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Intellectual property crime and enforcement in Australia

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Foreword

The importation of counterfeit goods such as clothing, and the domestic manufacture of goods that infringe copyright, such as films, music, games and software, seem to be the main forms of IP crime in Australia. Although international surveys suggest that Australia experiences relatively low levels of piracy and counterfeiting compared with other countries, it seems that the purchase of counterfeit goods is not uncommon across Australia, with one study finding that nearly one in five households had knowingly purchased pirated computer or video goods.

Industry bodies within Australia and overseas have argued that IP crime is increasing significantly and several overseas studies found that transnational and organised crime networks are increasingly involved in IP crime. In Australia, there are some indications that professional criminals may engage in IP-related crime as a relatively low risk means of generating income. However, it is impossible to verify such claims, as any attempt to quantify the extent of IP crime and its impact is currently hampered by the lack of transparency or consistency in estimate methodologies and data sources.

Official data indicate that there are very few prosecutions of IP crime at a federal level and this may be in part related to challenges associated with detection. There may also be a considerable level of under-reporting; the report underlines how victims with limited resources, such as small business or individual artists, are unlikely to pursue either civil or criminal remedies.

The conclusions in the report relating to the nature and extent of IP crime are, at best, tentative. Industry estimates are not in themselves sufficient. A national monitoring program is recommended that is informed and underpinned by empirical and replicable research and intelligence-based collections. An overarching theme in the report is the need to improve cooperation across government and between the public and private sectors to increase detection of domestic infringements. This is more likely to occur if there are common and agreed definitions of IP crime. More specific suggestions relate to the development of good practice guidelines to improve investigations, procedural and legislative reforms, and raising public awareness.

Judy Putt
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Acronyms and abbreviations

ABS	Australian Bureau of Statistics
ACAG	Anti-Counterfeiting Action Group
ACC	Australian Crime Commission
ACS	Australian Customs Service
AFACT	Australian Federation Against Copyright Theft
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIC	Australian Institute of Criminology
AICO	Adult Industry Copyright Office
Airtowel	Airtowel® Hygiene Systems
Allen	The Allens Consulting Group
ANCO	Australian National Classification of Offences
ARIA	Australian Recording Industry Association
Aristocrat	Aristocrat Technologies Australia
ASOC	Australian Standard Offence Classification
ASTRA	Australian Subscription Television and Radio Association
AVSDA	Australian Visual Software Distributors Association
BSA	Business Software Alliance
BT	BitTorrent, a file-sharing communications protocol
CD	Compact disc
CD-R	A write-once read-only medium developed from the CD
CD-RW	A CD that can be rewritten
CDPP	Commonwealth Director of Public Prosecutions
Corrs	Corrs Chambers Westgarth
CTM	Certification trade mark
DVD	Digital versatile disc
DRM	Digital rights management
IEAA	Interactive Entertainment Association of Australia
IFPI	International Federation of the Phonographic Industry

IP	Intellectual property
MIPI	Music Industry Piracy Investigations Pty Ltd
MPA	Motion Picture Association
P2P	Peer-to-peer
PBR	Plant breeder's rights
TMIS	Trademark Investigation Services

Executive summary

The Australian Institute of Criminology (AIC) was contracted by the Australian Government Attorney-General's Department (AGD) and IP Australia to undertake a review of the:

- nature and extent of intellectual property (IP) crime in Australia, including whether there are links to organised crime
- economic impact of such crime, including on regional communities and Indigenous Australians, and the methodologies employed to estimate this impact
- effectiveness of current responses, including legislation, law enforcement, and criminal prosecution and civil remedies.

The terms of reference for the inquiry are set out in Appendix A. The research project involved a literature review, legislation/case law review, and consultations with Australian Government stakeholders, and the main industry groups and legal representatives concerned with IP crime in Australia. These included representatives of the film, music, software, satellite broadcast and technology industries.

The final report includes information available at 1 September 2007, although the primary research, including all interviews with IP industry bodies, was undertaken between May and October 2006. Subsequent legislative changes and an increased allocation of Australian Government funding for IP enforcement may have had an impact on the accuracy of statements made in 2006.

Nature of the crime

Based on the available evidence, the piracy and counterfeiting problem in Australia comprises two substantial elements: the cross-border importation of counterfeit goods such as clothing, luxury goods and footwear; and the domestic manufacture of goods that infringe copyright such as films, music, games and software.

Counterfeit goods are typically imported into Australia on a separate component basis. For example, counterfeit shoes may be imported in one shipment, while items bearing the counterfeit trade mark may be in a separate shipment, with the trade mark being affixed to the shoes in Australia. Using this approach, the risk of border seizure is minimised. Typically, counterfeit goods originate from the low production cost economies of South-East Asia.

Historically, pirated films, music, games and software were imported into Australia. While the illicit importation of these items into Australia continues, developments in digital reproduction and distribution technologies have made it less risky and less expensive for pirates to manufacture infringing copies of films and other content in Australia, rather than import them. Often the 'masters' for film, music and other content are downloaded from

international websites. Copyright-infringing material imported into Australia is often very difficult to identify, because sometimes this material is an illicit factory 'overrun', and, as a result, is essentially identical to the authorised item.

Those involved in IP crime range from members of the general public to more professionally organised networks. The seemingly widespread purchasing of counterfeit goods and the illicit copying of IP material such as digital versatile discs (DVDs) would suggest a high degree of ambivalence amongst the public about the seriousness of the crime. There is also a lack of agreement about the extent to which IP crime is a matter for law enforcement agencies to police, as opposed to IP owners who are able to pursue remedies through civil litigation. As a high-volume, low-value crime, the impact of individual violations is low, even though the cumulative impact might be extensive.

Several overseas studies have reported that there is growing evidence that transnational and organised crime groups are increasingly involved in IP crime, some of it to finance terrorist activities. There is a substantial quantity of international literature (including Organisation for Economic Co-operation and Development, United States Department of Justice, Federal Bureau of Investigation and Interpol reports) asserting links between IP crime and organised criminal networks, and a recent Australian Crime Commission (ACC) intelligence assessment on the Australian situation found some evidence of network members engaging in IP-related crime, along with other illicit activity, as a relatively low-risk means of generating income. Some IP rights holders highlighted particular cases of professional criminals being involved in copyright infringement. It is likely that such activities will have an increasing impact on Australia in the years ahead.

Extent of the crime

Based on international research, most sectors in Australia experience relatively low levels of piracy and counterfeiting, with the exception of online pirated television shows. The International Federation of the Phonographic Industry (IFPI 2006c) reported that the sound recording piracy rate is less than 10 percent of the total market in Australia. Along with 15 other countries, Australia is in the lowest range of the 73 countries and regional areas examined by IFPI. An international study of losses from piracy and counterfeiting for the film industry estimated that the film piracy rate in Australia was 11 percent. An annual global software study estimated that Australia's software piracy rate was 29 percent in 2006, which placed it among the 20 countries with the lowest piracy rates. Australians are the leading downloaders of pirated television programs on a per capita basis, with a rate twice as high as the United States (Envisional 2004).

Even though Australia may experience relatively low levels of piracy and counterfeiting of most forms of IP within a global context, industry bodies argue that rates are increasing significantly. The Australian Federation Against Copyright Theft (AFACT 2006a) indicated

that the film piracy rate has nearly trebled since 2000. A law firm representing companies with valuable trade marks highlighted how their trade mark practice had increased by about 650 percent since 2000, and referred to statistics that showed a trebling in the number of seizures by private investigators and Australian Customs Service (ACS) from 2003 to 2004.

While there is no suggestion that piracy and counterfeiting is non-existent in Australia, there is a lack of verifiable empirical evidence on the extent of the problem. The methodologies employed in international studies – and in domestic research such as the Allen Consulting Group (Allen, 2003) study of counterfeiting of business software, computer and video games – include surveys of consumers and known victims. However, there are no published details on the representativeness of samples, or of research instruments and measures. A further complicating factor is the reliance on confidential information held by industry bodies, which is not available in the public domain, and was not provided as part of the present consultations.

Official data are also very limited. Statistics on infringing products detected by ACS are kept, but are only available on a confidential basis. They show an increase in enforcement activity in recent years involving goods subject to piracy and counterfeiting. Australian Federal Police (AFP) annual reports indicate that IP prosecutions are a very small proportion of their total work – in 2003–04 there were 22 IP crime investigations out of a total of 2,089 criminal investigations. There were 23 matters in 2005–06 and 16 in 2006–07.

Annual statistics on Commonwealth Director of Public Prosecutions (CDPP) prosecutions indicate that the number of copyright and trade mark actions have increased, from 21 summary charges since 2002–03, to 50 summary charges in 2003–04, 41 summary and two indictment in 2004–05, and 60 summary and three indictment in 2006–07. The number fell in 2005–06 to 30 summary charges. State and territory police and prosecution agencies also deal with breaches of copyright and trade mark legislation on behalf of the Australian Government, and these statistics are not included in CDPP reports.

Impact of intellectual property crime

The negative impact of IP crime includes adverse effects on business, the national economy, and consumer health and safety. For example, the software industry has argued that a 10-point drop in piracy globally could create 2.4 million jobs, \$400b in economic growth and \$67b in additional taxes.

Estimates of the loss to various sectors in Australia include the following:

- \$233m per year due to the piracy and counterfeiting of films (LEK 2006)
- \$677m of lost sales, in 2002, in the Australian toy, software and video games industry. This includes \$445.7m lost sales in the business software industry (Allen 2003)

- \$515m in absolute losses in software piracy in 2006 (BSA & IDC 2006)
- \$45m per year as the cost to Australian subscription television industry (ASTRA 2006a)
- \$300m per year in breaches of trade mark as losses to the textile, clothing and footwear industry (ACAG 2000).

While it is recognised that piracy and counterfeiting are serious issues affecting IP rights owners and the Australian economy as a whole, the impact on legitimate business cannot be quantified reliably nor is it calculated consistently by industry-instigated research across sectors. The methods used to cost infringement have included estimates of profits made by infringers, the value of items stolen, the retail value of lost sales, the wholesale value of lost sales and the discounted value of lost sales. Any one or combination of these methods may then be used to estimate the extent of IP crime.

There are particular sectors in the community that may be disproportionately affected by IP rights infringement. Individuals and small businesses may be unable to afford specialist IP advice and legal services to pursue civil remedies, which can have an adverse effect on their viability in competitive markets. Indigenous Australians have experienced unauthorised reproductions of their artwork, and also have cultural interests in traditional symbols and representations that may be difficult to protect using existing conventional civil IP enforcement mechanisms.

Current responses

Detecting infringements involves a wide range of strategies that may be used by enforcement agencies, industry bodies and private investigators. They include the use of surveillance, hotlines, monitoring the internet, customer complaints and notifications to the ACS. As it appears that a significant proportion of pirated and counterfeit material is produced locally rather than imported, border control and related Commonwealth law enforcement activity is unlikely to detect this category of infringements. Detection of domestic infringement requires cooperation between Australian Government and state/territory agencies, and also between the public and private sectors.

Regulatory mechanisms in place include the registration of some IP rights (through the Patent Office, the Trade Marks Office, the Plant Breeder's Rights Office and the Registrar of Designs in IP Australia); the use of ©, TM and ® symbols; and ACS notices of objection procedures (for copyright and trade marks). Key Commonwealth legislation containing infringement offences includes the *Copyright Act 1968* and the *Trade Marks Act 1995*. Recent amendments to the *Criminal Code Act 1995* that expand the scope of computer-related offences may also apply to digital infringement of IP rights. Other legislation that may have application is commercial dealings legislation (*Trade Practices Act 1974* and similar state and territory fair trading legislation) and general criminal laws.

Piracy and counterfeiting may be dealt with through either criminal or civil litigation, or both. Civil matters are typically commenced in the Federal Court, although some industry enforcement units have pursued matters through district or local/magistrates courts. The Federal Magistrates Court has jurisdiction to hear civil copyright infringement matters but not trade mark counterfeiting cases or criminal copyright cases. Overall, representatives of key industries indicated that they view civil proceedings as time-consuming and costly, with losses frequently not recovered even when proceedings are successful. This means that individuals and small businesses may be reluctant to pursue civil remedies even where they have taken advantage of available registration regimes for their IP.

IP owners may also report matters to the AFP or state/territory police, as well as lodge notices of objection with the ACS on the grounds that goods being imported infringe their copyright or registered trade marks. Although no statistics were provided by industry bodies on their rates of reporting to different law enforcement agencies, some representatives perceived the AFP and the CDPP as having little interest in IP crime and as being slow in their responses.

Criminal prosecutions for summary or strict liability offences under the *Copyright Act 1968* may be brought in the Federal Court or in other courts of competent jurisdiction, while offences under the *Trade Marks Act 1995* are typically commenced in the lower (state and territory) courts.

The annual statistics produced by the AFP and CDPP indicate that very few IP crimes are pursued at a federal level. No official statistics are available on charges laid or the prosecution of IP infringements at a state and territory level, principally because the recorded crime categories that relate to IP offences are not included in published statistics.

Less well-resourced victims of IP rights infringement tend not to pursue either civil or criminal remedies. These include individual creators/artists (including Indigenous creators/artists), small companies and sole traders, and unincorporated businesses and associations.

Future directions

To improve monitoring and understanding of IP crime and its impact, and the efficacy of current responses, the following are recommended:

- Uniform and agreed definitions of crimes need to be developed among key stakeholders, so that they can form the basis of an ongoing monitoring program.
- A national monitoring program should be developed that would establish a centralised process of coordinating information, involving intelligence-based collections, official statistics from government agencies, industry data, international research and any commissioned survey work.

- A research agenda needs to be developed and reviewed annually, to complement and inform the monitoring of IP crime issues. Key topics might include:
 - surveys of consumers to provide estimates of the extent of IP crime, and potential changes in infringement practices by the public
 - international reviews of enforcement activities in other areas
 - research on the prosecution and sentencing of IP crime, based on administrative records, and in-depth case and transcript analysis
 - econometric modelling to improve costing of impact across sectors
 - specific studies on the impact of IP crime on particular regional communities and specific groups including Indigenous Australians, to identify effective means to reduce and prevent such crime.

To improve responses to IP crime, the following could be pursued:

- educational initiatives to raise public awareness of IP crime and its impact, and more targeted approaches to promote good practice amongst key stakeholder groups responsible for civil or criminal responses to reported infringements
- an ongoing intelligence-based collection on IP crime, with a focus on organised criminal links
- the development of good practice guidelines for the investigation of IP crime, that include cooperation and communication between federal and state/territory law enforcement agencies
- legislative amendments to clarify and expand case referral provisions that apply to the Federal Magistrates Court and the Federal Court of Australia
- provisions that enable the Federal Magistrates Court to hear trade mark cases and criminal copyright cases as well as civil copyright cases
- amendments to the *Copyright Act 1968* to allow appeals, in copyright cases, from local or magistrates courts to district courts.

Overview of key issues

In Australia, there is a lack of reliable data on the extent to which crime involving intellectual property (IP) infringement exists. This lack of data has been identified in a number of public inquiries into copyright and trade mark infringement and enforcement in Australia (for example, HRSC/LCA 2000; IPCRC 2000). The purpose of the current research project was to collate available information on IP crime in Australia, and determine from existing research and through consultations:

- the economic impact on business of IP crime
- links to organised crime
- current public/consumer perceptions of IP crime
- public law enforcement responses to IP crime
- possible future directions.

Details of the methodology are provided in Appendix A.

The size of the problem

Piracy and counterfeiting are serious international issues and many countries including Australia devote significant resources to combatting them. The increase in these issues arises because IP has gained importance in this digital environment as, increasingly, business assets are reflected in intellectual as opposed to physical property (WIPO 2002: 20). Alternatively, goods and services with an IP component are increasingly important to the world economy, and IP rights infringement is a threat to these goods and services. In 2002, 'core' copyright industries accounted for six percent of the US GDP (US\$626.6b) and employed four percent of workers (5.48 million workers) and achieved foreign sales and exports estimated at US\$89.26b (Siwek 2004). Global entertainment spending will reach \$1.8t in 2010, fuelled by the spread of broadband and wireless technology (Keating 2006).

Piracy and counterfeiting include both domestically produced and imported infringing items (see Appendix B for a discussion on terminology). Industry data suggest piracy in Australia is at a low level by world standards. For example, IFPI report that the sound recording piracy rate is less than 10 percent in Australia and Australia is one of 16 countries in the IFPI lowest band range, compared with 57 countries/regional areas with piracy rates higher than 10 percent (IFPI 2005: 4).

It is likely that in recent years the base level of piracy may have increased as a result of the widespread availability to pirates and accessibility of inexpensive digital copying technology. With the recent increase in digital reproduction technology there is a perception that piracy and counterfeiting are becoming an increasingly 'home grown' problem. At interview, Corrs noted that some IP rights owners have argued that infringing items are being imported into

Australia in components, so as to minimise the risk of border interception, and are then being compiled in Australia to be sold locally.

A variety of different views on the nature of the IP crime problem have been expressed in recent times and was expressed through the consultation process. These include:

- the belief that piracy and counterfeiting represent a problem requiring law enforcement and prosecution activity
- the lack of reliable and valid data on the extent and quantification of IP to inform policy development.

The perceived seriousness of the crime

Views have occasionally been expressed that IP rights infringement is a 'victimless crime', being a form of behaviour that is 'technically' illegal but does not violate or threaten the rights of any individuals or companies. Neither Australian government nor IP rights owners accept such a view, and have responded with educational and media campaigns that seek to explain why piracy is not a victimless crime and should not be viewed as such by the community.

A community attitudes survey on piracy in 2005 found 41 percent respondents said they would buy counterfeit games if offered a 75 percent discount, and an additional 11 percent would acquire a game if it were free (Allen 2003: 32). An Australian Toy Association survey in 2003 found survey respondents categorised the harm caused by counterfeiting on toy companies as 'not at all' (26%) or 'minor' (30%), and three percent of households acquired toys that they believed or suspected to have been counterfeit (Allen 2003: 20). Independent research commissioned by AFACT and the film and TV industry into the attitudes and behaviour of the 23 percent of Australians estimated to be involved in film piracy found that while 92 percent of Australians understood that piracy is a crime, they did not:

- understand the consequences of their actions on other Australians and creative industries
- know what actions were permitted under copyright laws
- consider copyright theft to be morally wrong (AFACT 2006b).

Similar views on the perception of piracy and counterfeiting as a victimless crime have been expressed internationally. For example, a US survey found that 14 percent of respondents thought illegally copying a software program was a 'serious crime', compared with 30 percent 'who felt the same about driving at 40 MPH in a 25 MPH zone' (Harbaugh & Khemka 2002: 6). Teenagers' piracy attitudes have been identified as, 'They see it, it's free, they take it ... They see no problem with it'. Baby boomers are less attracted to

downloading (Associated Press 2000). Music downloading was not viewed as stealing by 53 percent of US internet users. Similar results have been found for compact disc (CD) burning (King 2000).

News reports on DVD piracy have highlighted the involvement of 'criminal gangs, drug dealers, people smugglers, paedophile rings and even terrorists ... it is an easy way for gangs to raise funds for their other criminal activities. Gangs can earn 10 euros (£6.65) for each euro invested in piracy, and a kilogram (35 ounces) of pirate DVDs is worth more than a kilogram of cannabis resin ...' (BBC News 2004). The OECD wrote:

Often brushed aside as a victimless crime, evidence collected thus far suggest that the effects of counterfeiting and piracy are becoming more far-ranging. Traditionally, consumers have been portrayed as beneficiaries of counterfeiting and piracy, as they pay less for an acceptable, if not identical, product. This, however, only applies to consumers who knowingly buy infringing products and who thereby accept any accompanying risks. A large number of consumers are unknowingly paying at or near full price for falsely branded products that are substandard, and sometimes dangerous (OECD 2006: par 8).

In response to the problem of piracy and counterfeiting, and these community attitudes, there have been a number of educational campaigns on piracy and counterfeiting in recent years:

- Crime Stoppers and the AFP launched a national crime prevention campaign to tackle the growing incidence of computer and video game piracy in Australia in 2005.
- In September 2006 AFACT announced its 'Copyright or Copywrong' public awareness and education initiative.
- The National Copyright Unit of the Copyright Advisory Group of Australian Schools and TAFEs (NCU) are developing an awareness program specifically for school children aged between eight and 12 (AFACT 2006b).

Transnational and organised crime

International reports provide growing evidence of the transnational and organised criminal nature of IP crime. Interpol, for example, recognises 'counterfeiting [as] a fully fledged criminal activity ... not peripheral to other criminal activities but at the very heart of them ... the counterfeiting of currency, travel documents and administrative documents facilitates national and international crime, and is a matter of great concern for States' (Interpol 2006: 1). In the *2005 national gang threat assessment* conducted by the National Alliance of Gang Investigators Associations in the United States, it was reported that gangs are becoming more involved in the pirating of movies and music via the internet. It was argued that this

lucrative criminal industry does not require a great deal of technical equipment or knowledge, and that gangs can allegedly make more money copying films than selling drugs (National Alliance of Gang Investigators Associations 2005: 4).

The OECD has also reported that organised crime can be involved when significant financial and organisational capability is required for the manufacturing and distribution of the goods (OECD 2006: par 16). The OECD's latest report of its project on counterfeiting and piracy indicated that 'criminal networks and organised crime are playing a major role in counterfeiting and piracy operations; they are attracted to the relatively high profits to be made and the relatively light penalties that could be applied if their operations were detected' (OECD 2007: 9). The report noted in particular that:

The groups involved in counterfeiting and piracy include mafias in Europe and the Americas and Asian 'triads', which are also involved in heroin trafficking, prostitution, gambling, extortion, money laundering and human trafficking (OECD 2007: 12).

The extent of organised criminal activity was illustrated in a major law enforcement operation in Spain in October 2005 which involved 75 Chinese nationals who were using 'the profits from optical disc piracy to fund other activities, such as drug trafficking' (Interpol 2006: 2). In examining the extent of organised crime in counterfeiting, a number of key features have been identified:

- a move from small-scale activity in the 1990s to highly organised networks
- the large scale of the costly modern industrial plants used
- the financial flows generated
- the highly structured nature of the businesses
- the flexible and reactive organisational structures from manufacturing to sales
- the extent to which the lawful economy is misused for the purposes of the underground economy (Union des Fabricants 2003: 6).

The extent to which organised crime is involved in IP infringement in Australia is difficult to determine. At present the main evidence is limited to a relatively small number of specific cases. A recent ACC intelligence assessment found some evidence of organised criminal involvement in IP crime. Along with other illicit activity, it seems IP-related crime is being committed as a relatively low risk means of generating income. In addition, in the ACC's submission to the Parliamentary Joint Committee on the Australian Crime Commission's inquiry into *The future impact of serious and organised crime on Australian society*, it was recognised that:

While continuing to maintain a strong presence in traditional illicit markets, organised criminal groups will remain significant facilitators of a broad range of criminal activities in Australia. These include crime types as diverse as

high-tech/computer crime, intellectual property crime and environmental crime. Organised criminal groups will expand their influence by increasingly exploiting opportunities and vulnerabilities presenting in the mainstream economy (ACC 2007: 7)

The submission went on to note that the drivers associated with this likely trend include the use of high-technology devices which can be used to facilitate organised criminal activities and the fact that organised crime groups now operate widely across jurisdictional borders. The submission noted:

Increased geographic flexibility has allowed organised crime to exploit differences in international legislative and regulatory frameworks and criminal penalties to obtain greater degrees of protection from law enforcement and to increase the potential for the generation of criminal profits (ACC 2007: 10).

