

## INQUIRY INTO ENFORCEMENT OF COPYRIGHT

This submission is made on behalf of Australasian Performing Right Association (“APRA”) and Australasian Mechanical Copyright Owners Society (“AMCOS”). It examines the enforcement provisions in the Copyright Act 1968 (“the Act”) substantially with respect to the making in Australia and elsewhere of infringing copies of musical works, whether embodied in sound recordings, audio visual works or other physical mediums. It is primarily focused on responding to paragraphs (b), (c), (d) and (e) of the Terms of Reference.

It is not considered necessary at this time to deal with the civil or criminal enforcement provisions of the Copyright Act, 1968 (Cth) in so far as they relate to the various rights of public performance. Although criminal provisions for public performance breaches do exist, the provisions are narrowly expressed and are hence of theoretical rather than practical importance.<sup>1</sup>

In APRA’s experience, the current civil remedies are adequate in so far as public performance infringements committed within Australia are concerned. This is because APRA’s chain of title is relatively easy to prove owing to the almost uniform practice throughout the world of composers and publishers assigning or conferring exclusive rights upon their national performing right collecting society.<sup>2</sup> This practice overcomes many of the problems that would otherwise be experienced by APRA in civil enforcement proceedings. Were APRA’s title to musical works vested non-exclusively, however, its experience in civil enforcement would undoubtedly be very different.

AMCOS’ experience is starkly different to that of APRA. Unlike APRA or other collecting societies operating with the benefit of statutory licences,<sup>3</sup> AMCOS is reluctant to commence legal proceedings for infringements of the reproduction right because of the extreme practical difficulties and enormous costs that are invariably involved. That is, the Act is framed in such a way that efficient enforcement is virtually impossible, especially when the infringement involves large numbers of works – especially foreign works - and constant repetition of illegal behaviour.

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<sup>1</sup> The only provisions are contained in s.132(5) and s.132(5AA)

<sup>2</sup> The principal exception to “assignment” and “exclusivity” applies to US societies, however, these societies are able to effectively enforce copyright because of the existence of the US system of copyright registration

<sup>3</sup> CAL and AVCS, for example, operate statutory licence schemes (see Part VA of the Act)

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AMCOS' experiences are similar to that of music publishers, and it is thus no surprise that infringement actions are very rarely instituted in relation to infringements of the reproduction right in musical works in Australia.

The cost and difficulty of enforcement tends to undermine the integrity of the rights and promotes an environment in which criminal and civil breaches of copyright may be conducted with impunity. These infringements are a considerable source of commercial loss to Australian copyright owners and licensees and undoubtedly cause substantial damage to the Australian economy as a whole.

According to the European Commission, counterfeiting from all sources accounts for between 5% - 7% of world trade and, quoting the International Federation of the Phonographic Industry ("IFPI"), sales of illegal compact discs account for 14% of the world-wide market.<sup>4</sup>

Composers and music publishers are alarmed at the emergence of a new form of piracy – to which Australia is particularly susceptible since the removal of the prohibition on parallel importation. In this new form of piracy, the reproduction of the sound recording may be authorized but the musical works are not. This is because record companies do not own the publishing rights in musical works. There has historically been considerable tension between record companies and music publishers (or their reproduction society) with respect to the rate of payment of "mechanical royalties"<sup>5</sup> for the reproduction of musical works in sound recordings for retail sale, indeed the existence of a statutory mechanical royalty in Australia, the United Kingdom and other countries owes its existence to the fears of record companies that permission to manufacture reproductions of musical works might be denied by composers and music publishers. These tensions have not faded over time to any significant degree.

