



Australian Government

Australian Institute of Criminology



AUSTRALIAN HIGH TECH CRIME CENTRE

HIGH TECH CRIME BRIEF

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Copyright offences

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COPYRIGHT

This brief looks at high tech copyright offending. Information and communications technologies (ICT) make it increasingly easy to copy, swap and trade in copyrighted material such as software, and audio and video content in digital format. It is beyond the scope of this paper to consider the additional problem of the use of the internet to create a worldwide marketplace for the exchange of counterfeited goods.

The Copyright Act 1968

The Australian Government is responsible for copyright, patents of inventions, designs and trademarks (s 51(xviii), *Australian Constitution*). The *Copyright Act 1968* (Cwlth) provides civil and criminal sanctions to protect copyright. Copyright may exist at a number of levels, for example, copyright in a song may be held separately for the lyrics, the music, or a particular recording (McRobert 2001). Exclusive rights may be held in relation to the use of material including moral, transport, rendering, derivative and back-up rights. These exclusive rights may, by assignment or licence, be limited in various ways, such as by region or time, or by way of prepaid subscriptions, site-specific licences, or sponsor-funded licences (Grabosky, Smith & Dempsey 2001).

There are other forms of intellectual property control that actually promote exchange:

- open source or public domain software: the source code on which the software is based is freely available so that users may access, change and redistribute it;
- freeware: copyrighted software is made available for free. The author retains control

over changes to the software and redistribution of it;

- shareware: the software is copyrighted but made available directly by authors on an honour system where a small fee for use is paid.

The *Copyright Act 1968* seeks to balance the interests of owners of intellectual property with the public interest in accessing copyrighted material. It uses a two-staged test of whether a substantial part of a work has been reproduced and whether or not a public interest defence (such as fair dealing) applies. It is recognised that not all infringements can be prosecuted and that law enforcement responses must be appropriate to the circumstances, with adequate means of supervision and review. In addition, the use of public resources to enforce copyright should be proportionate to the nature of the issue and other policing priorities (Attorney-General's Department 2003).

The size of the problem

It is difficult to estimate the extent and cost of copyright offending (Smith & Urbas 2003). An industry report by the Business Software Alliance for Australia in 2003 shows a rate of software piracy of 31 per cent, costing an estimated \$341 million (Business Software Alliance 2004).

The quantification of loss suffered by copyright holders through internet based copying is complicated by research that suggests that music downloads have a negligible effect on album sales (Oberholzer & Strumpf 2004).

CIVIL OR CRIMINAL PROCEEDINGS?

The conduct of a civil or criminal investigation is complex, time-consuming and expensive. Court action is usually reserved for persons or companies that are major offenders or who are at the core of a network of offenders. Breach of copyright is a criminal offence if a person makes, sells, trades or imports an article that infringes copyright in circumstances where they knew or ought to have known of that infringement (s 132(1) *Copyright Act 1968*). It is an offence to simply distribute an infringing item for the purpose of trade, or to an extent that 'affects prejudicially the owner of the copyright' (s 132(2) *Copyright Act 1968*).

Public or private law enforcement?

Federal police as well as state and territory police may investigate and commence prosecutions for breaches of the federal copyright law. Private investigators working on behalf of copyright owners, such as Music Industry Piracy Investigations (MIPI) may be involved in investigations. The blending of private and public law enforcement efforts mirrors developments elsewhere in the privatisation of policing and may raise concerns regarding possible effects on the implementation of public policy objectives.

In cases referred to it, the DPP decides the nature and extent of any charges and the manner of presenting the prosecution case. Irrespective of who is involved in an investigation, the Commonwealth Director of Public Prosecutions (DPP) ultimately has the power to take over the prosecution of federal offences. In the 14-year period from 1989–90 to 2002–03 the DPP prosecuted 143 copyright cases and 138 trademarks

CASE STUDY: TRAN, NG & LE

Tran and Ng were students at the University of Technology, Sydney, who developed a free music download site using MP3 technology. Le subsequently assisted in making copyrighted material available on the site. The site was said to have received some seven million hits. The matter was first investigated by MIPI and a brief was handed to the AFP before charges were prosecuted by the DPP in the Central Local Court in Sydney in December 2003. As no money or trade was involved, the charges were brought under s 132(2)(b) for knowingly distributing copyrighted work, to an extent that affects prejudicially the owner of copyright, for a purpose other than trade. Ng and Le were sentenced to perform 200 hours community service. Tran was assessed as unsuitable for a community service order and was fined \$5000. Tran and Ng each faced an additional charge reflecting their longer-term involvement and were convicted and received prison sentences of 18 months, suspended for three years.

An application on behalf of MIPI to be represented in the hearing was refused. MIPI advocated a full-time custodial penalty. It also sought an order for costs, which the DPP declined to put to the court. MIPI had estimated the loss caused to copyright holders by the defendants to be in the vicinity of \$200 million, whereas the AFP gave an estimated loss of \$60 million. On this point, the court found that the loss suffered was 'substantial' but could not be quantified with precision.

cases (Smith & Urbas 2003). The DPP prosecutes copyright offences summarily, as allowed by the case of *Ly v Jenkins* [2001] FCA 1640.

Investigation issues

Formerly distinct non-digital copyrighted formats have been converged through digitalisation and this has strained the legal framework for copyright protection. The *Copyright Act 1968* was updated by the *Copyright Amendment (Digital Agenda) Act 2000* (Cwlth). However, as Grabosky et al. (2001) indicate, there has been a cycle of protection followed by circumvention of each new protective measure. The protective measures include technological devices to limit access and jurisdictional enlargement to capture infringing activity. Encryption and steganography have emerged as important technological tools in the fight against piracy. Encryption seeks to make data inaccessible to those who have not paid for the appropriate key to access it. Steganography makes it possible to trace the origin of data on the basis of an embedded digital signature in a digital product.

The investigation of online copyright offences raises evidentiary issues that are common to the investigation of high tech crime generally, such as the identification of offenders online. Once an offender can be identified, it may be difficult to determine their level of involvement given that the internet provides the means to do away with intermediaries using peer-to-peer transactions.

Proof of ownership of copyright

Besides technical issues of proof, the nature of ICT complicates the prosecution of copyright cases. Particular problems are the proof of ownership of copyright and proof that a disputed version is not authorised.

The digitalisation of media has converged a diverse range of interests that were previously kept distinct by the physical form of the product. Digitalised media is also available instantaneously across multiple jurisdictions and proof that an item is not authorised requires the problematical proof of a negative proposition.

The possible existence of various licences in different countries and the evidential rules covering the proof of foreign business records make it difficult to prove some copyright offences. Smith and Urbas (2003) highlight this problem of proof of foreign ownership of copyright, citing the parallel importation case of *Holder v Searle* [1998] FCA 1775 (involving Twentieth Century Fox, Warner Brothers and Metro Goldwyn Mayer Inc).

The *Copyright Amendment (Parallel Importation) Act 2003* (Cwlth) has created a rebuttable evidential presumption in relation to labels, marks and government certificates of copyright registration, making them prima facie evidence of the facts they assert. Despite this, the proof of foreign copyright ownership is likely to remain problematic.

MIPI was not consulted in the preparation of this brief and MIPI endorsement of the views expressed is not claimed.

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Further reading

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Intellectual Property Australia web site: <http://www.ipaustralia.gov.au/>

All web sites accessed on 30 November 2004.