

Article for *Copyright World*

“Cracking down on copycats: enforcement of copyright in Australia”

Ian McDonald, Australian Copyright Council, 2 February 2001

In November 2000, the Federal House of Representatives Standing Committee on Legal and Constitutional Affairs published its report, entitled *Cracking down on copycats: enforcement of copyright in Australia* (see (1999) 91 *Copyright World* 8 for a news report on the terms of reference given to the Committee by the Federal Attorney-General).

The Committee found that, although the rate of infringement is low by international standards, copyright infringement is a real problem affecting Australia's economy. The Committee therefore made recommendations relating to:

- how to prevent pirated product being imported into Australia;
- technological protection (including the recommendation that industry be encouraged to develop appropriate technological protection for their copyright material);
- education campaigns aimed at the general community (to promote awareness and understanding of copyright), and at the business community to educate it as to how copyright differs from other IP rights, how copyright can be protected, and how copyright owners can assist the Australian Customs Service in intercepting infringing items being brought into Australia;
- criminal sanctions;
- civil remedies; and
- institutional arrangements for enforcement (that the Australian Customs Service and the Australian Federal Police have dedicated staff to work on enforcement of IP and that the Federal Police Commissioner be required to report against performance outcomes relating to the apprehension and prosecution of infringements of IP rights).

Among the recommendations relating to criminal sanctions were a recommendation that the Attorney-General suggest to the Chief Justice of the Federal Court that “guideline judgements” for copyright cases be developed, and a recommendation that the offence provisions be strengthened. The Committee noted that strengthening the offence provisions would both assist in changing judicial attitudes to infringement, and would be the most effective way to curb criminal infringements of copyright.

The Committee made several recommendations relating to the evidentiary and procedural difficulties copyright owners and prosecutors face in bringing and proving criminal cases. For example, it recommended that in some cases, rather than having to prove chain of title, prosecutors be able to rely on an affidavit in a prescribed form to raise a rebuttable presumption of ownership; and that Courts be given the discretion to award penalty costs against a defendant if a defendant unsuccessfully challenges chain of title, or against the person swearing the prosecution's affidavit in the event that a defendant succeeds in proving that the chain of title deposed to is false.

In relation to civil actions, the Committee made a number of recommendations also aimed at minimising the evidentiary and procedural difficulties facing a would-be plaintiff, and to assist in minimising the cost of enforcing copyright. Recommendations included: that the privilege against self-incrimination in proceedings for the infringement of IP be withdrawn; that copyright owners and their agents be entitled to seize infringing copies of their material offered for sale or hire other than from a place that is a regular or permanent place of business; that the existing presumptions as to ownership be modified in line with the recommendation in relation to the offence provisions; that the onus of proof in relation to the knowledge of infringement be reversed; that a system of statutory damages, linked to the amount of compensatory damages, be implemented; and that a small claims jurisdiction within the new Federal Magistrates Court be established.

Submissions were also made to the Committee concerning the protection of Indigenous intellectual and cultural property. The Committee stated that “the government should commit itself to review” relevant mechanisms “with a view to considering sui generis protection”, and recommended that the Minister for the Arts and/or the Attorney-General give the Committee a reference to inquire into the issue. (See Ian McDonald, “Copyright and Intellectual Property Concerns of Australia’s Indigenous People”, (1997) 73 *Copyright World* 15 for an overview of the relevant issues and developments to that date.) In light of this recommendation, the Committee did not make further recommendations aimed specifically at the protection of Indigenous material. However, the Committee did make two general recommendations, following the suggestion of one of the Indigenous groups which made submissions to the Committee. These recommendations were that Courts be given the discretion to order a defendant to make an apology, and that a 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”.

The report contains useful data on estimates of copyright piracy rates and its financial impact in relation to a number of industries. Contrary to the conclusions of the report by the Intellectual Property and Competition Review Committee (see [June-July 2000] *Copyright World* 6), it accepted that there is enough evidence to support a finding that organised crime is involved with copyright infringement.

As a whole, the report has been well received by the copyright community.

The Committee’s report is available via the Australian Parliament House site at: www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm.