

ART CRIME AND LAW ENFORCEMENT

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Introduction

Art crime - Why talk about the enforcement of copyright?

For many people, when the phrase 'art crime' is uttered, it immediately conjures up images of a James Bond type figure - clad totally in black, suspended from the roof by an incredibly strong wire, flashlight on the head, gently manipulating the Mona Lisa off the wall of the Louvre - who, just as the guards come storming down the hallway, pulls himself up the wire with one hand (the other clutching the famous woman), to retreat down an air conditioning shaft and escape to an exotic island where the head of an international art smuggling organisation has set up her clandestine headquarters.

There is another, somewhat less glamorous aspect of art crime. This is the rip offs, imitations, reproductions, unauthorised use and other fakes and frauds which an artist's work is vulnerable to once it is in the public sphere and the commercial market.

As producers of unique goods with commercial value, artists are particularly vulnerable participants in the market place. The monetary and cultural value of much artistic work stems from the uniqueness of the piece, and the personal or community expression, which it represents. These features of artistic endeavour are undermined if an artwork is replicated and distributed without authorisation. Further, the artist is denied remuneration for her or his work.

When the crime committed against an artist is unauthorised reproduction or distribution, one avenue of recourse for the artist is copyright law. The *Copyright Act* 1968 sets out civil and criminal sanctions against the infringement of an artist's copyright.

As there are other presenters at this conference who will be concentrating on the complexities of copyright law, for the purposes of this presentation, I will limit my description of a copyright infringement to the simple concept of an unauthorised:

- copy,
- sale,
- hire,
- distribution,
- exhibition,
- importation, or
- possession of an artist's, inventor's or content producer's work.

The *Copyright Act* is only effective in preventing copyright crimes to the extent that it is seen to be, and is, effectively enforced. Awareness of this truth has led to the referral to the House of Representatives Standing Committee on Legal and Constitutional Affairs of an inquiry into the enforcement of copyright.

The submissions to and the hearings of the inquiry have sought to uncover, inter alia;

- the nature and extent of copyright infringements in Australia,
- the extent of criminal involvement in copyright infringements,
- the adequacy of civil and criminal sanctions including the remedies which are available under existing provisions, and
- the desirability of amending the procedural or evidential elements of the law.

In the time allocated for this presentation, I will endeavour to give a snapshot of the issues that have been raised in submissions and public hearings before the Committee, with particular emphasis on the application of copyright law to individual artists.

The House of Representatives inquiry into the enforcement of copyright

The House of Representatives Standing Committee on Legal and Constitutional Affairs (the LACA Committee) has received submissions and heard evidence from over 30 individuals, industry groups, legal firms and government departments. A clear theme from these submissions is that the legal regime is not efficient nor effective enough in the way in which it enforces copyright laws.

Most of the submissions to the inquiry have focussed on the music, textiles, literary and computer industries. These industries are often reliant on the contributions to their products which are made by individual artists – for example: the art work on CD covers; the music on the CD itself; the text of a novel; the illustrations; computer graphics and so on. For these industries, the effect of breaches of copyright are usually represented as costs to the industry, rather than as an offence against the artistic integrity of the individual artist.

This does not mean however that the protection of copyright is not a relevant issue for individual artists. The LACA Committee has heard evidence from groups representing individual creators – such as Viscopy, the Australian Visual Arts Copyright Collecting Agency which represents traditional painters, sculptors, graphic designers, artists working in digital media, architects and video artists.

Artists are a substantial element of Australian society. A March 1997 ABS household survey found that about one third of the population were involved in cultural tasks in the previous 12 months, and that 2.2 million people were involved in a work capacity. According to the 1996 census, there were 41,363 people in Australia whose main job was in a visual arts occupation. In the 12 months to March 1997, an estimated 763,300 people had worked in the visual area, according to the ABS Survey of Work in Selected Culture/Leisure Activities.

This number will only increase in the future. The evidence given to the LACA committee suggests that the number of ‘sole creators’, or artists who produce and disseminate their own works, is on the rise. Technology is bringing art studios, recording studios, printing houses, advertising tools and the market place into people’s lounge rooms.