We have recently become aware that it is becoming far more common for record companies to authorise the manufacture of sound recordings in Asia for reasons of commercial expediency without ensuring that licences of the relevant composers or their music publishers are obtained. Such product has every appearance of being legitimate: the correct art work is used, the CD stamper and glass mould is provided by the sound recording company. There is no evidence from the appearance of the CD's/cassettes that music clearances have not been obtained. The only way in which the rights holders entitled to receive a mechanical royalty will know that their rights have been infringed is if they are able to carry out an audit of the manufacturers records. This is not possible

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<sup>4</sup> "Combating Counterfeiting and Piracy in the Single Market", Green Paper, Commission of the European Communities, Brussels (COM(98)

<sup>5</sup> the right to reproduce musical works in sound recordings for retail sale– see also section 55 Copyright Act, 1968

when the records which are needed to carry out such audits are located in foreign jurisdictions and are in the hands of persons with whom the Australian copyright owner has no contractual or any other kind of relationship.

We accordingly believe that the figure for counterfeit musical works reproduced in sound recordings is greater than the 14% figure quoted by IFPI, since that figure relates only to the trade in counterfeit sound recordings but excludes any calculation for the sale of authorized sound recordings containing unauthorized reproductions of musical works. It is not in IFPI's interests to investigate the extent to which sound recording companies fail to obtain authorization for the so-called mechanical right in musical compositions, since this would be drawing attention to the infringements of IFPI's own members of the rights of composers and music publishers. Prospects for detection of such unlicensed musical works are extremely low and are hence likely to cause immense damage to the incomes of composers and music publishers. The beneficiaries of the non-payment of such music royalties are, of course, the record companies authorising their manufacture.

It is not in Australia's public interest to encourage infringement of copyright (free-riding) by making it too difficult for rights holders to successfully conduct proceedings. Failure to accord sufficient weight to difficulties encountered in copyright enforcement will result in Australia losing investment in modern, innovative industries and will condemn it to a perennially negative balance of trade in copyright industries. Also, it runs the risk of being targeted for retaliatory trade sanctions because of its failure to ensure that foreign works are capable of being properly protected and enforced. We believe that Australia's enforcement record will be subjected to a great deal of scrutiny in due course because of the practical difficulties that are being encountered in conducting enforcement proceedings, particularly in relation to the reproduction right in musical works.

## **OPTIONS FOR COPYRIGHT OWNERS TO PROTECT COPYRIGHT**

Copyright owners, their assignees, exclusive licensees and non-exclusive licensees have traditionally had to protect their copyright with very little assistance from law enforcement agencies. Some of the factors which we believe have affected the willingness or ability of law enforcement agencies to take a more active part in criminal actions for copyright infringement include:

- ◆ lack of skills: intellectual property crimes involve complex legal concepts and factual circumstances in respect of which most federal and state police are ill equipped to deal;

- ◆ lack of resources: intellectual property crimes can use substantial resources which law enforcement agencies are reluctant to make available, particularly when they are under pressure to deliver results in more obvious areas of criminal activity;
- ◆ bias within law enforcement agencies to regard copyright infringements as matters solely within the realm of private rights; thus resources are not allocated to this important area of fraudulent criminal activity.

On those relatively few occasions when law enforcement agencies have become involved in enforcing copyright, they require copyright owners and their representatives to invest considerable resources in assisting in the identification of offenders, obtaining evidence of infringement and, of course, assisting in proving the elements of copyright subsistence and ownership. Since so much of the burden of criminal copyright enforcement nonetheless falls on copyright owners, it is not surprising that many are reluctant to invest their resources in work associated with criminal procedures:

- ◆ with the lower evidentiary burden, they are more likely to be successful in civil jurisdictions;
- ◆ enforcement is made considerably more difficult, or even impossible, when – as part of proving the elements of the offence, the copyright owner must prove the subsistence of copyright, place of publication and chain of title, especially when the circumstances of alleged infringement involve the usage of many hundreds of musical works of foreign origin;
- ◆ criminal penalties can also vary to an unpredictable degree, but they are usually quite low since such offences are generally not regarded as very serious by magistrates;
- ◆ the costs associated with assisting law enforcement agencies in criminal prosecutions can be very high but the copyright owner is not provided with any relief for the unlawful use of their property ie. their damages must simply be absorbed or further costs incurred to undertake civil proceedings.

