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Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Copyright Amendment Bill 2006

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Inquiry into the Copyright Amendment Bill 2006

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1 Introduction and Executive Summary

Throughout the process of reviewing copyright law over the last two years, the aim posited by the Attorney-General has been summarised thus:

> 'It is about fixing the law so we don't treat pirates as consumers – or consumers as pirates.'[1]

That is, the law was to become 'fairer for consumers and tougher on copyright pirates'[2]

The *Copyright Amendment Bill* 2006 does not make the law fairer for consumers. It creates exceptions which are drafted so narrowly that they do not allow consumers to do very ordinary things: like copy music to their MP3 player or use other new devices. The Bill also treats consumers as pirates. By expanding criminal liability, so that it applies even where a defendant is *unaware they are infringing* or dealing with infringing material, the new law makes it *more* likely that a consumer will be treated as a pirate. The drafting of the Bill is so complex, as to be unreasonable.

What is more, in the process, the objectives of copyright appear to have been forgotten. Copyright, it is said, is about encouraging the creation of new works by providing creators with exclusive rights to their works.[3] The people who have been forgotten, or who have had their rights restricted under this law, are:

1. Australian students and researchers, who have had their ability to make fair copies of material for their research and study severely, and arbitrarily circumscribed (see Part 4);
2. Australian comedians and social commentators, who received a parody defence so uncertain in its application that it will take advice from an expert in international trade law, as well as a copyright lawyer, to work out what they can do (not addressed in detail in this submission[4]);
3. Australian technologists and innovative businesses, which have been given no room at all and may now be subject to criminal liability even where they do not intentionally, knowingly or even recklessly infringe copyright (not addressed in detail in this submission).

The only parts of this Bill which arguably must pass this year, in order to ensure compliance with the Free Trade Agreement with the United States, are Schedules 9 (encoded broadcasts) and 12 (technological protection measures). In my view, the

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[1] Attorney-General, 'The Government's Intentions with Copyright Law Reform', Friday 22 September 2006. The same sentiment has been repeated by the Attorney-General on a number of occasions.

[2] Ibid.

[3] Intellectual Property and Competition Review Committee, *Final Report: Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), p33.

[4] I have addressed this issue elsewhere: see my web log, *Weatherall's Law*, on 5 October ('*An Analysis of the Copyright Exceptions Exposure Draft*) at http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116001656678911654 and 5 July 2006 ('The (New Australian) 'Flexible Dealings' Exception to Copyright') at http://weatherall.blogspot.com/2006_07_01_weatherall_archive.html#115209709458679279

remainder of this Bill should be deferred so that a proper analysis and discussion of the provisions can be undertaken.

This submission deals specifically with four points: two in brief, two in short. It deals with:

1. The Format-Shifting Exceptions (Part 2);
2. The Anti-circumvention provisions (Part 3)
3. The Fair Dealing for Research Exception (Part 4); and
4. The Enforcement Provisions (Part 5).

Recommendation 1: **(Schedule 6)** The next draft of the format-shifting exceptions must be made available for public discussion and comment prior to passing them.

Recommendation 2: **(Schedule 12)** The anti-circumvention provisions, while very far from perfect, have one benefit: language which enables a judgment to be made about whether technology truly is connected with the exploitation of copyright. The Committee should note that attempts to cover *every* contingency in the legislation will not be successful.

Recommendation 3: **(Schedule 6 Part 4)** This schedule should be removed. The result of this Schedule is to ensure that Australian students and researchers are *less* able than American or other international researchers and students to copy necessary material for their study.
No changes to the fair dealing exception are required or desirable. In the alternative, this part of the Bill should be deferred, in order to give interested stakeholders time to address the argument that these changes are required.

Recommendation 4: **(Schedule 1)** This Schedule of the Bill should be deferred pending further discussion on the move to strict liability offences in copyright, and to give time to ensure that the provisions, <u>if</u> introduced, are drafted in such a way as to ensure no ordinary Australian citizen, engaging in non-commercial activities, risks criminal liability. If passed in its current form, it ensures that Australian consumers unknowingly risk substantial criminal liability.

Recommendation 5: In conclusion, the Committee should note that, far from increasing the flexibility of copyright, and far from ensuring that Australians have the same rights of use as consumers in other countries, the Bill *reduces* flexibility and ensures that Australians risk infringement, and even criminal liability, in many circumstances where American users and users elsewhere in the world would not.

2 The Format-Shifting Exceptions

My comment on the format-shifting exceptions is brief. As I noted on 16 October elsewhere,[5] the currently drafted provision (Schedule 6, Part 2) does not cover iPod use, for two reasons:

1. Most MP3 players, including the iPod, require the making of more than one permanent copy of a sound recording to work;
2. Most Australians using MP3 players intend to use them outside the home. The qualification that use must be 'domestic' risks being interpreted to prevent such use.

The Attorney-General has noted in his second Reading Speech that these comments have been noticed, and that the government will listen to and consider comments and make any necessary technical changes to ensure the bill achieves the government's objectives.

We have not seen any updated draft. Two problems remain, however.

