

Protecting Copyright

- 3.1 The Committee's second term of reference focuses on the options for copyright owners to protect their copyright against infringement. Specifically, the term refers to measures, both legal and non-legal, that copyright owners can take to defend their copyright. Legal measures include litigation under the *Copyright Act 1968* (the Copyright Act) as well as other legislation. Non-legal measures include the use of technological protection devices and education campaigns. A preliminary issue that arose on a number of occasions in the course of the inquiry is: to what extent should the copyright owners alone be responsible for protecting their copyright? It is with this question that the Committee will deal first.

Protection—whose responsibility?

- 3.2 In evidence to the Committee, both law enforcement agencies and copyright owners accepted that they each have a role to play in the protection of copyright. Although neither suggested that the other bore sole responsibility, opinions differed as to who should be primarily responsible for protecting copyright material and enforcing copyright law. In the overview to its submission, the Motion Picture Association (MPA) stated that:

The law protects property in copyright, just as it protects other property, from misappropriation. The public policy arguments in favour of the State protecting property are so old and so obvious as to not need restatement.¹

¹ Motion Picture Association (MPA), *Submissions*, p. S257.

- 3.3 The MPA argued that law enforcement agencies should approach copyright infringement with the same attitude as they do the theft of tangible property. This may be contrasted with the view expressed by the Attorney-General's Department (AGD) in relation to the investigation of copyright infringement:

...our position has been that these are private property rights and, by and large, the main burden for the enforcement of those rights should fall upon those who own those rights.²

- 3.4 The Australian Customs Service (Customs) was also concerned about arguments intended to shift the burden of enforcement from the copyright owner over to the taxpayer, in the form of Customs.³ The Australian Copyright Council (ACC) objected to the burden being placed mostly on copyright owners:

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.⁴

Copyright as property

- 3.5 The Committee accepts the point made by the ACC, that intellectual property is regarded differently from tangible property in Australian society. This difference in perception is reflected in the law itself. The law has long been acquainted with tangible property, in the form of real property and chattels, whereas intellectual property rights are more recent and unfamiliar to many people. Indeed, Mattel Pty Ltd, the Australian Toy Association and Hasbro Australia Ltd (Mattel et al) submitted that, traditionally, the distinguishing point between an industrial and a feudal economy is the respect for intellectual property that is paid by both business and the courts.⁵
- 3.6 Perhaps it is for this reason that we view copyright differently from tangible property. It may also be due to copyright's intangible nature that we regard it differently. It may be, that since comparatively few members of society own copyright, we are unaware or unfamiliar with the concept.

2 Mr Fox, Attorney-General's Department (AGD), *Transcript*, p. 67.

3 Mr Burns, Australian Customs Service (Customs), *Transcript*, p. 98; *Submissions*, p. S151.

4 Australian Copyright Council (ACC), *Submissions*, p. S479.

5 Mattel Pty Ltd, Australian Toy Association & Hasbro Australia Limited (Mattel et al), *Submissions*, p. S663.

Whatever the reason, the Committee believes that the government has a responsibility to afford copyright, as well as other intellectual property rights, proper recognition and protection as property. This responsibility will only increase with the emergence of electronic commerce and the exchange of ideas through the Internet.

Joint responsibility

- 3.7 At the same time, the Committee recognises that protection of copyright necessarily requires the involvement and co-operation of copyright owners. This is due in part to the specialised nature of the property in question. It is also due to the fact that law enforcement agencies have limited resources to devote to property offences, including copyright infringement (see Chapter 6).
- 3.8 The Australian Visual Software Distributors Association (AVSDA) recognised that protection of copyright is a joint responsibility to be shared between copyright owners and law enforcement agencies.⁶ The Committee agrees with this position. In framing some of its recommendations in this chapter, the Committee has called upon the government and law enforcement agencies to help copyright owners protect their copyright.

Protection through legal means

- 3.9 The law protects copyright by providing legislative frameworks within which copyright owners can vindicate their rights. The Copyright Act, and other legislation, including the *Trade Practices Act 1974* (the Trade Practices Act), the *Trade Marks Act 1995* (the Trade Marks Act) and the *Commerce (Trade Descriptions) Act 1905* (the Trade Description Act), all provide remedies that can be used when copyright has been infringed. The Committee's task is to investigate what use copyright owners are making of these frameworks. The issue of registration will also be considered here.

