



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

**HOUSE OF  
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND  
CONSTITUTIONAL AFFAIRS

**Reference: Enforcement of copyright**

THURSDAY, 12 AUGUST 1999

CANBERRA

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**HOUSE OF REPRESENTATIVES**  
**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**  
**Thursday, 12 August 1999**

**Members:** Mr Kevin Andrews (*Chair*), Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Mossfield, Mr Ronaldson, Ms Roxon, Mr St Clair and Mrs Danna Vale

**Members in attendance:** Mr Kevin Andrews, Mr Cadman, Mr Kerr, Ms Livermore, Mr Mossfield, Ms Roxon and Mrs Danna Vale

**Terms of reference for the inquiry:**

- (1) The Committee will inquire into and report on issues relevant to the effective enforcement of copyright in Australia and, in particular, on:
  - (a) evidence of the types and scale of copyright infringement in Australia including:
    - (i) the availability and accuracy of data on copyright infringement;
    - (ii) the scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners;
    - (iii) the geographical spread of copyright infringement in Australia;
    - (iv) the cost of infringement and impact on Australian business;
    - (v) whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent;
    - (vi) likely future trends in the scale and nature of copyright infringement.
  - (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;
    - (ii) use of existing provisions of the *Copyright Act 1968*;
    - (iii) use of legislative provisions other than those of the *Copyright Act 1968*;
    - (iv) technological or other non-legislative measures for copyright protection.
  - (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;
  - (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;
  - (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;

- (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; and
- (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;
  - (ii) the relationship between enforcement authorities and copyright owners;
  - (iii) the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement; and
  - (iv) coordination of copyright enforcement.

(2) In undertaking the inquiry and framing its recommendations, the Committee will have regard to:

- (a) Australia's obligations under relevant international treaties, in particular under the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights*;
- (b) the provisions of the *Copyright Act 1968* and any amendments to that Act that have been introduced or have been publicly proposed by the Government, to be introduced into Parliament;
- (c) established principles of criminal and civil procedure which apply in cases generally;
- (d) Commonwealth criminal law policy;
- (e) enforcement regimes for other forms of intellectual property;
- (f) existing resources and operational priorities of Government enforcement agencies; and
- (g) the possible effect of any proposed changes on the operation of Government and private sector organisations.

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**Committee met at 9.30 a.m.**

**DANIELS, Ms Helen, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department**

**FOX, Mr Stephen William, Principal Legal Officer, Intellectual Property Branch, Attorney-General's Department**

**CHAIR**—I declare open this public hearing of the committee's inquiry into the enforcement of copyright in Australia. I welcome the representatives of the Attorney-General's Department, Ms Daniels and Mr Fox.

I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are in receipt of the submission from the Attorney-General's Department. I invite you to make some opening comments.

**Ms Daniels**—Thank you, Mr Chairman. With your leave, we propose to make a brief opening statement and then hand to the committee the statement and an attachment, rather than read through the attachment.

**CHAIR**—Yes.

**Ms Daniels**—The Attorney-General's Department is pleased to have this opportunity to appear before the committee. The department has made a written submission, which we hope has been of benefit. We do not propose to repeat all the points raised in the submission. It may, however, be of use to the committee, before responding to your questions, to highlight a few matters.

Overall, as currently informed, we believe the enforcement system is working reasonably efficiently, and this is reflected in the available comparative data. There are, however, factors which impact negatively on the effectiveness of enforcement. Apart from the major impact of changing technology facilitating greater ease of reproduction, the main factors appear to be: the level of, and resources available to undertake, public enforcement; the level of private enforcement, including public education; the relationship between public and private enforcement bodies; the apparent imbalance of incentives between pursuing criminal and civil actions; evidential difficulties in proving ownership and subsistence of copyright—mainly in criminal actions; lack of sufficient piracy data to properly assess its accuracy and to analyse its components, such as the level of criminal infringements compared to other forms of infringement; and, lastly, certain operational difficulties in the administration of border interception, particularly involving the interface with consumer protection type provisions and problems dealing with small consignments.

In our view, in criminal proceedings in particular, it would be desirable for the evidential difficulties to be reduced or removed where these are not germane to the issues in dispute. In whatever way this is done, it must be achieved without unfairly burdening the plaintiffs. We

are tentatively of the view that there may be some room for a rebalancing of the incentives as between criminal and civil actions. Allied to this, we believe it would be desirable for the affected parties to come to this committee and explain clearly their expenditure on enforcing or policing their rights. They should also present sufficient detail on how their estimates of piracy are derived to enable the committee to make an informed judgment about the accuracy of these claims.

We are firmly of the view that Australia is in the top league of countries in protecting copyright and meeting international obligations in that respect. The government is at times criticised as being in breach, or risking breach, of Australia's obligations under the TRIPS agreement. However, such claims have never been backed by other than general assertions about the lack of effective enforcement measures, which, in our view, are unsustainable.

The committee's terms of reference focus on enforcement of copyright only. A number of the reports in other jurisdictions comment on intellectual property violations in general. We are of the view that the comparisons with other jurisdictions provide some assistance in measuring performance and providing ideas for improvement, but generally such reports and comparisons should be treated with caution.

The main attention of the department's submission is confined to issues concerned with the enforcement of copyright in three industries: computer software, including interactive games, films, and sound recordings. This reflects the department's perception of the concerns of relevant copyright owners and of the monetary incentive to engage in infringing activity. Further, the submission largely concerns copyright material on physical media being traded, since the application of the criminal sanctions in the Copyright Act is on the infringing trade in such goods and not infringement of copyright per se.

The extent in evidence of trading of copyright material over electronic networks is very difficult to assess. Clearly, infringements on a massive scale are facilitated by the Internet. The legal means for combating such activity is addressed in the draft Copyright Amendment (Digital Agenda) Bill, which is likely to be introduced into parliament in the next few weeks. In the medium term, we believe that enforcement issues will continue to involve copyright embodied in physical media. In any case, many of the legal issues and administration issues are the same for Internet piracy, although cyberspace will add a new dimension and complexity in some cases.

As I said earlier, we do not propose to read but wish, with the leave of the committee, to tender a two-page attachment to this statement. This expands a little on the comments we have just made and reflects the views expressed in our submission.

**CHAIR**—Is it the wish of the committee that the attachment be incorporated in the transcript of evidence? There being no objection, it is so ordered.

*The attachment read as follows—*

**CHAIR**—Ms Daniels, could I take up your comment about estimates of piracy. I note an urging of the committee to test thoroughly, if I can paraphrase your words, the suggestions and comments put forward by industry representatives about the level of piracy. Do I detect some scepticism on the department's part about those estimates?

**Ms Daniels**—My colleague Mr Fox may be able to add to this. From the department's point of view, when industry comes up with figures, and we seek to explore the basis for how those figures are arrived at, there are times when we do not feel that we get satisfactory answers.

**CHAIR**—Are they largely ballpark figures from your observation?

**Ms Daniels**—Yes, that is right.

**Mr Fox**—If I may, I would like to add one brief comment. Another aspect is that, particularly in relation to computer software, the industry itself accepts, as it must, that many infringements of computer software are not, in terms of the act, criminal. We have a very hazy understanding of what percentage of the piracy stated to be in Australia—between 27 per cent and 33 per cent—is attributable to activity that could be regarded as criminal activity under the Copyright Act. That is certainly one issue that we are concerned about. The second would be: how are the values that are placed against those percentages actually calculated? Are they a retail value or a full price value? I say this to give you a sense of the size and dimension of the problem. It has been difficult to clearly assess what those figures actually mean in terms of real dollar costs.

**CHAIR**—Can I ask you about some of the evidential difficulties that have been raised? One of the suggestions made is that we in Australia, under our law, should add some presumptions of ownership and subsistence of copyright in the criminal law: do you have any comments about those proposals?

**Mr Fox**—The concern that we have about that suggestion is that it appears to have placed the burden wrongly on the accused to disprove something which is not peculiarly within the accused's knowledge. In other words, there is some evidential burden, and possibly a probative burden, which is then placed upon an accused to disprove something about which they have no particular knowledge; whereas, if someone is claiming to be a copyright owner, then it seems logical that they ought to be able to bring to the court evidence of their ownership and the circumstances under which that material was produced as to cause it to be protected in Australia.

The difficulty we see in the application of presumptions of ownership on the criminal side is that a person is faced with severe penalties and moral or community approbation, and is forced into a situation where they may be required to prove a negative—which is always an extremely difficult task—and to prove it without having anything peculiarly within their knowledge that suggests that they ought to have that burden. This is our concern: not so much that we do not believe that there is a procedural or a practical problem in the evidence needed to prove subsistence and ownership of copyright of foreign copyrights, but rather that to place some kind of burden upon the accused in the first instance seems to misplace where the burden should fairly lie.



**CHAIR**—The copyright owners who allege an infringement point to the difficulty of the cost—financially and in other senses—of being able to prove their case. If you are dealing with goods of small value and a number of alleged persons infringing the copyright, it makes it uneconomical to pursue any remedies. If there is some substance in the proposition that they put forward, is there some in-between position that we could arrive at that recognises the point that you are making but makes enforcement a little easier?

**Ms Daniels**—We would hope there was a midway point but, at this stage, we do not have any bright ideas to contribute.

**CHAIR**—Can I suggest a few that have been put forward and seek your comments on them?

**Ms Daniels**—Yes.

**CHAIR**—Should the range of penalties be modified so that, if the evidential burden was reduced, in those cases where there was a lesser evidential burden there would be a lesser penalty as well, a sort of trade-off?