The current approach of the Copyright Act, 1968, however, is to presume that all enforcement will be conducted by means of litigation. Recent amendments to the Act encourage litigation and place unfair hurdles in the path of copyright owners and in the case of foreign works, their Australian representatives. We submit that these amendments unfairly change the balance in Australia in favour of free-riding users of copyright matter who, as a matter of practice, run very little risk of being made accountable for their breaches of copyright.

To illustrate the procedural and evidentiary difficulties caused by the Australian Copyright Act to civil enforcement, we will discuss the progress in the only case to date in which an importer has been required to show that they have complied with s.130A of the Act. This section – which must be read in conjunction with s.44D and s.10AA - requires that an importer prove that copies of musical works contained in sound recordings are non-infringing copies.

The case concerns a company which is in the business of importing sound recordings from foreign territories. Prior to the amendment of the Act, this importer held a licence with AMCOS to engage in this activity.

### **MUCH MORE MUSIC - The Customs Proceedings:**

Much More Music arranged for the importation from Indonesia of 979 compact disks and 1,013 cassette tapes. These consisted of more than 125 different sound recordings in the form of CD's and cassettes. A list of the sound recordings is attached (Annexure "A"). Complete copies of all sound recording slicks are available (3 volumes of lever arch files). More than 1500 individual musical works were reproduced on the various sound recordings, composed by many hundreds of different composers and represented by an extremely large number of music publishers throughout the world.

Customs received notice from a licensed brokerage agent on 25 August 1998 that the stock had been landed. Customs requested an opportunity to inspect the goods. On 27 August the brokerage agent presented some samples for inspection. Based on this inspection, Customs requested that the entire shipment be presented for inspection. The shipment was made available for inspection on Friday, 28 August (ie. physical custody of the goods was given to Customs on Friday 28 August). On the same day (28 September), the Music Industry Piracy Investigations office ("MIPI") inspected the stock and identified a large number of suspect recordings. These recordings did not appear to have been manufactured by authorized manufacturers because:

- ◆ there was no identification of the country of manufacture on many of the CD's and accompanying packaging
- ◆ printing on the CD packaging indicated a different country of manufacture to that indicated on the CD's themselves (ie. there were inconsistent markings on many of the CD's when compared with their accompanying artwork)
- ◆ inconsistent identification of the country of manufacture on groups of compact discs which appeared to contain the same sound recording

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- ◆ certain cassettes of the same sound recordings had different artwork even though the sound recordings themselves purported to be identical (ie. different photos, images, fonts and colours were noticed)
  - ◆ the artwork of certain cassettes were degraded copies (ie. poorly made reproductions)
  - ◆ the artwork had been reproduced on inferior quality materials and featured differences in quality of packaging, even though the sound recordings in other respects purported to be identical
  - ◆ a number of logos purporting to refer to record companies appearing on a number of the sound recordings and associated packaging were unknown.

In short, the consignment contained a large number of CD's and cassettes of dubious origin. Based on the MIPI inspection, 339 CD's and 925 tapes were seized by Customs. A notice of seizure was served on AMCOS on 2 September 1998. The balance of the consignment, 728 units, was immediately released to Much More Music (ie. only that portion of the consignment which was considered to be a dubious origin was seized).

The seizure was challenged by Much More Music and was heard in the Duty Judge list of the Federal Court on 3 September 1998 (5 days after physical custody of the goods was obtained by Customs).

Notwithstanding evidence given with respect to the obvious indicia of illicit copies, the Duty Judge ordered the release of the majority of the seized CD's and cassettes. His Honour was swayed by the perceived need to release the stock in time for Father's Day sales even though there was a distinct possibility that the imported CD's and cassettes might be inferior copies that would damage the reputation and sales of copyright owners (ie. it appeared likely that they were counterfeit). His Honour thought that monetary compensation was a sufficient remedy. The order to release the majority of the stock to Much More Music in the face of strong suspicions as to its origin and provenance effectively finally determined the matter. That is, the ability to restrain the sale of pirate copies of musical works was lost as was the ability to obtain monetary compensation for those CD's and cassettes which were potentially infringing copies but nonetheless released for sale.