Copyright Act

- 3.10 It is difficult to gauge what proportion of copyright owners, who have had their rights infringed, seek remedies contained in the Copyright Act. AGD submitted that copyright owners are generally effective in their use of the provisions of the Copyright Act. In its opinion, this is due to the legal and

6 Mrs Simes, Australian Visual Software Distributors Association (AVSDA), *Transcript*, p. 317.

managerial sophistication of copyright owners, the availability of targeted training for copyright owners, and the collective administration and enforcement of rights.⁷ The Committee accepts that these factors may apply to large corporations, to publishers and to collecting societies. However, the Committee does not accept generally that individual copyright owners possess the sophistication, or have the resources, that are claimed.

- 3.11 Obtaining relief under the Copyright Act is expensive. Music Industry Piracy Investigations submitted that the average cost of infringement proceedings in the 1990s was in excess of \$100 000.⁸ VI\$COPY reported that the cost of pursuing one infringement of a particular artistic work was estimated to be \$60 000.⁹ The Anti-Counterfeiting Action Group (ACAG) submitted that it costs between \$15 000 and \$20 000, or more, to sue a clothing counterfeiter.¹⁰ An idea of the cost may also be gained from other intellectual property (patent) litigation, which IP Australia estimated to be between \$50 000 and \$250 000.¹¹
- 3.12 The Committee heard from many witnesses who claimed that the cost of litigation made the protection provided by the Copyright Act nugatory. The Victorian Employers' Chamber of Commerce and Industry (VECCI) and the Business Software Association of Australia (BSAA) both stated that small businesses are often precluded from enforcing their rights because of the cost.¹² Indeed, the Arts Law Centre of Australia (ALCA) submitted that in view of the impediments to the legal enforcement of copyright, the government has failed in its commitment to promote a fair regulatory regime for small business.¹³
- 3.13 Organisations representing creators, such as ALCA, the Arts Law Centre of Queensland Inc and the National Indigenous Arts Advocacy Association (NIAAA) also submitted that many creators could not afford to enforce their rights.¹⁴ These organisations reported that in many cases,

7 AGD, *Submissions*, p. S428.

8 Music Industry Piracy Investigations, *Submissions*, p. S174.

9 Ms Ward, VI\$COPY, *Transcript*, p. 238.

10 Anti-Counterfeiting Action Group (ACAG), *Submissions*, p. S368.

11 Mr Gould, IP Australia, *Transcript*, p. 129.

12 Ms Harmer, Victorian Employers' Chamber of Commerce and Industry (VECCI), *Transcript*, p. 39; Mr Macnamara, Business Software Association of Australia (BSAA), *Transcript*, p. 182.

13 Arts Law Centre of Australia (ALCA), *Submissions*, p. S100.

14 Arts Law Centre of Australia (ALCA), *Submissions*, pp. S101–102; Arts Law Centre of Queensland Inc, *Submissions*, p. S46; National Indigenous Arts Advocacy Association (NIAAA), *Submissions*, p. S574.

the most that creators can do is to threaten legal action, with varying degrees of success.¹⁵

Indigenous art

- 3.14 The Aboriginal and Torres Strait Islander Commission (ATSIC) submitted that lack of access to the legal system was the main obstacle preventing indigenous artists from benefiting from the protection provided by the Copyright Act.¹⁶ The NIAAA identified additional barriers facing indigenous artists, including the remoteness of many indigenous artists, and the lack of an infrastructure to support litigation.¹⁷ Yet together with ALCA, ATSIC and NIAAA both acknowledged the important role that test cases have played in extending the law and educating the copyright community in the area of indigenous art.¹⁸
- 3.15 On a more fundamental level, witnesses representing indigenous artists and peoples questioned the extent to which the Copyright Act can adequately protect indigenous interests. This is because in a number of significant respects, Aboriginal culture differs from the culture of property rights that is embodied in the Copyright Act. The most striking difference is the principle of communal ownership. An indigenous artist is responsible to their clan when they use cultural heritage in their work. They remain answerable to the clan, and may face serious punishment, if the heritage embodied in the artwork is used contrary to customary law.¹⁹ This is so even if the artwork is used without the artist's permission, in other words, in circumstances of copyright infringement.
- 3.16 In *Bulun Bulun v R & T Textiles Pty Ltd*²⁰ the Federal Court held that an indigenous artist owes a fiduciary obligation to their clan group to protect the clan's heritage which the artist uses in their artwork. In this way the Federal Court gave recognition to Aboriginal customary law. NIAAA suggested that an artist's fiduciary obligation to their clan be given legislative recognition. Additionally, it recommended that a clan be given standing to bring an action for infringement of any copyright material that involves clan heritage.²¹