**Mr Fox**—We did address that in our submission. It has a certain superficial attractiveness. I think we are drawing a fairly sharp line in our approach to this between a civil action, where the presumptions are available, and a criminal action. Having said that, a lower penalty is nevertheless a criminal penalty. It still attracts the community approbation which the criminal law should bring. Therefore, in seeking a trade-off, a principle against a lower level of harm seems to us to be the wrong equation. The principle is more important than simply being able to trade it off against a lower penalty. Our concern in relation to that kind of suggestion is simply that, whatever level of penalty is put, it would have to be a very low level in order to be able to properly say that the risk or the burden imposed upon the accused is sufficiently ameliorated.

I suppose we come back to the first point that the standard principle of the criminal law is that the Crown or the accuser should prove beyond reasonable doubt all the elements of the offence. This would make a quite substantial difference to that principle. So we have some concerns that it is not really possible to balance the principle and the lowering of the penalty.

**CHAIR**—What about a system of registration of copyright?

**Mr Fox**—When this current act was introduced in 1968, the decision was taken at that time to remove what was then a voluntary system of registration that was available under the 1911 act which it replaced. It is simply not a possibility that the government is prepared to entertain.

**CHAIR**—Can you expand on that?

**Mr Fox**—The administration of copyright in Australia really revolves around the determination mostly of policy concerns and some small measure of supervision of various declared societies under the act. It would impose a very substantial administrative burden to

solve what we believe is not a particularly substantial problem and move to a system of registration simply to resolve this particular issue.

**CHAIR**—Where there are jurisdictions that have registration, should the evidence of registration be sufficient to meet the requirements of the criminal law where an infringement is being alleged?

**Mr Fox**—We believe that, while that is superficially attractive, the difficulty in enshrining that in a legislative solution is that there is no means of ascertaining the veracity of that registration. An accused is placed in a position of having to prove a negative—that is, that the registration was invalid or in some way no longer current in terms of the statement of the current copyright owner. In jurisdictions such as the United States, which does have a registration system, there are a vast range of provisions whereby a person in that position can avail themselves of those provisions in order to challenge any registration that is put forward as the basis for copyright subsistence and ownership.

Just as a general statement, I think that it may be possible to also feel more comfortable about a registration in the United States than perhaps in another country where registration procedures may be less rigorous. We are required under our TRIPS obligations, and as a member of the World Trade Organisation, to treat all WTO members in a non-discriminatory manner. It may be that, if we were comfortable with a registration from the US, we may not be so comfortable with a registration from a number of other countries.

**Ms ROXON**—I do not understand how we are not jumping at shadows there. If you say that registration from another country simply shifted the burden, there is a difficulty in disproving these things. If you know the country of registration, you have some reason why our system should acknowledge that a presumption could be made in those sorts of circumstances. Why would we be being as cautious as you are suggesting? I do not really understand why, other than your general concerns about it being potentially a criminal charge. We really might not be jumping at shadows when a system of registration that is acceptable elsewhere could at least be a starting point. We are really only talking about changing the starting point. It still will not prove any sort of charge against somebody.

**Mr Fox**—That is so. The concern that we have is that, if this were to be enshrined legislatively, it would remove to some extent the discretion that judges already have to admit into evidence a certificate of registration from another jurisdiction. It is not as if judges cannot already give such weight to such certificates as they believe is appropriate. But in the two cases cited in the submission of the Department of Public Prosecutions the accused have challenged the ownership and subsistence and been successful, despite the fact that there were certificates of registration.

**Ms ROXON**—Would that not still be open to the accused anyway? Even if there was some sort of change to the legislation which made it easier for registration from another country to be at least recognised or to create some type of presumption or starting point, would it not still be open to the accused to then disprove that? That would not be any higher a burden than they already have. When a litigant comes along and produces the certificate, they still have to try to disprove that.

**Mr Fox**—It would be a higher burden. In that situation it is possible if, as the legislation says now, they challenge in good faith the subsistence or ownership of the copyright. The burden then shifts back to the prosecution to prove that copyright does subsist and that the relevant owner is the one that they say has not consented to the particular action, whereas in the situation where a certificate is *prima facie* evidence of subsistence and ownership, the accused would have to bring forward some specific evidence related to that issue. I accept that there may be some force in what you say, but I do think that there is a difference in terms of the burden placed upon the accused.

**CHAIR**—Can I ask you a general philosophical question, because it seems to me that this goes to the heart of it. We are moving into a global environment in which property has rapidly transformed in terms of its value. Things that are produced by way of general information technology are now of exceedingly considerable value in terms of world trade et cetera, yet we have a system in which you can drive a truck through a lot of the enforcement procedures. If the world economy is going to rely on information technology as its basic means of commerce, do we not have to provide stronger enforcement procedures than the ones that we have at the present time? I am interested in your general attitude to what I think is the broad question that we can debate detail about. Do you think that current types of provisions are sufficient for the world in which we now live or should we be doing something more precise?

**Mr Fox**—I will give a general answer and perhaps Helen will talk about the digital environment. Under the TRIPS agreement, a range of requirements are specified as the current world standard for the protection of copyright. The general system of criminal and civil actions available in Australia is consistent with, and indeed exceeds in some cases, those requirements. By and large, it is our understanding that copyright owners are not critical of the general range of remedies that are available but rather of the application or procedural difficulties that apply in relation to these evidentiary issues and, in some cases, the costs involved in taking certain procedures in civil actions, such as Anton Piller orders.

As a general statement, the types of remedies available are generally sufficient, but there is this difficulty which arises from globalisation—as you have said, Mr Chairman—of being able to reach out and actually acquire the relevant evidence when this property is being traded. Quite often, the difficulty lies in the fact that the property is traded in such a way that it is not specifically described and the documentation is held in different places. There are various reasons, such as tax incentives, why property is transferred to companies in the Bahamas and then back out again and so on. That is done for business reasons, but if copyright owners want to have the kind of flexibility that they have with their property—to divide it in time, in geography and so on—should it not be incumbent upon them to keep records in such a way that, should they need to prove their ownership and the subsistence of the copyright in a globalised environment, they can do so? In other words, they get a benefit in terms of this protection, but they also have a responsibility or an obligation to do their part in order to be able to pursue that protection.

**CHAIR**—What I am saying is that you can have a product produced in country A which ends up being pirated in country B, having passed through countries D, E and F digitally along the way and maybe even broken down into component parts—that is not the best technical language, I know—and maybe reconstituted. It seems to me that there are huge

enforcement difficulties. I understand your position is that that is a problem for the owners. I am questioning whether or not the owners are in a position, in the environment in which we now live, to realistically in any way be able to act against this new global digital environment. This comes back to the question of whether this is a form of trade that we ought to, as a society, be protecting and therefore can we rely on a legal system which was developed in a much earlier age for a different type of product to meet the new requirements of the day? That is the dilemma I have.

**Ms Daniels**—Yes, I would like to add to that. Your example is a good one because, in a way, it sees both sides of the problem. Your example showed the effect of passing through all those countries, wherever they are. If their enforcement regimes are much lower than ours—even if Australia had the most effective enforcement regime in the world—then it is all pretty pointless, if copyright owners cannot take action in their jurisdiction. Australia obviously has an interest in ensuring that international standards are high enough and appropriate enough to ensure that other countries, both in our region and on the other side of the world, accept that there has to be a certain level of protection for, for want of a better word, the Internet or new technologies, and that there need to be high standards to protect those. Even if we had a wonderful enforcement regime in Australia and it was the best available for copyright owners, it is only part of the answer as soon as their works go to another country—and the Internet makes that so easy and cheap.

**Ms ROXON**—Could I ask a question of Mr Fox? Again, this may show a lack of practical understanding of how this works, and do not hold back if that actually is the answer to it. When you say that it is incumbent upon copyright owners to keep their records and be able to prove their ownership, aren't we more often in a situation where there is a person or company in Australia that has clear ownership within Australia. They think their copyright is being breached, and whoever is actually bringing a product—if it is a product—into Australia is often only an end purchaser who thinks that they are legitimately purchasing the product. Presumably they are often not the copyright owner initially. Are you suggesting that, when anybody who wants to import into Australia purchases, they should make sure that they have the records of copyright ownership going back through the five different countries or stages before they would bring anything into Australia?

If that is often the practical situation, both the person or company in Australia and the person or company that is importing probably do not have the information within their control and probably do not have the copyright. You are saying the burden should not be on the accused because they often do not have the information. How is it that the Australian person or company is not entitled to have some presumption in their favour in a situation like that? I do not really understand the practical way that that works. I am not sure if that question is at all clear, but you know what I am getting at.

**Mr Fox**—Yes, I do. It is important to always clearly distinguish the physical media that may be being brought in and the ownership of the copyright that is embodied in that physical media.

In many cases, in fact in all of the three industries that we have focused our submission on, what will usually happen is that the companies will not be importing their product on physical media. They will produce it here in Australia because the right is the right to

reproduce. In terms of the acquisition of the rights, they are actually acquiring something which is ethereal. It is only a contract; it is an assignment or a licence. In that case, they do need to be satisfied that the person from whom they are acquiring that licence or assignment does indeed have the right to pass that right on to them. It is true that many people import many things with copyright material on them. In most of those cases, they have not acquired the copyright but they have acquired the property and the goods on which the copyright is carried.