However, during consultations, stakeholders were generally uncertain as to the extent of organised crime involvement occurring in Australia. As specific examples:

- AFACT reported that links between organised crime and film piracy were first uncovered following a raid on Malaysia-linked pirates in Sydney in 2002.
- The Australian Subscription Television and Radio Association (ASTRA) referred to several cases involving pirates who were involved in other criminal activity such as prostitution and drugs possession.
- Status Investigations and Security Pty Ltd referred to a matter that indicated organised links between IP offences and importation of prohibited weapons.
- Trademark Investigation Services (TMIS) argued that 'Recent Police cases suggest such links'. They pointed out that 'To examine high quality goods and packaging it is obvious that a single person could not set up the productions, packaging, export, import, wholesale, etc. alone. There is a network or chain where each party along the way is a part of the ongoing conspiracy to manufacture, package and sell the goods for profits they could not otherwise make from those goods if they were plain, unbranded goods'

There is some international literature asserting links between piracy, counterfeiting and terrorism (IFPI 2002b, 2006b). Corrs Chambers Westgarth (Corrs) offered some views on this matter:

There is an alarming and increasing body of evidence that shows that counterfeiting is commonly used to finance organised crime and terrorism. It is also thought that counterfeiting has become attractive to organised criminals and terrorists as a direct result of the commonly held view that it is a 'victimless crime', and that will not be pursued by police. We have already supplied to the Trade Marks Office and to the AFP copies of three recent reports by the International Anti-Counterfeiting Coalition (based in the United States of

America) and by the Union des Fabricants (based in France), two of which were published in the last 12 months or so, dealing specifically with the links between organised crime/terrorism and counterfeiting. The reports show that Al Qaeda, Hezbollah, Hamas, the IRA, Chinese triads and the Italian, Japanese and Russian Mafia have all been linked to counterfeiting. It appears likely that at least some of the profit made in Australia from counterfeits is channelled to groups like these overseas (Corrs 2006: 3).

The OECD's report similarly referred to a disturbing relationship between counterfeiting and piracy with terrorist financing. Interpol, for example, reported that IP crime was becoming the preferred method of financing for a number of terrorist groups. The links were said to take two basic forms:

- direct involvement – where the terrorist group is implicated in the production or sale of counterfeit goods and remits a significant portion of those funds for the activities of the group. Terrorist organisations with direct involvement include groups which resemble or behave like organised crime groups.
- indirect involvement – where sympathisers involved in IP crime provide financial support to terrorist groups via third parties (OECD 2007: 13).

In view of this evidence, it appears that transnational and organised crime is increasingly becoming involved in IP crime, some of it to finance terrorist activities. It is likely that such activities will have an impact on Australia in the years ahead. In this regard, it is of interest to note that in the 2007 Australian federal budget, the AFP was provided with additional funding of \$8.3m over two years to strengthen its capability to pursue serious and complex IP crime, particularly where organised or transnational criminal elements are involved (AGD 2007).

Coordinated transnational responses are also required. For example, at the *Third global congress on combating counterfeiting and piracy*, held in Geneva in January 2007, it was recommended amongst other suggestions that:

- the exchange of intelligence at the international and regional levels be promoted to respond to the increasingly sophisticated criminal networks driving counterfeiting and piracy
- options for improvement in international legal framework systems for sanctions against IP crimes be explored, either separately or in connection with other international instruments, e.g. on organised crime in general (World Intellectual Property Organization et al. 2007).

Initiatives such as these will help to reduce the growing incidence of organised crime groups engaging in IP-related crime across the globe.

Economic impact

IP rights infringement concerns content owners, law enforcement authorities and society at large because it results in negative business, legal and social impacts (Grabosky, Smith & Dempsey 2001). The OECD reported that:

The effects of counterfeiting and piracy on economies and society as a whole are far greater than initially thought. The scope is broad; infringing products are no longer limited to falsely branded items such as fashion clothes, luxury watches and designer sunglasses, but nowadays include a growing number of common food, pharmaceutical, chemical, electronic and household products. In addition to the economic effects on holders of intellectual property rights, such illicit practices increasingly pose threats to the health and safety of consumers. Moreover, the production of counterfeit and pirated goods has also become more sophisticated, with organised criminal groups playing an increasingly important role.

Although the magnitude of infringements is impossible to measure with precision, there are indications of pronounced growth. Seizures by ACS officials are rising, reflecting not only improved enforcement techniques, but also a rising volume of international trade in infringing products. Moreover, it appears that fake products, which have traditionally been sold largely on open markets, are finding their way at an increasing pace into legitimate distribution systems, and thus onto the shelves of established shops. Finally, the growth in the Internet as a platform for selling products has provided a new outlet that counterfeiters and pirates have been quick to exploit (OECD 2006: pars 6–7).

The following are some of the negative economic impacts of piracy and counterfeiting:

- reduced sales of goods and services with an IP component, as legitimate items are forced to compete with lower-priced pirated copies
- reduced rates of return available to IP rights holders, thereby reducing incentives for innovation and further investment in the production of goods and services with an IP component (OECD 2006)
- long-term effects, including reduced economic growth, reduced taxation collections, reduced employment levels in industries focused on the production of goods and services with an IP component (OECD 2006)
- increased national trade and balance of payments deficits, especially if the IP industries detrimentally affected by piracy are export industries (OECD 2006)
- reduced direct investment in creative industries – pirates ‘do not invest in recorded music’ (Rosen 2002)

- reduced ability of companies to engage in e-commerce (WIPO 2002: 33)
- impediments to developing countries who seek to use IP to achieve economic growth. Omkar Goswani, Chief Economist of the Confederation of Indian Industry and moderator of the 2003 East Asia Economic Summit described piracy as a ‘cancer’ strangling developing countries (East Asia Economic Summit 2003).

Counterfeiting also results in additional costs for companies whose goods are counterfeited (Allen 2003: 6–7) which include:

- reduced sales as they are forced to compete directly against counterfeiters for market share
- significant expense (millions of dollars in some cases) protecting their intellectual property by conducting investigations and mounting litigation against counterfeiters
- developmental costs associated with designing products that may be more difficult to counterfeit (e.g. copy-protected games, online software activation procedures, etc.)
- depressed prices and reduced sales
- undermining the brand image
- perception that the original product is expensive.

Interpol also highlighted that counterfeiting violates:

tax rules ... cause(s) serious damage to the economy and, in the long run, to whole sectors such as the record, film and software industries. They affect the development of businesses, their competitiveness and their capacity to innovate, since research requires greater and greater investment. Unfortunately, that is not all: every day ... counterfeit products prove to be dangerous for public health and safety. It is therefore quite clear that this form of crime affects States, national economies and individuals in equal measure (Interpol 1999).

The FBI reports that IP theft robs the US of ‘hundreds of thousands of jobs and as much as a billion dollars a year in lost tax revenues’ (FBI 2003). In Australia, pirates operate in the ‘cash economy’, evading tax. In *Universal Music & Ors v Hendy Petroleum & Ors* [2003] FMCA 373 (5 September 2003), a respondent alleged that he purchased unauthorised CD compilations in a Darlinghurst pub on a cash basis and did not obtain any written receipts of the transaction at the time. If the respondent’s explanation was true, it is unlikely that the seller would have declared the sale as taxable income. Music Industry Piracy Investigations’ (MIPI) then manager Michael Speck said piracy results in ‘diminished taxation – when you buy a CD, a significant component of its cost is tax. If you’re just copying something that’s already stolen, the tax wasn’t paid on it the first time, but every time it’s copied, it’s a taxation loss to the community’ (Webb 2002). Piracy has been blamed for sales and employment losses in creative industries, with many companies struggling for survival (Baca 2004).

Record companies have responded to piracy-based losses by reducing overheads. Staff levels and artist rosters have been reduced (Leeds 2004a; Goldstein 2003). New artists receive reduced advances, allowing them to only record singles instead of albums (Healey & Leeds 2004). In the United Kingdom, EMI cut 1,500 jobs, non-core artists and outsourced its CD production capabilities (Hopkins 2004). Similar overhead reductions took place at other companies as a result of piracy-based losses (Ahrens 2004; Australian IT 2003; IT Innovations & Concepts 2004; Leeds 2004b; Martinson 2004; Milmo 2003; Wall Street Journal 2004). Losses were so severe that major companies looked at mergers to reduce their exposure (Arango 2004; CNN Money 2003; New York Post 2003). Ultimately, Sony and BMG merged. The merger followed a profit announcement by Sony for the three months ending 30 September 2003, which revealed that revenue had fallen 8.9 percent to 126.7b yen (\$1.65b) (Sydney Morning Herald 2003). Songwriters also suffer losses due to piracy (Bernstein 2004), resulting in 50 Nashville songwriters lobbying Congress to fight file sharing (Zuckerbrod 2003).

Piracy can effectively destroy the ability of copyright owners to participate in a market. It may be impossible, for example, for copyright owners to compete with organised groups offering virtually identical products in identical formats, but at virtually no cost. Piracy can turn 'otherwise successful product(s) into a financial failure ... For small companies, this can easily prove fatal and damage the entire economy nationwide ...' (Cuciz 2004: part 1). Software piracy is also said to harm honest resellers who may be unable to compete with pirates. Consumers using pirated software 'needlessly' risk their business and reputation. Piracy 'can drive up the cost of PCs, lead to software incompatibility ... and leave your business without technical support'. The more money lost to piracy, 'the less that can be spent on research and development' of products (Corel 2006).

Although a global problem, piracy impacts are felt 'on the ground' in many countries. 'Owners of local record stores, CD plant workers, marketing, promotion and distribution people ... are all affected. As their earning power is diminished, local governments are robbed of an important part of their tax base, and local economies are placed in jeopardy' (IFPI 2002a). Victims of piracy include 'employees at the 224 retail stores that will close down (in the US this month); the hundreds of artists who won't get a record deal because of cutbacks of record company rosters; the thousands of people doing regular jobs, such as the sound engineers and CD factory workers; the people trying to build legitimate music services, develop payment systems and manage complex protection issues in the face of competition from the free-music infringers who have sidestepped all those complex processes; and everyone else in the chain of creation, production and distribution of music' (Berman 2003). With less money being spent on advertising, music publications have also suffered losses (Zeidler 2004).

Despite these widespread harms, some have argued that not all of the effects of piracy may be negative. In the sound recording industry it has been argued that piracy may result

in additional positive promotional effects as consumers ‘sample’ a sound recording prior to purchasing it (Lessig 2004: 68; Oberholzer & Strumpf 2004; Schwartz 2004; McGuire 2004; CNET News.com 2004; Smith 2004). One analyst said that people look to the internet ‘as a way to discover new bands and sample different types of music prior to making a traditional retail purchase’ (Cox 2002). Other studies have suggested that unauthorised downloaders tend to be the largest purchasers of CDs. It has been suggested that not only does file-sharing promote sales, but by watching trends in illicit downloading, record companies can find out what records are doing well, and should be released as singles.

However, the view that IP rights infringement may result in benefits to consumers and IP rights owners has been rejected by IP rights owners including IFPI (see for example IFPI 2006g).

For the producer, in some cases counterfeiting may increase demand for the original product, resulting in overall higher demand and sales than would otherwise occur. This is most likely where there are significant network externalities for the product. It may also occur where it has what Liebowitz has called an ‘exposure effect’ — a form of advertising or sampling that might lead to larger sales of the legitimate version ... For consumers, those unable to buy the genuine goods at the full price may gain utility from buying counterfeit goods at a lower cost, assuming that quality is sufficiently high.

However, in some cases consumers will be buying counterfeit products in the full knowledge that they are counterfeits. In such cases, those goods might fill a gap at the lower end of the income distribution for those who cannot afford the genuine product. Such cases may also not compete in any way with the genuine goods and so not result in any loss of sales volume, erosion of prices or producer reputation. Bosworth and Yang argue that the supply of counterfeit goods in these circumstances may in fact be welfare enhancing. This issue highlights the difference between deceptive and non-deceptive counterfeits (Allen 2003: 9).

Allen concluded by asserting that, overall, the costs of piracy and counterfeiting outweigh the benefits of piracy and counterfeiting.

Health, safety and consumer welfare

OECD’s examination of the impacts of piracy and counterfeiting found that:

Deceptive pharmaceutical products that do not contain proper active ingredients, improperly manufactured batteries that can explode and falsely branded automotive replacement parts that are deficient, and could fail in critical situations, are but three examples that have come to light. The market

for deceptive products is by far the more lucrative one for counterfeiters, and the one posing the greatest danger to consumers in terms of potentially high health and safety risks. As a counterpoint, criminals are being increasingly attracted to counterfeiting and piracy, because they consider that it is perceived as being as lesser crime than other activities (such as drugs), can be just as profitable, and if apprehended the penalties are likely to be mild (OECD 2006: par 9).

Corrs reported:

Counterfeit products include pharmaceuticals, alcoholic beverages, soft drinks, aeroplane, helicopter and automobile spare parts (including brake pads), hand tools, cosmetics, children's cough syrup, infant feeding formula, shampoo and even children's toys (including plastic figurines covered in lead paint and soft toys stuffed with sharp objects and flammable materials). The most obvious risks are, naturally, to consumers who purchase counterfeit drugs. Although the problem of counterfeit products has had far more disastrous consequences in the third world than in Australia, counterfeit drugs tend to be ineffective at best, and lethally dangerous at worst, for those who consume them. One of our clients has recently encountered counterfeits of one of its better-known products in which there were absolutely no active ingredients! (Corrs 2006: 3).

While most of the Corrs report refers to the international health and safety impacts of counterfeiting, it also discusses the Australian problem of counterfeit mobile telephone batteries.

One of our clients is [a] well-known telecommunications company, ... which has a significant counterfeiting problem in Australia. Counterfeit mobile telephone batteries have been reported to have exploded and counterfeit chargers have caught fire, which can naturally cause very serious injury risks. Admittedly there have not yet been any reports of serious injuries in Australia, but the risk is obvious and alarming (Corrs 2006: 3).

Additional consumer risks due to piracy and counterfeiting include financial risks, as consumers may suffer losses through the use of inferior counterfeits. Often consumers who purchase counterfeit items will not have the protection of product warranties and guarantees. Corrs notes that 'that an increasing number of counterfeit products are being sold as genuine, often coupled with "genuine" warranties or certificates designed specifically to fraudulently mislead consumers. This problem most affects consumers who purchase products on the internet.' (Corrs 2006: 4).

Piracy has also been linked to other undesirable social activities and may have adverse cultural impacts. France's culture minister said, 'To be a pirate today is to put our culture and musical creation in peril. I attach the greatest importance to defending authors, composers, creators, technicians' (Agence France-Presse 2004). John Kirby, Village Roadshow's Chairman, said copyright crime jeopardised the creative fabric of society (East Asia Economic Summit 2003).

Impact on Indigenous Australians

While there has been some litigation on behalf of Indigenous IP rights owners, there are numerous impediments facing this group of rights owners including difficulty of proof of subsistence/ownership. There is a general problem with 'group ownership' being used as a basis for IP rights under legislation that envisages a single creator or inventor, as well as issues related to overseas infringers, and Indigenous communities and individuals' lack of funds, organisation and legal expertise.

VISCOPY is the only dedicated visual artists' copyright agency in the Australia Pacific region representing over 5,000 regional artists, and over 200,000 artists internationally (VISCOPY 2006). VISCOPY indicated it has 6,500 members, of whom 48 percent are Indigenous Australians. VISCOPY Image Gallery provides online licensing and a collection of digital images that can be purchased and downloaded on demand for a fee. VISCOPY acts as an advocate on behalf of Indigenous Australian IP rights owners.

While some research has been done by academics, researchers and others on Indigenous copyright issues, including work on a resale royalty scheme for Aboriginal artists (see for example Golvan Arts Literary and Artists Agency 2000; Donald 2003), the practical impact of some of this work is yet to be realised, with Indigenous communities still suffering substantial losses as a result of IP rights infringement. VISCOPY, for example, has not engaged the state police or the AFP on behalf of Indigenous rights owners, and has only had some cursory discussions with the Australian Competition and Consumer Commission on issues related to piracy and counterfeiting. The extent of VISCOPY's enforcement activity on behalf of Indigenous rights owners is in providing proforma cease and desist letters for rights owners and some basic advice to rights owners. There is no evidence on the actual enforcement of rights that extends beyond the occasional infringement case that reaches the court system. For instance, no academic work has been identified on actual attempts to enforce Indigenous community rights in the present environment.

It is believed that unauthorised copies of counterfeit Aboriginal arts and crafts come from China, Indonesia (including Bali) and Thailand. Sometimes, counterfeit Aboriginal arts and crafts are made locally by visiting backpackers. Pirates in this area often rely on using an

artist's name fraudulently, without the knowledge of the artist. Sometimes, the piracy and fraud are in remote areas, which make enforcement activity even more difficult. Similarly, the rights owners are often located in rural areas and Indigenous communities.

VISCOPY reported that a large range of Aboriginal arts and crafts including paintings, didgeridoos, boomerangs, sculptures, clothing and historical artefacts are affected by piracy and counterfeiting. VISCOPY advises that some Aboriginal arts and crafts are sold illicitly over the internet from overseas-based websites. These items are manufactured overseas, without a licence in place, are typically of a poor quality and inexpensive. Some of these items are purchased by Australian companies, imported into Australia and sold as souvenirs.

VISCOPY is of the view that the problem of counterfeit Aboriginal items is not merely a problem for Indigenous Australians, but is a problem for the Australian tourist industry. Tourists visit Australia and seek to take home a genuine Australian souvenir. Rather than purchasing the genuine item, they purchase a cheap knock-off from a tourist shop. Often they are not aware that the item is not genuine. Although some copyright infringing activity that impacts on the Indigenous community is reportedly large scale and systematic, other copyright infringing activity impacts more directly on specific artists. For example, Joanne Brooker, a freelance Indigenous artist, recently wrote:

In October 2005, I received a postcard from Ireland. The postcard was a copy of my artwork. The original work had been printed in *The Courier-Mail* some years before. The copy had been changed using Photoshop to the detriment of my original artwork, including the replacement of my signature with the copier's signature. The postcard was printed by the Illustrators Guild of Ireland (IGI) of which he was a member. I had a friend email the copying artist, offering to buy the artwork. The artist said he had the artwork and it was available for sale. I then contacted the artist who admitted that he downloaded my artwork and had 'put his own spin on it' (Brooker 2006).

Industry estimates of IP crime: extent and impact

Reliable and valid data are required for estimating the size and nature of IP crime. This chapter focuses specifically on industry estimates. They are the primary source of data because government statistics are limited. Such data are used in a myriad of ways including:

- informing policymakers and policy direction
- educating the community
- providing a solid basis for industry decision-making
- informing and directing law enforcement activity
- evaluating the impact of interventions
- influencing the penalties imposed by courts.

All data have limitations, and in evaluating the statistics and the conclusions drawn from those statements, involves judgements about their quality and how they have been generated. We know that police statistics often underreport the level of crime (sometimes called the dark figure of crime) and that data collected from surveys can be influenced by how survey questions were framed, how many people participated and whether responses were consistent over time. Financial and cost data are the most difficult to accurately collect, particularly in the crime and justice sector where the behaviour of interest is an illegal activity.

There are a range of models that have been employed by different industry sectors to cost infringement. The main types of model employ different means of calculating cost based on one of the following methods:

- estimates of profits made by infringers
- value of items stolen
- retail value of lost sales
- wholesale value of lost sales
- discounted value of lost sales.

Any one or a combination of these methods may then be used to estimate the extent of IP crime (see Appendix C for detail on the different methods of calculating loss). It was acknowledged by stakeholders that modelling losses, for individual cases and for estimates of impact, is a difficult process, and that different methodologies have been used over time and across sectors resulting in variable estimates.

Film industry

There are two key industry groups – AFACT and the Australian Video Software Distributors Association (ADSDA). AFACT is an association tasked with addressing the issue of copyright theft for the film and television industry in Australia and works with industry, government,

police and educational institutions to protect the commercial interests of the film and television industry, and the interests of Australian moviegoers. AFACT members comprise Motion Picture Association (MPA) and non-MPA members, including: Village Roadshow, Buena Vista International Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Twentieth Century Fox International Corporation, Universal International Films Inc. and Warner Bros. Pictures International. AVSDA was formed in 1983 to represent the interests of owners of copyright in, and distributors of, videos in Australia. This now includes DVDs. In 2004, AVSDA members sold over 62.7 million titles worth over \$1.125b in wholesale sales. AVSDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as censorship, film piracy, technology challenges, copyright and enforcement (AVSDA 2006).

AFACT reports:

- the film piracy rate in Australia is 11 percent
- in 2005, 23 percent of Australians were involved in some way in film piracy (copyright theft)
- 86 percent of pirates researched had seen a film before its cinema release
- 59 percent of pirates did not then see the film at the cinema
- 47 million illegal DVDs were in circulation in Australia in 2005, almost equal to the 52 million legitimate DVDs sold in 2005
- piracy costs the film industry in Australia over \$230m per year in losses for movie product alone
- there were an estimated 11 million illegal downloads of films in 2005
- illegal downloads of TV products affected viewership by over 11 percent (AFACT 2006a).

The current rate has nearly trebled since 2000 (Pecotic 2006). Film industry authorities reported the following trends over the past decade:

- DVD piracy is growing fast, with unauthorised copies of movies rising from four percent in 2000 to around eight percent of the legitimate market in 2003. The direct cost of piracy to the industry in Australia each year is \$45m, but this figure rises to almost \$200m if losses in tax revenues and ancillary industries such as advertising and snack bar sales are included (Screenrights 2004).
- Parallel importers and distributors of pirate products have a significant adverse effect on the industry through destroying the operating system and affecting the revenue of those who rely upon it (MPA 2000: 3.10).
- Pirated films have been imported into Australia at an increasing rate (MPA 2000: 3.19). In the quarter ending 12 March 1999, the total of infringing items in various formats seized was 11,458, with an approximate value of \$687,000. This compared with seizures in the first quarter of 1997 of 2,064 items, with an approximate value of \$123,000 (MPA 2000: 3.21).

- Later piracy operations were alleged to be linked to the laundering of drug money and all available evidence was referred to the appropriate authorities (MPA 2000: 3.29).

Although these estimates provide a general indication of the scale of the problem, the validity of the data is open to some debate. The methodology used in some industry research is not publicly available and details of samples surveyed and precise methods of calculation are often not disclosed. All that is known, for example, of the MPA and LEK survey is that the study was conducted over 18 months using a survey of 20,600 movie consumers in 22 countries using focus groups and telephone, internet and in-person interviews. Data from the 22 countries were then extrapolated to 42 additional countries using a regression model based on country-specific characteristics. Details of exactly how this was undertaken were not available. The study's piracy loss was based on the number of legitimate movies (movie tickets, legitimate DVDs) consumers would have purchased if pirated versions were not available (MPAA 2006). Unfortunately, without further detail it is impossible to undertake a comprehensive assessment of the quality of the data provided.

The pirating of VHS, DVD, VCD, DVD-R or other optical disc formats represents the single biggest threat to the industry (AVSDA 2006). Pirated films also appear as unauthorised digital files on peer-to-peer (P2P) or centralised websites, which can be downloaded by users for free. AVSDA highlight the unintended consequence of increasing internet and broadband usage as:

With the rapid growth and adoption of broadband in Australia, the industry faces a new threat from the internet. AVSDA is working with the Federal Government to develop solutions to protect the intellectual property rights of film owners and distributors in the peer 2 peer networking environment in which we are currently operating (AVSDA 2006).