15 NIAAA, *Submissions*, p. S570; Ms Browne, ALCA, *Transcript*, p. 259.

16 Aboriginal and Torres Strait Islander Commission (ATSIC), *Submissions*, p. S732.

17 NIAAA, *Submissions*, p. S574.

18 NIAAA, *Submissions*, p. S580; ALCA, *Submissions*, p. S103; ATSIC, *Submissions*, p. S733.

19 Ms Janke, NIAAA, *Transcript*, p. 335.

20 (1995) 30 IPR 209.

21 NIAAA, *Submissions*, p. S574.

- 3.17 The Aboriginal and Torres Strait Islander Commission (ATSIC) pointed out that the Copyright Act also fails to protect images in rock paintings which have been in existence since time immemorial.²² Due to these perceived shortcomings, ATSIC together with NIAAA, submitted that the Copyright Act alone cannot protect indigenous cultural and intellectual property.²³ They argued that, due largely to the notion of collective ownership and the need for broader protection of Aboriginal heritage, *sui generis* legislation is required to protect indigenous intellectual property.
- 3.18 The Committee considers that the government should commit itself to reviewing mechanisms for the protection of indigenous cultural and intellectual property generally, with a view to considering *sui generis* legislation. A suitable starting point in this process might be to review the recent report commissioned by ATSIC and the Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our Culture: Our Future*.²⁴

Recommendation 2

- 3.19 **The Committee recommends that the Minister for the Arts and/or the Attorney-General give the Committee a reference to inquire into the mechanisms for the protection of indigenous cultural and intellectual property.**
- 3.20 In light of the above recommendation, the Committee refrains from making any recommendation as to how communal ownership could be recognised in the Copyright Act. The Committee considers that this issue should be addressed in the proposed review.

Copyright industries

- 3.21 Even corporate copyright owners find protecting their rights using the Copyright Act burdensome. Mattel stated that it is involved in litigation on a weekly basis.²⁵ Sony Computer Entertainment devoted \$700 000 to enforcement strategies in 1999 and at the time of giving evidence, had 35 infringement proceedings pending in the Federal Court.²⁶ BSAA estimated its members' expenses on anti-piracy activities in the 1998–99 financial

22 Aboriginal and Torres Strait Islander Commission (ATSIC), *Submissions*, p. S735.

23 ATSIC, *Submissions*, p. S730

24 T Janke, 1998.

25 Mr McDonald, Mattel, *Transcript*, p. 4.

26 Mr Ephraim, AVSDA, *Transcript*, p. 306.

year to be \$3.5 million. Since 1989 BSAA and its members have commenced over 160 infringement actions in the Federal Court.²⁷ The Committee concludes that the major copyright owners are vigorously pursuing infringement under the Copyright Act.

- 3.22 From a logistical point of view, the nature of copyright infringement often requires a joint response from the copyright owners in a particular industry. The investigation and prosecution of infringement is often carried out by a single policing body for the industry, which receives funding from the members of that industry. Such bodies exist in both the music and film industries: Music Industry Piracy Investigations (MIPI) and Australasian Film and Video Security Office (AFVSO) respectively. In other industries, copyright owners band together and employ private investigators to carry out the surveillance and prosecution of infringement. The BSAA has established a hotline for 'dobbing in' software infringers, with a reward offered.²⁸
- 3.23 AGD suggested that the industries' funding of their own policing bodies may not be generous.²⁹ The Committee is not in a position to comment on the accuracy of that suggestion, although the evidence indicates that at least some copyright owners expend considerable amounts on enforcement of their rights.