1. The government has not clearly articulated its objectives. Is it intending to legalise iPods, or all MP3 players, for example? [6]
2. If the government holds to its intended timetable, there will be no opportunity to comment publicly on the revised draft. What assurance is there that there won't be similar problems with the next draft? Only through public commentary, and release of the draft, can problems be identified and dealt with.

The following recommendation is therefore made:

Recommendation 1: The next draft of the format-shifting exceptions must be made available for public discussion and comment prior to passing them.

3 The anti-circumvention provisions

My submission on the anti-circumvention provisions (Schedule 12) is also brief,[7] although I am willing and able to answer any specific questions the Committee may have. I wish to make one, brief point however. And that is: the Committee will no doubt here concerns from some stakeholders that the TPM provisions do not sufficiently protect copyright owners: that there are circumstances which 'may not be covered' by the various definitions offered in the Act.

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[5] See my weblog, *Weatherall's Law*, on 16 October ('No Virginia, there is no copyright exception for iPod use (or, the little iPod Inquiry that Couldn't), at http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116098203832627328. See my updated thoughts also on 25 October, ('On the Copyright Amendment Bill and iPods'), at http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116176028029078597.

[6] See the second post cited in the above note.

[7] For more detailed thoughts, see *Weatherall's Law*, on 26 October 2006 ('The New TPM Provisions in the Copyright Amendment Bill'), at http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116183172284086855.

In response to this argument, I wish to make one simple point: in my view (and I have been studying anti-circumvention law for 10 years now, since the WIPO Copyright Treaties were passed): the concept of a measure 'used in connection with the exercise of copyright' is both well-founded in international law (being found in both the AUSFTA and the WIPO Copyright Treaty), and gives sufficient flexibility to courts to ensure that cases which manifestly have nothing to do with copyright are not brought under these provisions. This definition, in other words, is a reasonable compromise between copyright owners' interests and the need to ensure the laws are not over-broad in their reach.

I am happy to provide further detail on request; my thoughts are published in more detail elsewhere.[8]

> ***Recommendation 2: The anti-circumvention provisions, while very far from perfect, have one benefit: language which enables a judgment to be made about whether technology truly is connected with the exploitation of copyright. The Committee should note that attempts to cover every contingency in the legislation will not be successful.***

4 The restriction of fair dealing for the purposes of research and study

This part of the submission is concerned with **Schedule 6, Part 4** of the Bill, which deals with fair dealing for research or study.

> ***Recommendation 3: Schedule 6 Part 4 of the Bill should be removed. No changes to the fair dealing exception are required or desirable. In the alternative, this part of the Bill should be deferred, in order to give interested stakeholders time to address the argument that these changes are required.***

4.1 The impact of the Bill

Under current law, it is not an infringement of copyright to make a fair dealing with a literary, dramatic, musical or artistic work for the purpose of research or study. In general, fair dealing is assessed on a 'case by case' basis: that is, whether a dealing is fair is assessed by reference to factors such as the nature of the particular work, the purpose of the copying, the amount and substantiality of what has been copied, and the effect on the copyright owner's market.

Particularly important in the operation of this exception in practice are the two 'deeming' provisions. Here the legislation sets out circumstances which are deemed fair dealing, without further analysis being required:

- Where a person copies an article in a periodical; or
- Where a person copies a 'reasonable portion' of a work. 'Reasonable portion' is non-exhaustively defined in the Act as meaning:

[8] See above n7.

- for published editions over 10 pages long: either 10% of the number of pages in the edition, or one chapter (even where the chapter is more than 10%);[9] or
- for published works in electronic form: 10% of the number of words in the work, or one chapter.

The effect of Schedule 6, part 4 is not entirely clear, due to very strange drafting.[10] On one interpretation, the effect of these amendments to s 40 of the *Copyright Act* is:

- Copying a work contained in an article from a periodical is taken to be a fair dealing;[11]
- Where a literary, dramatic or musical work is *not* contained in an article in a periodical, but is in a published edition or in electronic form, copying that work for research or study can be fair dealing **only if 10% or less, or one chapter, is copied**.

That is, a court could interpret the amended s40 as requiring that 10% (or one chapter), instead of being a 'deemed fair dealing', represents an **upper, absolute cap on the exception**.[12]

There is another interpretation: that an individual copying of more than 10% may still rely on s40(1). However, the 'absolute cap' interpretation is open on the text. The words 'if and only if' are unequivocal. Nothing in the current Explanatory Memorandum clearly excludes the 'absolute cap' interpretation.

This change may seem highly technical and not very important from a public interest perspective. On the contrary, however, the exception is essential to the education system in Australia, and the conduct of research in public and private sector organisations which leads to new knowledge of both an academic and applied kind. The exception for fair dealing for the purposes of research or study protects from liability for copyright infringement:

- School and university students who copy materials in their school or university library for the purposes of doing an assignment or preparing for exams;
- Academics and other researchers who copy material, such as scholarly articles or other material, in the course of their research.

From a policy perspective, there are four key problems with an absolute 10% cap on research or study-oriented copying.

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[9] *Copyright Act* ss10(1A) and 10(2).

[10] The details are beyond the scope of this submission, but are discussed in more detail on my weblog, *Weatherall's Law,* on 23 October 2006 (see http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116160341318821312).

