
The Parliament of the Commonwealth of Australia

Cracking down on copycats: enforcement of copyright in Australia

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Foreword

Copyright—though intangible—is the property of the new millennium. In the past our legal system was careful to protect real and personal property. Such protection reflected the importance of this property to the economy. The modern nation is increasingly an information economy. Many new jobs involve the creation, manipulation, storage and use of this property. It follows that adequate protection of intellectual property, including copyright, is essential not just for the needs of individual owners but for our future prosperity.

The House of Representatives Standing Committee on Legal and Constitutional Affairs has been pleased to undertake this inquiry. Enforcement of copyright is an issue that is not well understood in the community generally and the Committee has sympathy with the view that there are few laws that have such a wide effect but are so little understood. Through the recommendations of this report the Committee hopes to contribute not only to the effective enforcement of copyright but also to increased knowledge and appreciation of its importance.

In this report the Committee has considered the nature and extent of copyright infringement before canvassing the major issues involved in copyright enforcement in Australia. These include the question of who should bear prime responsibility for enforcement; the means by which proof of copyright ownership can be facilitated; the strengthening of criminal sanctions for infringement and the need for new offences to be created.

Increased effectiveness of civil enforcement measures was also a concern for the Committee and this has been addressed in the report. The Committee has also scrutinised the role played by government agencies in enforcement. The Committee trusts its recommendations in respect of these key issues will contribute to greater certainty in this critical area of the law.

Kevin Andrews MP
Chair



Membership of the Committee

Chair	Mr Kevin Andrews MP	
Deputy Chair	Ms Nicola Roxon MP	
Members	Mr Bruce Billson MP	(from 17 February 2000)
	Ms Julie Bishop MP	
	Hon Alan Cadman MP	
	Mr Alan Griffin MP	(from 31 August 2000)
	Hon Duncan Kerr MP	
	Ms Kirsten Livermore MP	(until 31 August 2000)
	Mr Frank Mossfield MP	(until 1 September 1999)
	Mr John Murphy MP	(from 1 September 1999)
	Mr Michael Ronaldson MP	(until 17 February 2000)
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Terms of reference

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

- iv) technological or other non-legislative measures for copyright protection.
 - c) the adequacy of criminal sanctions against copyright infringement, including in respect of the forfeiture of infringing copies or devices used to make such copies, and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement;
 - d) the adequacy of civil actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement including the adequacy of provisions for costs and remedies;
 - e) the desirability or otherwise of amending the law to provide further procedural, evidential or other assistance to copyright owners in civil actions for copyright infringement;
 - f) whether the provisions for border seizure in Division 7 of Part V of the *Copyright Act 1968* are effective in the detention, apprehension and deterrence of the importation of infringing goods, including counterfeit goods; and
 - g) the effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright, including:
 - i) the role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement;
 - ii) the relationship between enforcement authorities and copyright owners;
 - iii) the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement; and
 - iv) coordination of copyright enforcement.
- 2) In undertaking the inquiry and framing its recommendations, the Committee will have regard to:

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

List of abbreviations

ACA	Australian Consumers Association
ACAG	Anti-Counterfeiting Action Group
ACC	Australian Copyright Council
ACCC	Australian Competition and Consumer Commission
ACME	ACME Merchandising
ADA	Australian Digital Alliance
ADR	alternative dispute resolution
AFP	Australian Federal Police
AGD	Attorney-General's Department
ALCA	Arts Law Centre of Australia
ALCQ	Arts Law Centre of Queensland
ATSIC	Aboriginal and Torres Strait Islander Commission
AVSDA	Australian Visual Software Distributors Association
BSAA	Business Software Association of Australia
CAL	Copyright Agency Limited
Customs	Australian Customs Service
DoCITA	Department of Communication, Information Technology and the Arts
DPL	Department of the Parliamentary Library
DPP	Commonwealth Director of Public Prosecutions
IFPI	International Federation of the Phonographic Industry

IIPA	International Intellectual Property Alliance
Mattel et al	Mattel Pty Ltd, Australian Toy Association & Hasbro Australia Ltd
MIPI	Music Industry Piracy Investigation
MPA	Motion Picture Association
NIAAA	National Indigenous Arts Advocacy Association
NSW Police	Commercial Crime Agency of the NSW Police
Ovid	Ovid Australia Pty Ltd
TCM	Tress Cocks & Maddox
TMIS	Trademark Investigation Services
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
VECCI	Victorian Employers' Chamber of Commerce and Industry



List of recommendations

1 Introduction

2 Copyright Infringement in Australia

Recommendation 1

The Committee recommends that the documentation required to be completed by commercial importers when importing a product into Australia include a declaration to the effect that

- had the product been made in Australia, the making of the product would not constitute an infringement of copyright; and
- the product meets the applicable Australian safety standard.

3 Protecting Copyright

Recommendation 2

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.

Recommendation 3

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.

Recommendation 4

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

- 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.

4 Criminal Sanctions Against Infringement

Recommendation 5

The Committee recommends that the Attorney-General bring to the attention of the Chief Justice of the Federal Court of Australia the system of 'guideline judgments' instituted in the Supreme Court of New South Wales, with a view to developing guideline judgments in relation to copyright offences.

Recommendation 6

The Committee recommends that the *Copyright Act 1968* be amended so as to provide increased penalties for persons convicted of subsequent offences.

Recommendation 7

The Committee recommends that section 132 of the *Copyright Act 1968* be amended so as to clarify that in circumstances where more than one work or other subject matter are involved, the section applies to each work or other subject matter severally.

The Committee further recommends that subsection 132(6A) of the *Copyright Act 1968* be amended so as to clarify that in respect of each work or other subject matter, a person commits a separate offence when he or she contravenes each of subsections 132(1), (2), (2A), (3), (5) and (5AA).

