

Submission No 35

**AUSTRALIAN FEDERAL POLICE SUBMISSION TO
THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS
INQUIRY INTO ENFORCEMENT OF COPYRIGHT IN AUSTRALIA**



June 1999

Introduction

The Australian Federal Police (AFP) appreciates the opportunity to provide a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into enforcement of copyright. Having considered the terms of reference, the AFP considers that sub-paragraphs 1 (a) (v), 1 (c), 1 (g) (i) and (ii) and 2(f) refer to matters most directly related to its sphere of operations or interests and the submission is focussed accordingly.

Background

The AFP is the principal law enforcement agency through which the Commonwealth pursues its law enforcement interests. Its role is to enforce Commonwealth criminal law and protect Commonwealth and national interests from crime in Australia and overseas. The AFP is Australia's international law enforcement and policing representative and source of advice to the Government on policing issues.

The AFP has offices throughout Australia and works in cooperation with other federal agencies such as the National Crime Authority (NCA), the Australian Customs Service (ACS), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Office of the Director of Public Prosecutions (DPP).

Cooperative working arrangements also exist between the AFP and the State and Territory Police Services particularly when investigations are multi-jurisdictional. In addition the AFP has established and provides an international liaison officer network which is utilised by the Australian law enforcement community generally.

The AFP's functions are set out in section 8 of the *Australian Federal Police Act 1979*. These functions include the provision of police services in relation to :-

- laws of the Commonwealth;
- property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth;
- the safeguarding of Commonwealth interests; and
- to do anything incidental or conducive to the performance of the foregoing functions.

Within this framework the AFP is expected to pursue clearly defined outcomes agreed by the Government. The outcomes currently being pursued by the AFP include :-

- that criminal activity is deterred in areas impacting on the Commonwealth Government's interests;
- that those individuals and interests identified by the Commonwealth Government or the AFP as being at risk are kept safe and secure as a result of AFP protective services;
- that policing activity creates a safer and more secure environment in the ACT, Jervis Bay and Australia's external territories;

- that the Commonwealth Government contributes effectively to international law enforcement interests; and
- that community confidence in the honesty, effectiveness and accountability of the AFP is high.

Government shapes AFP priorities by the issue, from time to time, of Ministerial Directions made under section 13(2) of the *Australian Federal Police Act*. The current Ministerial Direction, issued in February 1999, requires the AFP to give special emphasis to:

- countering and otherwise investigating illicit drug trafficking, organised crime, serious fraud against the Commonwealth; money laundering and the interception of assets involved in or derived from these activities;
- providing community policing services in the ACT, Jervis Bay and external territories;
- providing protective security services to the Governor-General, federal parliamentarians, internationally protected persons, other persons who are of specific interest to the Commonwealth, witnesses and special events; and
- investigating special references and performing special taskings from the Government.

The AFP has also been requested to ensure, in particular, that it provides an effective contribution to the implementation of the Government's *'Tough on Drugs'* strategy and to the conduct of the 2000 Olympic Games.

Government has stated that the AFP should continue to develop a capacity to deal with new forms of criminal activity and that special attention should be directed at the investigation of economic crime, in all its forms, transnational crime and crime involving information technology and communications (including electronic commerce).

Present Situation

Stemming from its statutory functions, one of the roles of the AFP is to prevent, detect and investigate criminal offences committed against Commonwealth laws, revenue and expenditure. While copyright legislation falls under Commonwealth law, there are a range of factors to be taken into account by the AFP in determining whether a matter, irrespective of its nature or type, is accepted for investigation and secondly, the priority it is to be afforded.

Examples of the issues involved include the availability of limited resources; competing priorities; judgements about the level and extent of the criminality involved in the particular matter; the prospects of an investigation leading to a successful prosecution; the likely impact and outcome of police involvement; and the availability of alternative means of resolving the particular case.

A case categorisation and prioritisation model is applied to aid individual operational decision makers with an objective basis for evaluation and comparison of AFP operational activities. Considerations include incident type, impact, priority, resources, duration and the value. Underlying this evaluation and prioritisation process is the need to ensure that available resources are applied to those tasks which return maximum value to the Government and people of Australia.

All matters referred to the AFP for investigation, whether they relate to illicit drugs, serious fraud, intellectual property or copyright-type offences are examined by national and regional operational coordination centres to assess whether the AFP will accept or reject the referral. These judgements are made by assessing and weighing the referral against specified evaluation and prioritisation criteria.

Matters which are accepted for investigation have resources allocated to them and the inquiry commences. While it is acknowledged that application of the evaluation and prioritisation process often results in alleged copyright infringements not being accepted for investigation, the AFP considers that its processes rightly focus on those copyright matters where there is a high incidence of direct or associated criminality and the matter warrants application of the criminal law.