Certainly, in these industries, the vast majority of the companies or businesses that are involved in producing this kind of material generally do have close links to those from whom they acquire the rights. Therefore, it is not as burdensome to them as it might be in another situation. The other thing is to turn it around and say that if they are to have such a presumption that, in fact, the rights are owned by them, then what is it that an accused person can do in order to disprove that, or raise a doubt about that presumption? How does an accused, in fact, respond to such a presumption?

**Mr CADMAN**—I go back to the chairman's earlier remarks on the questioning of the accuracy of data available. There seems to be an absolute reliance on aggrieved persons to provide evidence. I know that is a traditional approach. Is it reasonable, however, to rely on that process alone when we have such a widely diverse prospect of infringement? A person's rights can be infringed by an electronic process in a hundred spots in Australia instantaneously; therefore, it may be beyond the capacity of a single entity to identify all those things. How do we get accurate information on infringements? Do you have any ideas or any suggestions about how we can home in on that to get that matter cleared up a bit more?

**Mr Fox**—You have asked a \$64,000 question.

**Mr CADMAN**—If you have ideas, we would like to hear them, though.

**Mr Fox**—What we have tried to do is extract, to the extent that we can, data of prosecutions that have been undertaken, what kind of civil actions are being undertaken, how many, where they are taken and in relation to what kind of infringements. In the end, we are thrown back onto some form of notional calculation because, in the example you gave, I think it is highly unlikely that it would be appropriate for, say, public authorities to be the surveillers of that kind of activity.

In that environment, I think that it will be technology which will provide the sorts of answers to those difficulties—that is, technology such as water marking, technology which at least enables the identification of something as a reproduction, technology which shows who it was originally signed by or owned by, technology which causes devices not to be able to make second generation copies, technology which is able to identify copies made other than by an authorised process. In all those kinds of situations, at least you get past this evidentiary burden of proving that something is indeed being copied without authorisation, or at least it is a copy of the original.

The difficulty still lies in identifying that these infringing copies have been made. I have to admit to not being sufficiently technologically literate to be able to answer whether or not

technology is going to be able to trace that kind of behaviour, certainly on the Internet or a similar electronic network. As far as surveillance of physical locations and the sale of physical media are concerned, our position has been that these are private property rights and, by and large, the main burden for the enforcement of those should fall upon those who own those rights.

Whilst, indeed, they have taken up that challenge through the formation of particular private enforcement bodies which do visit shopping centres, video shops, markets and so on, it simply is not within the government's powers, in terms of the kinds of resources available, to be able to pursue that as a matter of public enforcement, not simply as a resource issue either but also in terms of being able to identify where material may be infringing which requires some degree of expert knowledge. Whilst that could be acquired by a small number of people in the public sector, it really is necessary for the owners themselves to be out there and engaging in that kind of surveillance activity. When I say 'surveillance', not illegal surveillance but simply visiting these places and viewing the material.

**Ms ROXON**—Do you have any suggestions about how copyright owners could work better with, or assist the Customs Service or the Federal Police in, actually asserting their rights or identifying these issues? Do you have any proposals? I think you make comments in your submission that any additional public resources really should not be added to that. Do you have any feeling about whether there could be better cooperation with the copyright owners, or the copyright owners could take a more active role in assisting Customs and the Federal Police?

**Mr Fox**—I think we do have some suggestions, or some thoughts at least. Certainly, the representatives of those enforcement bodies, on behalf of copyright owners, have indicated that they would like to work more closely with the AFP particularly. You would have to ask the Customs Service about this, but certainly, from second-hand information, I think that the working relationship with the Customs Service appears to be a good one, except for the fact that copyright owners are not bringing forward a lot of intelligence information to the Customs Service to enable them to very effectively target shipments by particular importers and so on and to actually examine those shipments to ascertain whether or not there is, indeed, a prima facie case of importation without authorisation.

As far as the AFP is concerned, I think there has been some difficulty in so far as the AFP is a very regionalised organisation in terms of setting its priorities, as I understand it. So each region, whilst there are guidelines for the determination of investigations and the determination of priorities in those investigations, will have to make a decision on whether or not to pursue a complaint in light of that region's particular activities. It is the view of the chief officer of that region as to what can reasonably be done with the resources available and the priorities that they have been given by the government.

One thing that I think would be helpful would be to have a more nationally coordinated response so that officers in the regions could refer matters back to a centralised area. This may provide some assistance because that person or persons could indeed be specialists and receive specialist training, which would then enable them to provide helpful advice to the regions in relation to the types of activities or investigations that they might usefully undertake.

Part of the difficulty in this whole enforcement of copyright issue is that it is not a particularly transparent matter, that is, the statistics that are developed and generated are difficult to actually bring into view because they are not really very well targeted. It may be that, if some greater emphasis or visibility were paid to this in terms of recording and perhaps some greater specificity of recording were undertaken, we would get a better picture and therefore see that it was necessary for a better or more aggressive response in terms of public enforcement.

**Mrs VALE**—Mr Fox, given the difficulties of enforcement under copyright legislation, what would your views be regarding the use of other legislation like trade practices legislation and state fair trading legislation to try to enforce copyright?

**Mr Fox**—It seems to me that it is open for those acts to be used. We are all—at least those of us who have been trained in the law—familiar with section 52 of the Trade Practices Act which says that a person shall not engage in misleading or deceptive conduct. It is certainly arguable that a person who is selling or trading in a material that is pirated, but not saying so, is indeed engaged in that kind of activity. Part of the difficulty is that, as soon as you say they are trading in something which it is not, you then have to prove why it is not and so on.

**Mrs VALE**—You still have similar evidentiary burdens but perhaps coming from a different angle.

**Mr Fox**—Yes. I am certainly not a practitioner in terms of litigating these matters—I am not as qualified to comment on that question as perhaps some of the other parties who hopefully will appear before this committee in the future—but I do think there is room for pursuing such breaches, particularly under the fair trading acts and Trade Practices Act.

**CHAIR**—One of the propositions put forward by copyright owners from time to time is to have a system of statutory damages, as is the case in some other jurisdictions. What are your views on that?

**Mr Fox**—We are interested to receive more information about that. As we have said in our submission and our opening statement, we think perhaps there could be some room for rebalancing the incentives, if you like, for civil actions as against criminal actions, and certainly a civil penalties regime—a form of statutory liquidated damages, but liquidated against a criterion that is not very clear. We are conscious that the US has that form of civil damages or civil penalties. Canada has also recently introduced that approach. It does offer some incentives for owners, not necessarily in terms of a windfall gain but in not having the necessity to actually prove damage which, again, can be an extremely difficult task.

There is a concern that any kind of monetary figure or unit which is linked to a monetary figure may be unfair in particular cases. From our researches we have discovered that there are a number of countries in Europe that actually apply a slightly different basis for this kind of idea of statutory damages, and that is to apply a multiple of what would be the compensatory damages. In other words, if there is a breach found, then the normal approach to damages would be to compensate for it, and that compensation can be calculated as the licence fee that would have otherwise been payable for the exercise of the copyright rights.

The difficulty with simply having that compensation approach is, of course, that it is an incentive to infringe because you do not have to pay until you are caught and then, when you are caught, all you have to pay is what you would have had to pay in the first place. So these countries apply a multiple. Where the infringement is innocent—that is, the person was not aware that they were infringing—that has a multiple of two times the compensatory damages. Where it was knowing infringement or culpable infringement, the damages are three times, say, in Slovakia.

I think that kind of approach is an attractive one in the sense that it still links the damage to the value of the goods, rather than having an arbitrary statutory figure. To that extent I am personally attracted to it and I think the department would be. It does not infringe any principles that I am aware of in terms of the approach to damages under a civil regime.

**CHAIR**—Do you have some further information you can provide us with about which countries in Europe have that system and any other background material about its operation? In relation to Canada, which introduced the statutory damages regime recently, are you aware of whether there were any reports or background papers, et cetera, that were relied upon as arguments prior to the introduction of that system?

**Mr Fox**—In relation to the first question, I think we can provide the committee with some further information in relation to the countries that do adopt that approach. We shall do so. In relation to the second question, we have sought information from Canada but we are not aware at this stage of any documentation or background information. We are hoping to receive that in the near future. As soon as we do we would propose to forward it to the committee as part of our submission or as an additional submission to the committee.

**CHAIR**—Presumably there were some parliamentary debates, if nothing else, to effect a change in the law. Even that material may be of some interest to us in terms of why the Canadians decided to adopt that approach. Presumably there was some pressure from the Americans over the border. They might have had some other reasons as well.

**Mr CADMAN**—Parallel importing has me perplexed. I would like an explanation, if I could have it. As a person having the rights to import from a certain manufacturer, I find I am being attacked by other people bringing in products which they have acquired offshore and are the owners of. They bring them in and sell them. The establishment of copyright veracity is between myself dealing directly with the manufacturer—and we are certain of my copyrights—or where I may be manufacturing onshore, as compared with those who may be buying on an open market elsewhere and the copyright of their product may be hard to verify. Do we have any way of straightening that sort of thing out or do we depend on complaints?

**Mr Fox**—In terms of public enforcement, we do fairly much depend on complaints.

**Mr CADMAN**—The presumption of ownership of copyright is what I am driving at.

**Mr Fox**—Yes. There are presumptions of ownership of copyright for civil proceedings in the act. They are found in sections 126 through to 131. They are intended to facilitate the enforcement of rights in civil proceedings where precisely that kind of situation has arisen.



They may overcome the question of ownership and subsistence. In your example, you are the owner of the rights. The owner is named on the record or on the cover and that is a sufficient basis for the presumption that you are the owner. But it does not get to the question of whether or not those other importers have infringed those rights.