There are different means of identifying incidences of piracy and counterfeiting, depending on the format involved. Aside from price, with respect to DVDs, infringements may be easily identifiable if the quality of the reproduction or packaging is poor, or in any case of reproduction on a DVD-R, as this format is not commercially produced by AFACT member company film and TV producers. Pirated films are often of a poor quality and may be unclassified. There here have been examples of parents purchasing G-rated family films which have contained pornographic content (AVSDA 2006). In the case of poor quality reproduction, or a DVD burn, it may only be necessary to apply a simple observational approach to identify infringements. Where the pirate copy is more sophisticated, it may be necessary to undertake a forensic analysis to confirm that the DVD is a counterfeit.

Piracy identification activity can range anywhere within these two extreme approaches, depending on the nature of the underlying infringement. The absence of SID codes may be indicative of piracy and counterfeiting. No AFACT members release their DVDs on burnt CDRs/DVDRs, so the presence of films on burnt DVD-Rs is indicative of the existence of

piracy and counterfeiting. In the case of obviously pirated DVDs, there may be poor physical artwork, or an absence of artwork, flaws on the casing, sleeve, the existence of a plastic wrapper or the existence of thin easily breakable cases. Pirated DVDs may lack 'Region 4' coding or may not have any Australian classification information, which is required on all authorised releases in Australia. Another indicator of piracy and counterfeiting is the availability of films which have not been commercially released in Australia or overseas as a DVD.

Australian tourists purchase pirated and counterfeited DVDs from overseas holiday destinations such as Bali and bring them back to Australia either for personal use or as a gift. These items are not typically intercepted by ACS as they are not in commercial quantities. This behaviour has been identified as a significant problem in Western Australia by Blockbuster, Video Ezy and other video stores who found that after the Bali bombing there were fewer pirated DVDs being brought into the country. The result was an identified increase in DVD sales and rental business.

An owner of two Blockbuster Video Stores in the south-western suburbs of Sydney wrote to the Attorney General in 2005, highlighting:

In my local area you can

- 1: Buy illegal copies of movies, before they are on at the theatres, at the local markets.
- 2: Buy copies of illegal movies from lists distributed in office buildings, and offering a twenty four hour turnaround.
- 3: See school children under the age of 18 selling pirated copies of DVD's within schools
- 4: Hear of some stores renting pirated copies of DVD's
- 5: Have people coming into my store asking me if I would like to buy multiple copies of DVD's for a reduced rate.
- 6: Hear people talking of how many movies they bought back from Bali or overseas, sometimes as many as 500.
- 7: Talk to people who have downloaded movies off the internet.

AFACT has identified a 'camcording' piracy problem in Australia. Individuals have been caught in Australia sitting in front of a cinema screen and covertly using a camcorder to manually record the film content. Camcorder filmed content has also been delivered as master copies to internet websites, and this has facilitated internet based piracy. They have noted that internet users can use the internet to download anti-circumvention devices which allow them to copy DVDs either for personal use, or so that they can upload these master copies to the internet to again facilitate internet-based piracy.

Currently the preferred medium for pirated films in Australia, 90 percent of all illicit hard copies of films are DVD-R copies – that is burnt DVDs, typically manufactured in Australia. DVD-R films carry less risk and expense for pirates than imported DVDs and the observed trend from recent police seizures is for pirates to ‘burn to order’ rather than keep stockpiles of copied optical discs. Aside from the lack of any need to import DVD-Rs, which has some risk of detection by ACS, the likelihood of being caught pirating DVDs in Australia is low, while returns are substantial, with over 1,000 percent profit.

Another source of pirated films is auction websites. Auction websites allow consumers to purchase goods and services using a bidding system. On any given day, there are 600,000 auction offers available to Australians and some of the auction site available content includes second hand copies of DVDs, as well as new copies of films made available by retailers where these retailers have decided to bypass traditional distribution means in favour of websites such as eBay. Some of the auction site available content is authorised, while some of this content is unauthorised. AFACT advises that its estimate of unauthorised auction site content is approximately two to three percent of all offers. The methodology used to generate this estimate is not available.

In April 2006, LEK released a study commissioned by the MPAA (MPAA 2006). This was a worldwide study that included statistics on Australian losses due to piracy and counterfeiting. LEK found the losses due to piracy and counterfeiting of films in Australia was A\$233m per year. The Australian film piracy rate was 11 percent based on an examination of consumer behaviour. These figures did not include losses due to signal theft, or losses from piracy of television programs as opposed to feature films. They found there were 47 million burnt DVDs in circulation in Australia in 2005, compared with 53 million legitimate DVDs.

Key findings of their study were:

- The major US motion picture studios lost \$93m in Australia in 2005 to piracy.
- 61 percent of the \$93m loss results from internet piracy, and 39 percent from piracy of hard goods such as DVDs.
- The Australian motion picture industry, including foreign and domestic producers, distributors, theatres, video stores and pay-per-view operators, lost \$179m in 2005 as a result of piracy.
- Of those surveyed in Australia (700), the average pirate was 16 to 24 years old, male, lived in an urban area and did not attend college. Internet pirates were more likely to be younger than the typical pirate (MPAA 2006).

Internet piracy was defined as ‘obtaining movies by either downloading them from the Internet without paying or acquiring hard copies of illegally downloaded movies from friends or family’. Hard goods piracy was defined as ‘obtaining movies by either purchasing or

acquiring an illegally produced VHS/DVD/VCD through a commercial source, or making illegal copies for oneself or receiving from a personal source (friend or family) an illegal copy of a legitimate VHS/DVD/VCD' (MPAA 2006: 4).

Australia's film piracy rate was higher than Hong Kong and South Korea, but lower than five other South-East Asian countries. Losses to MPAA member companies at \$93m were higher than South Korea, India and Hong Kong, but lower than other South-East Asian countries (Table 1).

Table 1: South-East Asian film piracy rates and revenue losses, 2006

Country	Piracy rate ^a (%)	Revenue loss (US\$m)
South Korea	7	9
Hong Kong	9	4
Australia	11	93
Japan	15	216
India	29	7
Taiwan	51	98
Thailand	62	149
China	93	244

a: Piracy rates are derived from MPA member company legitimate revenue plus estimated revenue lost to piracy in each market. They are a static snapshot of the percentage of the potential market that is lost due to piracy.

Source: MPA & LEK (2006: 5–6)

MPAA member company revenues lost due to internet piracy in Australia were \$36m, which was more than losses in Korea and elsewhere, but less than losses in China, Japan and Taiwan (Table 2).

Table 2: South-East Asian film revenue losses due to internet piracy, 2006

Country	Revenue losses due to Internet piracy (US\$m)
India	1
Thailand	1
Hong Kong	2
South Korea	8
Australia	36
Taiwan	50
Japan	51
China	94

Source: MPA & LEK (2006: 7)

LEK found that the 'typical pirate is age 16–24 and male and 44 percent of MPAA company losses in the US are attributable to college students' (MPAA 2006: 4). A similar profile was found for pirates in Australia (MPAA 2006:9). The study was conducted over 18 months.

- LEK surveyed 20,600 movie consumers in 22 countries using focus groups and telephone, internet and in-person interviews.
- Those surveyed were movie watchers. Those who had dropped out of the market for movies were not included in the study.
- Data from the 22 directly researched countries were extrapolated to 42 additional countries using a regression model developed in conjunction with UCLA and based on country-specific characteristics to complete the worldwide piracy picture
- The study's piracy loss calculation was based on the number of legitimate movies – movie tickets, legitimate DVDs – consumers would have purchased if pirated versions were not available.

It is difficult to assess the quality of the method or data as neither are available in the public domain. It is not clear from the available information how many Australians were surveyed and the sample selection process. For example, it is unclear how the term 'movie watchers' was defined. Were urban and rural Australians targeted? Were any particular age groups under or oversampled? Given the probably small sample size there would be large standard errors around many of the estimates, particularly when examining small subgroups within the sample.

Film industry: adult film industry

The Adult Industry Copyright Office (AICO) was established as a not-for-profit organisation whose primary roles are to educate the public and to discourage breaches of copyright in adult films in Australia. Funding is provided from overseas adult film producers and Australian distributors (AICO 2006a). They do not independently collect statistics on members' losses due to piracy and counterfeiting. Information provided by members and anecdotal information obtained from its own activities suggest that piracy and counterfeiting are a significant problem for the adult film industry. Estimates by AICO suggest that 85 percent of all adult films sold in Australia are pirated (AICO 2006a).

According to AICO, in the area of piracy and counterfeiting, the main problem for the adult film industry is the widespread manufacture and sale of blue-backed backyard burnt pirate DVDs and factory-pressed silver-backed counterfeit DVDs. So-called bluebacks are sold through adult stores, internet websites and mail order catalogues. The sale of bluebacks predominates, but they are quickly being matched by the increase in the numbers of factory-pressed counterfeits with the majority originating from Taiwan.

Home-burnt DVD-Rs do not contain SID or IFPI codes that identify the place or manufacturer of the recorded film, or codes that relate to or identify the title of the film. Silverbacks will have some codes, but they will not usually correspond to the codes on any official DVD or CD release codes. AICO receives piracy reports detailing the activities of backyard operators, who sometimes blatantly advertise in the local newspaper offering to copy CDs or DVDs on a request basis. People provide their orders to these backyard operators, who then rent the DVDs, burn them and return the originals to the DVD stores.

AICO notes that pirated adult films can often be identified on the basis of their price. Price differences may be less obvious to consumers, because the price to consumers of counterfeit or pirate adult DVDs may be very close to the genuine adult DVD price. There is a much greater retailer mark-up for counterfeit adult DVDs compared to genuine adult DVDs. The wholesale price of counterfeit DVDs may be \$5 to \$10. The wholesale price of genuine DVDs may be \$14 to \$25. Typical retail prices for consumers of counterfeit and genuine DVDs may be \$40 to \$60 (the higher price being for 'premium' adult films). Some adult DVDs may retail for \$30, but not many. Prices are typically higher in regional areas, due to a lack of competition where adult DVDs worth \$60 may retail for \$75 or even up to \$100. Pirated adult DVDs are not very much less expensive, at retail level, than genuine DVDs, although recently there has been some downward price pressures on pirated DVDs with some sold for as little as \$15 each to consumers who make bulk purchases.

Online DVD prices for pirated product vary significantly. A typical online price for pirated products is generally from \$20 to \$30, compared to \$40 for the authorised mail order products. Rather than heavily discounting DVDs, some online pirates offer 'bonuses', such as buy 10 and receive 16. AICO recently bought 16 DVDs for \$150 from one of these online pirates. Some offer free or discounted postage/delivery costs. A Sydney retailer recently offered online consumers seven pirated DVDs for \$100. Some blueback discs do not play on all DVD/CD players. The full menu may not function, dropouts in pictures may occur, dropouts in the audio track may occur, freeze-frames may occur and pixilation of copied images may also occur. These problems usually do not occur on silverbacks.

Artwork may be poorer on pirated adult DVDs – especially on bluebacks. Artwork on the active side or slick of a silver-backed factory-produced disc may have slight visible errors/imperfections. These visible errors/imperfections will certainly be visible to the trained eye, but not to ordinary consumers. These visible errors/imperfections include colour shade differences, shape differences (inconsistencies in the edges of artwork) and size differences. Images may run off the edge of the disc, they may not be centred properly, the top/bottom/sides/edges of slicks may be cut off either because of poor copying or because the slick was cut inexpertly. AICO report that counterfeit factory-pressed DVDs are becoming commonplace in Australia and harder to detect (AICO 2006b).

Game industry: computer and video games

The Interactive Entertainment Association of Australia (IEAA) represents companies in the interactive entertainment industry who develop and market computer and video games software, hardware and accessories in Australia (IEAA 2006a). Their activities include business and market research, public affairs and intellectual property protection services (IEAA 2006b). IEAA classifies games piracy in the following manner:

- games are illegally copied or 'burnt' to a CD or shared on P2P networks
- game consoles are 'mod-chipped'. This involves soldering a non-genuine chip on the printed circuit board to circumvent the console's technological protection measures.
- games are downloaded illegally from the internet.

IEAA report that counterfeiting 'costs the games industry \$100m each year and 200 full and part-time jobs for young Australians' (IEAA 2006c) which represents 19 percent of all lost sales in Australia each year. The costs to consumers include 'electrical safety risks from the "backyard" modified consoles', and the cost to retailers is '\$4.3 million in lost profits' (IEAA 2006d). Consumers can also 'end up with product that does not load-up or contains totally unrelated content' (IEAA 2006c).

PricewaterhouseCoopers reported that piracy is at 10 percent of total games revenue, or about \$42m annually. Some observers thought this figure was very conservative. 'The direct costs of counterfeiting are largely borne by the legitimate industries that make and distribute original products. In 2002, counterfeiting resulted in \$677million of lost sales in the Australian toy, software and video games industries. This [included] \$100 million lost sales in the computer and video games industry' (Allen 2003). Allen's methodology was described in the following terms:

This report ... has taken a different and considerably more conservative approach to determining the cost of counterfeiting. It has started with a traditional measure of the potential gross impact on sales resulting from the estimated rate of counterfeiting prevalent in each of those industries. The aggregate gross value of lost sales derived in this manner has then been adjusted to reflect the weighted loss of sales margins of the firms in the industry (supplied by a survey of the toy, business software, and computer and video games industries). This has been done in order to derive a value of the net revenue (i.e. profit) at risk for sales lost to counterfeit products. In addition, potential losses were also adjusted to account for the likelihood that not every acquired counterfeit product is a complete substitute for the sale of an original product at full price. In applying this price effect, the Group has been guided by the results of the national household survey commissioned for this study. Among other matters, that survey provided some insights into the likely price elasticities for the purchase of counterfeit products. The

resulting estimate is, accordingly, a very conservative estimate, but is nonetheless one particularly reflective of the cost of foregone profits for the industries concerned (Allen 2003: 15).

In assessing losses due to piracy and counterfeiting, Allen identified the following problems:

- difficulties in determining the size of the legitimate industry, due to inadequate ABS measurements
- inconsistent and unverified (or unverifiable) estimates of the size of the legitimate industry provided by industry members
- no single or official body that compiles statistics on copyright infringement in Australia
- almost total lack of reliable data due to the clandestine conditions under which counterfeits of copyrighted and trade marked goods are produced and distributed. Manufacturers of counterfeit goods almost never record their activities or register with the authorities for tax purposes' (Allen 2003: 13).

Unlike many of the studies undertaken, Allen relied on interviewing victims of piracy and counterfeiting rather than asking individuals to self-report their own behaviour.

Gaming machine industry

Aristocrat is a leading gaming machine manufacturer and supplier providing:

- electronic gaming machine cabinets, screens and buttons
- external panels that embody artistic works identifying the game
- electronic components
- computer hardware, including software storage media (e.g. erasable programmable read-only memory chip – EPROMs)
- storage media upon which system software has been recorded
- storage media upon which game software has been recorded, including reproductions or copies of artistic, literary and musical works, cinematograph films and sound recordings in electronic form.

Aristocrat reported that it 'suffers very significant losses that are unquantified'. In terms of estimating losses, Aristocrat referred to 'at the large number of counterfeit products in the global marketplace that have been identified by our technical experts and realise the lost sales to our company. Even if we only obtained a fraction of those sales, it would still amount to significant loss'. The majority of pirated goods in this industry are claimed to originate from Australia. However, there does not appear to be any published evidence on size of the losses due to piracy and counterfeiting in this industry.

Luxury goods

Law firm Corrs represents a substantial number of companies with valuable trade marks and other intellectual property including adidas, Cartier/Dunhill, Caterpillar, Christian Dior, Ermenegildo Zegna, Fendi, Ferrari, Foster's, Hewlett Packard, Hugo Boss, Lacoste, Liz Claiborne, Louis Vuitton, Lundbeck, Nokia, Nike, Oakley, Quiksilver, Tommy Hilfiger, Vans and Versace. These companies trade in a number of industries including telecommunications, office equipment, pharmaceuticals, footwear and sporting clothing, heavy duty machinery, sunglasses, sportswear, luxury goods, automobile, beverages, clothing, surfwear, streetwear, skateboarding, snowboarding and biking products. Corrs reported:

There is now strong evidence that counterfeiting is no longer a problem which simply affects the profits of brand owners. The counterfeit trade also:

- 1) causes unacceptable risks to public health; and safety, and
- 2) deprives the government of significant tax revenues.

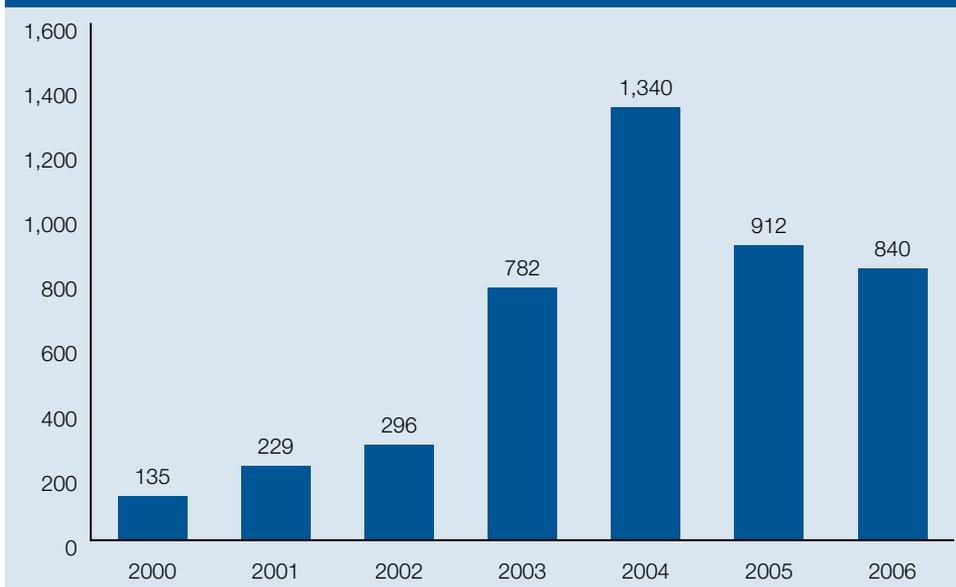
Irrespective of the significant anti-counterfeiting programs already put in place by our clients, some of whom even have a zero tolerance policy, the evidence is that counterfeiting is proliferating at an enormous rate in Australia. (Corrs 2006: 2–3).

Corrs have made effective use of the Notices of Objection system used by the ACS on behalf of their clients in recent years. The records collected and retained by Corrs on their clients show:

... the number of incidents involving the importation and sale of counterfeit products bearing one of our clients' trade marks was relatively high in the mid to late 1980s, with a decline in the early 1990s. There was a marked increase in the late 1990s and since 2000 the counterfeiting "industry" has boomed. In fact, the volume of work we have carried out on behalf of our clients has increased by about 650% since 2000.

Figure 1 provided by Corrs shows that the number of anti-counterfeiting files they have opened on an annual basis since 2000 has been on average increasing.

While this information may be considered to be a useful indication of the seriousness of the counterfeiting problem, it is not evidence in its own right of a worsening counterfeiting problem. However, in conjunction with other data sources, regardless of the source or its limitations, they all indicate a problem that is growing. Consistent with this overall trend, Corrs reported that the number of counterfeit products seized by private investigators or by the ACS on their clients' behalf increased from 14,811 in 2003 to 44,689 in 2004. Corrs added, 'we expect that the correct figure would be somewhere in the vicinity of 5% to 10%' (Corrs 2006: 6).

Figure 1: Total number of customs and non-customs anti-counterfeiting files opened annually, 2000–06

Note: Figures for 2006 are a projection based on activities to 30 June 2006

Source: Corrs (2006: 5)

Software industry

The Business Software Alliance (BSA) was established in 1989 and includes Adobe (incorporating Macromedia), Apple, Autodesk, Microsoft and Symantec, as well as Computer Associates as Associate Members. Their primary role is to advocate on behalf of the commercial software industry and its hardware partners to promote a 'safe and legal digital world'. They seek to achieve this through educating both business and consumers on IP issues related to software, copyright, cybersecurity, trade, e-commerce and other internet-related issues.

Each year, BSA conducts a study of global trends in software piracy in conjunction with IDC, the IT industry's leading global market research and forecasting firm. For these studies, IDC used proprietary statistics for software and hardware shipments gathered through surveys of vendors, users and the channel, and enlisted IDC analysts in more than 50 countries to review local market conditions. Although the research covers hardware and software markets in more than 75 countries, the methodology used is not without criticism (see below and Appendix C). IDC relies on a uniform international methodology – not one which is necessarily comparable with Australian piracy and counterfeiting losses for other industries.

IDC uses the following basic research architecture to measure piracy rates and dollar losses:

- determine how much packaged software was put into use in the year in question.
- determine how much packaged software was paid for/legally acquired during the year in question.
- subtract one from the other to obtain the amount of pirated software.

Once the amount of pirated software is known, the piracy rate is determined as the percentage of total software installed that was not acquired legally. IDC explains the procedure as follows:

PC shipments

Quarterly, IDC collects detailed PC shipment tracking data on more than seventy-five countries. For the additional 25-plus countries and markets, the data is either collected in-country or modeled regionally based on IDC's rest-of-region estimates. The basic tracking data is generated from suppliers, including local suppliers. IDC's definition of a PC includes desktops, laptops, and tablets, but excludes handhelds and PCs used as servers, either singly or in clusters.

PC installed base

The installed base is captured as part of IDC tracking exercises.

Software revenues

Software revenues are captured annually in more than seventy countries by IDC software analysts around the world. Revenues are gathered from interviews with in-country suppliers and cross-checked with global numbers and financial statements. For the countries not normally covered by IDC, the data were either collected in-country or modeled regionally based on IDC's rest-of-region estimates.

Software shipments (legitimate)

The software shipments were derived using average system values estimated country-by-country and regional analysis for five software categories (e.g., collaboration, office, security, operating systems, other). Prices were gathered from IDC's pricing trackers, local research, and interviews with the channel. They included adjustments for OEM and channel-loaded software, as well as software from local suppliers. Software unit shipments were derived by taking revenues and dividing by the average system value. These shipments represent the legitimate software installed during the year.

Software load

Software load is the number of software units installed and/or pre-installed (OEM) on PCs during the year, both newly shipped PCs and PCs already in the installed base. The number is derived from a model that uses results from

surveys in the field, analyst estimates, spot inventories, and other local research. Inputs to the model included surveys in fifteen countries in 2003, local surveys and research in 2004 and 2005, and another survey fielding in 21 countries in 2006. The surveys are *not* direct inputs to the piracy model, but are used to develop software load profiles for countries based on a variety of country statistics, including demographics, computer sophistication, and comparisons to like countries.

Within the software load, IDC accounted for:

- Software running on new computers
- New software running on existing computers
- Software obtained from retired computers
- Software obtained for free as shareware or open source
- Software running on Windows and non-Windows OS

Total software base

Total software base is the total amount of software, legitimate and pirated, installed during the year. It is obtained by multiplying the number of PCs receiving new software during the year by the average number of software packages per PC that were installed in 2006.

Pirated software

The amount of pirated software is determined by finding the difference between paid-for or legitimate packaged software units and the total software base.

Piracy rate

The piracy rate is the total number of units of pirated software put into use in 2006 divided by the total units of software installed.

Losses

The retail value of pirated software is calculated using the size of the legitimate software market and the piracy rate. The actual formula is: Value of Pirated Software = (Legitimate Market)/(1 – Piracy Rate) – Legitimate Market.

By using this calculation, IDC derived what should be considered the end user spending value of pirated software. For shrink-wrapped software sold in stores, it is the retail price, and for factory or channel-loaded software, it is the share of retail system value attributed to that software.

IDC's value of pirated software represents the 'losses' to the industry, including revenues to both international and local in-country software vendors and mark-up to local distributors and retailers. (BSA & IDC 2007: 15–17).