[11] This may or may not be narrower than the current exception which allows copying of a work which *comprises* an article in a periodical publication. It is arguable that the deeming provision will no longer apply to an article which is a whole work.

[12] There is another interpretation. And that is, that where their copying fails to fall within the definitions of 'reasonable portion', the individual is thrown back to s40(1) and their act may still be a fair dealing.

First, an absolute copying 'cap' of 10% or one chapter is arbitrary and can have pernicious, ridiculous effects in practice. It means, for example, that an academic who copies 12 pages from a 100 page book in the course of their research, or a student who prints 1,100 words from a 10,000 word electronic document is an infringer. This would be true even in the following circumstances:

- The author has been dead for 60 years and the work is out of print;
- The author is unknown and unidentifiable;
- The copyright owner, on application, refuses to license the work or doesn't respond to emails requesting permission;
- The document in question is a government report from the 1970s available in one library in Australia.[13]

Second, seen in the context of the rest of the Australian copyright law, the effect of such provisions is particularly damaging. Unlike many countries, Australian copyright law protects all government materials, public materials, public speeches and lectures on current events. Australia has no exceptions relating to works whose author cannot be identified or found. The 10% limit thus applies to prevent copying *in many circumstances where no copyright owner is harmed by the copying.*

Third, it means that Australian researchers have less freedom to copy for their research than users in almost any other of 22 countries reviewed for the purposes of this submission (see further below) – including researchers in the United States.

Fourth, this arbitrary cap is also unenforceable in practice:

- It will be impossible for libraries or other institutions effectively to monitor copying to ensure only 10% is copied; and
- A student or researcher wishing to comply with the law will frequently have no means of doing so. No collective licensing system exists for such copying. It is unrealistic to imagine that every researcher and student in Australia will obtain an individual license from the Copyright Agency Limited, or from individual copyright owners.[14]

4.2 Why these changes are not required

Discussions of the Exposure Draft suggest that the changes to s 40 may result from a view, internal to the Department, that compliance with Australia's obligations under international treaty – specifically, the three step test embodied in Article 9(2) of the Berne Convention, and Article 13 of TRIPS – *requires* the fair dealing exception to be limited in this way. Under Article 13 of TRIPS, exceptions to copyright must be

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[13] Robert Burrell and Alison Coleman, *Copyright Exceptions: the Digital Impact* (2005), 117.

[14] Libraries and universities could avoid this problem, of course, by buying some kind of license for the copying. However, (a) given existing strains on resources in these institutions, it is questionable whether they would be willing to do so on behalf of their users (they might prefer to simply sheet responsibility home to individual users and police to prevent really obvious breaches), (b) from a user perspective, compliance with the law might mean checking at each library whether such a license had been purchased. Given already existing low levels of understanding of copyright, in conjunction with long-standing practice of simply copying for research at libraries, it is very unclear that this would be effective in practice. Nor would it work to have a license fee for copying paid, for example, by students as part of their school/university fees. Students in formal institutions are *not* the only people who take advantage of the section 40 exception.

confined to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder.

Any view that these amendments are required under international law are unfounded.

1. There is nothing in the publication by Professor Sam Ricketson, directly on point, to support an arbitrary quantitative limit. Nor is there anything in the report to suggest that copying more than 10% can never be fair or permissible under international copyright law. The three step test is, as many expert commentators have noted, a flexible provision, which gives individual countries considerable leeway in shaping exceptions to their own circumstances
2. The practice of Member States of Berne and TRIPs contradicts any assertion that such a limitation of this fair dealing exception is required. If this provision is passed, Australian researchers and students will have considerably *less* capacity to use copyright materials in their research and study than researchers and students in other countries.
3. This change was not foreshadowed in public discussions preceding the release of the Exposure Draft. If there is a view, in the Department, that these changes are required under international law, the advice on which that view is based should be released, and stakeholders negatively affected by this change given the opportunity to obtain contrary advice. If, on the other hand, the change is based on evidence regarding the impact of the exception on copyright owners, that evidence should be released for public scrutiny.

These arguments are detailed further below.

4.2.1 Professor Ricketson's paper does not support a 10% limit on fair dealing for research

It has been suggested that Professor Ricketson's advice to the Centre for Copyright Studies, *The three step test, deemed quantities, libraries, and closed exceptions* (2002), may be the source of the changes to section 40 contained in the Bill.

Only a misreading of Professor Ricketson's paper could lead to the provision in the Bill. Professor Ricketson's argument was that there might be problems with deemed quantitative tests such as those in s 40(3), while the more qualitative factors in s 40(2) are more likely to be compliant with the three-step test. I have consulted personally with Professor Ricketson about this Bill. He agreed that there is nothing in his commentary that would support the view embodied in the amendments. I consulted several other leading international copyright experts on this change. None were of the opinion that the three step test required the imposition of quantitative 10% limit on the exception. Comments like 'nonsense' were made.