Other legislation

- 3.24 Material which is protected by copyright is often also protected by other intellectual property regimes, for example, the law of trademarks. The owner of a product which is protected under another regime, other than copyright, may chose to rely on that regime. For example, AVSDA stated that it has found the Trade Marks Act to provide the most effective protection for visual software products.³⁰ This is because the issue of ownership is easier to prove under the Trade Marks Act than the Copyright Act.³¹ On the other hand, BSAA stated that the Copyright Act has been the primary basis of all legal actions initiated against software pirates.³² AGD stated that infringements of copyright often also constitute

27 Business Software Association of Australia (BSAA), *Submissions*, p. S339.

28 BSAA, Mr Gonsalves, *Transcript*, p. 180.

29 AGD, *Submissions*, p. S428.

30 Mr Dwyer, AVSDA, *Transcript*, pp. 308–309.

31 Mrs Simes, AVSDA, *Transcript*, p. 313.

32 BSAA, *Submissions*, p. S339.

breaches of the Trade Practices Act.³³ Mattel confirmed that pirates could be pursued under the Trade Practices Act.³⁴

- 3.25 Mr Sugden of the University of Queensland stated that copyright has significantly more remedies than other areas of intellectual property law. Mr Sugden argued that the remedies should be unified across the various pieces of legislation.³⁵ AVSDA argued that additional damages, available under the Copyright Act, should also be available under the Trade Marks Act. The Committee, mindful of its terms of reference, has decided to concentrate on improving the operation of the Copyright Act rather than expanding the remedies available under related legislation.
- 3.26 Customs submitted that copyright owners often seek to prevent the importation of pirated products under the Trades Description Act rather than the Copyright Act.³⁶ The labels and logos on pirated goods, which make them appear genuine, breach the provisions of the Trades Description Act. Under the Act, a warrant must be obtained before the goods can be seized, an expense which is borne by Customs. For this reason, Customs advised that it would not automatically apply the provisions of the Trade Descriptions Act.³⁷ MIPI submitted that the seizure of goods under the Trade Descriptions Act is in any case only a stop-gap measure.³⁸
- 3.27 The Committee recognises that as a practical matter, legislation other than the Copyright Act has a role to play in the enforcement of copyright. The Committee further acknowledges that part of the reason that copyright owners are resorting to other legislation may be the problematic operation of the Copyright Act itself. The Committee is confident that, if implemented, the changes recommended in this report will make the Copyright Act a much more effective tool in the enforcement of copyright.

Registration

- 3.28 A number of witnesses argued that the law could better protect copyright from infringement if a system of registration for copyright were introduced into the Copyright Act. The concept of registration is not new in Australia. The *Copyright Act 1905* established the Copyright Office, which was responsible for maintaining a register of copyrights.

33 Mr Fox, AGD, *Transcript*, p. 68.

34 Mr McDonald, *Transcript*, p. 16.

35 Mr Sugden, *Transcript*, p. 384.

36 Customs, *Submissions*, p. S144.

37 Customs, *Submissions*, p. S155.

38 MIPI, *Submissions*, p. S176.

Registration of copyright was a precondition to taking any legal action in respect of a copyright; thus registration was a precondition to enforcement.³⁹ This position was changed by the *Copyright Act 1912*, under which registration was voluntary, although the 1912 Act provided additional remedies for registered copyright owners.⁴⁰ Registration remained an option for copyright owners in Australia until 1969, when the *Copyright Act 1968* commenced.⁴¹

- 3.29 In some overseas jurisdictions, including the United States of America, copyright is based on a system of voluntary registration. Although registration was at one time compulsory in the US, it is no longer so.⁴² Canada also has a voluntary system of registration.⁴³ The ACC and Mattel et al argued that compulsory systems of registration are inconsistent with the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS) and the 1886 Berne Convention for the Protection of Literary and Artistic Works.⁴⁴ The Committee understands that this view is generally accepted, and will therefore limit its attention to voluntary registration systems.
- 3.30 Voluntary registration helps to protect copyright owners by facilitating proof of ownership. This is useful in both civil and criminal infringement proceedings, in which often the hardest element for the plaintiff or prosecution to prove is ownership of copyright. Currently, copyright owners have to establish, using admissible evidence, a 'chain of title' to the material in question—a complex, and sometimes impossible, task. Often it involves gathering evidence overseas, at considerable expense. The MPA gave an example of proceedings in relation to one work that required 150 hours of employee time to assemble the documents necessary to prove ownership.⁴⁵
- 3.31 A voluntary system of registration would instead allow a copyright owner to establish prima facie ownership simply by producing a certificate of registration. For example, subsection 53(2) of the *Copyright Act* (Canada) contains a rebuttable presumption that the owner is the person whose name appears on the register.⁴⁶ Courts take judicial notice of certificates of registration.