The most recent survey, conducted in 2007, found that of the 102 countries examined, the piracy rate dropped in 62 countries between 2005 and 2006 and increased in 13 countries. However, because the worldwide personal computer market grew much faster in higher-piracy countries and regions, the worldwide personal computer software piracy rate remained at 35 percent for a third consecutive year. At the same time, because the size of the market grew significantly in 2006, losses from piracy at that rate rose by more than \$5b, a 15 percent increase over 2005.

While the worldwide weighted average piracy rate is 35 percent, the median piracy rate was 62 percent, indicating that half of the countries studied had a piracy rate of 62 percent or higher. In just under one-third of the countries, the piracy rate was higher than 75 percent. Although some high-profile countries – China and Russia – saw significant drops in piracy, they also commanded a higher percentage of the worldwide market, and this consequently prevented the worldwide average from dropping (BSA & IDC 2007: 1). Australia had a piracy rate of 29 percent in 2006, slightly lower than in preceding years.

The fourth annual BSA & IDC global piracy software study, found Australia's software piracy rate in 2006 was 29 percent, compared with 31 percent in 2005 and 32 percent in 2004. Australia appeared as one of 20 countries with the lowest software piracy rates, higher than countries such as the US, New Zealand, Austria, Finland, Germany, Japan and the UK, but lower than countries such as Canada, South Africa, Ireland and Singapore (BSA & IDC 2007: 4) (Table 3).

Table 3: Twenty countries with the highest and lowest piracy rates (percentage)

Highest rates					Lowest rates				
Country	2006	2005	2004	2003	Country	2006	2005	2004	2003
Armenia	95	95	n.a.	n.a.	United States	21	21	21	22
Moldova	94	96	n.a.	n.a.	New Zealand	22	23	23	23
Azerbaijan	94	94	n.a.	n.a.	Japan	25	28	28	29
Zimbabwe	91	90	90	87	Denmark	25	27	27	26
Vietnam	88	90	92	92	Austria	26	26	25	27
Venezuela	86	82	79	72	Switzerland	26	27	28	31
Pakistan	86	86	82	83	Sweden	26	27	26	27
Indonesia	85	87	87	88	Finland	27	26	29	31
Ukraine	84	85	91	91	United Kingdom	27	27	27	29
Cameroon	84	84	84	81	Belgium	27	28	29	29
Algeria	84	83	83	84	Germany	28	27	29	30
Montenegro	82	83	83	n.a.	Netherlands	29	30	30	33
El Salvador	82	81	80	79	Australia	29	31	32	31
Zambia	82	83	84	81	Norway	29	30	31	32
Bolivia	82	83	80	78	Israel	32	32	33	35
Ivory Coast	82	82	84	81	Canada	34	33	36	35
China	82	86	90	92	United Arab Emirates	35	34	34	34
Nigeria	82	82	84	84	South Africa	35	36	37	36
Paraguay	82	83	83	83	Ireland	36	37	38	41
Guatemala	81	81	78	77	Singapore	39	40	42	43

Note: n.a. = Data not available

Source: BSA & IDC (2007: 4)

In 2006, three new countries added to the study – Armenia, Azerbaijan, and Moldova – are on the top-20 list of high-piracy countries, as is Montenegro, split now from Serbia. Kazakhstan, Senegal, Russia, and Botswana are no longer on the list. The 20 countries on the list of lowest piracy rates remain unchanged.

In terms of absolute losses due to software piracy, Australia's \$515m in software piracy losses is comparable to the level of losses due to software piracy in South Korea, Poland, Thailand and the Netherlands (BSA & IDC 2007: 7). Details of these software piracy rates are shown in Table 4.

Table 4: Rankings by countries with losses of \$US200m or more, 2006

Country	US\$m	Country	US\$m
United States	7,289	Poland	484
China	5,429	South Korea	440
France	2,676	Thailand	421
Russia	2,197	Netherlands	419
Japan	1,781	Indonesia	350
United Kingdom	1,670	Ukraine	337
Germany	1,642	Switzerland	324
Italy	1,403	Turkey	314
India	1,275	Sweden	313
Brazil	1,148	Venezuela	307
Spain	865	Argentina	303
Canada	784	Malaysia	289
Mexico	748	South Africa	225
Australia	515	Belgium	222

Source: BSA & IDC (2007: 7)

Australia’s software piracy rate is also significantly lower than the South-East Asian regional average, which is 55 percent. Further details of these comparative loss levels are shown in Table 5.

Table 5: Asian PC software piracy losses, 2003–06 (percentage and \$m)

Country	Percentage				US\$m			
	2006	2005	2004	2003	2006	2005	2004	2003
Australia	29	31	32	31	515	361	409	341
China	82	86	90	92	5,429	3,884	3,565	3,823
Hong Kong	53	54	52	52	180	112	116	102
India	71	72	74	73	1,275	566	519	367
Indonesia	85	87	87	88	350	280	183	158
Japan	25	28	28	29	1,781	1,621	1,787	1,633
Malaysia	60	60	61	63	289	149	134	129
New Zealand	22	23	23	23	49	30	25	21
Pakistan	86	86	82	83	143	48	26	16
Philippines	71	71	71	72	119	76	69	55
Singapore	39	40	42	43	125	86	96	90
South Korea	45	46	46	48	440	400	506	462
Taiwan	41	43	43	43	182	111	161	139
Thailand	80	80	79	80	421	259	183	141
Vietnam	88	90	92	92	96	38	55	41
Other Asia Pacific	86	82	76	76	202	29	63	37
Total Asia	55	54	53	53	11,596	8,050	7,897	7,555

Source: BSA & IDC (2007: 10)

In 2005, the BSA sponsored the production of a white paper by IDC, which analysed the impact that information technology has in 70 countries around the world, and the economic benefits that accrue to countries that tighten and enforce their IP laws (BSA & IDC 2005a). IDC concluded that:

- Australia's Vibrant IT Sector Could Grow by 30 percent – Becoming a 200,000-Employee, \$25-Billion Economic Engine: Comparatively low software piracy and a thriving software sector have combined to help propel Australia's IT sector into a \$19 billion a year industry. Reducing its 32 percent piracy rate to 22 percent by 2009 could help the industry grow to \$25 billion a year, producing new growth for the economy, opportunities for businesses, jobs for workers, and tax revenues for the government;
- Fighting Piracy Could Boost the Economy by \$4.7 billion. A 10-point drop in Australia's piracy rate could create nearly 10,000 jobs and pump \$4.7 billion into the economy. It could also increase local industry revenues by more than \$3.5 billion and generate nearly \$1 billion in additional tax revenues; and
- An IT Sector Already Delivering on Its Promise. Australia's 32-percent piracy rate – lower than most in the Asia-Pacific Region – has already helped the country accumulate significant economic benefits. Strong demand for software has helped the IT sector become a full 3.1 percent of the country's economy with jobs for 165,000 Australians. Now Australia's software and services sectors are projected to lead future IT growth and keep pumping benefits into the economy as the IT sector grows by 30 percent over the next four years with the help of further piracy cuts (BSA & IDC 2005b).

Allen argues that:

The direct costs of counterfeiting are largely borne by the legitimate industries that make and distribute original products. In 2002, counterfeiting resulted in \$677 million of lost sales in the Australian toy, software and video games industries. This [included] \$445.7 million lost sales in the business software industry (Allen 2003).

For an analysis of Allen's methodology, see the discussion under the Gaming Industry. Allen has derived its own estimate of the extent and cost of counterfeiting to the Australian business software industry using:

- BSA aggregate sales data, augmented with confidential data from BSA members on sales and sales margins for elements of their business
- the BSA piracy rate from their global survey
- an allowance for price elasticity effects which impact differentially for operating systems and other business applications.

Adjusting for the weighted average loss of sales margins and taking into account the likely demand elasticities for the goods, a more conservative estimate of \$155m was derived (Allen 2003: 28). Two different approaches can yield very different figures of losses due to piracy and counterfeiting – \$445.7m in lost (gross) sales in one case, and \$155m in direct net revenue forgone to Australian business in the other.

The software industry has focused on gains that could be derived if piracy were reduced. The BSA said, 'Piracy reductions could help jump-start today's stagnant economy. All of this has the effect of speeding up local economies and increasing tax revenues at a time when every government is looking for funding' (Gross 2003). Lower piracy could produce higher 'IT benefits' including faster IT growth, especially in countries with high piracy rates. 'Every one point drop in the piracy rate could result in a \$40 billion increase in global economic output. A 10-point drop in piracy could create 2.4 million jobs, \$400 billion in economic growth, and \$67 billion in additional taxes'. Such a software piracy reduction would benefit:

- consumers – providing them with 'more choices and greater competition'
- workers – who would benefit from 2.4 million new jobs
- innovators – who would benefit 'from the financial rewards of their creative spirit'
- entrepreneurs – who would benefit from new opportunities 'to market, package, sell, distribute, customize, and service software'
- the Australian Government – who would benefit from \$67b in additional taxation revenues (BSA & IDC 2005a).

Sound recording industry

IFPI represents the recording industry worldwide, with over 1,450 members in 75 countries and affiliated industry associations in 48 countries. The Australian retail music market is worth around \$600m. IFPI's international secretariat is based in London. IFPI's priorities include fighting music piracy and promoting fair market access and adequate copyright laws (IFPI 2006e). IFPI's 2006 global *Piracy report* contains no statistics on sound recording industry piracy in Australia. However, Australia is not listed as a 'priority' or 'special focus' country unlike Brazil, Bulgaria, Canada, China, Greece, Indonesia, Italy, Mexico, Pakistan, Russia South Korea, Taiwan, Spain and the Ukraine (IFPI 2006c: 11–18). The report's only references to Australia are in the context of:

- recent civil proceedings against the parties involved in the Kazaa P2P file sharing system (IFPI 2006c: 4, 7)
- Australia being the destination of Indonesian pirate discs (IFPI 2006c: 11)
- the AGD's role in educating Australians regarding the importance of protecting IP rights (IFPI 2006c: 19).

The IFPI 2006 global *Digital music report's* references to Australia are again primarily references to the Kazaa case (IFPI 2006d: 3, 4, 18, 19) or references to the Australian launch of the authorised iTunes digital download service (IFPI 2006d: 4, 5).

In the 2005 global piracy report, sound recording piracy levels in Australia are estimated to be in the 'less than 10%' band (IFPI 2005: 4). This places Australia in the same band as 15 other countries/regions including the US, UK, Canada, Japan and New Zealand (Table 6).

Table 6: Domestic sound recording industry piracy rates, 2004

Region	Exceeding 50%	Between 25% and 50%	Between 10% and 24%	Less than 10%
North America	none	none	none	Canada United States
Europe	Bulgaria Czech Republic Estonia Greece Latvia Lithuania Romania Russia Serbia/ Montenegro Turkey Ukraine	Croatia Cyprus Hungary Italy Poland Portugal Slovakia	Belgium Finland Netherlands Slovenia Spain	Austria Denmark France Germany Iceland Ireland Norway Sweden Switzerland United Kingdom
Asia	China India Indonesia Malaysia Pakistan	Philippines Taiwan	Hong Kong South Korea Thailand	Japan Singapore
Latin America	Argentina Brazil Central America Chile Colombia Ecuador Mexico Paraguay Peru Uruguay Venezuela	none	none	none
Middle East	Egypt Kuwait Lebanon	Israel Oman Saudi Arabia	Bahrain Qatar UAE	none
Australasia	none	none	none	Australia New Zealand
Africa	Morocco	Nigeria South Africa Zimbabwe	none	none

Source: IFPI (2005: 4)

Domestic music piracy levels are calculated as pirate units divided by legal units plus pirate units (IFPI 2005: 4). Excess disc production capacity is a contributing factor to the worldwide problem of sound recording piracy, as CD manufacturing facilities are used for burning pirate discs. However, Australia is not included in a list of 11 territories with the largest disc manufacturing over-capacity (IFPI 2005: 5).

MIPI stated that it:

is an organization which provides anti-piracy investigative and intellectual property rights enforcement related services to the Australian recording and music publishing industries. MIPI acts on behalf of the major record companies and music publishers and their Australian subsidiaries. These include Sony BMG Music Entertainment (Australia) Pty Limited, Universal Music Australia Pty Limited, Warner Music Australia Pty Limited and EMI Music Australia Pty Limited'.

MIPI estimates the current sound recording industry piracy figure in Australia to be around 10 percent. This is consistent with other reported piracy figures, and is higher than earlier reported estimates (MIPI 2000: 1). The rate is based on calculations made by IFPI in London.

The music industry's current calculation of piracy losses is based on local surveys, research and seizure statistics. This information is also compared to historical estimates, data from optical disc manufacturers and patterns in seizure. Academic studies are also reviewed and worldwide we continue to develop criteria based and econometric approaches including working with academics and economic consultancies where possible (MIPI suggest looking at, for example, the Symposium on Piracy and File Sharing, *Journal of Law & Economics* XLIX(1), April 2006).

Subscription television industry

ASTRA is the industry body that represents subscription television operators and channel providers. ASTRA's members include Austar, Foxtel, Optus Television, and Telstra (ASTRA 2006b). ASTRA defined piracy as:

when a viewer or end user gains access to a Subscription Television Service without payment to the relevant subscription television provider. This can be either by use of pirate smart cards and unauthorised use of set top boxes. Piracy is also the sale, manufacture and distribution of broadcast decoding devices (ASTRA 2006a).

ASTRA argues that 'Piracy of subscription television services is a serious crime and costs the Subscription Television Industry millions of dollars in revenue and resource' (ASTRA 2006a, 2002b).

Since its inception in Australia in 1995, the Subscription Television industry has invested \$8 billion in people, infrastructure, technology and programming and now directly employs over 3,500 people ranging from program makers and advanced IT professionals to call centre staff and sales people. Thousands of others are indirectly employed in related industries. Piracy undermines this contribution, costing the subscription television industry millions of dollars in lost revenue each year (ASTRA 2002a).

At the time of interviews in 2006, ASTRA estimated the cost to the Australian subscription television industry as a result of piracy at \$45m per year. This estimate is based on information supplied by retail and commercial subscription television services to ASTRA and involves:

A comparison of subscription TV penetration rates for areas identified as having high levels of piracy (hot spots) against the national average to estimate percentage levels of subscriber piracy for those hot spots. This percentage is extrapolated to calculate an estimate of foregone revenue;

Multiplying the number of card sharing piracy software downloads that occur within Australia to calculate an estimate of foregone revenue;

Applying an assumed piracy % based on results of in-house technological counter measures to calculate an estimate of foregone revenue; and

A 50% discount is applied to non-subscriber estimates to reflect the propensity to subscribe to the services (i.e. in the situation where the individual pirating the services could only become a legitimate subscriber we have assessed that there would be a 50/50 chance that they would subscribe to the subscription television services (ASTRA 2006a).

ASTRA referred to its 2002 submission regarding the fraudulent reception of subscription television services, where it added,

the cost to the industry has been calculated based on lost revenue from these potential legitimate subscribers that are undertaking pirate activity of service (either complete piracy of service or through the upgrade of their basic service to a premium level) However, to be conservative about estimations and on the premise that only some pirates are potentially legitimate customers, only half of the potential legitimate subscriber numbers (and therefore half the figure for foregone revenue) has been calculated. These figures are supported by the results of internal countermeasures undertaken, the findings from police activity and prosecutions, and anecdotal evidence.

ASTRA stated that their 'estimate is as reliable as is possible given current knowledge and monitoring capabilities.' However, amendments to the Copyright Act in 2006 provided a more comprehensive legislative scheme to protect subscription broadcasts. This may affect the extent of piracy in this industry.

Television program industry

An Envisional study found Australia was the second-largest downloader of online pirated TV shows in the world (15.6%), behind the UK (18.5%) but ahead of the US (7.3%). Australians were the leading downloaders of pirated TV programs on a per capita basis. The report found that increased bandwidth take-up, technological advances and a high demand for US-based TV shows are some of the reasons that piracy has boomed. Seventy percent of the piracy occurs through BitTorrent (BT) (Envisional 2004, BBC News 2005, Reuters 2005). The survey found that the top TV show downloads were 24, Stargate Atlantis, The Simpsons, Enterprise, Stargate SG-1, OC, Smallville, Desperate Housewives, Battlestar Galactica and Lost (Idato 2005).

BT is a 'protocol designed for transferring files' (Dessent 2003), that is very popular for TV program downloads. There are no Australian-based surveys of BT usage or TV program downloading. However, given the globalised nature of BT usage, and the operation of their so-called global communities, the results of international surveys are likely to be at least indicative of Australian usage.

Furthermore, an examination of anecdotal information on BT usage and TV program downloading suggests that Australians are downloading TV shows in increasing quantities. Australians are also uploading locally produced programs and segments of these programs for others to download.

Textile, clothing and footwear industry

TMIS, a private inquiry agency, advised that counterfeiting is 'widespread' in Australia, with goods being manufactured in Asia and being imported into Australia, as well as being manufactured locally. TMIS reported that:

...the main sellers/dealers are either immigrants or visitors (students). The main forums for trade are markets, eBay, other internet, small independent businesses and party plane sales in private homes ... Markets are the biggest outlet or forum with over 1200 markets around Australia, (they operate in an unregulated environment" and do not maintain proper record keeping (TMIS 2006).

While the Anti-Counterfeiting Action Group (ACAG) reported:

... breaches of copyright cause losses to the Textile, Clothing and Footwear Industry and our members in excess of \$300 million per annum. This loss affects the ability of the industry to develop new products, employ Australians and to generate export earnings (ACAG 2000: 2).

It should be noted that it is unclear as to how the textile, clothing and footwear industry arrived at their estimates. ACAG provided a list of markets where they had found breaches of copyright in 70 percent of them (ACAG 2000: 2). They found that in the four months before Christmas 1997, over 130 parties were estimated to be selling counterfeit clothing of \$1,800 each in value on the New South Wales south coast alone (ACAG 2000: 6).

Media reports appeared in 2005 suggesting that the popular Von Dutch clothing label had 'pulled out of the Australian market' due to large scale counterfeiting of its brand. In one report, 'the Australian distributor of Von Dutch, the Tinine Group, has announced it has stopped importing the trendy label ... The Tinine Group said it blamed the proliferation of counterfeit Von Dutch goods for the decision. Faced with market stalls across the country selling fake Von Dutch caps for \$8, compared with the retail price of \$120 for the real thing, Tinine Group simply gave up trying to compete. "Unfortunately due to little support in the control of the fakes in Australia, we decided to cease importing the very popular brand," Tinine chief executive Brian Tinant said' (Cuming 2005).

Although Von Dutch's departure from Australia has been referred to as evidence of the extent and impact of the problem of counterfeiting, there may have been another explanation, as Von Dutch did not seek any law enforcement action:

... Von Dutch Originals company does not hold the copyright to the name or the label's distinctive designs. The trade mark is instead registered to a Brisbane company called Nolmont, which beat Von Dutch to the punch in 2003 and registered the name first ... in its haste to turn out a profit, Von Dutch Originals was slow off the mark to register the trade mark in Australia and Nolmont beat it to the punch. Records show Nolmont lodged its application on October 7, 2003, more than two months before Von Dutch. The wrangle over the rights to the trade mark is now in the hands of the lawyers, with the dispute still to be settled (Cuming 2005).

While the media report confuses the concepts of copyright, trade mark registration and business name registration, it suggests that there is a dispute over who owns the Australian Von Dutch trade mark. If this is the case, that would suggest that Von Dutch's exit from the Australian market may have been a decision influenced by commercial and legal factors rather than the prevalence of counterfeiting in the Australian market place.

Toy industry

The Australian Toy Association describes itself in the following manner:

... an independent, financially strong well resourced industry body representing and servicing Australian industries specialising in products for kids and family leisure, learning and entertainment to enhance their future health and prosperity (Australian Toy Association 2006).

The Australian Toy Association surveyed more than 1,600 markets and some 1,700 discount stores in late 2001. Their study found toys were sold in 80 percent of those markets (with an average of 7.6 stalls per market) and in every discount store. They found high rates of IP breaches with 53 percent of markets and 51 percent of discount stores having breaches (see Table 7)

Table 7: ATA-reported IP breaches at non-traditional retail outlets and discount stores, 2001

Area	Stalls/stores visited	Breaches found in sample group	%
Markets			
Vic	409	258	63.1
NSW	232	101	43.5
Qld	67	15	22.4
<i>Total</i>	<i>708</i>	<i>374</i>	<i>52.8</i>
Discount stores			
Vic	147	76	51.8
NSW	64	35	54.7
Qld	26	10	38.5
<i>Total</i>	<i>237</i>	<i>121</i>	<i>51.1</i>
Total market stalls and discount stores	945	495	52.4

Source: Allen (2003: 18)

Allen reported that 'it was not possible to directly identify the volume and value of sales of toys from these outlets', without an identification of the percentage of toys sold that were suspect, rather than the mere exposition of the proportion of stores selling these suspect. As a result, it is not possible to calculate the rate of breaches.

The direct costs of counterfeiting are largely borne by the legitimate industries that make and distribute original products. In 2002 counterfeiting resulted in \$677 million of lost sales in the Australian toy, software and video games industries. This (included) \$131.7 million lost sales in the toy industry. Conservatively, these lost sales represent \$200 million in lost profits.

Allen states that there are no official statistics, which describe the scale of toy counterfeiting in Australia (Allen 2003: 17–19).

Current legislative and regulatory provisions

Introduction

Piracy and counterfeiting may be dealt with through criminal or civil litigation, or both. Civil matters are typically commenced in the Federal Court of Australia, although some enforcement units/applicants have made use of the district court, the local court and, for civil copyright infringement, the Federal Magistrates Court of Australia.

Criminal proceedings

Criminal offences for infringement under Australian IP legislation are limited to three types of IP:

- copyright
- trade marks
- plant breeder's rights (PBR).

Infringements of other categories of IP such as patents, designs, circuit layouts and confidential information can only be addressed through civil remedies.

Copyright offences

On 1 January 2007, amendments to the *Copyright Act 1968* (Cth) came into operation, providing new enforcement measures to combat copyright piracy including a new tiered offences regime, proceeds of crime remedies, an infringement notice scheme (on-the-spot fines), strengthened evidential presumptions to make it easier to establish copyright piracy, and additional powers for courts to award larger damages payouts or other remedies to address large scale Internet piracy. In addition to these amendments, a number of the criminal law offence provisions of the Act were amended to harmonise the criminal law offence provisions with Australian Government criminal law policy and the *Criminal Code Act 1995* (Criminal Code).

Indictable, summary and strict liability offences were created with a range of penalty options, generally involving maximum penalties for indictable offences of fines not exceeding 550 penalty units or imprisonment for not more than five years, or both and for summary offences of fines of up to 120 penalty units or imprisonment for two years, or both. The strict liability offences are underpinned by an infringement notice scheme in the *Copyright Regulations 1969*. This gives police and prosecutors a wider range of enforcement options depending on the seriousness of the conduct.

Commercial-scale infringements that have a substantial prejudicial impact on the owner of the copyright are now proscribed under s 132AC of the *Copyright Act 1968* (Cth) as is airing of infringing works, sound recordings and films in public (ss 132AN, 132AQ, 132AR).

Amendments were also made to the evidential presumption provisions in civil and criminal proceedings to assist copyright owners and reduce costs in the litigation process. They provide that statements contained on labels, marks, certificates, etc. are presumed to be correct unless the contrary is established, rather than the existing 'admissible as prima facie evidence'. New presumptions were also introduced to recognise the labelling practices of commercially released films and computer software that will apply in both criminal and civil proceedings. The amendments also introduced a presumption of originality for computer programs. Amendments were also made to the provisions providing protection, civil remedies and criminal offences in relation to subscription broadcasts.