As technology grants greater opportunities for ‘sole creators’ and artists to produce artworks, so does the same technology make it easier for others to copy and reproduce these artworks. That is, to breach the artist’s copyright.

Unfortunately, although it is known that individual creators are the subject of copyright crimes, the current frequency, extent and economic impact of these offences have not been documented.

“[i]nfringement of the work of individual creators has generally attracted less attention than the infringement of material in which corporations are major copyright holders, although there is substantial anecdotal evidence indicating that artists and authors have found their works reproduced in electronic form, or copied, without their consent or appropriate remuneration.” [Submission by the Department of Communications Information Technology and the Arts (DOCITA)]

The LACA Committee has heard evidence from industry and advocacy groups which represent individual artists, and from small businesses which produce original artistic works, which indicates that copyright infringements do in fact occur, and that most artists find it almost impossible to enforce their rights through the legal system.

“...for the most part, our people are individual copyright owners, creative artists, or their families, of limited means. They are not corporations...So it something which comes back to the individual, where they have to defend their own rights.” Hansard, Committee Hearing Transcript Monday 6 September 1999, Ms Ward (Viscopy) page 238

The Arts Law Centre of Queensland submission to the LACA Committee looked at the situation of the ‘sole creator’ who has not assigned her or his rights to a publisher, collecting society, or other relevant body. In summary, the Arts Law Centre submission suggested that:

- for these artists, it is almost impossible to pursue someone who has committed an offence against the artist’s copyright;
- the hurdle is basically one of costs - sole creators are often unable to proceed beyond the act of sending a letter of demand; and
- the array of remedies available under the law is of little use for creators, as they can not afford to pursue litigation.

Copyright is a very live and crucial issue for indigenous artists, hence the recent launch of the Label of Authenticity. As there will be a presentation during this conference by members of the National Indigenous Arts Advocacy Association, the body which has launched the Label, there is no need now to elaborate on the particular issues for indigenous artists and copyright - it is best to leave a discussion of indigenous arts to an expert in the field. It is enough to clearly note at this point the importance of developing a copyright scheme which can apply to indigenous artists, and is sensitive to the particular issues, both cultural and artistic, faced by this section of our cultural industry.

Case study as an illustration of the general point made by the arts law centre.

Submission by “Beach Collections” to the LACA Committee

Beach Collections is a registered business in Queensland, which specialises in hand made plaster composite and timber products. The artworks produced are sold in weekend craft markets and wholesale. The business has about 300 original pieces from which authentic copies are made for sale.

Over the past three years, unauthorised copies of Beach Collections items have been made and sold at retail and craft market outlets. Beach Collections claims that “[t]he inability to enforce copyright has seen a proliferation of unauthorised copies of our product and concept throughout Australia, particularly in coastal areas”.

Beach Collections commenced legal action against a store which sold copies of Beach Collections products at a cheaper price.

Beach Collections claims that, in defiance of an undertaking given to the Supreme Court, the store continued to sell these unauthorised copies, whilst the case was on-going. The litigation resulted in an out of court settlement of \$2,000. This was after costs to Beach Collections of \$10,000 in legal fees, plus travel, purchase of unauthorised copies, and lost time. Beach Collections claims that the process did not stop the copy or the distribution of their product.

The conclusion of Beach Collections’ submission to the LACA committee is a strongly worded critique of the crime prevention value of the Copyright Act and the legal system as it currently operates:

“It is too costly to initiate and continue with litigation and the outcomes are inadequate. It would be financially prohibitive for us to pursue the people making unauthorised copies of our product. In addition, since all or (sic) partners are involved in the production, manufacture, sales and distribution of our product, it would be a tremendous burden on our business to pursue these people throughout Australia and elsewhere. From our experience, the current legislation is totally useless and the process fails to adequately resolve the situation in favour of the plaintiff. Therefore, we have no faith in the legal system to protect our business from breaches of copyright.”

This was a recurring theme throughout the majority of submissions to the LACA Committee; the costs and delays involved in pursuing an offender through the courts is prohibitive. Civil actions were depicted by industry groups, copyright agencies, individuals artists and advocacy agencies alike as difficult, costly, ineffective and unsatisfactory.