39 Section 74 of the *Copyright Act 1905*.

40 Section 26 of the *Copyright Act 1912*.

41 Mr Fox, AGD, *Transcript*, p. 62.

42 Ms Baulch, ACC, *Transcript*, p. 288.

43 MPA, *Submissions*, pp. S278-279.

44 Ms Baulch, ACC, *Transcript*, p. 288; Mattel et al, *Submissions*, p. S670.

45 MPA, *Submissions*, p. S274.

46 MPA, *Submissions*, p. S279.

- 3.32 Mattel et al and NSW Police drew an analogy between voluntary copyright registration and the Torrens title system for interests in real property. They argued that just as the latter made conveyancing more reliable, efficient and less expensive, voluntary registration would make dealings in, and litigation concerning, copyright more efficient.⁴⁷ NSW Police further suggested that a voluntary registration system may lead to more police involvement in cases of criminal infringement, because the crime would be easier and cheaper to prosecute.⁴⁸
- 3.33 In the Committee's view, the analogy between Torrens title and voluntary copyright registration is flawed. A voluntary registration system cannot guarantee title in the way that a system of indefeasible title can. In a voluntary registration system, a registered owner's title can always be challenged. The challenge, if successful, has the effect of defeating the registered owner's interest. For this reason a voluntary system of registration is of limited value.
- 3.34 AGD stated that it was not prepared to entertain the idea of registration. They claimed that it would entail a very substantial administrative burden, and that is not warranted in the circumstances.⁴⁹ NSW Police and Mattel et al and the BSAA all pointed out that a voluntary registration system could be self-funding, or even raise revenue for the government.⁵⁰ In this regard BSAA stated that IP Australia, the agency responsible for registering patents, trademarks and designs, made a profit of about \$11 million in the last financial year.⁵¹
- 3.35 In answer to the concern that a voluntary system of registration would impose an administrative burden on the government, the BSAA suggested that the register could be maintained by industry.⁵² In this way, administrative costs could be avoided. The integrity of the register could be maintained by requiring it to comply with standards specified in legislation.
- 3.36 The Committee accepts that it may be feasible to implement a system of voluntary copyright registration in Australia without involving the government. Given the interest in registration, the Committee was keen to uncover the reason why voluntary registration was abandoned in the Copyright Act. The answer is to be found in the Report of the Copyright

47 Mattel et al, *Submissions*, p. S669.

48 Sgt Shepherd, NSW Police, *Transcript*, p. 168.

49 Mr Fox, AGD, *Transcript*, pp. 62–63.

50 Mattel et al, *Submissions*, p. S671; Sgt Shepherd, NSW Police, *Submissions*, p. 163.

51 Mr Gonsalves, BSAA, *Transcript*, p. 184.

52 Mr Macnamara, BSAA, *Transcript*, p. 184.

Law Review Committee, 1959 (the Spicer Report).⁵³ In advocating the removal of the voluntary registration system from the 1912 Act, the Committee highlighted the fact that requirements for registration were minimal. It further stated:

Even if the provisions for the initial registration of the copyright required more effective proof of ownership, the fact that registration of assignments, transmissions and licences is of necessity voluntary greatly detracts from the value of the register as an accurate record of ownership.⁵⁴

