advice on arts related matters. Approximately 51% of advices are to callers from New South Wales. Of the remainder, around 21% are to Victorians, 11% to Western Australians, 8% to South Australians and 2% each to the Australian Capital Territory, Northern Territory and Tasmania.

Cost of infringement and impact on Australian business (Paragraph (1)(a))

Arts Law often advises clients whose estimated claims for compensation due for copyright infringement are far less than the estimated legal fees incurred through the enforcement of copyright either through a lawyer's letter of demand, or seeking an injunction or other civil remedies for copyright infringement in the Federal Court.

Copyright is a specialised, technical and complex field, so legal fees tend to be at the higher end of the range. Arts Law understands that hourly consultation rates for lawyers in this field can be up to \$300-\$400 per hour plus disbursements. Daily rates for barristers in the field can easily be over \$1,000.

The extent of preliminary legal advice required before a letter of demand can be sent is also a significant factor. In the case of an alleged infringement a client may need preliminary advice on issues including:

- ▶ The existence of copyright in the subject material - for example, whether the client's "idea" has attracted copyright protection.
- ▶ Ownership of copyright: for example, whether or not the client would be deemed to be an "employee" and therefore not the owner of copyright created for a project.
- ▶ Chain of title: for example, whether the client has assigned copyright to a publisher.
- ▶ Existence of licences: for example, whether the alleged infringer will be able to defend the claim on the basis that the client gave a written, oral or implied licence to use the material.
- ▶ The existence of any other defences such as fair dealing available to the client.
- ▶ The amount of compensation reasonably likely to be obtained.
- ▶ The amount of legal fees and court costs likely to be incurred in pursuing the claim.
- ▶ The likelihood of obtaining compensation: for example, whether the infringer resides in another country or may be bankrupt.

All of these issues involve complex issues of fact and law. In addition, the claimant often does not have sufficient documentation of their copyright assets because of the legal costs in preparing such documentation, making it more difficult to advise where an infringement occurs.

In our experience, the claimant will be not taken "seriously" by the infringer unless legal representation is obtained. The cost of legal representation more often than not proves prohibitive. Although Arts Law has sometimes been able to organised reduced fee referrals to lawyers in clear-cut cases of infringement this is not guaranteed. Most callers with copyright infringement matters are referred on to lawyers who take instructions at full fees. Most abandon or settle their claims for reduced compensation rather than incur these costs.

The Attachment to this submission presents two case studies illustrating these issues.

3. Options for copyright owners to protect their copyright against infringement (Paragraph 1(b)) and 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 (Paragraph (1)(d))

Litigation, or the threat of litigation is the most effective avenue of enforcement available to claimants. Please refer to case studies in the Attachment.

Advantages

- “Test cases” are good educative tools as they highlight the complex issues in cases of copyright infringement. “Test cases” may also establish or extend legal precedent to ameliorate the inadequacies of legalisation to accommodate cultural issues :
Milpurrruru v. Indofurn [1995] 30 I.P.R. 209
Bulun Bulun v. R&T Textiles Pty Ltd [1998] 41 I.P.R. 513
- Litigation enables copyright owners to obtain remedies which have not been offered in settlement negotiations. Eg: declaration, injunction and delivery up of infringing copies.
- The threat of litigation is often be used as a tool to facilitate a settlement. See first case study in the Attachment.

Disadvantages

- Litigation is very expensive. We refer to the estimates of legal fees provided in the first case study in the Attachment. In the case of most copyright infringements involving small businesses, litigation is too costly pursuing even a test case on a matter of legal principle is involved.
- Successful litigation often does not adequately redress the damage suffered. For example in the Grant Matthews case the amount awarded for damages was significantly less than Mr Matthews, and presumably others in the photography industry, would have wished as a precedent award.
- In a test case a successful enforcement action may not empower the claimant (but will empower others wishing to enforce their copyright). The legal action may put off potential licensees or business from doing business with the claimant.
- There can be lengthy delays that are crippling to the small business claimant.
- If litigation is threatened and the matter does not settle, the claimant is faced with “Hobson’s choice” either proceed with court action or abandon the claim.
- Even if the matter does settle before or during court action, the claimant often has to instruct a lawyer before settlement can be reached.

In some states such as South Australia local courts are now able to hear copyright infringement proceedings. In our view it is not a solution to expand the jurisdiction of local courts. Local courts are not equipped to deal with complex and specialised intellectual property cases. In addition, although court costs may be somewhat lower, lawyer's fees are largely unaltered by the change of forum. See first case study in the Attachment.