**Mr CADMAN**—That is right.

**Mr Fox**—The ability to parallel import at this stage is restricted to books, under certain circumstances, and to sound recordings. In the case of sound recordings, the onus is placed upon an importer who is accused of importing infringing material to show the legitimacy of the material that they have acquired. If an importer who does not claim to be the owner of the copyright but claims to have acquired the goods with the permission of the owner of the copyright is accused of breaching the owner's rights, the importer is required to prove to the court that their chain of title is a good one and that whoever they acquired the goods from in Indonesia, say, was authorised to produce those goods by the copyright owner in Indonesia.

**Mr CADMAN**—Yes. The alternative to that would be to ask them to produce a certificate at point of entry to show that they have acquired that right. Is that a reasonable alternative?

**Mr Fox**—You see my hesitation. It is not because I did not understand, but I am trying to explore quickly in my own mind the ramifications of requiring such a certification. That is the question: what would be the implication of such a certification? What penalty or what result arises from that certification being false or proving to be false?

**CHAIR**—Presumably if you are relying on a false certification, which you know to be false or would have reasonably expected to be false, then some penalty would flow.

**Mr Fox**—The question that then arises is: in what way is that different from a proof that they in fact have infringed the copyright? In other words, I can bring goods in, sign my certification, and until in the market I am accused by someone—

**CHAIR**—Can I stop you there. Maybe I misunderstood what Mr Cadman was suggesting and I am at cross-purposes, Mr Fox, but I would have thought the certification would not be a certification by the importer, that certification would be a certificate that the importer produces and deposits, but a certificate from the owner of the copyright in the goods coming in.

**Mr CADMAN**—It could be either, though.

**CHAIR**—It could be either. I understand the difficulty with one, but it is not the importer certifying, it is someone else.

**Mr Fox**—Thank you, that is a very helpful clarification because I had not picked that up. The comment in relation to that second issue, of the person claiming to be the copyright owner certifying that the particular importer is authorised, is that if we do have a regime allowing parallel importation, then we are giving copyright owners a great deal of market intelligence about their competitors. In other words, they are able to know when their

competitors are shipping material, what they are shipping, where they are shipping it to and from. It is perhaps an unfair burden on a free market economy to require those persons who are importing in competition with the copyright owners—and most of those are a vertical business—to disclose a great deal of the aspects of their operation. The second issue would be—

**CHAIR**—Can I stop you there. Why are they disclosing any more than they would be disclosing now under the normal documentations required by Customs?

**Mr Fox**—I am speaking out of turn to the extent that I am not administering Customs' border procedures, but my understanding is that when a customs entry is made it does not necessarily refer to the copyright material as such. It will simply say, 'Music CDs', for example, or it may even simply say, 'CDs', 'Books', 'Computer software', so there is no identification of the actual copyright material for a start. Even if there were, on what basis could a copyright owner know whether or not to certify that that particular import was of legitimate product unless they were either confident of the importer or did some kind of physical examination, which would hold up the import and require a fair expenditure of resources from both them and the Customs Service? I think there would be fairly significant difficulties just as a matter of practicality. In terms of this disclosure, the disclosure would be necessary because they would need to see what titles are included on a music CD, how many—

**Mr CADMAN**—I would have thought that on the import forms you would have had a box which would say something like, 'Copyright certificate available—tick the box', and that must be available at the entry point with other documentation. That would allow anybody, any official, to investigate whether that certification process was accurate. You are saying it needs to go further than that, perhaps for a further identification of the goods, what they are and all the rest of it?

**Mr Fox**—The question is: how is the certificate granted?

**Mr CADMAN**—Yes, you start to raise valid points.

**CHAIR**—Thank you very much for your submission and for addressing it this morning. Did you want to add something, Mr Fox?

**Mr Fox**—I wanted to end by saying that, from the evidence we have given thus far, it may seem we have a somewhat negative attitude to this question of enforcement, and I would like to put on record that that is not the case. We are concerned to ensure that there is the strongest possible fair and effective enforcement regime in Australia. What we are seeking to suggest is that that has to be done on a basis which is also fair in terms of the relationship between public and private enforcement and the rights of defendants and accused at the same time.

**CHAIR**—That is understood. My attitude to these hearings is to try to test various propositions and various points of view, and on that basis it may well be that we will invite you back when we have heard some more people and what they have to say in response to some of those things. In that way we can perhaps try to arrive at some views on what are

obviously dilemmas in this area—which everybody accepts—and we will try to find a way through it. I thank you again for your submission and for your comments and participation this morning.

**Proceedings suspended from 10.36 a.m. to 10.51 a.m.**

**CALLAGHAN, Ms Kate Jane, Policy Officer, WTO Intellectual Property Unit,  
Department of Foreign Affairs and Trade**

**LIVINGSTONE, Mr David, Policy Officer, WTO Intellectual Property Unit,  
Department of Foreign Affairs and Trade**

**PIERCE, Mr Mark, Assistant Secretary, Services and Intellectual Property Branch,  
Department of Foreign Affairs and Trade**

**TAUBMAN, Mr Tony, Director, WTO Intellectual Property Unit, Department of  
Foreign Affairs and Trade**

**CHAIR**—Welcome. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament.

The committee is in receipt of a draft submission from the department. Can I invite you to make some opening comments if you wish to, prior to some discussion about it.

**Mr Pierce**—We are currently finalising our submission and seeking ministerial clearance for it. We will have a tidied up agreed version to you as soon as possible, and that delay will be quite short. We will speak to that submission today, if you like. Perhaps, in the process of answering your questions, we can actually improve what we send you in the next few days.

**CHAIR**—Thank you. Do you want to make any further opening comments?

**Mr Pierce**—I do, if I may. You will have a very wide range of submissions for this reference. Our essential interest in intellectual property as a foreign affairs and trade department is in the way in which adding value to the exports we sell contributes to the competitiveness of the Australian economy and also helps underpin the foundation of what the Prime Minister calls ‘turning Australia into a clever country’.

In that work, copyright is fundamentally important as one of the pillars of intellectual property. Within that framework, enforcement is in turn fundamentally important—first, to the credibility of the international trade rules which we negotiated in the Uruguay Round and those we are continuing to negotiate in the TRIPS review and, second, to our bilateral dealings.

Within that framework, the most important single instrument for us is the agreement on trade related aspects of intellectual property rights—the so-called TRIPS agreement—negotiated as part of the Uruguay Round as the first attempt to extend into the multilateral trade rules making body—the WTO—a framework of rules on intellectual property.

It occurred to us that as your hearings proceed you will probably hear a variety of arguments against TRIPS. I thought it was best to state those straight away and to seek to rebut them. There seem to us to be four main lines of anti-TRIPS argument. One of those

says that TRIPS does not belong within the WTO family of agreements at all. It is not a trade liberalising agreement; it is an agreement that in seeking to harmonise standards actually raises standards and, therefore, necessarily raises some barriers. That would be one line of argument.

The second line of argument that you sometimes hear says the TRIPS standards, including those in relation to enforcement of copyright, are too tough. We will always run a deficit on imports of intellectual capital broadly defined, and therefore our interest is in getting at that intellectual property as cheaply, as quickly and as easily as we possibly can rather than setting the bar very high in the enforcement of tough standards.

The third argument would say, in regard to the developing countries which have to comply with TRIPS obligations by 1 January next year, meeting TRIPS standards and ensuring full compliance is going to be simply too difficult. There may be a backlog of disputes pending in January. Why would we go through all the contortions and expense involved in modifying our domestic systems in order to reach this very high standard?

The fourth argument would say that, of all the agreements in the WTO family of agreements, TRIPS is, in a way, the most uncertain. There is to be a review of TRIPS next year and we do not yet know what the agenda for that review will be nor, more particularly, the linkages between that review and the beginning of a new round of multilateral trade negotiations.

There are four arguments and I mention them up front really because I think you will run into them during the course of your hearings. We are not persuaded by any one of them or by any combination of them. Our view is really quite different. Our view is that the international community decided to set trade rules, among other things, for enforcement of copyright in the conviction that if we did not do so, the impediments and the distortions to trade would be damaging to us all. In domestic terms, our judgment is that without the effective enforcement of IP rights, including those pertaining to copyright, leading edge companies may not expose their technology or their innovations to unauthorised use in the Australian market.

Australian innovators, in turn, would be much more reluctant to invest in creative new enterprises in Australia, Australian manufacturing, supported by rights derived through licensing arrangements, would be more difficult to sustain and, therefore, the cumulative result would be that the rewards obtained by Australia for creativity and innovation would sharply diminish, just as would our access to new technological developments. We see a domestic trade and economic justification to begin with in our adherence to high standards of intellectual property protection and, therefore, accordingly high standards of enforcement.

We will talk to you in more detail and as much detail as you like about elements of the TRIPS and how the international rules on enforcement of copyright link back to what we are doing within our own domestic jurisdiction. I will just mention, if I may, to begin with, three articles as a way of demonstrating more than anything the incompleteness of the TRIPS. The TRIPS, you have to remember, is a first step at setting IP rules. It is a very good first step. If occasionally, despite the jargon, it has the quality of 'The cat sat on the mat' to it, I think you need to recall that in teaching reading as well that is the best first step.