- 3.37 In the Committee's view, this comment in the Spicer Report continues to have force. The Committee is not convinced that there is much practical value in instituting a voluntary system of registration, however it is funded or administered. As is discussed in Chapter 4, the Committee recommends the adoption of a rebuttable presumption in copyright proceedings. The operation of the rebuttable presumption has much the same effect as would the implementation of a voluntary registration system. For this reason that the Committee has decided against recommending introducing such a system in Australia.
- 3.38 An alternative to instituting a voluntary system of registration in Australia would be for Australian courts to recognise foreign registrations. A number of witnesses advocated that the Copyright Act should make provision for this. The DPP acknowledged that recognition of foreign registrations would make prosecutions much easier.⁵⁵ The Australasian Performing Right Association and the Australasian Mechanical Copyright Owners Society,⁵⁶ the BSAA and the MPA all argued in favour of recognising US registration.⁵⁷
- 3.39 IP Australia argued that recognition of a foreign registration would disadvantage Australian residents, who would have to register their copyright overseas in order to gain the benefit of Australian law.⁵⁸ The MPA responded that foreign nationals can register copyright in the US for a US\$30 fee.⁵⁹ However, AGD warned that recognising registration in some countries and not others may contravene TRIPS, which requires

53 Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth.

54 Spicer Report, para. 452.

55 Mr Thornton, Commonwealth Director of Public Prosecutions, *Transcript*, p. 90.

56 Australasian Performing Right Association and the Australasian Mechanical Copyright Owners Society, *Submissions*, p. S246.

57 Mr Gonsalves, BSAA, *Transcript*, p. 183.

58 Mr Gould, IP Australia, *Transcript*, p. 130.

59 Mr Alexander, MPA, *Transcript*, p. 142.

Australia to treat all WTO members in a non-discriminatory manner.⁶⁰ MPA replied that the legislation could be drafted in such a way so as not to discriminate between foreign registration systems.⁶¹

- 3.40 AGD submitted that recognising foreign registration 'flies in the face' of the Australian copyright regime that is not based on any formalities.⁶² It was also concerned that a legislative provision requiring judges to recognise foreign registrations would remove the discretion judges already have to admit foreign certificates of registration into evidence.⁶³ The Committee notes that in one of the prosecutions discussed by the DPP, *Holder v Searle*,⁶⁴ Spender J admitted US certificates of registration into evidence.⁶⁵ This suggests that Australian courts are prepared to have regard to foreign certificates of registration. AGD pointed out that despite tendering the certificate of registration, the prosecution failed to prove ownership of copyright in that case.⁶⁶
- 3.41 The Committee considers it unnecessary and undesirable to introduce a provision in the Copyright Act requiring judges to take judicial notice of foreign certificates of registration. The Committee is satisfied that the courts will continue to accept into evidence certificates of registration from other jurisdictions and accord to them such weight as is appropriate.

Protection through other means

- 3.42 Based on its experience, the MPA suggested to the Committee that copyright protection is derived from three distinct areas: technical safeguards, strict and strong legal platforms and a commitment to enforcement.⁶⁷ The Committee recognises that legal protection (law and law enforcement) is a necessary part of copyright enforcement. However, like the MPA, the Committee also recognises that other, non-legal, strategies can be effective in the enforcement of copyright. These non-legal strategies are discussed below.

60 Mr Fox, AGD, *Transcript*, p. 63.

61 Mr Alexander, MPA, *Transcript*, p. 143.

62 AGD, *Submissions*, p. S440.

63 Mr Fox, AGD, *Transcript*, p. 63.

64 (1998) 44 IPR 1.

65 (1998) 44 IPR 1 at 18–20.

