

**Submission to the Attorney-General's Department
Draft Infringement Notice Scheme Guidelines**

**Kimberlee Weatherall
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I am a Senior Lecturer in Law at the TC Beirne School of Law, The University of Queensland, a specialist in intellectual property law and adjunct research fellow at the Australian Centre for Intellectual Property in Agriculture. I have studied intellectual property issues at Oxford University and at the Yale Law School, and have written and published widely on intellectual property generally, and on copyright in particular. This submission is made in my personal capacity, and represents my views only. It does not represent the views of the University of Queensland, any body of which I am a member, or anyone else. I have also seen, and provided input into, submissions made by the Law Council of Australia and the Australian Digital Alliance.

I am of course happy to answer any questions on any matters raised in this submission.

Kimberlee Weatherall

TC Beirne School of Law
The University of Queensland
St Lucia Queensland 4072
Email: k.weatherall@law.uq.edu.au
Phone: + 61 7 3346 7503
Facsimile: + 61 7 3346 7480

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Introduction

According to the Draft Guidelines on the Infringement Notices and Forfeiture of infringing Copies and Devices Scheme (‘Draft Guidelines), the intention of the document is to ‘*assist law enforcement officers in their use of the infringement notices and forfeiture of infringing copies and devices scheme*’.

In my view, the Draft Guidelines do not provide sufficient guidance on the administration of the Infringement Notice Scheme: either for the officers concerned, or for members of the public or other stakeholders. On the contrary, the Draft Guidelines are overly vague, and in some areas, contain a number of questionable, unclear, or incorrect legal assertions. It is also notable that the Draft Guidelines provide considerably *less* detailed guidance than equivalent guidelines for other Commonwealth Infringement Notice Schemes. This is problematic for the following reasons:

- (1) Copyright law is complex and counter-intuitive. The Guidelines may be the key source of information for both non-specialist police officers and members of the public who receive Infringement Notices;
- (2) In copyright law, the bare provisions of the statute depart significantly from their application in practice: no criminal infringer is ever charged, or fined, for every copyright infringement they have done. By summarising the law only, and providing no information on existing enforcement practices, the Guidelines could lead to an Infringement Notice practice that departs significantly from existing practice and imposes substantially higher penalties than any court would order;
- (3) There is no specialist regulator of copyright law, thus no body which will be engaged in overall supervision or providing a single, coherent enforcement policy;
- (4) Unless more detailed information is provided, there is a legitimate concern that officers will be forced to turn, for more information or guidance to third parties: in particular, copyright owners or organizations, representatives of which can be expected frequently to be present or involved in investigations of criminal copyright infringement. While expert, such groups have a strong interest in maximum enforcement and deterrence, and any information from this source will have at least the appearance of bias.

Specific Recommendations

I have a number of specific recommendations, listed here. The recommendations, and the basis for making them, is explained in more detail below.

- (1) The Final Guidelines should include more detailed hypothetical examples. Some examples of the kinds of scenarios that could be discussed are provided in **Appendix A** to this submission. In particular, there ought to be more detailed, worked examples providing guidance in relation to:
 - (a) How many Infringement Notices may be issued;
 - (b) The persons to whom Infringement Notices should be issued;
 - (c) What counts as an ‘infringing device’; and
 - (d) The circumstances in which conduct could be considered ‘organised’.

- (2) The Final Guidelines should include some examples of the kinds of situations in which the Infringement Notices scheme is intended to operate: in particular, those examples should be limited to the kinds of circumstances in which it was represented to Parliament that the scheme would be used: market sale of counterfeits, online mass infringement, and other analogous circumstances.
- (3) Detailed, worked examples of the kinds of factors which impact on an officer's discretion should be provided: in particular, concepts requiring better definition include:
 - (a) 'The significance of the breach'
 - (b) The likelihood that a notice will be an effective deterrent; and
 - (c) The estimated value of the goods.
- (4) In relation to the potential for the simultaneous issue of Multiple Notices, the Guidelines:
 - (a) Should expressly address the issue of administrative double jeopardy, by ensuring that:
 - (i) A person is not issued with more than one Infringement Notice for exactly the same conduct;
 - (ii) A person who pays an Infringement Notice is not subject to prosecution for an offence arising from the same general set of facts (ie, selling at the market that same day); and
 - (b) Should provide express guidance on the number of Infringement Notices which would be considered 'reasonable', for example, by providing worked examples.