There are a lot of incompletenesses and ambiguities in the TRIPS. But the point that matters most to the committee is that on the critical issue of enforcement there has not been enough time to generate the jurisprudence which comes from WTO case law which comes from disputes. There is one current dispute in which Australia is the third party pertaining to the enforcement of copyright. I will talk about that in more detail if you like. I mention that because it exemplifies the problem in working out exactly what the rules on enforcement of copyright mean. The relevant article in the TRIPS is article 13. There is a section in our submission on it, but if you will bear with me for a second I think this is worth talking about.

Article 13 talks about exclusive rights. It confines limitations or exceptions to exclusive rights to what it calls:

... certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder.

There are similar provisions for trademarks designs for patents. That article is fairly straightforward and relatively jargon free.

But the plain meaning of the simple words is not yet determined in case law. So we ask ourselves in relation to the current case pending in the WTO in relation, to the TRIPS review, in relation to other matters going on: what actually are the limits to normal exploitation of a work and how can they be set? At what point are rights unreasonably prejudiced? How far do the legitimate interests of the right holder actually extend? Where are the boundaries? How is the framework to be set? The answer in the WTO system is incrementally bit by bit, case by case, building up like that, perhaps taking longer and being less clear-cut than some of us may wish.

But what we will see over the next few years is much greater clarification than we can currently offer you of the applicability and the enforceability of the international rules on copyright. Mr Chairman, that is really all I would like to say to start with.

**CHAIR**—Thank you very much. Can I just ask a question which was raised by the Attorney-General's Department earlier about the level of infringement of copyright and level of piracy, et cetera. Do you have any reasonably accurate data about that? There seemed to be some scepticism expressed by the Attorney-General's Department about estimates given by copyright owners or representatives of copyright owners about the level.

**Mr Pierce**—Do you mean domestically or in the region?

**CHAIR**—Domestically.

**Mr Pierce**—We have no access to any distinctive or special information on that. We would be guided by the Attorney-General's Department and by the Customs Service, to whom I understand you are speaking later today. Our essential judgment which we have put in our submission is that our own rates of piracy are amongst the lowest in the world. But in terms of specialised statistical backup for that judgment, we would like to help. We will

certainly talk to our other departments and buttress that point in our submission, but it may be something you would care to raise directly with them as well.

**Mr Taubman**—Ultimately, the matter is always going to be a relative measurement. Even if you take the industry figures at face value, Australia comes out at the lowest point on each category. This has certainly been an element of our rebuttal of bilateral concerns about copyright enforcement in Australia. We have pointed out that even by industry's own measurements—that is US industry's measurements—we come out at a very low rate regionally and internationally.

**CHAIR**—Can you tell us something about what you are doing in terms of encouraging greater enforcement regimes and practical enforcement amongst countries in our region?

**Mr Pierce**—The TRIPS does enjoin us to seek to establish ways to cooperate together in order to improve enforcement. TRIPS article 69 enjoins:

... to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights.

The issue there is what the article stipulates and how it could have done better than this as a first go. What the article stipulates is best endeavours, nomination of contact points, exchange of information, and cooperation between customs authorities. These are the best first steps that you could devise and the obvious ones that we would think about in trying to give practical form and substance to cooperation.

There is little evidence so far that the article has been effectively implemented. The focus of our concern has been to make sure that we can implement it effectively in our region. The instrument we use for that is the intellectual property group of APEC. The mechanism we use is the joint proposal between us and the government of Mexico for the improvement of standards throughout the region. The Attorney-General's Department would have talked to you about some of the exemplary work that they have been doing in Thailand, Indonesia and elsewhere, assisting regional countries to be able to enforce the rules to which they have subscribed.

This is the reason I wanted to start answering this question. We have been devoting a lot of effort and attention to the work of the IP group of APEC. It has not been my particular concern; it has been Mr Taubman's particular concern. I wanted to start talking to you about it because, in my judgment, it has been done very well. The objectives have been improving standardising, dragging up standards throughout the region, demonstrating to countries their economic and trade interest in effective enforcement, and finding ways of cooperation which are not patronising or intrusive. All of that has been done very well indeed with the IP community in Australia, IP Australia, the Attorney-General's Department, and Mr Taubman, in particular. He should talk to you in more detail about it.

**Mr Taubman**—Thank you. I think I would draw the distinction between the establishment of a legal framework and the establishment of practical enforcement mechanisms. I am sure that distinction has come out very clearly in the work of this committee. Almost all developing countries in our region are not yet due to implement the

TRIPS agreement. They are due to have done that by next January. Their initial focus has been to bring in brand new laws. They might be introducing copyright laws for the first time or overhauling their existing laws to bring them into consistency with the TRIPS agreement. That has been their main focus until now.

As we find with all of our major markets in the Asian region, having good laws on the statutory books is one thing and having effective enforcement is another. Effective enforcement is very much more than simply helping people draft laws that meet the formal requirements of TRIPS. There are two main elements: one is the political will to carry out effective copyright enforcement, and the other is just having the practical skills to enforce copyright.

Political will, in turn, is linked to public awareness and a cultural acceptance that copyright is valuable and has a role to play in economic development. To that end, we are working with APEC on a public education program which is not intended to serve simply to promote industry interest but just generally promote understanding of how the copyright system works and why it is important.

The second strand is having the practical skills and the wherewithal to enforce copyright. We find that many customs services and police forces around the region are coming to this issue for the first time. It is difficult and complex. It involves entirely new senses of corporate mission for, say, a customs service which has essentially been concerned with narcotics and revenue raising now turning their hand to intellectual property. It is totally fresh and you have to turn around an entire institution.

For a country like Indonesia, which is introducing very impressive border control measures on intellectual property, this involves an enormous effort. The customs service is vast. It is very geographically scattered. There are hundreds of entry points into the country. It is an enormous job. We are also lending a hand there training prosecutors, police, judges and customs officials in the law and the practicality of copyright enforcement. That is the main framework. There is a lot of detail.

**Mr Pierce**—We have really been stripping down our resources at home to make sure that we can make this project work. We sent Mr Livingstone, for instance, up to Jakarta last week to lecture an Indonesian group for a week on intellectual property rights, including enforcement. David, do you want to talk about that?

**Mr Livingstone**—I would just like to make one further point about APEC. Mark has already mentioned the article 69 obligation to develop an international framework for cooperation for enforcement. One of the key activities is developing a model for that sort of cooperation within APEC and then taking that model forward into the World Trade Organisation. We are also very busy bilaterally. Last week was a real eye-opener for me when I was in Indonesia dealing with people who are in key enforcement positions and yet have only a rudimentary understanding of intellectual property itself. It just showed the enormity of the task that developing countries are facing. We are quite active in trying to raise the general understanding of intellectual property issues amongst the policy elite and the implementation agencies of developing countries. Last week was just one more activity towards that end.



**CHAIR**—I take it from what you have said that it is likely that, by the beginning of next year, some countries are not going to have fully met the obligations. How would you rate the progress overall if you had to make an assessment now about when obligations are likely to be met? How much longer do you think it is going to take?

**Mr Pierce**—The short answer would be that progress is necessarily uneven. There is a substantial body of work to do. Implementing TRIPS was relatively easy for us. There were a couple of substantial changes and some fiddling, but it was not that hard for us. Our standards were already there. The first and most important thing to say to you is that there is a great deal of work being done in the region to improve standards. There are some significant successes, including a record of enforcement against counterfeiting and piracy particularly. You are asking for a report card. Our window into that work is through APEC.

**Mr Taubman**—We are fortunate in that our major trading partners in the region are quite well advanced compared to developing countries generally. The commitment of ASEAN countries collectively to upgrade their intellectual property systems is part of that. The APEC group has performed a useful role. It is often queried how APEC works. In this case, it has worked quite well as it has done promotion through a more or less adversarial way than is evident in the WTO context, where there are disputes and other ultimate sanctions. In APEC there has been a sense of consensus, common ownership of the intellectual property system and common interests in its development developing, mainly because we trade together, share borders and so on.

In that context, there has been a firm commitment to implement TRIPS by the year 2000; this is the Osaka declaration. So even countries which are not in the WTO, like China, are committing themselves. Of course, in intellectual property China is a very important country for our export interests. China has committed itself within APEC to implement TRIPS before the year 2000, even though it is not yet a member of the WTO and it has no formal legal obligation to implement TRIPS.

Overall, the feedback from the APEC group has been very positive. The group has been prepared to commit itself to a formal statement of complete TRIPS compliance throughout the region next year. This was a very positive signal—one that I personally did not expect to come through, yet it has come through. That reflects a high degree of confidence among policy makers in the region that they will achieve TRIPS compliance. This will be formal TRIPS compliance—a copyright law on the books, patent law on the books. There will still be a long way to go in terms of bringing up the levels of enforcement in particular, and the enforcement capacity among the key agencies.

**Mr Pierce**—What we are really saying to the countries of the region is what we are saying to ourselves: the effort involved scrupulously and rigorously to enforce these standards is compellingly in your own economic interests. It is a way of guaranteeing investment; it is a way of guaranteeing innovation; it is a way of guaranteeing transfer of technology; it is a way of underpinning the sort of exports on which your jobs growth and your trade growth will be based. We are not saying to our neighbours anything different from what we are saying to ourselves in regard to the application of these rules. The self-interest is the same.

**Mr KERR**—I am interested in following that specific point up because I am not certain that the practice actually is in line with the theory in terms of our domestic response. I know that when I was Minister for Justice enforcement of copyright moved slightly up the agenda—the menu—of the Australian Federal Police. Since I have become shadow justice minister, I have become aware that it has moved significantly down the menu of operational activities of the Australian Federal Police. Many matters now are simply not investigated and are responded to by standard form correspondence, which says that resource allocations within the Australian Federal Police require them to make these difficult allocative decisions and they are not proceeding in this particular matter. That seems to be the case across the board with most matters that are referred to their attention on the basis of copyright law breaches.