66 Mr Fox, AGD, *Transcript*, p. 63.

67 Mr Baker, MPA, *Transcript*, p. 138.

Technological protection devices

- 3.43 One way to protect copyright material from infringement is to use a technological protection device. Such devices operate by either aiding the identification of copyright material, or by restricting access to, or the use of, copyright material. Protection devices have the advantage of providing intrinsic protection to copyright material; they prevent infringement from occurring, rather than merely providing a remedy once it has occurred. The Department of Communications, Information Technology and the Arts (DoCITA) submitted that in many cases preventative action is the most appropriate form of protection against infringement.⁶⁸
- 3.44 Technological protection devices are especially important in the electronic environment. This is because the possibilities for infringement in the electronic environment are vast, rendering legal protection largely ineffectual. The *Copyright Amendment (Digital Agenda) Act 2000* refers to two types of protection devices that can apply to material in electronic form: see the definitions of 'electronic rights management information' and 'effective technological protection measure' inserted into section 10(1) of the Copyright Act.
- 3.45 AGD submitted that there is a large range of measures now available to copyright owners to seek to mark or identify their material.⁶⁹ OVID Australia Pty Ltd (Ovid) described a new technological protection device that has been developed in Australia. The device protects physically embodied copyright material, such as compact discs (CDs), digital video discs (DVDs), floppy discs and videos. It takes the form of a foil or veneer which can be applied to the physical body (the disc or video), and which has special optical properties—a so called optical variable device.⁷⁰ The foil identifies legitimate material, and enables it to be distinguished from counterfeit copies.
- 3.46 Not all witnesses placed confidence in technological devices as a means of protecting copyright. DoCITA referred to the Secure Digital Music Initiative that is being developed by the music industry.⁷¹ Yet MIPI submitted that there were no technological protection devices, nor any on the horizon, capable of preventing infringement of sound recordings. They also argued that the attempts to provide protection are exacerbated by the

68 Department of Communications, Information Technology and the Arts (DoCITA), *Submissions*, p. S646.

69 AGD, *Submissions*, p. S430.

70 OVID Australia Pty Ltd, *Submissions*, p. S139.

71 DoCITA, *Submissions*, p. S651.

fact that there is no effective control over hardware such as CD burners and cassette replicators.⁷²

- 3.47 The Committee understands that some technological protection devices may have a limited period of effectiveness, in that pirates may soon master the relevant technology and circumvent a device. Nevertheless, the Committee considers it desirable to encourage the development of innovative technological protection devices such as Ovid's foil, described above.
- 3.48 The BSAA argued the use of technological protection devices should be an industry initiative, driven by market forces rather than government regulation.⁷³ While agreeing with this view, the Committee adds that once protection devices are in use, they should be protected from unauthorised removal or alteration by legal sanctions. An example of such sanctions in respect of protection devices for material in electronic form is found at section 116A of the Copyright Act, inserted by item 98 of Schedule 1 of the *Copyright Amendment (Digital Agenda) Act 2000*.

Recommendation 3

- 3.49 **The Committee recommends that industry be encouraged to develop technological protection devices that are used to protect copyright material.**

The Committee further recommends that the *Copyright Act 1968* be amended so as to provide legal sanctions against the removal or alteration of technological protection devices.

Education

- 3.50 A recurring theme that emerged from evidence to the Committee was that part of the difficulty in enforcing copyright in Australia lies in the community's attitude towards, and in some cases, ignorance about, copyright. Many witnesses identified education as an important strategy in combating a culture that tolerates copyright infringement.

72 MIPI, *Submissions*, p. S178.

73 BSAA, *Submissions*, p. S340.

Attitudes to infringement

3.51 In evidence to the Committee, Mattel et al stated:

... a fundament point is that the attitude in Australia that seems to be permeating through the community is that copyright is not really a serious issue. Whether it be in the marketplace where cheaper products are purchased—from \$2 shops or at that end of the market—or within the judiciary, there generally is a feeling that copyright is not a major matter.⁷⁴

3.52 This point was also made by Mr Stephens, of Stephens Lawyers, who argued that many people do not understand what intellectual property is, and that they genuinely do not believe that the theft of intellectual property is wrong.⁷⁵ The Commercial Crime Agency of the NSW Police Service (NSW Police) argued that the present public attitude towards breach of copyright is akin to that displayed 20 or 30 years ago to drink driving.⁷⁶ Mattel et al also likened copyright infringement to drink driving, arguing that drink driving was curbed through law reform and an education campaign.⁷⁷ Both the NSW Police and Mattel et al suggested that a similar education campaign is necessary with respect to copyright.

3.53 DoCITA joined the NSW Police and Mattel et al in suggesting that a public awareness campaign about copyright is required.⁷⁸ In its submission, AGD referred with approval to a report of the Office of Strategic Crime Assessments, which suggested that education is a significant factor in enforcement because of its effect on social values.⁷⁹ Mattel et al called for a 'cultural paradigm shift' with respect to copyright protection.⁸⁰ CAL referred to a decision made by the United Kingdom government to 'raise awareness and understanding of copyright laws' in response to that government's view that 'few laws have such a wide effect and yet are so little understood by the public'.⁸¹ The Committee agrees that a campaign, aimed at fostering greater public appreciation of copyright law, would be a valuable strategy in preventing copyright infringement in Australia.

