

**NSW POLICE SERVICE SUBMISSION**

**TO THE**

**FEDERAL PARLIAMENTARY INQUIRY**

**INTO THE ENFORCEMENT OF COPYRIGHT IN AUSTRALIA**

**Inquiry Terms of Reference (so far as they relate to the NSW Police Service)**

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

The Commercial Crime Agency believes there is evidence of organised crime group involvement in copyright infringement in NSW, however, it is not aware of the level of such involvement and further investigation would be necessary to establish the extent. The Commercial Crime Agency considers copyright infringement to be an area of crime that is emerging and expanding with advances in technology and is being facilitated by a lack of resources (finance, training, intelligence) provided to law enforcement.

The Commercial Crime Agency believes there are opportunities for organised crime groups to expand their criminal enterprises from the importation of narcotics to copyright infringement. There is considerable difference in penalties between the two, profits can be similar and there is far less associated risk. There is also the opportunity for laundering money.

Overseas experience (eg., Hong Kong) indicates that organised crime groups (eg., Triads) are involved in copyright infringement. Crime Agencies notes UK intelligence is that there is Russian Mafia involvement in copyright infringement, however, there is no information that it has spread to Australia. Crime Agencies believes that the potential threat is from South East Asia, however, at present it is difficult to substantiate the extent of the threat.

The Commercial Crime Agency advises there are examples of lower level criminal involvement in NSW in commercial based copyright infringement. These can be identified on the Computerised Operational Policing System (COPS).

**1(c) The adequacy of criminal sanctions including forfeiture and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement.**

**a) *Criminal sanctions -***

It is the opinion of the Commercial Crime Agency that the present penalties under s.132 of the Copyright Act 1968 (Cth) are insufficient and do not adequately address the criminality involved in copyright infringement.

The most serious penalty for the individual is 5 years imprisonment and a maximum fine of 550 penalty units whereas prosecutions under s.300 of the NSW Crimes Act 1900 (make false instrument) make an individual liable to 10 years penal servitude. The Crimes Act provides that a false instrument includes a disk, tape, soundtrack or other device on or in which information is recorded or stored. It is also noted that the NSW legislation does not provide for specific penalties against corporations and nor is it able to properly address all matters that could arise pursuant to copyright issues.

The penalties for intellectual property fraud should adequately reflect the commercial

damage and cost of investigation and prosecution of offenders.

**b) *Forfeiture -***

The Commercial Crime Agency considers that the forfeiture provisions are adequate, however, there could be additional provisions to facilitate the seizure of profits and assets from offenders. This could serve as a real deterrent to organised crime groups.

However, the NSW Police Service would argue against NSW police being required to seize, store and maintain counterfeit items. The legislation could provide a representative sample could be used in prosecutions or other alternative means to satisfy evidentiary and other legal requirements.

The destruction or otherwise of the counterfeit items should be the responsibility and/or cost of the Commonwealth. In relation to items that must be seized, stored and maintained by NSW police, then funding and other assistance should be forthcoming from the AFP or Federal Government.

**c) *Desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement -***

The Commercial Crime Agency considers the various presumptions (Division 4, Copyright Act 1968 (Cth)) that exist for the proof of facts in civil actions for copyright infringements should be extended to criminal proceedings.

The NSW Police Service believes that foreign corporations are the majority owners of intellectual property rights that are the subject of fraud offences in Australia. This creates significant difficulties for the investigation and the prosecution of offenders regarding the proof of ownership of copyright.

This is further complicated if the offender is a foreign corporate citizen that alleges they have ownership of the disputed copyright (note the difficulties with disproving copyright ownership). Under the current system the investigative authority would be forced to travel overseas to take statements and examine documents. Further, the prosecution would be required to call those foreign witnesses (at considerable expense) to give evidence if their affidavits were not accepted by the defence. There needs to be in place a simplified system to establish the ownership of copyright and its proof at court.

Consideration should be given to the creation of an offence that simply prohibits the 'possession' of copyright infringing material for a commercial purpose. The Act should define 'commercial purpose' in an inclusive and non-exhaustive manner. Any defences for a breach of the statute should be defined within the section to simplify the investigative and brief preparation processes.

Further, once the prosecution has proved that an individual or corporation is prima facie in possession of copyright infringing material, the burden of proof (on the balance of probabilities) should move to the defendant to disprove the possession of the copyright infringing material was not for a commercial purpose.

Jurisdictional issues should also be clearly addressed so that all parties (investigation, prosecution and defence), know that a prosecution is to be summary or on indictment.

**1(f) Whether the border seizure provisions of Div 7 of Part V of the Copyright Act, 1968 are effective re: detention, apprehension and deterrence of the importation of infringing goods.**

No specific comment.

**1(g) The effectiveness of existing institutional arrangements and guidelines for enforcement of copyright including, role and function of the AFP and State Police in detecting and policing copyright infringement; the relationship between enforcement authorities and copyright owners; the role and function of customs etc.**

There does not appear to be any existing institutional arrangements or guidelines for the enforcement of copyright. It is addressed on an ad-hoc basis upon complaint from a copyright owner or external industry agency.