In addition, in order to ensure that the penalties applied under the Infringement Notice Scheme do not exceed the penalties that would be applied by a court, the Attorney-General's Department ought to ascertain, and publish, the criminal fines which have been applied to individuals charged for copyright infringement, together, in each case, with a summary at least identifying how many infringing articles were involved.

- (5) In relation to forfeiture, the Final Guidelines should
 - (a) Be amended to ensure consistency with the narrower scope of s 133B of the Act;
 - (b) Provide a series of clear examples of the kinds of equipment which would be considered an 'infringing device';
 - (c) Provide guidance to officers on what to do when an alleged infringer states that the equipment belongs to someone else; and
 - (d) Address whether 'forfeiture' applies to electronic copies of copyright content where the device (for example, a general purpose computer) is not to be forfeited.
- (6) In relation to record keeping:
 - (a) The Final Guidelines, or the Attorney-General's Department, should provide information on the privacy protections which apply to records of Infringement Notices issued, explaining the conditions under which such records will be kept, whether they 'expire', what the records may be used for and who may access them.

- (b) For the purposes of transparency and accountability, the Department should establish a system for reporting the application and basic facts of Infringement Notices issued (date, number of notices, offences, and (approximate) number of infringing articles involved).
- (7) The Guidelines should explain the individual human beings to whom it is appropriate to issue Infringement Notices (all employees? The person running the stall?).
- (8) The Guidelines should set out, for the benefit of both officers and copyright owners, the boundaries of the appropriate role for third parties (in particular, copyright owners or enforcement organizations) in the process of investigating criminal copyright offences and the issue of Infringement Notices.
- (9) The Guidelines should clarify whether it is appropriate to offer an alleged infringer an opportunity to obtain legal advice before agreeing to forfeiture.
- (10) The Guidelines should explain, with examples, the circumstances in which the defence of ‘honest and reasonable mistake of fact’ applies in the case of copyright infringement.
- (11) In relation to withdrawal of notices (paras 66-67), the Draft Guidelines should explicitly mention the possibility of miscarriage of the discretion to issue more than one Infringement Notice at a time ought to be specifically discussed as a possible ground for withdrawal of one or more infringement notices.
- (12) The Department should pay more attention to the issue of what information is to be provided to recipients. In particular, the following ought to be provided:
 - (a) The penalty and maximum penalties in figures, rather than penalty units (currently this is a suggestion, not a requirement, in the Guidelines);
 - (b) A clear statement that the person is not obliged to pay the penalty in the notice, and that they have a right to have the matter dealt with by the courts (this is only suggested implicitly in the current prescribed notice);
 - (c) Information about defences, in particular, the defence of ‘honest and reasonable mistake of fact’; and
 - (d) Information about matters which would be relevant to the exercise of the discretion to withdraw the notice.

The model for such information should be Appendix C to the *Customs Infringement Notice Guidelines*, page 7. That document is entitled ‘**What to do if you receive an infringement notice from Customs**’. It is written in plain English, and addresses key matters of concern to the recipient of a Notice.

- (13) Consideration should be given to whether (a) the Finalised Guidelines are to be placed online (as, for example, the guidelines under the Customs Infringement Notice Scheme are), and (b) whether or not the Finalised Guidelines will be placed online, what information will be provided either as context, or in substitution for, these guidelines directed at members of the public. The Attorney-General’s Department ought to be the source of objective, authoritative information on the scheme and criminal copyright offences. It would not be satisfactory for the Department to refer to sources of information coming from stakeholders such as the Australian Copyright Society.

The need for hypotheticals/case studies

The case studies in the Draft Guidelines are sparse in their detail – this becomes particularly obvious when the case studies in these guidelines are compared with those in other guidelines, such as the Guidelines for the Customs Infringement Notice Scheme. Some examples have been extracted in the table below.