If the civil justice system is not working, theoretically, copyright owners can also turn to the criminal justice system to enforce their rights and to protect the integrity of their artwork. In light of the difficulties artists experience with the civil law system, the effectiveness of criminal law enforcement becomes an important issue.

Criminal law enforcement – Growing demands and insufficient resources

The Office of Strategic Crime Assessments has predicted an increased demand for the criminal enforcement of copyright offences in the first few years of the new millennium. As a result of changing technology and increased levels of technological skills:

- the commission of intellectual property offences will become easier and more frequent,
- their detection will become more difficult, and
- the enforcement of intellectual property rights will be harder.

These trends will result in an increase in complaints to criminal law agencies from small companies (and individual artists) whose rights are breached and who cannot afford the costs of civil proceedings. The Office of Strategic Assessments also predicts that the increased number of complaints will result in increased criticism of the priority that law enforcement gives to investigating such infringement. [Office of Strategic Crime Assessments (November 1997) *Intellectual Property Rights in Australia: An Assessment of current claims and future threats.*]

The LACA Committee has received evidence on the issue of the adequacy of criminal law enforcement of copyright as it exists at the moment– and the evidence is not encouraging.

“whilst legislative provisions regarding the enforcement of copyright provide adequate protection for copyright owners on their face, the actual enforcement of those provisions is ineffective...” [Tress Cocks & Maddox Solicitors, Submission to the LACA Committee, 1999]

As the *Copyright Act* is a Commonwealth act, the Australian Federal Police has primary responsibility for its enforcement, with State Police occasionally exercising Federal jurisdiction in order to pursue offences under the Act. The Committee heard from several submitters that the AFP are not effective in enforcing the criminal provisions in the Act.

For example, the Anti Counterfeit Action Group claims that police resources are not dedicated to criminal breaches. There is an urgent need for more police resources to allow a fast, decisive and effective resolution of breaches. Submitters to the Committee have claimed that Australia is currently in breach of the obligation under TRIPS to provide effective enforcement.

In their submission, the legal firm Tress Cocks & Maddox claimed that:

“the Federal Police and State Police exercising Federal jurisdiction do not have a sufficient grasp of the principles of the Copyright Act to provide sufficient assistance to copyright owners. Whilst the Federal Police have been helpful to our clients on the rare occasions when their resources have allowed them to help and whilst they have gone so far as to make three arrests where there have been breaches of the Trade Marks Act, they clearly lack expertise in issues arising under the Copyright Act”. [Submission to LACA Committee, 1999]

The AFP rejects the claims made to the LACA Committee that the AFP does not give full and proper consideration to requests for investigation of copyright complaints. However, the fact remains that the enforcement of copyright law is not one of the tasks at the top of the AFP’s operational priorities list.

While the Australian Federal Police (AFP) is charged with the provision of police services in relation to laws of the Commonwealth, it’s activities with respect to the various Commonwealth laws are prioritised according to outcomes agreed by the Government and by Ministerial Directions. The current Ministerial Direction, issued in February 1999, requires the AFP to prioritise illicit drug trafficking, organised crime, serious fraud against the Commonwealth, money laundering, community policing services in the ACT, the provision of security services and the investigation of special references given by the Government.

The AFP has told the LACA Committee that:

“the number of offences against [Commonwealth] laws referred to the AFP far exceeds our capacity to investigate. We must ensure that our limited resources are directed to the most deserving priorities, and the decision to accept or reject matters for investigation is fundamentally based on this precept.”

For the 11 months between July 1998 and May 1999, the AFP received over 8,250 referrals for investigation. Of those, there were 23 which related to copyright offences. The AFP was only able to take on 2 of the 23 copyright matters.

In deciding whether a matter will be accepted for investigation, the AFP will consider:

- the availability of limited resources;
- competing priorities;
- judgements about the level and extent of the criminality involved in the particular matter;
- the prospects of an investigation leading to a successful prosecution;
- the likely impact and outcome of police involvement; and
- the availability of alternative means of resolving the particular case.