The Commercial Crime Agency and Local Area Commands would like to see the introduction of policies and guidelines to facilitate the investigation and prosecution of intellectual property fraud.

As the Federal Government has the exclusive power to legislate under section 51(xviii) of the Constitution in respect of copyright, the Australian Federal Police (AFP) should be the law enforcement body with primary responsibility for the policing of intellectual property rights. However, the NSW Police Service, being responsible for the largest number of citizens and the economic capital of the Commonwealth, must accept part of the burden to protect its corporate citizens' intangible property rights. This does not mean that every alleged breach of copyright in NSW should attract the interest of the NSW police. There should be clear differentiation between what is civil and criminal and NSW police involvement should be focused towards the high incidence of criminality engaged in commercial activities. Copyright owners should be encouraged to use civil remedies to protect their intellectual property rights, whilst the police concentrate on criminal activity.

This review of the effectiveness of policing arrangements between Federal and state jurisdictions in regard to detecting and prosecuting copyright offences should not in any way progress to a reduction and/or withdrawal by the AFP in respect of its current responsibilities.

Advice from Local Area Commands is the AFP does not only decline to provide resources to assist NSW police in copyright operations and investigations, but it is becoming increasingly unavailable as a consultancy agency. This is a matter of serious concern to the Police Service. The greatest support seems to come from non-Government agencies such as Music Industry Piracy Investigations (the investigative arm of the Australian Record Industry Association (ARIA)) and the Australian Film and Visual Securities Office which provide resources and advice.

NSW police are often left with the responsibility of enforcing the Commonwealth laws after localised intervention of the various private agencies such as ARIA, Music Industry Piracy Investigations, the Copyright Agency Limited, Australian Performing Rights Association, Australian Film and Visual Securities Office etc.

For example, in December 1998, Greater Hume North Anti Theft Unit police met with an investigator of the Music Industry Piracy Investigations (MIPI) concerning CD, digital CD and video piracy. The information report on the matter notes that it is estimated by MIPI that copyright offences alone add up to millions of dollars illegally obtained. A number of businesses in the Cabramatta CBD were identified and investigated under Operation Cedar which has been recognised by ARIA as being Australia's largest cd piracy seizure to date. The Operation was successful due to the coordinated efforts of the external agencies and police.

Operational police have referred to their lack of expertise, training and equipment to analyse or expert test items seized in the area of copyright. It has been suggested the Commonwealth could inject law enforcement funds directly to the states to pay for such investigations if it is to continue to have a role in the area of criminal copyright enforcement.

The Customs Service is in a unique position to monitor the importation of material that may infringe upon intellectual property rights and gather intelligence. The relationships that already exist between the AFP, NSW police and the Customs Service regarding narcotic investigations should be expanded to include the investigation and prosecution of intellectual property offences.

The investigation of intellectual property fraud is time consuming, very expensive and requires a high level of expertise (note that a TV drama can have different copyrights arising on the same program, eg., screenplay, music, etc.). There appears to be very little (strategic or tactical) intelligence to assist law enforcement bodies in the performance of their duties.

There needs to be established a Copyright Industry Committee comprised of representatives from industry, customs and policing (both Federal and State) that can gather and assess intelligence, set priorities and formulate protocols to assist in the deployment of scarce policing resources.

The Industry Committee needs to establish clear and definable guidelines as to what matters are to be civil or criminal prosecutions ie. what matters will exclusively be investigated by the police with criminal penalties and those that are the responsibility of the copyright owner to prosecute civilly. It is envisaged that police involvement would be focused upon:

- X organised criminal group involvement;
- X offences that have a relationship with other serious crime;
- X activities that a likely to have a significant impact on Commonwealth and State interests (trade, revenue, etc);
- X activities that have the potential to impact upon Commonwealth and State international relationships.

There needs to be protocols established between the AFP and the NSW Police Service for the investigation of intellectual property fraud offences to determine which body has jurisdiction (recognising that the AFP has primary responsibility) and the creation of joint task forces where appropriate.

Copyright owners must provide assistance to the police for the investigation and prosecution of offenders in the (non-exhaustive) following ways;

- X introduce and maintain a body of industry based investigators to gather intelligence and assist in the detection of offenders at market level;
- X training of police investigators;
- X training of prosecutors;
- X assistance with the cost of investigations (NB. it is not envisaged police should be required to store large quantities of seized items. Legislation should be introduced to allow for alternative means of dealing with quantities of counterfeit items and satisfying evidentiary and other legal requirements);
- X facilitation of proof of copyright ownership;
- X facilitation of the proof of copyright infringement; and
- X evidence of damage caused by the infringement.

#### **Additional Information**

The NSW Police Service would be pleased to provide any further information or expand on any of the points or recommendations made in this submission. Please contact Michael Holmes, Director, Commercial Crime Agency, on (02) 9384 6196 or facsimile (02) 9384 6956.