So it seems to me that we sing a good tune but, when it comes to actually applying what you assert to be in our national interests, there are significant information gaps. I am wondering what role followed the TRIPS process to liaise, for example, with the Federal Police and other affected agencies so that these national interest priorities are better reflected in what we actually do at home.

**Mr Taubman**—From a DFAT perspective, of course, we have limited capacity to comment on that. But, in terms of our dealings with the region, one particular point has been that borders are becoming increasingly immaterial when it comes to the transfer of copyright material and to enforcement. It will always be a difficult matter for us to police every last consignment, particularly—

**Mr KERR**—Yes, but ‘every last’ is different from none.

**Mr Taubman**—Yes.

**Mr KERR**—This is basically where we are at with the Australian Federal Police’s attention to alleged breaches of copyright of intellectually related property. I am not saying that we turn a blind eye entirely at Customs. No doubt they deal with those issues to the extent that they ascertain that material is in breach of TRIPS, although there have been complaints to us in relation to how that is done. But certainly I have seen a lot of correspondence coming forward where these standard form replies have come out, and it appears to be the case across the board that essentially they leave it to private enforcement, and many instances of quite substantial and complex matters involving pretty substantial breaches, which you would think had criminal consequences, are simply being ignored.

**Mr Taubman**—Certainly this is one question that has been raised in relation to the TRIPS agreement. There is a fundamental obligation there to provide effective enforcement. There is at the same time a proviso that you do not have to put more resources into intellectual property as against any other particular area of law enforcement. Certainly from our perspective, we cannot really comment on the effectiveness of—

**Mr KERR**—I am not really asking you to. I have two questions, and this is the last one on this theme. If indeed there is a departmental position—and I assume a government position, because the department does not operate independently of the broad policy framework set by government—that this issue is an important one, is there any role that you

play not only to advocate these responses to our neighbourhood but also to carry that message through to our domestic institutions? I am wondering whether that does actually occur and, if so, what resource and effort is put into it. My impression is that there may not be a sufficient process of communication of that message.

**Mr Pierce**—I suppose there are two important constituencies there. One is our colleague departments and agencies with which we discuss these issues all the time. Again, I do not want to play pass-the-parcel, but it may be best to ask them questions about domestic jurisdiction and domestic enforcement statistics in the first place. We talk to them on the basis that our obligation, as the applier or the interpreter of the international trade rules, is to say that our domestic system has to be credible to begin with. If we do not have credible enforcement at home then where do we start in terms of our negotiations internationally?

The second constituency is the business community. We have been talking much more actively to them this year in the preparations for the new round of multilateral trade negotiations about the agenda that we have for the TRIPS review—the agenda as it might be shaping up. We are intending to put out a discussion paper on that in the next couple of weeks. We have been talking to them about the stake that they have in effective enforcement of IP rights. I sit on the IP steering group for the Prime Minister's innovation summit. We have been working there to shape the recommendations with the business community on enforcement of copyright. At the next meeting, all the members of that steering group will discuss the submission which we are putting to you as a committee. So we do an overlapping series of consultations.

Our essential role is to demonstrate the stake that we have, in terms of our trading future and our economic growth, in compliance enforcement—those high standards we have set for IP protection. We need to make sense of that argument not just for other departments and agencies—there is no need to do it for them; they know that case as well as we do—but for the business community and for the state governments, in more systematic outreach than we may have done in the past.

**Mr KERR**—I will comment and then I will ask another question. I am not certain that other departments and agencies know it as well as you do. I am not certain that that is in fact the case. I have two other quick questions. One is about the US watch list and its relationship to the TRIPS process, whether TRIPS has influenced the way in which the watch list process is being dealt with.

The second question is whether you could tell us about the process of case law development on TRIPS. You mentioned that there is one matter in which we are currently engaged as a third party, I think you indicated—

**Mr Taubman**—Yes.

**Mr KERR**—to get some sense of where we are building towards in terms of greater understanding of TRIPS obligations, and whether there is anything now that we put forward as a model for how to address it: whether there is an EU process that is becoming seen as the way to proceed in these areas; whether the United States is being seen as the model; whether ours is being seen as the model; whether there is increasingly a view internationally

of the most appropriate way. I am not necessarily suggesting that others are not to be looked at, but is there a view that there is something that is now increasingly being seen as a best practice model?

**Mr Pierce**—All of the apparatus in United States trade policy—section 301, special 301, super 301—which were introduced I suppose to reflect a sense of frustration and impatience and annoyance at the fact that barriers did not fall down of their own accord or could not be broken down by other means, all of the frustration devices now have to be read in the light of the TRIPS. Has that affected the way in which the American trade policy mechanisms work so far? Not really, because the resubmit system is the same—that is to say, the system of special watch list, the system of industry concerns being directly put to the US trade representative. It is in a way self-evident but worth repeating that the United States has an enormous stake in every single field of IP protection, the stake they have built up in their software, in their film industry and their design—in anything literally that you care to name.

The concerns, the complaints expressed about companies raised by US industry, digested by USTR, published in the section 301 reports, all goes on, and it is a process we address bilaterally with the United States in so far as they have concerns or complaints about us. The chairman was recently in Washington and may well have encountered some of this himself.

**CHAIR**—If I can break in, Mr Pierce, one of my questions was whether in evidence today or in your final submission you could address some of the matters that were raised in the 301.

**Mr Pierce**—Let me go back one step. The 301 report earlier this year foreshadows a review of copyright, including copyright enforcement for a large number of countries for September. Free TRIPS compliance for the developing countries is seen as, if you like, warning flags included in the past 301 reports. There are things which we, the United States, will be particularly attentive to; there are things we are watching for; there are signs of progress we are looking for.

If you are asking me a more general question, Mr Kerr, which would be: is the United States about to rely entirely on the WTO dispute settlement mechanism in preference to using what may be an old-fashioned mechanistic resubmit system, section 301, I have not seen signs of that. The signs I have seen are that they would like to run the two mechanisms in tandem in order to maximise leverage and pressure to respond to the concerns and complaints raised by their industry. I have not seen signs that they would replace the one with the other. There are, of course, regular and separate reviews of the efficacy of the 301 mechanisms.

**Mr Taubman**—I think 301's role has become clearer and clearer as a register of US industry concerns rather than as a clearing house for potential WTO disputes, essentially because those concerns are not necessarily linked to specific TRIPS obligations.

If you think of the most conspicuous example, the question of CDs, sound recordings, parallel importation of sound recordings, Australia changed its approach in a way that displeased the US, displeased the US industry interests, but nonetheless it is quite clear that TRIPS is entirely silent on this issue. It was particularly not concluded in the negotiations so

there can be no TRIPS case on that issue. Nonetheless it has been a major point of focus in the 301 process.

**Mr KERR**—But Mr Pierce was right. What I was asking, I suppose, in the years since I stopped having an immediate understanding of the way this operated, was whether the United States—except in those sorts of areas where TRIPS just does not speak in relation to those copyright or intellectual property related issues—was moving to rely more on the dispute resolution processes in TRIPS rather than on using 301 mechanisms, and he answers that no, they are not; they are using both processes in parallel.

**Mr Livingstone**—There is a sort of loose relationship between TRIPS and special 301. As Tony said, it is really a list of grievances by US industry. In this regard TRIPS acts as both a sword and a shield for countries. It acts as a sword in that some of the issues raised in special 301 flag to the country nominated that it might be in for a WTO dispute on this particular issue, so you would look quite closely at that particular issue because you want to avoid a WTO dispute. But TRIPS also acts as a shield because in listing those disputes such as parallel importation, we can see that in TRIPS we are fully compliant and that, if it were to go to the WTO, we would be quite safe. So it strengthens our bilateral position against the US in regard to this listing on that issue in that the bottom line is that it is WTO consistent.

**Mr Taubman**—I think we have to bear in mind that special 301 is really why TRIPS exists. It was because of the difficulty of unilateral actions by the US, prompted by the special 301 in its heyday, that greatly facilitated the move towards a rules based system under which there are predictable dispute settlement rules rather than the more arbitrary imposition of punitive tariffs and so on, which was the only weapon available at the time.

Of course the flip side to that is that those unilateral measures are no longer available to the US in most cases, and that has changed the nature of the 301 in itself. It is not so much a direct threat for an issue such as decompilation where there may be a debate about whether we are TRIPS compliant or not. It is really not of concern directly to us whether we are on the 301 list or not. It is more a question of whether we have a credible case in the WTO. The importance of 301 has diminished in that sense because it does not have the same enforcement mechanisms, the sanctions, that used to exist before TRIPS came into effect.

**CHAIR**—Mr Kerr also asked about the development of case law.

**Mr Taubman**—Case law is still at a very early stage. The most interesting case that we did not hear about was on enforcement, thinking of copyright enforcement in particular, the difficulties the US had with Sweden on the availability of provisional measures. Sweden had said initially that constitutionally its legal system simply could not provide for ex parte hearings. They could not have any legal proceeding that did not have both parties represented. But TRIPS obliges that. That was really resolved through consultation so we do not have any direct insight into that. There is one case with some bearing on copyright enforcement at the moment. This is on patent law and the availability of exceptions to patent law.

**CHAIR**—A division has just been called so we are going to have to go. Before we go, were there any other pressing questions anybody had, or can we put them on notice to the department at this stage?