The AFP is anxious to avoid the commitment of resources to investigations where the prospect of a successful outcome is problematic. Unfortunately, copyright offences often are seen to fall within this category:

“The long term view of copyright is that with emerging technologies, it is almost impossible to police.... It could be said that copyright as a trespass will become decreasingly important as technological transfer of information and virtual printing become commonplace.” *AFP written submission to the LACA Committee.*

In addition to the above mentioned barriers to mounting a criminal investigation, the AFP’s reluctance to pursue copyright infringements stems from their experience that, even if an investigation is undertaken, prosecution through the courts is difficult and often unsatisfactory. The AFP reports that it experiences evidential and legal technicalities, difficulties in discharging the criminal standard of burden of proof, and a reluctance by the courts to hand down substantial sentences.

As a result, the AFP has concluded that the appropriate avenue for enforcing copyright is through civil litigation, and not through the criminal justice system:

“...be it AFP or state police or territory police, we believe that in many instances it is more appropriate, given the commercial nature of the issues involved, for it to be dealt with on a civil basis rather than seeking criminal remedies.” Page 125 Thursday 26 August Mr Hughes AFP

Options for reform

The general theme of the submissions, both relating to criminal and civil enforcement of copyright law, is well summed up by the submission of McDonald & Associates on behalf of the Senior Officers Group of the Australian Police Ministers' Council:

“It is obvious after one has had the opportunity of considering the very substantial submissions made to this Committee throughout this inquiry, that most people are of the view that the penalties provided for against infringement under the Copyright Act are either inadequate or are inadequately enforced by the Courts, particularly with respect to the penal provisions that can apply and fines that follow.”

A useful starting point framework for an effective enforcement regime has been suggested by Stephen Fox, who is a senior government lawyer with the Intellectual Property Branch of the Attorney-General's Department. [Presentation by Stephen Fox to the WTO Workshop on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on 29 April 1998]

There are six elements in an effective IP enforcement regime – based on Australian experience and a study conducted by WIPO in 1996 of the IP enforcement regimes of the ASEAN countries:

1. active participation by intellectual property right owners;
2. focused interagency coordination between the police, prosecution authorities, customs agencies and the policy departments and elements within them;
3. training and familiarisation with the intellectual property laws and procedures for police, prosecutors, customs officials, judges and policy makers;
4. public education about intellectual property rights;
5. accessible, transparent and accountable administrative or judicial proceedings providing adequate remedies (including the need for adequate procedures for border interception); and
6. effective, treaty consistent legislation.

The submissions to LACA Committee indicated that the law and its enforcement, as they stand at the moment, are in need of reform or complete reshaping in each of the above mentioned six categories. There are numerous reform suggestions for each of these categories. As time prohibits going into each of these reforms proposals in any detail, an overview which gives an indication of the direction the various reform proposals have taken, will have to suffice.

Rules of evidence and procedure

Many of the submissions looked at changes to the rules of evidence and procedure, with some legislative changes. A brief overview of the changes canvassed:

- Reversal of the onus of proof of ownership, onto the alleged offender rather than copyright owner - addition of presumptions of ownership and subsistence of copyright into the criminal law.
- Reduce the burden of proof for criminal investigations to balance of probabilities.

- Extend the scope of the criminal provisions of the Act to non-commercial infringement.
- Introduction of statutory damages (such as exist in the USA and Canada) – plaintiff may elect to receive statutory damages set a pre-determined amount per infringing article.
- Greater utilisation of the right to allow private prosecutions – used in the UK for copyright matters, not used in Australia at the moment.
- Owners of copyright in a sacred or secret artistic work should be expressly entitled to exemplary damages and remedies appropriate to their cultural contexts.

These procedural and evidential points, while important, will not sufficiently address the problem of effective law enforcement. What has been made clear to the LACA Committee is that those involved in artistic and content adding industries demand a new point of departure for copyright law enforcement.

Criminal law enforcement

Effective criminal law enforcement is dependant upon the AFP’s capability to carry out investigations into copyright breaches. The obvious response to this dilemma is to increase funding to the AFP.

While funding the AFP so that it can carry out more and more effective investigations should always be a priority for Government, the question remains as to whether increased funds would actually result in better enforcement of copyright law. The AFP itself has suggested to the LACA Committee that increased funding is not the answer. The reality is that the degree to which increased resources to police are operationalised down to street level is always going to be subject to the operational priorities within law enforcement, within which, copyright infringements of individual’s art works is not high.