Having accepted that there was a prima facie case that some of the CD's and cassettes were counterfeit, His Honour ordered that small number of sample CD's and cassettes be retained to enable AMCOS and other copyright owner's/right holders to sue for infringement of copyright cassettes (153 units in all – less than 8% of the consignment). Proceedings have been commenced in relation to the retained CD's and, but these are continuing with great difficulty and expense.

One of the matters which substantially concerns AMCOS and copyright owners generally is that His Honour did not even consider the onus which the Act imposed on importers to prove that the copies were non-infringing. Since His Honour failed to consider whether the importer was able to meet its obligations under s.130A, s.44D and s.10AA and decided that the bulk of the stock should be released for sale, there was little practical point in AMCOS or other copyright owners pursuing an appeal since the real damage had been done by allowing the stock to be placed on sale in Australia at all. Virtually all stock placed on sale was allegedly sold within a matter of days.

Since September 1998, we have been advised by MIPI that Customs officers in most locations no longer put in place any of the steps which would otherwise result in even a small number of consignments of CD's being physically inspected. We have been informed that in Perth, for instance, a senior Customs Officer refuses to run even the most routine of documentary checks at the border on the basis that it is now Government policy to give unfettered access to Australian markets for all sound recordings. In another case – in Melbourne – an officer reluctantly inspected stock at the border but refused to issue a seizure notice even though it was evident from the appearance of the stock that was of extremely inferior quality. MIPI informed AMCOS that, if the stock was not counterfeit, then it was undoubtedly stock that was never intended for sale (factory seconds). Even if the Melbourne stock was made of factory seconds rather than counterfeits, there is no doubt that mechanical royalties for the reproduction of musical works would not have been paid anywhere in the world.

We believe that Customs records will show that inspection of documents associated with importations of sound recordings are at an all time low, possibly even non-existent in the majority of points of entry. We also believe that action by Customs officers to inspect in-bound sound recordings will be less in real terms than it was *before* the Act was amended in July 1998 notwithstanding that the floodgates to imports from high counterfeiting territories such as Indonesia, Hong Kong, Malaysia and Thailand have been opened.

It is now proposed by the Federal government to widen the scope for imports to cover importations of certain cinematographic films contained in articles which also embody sound recordings (ie. CD-ROMS, DVD's etc).<sup>6</sup> Australia has totally inadequate measures in place to provide any protection to copyright owners of existing classes of matter. We suspect that the illegitimate market place in Australia which grow to very embarrassing proportions if the Government passes the new Copyright Amendment Bill in the absence of effective anti-piracy and enforcement measures.

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<sup>6</sup> Copyright Amendment (Importation of Sound Recordings) Bill, 1999

Since little or no action is now being taken at the border, copyright owners are forced to inspect the shelves of shops for infringing material. In the course of our investigations we have noted that a great deal of imported product is being obtained from Indonesia – a territory which itself permits parallel importation because there are so few representatives of foreign works in that country, where copyright laws and enforcement mechanisms are in their infancy and are in any event wholly inadequate, where it is known that the state of economic decline and civil unrest has been extremely severe over the last 18 months to 2 years. It is inconceivable that the majority of Indonesian stock sitting on Australian retail shelves is legitimate in so far as the underlying musical works are concerned, particularly when it has been acknowledged to APRA and AMCOS by an Indonesian record company executive that there is little local demand for the Anglo-American repertoire ie. production lines of Anglo-American repertoire in Indonesia substantially exceeds domestic demand. One of the matters which alerts countries such as the USA and the European Union to the likelihood that manufacturers in a country are likely to be engaging counterfeiting activities is that production lines exceed domestic demand.