**Mrs VALE**—I was going to ask a question on the encouragement of entrepreneurial activity, which I thought was very important. On page 2 of your draft submission you said that without effective enforcement of intellectual property rights in Australia, leading edge companies may not expose their technology and innovations to unauthorised use in the Australian market. Do you have any suggestions about changes to existing resources and operational priorities of government enforcement agencies to ensure the continuing competitiveness and entrepreneurial activity of Australia? Ultimately, that is what this is all about. From your professional standpoint, I would just like to have what suggestions you might have. I know you have touched on it a bit, but I am just putting the question to you squarely.

**CHAIR**—If you are happy to wait for about 10 minutes—I think this is only one division—you might take that question and answer it then.

**Proceedings suspended from 11.36 a.m. to 12.08 p.m.**

**CHAIR**—Before the suspension, Mrs Vale had asked a question as we were rushing out the door. She has now informed me that she has had to go to another appointment. Therefore, you may briefly answer the question for the record, or take it on notice; I do not mind.

**Mr Pierce**—It was not a question which falls strictly within our field of competence. That is to say, we are much easier giving advice to the Indonesians or the Thais about ways in which their enforcement can be improved rather than giving advice to our colleague departments and agencies.

There are a couple of reasons for that. The first is the obvious one about division of labour and portfolio responsibilities. The second one is that if you look at any realistic reasonable curve of enforcement, any bell curve for the APEC region, we are at the top end. The problems with which we deal, the issues we address and want to pursue in international trade negotiations, are not concerns about our own system. We are not using the trade rules as a way of enforcing domestic change. There is no such agenda in our portfolio. Therefore, we would really be reluctant to make any specific suggestions in the jurisdictions of other portfolios.

I am sorry, I know that is perhaps an unsatisfactory answer and I apologise for that, but it does reflect, more than anything else, the division of labour between portfolios which is backed up by a quite harmonious informal constructive relationship. We are not having any fights about these issues within the IP community; it is not our habit.

**CHAIR**—Thank you. There are no further questions. I am sorry I have delayed you for that period of time. I thought it was going to be a short division. Such is democracy at work. Thank you for your input into the inquiry to date and for coming along and participating this morning. We look forward to the further submission when it comes forward. It may well be that there are some issues raised during the course of the inquiry that we would like to speak

to you about again. I do not envisage that the committee's inquiry will be completed this year, so there may even be some questions arising—

**Mr Pierce**—We would be very happy to come back, Mr Chairman; we are entirely at your disposal. We gave you the draft submission. Perhaps, from the drift of your questions and Mr Kerr's questions, we did not pay enough attention to what I suppose we could summarise as the report card action, to a section which would say to you, 'The problems in the region look like this. The main difficulties look like that. The commitments they have given are as specified.' Perhaps the submission would be made more valuable to you by the addition of that material, and the short delay we are requesting would give us a chance to do that for you.

**CHAIR**—Yes. I appreciate that and I think it will be useful because, whilst enforcement of copyright at one level is a purely legal consideration, the reality is that there are trade and other considerations that must inform our judgments about this matter as well.

**Mr Pierce**—We are very happy to do it.

**Mr Taubman**—We only gave half an answer to Mr Kerr's question about developing a jurisprudence on TRIPS. I would simply mention that there are several cases now alive which have direct bearing on what we are doing. We could give a brief account of the issues at stake in those as well. In terms of actually resolved jurisprudence, there is virtually nothing so far. That will change in the life of this committee, however.

**CHAIR**—Yes. Thank you very much.

[12.13 p.m.]

**THORNTON, Mr John Edward, Deputy Director, Office of Commonwealth Director of Public Prosecutions**

**CHAIR**—Welcome. I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The committee is in receipt of the DPP's submission. Would you like to make some opening comments?

**Mr Thornton**—Not really, Mr Chairman. The submission that the DPP has put in sets out the legislation in terms of the criminal prosecutions. What I have tried to do there is to show some of the complexity in the background and how that flows on to the practical and logistical difficulties that do exist in prosecuting. In that submission I have given some examples of cases. From our perspective I would just like to say that these are difficult cases to prosecute and I think that those difficulties will continue. I think that there is a gap between the expectations of the victims and of the bodies that represent the copyright holders and what the criminal sanctions under the present arrangements can deliver. Having said that, we continue to receive cases, we continue to assess them and we continue to do some prosecutions.

We have not made specific recommendations in terms of changes to the legislation. But I am certainly happy to discuss those with the committee, if you have an interest in those.

**CHAIR**—Just looking at the number of defendants prosecuted over the last eight years, with the maximum of 14 in 1992-93, a minimum of three in 1996-97 and only seven and six in 1997-98 and 1998-99, one wonders about the cost-benefit ratio of all of this. Do you have any comments about that?

**Mr Thornton**—In terms of the cost benefit, the real impact is whether there is any deterrent effect from prosecutions. That is always a very difficult concept to measure. I know from some of the industry bodies that they suggested the deterrent factor in criminal prosecutions is greater than in civil. We are not really in a position to comment on that. I guess if there were no prosecutions at all it may be a different story in terms of how people perceive their chances of being caught and prosecuted criminally, but I cannot comment on the numbers that you would need to provide the maximum deterrent effect.

**CHAIR**—With regard to deterrence, do you have a breakdown of the outcomes in terms of fines, in terms of what penalties were imposed?

**Mr Thornton**—I have just tried to give a range over the last two years. I have actually examined the cases in the last two years in some more detail. For example, in 1997-98 there were eight completed prosecutions for copyright offences. Five defendants pleaded not guilty and four of those were convicted of at least some offences. The other three defendants pleaded guilty. The penalties ranged from non-conviction bonds to small fines of up to \$3,000. In this current financial year there were six completed prosecutions and the penalties



ranged from conviction bonds to fines of \$4,800. So, yes, I would have to agree that, in terms of the maximum penalties, those were certainly at the lower end.

**CHAIR**—It does not sound like there is much deterrent effect there.

**Mr Thornton**—I think that is right. But the fact of being prosecuted and the fact of being investigated does have an impact. First of all, there is normally a raid where the AFP will come along and take all of your stock. It then takes some time for the prosecution to go through and, once you are prosecuted, most of the stock is forfeited. It obviously has some impact on these businesses. In a number of instances we have prosecuted people and they have finished up bankrupt by the time it gets to imposing the fines. I think that has some impact on the sorts of sentences that are imposed at the end of the day.

The other factor in terms of the prosecutions is that, because of the difficulties that there are in proving the existence of ownership of copyright, we have obviously taken an approach to try and mount cases in the most effective way. So, at the end of the day, you probably do not finish up with the number of charges that you might otherwise if it was easier to actually prove them. Again, that militates against the charges reflecting all of the criminality. That obviously has a result on the penalties as well.

**CHAIR**—Have you argued for greater penalties than those that have been imposed?

**Mr Thornton**—I could not answer that in terms of the specific cases. Certainly there have not been any submissions come through that I am aware of where we have said that we wanted to appeal the penalties because we thought they were out of line with either penalties imposed generally or with the criminality reflected in the charges.

**Mr KERR**—Just a couple of things, Mr Thornton. Firstly, it would seem, in relation to the evidence you have given, that there is a pretty good case for looking at some form of averment in relation to these matters where the burden of proof of establishing copyright would shift to a defendant in certain circumstances. If Mr Justice Spender's judgment is the norm for sensitive and effective judicial enforcement of the law, I would have thought that that case becomes more strongly capable of being held. The first question is whether we should think about some form of averment.

Secondly, is it plausible for us to say that, because of all these technical difficulties that apply, which presumably also influence police in terms of their decision whether to investigate, as opposed to the next stage, which is to pass them on to you and then you decide whether or not to proceed, a whole bunch of stuff is happening where legitimate complaints have been made in relation to breaches of the law which are not being followed through?

**Mr Thornton**—I will just deal with the first bit about averments. I take your point; I think the Searle case, the example I have given there, demonstrates some of the frustrations that people in this area would feel in that we spend a lot of time there arguing about which particular entity within a group of entities actually owns the copyright. One might think that that was irrelevant to the question of whether or not the defendant owned the copyright, yet

the charges stood or fell on that particular issue. This is a common thing that we come across continually.

The other point is that, whilst if it is a large-scale operation it might be worthwhile putting the resources in to strictly prove the existence and ownership of copyright, the same sort of effort has to be made even if you are talking about somebody operating in a market with goods that are obviously counterfeit in some way—photocopied covers on them and poor quality—selling at \$2 a go. You still, potentially, have to go through the same level of evidence to prove that case as you would for a large-scale operator who is operating with very sophisticated equipment and producing very good copies. Obviously, the difficulty does exist.

The other thing in relation to that is that the legislation provides assistance in civil matters. I understand that there are different policy issues, but I think that demonstrates that the difficulties are recognised. In civil matters you have the copyright owner who has to prove that they own the copyright on the balance of probabilities, yet they are given assistance because it is recognised that it is a very difficult task. When you look at the criminal sphere, it is not the copyright owner, although you have the assistance of the copyright owner, and you are proving it beyond reasonable doubt, so the standard is much greater. I think it seems to be accepted that the difficulties are there. The real question seems to be how you can fairly overcome them in terms of the balance between the rights of the accused and the prosecution.