The thrust of Professor Ricketson's analysis is that exceptions must, under international law, be certain and limited – and limited in ways *related to the purposes*

of copyright law and the exception. Professor Ricketson's view, *if accepted*, might support removal of the 10% 'deemed fair dealing' provision entirely, and subjection of all research and study copying exceptions to assessment on the factors listed in section 40(2). This approach would reduce the amount of certainty given to users – but at least it would not lead to any of the arbitrary, and undesirable results detailed above.

Even here, however, it is worth noting that Professor Ricketson's view is *one view of what is required*. Many leading jurists have taken the view that the three step test is more flexible than Professor Ricketson suggests.[15] It may also be worth noting that the scope and meaning of the three step test is in a state of development at present. In the last few years, a number of countries, particularly in Europe, have specifically incorporated the test into their domestic law.[16] As Geige has recently pointed out, in Europe courts have reached diametrically opposite conclusions on whether certain exceptions comply with the test.[17]

4.2.2 Interpretation/application by Member States of the exception

As a number of leading commentators have noted, it is legitimate, in considering what the three step test requires, to consider the historical practice of Member States of the Berne Convention.[18] This is legitimate in part because the formulation of the three step test was designed, at the time it was written, to accommodate exceptions existing in national laws at the time it was added to the Berne Convention (in 1971). It also constitutes state practice, a legitimate source in interpreting international law.

The limited time available to write this submission has prevented a full review of legislation of TRIPS and Berne Member States. However, a review of the of all 22 of the countries whose law is described in Paul Geller's *International Copyright Law and Practice* indicates that only *one* has imposed a quantitative limits on analogous exceptions copying allowed under their various exceptions (Italy, which limits copying to 15%).

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[15] See, for example, Ruth Okediji, 'Toward an International Fair Use Doctrine' (2000) 39 *Columbia Journal of Transational Law* 75.

[16] Italy, Greece, and China have integrated the three step test in recent legislative reforms; France will do, or recently has done the same: see Christophe Geige (Doctor of Law in charge of the Department for France and the African Francophone Countries, Max Planck Institute) , 'The Three-Step Test, a threat to a balanced copyright law?' (paper on file with author). Courts in Germany and the Netherlands have also considered the test, although it has not been implemented: ibid.

[17] Christophe Geige (Doctor of Law in charge of the Department for France and the African Francophone Countries, Max Planck Institute) , 'The Three-Step Test, a threat to a balanced copyright law?' (paper on file with author). Geige points out that in Europe, where the three step test has been integrated into domestic legislation, different national courts in Europe, considering very similar exceptions in national law, have reached diametrically opposite conclusions on whether those exceptions comply (see, eg, footnote 26, noting German and Netherlands courts reaching different conclusions on the question of press services summarising the press in electronic format). That is, even within Europe, there is disagreement and uncertainty regarding the scope of this limit.

[18] See Ruth Okediji, Jane Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three Step Test' for Copyright Exceptions' (2001) *Revue Internationale du Droit d'Auteur*; see also Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (2nd ed 2003), 144-146.

Reviewing the analogous exceptions – ie, those which allow individuals to make copies for their own research or study – it would appear that there are, broadly speaking, two models. Countries either have:[19]

1. A fair dealing exception for private research or study, with no quantitative limits, and no system for compensation of copyright owners (US, Canada, UK, Israel, China, India, Hong Kong); or
2. An exception which allows copying for 'private purposes' (not limited to research/study), with no quantitative limits,[20] but supported by a levies on equipment or other means of compensating copyright owners (Belgium, Germany, Greece, Hungary, Italy, Netherlands, Poland, Spain, Sweden, Switzerland, France).[21]

In *neither* case are quantitative limits on the copying imposed. In some countries, 10% is stated as a general guideline or rule of thumb. For example, in the US, the Copyright Office Guidelines, *Reproduction of Copyrighted works by Educators and Librarians*, use 10% or a chapter as a guide for educators' copying. However, the guidelines specifically state that:

> *The following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.*[22]

The first point to highlight here is that the *current Australian provision has many analogues internationally*. If, in allowing research copying of more than 10% of a work without remuneration to copyright owners, Australia is not complying with the three step test owing to the section 40 exception - neither are the UK, US, Canada, Israel, China, India or Hong Kong.

Second, and to generalise, countries either have an exception allowing private copying, regardless of purpose, but supported by remuneration (the 'European' system) or private copying for specific purposes (scholarship and study), *without* a remuneration scheme. This makes sense from a theoretical perspective. Based on practice, it would appear to be accepted that a country can *either:*

1. Allow copying to an extent, and in circumstances, which compete economically with the copyright owner (ie, all private copying) – but ensure remuneration; *or*
2. Allow copying only where it is supported by a public policy ground (furthering research and scholarship), and where it is less likely that uses economically compete with the copyright owner and where such

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[19] Perhaps a third model is found in Japan and Korea, which have no specific exception for personal copying using photocopiers, but do allow libraries and educational institutions to make copies subject to conditions.

[20] Except in Italy.

[21] This approach is also embodied in the European Union Directive on Copyright in the Information Society, Article 5.

[22] At page 8.

interference as there is with the copyright owners' interests are justified by the public policy purpose.