In light of this low priority given to copyright infringements, the answer may not be merely increasing funding. It may necessitate tied funding – the allocation of dedicated resources. In order to ensure that copyright breaches are pursued, particularly breaches which involve the work of one artist and are therefore not part of a high value organised crime operation, it may be necessary to specify a certain level of funds which must be directed by the AFP towards copyright law enforcement.

A new law enforcement strategy

The Committee heard submissions which suggested that copyright law enforcement could be made to work more effectively if the bodies already involved in the process were to be more collaborative. The Australian Copyright Council suggested that 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” would have a positive impact upon copyright enforcement. The Australian Copyright Council submission also gave support to a 1997 AFP proposal for 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.

The Music Industry Piracy Investigations and the Motion Picture Association both canvassed the establishment a co-ordination committee made up of law enforcement agencies and industry bodies.

Similarly, the Arts Law Centre of Queensland suggested two options: establish a funded 'enforcement agency', or allocate Commonwealth funds to be administered through the various bodies advising the arts community on these matters.

An alternative legal regime

In light of the problems with using the existing civil and criminal regimes, many reform suggestions centre around devising a non litigious approach to ensuring effective, equitable remuneration for infringement of works.

Existing schemes may be imported into the copyright enforcement environment. For example:

- the utilisation of a scheme akin to the statutory licensing arrangements which exist for collecting societies; or
- the extension of the Copyright Tribunal's powers to resolve a range of copyright enforcement disputes – eg the conference procedure used for unfair dismissal cases by the NSW Industrial Relations Commission [Arts law Centre of Australia evidence given on Tuesday 7 September 1999 page 259]

Alternatively, new technology could be used as a method of alternative dispute resolution. Overseas jurisdictions have taken the approach of setting up a 'cyber tribunal', with an online mediator for disputes involving unauthorised use of material from web sites.

A third, arguably more radical but possibly more effective option, would be to devise a new civil scheme with an individualised power of enforcement. The framework of such a scheme would broadly entail:

- granting copyright owners a right to seize goods which they believe breach copyright law,
- requiring copyright owners to provide a notice in an appropriate form that the goods have been taken to some place where the owner of the goods can then claim them back;
- incorporating a safeguard which provides threefold or tenfold damages against copyright owners who make a false seizure. Therefore, if the seized goods/artwork/reproduction are properly licensed the owners of these goods will have recourse for the inconvenience of having them wrongfully seized; and
- ensuring that the absence of a claimback, the goods would be forfeited within a certain period of time.

In addition to such a civil scheme, a new approach to copyright law enforcement could involve the creation of a special court with the jurisdiction to determine matters of copyright infringement and to grant copyright remedies. The Parliament is currently considering legislation which would establish a Federal Magistrates Court. If such a court is established, it could be granted the jurisdiction to hear copyright disputes which would give rise to damages of around \$40,000, making it somewhat equivalent to small claims jurisdiction. In this way, individual artists and small artistic companies would have some recourse to the legal system at substantially less expense than under the current system, while more complex and commercially sensitive copyright disputes would remain in the jurisdiction of Supreme Courts and the Federal Court.

Conclusion

The very clear theme which emerges from the Legal And Constitutional Affairs Committee hearings and submissions is that artists and industry groups are not happy with the copyright system as it currently exists. There is a clear demand for a new point of departure for copyright law enforcement.

Copyright should be an important tool for artists to safeguard their artistic integrity and their incomes. On the international scene, Australia is all too ready to slam other countries such as China for their failure to enforce copyright. Unfortunately, when subjected to scrutiny, we find that Australia does not stand up too well either when it comes to enforcing our copyright legislation.

In both criminal and civil law actions, the issues faced by artists are cost, difficulties of proof, rules of evidence, and the general attitude towards copyright infringements as being more a matter to be solved between individuals than one for criminal law enforcement agencies or the courts.

When it comes to copyright enforcement, rhetoric and reality are at odds. This situation should not be allowed to continue. In order to ensure that artists are not the victims of copyright crime, and are not subject to having their artistic integrity violated and their commercial income jeopardise, Australia must develop a copyright enforcement regime which is expedient, inexpensive and, most importantly, effective.