There was some discussion this morning about reversal of the onus of proof. I think that needs to be explored a little in that, simplistically, I suppose you can say that, if it is so difficult for the prosecution to prove it, how in the hell can you expect the defendant to prove it with a lot less resources? But I do not think it actually gets to that. The real issue is: what happens if there is no evidence? The defendant does not say anything and the prosecution does not produce anything. At the moment, if that is the situation, the prosecution would lose because the onus is to prove all elements.

If there were some sort of presumption so that in those circumstances the court could look at the case and say, 'We're satisfied, using the presumption, that that element is established,' then I do not see that the defendant would necessarily be that much disadvantaged. We are not asking the defendant to actually prove who does own it, et cetera. What we are really saying is, 'Is there some information or some evidence that the defendant can point to which would indicate that there is an issue about it?'

With most of the cases that we deal with, the copyright is held overseas. If you think about that, if there is somebody in Australia that we are prosecuting, really the only way that they can have permission to reproduce those articles or to sell them is to have some sort of licence agreement. The fact of whether they have a licence agreement or not is something within their knowledge rather than within ours. We face the proposition that the AFP executes search warrants, we pull all the evidence together and it looks like a good case, but at the last minute they might say, 'But what about this?'

So there is certainly room to explore some sort of presumption, averment or whatever, in the legislation. I do not know exactly how you do it. I do not have the perfect solution, but I think there is room to move there.

**Ms ROXON**—Are you saying that, in all circumstances, or in most circumstances, there would be some type of licence agreement? Because you effectively could not have the rights otherwise. So we could look at a change where you would have—perhaps not even have a presumption—some sort of procedural step where that has to be disclosed and, if it is not, you assume that they do not have one or something. I am not sure. Would there be very few or no circumstances where there is not a licence agreement of some type that you can think of?

**Mr Thornton**—Certainly, in the cases that I have experience with—the ones that we have prosecuted—it is either that you would expect them to have some sort of licence or they would not have any entitlement at all. We do have cases where, as part of the evidence gathering procedure, we have actually come across copies of some licences. You have to be very wary then and say that the person might have a licence. In that situation, you probably would not proceed with the prosecution.

**Ms ROXON**—You probably would not?

**Mr Thornton**—You would not proceed if they had some sort of licence and had some sort of genuine aspect to it.

**Ms ROXON**—Would it also be helpful that, if you were going to look at this, you presumably would want it to be a procedural step where, if there were a requirement to produce this licence if you had one, it would be earlier on, so that the prosecution would not otherwise have to go to enormous cost and, as you say, find out at the last minute?

**Mr Thornton**—That certainly would be helpful. To get back to your initial question about whether or not there is any other way that they can have some sort of right, I do not know the answer to that. I can speak only from our experience. In our experience, in the cases we have prosecuted, if they did not have the licence, then it would seem fairly clear that they did not have the entitlement.

**Ms ROXON**—It may be that we can ask some other industry representatives about that, anyway.

**CHAIR**—The trouble, it seems to me, just thinking of it, is that, if you have pirated certain materials, often the licence is part of the materials that have been pirated. I am thinking of something simple like software, which you can download. Part of what you download is actually the licence, which you then fill in with the details and send off. Does that help us or not?

**Mr Thornton**—I suspect we might be talking about slightly different licences or agreements, because the sort of thing we are talking about is the right to distribute a product in Australia generally, as opposed to the right to use an individual copy that you have purchased. So it is a more generic type licence that covers the sale or distribution generally.

**Ms ROXON**—Or reproduction or something like that.

**Mr Thornton**—That is right.

**CHAIR**—You might be right. It is suggested from time to time that organised crime is involved in piracy in this area. Is there any evidence of that that you are aware of, Mr Thornton?

**Mr Thornton**—We are not aware of that from the cases that we have prosecuted. We see only the cases where, at the end of the line, we see the end product. We would not necessarily know the full background to the case, but, in the matters that we have prosecuted, we do not have any evidence of that.

**CHAIR**—The Attorney-General's Department were suggesting, in effect, that copyright owners ought to be doing more to assist in the enforcement of their rights and their property. Is there more that they can be doing in terms of preparing the evidence which is necessary to successfully prosecute in these cases?

**Mr Thornton**—I think a lot of it has to do with the way that they carry out their commercial operations which, for a variety of reasons, means that they operate through a number of different companies. I think, as was mentioned this morning, they may have companies in particular countries that have particular tax regimes or whatever. Also, it has to do with the way they keep their records within, say, the United States of America—whether they are held in different parts of the country in different companies, whether you can actually get to one person to swear an affidavit in terms of business records which would assist you in the proof. It sounds as though it is an easy proposition, I suppose, to say that you should be able to find the right person to swear affidavits, but a lot of times, because of the way they operate, it means that you need a lot of different affidavits and evidence from a lot of different areas, and they are normally from people who are very difficult to get hold of. So we have had limited success.

We have had some discussions with some of the industry bodies and have tried to work out some sort of method of operation so that we can target articles which may have a clearer proof of title. If, for example, a raid is done and they take 20 different movie titles, we might pick a couple and say, 'You tell us which ones are held by the most simple form of corporate structure, where you can trace how the thing was produced, who owned the copyright when it first started and what steps have happened since then.' We have tried to target that. Obviously, there were ways and means by which they could organise their operations to pull a lot of that information together. I imagine that there are a whole lot of other factors for those corporations which mean it is advantageous to operate the way they do.

**Ms ROXON**—It seems to me that we then just say, 'The more complex your corporate structure is, the less interested we are in ever prosecuting breaches that you might be involved with.' That is certainly what we see happening in a whole lot of other areas too. But it is not really a good basis for our public policy formulation, is it?

**Mr Thornton**—I would certainly agree with that. I can agree with the frustrations because, if you think about it, these companies deal with these items on a daily basis in the commercial sphere. Everybody accepts they own the copyright in them and they probably sign contracts worth millions of dollars on that basis. Yet, when it comes to saying, ‘Let’s strictly prove it to the criminal standard in Australia,’ they find that it is very difficult. There is an obvious frustration there.

One of the examples that I gave was that in one of the cases we could not prove that *Beauty and the Beast* was owned by Walt Disney. You could almost take judicial notice; everybody associates those two things. But when it came to the strict proof, it was not there. It must be very frustrating for the companies involved.

**Ms ROXON**—Especially the decisions about how you structure something really made solely for financial reasons but then the same protection is not afforded to others. I do not know how you strike that balance. It does seem a little unfair.

**Mr Thornton**—I suppose you could take the view that, if you cannot prove the existence and ownership of copyright and get to that first stage, we cannot prosecute. But we have not done that. We sit down with them and try and work out how we can do it and work around it as best we can. It is a very complex task and, logistically, the chances of getting something wrong somewhere along the line are fairly high.

**Ms ROXON**—How much would prosecution be assisted if you could take notice of the registration systems in other countries where they existed?

**Mr Thornton**—It would certainly make it a lot easier because you would not have to do the first step, which seems to be one of the major issues in every prosecution you turn to. There are obviously other policy issues involved in that but, from a prosecution perspective, it is the sort of proof or evidence that you find in a lot of other areas. If you want to prove who owns a particular block of land, you produce a certificate of title. It is quite a common way of proving things.

**CHAIR**—I suppose the question is: given that we moved, to take your analogy in property law, largely from a system which did not involve registration to one which does, shouldn’t we be considering a similar move in this area? That is a policy question beyond you. I accept that, Mr Thornton.

**Mr Thornton**—Certainly.

**CHAIR**—In your observation, being at the end of the line in terms of what happens in prosecutions, are there any particular things that either the Australian Federal Police or Australian Customs Service could be doing which they are not doing now which you would see as desirable?

**Mr Thornton**—We have most of our dealings with the Australian Federal Police rather than the customs service. Most times they would consult fairly closely with us and at a fairly early stage because of the complexity of the investigations. We work fairly closely together.

Mr Kerr asked a question about the level of referrals to the AFP. We do not get to see the cases if they do not take them on. If they take them on, then we get to deal with them at a fairly early stage, and we are involved in the whole process. There is nothing that I can point to that would make it a lot simpler. In terms of obtaining the evidence about the existence and ownership of copyright, mostly that falls to the industry bodies that liaise with the companies in the United States of America and other places.

**CHAIR**—In your experience, is there any reluctance on the part of industry bodies to pursue their civil remedies and wish to rely on criminal remedies?

**Mr Thornton**—That is a bit difficult to answer. I suppose the fact that the criminal remedies are quite difficult does not exactly encourage them to go down that route. If there was assistance in legislation in terms of proving existence and ownership of copyright, you might shift the balance. Industry might suddenly say, ‘It is a lot easier now these provisions are in place; over to you.’ There would be a real resource issue if that occurred.

**CHAIR**—But wouldn’t that equally apply if, say, you were going to bring an action under the Trade Practices Act or fair trading laws for misleading and deceptive conduct? You are still going to have to prove some of the same elements. You are not going to get off the ground unless you can prove ownership in the property in the first place.

**Mr Thornton**—That is right.

**CHAIR**—Is it fair for me to conclude that the problem is a problem in common for both the civil and the criminal spheres?

**Mr Thornton**—Except under the Copyright Act. If you proceed civilly, there are presumptions in the legislation as to the existence and ownership of copyright. I do not have any experience as to how well they work, but they are certainly there.

**CHAIR**—Thank you very much for your submission and for coming along and discussing it with us this morning. It may well be that in the course of the inquiry some other issues might arise from other evidence that we take and we might therefore wish to talk to you again.

**Mr Thornton**—Thank you.

Resolved (on motion by **Mrs Vale**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 12.37 p.m.**

