

Australian Copyright Council

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Inquiry into the enforcement of copyright in Australia

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

Thank you for providing us with an opportunity to make a submission in relation to this inquiry.

1. Australian Copyright Council

The Australian Copyright Council is an independent non-profit organisation. We are partly funded by the Australia Council. Our objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community generally about the importance of copyright;
- research and identify areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright; and
- foster co-operation amongst bodies representing creators and owners of copyright.

There are 23 organisations affiliated with the Copyright Council, some of which have made, or will make, separate submissions to the Committee. Further information about our services and activities is contained in the information sheet enclosed with our submission. A copy of our annual report for 1997 is also enclosed.

The Council does not have a direct role in the enforcement of copyright in Australia, although it is often incorrectly assumed by members of the general public that we have powers to enforce copyright or make determinations with respect to copyright infringement. As part of our free legal advice service, we provide advice to owners of copyright on matters such as whether they have a cause of action in relation to infringement of their copyright. In some cases we assist owners of copyright to draft letters of demand in relation to copyright infringements. We do not send letters of demand on behalf of clients, nor do we represent clients in disputes.

We also advise users of copyright material to assist them to avoid infringing copyright.

We generally receive 80 to 100 telephone calls per day from people seeking information or advice about copyright. We also receive enquiries in writing. About one-

third of the enquirers receive legal advice.¹ The remainder receive information rather than legal advice, and most are referred to one of our information sheets such as *What can I do if my copyright has been infringed?* and *Infringement: actions, remedies, offences and penalties*. We provide these information sheets to the general public on request by post and by fax, and they are available from our web site (<http://www.copyright.org.au>). Copies of these information sheets are provided with this submission.

Over the last five years, between 6% and 11% of the enquiries dealt with by the legal staff in each year involved infringement issues.

The vast majority of enquiries concerning infringement are from individual owners of copyright who are concerned that their copyright has been infringed.

From time to time our enquirers include businesses legitimately involved in the sale or rental of copyright material complaining about illegitimate importation, sale or rental of the same product.

Apart from statistics concerning our enquirers, we do not collect statistical information about piracy in Australia.

Another of the Council's functions is to provide training in relation to copyright. We run an annual seminar program and provide talks and lectures on request. In 1998, we gave a talk on the enforcement of copyright to members of the New South Wales Police Service. In 1996 and 1997 we participated in the Australia/Indonesia training program where we provided training on copyright issues for members of the police service and the judiciary in Indonesia.

We would be happy to provide the Committee with further information about our activities in relation to infringement, including more detail about the types of enquiries we receive.

2. Introductory comments

Two of the main objectives of copyright law are:

- to reward creative and intellectual endeavour; and
- to provide stimulus and incentive to innovate or create.

Clearly, these objectives can only be achieved in an environment where copyright law is respected and where it can be effectively enforced if not complied with.

Enforcement of copyright is an issue that is of fundamental concern to the Council, our affiliated organisations and our clients.

Effective mechanisms for enforcement are required under our international treaty obligations. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that member States must ensure that enforcement procedures are

¹ The guidelines about which callers may receive legal advice are available from our web site and from the printed information enclosed with this submission.

available under their national laws so as to permit effective action against any act of infringement of intellectual property rights, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.²

We think that the levels of copyright infringement and commercial piracy in Australia³ are of concern and that Government policy and resources should be directed towards reducing these levels.

We are concerned that there appears to be a perception, particularly among law enforcement agencies, that copyright infringement is primarily a matter for copyright owners alone. In this respect, intellectual property rights, including copyright, are viewed differently from other categories of property rights.

We submit that the problem of copyright infringement and commercial piracy is not simply one for copyright owners and copyright-based industries, but that it has wider significance. Infringement, whether by private individuals for their own purposes or by those in the business of making and selling infringing copies impacts adversely on consumers, employment, government revenue and gross domestic product.

The ability to enforce rights arising under copyright law is clearly of vital importance to the industries which trade in these rights, such as the music, book publishing and film industries. The long term sustainability of these industries depends, in large part, upon the effective protection and enforcement of the rights they own and control. Digital technology is starting to impact upon the way these industries do business and distribute their products. This technology has also created new opportunities for infringement of copyright. It is of fundamental importance that copyright owners are able to effectively trade in and enforce their rights in the new technological environment.

Copyright-based industries are an increasingly important component of the Australian economy. Please refer to our publication, *Copyright: An Economic Perspective* (2nd ed) by Hans Guldberg, which we have enclosed with this submission, for some indicative figures.

In our view, it is in Australia's best interests to foster a culture which respects copyright and to make concerted efforts to reduce copyright infringement and commercial piracy. We would like to see greater co-operation between Government, law enforcement agencies and copyright industries and interests to achieve this.⁴

² Article 41

³ eg. figures included in submissions of the Music Industry Piracy Association and the Motion Picture Association and figures published by the Business Software Association of Australia,

⁴ We note the proposal in the European Commission's Green Paper, "Combating Counterfeiting and Piracy in the Single Market" (1998) that there be greater co-operation between private interests and the State.