This highlights that the approach embodied in the Bill ***simply does not make sense***. In policy terms, it is incoherent. The government seeks to allow:

1. Copying for private, consumptive purposes (format-shifting in particular, but also time-shifting), *without* a quantitative limit (to consume media, a person may copy the whole work); and
2. Copying for research and study *with* a quantitative limit (for research, a person can only copy 10%).

4.2.3 These changes were not foreshadowed

The limitation of the fair dealing exception was not foreshadowed with stakeholders prior to the release of the Exposure Draft (unlike other areas which have been the subject of Discussion Papers). It was not foreshadowed in the Issues Paper relating to Fair Use – which focused almost exclusively on the question of format- and time-shifting. It is not a response to the Digital Agenda Review, the Report for which contained no recommendations on this issue. It is contrary to reports such as the Copyright Law Review Committee Report on exceptions which emphasised the need for *flexibility* in exceptions. Nor has any advice or report justifying the change been released for public scrutiny or debate. The short time for comment on this change has precluded proper discussion or argument. The change is *not* urgent and should be *removed from this Bill*. If such a change is proposed, given its effect on stakeholders and Australian students and researchers, the Parliament should require proper evidence to be put as to why it is required.

> ***Recommendation 3: Schedule 6 Part 4 of the Bill should be removed. No changes to the fair dealing exception are required or desirable. In the alternative, this part of the Bill should be deferred, in order to give interested stakeholders time to consider any evidence put that the change is required.***

5 Schedule 1: The enforcement provisions

This part of the submission deals with Schedule 1: the criminal enforcement provisions. Two key innovations are introduced by Schedule 1 (the enforcement provisions). They are:

1. The creation of offences of strict liability: that is, offences where no mental element or *'mens rea'* is required for liability. A defence of mistake of fact does apply to these offences;
2. The introduction of a system (the parameters of which are quite unclear) of 'infringement notices', whereby a person may pay a penalty to the Commonwealth as an alternative to prosecution.

From discussions since the Exposure Draft was released, the government appears to be of the view that these changes are uncontroversial, and do not pose any increased risks for ordinary Australians.

This is not the case.

On the contrary, the policy decision embodied in the Enforcement provisions in Schedule 1 is radical, troubling, and does treat ordinary Australian consumers like copyright pirates. It also subjects Australians to criminal penalties in circumstances where an American citizen would not be committing a criminal offence.

In my submission, the enforcement provisions should not be passed in their current form. It is my opinion that the introduction of strict liability for copyright infringement should be rejected as a matter of principle. At the very least, this part of the Bill should be deferred, pending further discussion.

> ***Recommendation 4: Schedule 1 of the Bill should be deferred pending further discussion on the move to strict liability offences in copyright, and to give time to ensure that the provisions, <u>if</u> introduced, are drafted in such a way as to ensure no ordinary Australian citizen, engaging in non-commercial activities, risks criminal liability.***

5.1 The arguments against strict liability

5.1.1 Strict liability in copyright law is unprecedented

The application of criminal offences of strict liability to copyright law is unprecedented in any common law country that I am aware of. This means that in the United Kingdom, Canada – and perhaps most notably, the United States – offences of strict liability do not exist in copyright law. A mental element – intention, knowledge, recklessness – is required before a person will be treated as a criminal for copyright infringement. Similarly in Europe, neither the existing enforcement directive, nor the proposed second enforcement directive, contain criminal offences of strict liability. Some of the reasons why strict liability is undesirable in this area are addressed in the next section.

It should also be noted that the Free Trade Agreement with the US does not require the creation of offences of strict liability.

Remarkably, too, this change to copyright law has not been publicly canvassed or discussed. 2006 is not the first time the government has considered how criminal law should apply to copyright. In 1999, the House of Representatives Standing Committee on Legal and Constitutional Affairs was tasked with the job of inquiring into and reporting on issues relevant to the effective enforcement of copyright in Australia. In late 2000, it tabled its final report, *Cracking Down on Copycats: Enforcement of Copyright in Australia.* In 2003 the government tabled its response to the Report. In neither that report, nor in the response, was changing the regime to introduce strict liability was not raised as a potential change. No opportunity for submissions on this policy decision has been given to members of the public. Nor was strict liability canvassed in the most recent substantial public discussion of criminal law in a copyright context, an issues paper released in May 2005 on the criminalisation of unauthorised access to subscription television. Given the

unprecedented nature of these laws, and the risk of treating ordinary Australians as pirates, public discussion is warranted.

5.1.2 The interaction between these provisions and past moves to strengthen criminal copyright law makes the outcomes unjustifiably harsh

Another point which it is important to note is that the offences of strict liability contained in the Act potentially give rise to very significant penalties for offences lacking a *mens rea*. Offences under the *Copyright Act* apply to **each infringement**. The problem is that acts relating to copyright often infringe multiple different copyright works, in part because most 'products' (such as CDs) contain multiple copyright works. Thus the maximum penalty applicable to particular 'conduct' can quickly escalate.

For example, if you sell 10 burned CDs, each with 8 tracks, you are already talking about 8 x 10 offences for the sound recordings, let alone the infringements of the musical works. Each offence (under the strict liability provisions) carries a maximum penalty of $6600. That means that the maximum penalty, in these circumstances, is $528,000 (the maximum on the spot fine, at 20% of the maximum, would be $105,600).