The fundamental aim of the AFP investigative effort is to ensure that limited investigative resources are directed to the most important investigations which in practice are largely those of 'high end' criminality. It is critical that our limited investigative resources are deployed to best effect. An endeavour is made, wherever possible, to target criminal action on those matters likely to have the most beneficial impact rather than solely on the basis of the monetary amounts involved.

The AFP is also anxious to avoid the commitment of resources to investigations where the prospect of a successful outcome is problematic. The long term view of copyright is that with emerging technologies, it is almost impossible to police. The internet provides infinite opportunities to copy material with limited prospects of ever being detected. Modern technology increases the opportunities to make minor alterations to originals which almost always results in a failure to convince tribunals of a breach of criminal or civil law. It could be said that copyright as a trespass will become decreasingly important as technological transfer of information and virtual printing become commonplace. The AFP's resources have to therefore reflect the reality of policing the problem. The provision of additional resources will not solve the problem.

The AFP acknowledges concerns which have been raised from various sources about the role and extent of criminal enforcement in intellectual property and copyright matters generally, and has participated with other Commonwealth agencies in discussions on the matter under the auspices of the Attorney-General's Department.

The AFP however, rejects any assertion that it does not give full and proper consideration to requests for investigation of copyright complaints or that, by applying its assessment, evaluation and prioritisation process to copyright referrals, it has adversely impacted on Australia's international obligations.

Terms of Reference

Whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent [I(a)(v)]

Organised crime, apart from its involvement in traditional areas of criminal activity, also permeates a wide range of legitimate commercial and business activity, both within Australia and at international level. Wherever opportunities arise to exploit or capitalise on genuine commerce for criminal gain, it can be anticipated that there will be individuals or groups, organised or otherwise, who will seize the opportunity.

Commercial activities which entail high turnover of product, substantial cash flows, an opportunity for the laundering of funds or avoidance of liabilities (eg taxation etc), are among those which are vulnerable. The nature of the activity and the production efforts involved in the large scale manufacturing of various forms of copyright infringed goods (eg compact discs etc) clearly exposes the activity to exploitation by criminal syndicates.

Against this background however, the AFP, in the case of those copyright cases which it has investigated, has not established any significant evidence to substantiate the involvement of organised criminal groups within Australia in copyright infringement. With the international interaction which occurs in such matters, between Australia and countries of South-East Asia in particular, the prospect of organised criminal activity being involved is clearly a matter which needs to be taken into account.

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 [I(c)]

In the AFP's experience, the principal practical difficulties encountered in pursuing criminal prosecutions revolve around establishing and proving issues of fact rather than law. That is, obtaining evidence to prove the existence of copyright in a particular case to the required standard. For instance, in December 1998, the Federal Court issued a decision on copyright charges against a person alleged to have possessed two thousand pirated laser discs for the purpose of supply. The Court found only 9 discs to be infringing copies citing insufficient evidence in relation to copyright ownership in affidavits supplied by the movie companies in the United States as a deficiency in the crown case.

The level of penalties provided in the Act are regarded as adequate, however the actual sentences handed down by courts are often relatively low. In a recent matter which commenced in October 1995 and concluded in May 1999, a fine of \$4,900.00 was imposed which was disproportionate to the effort and resources applied to the investigation.

The Attorney-General's Department is best placed to comment on the desirability of amending the law, however the AFP supports any proposals to simplify proceedings.

The role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement [I(g)(i)]

The AFP has the primary responsibility for investigating criminal offences against Commonwealth law, however, the number of offences against such laws referred to the AFP far exceeds our capacity to investigate. We must ensure that our limited resources are directed to the most deserving priorities, and the decision to accept or reject matters for investigation is fundamentally based on this precept.

Accordingly some criminal offences will not be routinely investigated by the AFP. In recognition of resource constraints, the AFP, in an effort to better apply investigative effort has adopted a policy of selectively targeting, in conjunction with referral agencies, those offenders or activities seen as instrumental in devising, promoting or carrying out particular types of criminality.

For example, in the case of taxation matters, it is considered more effective and efficient to target the instigators or key operators of a particular fraudulent scheme rather than routinely applying resources to pursuing the many lesser participants who take advantage of the scheme as downstream beneficiaries.

In other words, the focus is on exposing and eliminating the core element of the fraudulent scheme or activity thereby maximising the effect of the investigative resources applied. This 'exemplary' approach is considered to be equally appropriate in the case of copyright infringement cases.

In making the decision to accept or reject a matter for investigation, regard must be had to the nature of the alleged crime, the effect of the criminality involved and the resources required for investigation. Each reported matter must be weighed and balanced against all other newly reported matters and against other ongoing investigations.

As part of the priority setting process, regard must also be had to the existence and nature of any alternative solutions to the particular problem. Alternative solutions may include investigation by other bodies or agencies, regulatory action, or civil process notwithstanding prima facie evidence of a criminal offence.