3. Our submission

In our submission we make comment in relation to the following issues covered by the terms of reference:

- options for copyright owners to protect their copyright, including technological protection measures;
- the adequacy of civil and criminal sanctions; and
- the desirability of amending the law to provide procedural and evidential assistance in civil and criminal actions.

4. Options for protection

Technological measures for protection of digital material

Copyright owners are increasingly looking to technological protection measures, such as encryption and “locks”, for protection of their material, particularly in the digital, on-line environment. For the on-line environment, such protection measures are the equivalent of locked doors and security guards.

While technological protection measures are important they certainly do not, and will not, supplant effective copyright laws and effective enforcement. Technological protection measures break down and can be overcome, just as warehouses can be broken into. Also, technological measures do not apply to copies of material available in non-digital form.

We note the Government’s moves to provide a framework for the protection of technological protection measures in the Copyright Amendment (Digital Agenda) Bill 1999. We welcome the attempt to bring our copyright law into line with the standards set by the WIPO Copyright Treaty in the area of technological protection measures. However, we are seriously concerned that the provisions in the Bill, in the form circulated in February, will allow circumvention of such protections to an extent which may result in a market for circumvention devices which will in all likelihood be used for infringing as well as non-infringing purposes. We expressed these concerns to the Government in our submission on the Bill dated 19 March 1999.

Private copying

There are some situations in which, despite the provisions of the Copyright Act, effective enforcement of copyright owners’ rights is, as a matter of practicality, impossible. One example of this is the area of private copying. Home taping of sound recordings and television programs is an infringement of copyright owners’ rights that is virtually impossible to detect. Even if detection were possible, bringing actions for infringement would be impractical.

An indication of the revenue lost by copyright owners to this type of infringement in Australia can be gained from data from countries where levies are collected for home taping. In 1991, the following amounts were collected for the private copying of films:

	US\$M	
France	100.50	
Germany	70.00	
Finland	11.00	
Austria	10.40	
Hungary	0.66	
Iceland	0.44	(audio and video)

It seems likely that convergence of technology resulting in devices that can simultaneously receive and duplicate copyright material will lead to increases in the level of this type of infringement.

On the other hand, technology is likely to provide copyright owners with new solutions, such as encryption, enabling them to directly license the duplication of copyright material.

We submit that the fairest and most practical solution to the current private copying problem is the blank recording media levy which has been adopted in many other countries, including those listed above.

Under this scheme, a levy is paid on blank recording media or recording equipment either by the manufacturer or by the wholesaler, retailer or consumer to a collecting society which distributes the money to owners of copyright in material copied.

In Australia in 1989 the Government passed legislation to give effect to such a scheme in relation to the copying of audio recordings. An action brought by blank tape manufacturers resulted in the legislation being held invalid by the High Court on a technicality concerning the constitutional requirements of taxation schemes. Following the defeat of the legislation the Government undertook to introduce an alternative scheme to achieve the same result. This legislation was prepared but never passed.

We support the introduction of a blank recording media levy for both audio and video recordings.

5. Adequacy of civil and criminal sanctions

On-line infringements

One of the issues that we think should be considered in the course of this inquiry is whether the current civil and criminal infringement provisions apply adequately to infringements that take place on digital networks, such as the Internet. In our view, it is not clear that they do.

We note, for example, that section 132 creates offences in respect of “articles”. This term arguably denotes a physical item and it is not clear that the term would apply to digital files containing copyright material which are duplicated and sold and otherwise distributed on-line. Although such an activity is likely to involve an exercise of the copyright owner’s right of reproduction, and to the new right of communication (when

introduced by the Copyright Amendment (Digital Agenda) Bill 1999), we submit that a commercial activity of this nature should also attract criminal penalties.

An important issue which arises in relation to infringements on the Internet is the question of liability. In our view, a copyright owner should have rights against Internet service providers in some circumstances. For example, if a service provider hosts a web site which has infringing material on it, the copyright owner should be able to take legal action against the service provider to at least have the material removed. This may be particularly important if the proprietor of the web site cannot be found or is offshore. If the service provider failed to remove the material after being notified that it was infringing, the service provider should also be liable for damages. We have made this submission to Government in relation to the Copyright Amendment (Digital Agenda) Bill 1999.

Possession in the course of a business

In our submission on the CLRC's 1994 draft report on computer software protection, we supported the proposal to amend the Act so that a person infringes copyright in a work if they possess an infringing copy in the course of a business. The UK Copyright, Designs and Patents Act has a provision to this effect.