Recommendation 8

The Committee recommends that the *Copyright Act 1968* be amended so as to introduce a presumption as to ownership of copyright substantially similar to that contained in proposed section 126A of the Copyright Amendment Bill 1992. The presumption would apply in prosecutions for offences under section 132 of the Copyright Act.

In addition, the Court should have a discretion to award penalty costs:

-
- against the defendant if they seek to challenge the chain of title as deposed to in the prosecution's affidavit and fail; and
 - against the person who swore the prosecution's affidavit, if the defendant succeeds in proving that the chain of title deposed to in the affidavit is false.

Recommendation 9

The Committee recommends that the Copyright Act 1968 be amended so that section 133A applies also to literary, dramatic, musical and artistic works, cinematographic films, television broadcasts and published editions of works.

Recommendation 10

The Committee recommends that the *Copyright Act 1968* be amended so that a licensee will be guilty of an offence where an employee or agent of that licensee is found in possession of a computer program, of which the licensee had actual notice, and which the licensee knew, or ought reasonably to have known, is an infringing copy of the licensed computer program.

Recommendation 11

The Committee recommends that the *Copyright Act 1968* be amended so as to provide:

- a summary offence, for being in possession of copies of copyright material up to a certain value, that are reasonably suspected of being infringing copies; and
- a defence to a prosecution for the offence, if the defendant satisfies the court that she or he had no reasonable grounds for suspecting the copies to be infringing copies.

5 Civil Remedies for Copyright Infringement

Recommendation 12

The Committee recommends that a provision be introduced into the *Copyright Act 1968*, similar to section 100 of the *Copyright, Designs and Patents Act 1988* (UK), which authorises a copyright owner or their agent to seize a copy of their work (or other subject matter) that is offered for sale or hire from a place other than a regular or permanent place of business.

Recommendation 13

The Committee recommends that a provision be introduced into the *Copyright Act 1968*, similar to section 72 of the *Supreme Court Act 1981* (UK), which withdraws the privilege against self-incrimination in civil proceedings for the infringement of intellectual property.

Recommendation 14

The Committee recommends that the *Copyright Act 1968* be amended so as to introduce a presumption as to ownership of copyright substantially similar to that contained in proposed section 126A of the Copyright Amendment Bill 1992. The presumption would apply in civil proceedings for infringement under the Copyright Act.

In addition, the Court should have a discretion to award penalty costs against either party if they abuse the presumption of ownership.

Recommendation 15

The Committee recommends that the *Copyright Act 1968* be amended so as to place on the defendant the onus of proof in relation to the knowledge requirement in civil actions based on sections 37, 38, 102 and 103 of that Act.

Recommendation 16

The Committee recommends that the government introduce a Bill to amend the *Copyright Act 1968*, so as to provide a system of statutory damages for the infringement of copyright. The system would:

- be an alternative to the system for awarding damages provided for in subsection 115(2) of the *Copyright Act 1968*; and
- link the amount of statutory damages to the amount of compensatory damages.

Recommendation 17

The Committee recommends that the *Copyright Act 1968* be amended so as to allow judgment debts to be recovered from directors of corporations that are found liable for infringement pursuant to sections 37, 38, 102 or 103 of the Act.

Recommendation 18

The Committee recommends that the *Copyright Act 1968* be amended so as to provide the following remedies in actions for the infringement of copyright:

- a provision for the Court, in determining what other remedies it should grant, to take into account whether or not the defendant has apologised to the plaintiff; and
- an order that the defendant attend the plaintiff at a time and place specified in the order and listen to the plaintiff explain the significance of the work and its infringement.

Recommendation 19

The Committee recommends that the government produce an Exposure Draft of a Bill to amend the *Copyright Act 1968*, so as to allow for the compulsory licensing by collecting societies of infringing copies of copyright works and other subject matter. The amendment should indemnify a copyright user from liability for copyright infringement once the licence fee has been paid.

Recommendation 20

The Committee recommends that appropriate legislation be amended to establish within the Federal Magistrates Court a small claims jurisdiction to hear copyright matters. The Committee considers that the procedure of the proposed small claims jurisdiction of the Federal Magistrates Court should resemble that of the Small Claims Court of the Australian Capital Territory or the Small Claims Division of the Magistrates Court of Tasmania. The amendments should allow for matters to be transferred out of the small claims jurisdiction into the general jurisdiction, or to the Federal Court, in appropriate circumstances.

6 Institutional Arrangements for Enforcement

Recommendation 20A

The Committee recommends that the Australian Customs Service dedicate staff to work on the enforcement of intellectual property rights. The Committee further recommends that the Australian Customs Service also provide publicity about the nature of its role in copyright enforcement and how copyright owners can assist it in intercepting infringing goods at the border.

Recommendation 21

The Committee recommends that the Minister for Justice and Customs, in conjunction with the Commissioner of the Australian Federal Police, establish a task force for the enforcement of intellectual property rights within the Australian Federal Police. The Task Force should seek the

involvement of the representatives mentioned in, and have at least the responsibilities outlined in, paragraph 6.36.

The Committee recommends that section 67 of the *Australian Federal Police Act 1979* be amended so as to require the Commissioner to report specifically on the establishment and activities of the task force in his or her annual report. The amendment should require the Commissioner to report against performance outcomes that relate to the apprehension and prosecution of breaches of intellectual property rights, including copyright.

7 Related Issues

Recommendation 22

The Committee recommends that sections 48A and 104A of the Copyright Act 1968 be amended so that each section concludes:

‘...being a library the principal purpose of which is to provide library services for the members of a Parliament.’