

SECTION 135 OF THE COPYRIGHT ACT 1968

185. The provisions of s. 135 of the Copyright Act have earlier been referred to; see para. 11 above. The section is set out in Appendix B. Provisions to the same effect are to be found in the copyright laws of a number of countries. This is no doubt due to the provisions of Article 16 of the Berne Convention which provides:-

- "(1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
- (2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.
- (3) The seizure shall take place in accordance with the legislation of each country."

186. It is to be observed that Article 16 applies to "works". The expression 'Literary and artistic works' , defined in Article 2 paragraph 1 of the Convention, includes 'cinematography works' but does not refer to sound recordings. The commentary in the WIPO Guide to the Berne Convention, Geneva, 1978, states (para. 2.6, p. 13) that the expression 'literary and artistic works?' should be taken as including all works capable of being

protected on the basis that the definition only lists examples and does not limit the field of protected works. However, the commentary goes on to state that while countries with Anglo-Saxon traditions provide copyright protection to sound recordings this fact does not mean that other Berne Union countries have an obligation to do the same. It is the Committee's view that Article 16 does not apply to sound recordings but that its minimum requirements require that the scope of s. 135 should be expanded to include cinematography films. Section 135 applies only to printed copies of works; see sub-section (4). Submissions made to the Committee by the sound recording, computer software and film industries all sought the extension of the section to include such works or subject matter. The submissions also sought the widening of the section to cover reproductions which did not fall within the description "printed copies".

187. Information about the operation of s. 135 was obtained from the Australian Customs. No record is held of the Customs having received a notice pursuant to sub-sec. 135(2). This is the step which must be taken before the section can operate. The sub-section provides that the owner of the copyright in a published literary, dramatic or musical work may give notice in writing to the Comptroller-General of Customs stating that he is the owner of the copyright and that he objects to the importation into Australia of copies of the work to

which the section applies. The Customs listed a number of shortcomings which it envisages arising if and when a notice is received. The Customs said:-

"The primary difficulty which would be experienced in administering the provisions of s. 135 of the Act once a notice had been received would be to locate and detect the prohibited copies of the work. Given the nature of the goods prohibited and the quantities in which they are imported it would be virtually impossible without unlimited staff resources to locate and detect the prohibited goods amongst the vast quantity of goods imported into the country through the Customs Barrier each day.. There is a further problem involved in that often the title of the work (which must be included in the notice given to the Comptroller-General by the copyright owner: reg 21, copyright Regulations) may not disclosed on the documentation (eg. invoice) accompanying a consignment and that documentation forms an integral part"of the checks performed by Customs on imported goods.

Accordingly, even if a notice was received pursuant to s. 135 of the Act, limited resources would mean that the location and detection of the goods could only be afforded a minimal priority. As a general rule action would only likely be taken where advance notice had been received of the shipment of goods the subject of a notice lodged under s. 135 of the Copyright Act 1968."

A further difficulty was thought likely to arise in relation to the establishment of the subsistence of copyright in a particular work and in establishing that the person giving the notice was the owner of the copyright.

188. The Customs referred to the comparable provisions of s. 103 of the Trade Marks Act 1955. Major difficulties have been encountered in the location and detection of goods. Six instances of action under s. 103 of the Trade Marks Act arose in the three year period prior to 1986. Four of these involved seizure of goods by the customs and two the investigation of claims of registered owners of trade marks after the goods had been imported. The six instances resulted from approximately 40 notices covering a total of approximately 600 trade marks. The Customs said that it had insufficient staffing resources to ensure detection of all goods subject to a notice under s. 103.

189. The terms of reference asked the Committee what streamlining "amendments should be made to s. 135. After due reflection, the Committee is unable to suggest any streamlining amendments. None was suggested in any of the submissions which, nevertheless, advocated the retention of the section and its amendment to cover a wider variety of copyright articles. Accordingly the Committee recommends that the section be amended to cover copies, whether printed copies or not, of all works and subject matter. It also recommends that the section be amended to empower the exclusive licensee, as well as the owner of the copyright, to give a notice. The Committee does not recommend repeal of the section. Not only would this be contrary to Australia's treaty obligations; the retention and widening of the section

will probably continue to have a deterrent effect in some cases. That is a sufficient reason for keeping it as part of the Act.