In its final report,⁵ the CLRC recommended an amendment to the Act to make it an offence for an employer⁶ to possess an infringing copy of a work where he or she knew, or ought reasonably to have known, it was an infringing copy. We understand that this recommendation is still under consideration by the Government.

We support an amendment to the Act which provides that a person infringes copyright by possessing (without the licence of the copyright owner) an infringing copying of copyright material in the course of a business where the person knew or ought reasonably to have known that the copy was an infringing copy. We submit that this act should also be an offence.

Advertising for supply of infringing copies

Section 133A makes it an offence to advertise the supply of copies of a computer program if the person has the requisite knowledge that the copies are or will be infringing copies.

We submit that a similar provision should apply to all types of copyright material. There does not seem to be any reason why this provision should only apply to computer programs.

⁵ Commonwealth of Australia, *Computer Software Protection*, Canberra 1995

⁶ It is not clear from its report why the Committee recommended only that employers be guilty of an offence when the proposal discussed in its draft report was that liability would fall on any person possessing an infringing copy in the course of a business.

Resources for law enforcement

We understand that there are very few prosecutions for criminal offences under the Copyright Act. The main reason for this appears to be the law enforcement agencies' lack of resources and expertise in this area.

We submit that, if the criminal provisions of the Act are to properly serve their function, there needs to be sufficient resources allocated to their enforcement.

We note that, although the criminal provisions provide for potentially large fines, in practice convictions very often result in the imposition of relatively small fines.⁷ This is a factor contributing to the reluctance of copyright owners to invest resources in criminal procedures.

Intellectual property committee and national law enforcement strategy

We support the recommendation of Music Industry Piracy Investigations and the Motion Picture Association that a law enforcement/industry co-ordination committee be set up. We note that in 1997 the Australian Federal Police proposed the establishment of a committee comprising representatives from intellectual property industries, the AFP and the Australian Customs Service for the purpose of sharing intelligence, to assist with setting priorities for enforcement and for referrals to Customs.

We also support the development of a national enforcement strategy involving co-operation between the Federal and State law enforcement agencies and a national intellectual property training program for law enforcement officers.

6. Amendments to the law to provide procedural and evidential assistance to copyright owners

Presumptions

Presumptions of subsistence, ownership and authorship

Section 126 of the Copyright Act currently provides that copyright is presumed to subsist in copyright material which is the subject of legal action and, where subsistence is established the plaintiff is presumed to be the owner. Both of these presumptions can be displaced by the defendant putting the respective matters in issue.

While these presumptions can provide some limited assistance to copyright owners, we understand that they will often (and easily) be displaced by defendants who will put

⁷ In 1996 an offender was charged with possession of 1000 CDs and offering to manufacture 20,000. He was fined \$500. In late 1998 an offender was charged with 32 counts of copyright infringement. He was fined \$2000. In March this year an offender was fined \$2,500 in connection with five matters involving possession of 1,500 counterfeit CDs. These details were supplied by legal counsel for the Australasian Performing Right Association.

these matters in issue (even though they are not seriously contestable). This tactic can be used to discourage plaintiffs from pursuing proceedings by making the proceedings more difficult and costly. We note, in particular, the problems faced by copyright owners outlined in the submissions of APRA and AMCOS, Music Industry Piracy Investigations, and the Motion Picture Association.

The Copyright Amendment Bill 1992 provided that copyright in a sound recording would be presumed to subsist if the plaintiff filed an affidavit stating certain things, such as the date and place of publication. The provision also contained a presumption that, if subsistence were presumed, the plaintiff would be presumed to be entitled to bring the action if the plaintiff filed an affidavit asserting certain things, such as that he or she was the maker of the sound recording. A copy of the section is annexed to this submission.

The 1992 Bill lapsed and the provision has never been enacted. We note that the Copyright Law Review Committee (CLRC) recommended that a similar provision be introduced in relation to computer software in its 1995 report.⁸ We note that there is a similar provision in relation to sound recordings, computer programs and films in the Copyright Act of the United Kingdom.⁹ We understand that the Government has not yet decided whether to accept the CLRC's recommendation.

Although we note that the CLRC in its report on the simplification of the Copyright Act, Part 2, recommended against such a provision,¹⁰ we submit that the Copyright Act should contain a provision such as this in respect of all copyright material to assist owners of copyright to enforce their rights.

We submit that the presumptions in sections 126, 127, 128, 129, 130 and 131 applying to civil actions should apply equally to prosecutions under the offences provisions.

Presumptions in relation to importation

In an action in relation to the importation of pirate or legitimate copies of copyright material, the copyright owner has to prove, among other things, that the importer knew, or ought reasonably to have known, that the making of the article in Australia would (if made by the importer) have infringed copyright.

In the case of sound recordings, legitimate copies of which can now be imported without the copyright owner's consent, the defendant can argue in his or her defence that the imported copy is a "non-infringing copy".