Indonesia has long been noted to have serious continuing deficiencies in relation to its intellectual property laws and enforcement regime, in particular that it has inconsistent enforcement and an ineffective legal system.<sup>7</sup> According to the office of the US Trade Representative, Indonesia remains on the Special 301 Priority Watch List because it has not made progress to address the lack of adequate and effective protection for intellectual property rights.<sup>8</sup>

Some product has also been sourced from Malaysia and Thailand. These territories also have significant problems. For instance, it has been noted that 90 CD, CD-ROM, VCD and DVD production lines are operating, the combined production capacity of which exceeds local demand and legitimate exports. Products identified as “pirate” which originated in Malaysia have been detected *throughout* the Asia-Pacific region, North America, South America and Europe.<sup>9</sup> Woolworths’ is known to have sourced product from Korea. The US Trade Representative also notes that Korea’s intellectual property law is not TRIPS compliant.<sup>10</sup>

Since MIPI’s advice to the effect that Customs has virtually abrogated all its duties to prevent importation of counterfeit stock, the only measure open to copyright owners and rights holders in Australia is to correspond with retailers known to be stocking imported product and to request details of the steps taken

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<sup>7</sup> USTR Press Release, 1.5.98

<sup>8</sup> USTR Press Release, 19.2.99 at page 11

<sup>9</sup> *Ibid*, pg.2

<sup>10</sup> *Ibid*, pg.18



to satisfy themselves that the reproductions of musical works were authorized. All correspondence to date with stores large and small has been met with a refusal to divulge any particulars whatsoever. This means that the only measure actually available to copyright owners involves the institution of legal proceedings. Surely it was not intended by Parliament that the place of first and last resort for Australian copyright owners and their representatives should be the Courts.

Copyright owners and their representatives in Australia are at a complete disadvantage in the circumstances described above: they must engage in a “needle in a haystack” search of stock on retail shelves. Such a haphazard means of detection is the only option when there is no real obligation on importers or retailers to provide information as to:

- ◆ who manufactured the sound recording
- ◆ when it was manufactured
- ◆ where it was manufactured
- ◆ who imported it
- ◆ when it was imported

The so-called onus to demonstrate that the stock is non-infringing, it is now clear, is theoretical only. It provides no assistance whatsoever to copyright owners. If anything, we believe that copyright infringers have taken great encouragement from the change in the law, which has enabled them to significantly build on the already important advantages conferred upon them in the course of legal proceedings by the current structure of the Act and the presumptions. These advantages are exemplified by the progress made to date in the conduct of the infringement proceedings referred to above against Much More Music.

### **MUCH MORE MUSIC – The Infringement Proceedings**

In November 1998 infringement proceedings were commenced against Much More Music in relation to the few items that were ordered to be retained by His Honour, Mr. Justice Madgwick. Potentially the proceedings would have involved suing in relation to more than 1000 musical works. This was impractical, accordingly – for the purposes of conducting a test case – AMCOS limited its Statement of Claim to approximately 120 musical works, composed by 42 composers, some of whom are Australian and others from the USA, UK and elsewhere. The Applicants include several of the composers as well as nine Australian publishers. According to AMCOS’ records, all composers had entered into publishing arrangements with established music publishing companies. Proof

of the chain of title in relation to the musical works reproduced in each sound recording referred to in the proceedings consists of many separate contracts between the composers and their original music publisher, and then between the original music publisher and other publishing companies in a myriad of territories throughout the world. It is an enormous undertaking to obtain copies of such original contracts which – by their very nature – are commercially sensitive, confidential documents sometimes relating to some of the most highly prized and valuable contemporary musical works.