Trade marks offences

Penalties under the *Trade Marks Act 1995* (Cth) are somewhat lower (s 149): 500 penalty units and/or imprisonment for not more than two years (again, a corporation may be fined five times this amount). Offences attracting this penalty include falsification of a registered trade mark in the course of trade (s 145), and selling goods which are falsely marked (s 148). The fault element is knowledge or recklessness as to the falsification.

Other IP offences

The only other category of IP for which there is an infringement offence under Australian legislation is PBR. Section 74 of the *Plant Breeder's Rights Act 1994* (Cth) provides that infringement of any of the PBR rights set out in s 11 is punishable by a fine of 500 penalty units (\$55,000). Infringement is defined in s 53. No fault element is specified, although strict liability expressly attaches to the physical element of circumstance that the infringing act would be infringing under s 53. It would seem that the default fault element of intention under s 5(6) of the *Criminal Code Act 1995* (Cth) attaches to the conduct elements involved in the infringement (e.g. producing or selling), and recklessness attaches to the circumstance that the act is without the authorisation of the grantee of the PBR. There have been few if any prosecutions commenced under s 74 of the *Plant Breeder's Rights Act 1994* (see ABC report *Investigation into illegal grain seed trading*, 17 November 2004).

Almost all other offences contained in Australian IP legislation relate to misrepresentations as to whether a patent, trade mark, design, etc. is registered, or dishonesty dealing with the registration offices.

Prosecution

Copyright offences are generally tried summarily, although indictable offences are now provided for since the commencement of the *Copyright Amendment Act 2006* (Cth) on 1 January 2007. The main provisions of the *Copyright Act 1968* that arise in prosecution include:

- s 132 – offences relating to infringing copies
- s 132A – presumptions in relation to subsistence and ownership of copyright
- s 133 – destruction or delivery up of infringing copies.

Trade marks offences may be tried either summarily or on indictment. The main provisions of the *Trade Marks Act 1995* that arise in prosecution are:

- s 145 – falsifying, etc. a registered trade mark
- s 146 – falsely applying a registered trade mark
- s 148 – selling, etc. goods with false marks
- s 149 – penalties.

Customs

The ACS notices of objection mechanism for copyright material operates as follows:

(i) Notices of Objection

Division 7 of Part V of the *Copyright Act 1968* establishes a procedure whereby a person (the “objector”) who is owner or exclusive licensee of copyright in copyright material may lodge with the ACS a notice of objection in relation to the importation of copies of that material (s. 135[2]). “Copyright material” means a work, sound recording, cinematographic film, published edition of a work, or a television or sound broadcast as recorded in a cinematographic film or a sound recording (s. 134B). Prior to amendment of the *Copyright Act 1968* in July 1995 to implement Australia’s response to the obligations relating to copyright contained in the Trade-Related Aspects of Intellectual Property Rights agreement, the objection provisions applied only in relation to printed copies of published literary, dramatic or musical works. ACS has reported that no notice of objection was ever received under this scheme ... Since the inclusion of subject matter other than works (most notably encompassing compact disc [CD] sound recordings, video tapes, computer software, clothing and footwear) notices of objection have become more prevalent ...

(ii) Seizure

Section 135(7) of the *Copyright Act 1968* empowers the ACS to seize goods which are imported for the purposes of trade, which are subject to the control of Customs within the meaning of the *Customs Act 1901*, and which are covered by a current Notice of Objection. It is important to note that the ACS does not itself adjudicate on copyright infringement, but is empowered simply to seize any such goods and hold them for 10 working days, extendible for a further 10 days upon reasonable request by the objector (*Copyright Act 1968*, s. 135AC and *Copyright Regulations*). As soon as practicable after the seizure, the ACS must serve written notification on both the objector and importer, stating that the seized copies will be released to the importer unless an action for infringement is instituted by the objector in respect of the copies. In many cases, particularly those involving small consignments of goods, the importer simply consents to forfeiture of the seized copies (ss. 135AC and 135AE) rather than defend an action for copyright infringement (Urbas 2000).

A similar mechanism operates for trade mark objections:

(i) Notices of Objection

The *Trademarks [sic] Act 1995* similarly allows for notices of objection to be lodged with the ACS in respect of infringing imports. Such notices may be lodged by either the registered owner of a registered trademark or, in certain circumstances, by an authorised user of the trademark (s. 132). A notice of objection remains in force for a period of two years from the date of the notice unless revoked earlier.

(ii) Seizure

Section 133 provides for the seizure of imported goods which bear a mark that, in the opinion of the ACS, is “substantially identical with, or deceptively similar to” a trademark in respect of which a notice of objection has been lodged. Unlike the non-mandatory seizure provisions under copyright legislation, however, s 133(2) of the *Trademarks Act 1995* provides that the ACS must seize the suspect imported goods unless satisfied that there are no reasonable grounds for believing that the notified trademark is infringed by the importation. As soon as practicable after seizure, both the objector and the designated owner must be notified in writing (s. 134). As with copyright seizure, unless the objector commences an infringement action within 10 days (extendible to 20 days on request), the goods are released to the owner. In any case, the goods must be released after 21 days unless a court order provides otherwise (s. 136, and regulations) (Urbas 2000).

The January 2007 amendments to the *Copyright Act 1968* (Cth) included amendments to the ACS notice of objection provisions in the Act to reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices. It also ensures that the Notice of objection provisions remain consistent with recent changes made to the *Trade Marks Act 1995* (Cth). Similar changes were made to the *Trade Marks Act* in 2007, including extending the time that notices remain in force from two to four years.

Other legislation

Other legislation that may have application (apart from other types of IP rights legislation such as that relating to patents, designs, PBR, circuit layouts, etc.) includes commercial dealings legislation (trade practices/fair trading Acts), and general criminal laws. Section 52 of the *Trade Practices Act 1974* (and similar state and territory fair trading legislation) applies to misleading or deceptive conduct and false representations.

The definition of 'property' in theft offences can be wide, e.g. the theft provisions of the *Criminal Code 2002* (ACT) refer to the definition of property in the Dictionary to the *Legislation Act 2001* (ACT):

property means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes a thing in action.

A thing in action is an intangible personal property right recognised and protected by the law. Examples include debts, money held in a bank, shares, rights under a trust, copyright and right to sue for breach of contract. The reference to 'copyright' is tantalising, but other elements of theft such as intention permanently to deprive are presumably missing in copyright infringement.

Unauthorised modification of data (such as copyright notices, proprietary information, or digital rights management (DRM) information) using the internet, and with intent to commit a serious offence (such as criminal copyright infringement), would potentially be an offence under s 477.1 of the *Criminal Code Act 1995* (Cth). This offence prohibits 'unauthorised access, modification or impairment with intent to commit a serious offence' and, along with other offences added under the *Cybercrime Act 2001* (Cth) targeting hacking and other computer misconduct, has potentially wide reach and carries heavy penalties. The penalty under s 477.1 is as for the serious offence intended to be committed (which must be five years or more, e.g. copyright infringement under s 132 of the *Copyright Act 1968*, while s 477.2 (unauthorised modification of data to cause impairment) and s 477.3 (unauthorised impairment of electronic communication) both carry penalties of 10 years imprisonment.

Recent amendments of the *Criminal Code Act 1995* (Cth) effected by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth) considerably expand the scope of these computer offences. For example, s 474.14 creates a new offence of 'Using a telecommunications network with intention to commit a serious offence'. As with s 477.1, the serious offence in question might be a copyright offence, but there is no element of 'unauthorised access, modification or impairment' involved – simple use of a telecommunications network with the requisite intent suffices. The penalty is as for the serious offence (e.g. five years). These new telecommunications offences commenced on 1 March 2005.

Non-litigation based regulatory mechanisms

Not all instances of piracy and counterfeiting result in litigation. There are also many other regulatory mechanisms that play a role in relation to piracy and counterfeiting, including the registration of some IP rights, the use of ©, ™ and ® symbols, and the notices of objection procedures.

The copyright symbol, ©, is not required for material to be protected under the *Copyright Act 1968* within Australia. However, users may use the symbol followed by the name of the copyright holder and the year that the work is first published if they wish. Before a trade mark is registered in Australia, the ™ symbol may be used with the trade mark. The ™ symbol is generally understood to indicate that the mark located near to the symbol is intended to be used as a trade mark. The ™ symbol may act as notice that the owner of the mark is using the mark or intending to use the mark on an exclusive basis. After a trade mark has been registered in Australia, the ® symbol may be used with the trade mark. Use of the ® symbol affords notice to other parties that the owner of the trade mark has the exclusive right to the use that trade mark in relation to the goods or services for which that trade mark is registered.

Enforcement units

When civil litigation is used, rights owners are often assisted and/or represented by industry enforcement units. Enforcement units have a unique organisational and management structure designed to undertake a specific set of objectives, functions and operations. Sometimes described as quasi-police forces, enforcement units feature specially trained personnel with particular qualifications, experience and expertise for dealing with copyright enforcement. Enforcement units have developed in-house expertise and experience in dealing with infringement activities, especially in newer jurisdictions, such as the Federal

Magistrates Court. They have also developed expertise in taking advantage of new tools and methods for dealing with copyright infringement such as the use of *Anton Piller* orders in which a court can require a defendant to grant access to property and /or premises to allow the claimant to conduct a search for evidence that may be easily disposed of upon notice of legal proceedings (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, 1 All ER 779). Enforcement units such as AFACT and MIPI lead civil proceedings on behalf of their stakeholders. As part of this process, they are involved in instructing and managing the lawyers, investigators, computer forensic specialists and surveillance operatives engaged by the stakeholders.

Federal Magistrates Court

The Federal Magistrates Court of Australia (also known as the Federal Magistrates Service) was established by the Commonwealth Parliament at the end of 1999 by the *Federal Magistrates Act 1999*. Its jurisdiction is found in the *Federal Magistrates (Consequential Amendments) Act 1999*. The objective of the Federal Magistrates Court 'is to provide a simpler and more accessible alternative to litigation in the superior courts and to relieve the workload of those courts' (Federal Magistrates Court of Australia 2006a).

The Federal Magistrates Court has jurisdiction to hear and determine civil copyright matters under the *Copyright Act 1968*, as amended by the *Copyright Amendment (Parallel Importation) Act 2003*. In particular, the court can deal with matters arising under parts V, VAA, IX and s 248J of the *Copyright Act 1968* (Federal Magistrates Court of Australia 2006b).

Usage of the Federal Magistrates Court has been a relatively recent development, and has resulted in substantial cost savings for applicants and respondents in copyright cases. Several interviewees indicated that decisions in Federal Magistrates Court cases develop jurisprudence in this field. Federal Magistrates Court cases typically cost between \$10,000 and \$25,000 each. In contrast, relatively uncontentious Federal Court cases typically cost between \$100,000 and \$350,000 each. More contentious Federal Court cases can cost well in excess of \$500,000, especially if the court's decision is subject to appeal.

Currently, the Federal Magistrates Court is available in civil copyright infringement cases, but not trade mark infringement cases, so the cost savings and other benefits available to copyright owners as a result of the availability of these types of proceedings are unavailable to trade mark holders. The Advisory Council on Intellectual Property has recommended that jurisdiction be extended to patents, trade mark and design matters (ACIP 2004).

It has been suggested that there is some resistance among the major law firms to the use of the Federal Magistrates Court in IP-related matters. If this resistance exists, it may arise

as a result of the service model adopted by the major law firms. In the words of one of the interviewees, the Federal Magistrates Court, ‘has robustly and courageously dealt with intellectual property rights matters. We are aware of some criticisms of this Court that are based on nothing more than the Court’s capacity to refer matters to the Federal Court. This has occurred in one significant internet infringement case and was the proper decision in all of the circumstances’.

Federal Court of Australia

Prosecutions for summary offences and offences of strict liability, but not indictable offences involving copyright infringement may be brought in the Federal Court. Prosecutions for offences under the *Trade Marks Act 1995* cannot be commenced in the Federal Court under s 191(3) of the *Trade Marks Act 1995*. Typically, offences under the *Copyright Act 1968* and *Trade Marks Act 1995* are commenced in the local court. Ordinarily, appeals from the local court in Commonwealth matters will be heard in the district court in the same manner as appeals in relation to state matters, under s 68(2) of the *Judiciary Act 1903* (Cth).

Section 131B of the *Copyright Act 1968* expressly provides that the jurisdiction to hear appeals is vested in the Federal Court. It is therefore not possible to institute an appeal in relation to an offence under the *Copyright Act 1968* in any court other than the Federal Court. In one recent case, the appeal was incorrectly heard in the district court and was referred to the Federal Court. However, s 131B(2)(b) makes possible an appeal by special leave to the High Court.

As a result of this decision, it is clear that appeals from the local court in trade mark cases can be heard in the district court, whereas appeals from the local court in copyright cases must be heard in the Federal Court. This distinction in the treatment of appeals in IP cases is difficult to justify in principle. As a result, appeals in relatively minor copyright cases heard before the local court must be heard in the Federal Court instead of the district court, thereby increasing the cost of these appeals. Furthermore, this system provides a substantial disincentive to defendants to appeal copyright convictions because of the need for these appeals to be heard in the Federal Court.

Some IP rights owners reported that appeals in Federal Court matters also create some difficulties for rights owners because judges do not see witnesses testify, and may not always develop an accurate and/or complete perspective of the case. In this regard, Federal Court appeals on IP matters are no different from appeals on other types of matters.

A perceived problem with the use of the Federal Court in IP matters, according to several interviewees, is that it is open for the defence to use methods, such as frivolous challenges on legal grounds for copyright subsistence. This increases the cost and time involved in

hearing matters. Of course, one party's frivolous challenge may be interpreted by the other party as a legitimate and viable challenge to the validity of registration and may form the grounds for a defence to an action or a cross-claim.

One alleged victim of trade mark infringement reported that he had an actionable matter but was advised not to bother with Federal Court proceedings unless he could afford to lose 'north of \$300,000'. This was of concern to him, as he had an actionable matter based on the infringement of his trade mark, but he simply could not afford to commence proceedings. An Airtowel representative reported:

To protect an IP, trade mark or copyright, you must have a very large sum of money as this will, if you survive the financial journey, end up in the Federal ... Court. This is the advice I received from both lawyers ... and IP Barristers ... "If you do not have \$300,000 do not play the game. If your opponent has more money than you, you will be buried in cost". Apparently most cases are won by one or the other being unable to continue with the fight".

Local/magistrates courts

Because most IP cases are prosecuted in local/magistrates courts, difficulties have arisen in making the outcomes of proceedings and sentences awarded known, as decisions of these lower courts are generally not reported. Even in district/county courts, judges' sentencing remarks are often not reported, but in the lower courts it is often only from media reports that information about cases is available. This detracts from the ability of sentencing to deter future offending if potential offenders are unaware of the imposition of sentences in the courts. Similarly, it is often difficult for other magistrates to be aware of how matters in other lower courts are handled. One report suggested that:

One of the main problems in criminal IPR litigation is that the cases are often handled in the Local Court. The Local Court rarely provides publicly available written judgments – the judgments are provided only to the participants. I submit that there may be a skew in the judgments that this Inquiry receives, and thus considers. There is a risk that the only judgments that you will receive in this Inquiry are judgments that are favourable to IPR owners and show that proper procedure was followed and everything was fair. You will have a difficult time trying to get any other judgments because they are not publicly available, and it is unlikely the diverse and widely dispersed defendants will be making any submissions to this Inquiry ... Criminal IPR litigation should be litigated in the Federal Court, or at least the Federal Magistrates Court. It should not be handled in the Local Court (Anonymous 2005: 3).

Some IP rights owners interviewed said there is a problem of inconsistent local/magistrates courts judgments, and this has arisen as a result of the lack of published judgments. In practice, IP rights owners have sourced information on local/magistrates court decisions from a number of locations including media reports and informal reports from their own investigators. Some IP rights owners suggested that the local court system should develop a centralised repository of IP-related judgements as a publicly available list of IP precedents.

Generally, criticism of the local/magistrates courts has been limited, with most interviewees agreeing that it is appropriate for local/magistrates courts to continue to hear IP cases. One interviewee was very critical of the idea that IP cases should not be heard in the local court, stating:

Local Courts are the ideal forum for the hearing of criminal copyright cases. They allow parties to have their day in court without the expense and delay of a Federal Court case. Removing copyright cases from the Local Court system would result in copyright matters being treated differently to other types of criminal matters and there is no basis for treating copyright matters differently to other types of criminal matters.

Some interviewees suggested that additional resources should be devoted to the education of magistrates with respect to IP matters. This is of particular importance in view of the extensive and complex reforms introduced with the commencement of the *Copyright Amendment Act 2006* (Cth). Arguably, additional resources could also be provided to lower courts to establish databases of decisions in criminal cases (not only IP matters) that improve consistency in sentencing and allow research to be undertaken.

Choice of forum

There are no fixed 'rules' as to which provisions of particular legislation or which court are used by rights owners in civil proceedings. Typically, decisions are made on a case-by-case basis. Some rights owners/enforcement units match cases to particular courts and legislation, while others follow informal practices.

Responses to infringement

Price is, arguably, the strongest indicator of the existence of pirated and counterfeit items. Pirated and counterfeit items typically retail for a price significantly lower than the retail price of the authorised item. However, in recent times counterfeiters have become keenly aware of pricing issues, and are often selling counterfeit items for only slightly less than the standard price of the genuine item, to mislead consumers into believing they are purchasing seconds or genuinely discounted items rather than counterfeit items.

Some interviewees suggested that lower-priced items with a smaller price differential are more likely to be mistaken as genuine items, compared with higher priced items which can be viewed as being 'clearly' counterfeit. One interviewee suggested that low-priced items have a higher degree of substitutability with pirated items, compared with more expensive items.

Furthermore, many counterfeit goods are sourced from the same location that manufactures the legitimate item, and take the form of stock overruns. In these cases, the legitimate and illegitimate goods are often perfect replacements for each other, and price is the only indicator of pirated and counterfeit items.

Appearance may also be an indicator of the existence of pirated and counterfeit items. However, the identifying factors classified as appearance will vary, depending on the item subject to piracy or counterfeiting. For example, AICO advise:

How to Spot a Pirate DVD

Authentic DVDs are manufactured to a high standard. The flip (active) side of the disc should have a silver surface with manufacturing (SID) codes around the centre ring. The playback quality of an authentic DVD will be of a professional standard and all menu options will work. The artwork on the cover inlay and the disc will be of high quality with good colour separation and clear images and text. The cover inlay will usually be printed on good quality glossy paper.

Pirate DVDs could have some of the following telltale signs that indicate the DVD you are buying might be a pirate copy. These include:

Backyard burnt pirate DVDs

* Colour of Disc – the flip (active) side of the disc is a purple or blue colour. This usually indicates the film has been copied (burnt) onto a DVD-R disc on a DVD recorder.

* Artwork – lower quality artwork on the film cover and/or the disc. This includes reddish and dark hues, pixilation of images, blurry images and barcodes and text that is hard to read, particularly the fine print. Poor quality paper might be used for the cover inlay.

* Poor Replay – image and soundtrack dropouts and lower quality play mode. In some pirate DVDs the menu options don't work.

* Price – DVDs offered for sale at prices well below what you'd usually pay. This is especially relevant for retailers and wholesalers. Unfortunately consumers usually still pay full price for pirate films.

Factory pressed pirate DVDs

These professionally manufactured DVDs will often look very much like their authentic counterparts with silver backed discs and digital printing.

* Price – as per backyard burnt DVDs, factory pressed pirate DVDs are offered for sale at prices well below what you'd usually pay. This is especially relevant for retailers and wholesalers.

* Artwork – while artwork may be of a high standard there will be differences in colour shades printed on the disc and film cover. The lines of the barcode on the cover will be blurry due to copying from an original cover.

* Disc codes – all factory pressed DVDs have manufacturing codes imbedded in the flip (active) side of the disc. The codes on pirate discs will usually not match the codes on their corresponding authentic counterparts (AICO 2006b).

According to IFPI, a pirated CD could contain any or all of the following indicators:

- No record company logos;
- SID Code obliterated;
- No SID Codes;
- Poor-quality inlay & graphics, often 2 colour print only;
- Poor paper quality;
- Promo versions;
- Incomplete, Incorrect, or no licensing or trademark details;
- Discrepancies between disc and packaging;
- Incorrect spelling;
- Artist name or album title is incomplete or cropped off the disc;
- More than one artist's full name on a disc;
- Low cost;
- No plastic "jewel" case;
- CDs, plastic cases and inlay cards packed separately; and
- Disc is a CD-R/DVD-R (IFPI 2006f).

Reporting infringements

Infringement activity may be identified by enforcement agencies, private investigators and other individuals in the following ways:

- as a result of surveillance
- through the use by some rights owners of hotlines or anonymous 'tip' lines (ASTRA 2006c; AICO 2006b)
- as a result of activities by private investigators and other contractors on behalf of IP rights owners
- from an examination of public registers – e.g. business names, ACN/National name/ABN registers (counterfeiters often appear here – especially if they are large criminal enterprises)
- through the use of Google and other search engine searches (client searches)
- monitoring of the internet, and in particular P2P websites, for examples of infringing use and offers of infringing products and services
- customer complaints (either to legitimate producers/distributors, or to regulatory agencies) – especially when counterfeit goods fail to reach the same standard of merchantability or fitness for purpose as a legitimate good
- ACS notifications.

Where rights owners or consumers become aware of infringing activity, the activity is often reported to state police, who may refer the matter on to the AFP. It is also possible to refer matters directly to the AFP's IP case officers in Sydney and Melbourne.

Availability of self-help measures

Some rights owners have undertaken self-help measures including civil proceedings, while others have been reluctant to incur the associated expenses. The issue is complex as the victims of infringement of IP rights can range from individuals through to large corporations. Some IP rights owners have little or no expertise in enforcement activities, and accordingly are unable to undertake enforcement activities in response to criminal infringements. Furthermore, some groups/individuals genuinely have no / little ability or resources to devote to enforcement activities in response to criminal infringements.

For example, Indigenous groups have undertaken few, if any, enforcement measures to protect copyright and trade marks embodied in Aboriginal arts and crafts, including boomerangs, paintings and didgeridoos. VISCOPY advises that it has not even been able

to engage state police or the AFP in this regard. Nor have Indigenous groups exhibited any capacity to engage in direct law enforcement activities, or develop relationships with law enforcement officials.

Some have criticised rights owners for not adopting effective preventive measures to guard against infringing activity. One organisation suggested 'that there is a product that can substitute all searches for known online infringing content files with either law enforcement agencies' warnings or an opportunity to purchase a legitimate version across the web'. Such preventive solutions need further examination, particularly those which seek to address digital infringement where online piracy could be easily overcome. An example concerns technological protection measures such as access codes, passwords, DRM, and content protection systems including those used on DVDs, as well as encryption software.

Private prosecutions

A further option raised by some is the possibility of privately undertaken criminal action. One interviewee referred to various provisions of the *Crimes Act 1914* (Cth) under which IP rights owners are able to commence criminal proceedings themselves. There is provision under the Act for a civilian to apply for a search warrant under s 3E, as there is no restriction in the legislation as to who may apply. Rather, s 3E requires the issuing officer to be satisfied by information on oath that there are reasonable grounds for the search. To date, there have been no private criminal prosecutions undertaken by IP rights owners in Australia. Furthermore, there are no apparent legal impediments in Australia to the commencement of private criminal prosecutions (see *Brebner v Bruce* (1950) 82 CLR 161).