It is highly unlikely, of course, that this maximum penalty would be applied, particularly in a case where someone was unaware their conduct was infringing. However, it should be remembered that when people are given legal advice on these issues, or informed by rights-owners of the potential penalties applicable to their conduct, they will be told the maximum penalty which applies. In circumstances where the maximum penalty is so disproportionate to the offence, the criminal law, and the copyright law, are brought into disrepute.

5.1.3 These harsh amendments to the enforcement provisions can and should be deferred pending the outcome of the current study of enforcement in Australia

The government has recently commissioned the Australian Institute of Criminology to study enforcement issues in Australia. This recognises that, as at the time of the *Copycats* inquiry, the available data on infringement is piecemeal. It is all the more confusing, therefore, that prior to any outcomes of that study, the government proposes to introduce harsh, unprecedented laws out of line with international standards. These changes should be deferred pending the outcome of that study, which may reveal whether, *and when*, such offences of strict liability are required.

5.2 The arguments in favour of strict liability are not convincing

A number of arguments have been made in favour of offences of strict liability, which the Committee may hear from supporters of this move. I wish to put in writing counterarguments to such common arguments.

5.2.1 We have strict liability offences for other property offences. These amendments simply make copyright consistent with other areas of Commonwealth criminal liability.

It is true that offences of strict liability are not uncommon in the criminal law, in particular, in relation to offences against physical/tangible property. In my opinion, this is a poor argument for strict liability in copyright.

Copyright is different from other property. It is intangible, and artificially constructed by law. This is not to say that copyright is less important that physical property, but from the perspective of imposing criminal liability, it makes a significant difference in practice to the level of awareness that ordinary people can be expected to have regarding when they risk criminal liability. Climb over a fence and you know that you are trespassing. Take an apple from someone and you know that you are depriving them of the apple.

With copyright, an ordinary person is not alerted to when they overstep the boundaries of this law. Do people really know that performing a song in public - or playing a legitimately purchased record at their office Christmas party is an infringement? That making a recording of a busker in the street then putting it online could be an infringement of the busker's performers' rights? The borders aren't tangible, nor are they are natural - they are artificial, and the law is simply not easy to understand.

It might be argued that we can educate people about the nature of copyright: that its intangible, and complex nature do not justify treating it differently. There are two answers to this response. First, such education will not be straightforward. Copyright law is becoming more, not less complicated. It is simply not possible to explain copyright in simple terms. Second, it is questionable whether it is appropriate to 'criminalise first, educate later'.

There is another reason why copyright is different. And that is, as any beginner student in the area knows, material protected by intellectual property law has two characteristics: it is **non-excludible** (it is difficult to exclude people from a song: you can't build a fence), and, importantly, **non-rivalrous** (my consumption of a song, unlike my consumption of an apple, does not interfere with your consumption of a song). This has two implications. First, for a very long time, a great deal of copyright infringement has been tolerated. And second, partly as a result of that tolerance, and partly owing to the property of non-rivalry – our moral sense of copyright infringement is different from that towards offences regarding tangible property. Quite simply, it feels less wrong.

An implication of this is that criminalising copyright infringement in a way that is consistent with other property offences will lead to law that departs from people's moral sense of the appropriate reach of criminal law. Criminal law earns disrespect when it contravenes people's moral sense.

5.2.2 The defence of mistake of fact applies to ameliorate any harsh effect of the imposition of strict liability

It is true that the defence of mistake of fact is available for offences of strict liability, and that this *will* ameliorate the harshness of this law.

However, it is worth noting the limits of this exception. Under Section 9.2 of the Commonwealth Criminal Code, a person is not criminally responsible for an offence if:

1. At or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
2. Had those facts existed, the conduct would not have constituted an offence.

In other words, the person must turn their mind to the possibility of infringement, and have a 'reasonable' belief that they are not infringing. But will people always turn their mind to this possibility?

5.2.3 The law does not introduce new criminal offences, it changes the way in which penalties apply and gives the law more flexibility

I have not had time to check whether any new kinds of conduct have been criminalised. However, even if there are no new kinds of criminal conduct introduced into the Act, it is submitted that imposing liability in the absence of a *mens rea* is substantively *different* from imposing criminal liability to knowing or reckless infringers. To adopt the government's discussion of when criminal liability should be imposed, taken from the *Subscription Television Issues Paper,*[23] we should ask ourselves whether:

1. Conduct where someone infringes without knowing has a 'degree of malfeasance' sufficient to justify the imposition of criminal liability?
2. What is the nature of the conduct? For example, is there an element of dishonesty?
3. Does the conduct seriously harm other people?
4. Does the conduct in some way so seriously contravene our fundamental values as to be harmful to society?
5. Is it appropriate to use criminal enforcement powers in investigating the conduct?
6. Is the criminal law appropriate for dealing with the undesirable conduct in question?
7. How is similar conduct regulated in the proposed legislative scheme and other Commonwealth legislation?