Copyright Infringement Notice Guidelines	Customs Infringement Notice Guidelines
<p>[Defining ‘infringing device’]</p> <p>‘This could include a DVD burner in some circumstances’</p>	<p>[relating to the question ‘when is a statement false or misleading?’]</p> <p>‘Example’: A statement that correctly describes goods may be regarded as misleading if it omits that they are made of a substance for which a permit may be required.’</p>
<p>‘For example, a market stall owner has 20 pirated Dandy Warhol CDs for sale and an assortment of 20 other individual pirated CDs for sale. Technically, for each song, there would be a separate breach. In this situation, the authorised officer must use his or her discretion not only in whether to issue a notice, but how many notices to issue.’</p>	<p>[relating to the applicability of a defence]</p> <p>‘Example: In relation to an import declaration, it would generally be acceptable for a person to state that the quantity details from an overseas supplier are illegible in a fax and no clearer copy has been provided despite requests by the person.’</p>

The comparison clearly shows that the examples in the Customs Guidelines are different in two ways:

- (1) They are factually specific (and thus applicable to the kinds of situations officers might actually face on the ground): compare the first of the Copyright examples, which simply states that ‘sometimes’ a DVD burner could be an infringing device.
- (2) They give guidance on the *result*, not just the facts that could arise. Thus in the second two examples, the Customs example states what would be considered ‘acceptable’ (ie protected by the defence). The Copyright example notes a particular situation could arise, but gives *no* guidance on what the result in such a situation would be, or even how the result would be reached.

If anything, it is *more* important that good examples be given in the Copyright Guidelines, where the law is more complex and the officers are not necessarily specialised in copyright law. Some examples of the kinds of hypothetical situations that could be posited, and discussed in the Guidelines are provided in Appendix A, page 14 below.

Scope of the Scheme (Targeting)

There is no reference in the Draft Guidelines to the kinds of situations in which Infringement Notices are suitable. This is unfortunate, owing to the broad scope of the criminal provisions in the *Copyright Act*. On the strict terms of the legislation, it is equally a criminal infringement to sell a book which includes extracts from other books beyond allowable fair dealing, as it is to sell an entirely counterfeit and unauthorised copy of a popular movie on

DVD (the Act only requires the selling of an article which is an infringing copy). In theory, either kind of infringement could lead to an Infringement Notice.

Of course, no one expects that the scheme will be applied that way. However, it is notable that the Draft Guidelines impose no limit on the scope of potential application of the scheme. This failure:

- (1) Is inconsistent with representations made by the Minister for Justice to Parliament during debates on the legislation;¹
- (2) Is inconsistent with Commonwealth policy on the framing of offences, which requires that Infringement Notices only be used where an offence carries ‘physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence;’² and
- (3) May lead to pressure on officers to issue Infringement Notices in circumstances beyond those envisaged and discussed by Ministers in Parliament.

The establishment of clear boundaries, or guidelines, on the appropriate situations for the use of Infringement Notices would be of considerable assistance in managing any gap in expectations: between the resources and intentions of the Department and police officers on the one hand, and the expectations or hopes of stakeholders on the other, who have been quoted as suggesting that both activities which occur within the home, and the conduct of small and medium business fall within the range of criminal conduct.³

It is submitted that it would be appropriate for the Final Guidelines specifically to state a series of scenarios in which it is expected that Infringement Notices would be suitable (such as, for example, the organised sale of counterfeit product; the mass distribution of electronic copies of copyright work). Such examples would not be binding on officers, who would still be expected to exercise judgment, however, they would provide some guidance and assist to manage expectations in relation to the scheme, for the benefit both of police officers and stakeholders (whether owners or users).

Factors influencing an officer’s discretion

A further consequence that flows from the breadth of the copyright criminal provisions is that a great deal of importance ends up placed on the exercise of judgment and discretion of the individual police officer. Factors relevant to the exercise of the discretion are listed in paragraphs 23 – 27. In my submission, these factors are stated at such a high level of generality that they are unlikely to be particularly useful. Factors which are described in particularly vague and general terms include:

¹ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 113 (Chris Ellison, Minister for Justice and Customs); 164 (Chris Ellison) (further elaborating here that ‘Throughout my remarks in support of these amendments I have mentioned that the aim of the legislation is to target those pirates who are the ‘genuine pirates’, if I can call them that... from my knowledge of the AFP and the people they have been targeting, it would ... be those people down at the markets who are selling CDs in a very organised fashion. They are the ones who are doing all the damage.’

² *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004) at 45.