However, it should be noted that the CDPP has statutory power to take over a private prosecution commenced in relation to a Commonwealth offence under ss 6 and 9 of the *Director of Public Prosecutions Act 1983* (Cth). Furthermore, search powers under the *Crimes Act 1914* are limited to constables, so that the commencement of a private prosecution would still require the involvement of law enforcement officers in the execution of any search and seizure activities.

Public prosecutions

The primary role of the CDPP is to prosecute offences against Commonwealth law which includes offences under IP laws such as the *Trade Marks Act 1995* and *Copyright Act 1968*. The CDPP was established under the *Director of Public Prosecutions Act 1983* and began operations in 1984. The CDPP is an independent statutory agency. Prosecutions take place all around Australia and are coordinated through head office in Canberra, as well as in

capital city offices and regional offices (CDPP 2006a). The CDPP does not prosecute all offences. The prosecution of offences is subject to the prosecution policy of the Australian Government. All decisions in the prosecution process are made in accordance with these guidelines, which have remained unchanged since 1992. Relevant factors include whether there is a prima facie case, if further evidence is required before the CDPP can proceed. These and other factors are considered to determine whether there are reasonable prospects of a conviction. Only after it is accepted that there are reasonable prospects of a conviction will the CDPP consider whether the public interest requires a prosecution. The CDPP does not take into account the likelihood of content owners commencing civil proceedings to protect the same subject matter, in determining whether to commence criminal proceedings.

Many offences fall within the jurisdiction of states and territories, and the CDPP may have no involvement in prosecuting these offences. The CDPP works closely with the AFP, which is the Australian Government’s investigating law enforcement agency. The CDPP receives briefs of evidence from the AFP, which are then assessed in accordance with the prosecution policy. Although not an investigative agency, it does provide advice and assistance to the AFP during the investigative stage, particularly in complex matters.

The CDPP includes details of IP-related prosecutions in annual reports each year (Table 8). Such statistics are limited to cases actioned, and are not representative of piracy and counterfeiting across the board. In 2005–06, the CDPP dealt with 25 copyright actions (all summary) and five trade mark actions (all summary). This decline over the 2004–05 figures was reversed in 2006–07, to 38 copyright and 25 trade marks matters.

Table 8: Number of CDPP IP-related prosecutions, 1992–93 to 2006–07

Year	Copyright	Trade mark	Total
1992–93	14	22	36
1993–94	6	13	19
1994–95	11	20	31
1995–96	8	11	19
1996–97	3	11	14
1997–98	4	3	7
1998–99	12	12	24
1999–2000	15	7	22
2000–01	8	15	23
2001–02	10	14	24
2002–03	11	10	21
2003–04	23	27	50
2004–05	37	16	53
2005–06	25	5	30
2006–07	38	25	63

Source: CDPP annual reports

TCDPP cases have been in the areas of film, music, software, games (e.g. Xboxes), clothing (e.g. T-shirts), shoes, and accessories such as sunglasses.

In the 2007 federal budget, the CDPP was given an additional \$4.1m over two years for new prosecutors and training to enable the prosecution of IP crime and finance the pursuit of proceeds of crime (AGD 2007).

Policing IP infringements

The AFP is a law enforcement organisation whose role is to enforce Commonwealth criminal law and to protect Australian Government and national interests from crime in Australia and overseas. The AFP works closely with other law enforcement bodies at state, territory, Australian Government and international levels (AFP 2006) and receives electronic crime referrals from a range of sources including international law enforcement agencies, government departments, organisations, companies and individuals. In dealing with IP matters, the AFP focuses on incidents involving the importation, manufacture and sale of counterfeit goods (for details of AFP enforcement activity from 1997 to 2005 in relation to IP see Appendix G).

The AFP chairs the Intellectual Property Enforcement Consultative Group, which was formed in 2001. This group includes representatives from the ACS, the AIC, the CDPP, the AGD, the state police and representatives from industry include software, music, entertainment, toys and sporting goods interests. The group works together to facilitate the exchange of information between industry organisations and Australian Government agencies, including the ACC. Industry organisations also provide intelligence to the ACC about possible links between organised crime and intellectual property crime within Australia. Finally, exchange of information is also achieved through the Interdepartmental Committee on Intellectual Property Enforcement, chaired by AGD, which aims to coordinate a whole-of-government response to these issues.

The AFP typically becomes aware of IP rights being infringed as a result of being notified by rights owners through the referral process (see <http://www.afp.gov.au/services/referrals> for details on the referral process). Sometimes the AFP becomes aware as a result of the activities of other agencies including ACS, with whom they have a close relationship. The AFP also becomes aware of infringing activity through their own investigations including intelligence probes. In many instances the AFP can do little to prevent IP rights infringements. They only become aware of infringements 'after the event'.

All matters including IP matters are evaluated in accordance with the AFP's Case Categorisation and Prioritisation Model. This is because the AFP does not have the resources to investigate all reports.

In 2002–03, the AFP reported there were 15 IP crime investigations, and in 2003–04, there were 22 investigations. No data were available for the 2004–05 annual report. While some raw statistics were available, piracy and counterfeiting crime statistics were often classed with other types of crime, such as cybercrime and white collar (corporate) crime. This makes year-to-year comparisons difficult. For example, the AFP received 301 referrals in 2002–03. In that year, intellectual property offences were classed in the ‘other’ category, along with offences such as fraud and the sale of illegal items via the internet. Appendix 1 of the 2001–02 annual report states there were 34 corporate, bankruptcy and intellectual property cases referred to the AFP in that year, to a value of \$3,669m.

In the 2007 federal budget, the AFP was provided with additional funding of \$8.3m over two years to strengthen its capability to pursue serious and complex IP crime, particularly where organised or transnational criminal elements are involved (AGD 2007).

The Priscott case

A leading case involving the CDPP and AFP was the Priscott case, which resulted in a Brisbane man being sentenced to nine months imprisonment on charges relating to counterfeit DVDs. The then Minister for Justice and Customs advised that this was the first instance in which an Australian had been sentenced to a term of imprisonment for offences under the *Copyright Act 1968*. According to a media release issued at the time:

Sydney Grant Priscott, 53, was sentenced today in the Brisbane Magistrates Court to nine months imprisonment (with three months to serve), a recognisance of \$1500 and five years conditional good behaviour after being found guilty of 28 charges relating to importing, possessing and exposing for sale counterfeit DVDs. The investigation started on 23 September 2003 when Brisbane Customs officers at air cargo detected approximately 800 counterfeit DVDs concealed in a shipment of audio speaker stands. The shipment of DVDs had been sent from Malaysia to an address in the Brisbane suburb of Salisbury. Investigations by Customs and the Australian Federal Police (AFP) revealed this address was false. On 6 October 2003, federal agents and Customs executed a search warrant at an address in Coopers Plains.

During the course of the search further DVDs were located. At the completion of the search a 53 year-old man was arrested and charged with offences under the provisions of the Copyright Act. He was subsequently bailed from the Brisbane Magistrates Court. After his court appearance witnesses advised police that the man was continuing to sell DVDs at the Eumundi Pavilion Markets. A search warrant was executed at a stall at the Eumundi Pavilion Markets on 6 March 2004 where further counterfeit DVDs were seized. On 9 March 2004 the same man was arrested in connection to this seizure of DVDs (Minister for Justice and Customs 2004).

State policing

There are no national data on IP crime recorded by state or territory police. The Australian Bureau of Statistics (ABS) collects Australia's official crime statistics which include crimes involving IP infringement recorded by police (ABS 2006). However, changes in coding practices mean it is impossible to separate out specific IP offences.

The ABS has used the Australian Standard Offence Classification (ASOC) since 1997, replacing the Australian National Classification of Offences (ANCO) developed in 1985. The ASOC coding 'Theft of intellectual property' (0822) is a subcategory of 'Theft and related offences' (08). ANCO previously included 'Copyright and patents' as a separate category which included both 'Copyright Act offences' and 'Trade mark/description offences' (ABS 1985: S Group 839). The transition from ANCO to ASOC in 1997 indicates that 'Theft of intellectual property' may include some offences previously recorded as 'Other theft' under ANCO (ABS 1997; Urbas 2000: 4). Although data are recorded as a subcategory of theft and related offences, statistics are not released for this subcategory. However, the ABS is keen to develop its statistical holdings in this area, as discussed in its publication *Innovation in Australian business* (ABS 2003).

During consultations it was noted that ASTRA members had reported 97 matters to the AFP and state police, although they did not distinguish between reports to the AFP, and reports to the state/territory police. By 2007, 61 matters had been finalised in the local/magistrates courts. Some IP rights owners suggested that the state/territory police do not pursue criminal investigations regarding copyright infringements because they consider them to be the exclusive responsibility of the AFP. Some interviewees reported that the state police are often reluctant to charge parties under the *Copyright Act 1968* and *Trade Marks Act 1995* because they are federal legislation, and state police prefer to rely solely on state legislation or a combination of both state and federal legislation.

ASTRA stated during consultations:

From a practical point of view, it is important to note that the legislation that is relied on is often dependant upon the individual law enforcement officer managing a particular investigation. In the current absence of clear criminal sanctions in federal legislation, many officers shy away from applying federal offences to particular circumstances and rely solely on state legislation or a combination of both state and federal. The types of charges include:

- Possess false documents (NSW)
- Obtain financial advantage by deception (NSW)
- Fraud (Qld)
- Possess tainted property (Qld)

- Dispose of tainted property (Qld)
- Custody / Control of false documents (Vic)
- Use false document (Vic)
- Dishonestly acquire an advantage (Tas)
- Make broadcast decoding device (Cth)
- Sell broadcast decoding device (Cth)
- Supply broadcast decoding device (Cth)
- Handle stolen goods (Vic)

In legal proceedings, ASTRA stated that they relied on the fraud inherent in the use of a forged or counterfeit access card by a consumer to access pay television services, rather than the original counterfeiting activity. The state police appear to follow a similar course – treating matters which could be viewed as examples of IP infringement as other types of infringing activity, perhaps for the sake of legal expediency or convenience. The reluctance of state and territory police to pursue copyright or trade mark matters may be due to state and territory police agencies’ internal instructions, policies and cooperative arrangements. It should be noted that ‘clear criminal sanctions’ were introduced in the 2006 *Copyright Act* amendments. It is no longer necessary to prosecute under state/territory offences.

The Le case

One case involving the CDPP and state police concerned Thi Tho Le, sentenced to 11 terms of 12 months imprisonment to be served concurrently, with a non-parole period of eight months. Le was also placed on a three-year good behaviour bond.

In December 2005 in a NSW Police raid of her home in Sydney, Le was found with 35,000 pirated video tapes in her possession. In June 2006, Le pleaded guilty to 11 counts of copyright infringement. A media report stated:

Police were alerted to Le’s home copying after customers of the local video rental store, licensed to rent Vietnamese-language films distributed by China TV & Film Consultants, told the owners they could rent films cheaper at Le’s house. China TV & Film Consultants hired William Bush ...who then conducted “trap rentals” from Le before contacting NSW police.

Mr Bush said yesterday that, when the police executed search warrants on her house, they found 35,000 movie tapes, as well as 19 video recorders and two TV sets. It took police from 7.30am until 5pm to remove the tapes from the house, stacking them in boxes and then directly into a truck when they

ran out of boxes, he said. Stacked one on top of another, without their cases, that number of tapes would dwarf the world's tallest building, towering 875 metres high. In their cases, the pile would be more than a kilometre high.

Anti-piracy investigators from the record and film industry say that the sentence is easily the longest handed out, with most convicted pirates receiving only fines ... Mr Bush said even if the judge had just meted out one sentence of one year, it still would have been "by far the heaviest penalty" he'd seen in eight years of anti-piracy work (Davidson 2006).

Other cases

Information on the other recent cases and penalties was provided by MIPI and is shown in Table 9. The data show that, although some substantial fines have been imposed in recent years, terms of imprisonment are still rare and actual full-time custodial sentences even rarer.

Table 9: Recent IP-related cases and penalties

Case	Offences/proceedings	Primary sentence	Forfeiture orders
<i>Police v Trac</i> 29/11/2005	5 offences – s 132(2A)(a) <i>Copyright Act 1968</i> 3 offences – s 148 <i>Trade Marks Act 1995</i>	\$3,000 fine	All material and equipment forfeited to copyright owners
<i>Police v Nguyen</i> 11/11/2005	4 offences – s 132(2A)(a) <i>Copyright Act 1968</i> 4 offences – s 148 <i>Trade Marks Act 1995</i> 2 equipment offences – s 132(3) <i>Copyright Act 1968</i>	\$10,000 fine	All material and equipment forfeited to copyright owners
<i>Police v Senior</i> 22/8/2005	10 offences – s 132(2A)(a) <i>Copyright Act 1968</i> 8 offences – s 148 <i>Trade Marks Act 1995</i> Equipment offences – s 132(3) <i>Copyright Act 1968</i>	\$12,000 fine 600 hours community service	All material and equipment forfeited to copyright owners
<i>CDPP v Gare</i> 30/06/2005	14 offences – s 11.2 <i>Criminal Code Act 1995</i> (aid and abet the distribution of an infringing copy of a work) s 132(2) <i>Copyright Act 1968</i> offence s 19B(1)(d) <i>Crimes Act 1914</i> (Cth) (re: bond)	6 month/\$500 good behaviour bond, no conviction recorded to pay disbursements and professionals costs (guilty plea)	
<i>Police v Norris</i> 6/4/2005	ss 132(1)(a),(b),(c) & 132(2)(a) & 132(2A)(a),(b) & 133 <i>Copyright Act 1968</i> (possession, manufacture, distribution, exhibition, and sale of sound recordings)	Trevor Norris – \$6,000 fine Shirley Norris – \$2,000 fine Total \$8,000	All material and equipment forfeited to copyright owners
<i>Police v Nguyen</i> 2005	ss 132 & 133 <i>Copyright Act 1968</i>	\$1,500 fine	All material and equipment forfeited to copyright owners

Table 9: continued

Case	Offences/proceedings	Primary sentence	Forfeiture orders
<i>Jin Hua Chen v NSW Police Service</i> [2003] FCA 589	8 offences – ss 132 (1)(b) & 132(2A)(a) & 133 <i>Copyright Act 1968</i> – 8 charges.	\$8,000 fine payable in monthly instalments of \$100/month (heard on appeal from local court on the severity of sentence – decision upheld by the Federal Court)	All material and equipment forfeited to copyright owners
<i>Police v Darminian</i> 6/9/2001	5 offences – ss 132(2A) & 133(4) <i>Copyright Act 1968</i> (possession and sale of infringing articles)	\$1,250 fine (x 5 counts) Total \$6,250	All material and equipment forfeited to copyright owners
<i>Police v Issa Zaybat</i> 23/8/2001	4 offences – s 248Q <i>Copyright Act 1968</i> (possession, sale, letting for hire of infringing articles, unlicensed public performance – bootlegging infringement)	3 months imprisonment	
<i>Police v Dannoun</i> 23/8/2001	3 offences – ss 132(3) & 133(4) <i>Copyright Act 1968</i> (possession and sale of infringing articles)	\$7,500 fine (x 3 counts) Total \$22,500 & fingerprinting	All material and equipment forfeited to copyright owners
<i>Police v Ankelsaria</i> 24/7/2001	4 offences – ss 132(2A)(a) & 135(AS) & 132(3), & 133(4)/135AU <i>Copyright Act 1968</i> (make/sell a broadcasting device, possess device for making infringing copies, possess infringing article)	\$950 fine \$950 fine \$3,800 fine Total \$5,700	All material and equipment forfeited to copyright owners
<i>Police v Yue Tea Ong</i> 7/5/2001	ss 132(2A) & 133(4) <i>Copyright Act 1968</i> (possession of sound recordings)	\$10,000 fine	All material and equipment forfeited to copyright owners
<i>Police v Hang Tran</i> 27/4/2000	6 offences – ss 132(2A) & 133(4) <i>Copyright Act 1968</i> (possession of sound recordings)	\$1,000 fine (x 6 counts) Total \$6,000	All material and equipment forfeited to copyright owners
<i>Police v Warren John McKay</i> 15/2/2000	s 132(2A) <i>Copyright Act 1968</i> (possession of sound recordings)	\$1,500 fine	
<i>Kam Lai-Ha v McCusker</i> [2000] FCA 1174	17 offences – s 132(2A)(a) 4 offences – s 132(1)(b) <i>Copyright Act 1968</i> (possession/letting for hire films, sale /let for hire/offer for sale films). Appeal from the local court on severity of penalty upheld; remitted back to local court for further hearing and determination of appropriate penalty	\$1,500 (x 2 counts) Total \$3,000 (revised penalty unknown)	

Source: MIPI unpublished data

Customs enforcement

The ACS manages the security and integrity of Australia's borders. The ACS works closely with other government and international agencies, including the AFP to detect and deter unlawful movement of goods and people across the border (ACS 2006a). The ACS is involved in the detection and seizure of counterfeit goods, and in doing so prevents importers 'improperly trading on the good name and financial investment of genuine manufacturers'. The ACS also 'plays a key role in protecting consumers from purchasing goods which may not only be fake, but may also be dangerous or substandard in quality' (ACS 2006b).

Companies are able to lodge Notices of Objection with the ACS under s 132 of the *Trade Marks Act 1995* and s 135 of the *Copyright Act 1968*. 'Where goods are imported into Australia and have applied to them a similar or identical trade mark that has been applied without the consent of the trade mark owner in Australia, they may be seized by Customs' (ACS 2006c).

The ACS was able to provide seizure statistics, but only on a confidential basis. These statistics demonstrate an increase in enforcement activity in recent years involving goods subject to piracy and counterfeiting. They do not include any domestically produced pirated and counterfeit materials, which make up a significant component of the Australian piracy and counterfeiting problem. Also publicly available were lists of notices of objection registered under the *Copyright Act 1968* and *Trade Marks Act 1995*, and held by the ACS. (For the current list of trade mark notices of objection see ACS 2006c, and for the current list of copyright notices of objection see ACS 2006d.)

Examples of recent ACS IP enforcement include:

In August 2006 Victorian ACS officers uncovered a shipment of counterfeit designer brands which included over 1,000 pairs of jeans, as well as handbags, wallets, watches and perfumes. Over 5,200 articles were seized, representing 17 manufacturers including Hugo Boss, Chanel, Gucci, Diesel, Calvin Klein and Polo Ralph Lauren. If all counterfeit items had been sold at the full retail price of the genuine items, the seizure would have been worth \$1 million (ACS 2006e).

In February 2006 the ACS seized 30,000 bottles of counterfeit designer perfumes in Victoria. The perfumes would have been worth up to \$2 million if the perfume were genuine. The bottles were discovered when ACS officers selected two shipping containers from China for inspection. Brands impacted by the counterfeit activity included Gucci and Joop! (ACS 2006b).

Although ACS's enforcement activity is generally regarded favourably, some rights owners expressed concerns that there was not an effective system for sharing intelligence. For example, there was not a specific contact person assigned with the task of collecting content owners' intelligence on IP rights infringement matters that impact on border controls.

Limitations of public enforcement

Policing and prosecution activity

During the consultations, some rights owners expressed concern at the level of priority given to piracy and counterfeiting investigations by police and prosecutors. According to some IP owners, difficulties were encountered in securing prompt prosecution outcomes and also in achieving satisfactory sentences following conviction. Some reasons for this were said to be due to IP matters having to be prosecuted federally by the CDPP. TMIS, for example, estimated that state cases without CDPP involvement took two to six months, while CDPP cases took between 18 months and six years.

ASTRA reported that 'it is concerned that the current Case Categorisation and Prioritisation Model utilised by the AFP places too low a priority on Copyright offences and is only relevant for between 5 and 10 percent of actions ... ASTRA has concerns regarding the availability of AFP resources to adequately and proactively enforce Copyright and IP crime. ASTRA members are concerned that some Copyright investigations accepted by the AFP take significant amounts of time to be finalised and referred to the Commonwealth DPP (18 months in one case)'. ASTRA also had concerns regarding 'the conservative approach undertaken by the Commonwealth DPP when making decisions on whether to prosecute Copyright and IP crime' (ASTRA 2006: 18).

According to the CDPP, two recent cases demonstrate their effectiveness. These are the Tran case (*CDPP v Ng, Tran & Lee* [2003] NSWLC 17) and a Brisbane case involving the importation of DVDs which resulted in the defendant receiving a nine-month (non-suspended) custodial sentence. These cases demonstrate the problem of enforcing the criminal provisions on behalf of IP rights owners who, in the Tran case, were vocal in their public opposition to some of the CDPP's actions and decisions, including the CDPP's submissions on the penalties which were ultimately accepted by the court and imposed on the defendants. The defendants received suspended sentences. The CDPP expressed the view that the sentences in these cases were reasonable and appropriate in the circumstances, given that the defendants were university students with no prior criminal records. However, MIPI had claimed in various public fora that it would have been more appropriate for custodial sentences to have been imposed on the defendants in the Tran case, and MIPI viewed the final Tran case result as not providing a sufficient deterrent effect to other would-be pirates.

Former law enforcement professionals are increasingly involved in private enforcement units. This has resulted in the expression of some criticism by some IP rights owners who claim to be unable to engage state police to undertake any piracy and counterfeiting enforcement matters unless they use former police as investigators. In turn, it is alleged the former police use their personal networks in various state police forces to convince the state police to undertake the desired investigative activity.

This criticism of the role of enforcement professionals is not accepted by all parties. AFACT's observation is that it has implemented good, credible and reliable processes and work practices, which include the development of good relationships between AFACT investigators, the police and prosecuting agencies. AFACT suggests that while processes for dealing with the state police may not be transparent, they do exist, and are implemented by the state police in determining whether they will investigate particular copyright infringement matters. AFACT sees no reason why such an approach cannot be applied uniformly, if desired, by all IP rights owners investigating IP rights infringement matters.

Funding issues

Different financial considerations apply when discussing criminal and civil enforcement action. Most IP rights owners recommended the expenditure of additional resources on government enforcement activity, including more prosecutions by the CDPP, more investigations by the AFP and state police, and more seizures by the ACS. The BSA indicated that it is focused on working with other industries and the Australian Government to strengthen the cooperation of both state police and AFP to proactively take IP cases under the criminal provisions available to them.

In relation to civil proceedings, some IP rights owners referred to the difficulties associated with, and the inadequacies of, taking civil action, particularly in view of the costs involved. IP rights owners indicated that civil proceedings are time consuming and, even if they are successful, they often fail in their attempts to recover their losses, often failing to even recover their legal costs in successful matters. Unsuccessful respondents disappear, leave the country, and wind up their companies and/or operations before commencing new companies and resuming their illicit operations elsewhere. TMIS stated, 'There is a low level of damages collection and a high level of recidivism' (TMIS 2006).

Owing to the high cost of IP specialist advice and legal services, a number of groups of IP owners have experienced difficulty in pursuing infringements, particularly to pursue civil remedies. At the same time, infringements can have a disproportionate impact on their viability in commercial markets. These groups include:

- Indigenous IP rights holders
- small to medium-sized companies

- sole traders
- unincorporated businesses and associations
- unremunerated creators/artists.

Following the allocation of \$8.3m over two years to strengthen the AFPs capability to pursue serious and complex IP crime, and \$4.1m over two years to enable the CDPP to prosecute IP crime and pursue the proceeds of crime (AGD 2007), it is likely that official enforcement action will increase in Australia. The provision of new offence provisions should also facilitate the success of IP prosecutions. The high cost of pursuing civil remedies, however, remains.