Intentional or reckless conduct, in which a person dishonestly profits from the exploitation of copyright, may fulfil these criteria. It is highly questionable whether unknowing, and merely 'unreasonable' conduct does. Whichever way you look at it,

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[23] Attorney-General's Department, 'Protecting Subscription Broadcasts: Policy Review concerning Unauthorised Access to and Use of Subscription Broadcasts', Discussion Paper, May 2005, at 15-16.

the harm caused by copyright infringement, while serious in some cases, is commercial, not physical; no one is permanently deprived of property or the ability to use their property by copyright infringement, and it is highly questionable whether society fundamentally condemns unknowing, unthinking infringement of copyright. As to the question of how similar conduct is regulated in other legislation, see the comments above regarding the fact that 'copyright is different'. Offences of strict liability offences do not exist in patent or trade mark law in Australia.

5.2.4 The offences apply to commercial conduct, not the kinds of things that ordinary people do, and it is right to treat commercial operators who are infringing copyright on a commercial scale as criminally liable

There are three responses to this argument.

First, it is not accurate. There are a series of offences under this law which apply in the absence of any commercial motivation:

- engaging in conduct which results in one or more infringements on a commercial scale which have a substantial prejudicial impact on the copyright owner (s132AC);
- distributing an article which is an infringing copy to the extent that the distribution affects prejudicially the copyright owner (s132AI) (strict liability applies);
- making or possessing a device, intending it to be used for making an infringing copy of a copyright work (s132AL) (strict liability applies, so if the device is to be used for making infringing copies, you can be liable);
- causing a work to be performed in public, or a sound recording or film to be seen or heard in public, at a place of public entertainment (ss132AN and 132AO) (strict liability applies. It does not say on the face of the legislation that you have to own or run the place of public entertainment);
- making a recording - directly or indirectly - of a performance without the permission of the performer (ss248PA and 248PB) (strict liability applies. note that the performer does not need to be professional);
- communicating an authorised recording of a performance to the public (s248PC) (strict liability applies);
- causing an unauthorised recording of a performance to be heard in public (s248PD) (strict liability applies);
- possessing recording equipment intending it to be used to make an unauthorised recording of a performance (s248PE) (strict liability applies - so possessing equipment to be used for that purpose is an offence);
- copying an unauthorised recording of a performance (s248PF) (strict liability applies);
- distributing an unauthorised recording of a performance, where the distribution will prejudicially affect the financial interests of the performer (s248PJ) (strict liability applies);

Second, not all 'commercial' activities are necessarily activities we would consider morally culpable. Individual consumers sometimes sell things. One example is selling an iPod, which, if it still has even one song on it, risks being characterised as selling an article which is an infringing copy.

Third, and perhaps even more troubling, is the problem of the device provisions and other 'indirect' provisions. In an environment when many private copies remain infringements - when it becomes criminal to make or possess a device for making infringing copies - or an indictable offence to engage in conduct that results in substantial infringements - you create a major deterrence to small or innovative businesses having *anything at all* to do with copyright content. It is important to recall that the iPod is, under current law, a device for making infringing copies. Even if the law is amended to allow iPod use, the next device

Once again, it is important to recall that the consequences of the breadth of these provisions have been limited, historically, by the requirement of a mental element. Strict liability offences remove that limit.

The problems with these provisions are real, too, in that there are situations where criminal liability applies inappropriately because of the reach of the laws. For example (this being a non-exhaustive list of possible issues):

1. Section 132AL makes it an offence of strict liability to make or possess a device which is to be used for copying a work or other subject matter, where the copy will be an infringing copy, and copyright subsists in the work or other subject matter at the time of the possession of the device.
   This provision is that it does not require, on its face, that the device have the sole or dominant purpose of making infringing copies. Is a PC a device to be used for making copies? At the moment, isn't an iPod?
2. Section 132AH makes it an offence - of strict liability - to import (for sale) infringing copies.
   'Infringing copies' includes legitimate copies made overseas but imported contrary to bans on parallel importation which still apply to some copyright works, like films. Making this an offence of strict liability has the potential to catch people who are not aware of the finer points of parallel importation rules.
3. Section 132AI makes it an offence to distribute infringing articles to an extent that affects prejudicially the owner of copyright. This is an offence of strict liability.
   This covers file-sharing (because 'articles' includes electronic copies). It would cover those situations where you put a file or document on your website in circumstances where doing so is not excused under one of the fair dealing defences.
4. The section for the unauthorised recording of performances contains many offences of strict liability, requiring no commercial motive.
   This makes teen fans criminals when they take their mp3 recorder to the Big Day Out – and it is a criminal act even before the record button is pressed, since they possess equipment intending to make an unauthorised recording.
5. Under s 132AC, it is an offence (indictable or summary – there is no strict liability here) if a person intentionally engages in conduct, which

> results in one or more infringements of copyright, the infringements have a substantial prejudicial impact on the copyright owner, and the infringements occur on a commercial scale.
> *The scope of this provision is uncertain. Does it apply to a person who put copyright-infringing material on their (high traffic) website? A person who links to copyright-infringing material on their (high traffic) website? A person who sold or provided a computer program which could be used to infringe copyright?*

In addition, it is worth noting that some of the provisions have defences for public institutions like libraries, archives, galleries, cultural institutions, educational institutions acting lawfully. The defences, however, are not general.