The strategy adopted by the Respondent importer in this case is typical of that adopted by persons accused of copyright infringement generally. It involves requiring particulars of subsistence of copyright, publication, production of all contracts constituting the chain of title before a Defence is even filed. This strategy is, we believe, an abuse of the processes of the Court and which unduly adds to expense and difficulty of conducting legal proceedings. This is especially so in a case such as this where the Respondent cannot have any reasonable cause to doubt that the works are protected (ie. they are in every case well known popular musical works which are undoubtedly in copyright throughout all Berne Convention countries). This strategy has been successfully employed in other proceedings to impede or prevent the conduct of criminal proceedings as well as civil proceedings. By requiring the production of contracts etc prior to the filing of a Defence, the Respondents have not actually put the Applicants to proof of the presumptions in s.126 and s.127 of the Act and therefore do not bear any risk of an award of costs against them. Costs incurred in the Much More Music infringement case are now well in excess of \$50,000 and, as stated above, a Defence is yet to be filed.

It is clear that there is a substantial and unjustified imbalance in the operation of Australia's copyright enforcement provisions which puts copyright owners and their representatives at an unfair disadvantage in the protection of the integrity of their rights.

### **RECOMMENDATIONS:**

Amendments should be made to the Australian Copyright Act as follows:

- ◆ allow prima facie proof of copyright ownership and subsistence of copyright on production of a copy of the US certificate of registration; this simple measure would prevent the substantial abuses of process which have been allowed to impede civil and criminal enforcement proceedings over many years;

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- ◆ prohibit the dissemination and sale of suspected counterfeit matter until the copyright owner or their representative have had an opportunity to conduct infringement proceedings (ie. there should be an obligation to preserve evidence both before and during infringement proceedings);
  - ◆ Consider the introduction of mandatory technical devices in authorised sound recordings and audio-visual products to provide for authentication of the products. For instance, security holograms, microscopic labels etc., should be required to be applied whether the products are made in Australia or imported from elsewhere (such measures have had an extremely positive result in territories such as Poland where piracy had previously been rampant);
  - ◆ There should be stronger criminal penalties including the partial or complete closure for a certain period of a shop or other establishment where the unlawful act was committed;
  - Introduce a requirement to compel the infringer to recall the goods containing unauthorized copyright matter at their own expense;
  - Introduce a “right of information”, as permitted by TRIPS, whereby any suspected infringer can be compelled to reveal information about the origin of the goods, the distribution channels and the identity of any third party involved in the production and distribution of the goods. This should be coupled with effective safeguards to ensure the confidentiality of the information furnished. This “right of information” should be administrative in nature ie. it should be applicable independently of legal proceedings;
  - ◆ The presumptions regarding “non-infringing copies” should be linked to the information required to be supplied under the “right of information” – ie. failure to produce documents, or supply such information, at the border should result in a prima facie inference that the CD’s are infringing copies and should entitle Customs to issue seizure notices without any further formality;
  - ◆ Require suspected infringers to provide information about the number of products sold/selling price and to produce evidence of this (possibly on oath) at an early stage in any proceedings;
  - ◆ Introduce the concept of “treble damages” for civil proof of counterfeiting/importation of infringing copies, as in the United States where large awards of damages are a real deterrent to illicit conduct (in Australia, the usual method of valuation is the “licence fee” method, which provides damages only in the amount of the amount the copyright owner would have received in licence fees had a licence been obtained).

In so far as criminal enforcement is concerned, we endorse suggestions made by MIPI as follows:

- ◆ Introduce a national intellectual property training program for law enforcement agents (police and Customs officers) with respect to the investigation of copyright offences and other provisions under State/Federal law which also apply;
- ◆ Develop a national intelligence data base on intellectual property crime;
- ◆ Gather and publish statistics by the ABS (or other Government authority) on piracy/pirated product
- ◆ Remove any restrictions in the Customs Act/Regulations which inhibit the dissemination of information obtained at the border to other law enforcement agencies and rights holder bodies assisting those law enforcement agencies in combating piracy;
- ◆ development and implement a national enforcement strategy whereby the law enforcement officers of the various States and Commonwealth exchange information and actively co-operate with each other to investigate and prosecute offenders (ie. a proposal for the co-ordination of resources/strategies)

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**TERMS OF REFERENCE**  
**Inquiry into enforcement of copyright**

- 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.