We note that the Government's media release of 8 October 1997, announcing the abolition of the parallel importation provisions in relation to sound recordings, stated that the amending Bill would "change the onus of proof". The amended Act attempts to implement this policy by providing that in an action for infringement by importation,

⁸ Commonwealth of Australia, *Computer Software Protection*, Canberra 1995 at para 16.24

⁹ Section 105 Copyright, Designs and Patents Act 1988

¹⁰ Commonwealth of Australia, *Simplification of the Copyright Act 1968, Part 2, Categorisation of Subject Matter and Exclusive Rights, and Other Issues*, Canberra 1999 at para 7.154

it is presumed that a copy is not a non-infringing copy, unless the defendant proves otherwise.¹¹

As we submitted to the Senate Committee inquiry into CD prices, the provision as enacted does not have the effect of reversing the onus of proof as claimed. In an action for unauthorised importation, the copyright owner must still prove that the defendant knew, or ought to have known, that making the imported article in Australia would have infringed copyright. The onus of proof shifts to the defendant only when this knowledge and other elements had been established. This is no different to the onus of proof in relation to existing exceptions and provisos in the Act, including the provisions which allow the importation of books.

When the Spicer Committee looked at the importation provisions in 1959, it recognised the difficulty copyright owners have in proving guilty knowledge and recommended that the onus should be on the importer, seller or dealer to prove that he or she was not aware and had no reasonable grounds for suspecting that the making or importation of the material was an infringement.¹²

We ask the Committee to give consideration to recommending the amendment of sections 37, 38, 102 and 103 to provide that, in the case of imported items, the defendant must prove that he or she had no knowledge that he or she would infringe copyright if the imported item were made by the importer in Australia, and, in the case of items sold or dealt with commercially in Australia, that he or she did not know and had no reasonable grounds for knowing that the making of those items constituted an infringement.

Labelling on imported products

We note the view expressed in the Productivity Commission's Staff Research Paper, *Trade-Related Aspects of Intellectual Property Rights* that where parallel importation of copyright material is permitted there may need to legislative measures to help combat piracy.¹³ We agree that this is the case. One of the main concerns of the music industry in relation to the abolition of the parallel importation control on sound recordings is the resulting influx of pirate copies of sound recordings and the fact that it can be very difficult to distinguish legitimate from pirate goods.

We think the Productivity Commission's suggestion that there should be a requirement to attach labels to copyright material imported into Australia indicating the name and location of the overseas enterprise from which the product was bought has merit.¹⁴ We think this information as well as the names of the manufacturer and importer and the location of manufacture would be useful in assisting copyright owners to identify and track down pirate copies of material.

¹¹ Section 130A Copyright Act

¹² Commonwealth of Australia, *Report of the Copyright Law Review Committee*, Canberra 1959 at paras 94 and 304

¹³ Revesz, J. 1999, *Trade-Related Aspects of Intellectual Property Rights*, Productivity Commission Staff Research Paper, AGPS, Canberra, at pp50 and 51

¹⁴ at page 51

7. Further information

We would also be happy to provide the Committee with further information in relation to matters raised in our submission, or in relation to copyright generally.

Virginia Morrison
Legal Officer
Australian Copyright Council
22 July 1999

Appendix

126A Copyright Amendment Bill 1992

(1) In an action brought under this Part in relation to a sound recording, copyright is presumed to subsist in the sound recording if:

(a) the plaintiff files an affidavit:

(i) stating that the record embodying the sound recording or its container bore a label or mark specifying the date and place of first publication of the sound recording; and

(ii) specifying that date and place; and

(b) the date and place of first publication specified in the affidavit are such as, if proved, would support the subsistence of copyright in the sound recording on the day on which the action is instituted.

(2) If the subsistence of copyright is presumed under subsection (1), the plaintiff is presumed to be entitled to bring the action under this Part in relation to the sound recording if the affidavit filed by the plaintiff asserts:

(a) that the plaintiff is the maker of the sound recording and is specified on the label or container of the record embodying the sound recording as the maker of the sound recording; and

(b) that the plaintiff has not assigned the copyright in the sound recording.

(3) If the plaintiff is not the maker of the sound recording, the plaintiff is presumed to be entitled to bring the action under this Part in relation to the sound recording if the affidavit filed by the plaintiff:

(a) asserts that the plaintiff is entitled to bring the action as assignee or exclusive licensee of the copyright in the sound recording:

(i) from the maker; or

(ii) from a person other than the maker; or

(b) asserts that the plaintiff is entitled to bring the action as owner of the copyright under subsection 97(3).

(4) An affidavit filed by the plaintiff under paragraph (3)(a) must list all the persons through whom the plaintiff claims to have the assignment or exclusive licence of the copyright in the sound recording.

(5) The presumptions under subsections (1), (2) and (3) operate unless the contrary is established.