Litigation is generally expensive tool for small businesses to use to protect their copyright assets. While we welcome suggestions for initiatives to reduce court fees or to allocate funding for public interest litigation in some copyright infringement test cases, we prefer to explore more wide-ranging models of general regulation. As Senator Alston has recently remarked in the trade practices context, increased litigation is often a sign that a regulatory system is not working.²

3. The desirability or otherwise of amending the law...(Paragraph (1)(e))

In our view amendments to copyright legislation should urgently address methods of resolving copyright infringement disputes which encourage informal, timely and cost-effective dispute resolution.

Arts Law has previously advocated that urgent attention be given to the proper role and appropriate procedures of the Copyright Tribunal.³ Those comments are repeated here as follows:

The Centre submits that the proper role, and appropriate procedures, of the Copyright Tribunal, are issues which merit urgent and specific attention. The Centre is particularly concerned with the issue of access to justice, and that the priority which the Government has given to ensure that Australia enjoys a first rate copyright environment is not undermined by inattention to the question of how creators can pursue their rights in a forum which is competent and accessible.

We would be happy to comment further on anything in this submission and would welcome the opportunity to make an oral presentation before the Inquiry.

²Speech at NOW99, Darling Harbour, 4 pm 17 May 1999.

³ Submission to the Intellectual Property Taskforce on Review of the Australian Copyright Collecting Societies Report (the "Simpson Report"), 27 September 1996.

Yours faithfully

Delia Browne
Executive Director

Sally McCausland
Legal Officer

ATTACHMENT - CASE STUDIES ON ENFORCEMENT OF COPYRIGHT

1. Unauthorised use of photograph by newspaper

The subscriber is a well-known photographer. Early this year he discovered that one of his photographs, which had previously appeared in a book of photographs published by him, was being used in an advertisement for a boutique appearing in a local newspaper. In telephone conversations the boutique acknowledged that they had not had permission to use the photograph, and the newspaper assured him that the advertisement would not appear again and offered to print an apology. However, the advertisement was subsequently run again.

The subscriber then contacted Arts Law and we advised him to write a letter to the studio and the newspaper reiterating that no permission had been granted for use of the photograph and that he reserved his rights. We then organised an Arts Law Legal Advice Night in Adelaide for the subscriber with one of our panel lawyers in order to consider what compensation or other remedy might be available to him.

The photographer was advised that he would be entitled to compensation for copyright infringement and that he would be able to bring an action for compensation in the local court. However, he was also advised that it was unlikely that he would recover the full amount of the licence fee he felt entitled to, and that *it was likely that he would spend far more on legal costs than he would recover by way of an award for costs.*

The subscriber was not successful in negotiating a settlement with the newspaper on his own behalf, and decided to engage the panel lawyer to represent him. He instructed the lawyer to write a letter of demand, and with some negotiation the matter settled in April 1999, three months after the initial infringement.

The subscriber has provided us with an estimate of his costs in pursuing this matter, including time, which indicates substantial costs to his business in administration, time and legal expenses in getting the matter resolved. Had the matter not settled, he would have been faced with even greater costs and a very lengthy delay. The subscriber has indicated to us his dissatisfaction with copyright enforcement provisions given that this matter involved a clear breach of copyright for which liability was admitted at the first instance.

2. Magazine exceeding licence given by photographer

This is a reported case involving a photographer, Mr Grant Matthews who sued Australian Consolidated Press over the re-use of a photograph initially commissioned for another article in a magazine as a front cover for another magazine. The case is not connected with Arts Law, but it illustrates the fact that court action can be lengthy

and costly for little return. The court awarded only \$1650 in compensation for the reuse of the photograph as a front cover. This was significantly less than the \$10,000-\$20,000 Mr Matthews said he would have expected as his licence fee. The case also illustrates the length of court proceedings in copyright infringement cases. The photograph in question was commissioned in September 1995 and reused in around June 1997. The application for relief in this matter was filed in September 1997. The trial was held in April 1998 and judgment was delivered in September 1998. At the time of judgment the issue of costs was still to be debated.

However, the case does have value as a precedent, establishing that photographers are entitled to additional fees for reuse of their commissioned photographs under section 35(5) of the Copyright Act (as it then was). For this reason the case was an important test case for the economic rights of photographers. A full report of the case can be found at [1998] 41 I.P.R. 535.