Conclusion

Introduction

Piracy and counterfeiting create problems for IP rights owners, users and governments. The problems for IP rights owners include lost sales, reduced licence income and a diminution in the value of branding. The problems for content users as a result of IP crime include poor quality products, with possible health and safety impacts. The problems for the Australian Government as a result of IP crime include forgone taxation revenues and reduced economic growth which, in turn, impact on employment levels.

It is clear that IP crime causes serious problems, and in recent years governments have devoted significant resources to enforcement activities and legislative amendments. However, to determine how further resources should be devoted to combating IP crime, it is necessary to collect further information on the extent of and impact of piracy and counterfeiting. The statistics of IP rights owners and law enforcement agencies provide a partial and fragmented picture of the extent of piracy, counterfeiting and IP rights infringement generally in Australia, or its impact on Australia. Beyond the primary finding regarding the inadequacy of current publicly available data, lack of consistent counting rules and differences in methodologies, a number of areas recommending future research activity were identified.

Need for better data and further research

One of the important reasons for statistical information being unavailable is that many local IP rights owners collect raw data on infringing activity, which is then transferred offshore where it is analysed and retained. For example, international sound recording industry piracy statistics including the Australian statistics are developed and maintained by IFPI in London, based on raw data supplied by the Australian Recording Industry Association (ARIA) and MIPI to IFPI. IFPI is ARIA's international parent organisation based in London and incorporated in Switzerland. Similarly, international film piracy statistics including Australian statistics were recently developed offshore by LEK, an international consulting firm, on behalf of the US based MPA. The Business Software Alliance of Australia software piracy statistics are contained in an international BSA *Cost of counterfeiting study* which was prepared internationally by IDC (BSA & IDC 2005a).

The benefit of uniform global approaches is that piracy and counterfeiting loss statistics applicable to a particular IP rights owner may be comparable on a country-by-country basis. For example, IFPI's Australian sound recording industry's piracy data may be comparable with sound recording piracy data from other countries such as Canada, the United Kingdom and United States. However, this approach also creates difficulties. While piracy and counterfeiting loss statistics are comparable on a country-by-country basis for each

industry, they are often not comparable on an industry-by-industry basis. This is because IFPI, LEK and IDC implement different methodologies that are not directly comparable. Furthermore, the data collection and analysis standards of IFPI, LEK, IDC and other organisations in statistical collection will not be uniform. As a result, loss figures across different industries will not be comparable.

IFPI's Australian piracy figures will not be comparable with Australian piracy and counterfeiting data for other industries. There is no way to determine whether the Australian film industry's 11 percent piracy rate represents a more or less serious problem than the Australian music industry's 10 percent piracy rate. However, it is important to note that the collection of nationally consistent statistics is not core business for the industry.

Internationally, a number of organisations including the European Union, the FBI, WIPO, the OECD, and Interpol are currently conducting research into identifying the severity of the piracy and counterfeiting problem. To date, few findings have been reported which could be applied to the Australian environment, and different organisations employ different methodologies. Should the international agencies engaged in piracy and counterfeiting research develop useful models, these could be considered for application to the Australian context. However, it may be preferable for Australia to proceed with its own research agenda. At the same time, Australia might wish to consider increasing its practical involvement in some of this research activity, to encourage as far as possible the international adoption of uniform methodologies for measuring losses due to piracy and counterfeiting.

Domestically, Australia might wish to move towards the adoption of a single agreed model for determining losses and impacts as a result of piracy and counterfeiting. This could be implemented across a number of industries. Part of the difficulties facing IP rights owners in quantifying their losses may be due to a lack of expertise, skills and resources. Most IP rights owners acknowledge the difficulties in quantifying their losses, and some, such as the film and sound recording industries, have offered to cooperate and assist with endeavours to provide additional certainty to the statistical collection and modelling process.

Arguably, some of the problems associated with the lack of data on the incidence and cost of piracy and counterfeiting could be overcome by the introduction of a national monitoring program that would ensure there is a centralised process of coordinating information involving intelligence-based collections, official statistics from government agencies, industry data, international research and any commissioned survey work. Such a process would involve developing a standard data dictionary, consistent counting rules and methods for calculating basic indicators that would be collected and reported routinely.

Other types of research activity might include:

- surveys of consumers to inform estimates of the extent of IP crime, and potential changes in infringement practices by the public

- international reviews of enforcement activities
- research on the prosecution and sentencing of IP crime, based on administrative records, and in-depth case and transcript analysis
- econometric modelling to improve costing of impact across sectors
- specific studies on the impact of IP crime on particular groups including Indigenous Australians, to identify effective means to reduce and prevent such crime
- ongoing intelligence-based collection on IP crime, with a focus on organised criminal links.

Improving responses to prevent and reduce IP crime

Compensation

If an agreed model for determining losses and impacts as a result of piracy and counterfeiting were to be adopted in Australia, the government might wish to consider the introduction of a specific compensation provision in the criminal law provisions of Australian copyright and trade mark laws. A criticism or observation arising out of the operation of the previous criminal provisions was that they did not facilitate a compensatory order for the crime victim. As a consequence, this required at least two sets of separate legal proceedings involving the IP rights owner, to restore themselves to their former position, or at least go part of the way to restoring themselves to it. The IP rights owner would typically need to rely on criminal and civil proceedings in these circumstances, which could be a very expensive and time consuming process.

While compensatory orders may be available for victims of crime in certain circumstances – principally where personal injury has been suffered, and may even be available for victims of IP crime – such a process is complex. With the introduction of the amendments to the *Copyright Act 1968* (Cth) that came into operation on 1 January 2007, improved enforcement measures to combat copyright piracy now exist. These include a new tiered offences regime, proceeds of crime remedies, an infringement notice scheme (on-the-spot fines), strengthened evidential presumptions to make it easier to establish copyright piracy and additional powers for courts to award larger damages payouts or other remedies to address large scale Internet piracy. Arguably, these new provisions will help to address the criticisms raised in the past by some IP rights owners that the criminal provisions under Australia's IP laws and the enforcement of these provisions did not provide a sufficient disincentive for criminal activity in the IP area. These new provisions will have the effect of reinforcing the deterrent value of these provisions and clearly enunciating the penalties for piracy and counterfeiting to would-be offenders.

IP crime investigation guidelines

To improve responses to IP crime, consideration could be given to the development of good practice guidelines for the investigation of IP crime. These guidelines could include practices and procedures that enhance levels of cooperation and communication between federal and state/territory law enforcement agencies.

Improving public awareness

Further research is required into the issues surrounding the public awareness of criminal offences under IP law. In many instances, it is possible that copyright and trade mark infringers are not even aware they are committing a possible criminal act by engaging in their IP rights infringing activity. According to some interviewees, this lack of awareness applies to many Australian legal professionals and even some Australian magistrates. Certainly, most Australian IP laws seem to be tailored to civil provisions, but this lack of awareness of the criminal provisions points to a need for further investigation of education measures which could be taken for the community, as well as sections of the legal and judicial profession. These measures could include:

- educational initiatives to raise public awareness of IP crime and its impacts
- more targeted approaches to promote good practice among key stakeholder groups responsible for civil or criminal responses to reported infringements
- the identification of opportunities to launch consumer education and awareness programs on the consequences of piracy and product counterfeiting.

Federal Magistrates Court

The Federal Magistrates Court has no criminal jurisdiction but does hear civil IP infringement cases and provides many opportunities for the creation of robust real-time precedents in the copyright infringement area. Use of the Federal Magistrates Court has resulted in substantial cost savings for applicants and the faster resolution of disputes.

Currently, legislation allows matters to be moved from the Federal Magistrates Court to the Federal Court in certain circumstances. A similar discretion should be implemented allowing matters to be moved from the Federal Court to the Federal Magistrates Court in certain circumstances. To the extent that such discretion already exists, the judicial system should encourage its implementation, so that more IP infringement matters are heard when possible in the Federal Magistrates Court.

Consideration should also be given to imposing an arbitrary cut-off so that IP infringement matters above a certain value cannot be heard in the Federal Court in the first instance unless there are exceptional or unusual circumstances.

In 2004, the Australian Council on Intellectual Property released a report recommending the extension of the jurisdiction of the Federal Magistrates Court to include patent, trade marks and designs matters (ACIP 2004). Several interviewees involved in the enforcement of trade marks, expressed support for extending the jurisdiction of the Federal Magistrates Court to include trade mark matters. Such a move would encourage the use by rights owners of faster and less expensive civil proceedings, rather than criminal proceedings in the trade mark area.

IP specialist courts

Some groups suggested the development of IP specialist courts or IP specialist judges as an effective way of dealing with piracy and counterfeiting cases. Other groups suggested that, to an extent, this already takes place in the Federal Court, with certain judges hearing most IP cases. The argument for IP specialist courts was typically made with the expression of the view that local/magistrates courts are an inappropriate or inadequate forum for dealing with IP infringement cases, and that magistrates lack the necessary skills and expertise to hear IP cases. One interviewer suggested that local courts are too heavily skewed in favour of rights owners and against defendants. There is also the problem that most local court cases go unreported. As a result, magistrates only hear about the cases where the IP rights owners are successful or those that go to appeal.

A number of problems could arise if IP specialist courts were implemented:

- It is unlikely that there would be a sufficient number of piracy and counterfeiting cases to 'occupy' IP specialist courts, with the result that specialist judges and court resources would be under-utilised.
- The use of IP specialist courts might increase the likelihood of inconsistent judgements and penalties, with IP specialist judges possibly using the so-called 'special circumstances' of an IP case to justify handing out more lenient judgements and penalties to defendants and respondents.
- For IP specialist courts to be implemented, the legislature would need to enact a statutory definition of piracy and counterfeiting, to develop a classification system to determine the types of cases eligible to be heard by IP specialist courts. Such a statutory definition of piracy and counterfeiting could create difficulties – this project has already demonstrated that interviewees have different views on the meaning of piracy and counterfeiting. Litigants could attempt to characterise certain types of behaviour as piracy and counterfeiting to have them heard by IP specialist courts, even if this behaviour does not fall within the traditional view of piracy and counterfeiting. For example, an ambush marketing case could be characterised as an IP infringement case for the matter to be heard by IP specialist courts.

Copyright appeals to district courts

To improve responses to IP crime, consideration should be given to amendments to the *Copyright Act 1968* to allow appeals, in copyright cases, from local or magistrates courts to District Courts.

Indigenous IP rights

Further research is needed on Indigenous IP rights. In addition, it has been argued that Indigenous IP rights owners should be given the benefit of a special trade mark to guarantee the legitimacy of Indigenous products. The development and widespread usage of such a trade mark would, arguably, create a commercially viable enforcement and protection mechanism.

Consideration could also be given to such a trade mark being a certification trade mark (CTM). A CTM indicates that those goods have been 'certified' as meeting a particular standard of quality or accuracy, or as having a particular composition, mode of manufacture, geographical origin or some other characteristic (IP Australia 2006c). In this instance, an Indigenous Australia CTM would certify that goods carrying it are genuine Indigenous Australian goods.

A stand-alone copyright registration system for Indigenous Australian IP is a further idea that could be considered. If such a system were to be implemented, Indigenous Australians could be encouraged to register their works, and have them displayed and be available for license through an online system. Licence fees could provide the funding for such a system.

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Appendixes

Appendix A: Terms of reference and methodology

Terms of reference

The AIC was asked to address the following questions:

- What kind of IP crime is affecting Australia (i.e. what is the volume of counterfeit/pirated goods on the market) and what aspect of IP crime is impacting the most (e.g. small-scale market distribution, organised crime involvement, cross-border importation or domestic manufacture, and online distribution of music, film, television and business software products)?
- What official statistics are available on IP crime (i.e. how much infringing product is detected by Customs, what types and level of IP crime are reported to police, how is this classified, what proportion is acted on by police and referred to other agencies, how many prosecutions are undertaken and what are the results)? What are the gaps in these statistics and what data need to be collected?
- Are there any verifiable links between IP crime and other organised crime activities (e.g. drug importation and trafficking, arms smuggling, financing of terrorism, etc.) and groups known to be involved in such criminal enterprises?
- What is the economic impact of IP crime on small business, industry and employment in Australia (e.g. including perceptions of the illegality and seriousness of buying infringing or 'knock-off' products (An interesting recent study conducted by the IP Academy of Singapore into consumers' awareness, motivations and attitudes in relation to IP piracy may provide a model for similar research in Australia.))?
- How are calculations of the economic impact on industry made by industry and what is the veracity of these figures? Are there independent statistics available and, if so, how do they compare?
- How does IP crime affect regional communities and Indigenous Australians (i.e. economic impact on local cinemas – social impact on community, artistic works and counterfeit goods)?
- What other research has been done in this area that is relevant to the present questions of enquiry both nationally and internationally (this would include an extensive literature search)?
- What is known about the effectiveness of the Australian IP (and other) legislation in preventing IP crime (e.g. what effects do increased penalties, simpler proof provisions for subsistence and ownership, and changes to 'fair dealing' and other defences have, and what do international legislative comparisons suggest by way of promising legislative reform)?

Methodology

The research entailed a range of research activities carried out primarily between May and October 2006. These included:

- literature searches and legislation/case law reviews
- interviews with the ACS, AFP, AGD, CDPD and other Australian Government organisations
- interviews with main industry groups and legal representatives concerned with IP crime including, representatives of the film, music, software, satellite broadcast and technology industries.

The research was approved by the AIC Human Research Ethics Committee on 12 September 2006. Various public documents were obtained and examined during the course of this project, including court judgments and transcripts, and public submissions to previous Australian Government enquiries. Systematic searches were conducted using AustLII and several general search engines for relevant material. Policy information on IP crime was also collected with the consent of the interviewees. This policy information included details of the CDPD prosecution policy and the AFP investigation policy.

Consultations were also undertaken with key stakeholders, namely industry groups, legal representatives and other parties interested in IP crime or with a specialised knowledge of IP crime. Interviewees were identified in the following manner:

- from their prior participation in Australian Government committees, which examined the treatment of IP rights, including the Cracking Down on Copycats inquiry (HRSC/LCA 2000) and the Ergas Report (IPCRC 2000)
- from their prior participation in Australian court cases dealing with the enforcement of IP rights. These cases were identified as part of the review process.
- from their preparation of any prior written materials, including submissions to Australian Government inquiries, journal articles and newspaper op-ed articles. These materials were identified as part of the review process
- as a result of stakeholder recommendations.

Appendix D is the notice inviting contributions to this project and places at which the notice was disseminated. Several emails and contributions were received as a result of the publication of this notice. Appendix E lists the interview topics.

Appendix F lists the organisations who contributed to this project. Interviews were conducted in New South Wales, Victoria, Queensland and the Australian Capital Territory over a five-week period between July and August 2006. During the course of the interviews, the interviewer took notes, which were converted into an electronic record that was put to

each interviewee for confirmation prior to the record being treated as a 'final' record of the discussion. Interviewees were asked if they had any additional information which could be useful to this project, including statistical information about IP crime and information on the methodologies employed to derive the statistics.

Written contributions were received from individuals who were unable to be interviewed because they resided overseas or interstate, but who nonetheless wished to have their views represented in the study. Some interviewees also provided supporting materials not in the public domain at the time of their interviews, or shortly thereafter. Appendix F lists the organisations that made written contributions and/or provided supporting materials as part of this project.

Additional information and written materials provided by interviewees included:

- information in the public domain from various international organisations, including MPA information sheets (for the film industry), the IFPI 2006 Piracy Report and IFPI 2006 Digital Music Report (for the sound recording industry), and the Adobe anti-piracy initiative, Autodesk Licensing Policies, Apple Legal Information and Microsoft's Protecting Intellectual Property (for the software industry)
- contact details for international parties who might be able to provide additional information to the project
- case notes, case summaries and judgements
- white papers
- press releases, and newspaper and magazine articles
- affidavits, witness statements, photographic material, and briefs of evidence.

Some Australian Government organisations such as the ACS, ONA, and the ACC indicated during consultations they were conducting their own research in this area. ACC noted that it was developing a database of IP criminal activity and offenders, while the ACS indicated that it was in the final stages of completing a report on the importation of pirated and counterfeit items.

A draft of the report was submitted to AGD and IP Australia in October 2006 and following receipt of comments, further research was undertaken prior to delivery of the final report in September 2007.

Appendix B: Terms and concepts – IP, piracy, counterfeiting and bootlegs

IP has been described as ‘the property of your mind or intellect’ (IP Australia 2006a). Forms of IP include patents, trade marks, copyrights and trade secrets (Urbas 2000). A trade mark can be a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or a combination of these. A trade mark is used to distinguish the goods and services of one trader from those of another. A registered trade mark gives the owner ‘the legal right to use, license or sell it within Australia for the goods and services for which it is registered’ (IP Australia 2006d).

Two commonly used expressions are ‘piracy’ and ‘counterfeiting’, although there are no statutory definitions of these under Australian law. Piracy and counterfeiting are commonly acknowledged words which recognise that certain behaviour infringes provisions of Australia’s intellectual property rights legislation such as the *Copyright Act 1968* (Cth) and *Trade Marks Act 1995* (Cth). These terms are used widely in the public discourse by IP rights’ owners, particularly in the media.

Historically, there were references to piracy and counterfeiting in Australian copyright and trade marks legislation. For example, the *Copyright Act 1905* (Cth) used the terms ‘pirate’ and ‘piracy’, and defined those terms in the context of the unauthorised copying of copyright materials for a commercial purpose (Kelcey 1995: 232). These terms were later removed in favour of ‘infringement’ provisions. However, footnote 14 to Article 51 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement contains the following useful definitions:

(a) ‘counterfeit trademark goods’ shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

(b) ‘pirated copyright goods’ shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

In the present research, when asked about the definitions of piracy and counterfeiting, a typical response of interviewees was that piracy is typically viewed as the unauthorised duplication of a product for commercial gain without the consent of the rights owner. The

packaging of pirate copies is different from the original. Counterfeits are typically viewed as items that are copied from an original item, and are packaged to resemble the original as closely as possible. The original producer's trade marks and logos are reproduced to mislead the consumer into believing that they are buying an original product.

However, there was some variation amongst interviewees as to the definitions of piracy and counterfeiting, with some interviewees suggesting that for behaviour to be classified as piracy and counterfeiting, it must be motivated by the prospect of commercial gain. This reflects the requirement in some legislation that distinguishes criminal from other forms of infringement. Other interviewees, such as AFACT, rejected the necessity of linkages to commercial gain. In AFACT's view, infringing activity for commercial and non-commercial purposes are both examples of piracy. While commercial piracy and counterfeiting might be subject to legal proceedings, and non-commercial piracy and counterfeiting might not be subject to any legal proceedings, this did not mean that non-commercial piracy was not an example of piracy.

This distinction is important because, if piracy and counterfeiting are defined more broadly by a content owner such as the film industry, it is likely their piracy and counterfeiting statistics will include a larger number of offenders in their statistics than those content owners who do not include non-commercial infringements in their piracy statistics. Furthermore, if some content owners define piracy to include non-commercial infringing activity, and others do not, this means that the statistics produced by different groups may not be immediately comparable.

Another important category of infringement is bootlegging. A bootleg involves the unauthorised recording of live performances. According to one interviewer, the problem of bootlegs, which was historically serious and has been less serious in recent times, is making a comeback through the use of camera phones and digital devices that are able to record segments or digital streams of concerts, films and live events.

In understanding piracy and counterfeiting, the following observations are of assistance:

- In 1716 William Hawkins defined a pirate as 'one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods and treasure'. Nowadays, 'digital treasure in the form of information is carried internationally via fibre optic cables and satellites' and is being set upon by pirates who 'again for self enrichment', make copies of works belonging to others 'in order that they may use the information contained therein free of charge or pass them off as their own intellectual creations' (Smith 1997).
- Piracy refers to all forms of IP infringement 'whether they involve the making of exact replicas or another form of stolen content' (Williams 2001).
- IFPI (2008) provides the following definitions of piracy and related concepts:

The term of piracy is generally used to describe the deliberate infringement of copyright on a commercial scale. In relation to the music industry it refers to unauthorised copying and, in this context, falls into 4 categories:

Physical music piracy

Physical music piracy is the making or distribution of copies of sound recordings on physical carriers without the permission of the rights owner. The term 'piracy' refers to activities that are of a commercial nature, including activities that cause commercial harm. The packaging of pirate copies may or may not be different from the original. Pirate copies are often compilations, such as the 'greatest hits' of a specific artist, or a collection of a specific genre, such as dance tracks.

Counterfeits

Counterfeits are one type of physical piracy – These are recordings made without required permission, which are packaged to resemble the original as closely as possible. The original artwork is reproduced, as well as trademarks and logos in some cases, and IS likely to mislead the consumer into believing that they are buying a genuine legitimate product.

Bootlegs

Bootlegs are the unauthorised recordings of live or broadcast performances. They are duplicated and sold – sometimes at a premium price – without the permission of the artist, composer or record company.

Internet Piracy

'Internet piracy' is commonly used to refer to a variety of unauthorised uses of music or other creative content on the internet.

'Internet piracy' refers in particular to acts of infringements on the internet that are of a commercial nature – not necessarily due to the motivation of the perpetrator. While some internet pirates generate income from their activity, many people engage in such acts for other, non-commercial reasons – and they all can cause enormous commercial damage.

The term is also often used to refer more generally to any use of creative content on the Internet that violates copyright, whether via websites, P2P networks, or other means.

Appendix C: Counting the cost of IP crime

There are different ways of calculating losses due to piracy and counterfeiting. While this is not a comprehensive list, the following are the most common approaches.

Profits made by infringers

This model assumes that losses to copyright/IP rights holders are equal to the amount of profits made by the infringers. This is a view typically taken in assessing damages in civil proceedings over copyright and trade mark infringement. The advantage of this model is that it is very simple and transparent. If an infringer made a profit as a result of his activities, the amount of the loss suffered by the rights owner is deduced to be equal to the amount of that profit made by the infringer. Furthermore, the infringer's profits can be repatriated to the rights owner as compensation in any successful civil proceedings.

From a perspective of the manufacture or trafficking of illicit products, perhaps IP rights owners could look to the estimated potential street value' model relied upon by law enforcement agencies in relation to illicit drug-taking/manufacturing activities. In this process, law enforcement agencies rely on the retail or street value of a predetermined unit of a narcotic as the basis for calculations. This model has become a national and international standard for valuation of the crime. Intuitively, estimated potential street value readily adapts to estimated potential manufacturing capacity as well.

This formulation is useful in some circumstances but may be subject to challenge in others. For example, IP rights infringements are, on occasions, committed by individuals for reasons other than profit. Hobbyists and other early adopters of new digital technologies sometimes undertake infringing activities for reasons other than the making of profits.

For example, early adopters of new digital technologies may undertake infringing activities for 'fun', or for reasons of enhancing their own reputation. Some individuals enjoy the thrill of breaking DRM locks. These and other individuals may not profit from their activities, yet rights holders may still suffer significant losses as a result of their activities. If the ability of rights holders were limited to their ability to recover profits made by infringers, in these circumstances they would not be able to recover a large sum of money despite the existence of significant apparent losses as a result of the infringing conduct.

MIPPI agreed there were limitations in the account-of-profit approach. For example, in *Universal Music Australia Pty Ltd v Cooper* [2005] FAC 972, the respondent earned money from advertising under his business model, yet losses asserted by the recording industry were to be far higher than respondent Cooper's reported profits. Cooper did not charge users for downloading sound recordings, but did benefit 'financially from sponsorship and advertisements on the website'. The court indicated that the commercial benefit to Cooper

could be characterised as ‘a collateral one, arising from the sponsorship and funding he received as a result of the exposure of the advertising material on his website’ (*Universal Music Australia Pty Ltd v Cooper* [2005] FAC 972 [90]).