In its discussion of when conduct should be criminalised, the government has noted that the primary purposes of applying criminal law to conduct are deterrence and punishment. The question arises why criminal liability is considered necessary to deter or punish public institutions like libraries, archives and galleries. Existing empirical research in the cultural institution sector indicates that the sector is both risk-averse, and concerned to protect the interests of creators.[24] Nevertheless, these laws will apply criminal law to such institutions. Consider, for example, the following hypothetical:

> 'You run a historical museum. You have an amazing collection of old love letters from the Front in your collection. You run an exhibition of said letters. It is wildly successful. People keep asking for copies. You want to create a brochure. You cannot possibly trace the copyright owners. Hence, you know you are infringing copyright – or at least, that there is a substantial risk that you are. You decide to go ahead. Let's say there are 9 photos of letters in the catalogue. Let's say you sell the catalogue. What is your potential criminal liability?'

One obvious answer to all these concerns is that the full force of the criminal law will not be applied to a person who merely possesses an iPod, Zune or laptop computer; that gallery and archive staff are unlikely to be criminally charged. This is true, however it is submitted it is not a complete answer to the problem, because:

- Information sheets, and risk management policies, will need to describe the full force of the law, thus deterring a whole range of activities and/or unnecessarily scaring people (and unnecessarily making copyright law look unconscionably harsh);
- It is undesirable, from a policy perspective, to create so broad and general a discretion to impose liability for conduct which is not considered, by the general population, seriously to contravene fundamental values.

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[24] Emily Hudson and Andrew Kenyon, 'Communication in the Digital Environment: An empirical study into copyright law and digitisation practices in public museums, galleries and libraries', IPRIA Working Paper No. 15/05 (2005), available at http://www.ipria.org/publications/workingpapers.html.

5.2.5 Strict liability may be needed because people who are the final 'link' in the chain of copyright infringement (for example, the person selling pirate copies in a market) may not know what they are doing is infringing, who never turn their minds to the issue at all. It is appropriate to have a graded system of strict, summary and indictable offences, so that such offenders can be simply dealt with. The system of strict liability and the availability of infringement notices achieves this aim.

This argument is more compelling. It clearly is appropriate for police to have, at their disposal, a range of tools, particularly to send a clear, unequivocal message to the lowest functionaries of a copyright infringement network.

It is questionable however whether infringement notices are the best way to achieve this end. The fundamental question is this: given limited resources for prosecution, who are the most appropriate targets of criminal enforcement: the individuals who knowingly (perhaps regularly) infringe copyright, or those who never turned their mind to the issue?

To the extent that an individual knows they are doing wrong, it might seem weak - another mere cost of doing business. To those who are not aware, the fine is not insignificant - over $1,000 per offence. This can escalate quickly: selling 10 burned CDs, each with 8 tracks, creates a theoretical liability of $105,600 *as the potential on the spot fine* (20% of the maximum penalty for the strict liability offence) – and that's just for the sound recordings, let alone the infringements of the musical work.[25]

Second, it is possible to have a graded series of penalties *without* strict liability. The lowest form of penalty could be the summary offence, with a range of penalties available within that offence. Another possibility would be more use of private criminal prosecutions, which have been used in countries like the UK. That way we would not sacrifice the general principle - which I argued for above - that criminal liability should have a condition of awareness, because *copyright is different*.

In summary, then:

- Strict liability is unprecedented in copyright law in common law countries. There are very good, practical reasons why copyright has been treated differently from other property rights. That is because it *is different*.
- These provisions are broadly drafted. Ordinary Australians undertaking non-commercial acts risk criminal liability under these provisions. Australians risk criminal liability, too, where American citizens would not.
- This major policy shift has not been canvassed with stakeholders nor has there been sufficient time to assess their reach.

Recommendation 4: Schedule 1 of the Bill should be deferred pending further discussion on the move to strict liability offences in copyright, and to give time to ensure that the provisions, <u>if</u> introduced, are drafted in such a way as to

[25] This figure assumes, for present purposes, that there is no numerical limit on the on the spot fine, as the regulations and final shape of the infringement notice system are presently unavailable

ensure no ordinary Australian citizen, engaging in non-commercial activities, risks criminal liability.

6 Conclusion

The problems highlighted in this submission are by no means exhaustive of the issues with this Bill. It is also worth noting that the drafting is in many respects so complex that unintended consequences may yet be identified. Little time for analysis has been allowed.

But the problems identified in this submission do support a more general point: that this Bill, far from 'fixing the law so we don't treat pirates as consumers – or consumers as pirates', in fact gives consumers very little, restricts the rights of other users, and does ensure that many will potentially be treated as pirates. Nor does the Bill ensure Australians have the same rights as users in other countries. Far from it, as this submission has sought to illustrate.

In my opinion, the Bill is a seriously retrograde step for Australian copyright law.

Recommendation 5: In conclusion, the Committee should note that, far from increasing the flexibility of copyright, and far from ensuring that Australians have the same rights of use as consumers in other countries, the Bill reduces flexibility and ensures that Australians risk infringement, and even criminal liability, in many circumstances where American users and users elsewhere in the world would not.