74 Mr McDonald, Mattel et al, *Transcript*, p. 348.

75 Mr Stephens, Stephens Lawyers, *Transcript*, p. 46.

76 Sgt Shepherd, Commercial Crime Agency NSW Police Force (NSW Police), *Transcript*, p. 164.

77 Mattel et al, *Submissions*, pp. S663–664.

78 DoCITA, *Submissions*, p. S646.

79 AGD, *Submissions*, p. S424.

80 Mattel et al, *Submissions*, p. S682.

81 CAL, *Submissions*, p. S600.

- 3.54 The Committee is aware that in this regard, organisations representing copyright owners currently conduct education programs. The ACC reported that it provides training on copyright, both to its members and to law enforcement agencies.⁸² The MPA submitted that it conducted, through AFVSO, extensive and varied public education campaigns.⁸³ However, the Committee was not presented with detailed information about the extent of direct public education undertaken by the organisations. Neither is such information known by AGD.⁸⁴
- 3.55 In the Committee's view, a public education campaign that aims to promote awareness of copyright law should be undertaken jointly by the government and organisations representing copyright owners. The campaign could include initiatives such as advertising in the media, and producing educational resources for use by schools, amongst others. The campaign should be balanced in the sense that, in addition to promoting respect for copyright as property, the campaign should clearly explain the legislative exceptions to the exclusive rights of copyright owners.
- 3.56 Misconceptions about copyright are not confined to the general public; often creators themselves are unaware of how copyright protects their material. VECCI highlighted the need to convey to members of the business sector that copyright is a valuable intellectual property asset, which must be safe-guarded.⁸⁵ Stephens Lawyers and IP Australia confirmed that there is a very poor understanding in the business community of the whole intellectual property system, including copyright.⁸⁶ VECCI submitted that in the long term, education of small to medium businesses is very important.⁸⁷ The Committee recognises the need to educate the small and medium business community about the nature of copyright and how it can be protected.

Recommendation 4

- 3.57 **The Committee recommends that the government conduct, in conjunction with representative organisations from the copyright industry, a public education campaign aimed at**

82 ACC, *Submissions*, p. S478.

83 MPA, *Submissions*, p. S259.

84 AGD, *Submissions*, p. S427.

85 VECCI, *Submissions*, p. S489.

86 Mr Gould, IP Australia, *Transcript*, p. 129; Mr Stephens, Stephens Lawyers, *Transcript*, p. 45.

87 Ms Harmer, VECCI, *Transcript*, p. 41.

- **promoting awareness and understanding of copyright in the general community; and**
- **educating the business sector as to what copyright is (including how it differs from other intellectual property rights) and how it can be protected.**

- 3.58 Some witnesses also expressed surprise over the judiciary's attitude to copyright infringement, as reflected in the minimal damages awarded in infringement actions. Mattel et al argued that this sends the wrong message to the community as it gives the impression copyright infringement is a trivial breach of the law.⁸⁸ Penalties for copyright infringement, together with possible sentencing guidelines, will be considered further in Chapter 4.
- 3.59 One member of the Committee noted that in her experience, police tend to regard copyright matter as a commercial matter which should be left to the civil courts.⁸⁹ In response, NSW Police stated that in the past a similar attitude of disavowal was taken by police towards domestic violence offences.⁹⁰ They used this to argue that an attitudinal change is required.
- 3.60 In conclusion, the Committee wishes to emphasise the importance of education to the enforcement of copyright in Australia. The Committee considers that education, aimed at all groups of people who deal with copyright, from members of the public, small businesses and large copyright industries, to law enforcement officers and members of the judiciary, will be a significant step in preventing infringements of copyright from occurring.

88 Mr McDonald, Mattel et al, *Transcript*, p. 349.

89 Mrs Danna Vale, *Transcript*, p. 169

90 Sgt Shepherd, NSW Police, *Transcript*, p. 169.