The approach where losses to the IP rights owner are equated to profits made by the infringer is perhaps more useful in typical civil proceedings where an account of profits can be completed, and any of the impacts of losses, for example due to larceny, can be calculated and scrutinised carefully.

Value of items stolen

This model assumes that losses to copyright/IP rights holders are equal to the value of the item stolen or misappropriated.

This loss model is simple and consistent with the treatment of other forms of property loss. For example, if a computer store is subject to a break and enter and 20 computers are stolen, for insurance valuation purposes the loss is the retail or wholesale price of the 20 computers. If the average purchase price to the retailer of each computer is \$1,500, the loss as a result of the theft is \$30,000.

In this example, no positive evidence is asked for nor offered by the victim of crime, that in the absence of the theft, that 20 computer sales would have certainly been made. No positive evidence is asked for nor offered by the victim of crime, which suggests that some of the stolen 20 computers *might* have been subject to later discounting which would have resulted in an average sale price of below \$1,500. No positive evidence is asked for nor offered by the victim of crime, which suggests that some of the 20 computers *might* have been returned to the wholesaler resulting in fewer than 20 consumer sales, thereby reducing profits forgone as a result of the theft.

Similarly, if a private residence is subject to a break and entry, and a plasma screen television which cost \$7,000 is stolen, the theft is valued at \$7,000. No evidence is asked for nor offered by the victim that the plasma screen television is two years old and has a street value or secondhand value of \$3,000, or a current replacement cost of \$4,500.

Retail value of lost sales

This model assumes that losses to copyright/IP rights holders are equal to the retail value of lost or forgone sales.

This is a view typically taken by rights holders when they can confidently assert or prove a specific amount of lost sales as a result of infringing activity. Under this method, the rights owner asserts that a quantity of sales were lost as a result of the infringing activity. This

quantity of lost sales is then multiplied by the sale price of each of the items whose sale was lost or otherwise forgone.

For example, under this method of calculation, the sale of 10 counterfeit Prada bags for \$50 each would result in losses equal to 10 multiplied by the retail price of a Prada bag. If each Prada bag retails for \$500, the illicit sale of 10 counterfeit Prada bags might represent losses to the rights owner in the amount of \$5,000.

Wholesale value of lost sales

This model assumes that losses to copyright/IP rights holders are equal to the wholesale value of lost or forgone sales.

Under this method of loss calculation, the value of lost sales can be determined by multiplying the quantity of lost sales by the wholesale price rather than the retail price. In the previous example, if the wholesale price of each Prada bag is \$250, the illicit sale of 10 counterfeit Prada bags might represent losses to the rights owner in the amount of \$2,500.

Discounted value of lost sales

This model assumes that losses to copyright/IP rights holders are discounted value of lost or forgone sales.

Under the loss models relating to the retail or wholesale value of lost sales, the quantity of sales lost to the rights owner as a result of the infringing activity is assumed to be equal to the quantity of items pirated or counterfeited. This approach assumes that the sale of every pirated and counterfeit item represents one lost sale of a legitimate item. This is the typical approach for most IP rights owners. According to Allen, 'The standard industry claim has generally been that every counterfeited product represents an equivalent lost sale' (The Allen 2003: 15). In some instances this can be a valid assumption but it can be challenged in others.

For example, using the earlier Prada bag example, the sale of 10 counterfeit Prada bags for \$50 each might not necessarily have resulted in the sale of 10 authentic Prada bags being forgone. Perhaps some consumers of the counterfeit Prada bags had no desire or intention to purchase the legitimate Prada bag. Perhaps they were aware they were purchasing the infringing item and they were satisfied with it.

In those circumstances, the sale of 10 counterfeit Prada bags might have resulted in only three lost legitimate sales. In those circumstances, the loss due to piracy and counterfeiting might only be \$1,500 (being $\$500 \times 3$), using the retail price method described above, or \$750 (being $\$250 \times 3$), using the wholesale price method described above.

This compares with \$5,000 in losses under the retail price method and \$2,500 in losses under the wholesale price method described above. However, if the Prada brand was damaged as a result of the existence of the counterfeit Prada bags, losses might be higher than the stated amounts.

In many instances, especially when high-priced items such as luxury handbags are involved, consumers are aware that they are not purchasing a genuine item. The price of the counterfeit item is too low and, as discussed, the pricing is indicative that the item is counterfeit. In other instances, such as computer software, there is little price difference between the genuine and infringing items. In those circumstances, consumers may have a belief that they are purchasing the genuine item, and given the choice they would have preferred to purchase the genuine item. In those instances, a sale of a counterfeit item would have resulted in the lost sale of a genuine item.

Some interviewees including the AFP argued against the view that every counterfeit product represents an equivalent lost sale. They suggested that the value of lost sales should be discounted according to some formula. This is because when an item is subject to piracy or counterfeiting, the original owner is not permanently deprived of its ownership. Furthermore, the product misappropriated is capable of being divided infinitely.

Mixed models

A mixed approach is also available based on lost or forgone sales.

Some interviewees including Corrs argued in favour of the view that every counterfeited product represents an equivalent lost sale for particular products. In their contribution, Corrs wrote '... for some products, such as Nokia phone batteries, it is likely that the sale of one counterfeit battery causes the loss of one genuine battery sale to Nokia – it is not at all unlikely that the same consumer who purchased the counterfeit battery would have purchased the genuine article had the counterfeit not been available. It is also highly likely that most purchasers of counterfeit footwear would be likely purchasers of the genuine products if no counterfeits were available, because the price of counterfeits has risen considerably in recent years' (Corrs 2006: 7).

However, Corrs agreed that for some goods, every counterfeited product *did not* represent an equivalent lost sale for the products. Corrs added '... the same cannot always be said for luxury products, because the consumers who buy counterfeits often have no inclination to spend the significant sum required to purchase the genuine product. That said, consumers of luxury goods repeatedly voice their annoyance at the ease with which counterfeits can be purchased, thereby diluting the status (and ultimately the sales) of the genuine products. This in turn has an impact on the government through lower taxes being paid by the brand owners where their sales fall' (Corrs 2006: 7).

Corrs provided the following Australian Government taxation loss calculation, which is based on a number of assumptions, as is often necessary in this type of work:

To calculate a rough figure, however, if (in 2004):

- each of the 44,689 counterfeit products in the above table had sold for \$100. Corrs reported that “whilst this figure may be high for some products, counterfeit footwear and clothing products are commonly sold for much higher prices than \$100 per unit. Given the weighting of the products detected by ACS, \$100 per item is probably a reasonable average”.);
- those sales would have collectively generated approximately \$4.5 million; and
- none of that income would have been declared to the Australian Taxation Office by the vendors.

Further, if we are correct that the above table represents about 10% of the counterfeit products that were imported into Australia, we can estimate that:

- a grand total of about 450,000 counterfeit products (of these clients) were imported;
- about 400,000 were sold (subtracting those intercepted); and
- assuming that each product was sold for \$100;
- then over \$40 million worth of sales were made but not taxed.

Further, these figures only apply to 2004 and only for our clients which represent only about 10% of the total companies whose trademarks have been registered with Customs. Based on the 2003 figures in the above table, there would have been an additional \$15 million worth of sales made in that year that was not taxed.

Even if one halves the estimate of the sale price of each counterfeit article (and ignoring the very heavy imports and sales of items which commonly sell for well in excess of \$100 per item), the loss of tax revenue only falls to the tax on \$20 million for 2004 and \$7.5 million for 2003. These figures of course exclude the GST revenue that the Government would have received (Corrs 2006: 7).

Appendix D: Public notice calling for submissions and places of notification

The public notices took the form of the following statement, or a derivative of the following statement:

The Australian Institute of Criminology (AIC), Australia's pre-eminent national crime and criminal justice research agency, is currently conducting a study in relation to intellectual property crime and enforcement in Australia. As part of this research, the AIC is collecting data on the extent to which intellectual property (IP) crime exists and its impact. The research will identify options for the Federal Government's response to piracy and counterfeiting in the future. If you wish to assist in this research by providing your informed views on the type, amount and impact of IP crime in Australia, we invite you to contact Alex Malik a consultant researcher with the AIC by August 4, 2006. In your note, please tell us about yourself and your organisation, and explain why you believe you may be able to contribute to this research. Thank you for considering taking part in this important national project.

Advertisements and notices were placed in the following locations, inviting interested parties to participate in this project:

- AIC website
- *Australian intellectual property law bulletin* 19(4): 63
- *CCH news headlines*
- Crimnet
- *In music & media - Christie Eliezer's business news*. http://www.themusic.com.au/im_m/archive/2006/060725-516_eliezer.php
- *Inventors news*, August 2006
- IP Australia website
- IPRIA website
- LawFont.com – a law, technology, economics and policy blog
- Music & Money by Ben Butler. Formerly at http://www.themusic.com.au/im_m/archive/2006/060725-516_music_money.php
- P2PNet.com – technology blog
- Warwick Rothnie – an IP law blog
- Weatherall's Law – an IP law blog

Appendix E: Interview topics

Introduction

1. Describe your agency – who are you, who do you represent?

Definitions and scope

2. What do you understand by piracy?
3. What do you understand by counterfeiting?
4. What are the key indicators and characteristics relied upon by you to identify the nature of piracy and counterfeiting?
5. What is the nature of piracy and counterfeiting in Australia?

Types and methodologies of offending

6. In your industry's experience, from where does the majority of pirated or counterfeit material originate? (Is it produced locally or imported?)
7. Are you aware of links between piracy & counterfeiting, and organised crime? If so, provide details.

Legislation and penalties

8. What provisions of legislation do you rely on? Why? Do they work?
9. Are there any criminal provisions you don't use? Why not?
10. In which courts are your copyright/counterfeiting matters prosecuted? (Federal Court? District court? Local court? Federal Magistrates Court?)

Extent, cost and monitoring

11. What are your current estimates of losses due to piracy and counterfeiting?
12. How are your estimates arrived at?
13. How reliable are your estimates? Do you have 'complete' information? Are there any underlying assumptions? Can these assumptions be tested?
14. Are any efforts being made by other industries to use a valuation system similar to your own, to estimate piracy and counterfeiting losses?
15. What would a standardised model of piracy & counterfeiting statistics collection look like? Do you intend to change your methodology in the future to reflect this ideal?

Reporting and responses

16. How do you identify possible IP infringement activity? e.g. do you rely on enforcement agencies, private investigators, reporting hotlines, etc.?

17. To whom do you report incidences of piracy? What are the responses to these reports? Do you rely on these responses?
18. Do you undertake civil enforcement activities? If so, why? How many? What are the results? If not, why not? Will this change in the future?
19. Do you rely on criminal enforcement activities? If so, why? How many? What are the results? If not, why not? Will this change in the future?
20. What are the determining factors when deciding to take civil or criminal proceedings before a court?

Other issues

21. Are there any other issues related to the criminal prosecution of copyright or counterfeiting matters that you are concerned with? If so, what is your concern?
22. Can you produce any relevant judgements, court transcripts, statistical information, case histories, briefs of evidence, affidavit evidence?
23. Is there anything else you wish to add or provide on these matters?

Appendix F: Organisations consulted

Adult Industry Copyright Office

Airtowel Hygiene Systems

Allen Consulting Group

Attorney-General's Department

Australian Bureau of Statistics, National Centre for Crime and Justice Statistics

Australian Crime Commission

Australian Customs

Australian Federation Against Copyright Theft

Australian Federal Police

Australian Subscription Television and Radio Association / Foxtel

Australian Visual Software Distributors Association

Business Software Association of Australia / Microsoft

Commonwealth Director of Public Prosecutions

Clayton Utz

Corrs Chambers Westgarth

Cyberspace Law and Policy Centre, University of New South Wales

Distributed Computing Industry Association
Foster's Group
IP Australia
Memcor Australia
Music Industry Piracy Investigations Pty Ltd
NetResult
Office of National Assessments
Railtrade Nominees
Speck Consulting Group
Simpsons Solicitors
Status Investigations and Security Pty Ltd
Swaab Attorneys
VISCOPY
TasMusic
Trademark Investigation Services

Appendix G: AFP IP rights enforcement activity 1997–2005

1997–98

The AFP received 83 referrals in 1997–98, to a value of \$4.807m. Intellectual property offences were classed in the same category, along with corporate and bankruptcy offences.

In what has been described by the Australian Film and Video Security Office (AFVSO) as Australia's largest seizure of 'pirated' audiovisual material, AFP officers seized substantial quantities of copied or illegally imported VCR tapes, CDs, laser discs, video CDs and DVDs from premises in Sydney's western suburbs. Recording, monitoring and production equipment was also seized in the execution of the search warrant.

The 37-year-old proprietor of a video store was charged with copyright offences following the further seizure of a large quantity of allegedly copied or illegally imported music and video CDs, laser discs, DVDs, and video cassettes. The seizure and arrest came only two months after federal agents seized a similar variety of allegedly illegal material from the same video outlet. Summonses for copyright offences were being prepared when ACS officers discovered allegedly illegal material from Hong Kong and Malaysia addressed to the outlet. As in the previous operation, a large amount of technical equipment was seized.

1998–99

The AFP received 87 referrals in 1997–98, to a value of \$7.756m. Intellectual property offences were classed in the same category, along with corporate and bankruptcy offences.

1999–2000

There were six confirmed copyright and patent offences to a value of \$1m. There were 56 corporate, bankruptcy and intellectual property cases referred, to a value of \$14.3m.

2000–01

The AFP reports it received 410 electronic crime referrals in 2000–01. Intellectual property offences were classed in the ‘other’ category, along with the sale of illegal items via the internet. Of the 410 referrals in 2000–01, less than 20 percent of electronic crime referrals were classed in this category.

Appendix 1 states there were 54 corporate, bankruptcy and intellectual property cases referred, to a value of \$25.182m.

There were 11 confirmed counts in relation to copyright and patent offences in 2001–02 to a value of \$350,000.

The following are examples of intellectual property matters investigated during the reporting period.

- An investigation commenced in October 2000 into alleged breaches of copyright and trade mark licences, with an estimated value of \$3.51m, relating to Microsoft Windows 98 software.
- In another case, a brief of evidence has been forwarded to the Director of Public Prosecutions (DPP) relating to the alleged manufacturing and sale of counterfeit Sir Donald Bradman cricket bats and wall plaques, comprising offences under the *Trade Marks Act 1995*.
- On 8 September 2000, a 41-year-old man pleaded guilty in the Southport Magistrates Court to four charges in relation to 873 articles of counterfeit clothing, bags and caps that he had in his possession for the purpose of trade at various markets. He was convicted and fined \$3,000 in default of 60 days imprisonment.
- On 22 September 2000, a 23-year-old Brisbane man was found guilty of eight counts relating to the making and selling of copyrighted Sony Playstation games and fined \$3,500 in default of 116 days imprisonment.

2001–02

In 2001–02, there were 25 intellectual property criminal investigations, out of a total of 2,252 criminal investigations and a total of 4,070 criminal investigations, liaison and assistance matters.

Appendix 1 states there were 34 corporate, bankruptcy and intellectual property cases referred, to a value of \$3.669m.

In March 2002, the IPRCG endorsed the first Crime Management Strategy for IP fraud. This is the first Crime Management Strategy that the AFP has been involved with in partnership with other state and Australian Government agencies and the private sector. The strategy provides a coordinated response involving partnership with the public and private sectors against those involved in intellectual property crime at local, national and international levels. It recognises a broad enforcement environment in which border control, and civil and criminal action is possible. The AFP appointed an Intelligence Collection Manager for IP crime, whose responsibilities include liaison with operational areas and external agencies/industry, strategic assessments and the preparation of quarterly threat assessments. In February 2002, the AFP's Intelligence Collection Manager attended an Asia-Pacific Economic Cooperation seminar for IP rights experts in Hong Kong. The following are examples of IP matters investigated during the reporting period:

- A brief of evidence was been forwarded to the DPP relating to the alleged manufacturing and sale of counterfeit Sir Donald Bradman cricket bats and wall plaques. One person was been charged with three counts of recklessly selling goods with false trade marks under s 148 of the *Trade Marks Act 1995*.
- The AFP conducted an investigation into alleged copyright offences where Malaysian nationals had been involved in the organised importation and pirating of new release movies for distribution and sale in Victoria. Approximately 35,000 DVDs and items of recording equipment were seized during the execution of several search warrants. This seizure is the largest of this type of material in Australia and disrupted an organised operation with international links. Motion Picture Association representatives expressed their gratitude, stating that initial indications were that the seizures had limited the availability of pirated DVDs in South Australia, New South Wales and Victoria. On 31 May 2002, the offender pleaded guilty to 127 charges of possession and one charge of importing copyright-infringing DVDs. The offender was ordered to pay a \$20,000 fine and received a six-month suspended sentence. It was further ordered that all the seized DVDs be forfeited for destruction.
- Police in the ACT conducted a successful operation at the Royal Canberra Show in February 2002. The AFP seized counterfeit sunglasses, perfumes and leather wallets under search warrants. The items seized were cheap goods that had been legitimately imported into Australia and then had counterfeit labels and packaging added at the point of sale. So far, three people have been arrested and charged with selling goods with false trade marks, with three more people to be summonsed to appear in court.

2002–03

The AFP received 301 referrals in 2002–03. Intellectual property offences were classed in the 'other' category, along with offences such as fraud and the sale of illegal items via the internet. Of the 301 referrals in 2002–03, 11 percent of referrals were classed in this category.

In 2002–03, there were 15 intellectual property criminal investigations, out of a total of 2,233 criminal investigations and a total of 4,191 criminal investigations, liaison and assistance matters.

Significant achievements in 2002–03 included the following:

- In March 2003, the AFP participated in the largest seizure of counterfeit clothing items in Australia. This followed a joint agency investigation between the AFP, ATO and Centrelink into a possible syndicate of Russian/Ukrainian persons involved in the manufacture and sale of counterfeit clothing labels. Twelve search warrants were executed across the Sydney metropolitan area resulting in the seizure of approximately \$5m of counterfeit and unprinted clothing items. The investigation is continuing.
- An investigation relating to a copyright distribution network that distributes copyright music via MP3 (a standard technology and format for compressing sound sequences into very small files) over the Internet contrary to s 132 (2)(b) of the *Copyright Act 1968* is currently in brief preparation. This matter is rated by music industry complainants as potentially worth \$70m. Search warrants were executed in Western Australia, Victoria and New South Wales. In New South Wales, three people have been charged with breaches of the *Copyright Act 1968*.

2003–04

In 2003–04, there were 22 intellectual property criminal investigations, out of a total of 2,089 criminal investigations and a total of 3,670 criminal investigations, liaison and assistance matters.

Significant investigations in 2003–04 included the following:

- In September 2003, ACS officers in Brisbane detected 821 counterfeit DVDs in an air cargo shipment of sound speaker stands sent from Malaysia to a Brisbane address. A further 200 destined for the same address were later seized by ACS and a search warrant executed on the premises by the AFP with an additional 211 counterfeit DVDs seized.
- A man who had previously been charged with the importation/possession offences for counterfeit DVDs was again charged by the AFP in March 2004 when the AFP seized 206 counterfeit DVDs and charged him for exposing for sale counterfeit DVDs at a market. In June 2004 the defendant was found guilty on 28 charges under the *Copyright Act 1968*, sentenced to nine months imprisonment and ordered to be released after three months on a \$1,500, five-year good behaviour bond. This was the first time in Queensland an offence of this nature had resulted in an imprisonment term.

- In August 2003 a Malaysian man was arrested at Brisbane airport after ACS located 561 counterfeit DVDs in his luggage. The man was charged in relation to importing copyright material contrary to the *Copyright Act 1968*. He pleaded guilty and was convicted and fined \$8,000.
- In April 2003 the AFP conducted an investigation into a network that distributed copyright music via MP3 over an internet web site. Three males were subsequently arrested and charged in Sydney on offences contrary to the *Copyright Act 1968*. Representatives for the music industry estimated that the distribution network had robbed the music industry of over \$50m in potential sales. All three pleaded guilty to the offences charged and were convicted. Two were sentenced to 18 months imprisonment, suspended, upon them agreeing to be of good behaviour for three years. All three were also sentenced to perform 200 hours community service.

2004–05

The AFP reported five significant investigations in 2004–05:

- Following the receipt of a complaint from a television broadcasting organisation, ‘the AFP began an investigation into the sale of pirate broadcast decoder devices ... The matter was investigated and the offender pleaded guilty to 46 offences breaching the Act. On 27 October 2004 the offender was fined \$350 on each of the charge matters, totalling \$16,100’.
- ‘In April 2002, Hewlett-Packard Australia received anonymous information that trademark-infringed Hewlett-Packard print product was being sold in Australia ... The AFP executed a search warrant seizing a pallet of Hewlett-Packard trademark-infringed toner cartridges and documentary evidence. A total of 610 trademark-infringed toner cartridges were located inside the warehouse. The retail price for the toner cartridges was estimated to be \$166,000. In August 2004 the company was convicted of the breaches and fined \$800 for each charge, totalling \$3200’.
- MIPI referred a matter to the AFP involving a 16-year-old who was involved in running a website which offered unauthorised MP3 downloads of sound recordings to members of the public. ‘In June 2005 the youth was found guilty, and placed on a six-month-probation period with a \$500 good behaviour bond’.
- ‘In June 2004 the AFP received information from Customs relating to two shipping containers imported from China by an international trader’. The container contained 21,938 counterfeit goods, which infringed various trademarks including Duracell, Disney, Nike, Hugo Boss and Mercedes-Benz. A third container inspected in July 2005 also contained counterfeit goods. ‘Two people were arrested and charged with 26 counts of importing, exposing for sale, and possessing goods, in contravention of the Trade Marks Act’.

- The AFP assisted AFACT in regard to the execution of search warrants on a DVD supplier resulting in the seizure of about 1,100 counterfeit DVDs. 'A brief has been presented to the CDPP'.

No specific statistical information on IP related investigations was included in the 2004–05 annual report.

2005–06

Twenty-three matters were referred to the AFP, with five requiring significant investigation. Two of these are still under investigation and cannot be further reported.

- A government department referred a matter which was based on the misuse of their logo. The allegation was that the logo was used in a way that misrepresented the agency. After an agreement was reached between the parties the allegation was withdrawn.
- AFACT referred a matter of pirated computer games which is currently under investigation. The AFP is awaiting advice from the Industry representative before formal charges are expected to be laid.
- An American company referred a matter in which an Australian was offering illegal pirated copy of the company's product. The person was charged under the Copyright Act for make, sell, offering for sale and possess infringed article. They pleaded guilty and were fined \$1,200 on each of the first three charges and \$1,250 on the fourth charge.

2006–07

Of the 16 matters referred to the AFP:

- In June 2007 a referral was received from the Trade Mark Investigation Services in relation to various trade mark infringements and counterfeit product imports in respect to Unilever products, including Omo, Dove and Huggies. Omo was the most significant import with nine traced imports amounting to 185,534 kg of illegal shipments to date. Two persons were charged with import and sell goods with false marks. They have entered a plea of guilty and are awaiting court sentencing. There will also be an additional charge in relation to import and sale in relation to other counterfeit products found during search warrants.
- Two further matters are still under investigation and cannot be discussed further.

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This report deals with the nature and extent of intellectual property crime in Australia, its organisation, social and economic impacts, and the efficacy of responses through legislation, law enforcement and criminal prosecution. The importation and domestic manufacture of counterfeit goods by both the public and transnational organised crime groups attract response strategies that encompass surveillance, regulatory mechanisms and litigation. The report calls for better understanding of the impact of IP crime through monitoring and intelligence gathering, research into enforcement and prosecution activities, and econometric cost modelling, using educational, good practice and legislative reform initiatives.