It is the AFP's view that the most appropriate avenue for dealing with the greater proportion of allegations of copyright infringement is through civil proceedings between the parties rather than by recourse to the criminal process. The reasons for this view include :-

- the standard of proof which in civil matters is a lesser standard than that required to be met in criminal prosecutions;
- the range and type of remedies available through the civil process having regard to the frequent motivation of complainants being pecuniary satisfaction rather than criminal conviction - a potential outcome unlikely in criminal proceedings;
- the proliferation of commercial bodies tasked with addressing the matter who merely wish to gain access to police powers to "prop up" their own privately funded functions;
- the inconsistent approach to the problem, for example, where obvious counterfeit clothing and branding is not targeted at the import stage where the items are for personal use which reflects the reality that many overseas countries ignore the problem and encourage tourism to markets where counterfeit branding is readily available;

- the resource intensive nature of copyright investigations compared with the level of criminality involved - a factor reflected in sentences delivered; and
- establishing proof of copyright in individual items is often expensive, impractical and on occasions unsuccessful.

The AFP will usually accept matters of this type for investigation only where there are clear and substantial circumstances of direct or associated criminality which impact on or affect the Commonwealth's law enforcement interests. These are generally large scale and organised breaches of copyright which are frequently investigated with assistance from the complainants concerned or their industry representatives. This assistance has the added benefit of reducing the demand on AFP resources.

Copyright infringements are viewed by the AFP as forming but one part of the wider intellectual property framework. We are also conscious of the potential or likelihood of the broader impacts that significant breaches of copyright have on Commonwealth interests and of the requirement to comply with Australia's international obligations.

In terms of the involvement of police of the States and Territories in detecting and policing copyright infringements, the AFP is aware that some State Police Services have participated in such investigations. The powers available to members of the AFP under many Commonwealth Acts, including the *Crimes Act 1914*, are equally capable of being exercised by State and Territory Police.

***The relationship between enforcement authorities and copyright owners
[1(g)(ii)]***

The AFP endeavours to maintain an effective cooperative relationship with individual copyright owners and industry groups where investigations are undertaken. In some instances however, individual copyright owners or industry groups have expressed frustration or dissatisfaction with the AFP's inability to accept particular matters for criminal investigation.

It is clear that in many instances, the approach made by the various bodies established by the copyright owners is merely to provide a police presence to support their own activities. The use of search warrants by the AFP is normally restricted to assisting other government departments and a move to support private entities has significant ramifications in terms of integrity and competition for resources. The AFP has already witnessed improper approaches by agents of copyright owners attempting to achieve priority for their investigations by offering meals and other forms of entertainment such as concert tickets.

On some occasions, the approach to the AFP to undertake a copyright investigation appears to be accompanied by either a lack of awareness or acceptance by complainants of the prospect of seeking alternative means of redress, or a concern that pursuing such an alternative may involve them in greater expense, effort or delay in achieving a satisfactory outcome.

Correspondence has been exchanged by the AFP with such bodies as the Australasian Film and Video Security Office, the Music Industry Piracy Association and the Australian Record Industry Association in an endeavour to outline the position of the AFP in respect to copyright investigations.

Existing resources and operational priorities of Government enforcement agencies [2(f)]

Within its organisational program structure, the primary goal of Program 1 of the AFP (Investigation of Crimes against the Commonwealth) is to deter serious fraud, major and organised crime against the Commonwealth. AFP investigative resources are broadly structured in each region under operations and operations support streams.

All referrals seeking or requiring application of investigative resources are channelled through Operational Coordination Centres established in each of the AFP regions and in National Operations at AFP Headquarters. The referrals are then subjected to the assessment, evaluation and prioritisation process outlined earlier in this submission.

The investigative resources available at any one time at either national or regional levels to undertake new investigations vary considerably on a day to day basis. This results from a range of factors, many of which involve non-discretionary obligations or commitments (such as situations requiring immediate response, offenders apprehended, incidents in progress, ongoing tasks etc).

Referrals accepted are allocated or tasked, under the auspices of the respective Regional Management Team or the National Operations Management Team, to either an existing investigative team or a new team is formed to carry out the particular task, dependent on its nature, scale and anticipated duration.

The AFP had 23 referrals of copyright in 1998 with 9 to date in 1999. Of the 23 referrals in 1998, 20 were rejected, 2 were investigated and 1 was withdrawn by the complainant. Of the 9 referrals this year, 5 have been rejected, 2 have been accepted and a further 2 are under evaluation.

In terms of the management of investigations the AFP has adopted the following principles :

- management decisions must focus on achieving specific outcomes;
- investigations are subject to the realities of resource allocations;
- the investigative process must be open to administrative, operational and judicial review;
- the system used to manage investigations must be flexible;
- communication must be clear and unambiguous; and
- a multi-disciplinary team approach is best.

The operational priorities of the AFP are primarily determined and applied within the framework set out in the Ministerial Direction formally issued under section 13(2) of the *Australian Federal Police Act*, extracts of which are referred to on page 2 of this submission.