³ Supplementary Submission of the Australian Federation Against Copyright Theft to the Senate Legal and Constitutional Affairs Committee, 9 November 2006, available at http://www.aph.gov.au/senate/committee/legcon_ctte/copyright06/submissions/sub57B.pdf.

- (1) The ‘significance of the breach’. Nowhere is it specified what might be considered a ‘significant’ breach: is the offering of 100 counterfeit DVDs at a market ‘significant’? What about 50? 10? What volume of infringing items would be considered too *great* to support the issue of an Infringement Notice? (paragraph 26).
- (2) The likelihood of a notice being successful as a deterrent: it is not clear on what basis such a judgment is to be made, or how an officer might judge the number of notices necessary in order to effect a deterrent. Should the officer take into account the apparent material resources of the accused infringer? Would that be appropriate without further information about ownership of those material resources?
- (3) The estimated value of the goods: is this value to be judged according to the retail price of the genuine article, or the price for which the infringing items are sold?

It is submitted that *particularly* in relation to the factors influencing an officer’s discretion, the Final Guidelines would benefit from further use of detailed, worked examples. In the absence of such information, the only source of guidance on what counts as ‘significant’ may be any copyright owner representatives present at the time. It is by no means clear that copyright owner views of what is ‘significant’, or what is necessary for a ‘deterrent’, will be consistent with what Parliament intended or even what the Department intended in providing the tiered system.

Multiple Offences/Multiple Notices

It is not acceptable that the Draft Guidelines provide no guidance whatsoever on the question of how many Infringement Notices may be issued simultaneously.

The key problems with this approach are fourfold:

- (1) Procedural fairness to alleged infringers: in a situation where it will not be at all uncommon for a single ‘event’ to lead to multiple copyright infringements (a market trader with 100 pirate CDs has committed at least 100 criminal copyright offences), in the absence of relatively clear guidance it is quite possible for different officers to impose vastly different penalty outcomes (anywhere between 1 and, say, 10 infringement notices, on the assumption that 100 would be manifestly unreasonable) – perhaps based on their view of the fine necessary for ‘deterrence’ (a highly subjective evaluation). Such discrepancies would be inconsistent with the basic principle of equal application of law to persons in equivalent circumstance. From the point of view of a recipient, the absence of guidance renders the decision-making opaque to the recipient of a notice (a recipient, say, of 2 Notices, can turn nowhere for information on whether that particular decision is ‘reasonable’ or not, because no guidance on what is reasonable is provided in the Guidelines);
- (2) Inconsistency with government policy on administrative double jeopardy: Commonwealth Policy on the framing of offences states that ‘administrative double jeopardy’⁴ should be avoided. ‘Administrative Double Jeopardy’ occurs where a single contravention might be captured under two or more offences.

⁴ *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004) at 54 (noting that in such circumstances it may be desirable to include a provision stating that a notice may only be directed to one offence constituting a contravention). The ALRC Report Number 95, *Principled Regulation* also recommended that this should be a standard provision (Recommendation 12.8(g)). However, there are certainly situations

There is no provision in the Regulations or Act, and no discussion in the Guidelines, of the issue of Administrative double jeopardy. Given the breadth of the copyright criminal provisions, it is possible:

- (a) there may be overlap: the same ‘course of conduct’ could constitute both an ‘offer’ to sell an infringing article (s 132AF) and a sale (s132AE); or
- (b) that a person could be issued with an Infringement Notice for one or more infringements, but also prosecuted for other infringements arising from the same set of facts.

Both possibilities should be specifically dealt with – and prevented by – the Final Guidelines.

- (3) Inconsistency with Commonwealth policy on the magnitude of Infringement Notice penalties: Commonwealth policy also states that the penalty under an Infringement Notice should be neither (a) too low, such that there is no deterrence or (b) too high, such that there is no incentive to pay and avoid contesting the charge in court. By providing no guidance at all, the Guidelines offer no guarantee that the penalty imposed on an individual will not be significantly in excess of the penalty that would be applied by a court – in those circumstances, a person has no incentive to pay the Infringement Notice – unless they are being misled as to what penalty a court would in fact apply.⁵
- (4) The potential for pressure to be applied by outsiders: once again, it is submitted that in the absence of information or guidance from the Guidelines, it is possible that, in determining the appropriate number of Infringement Notices, officers may turn to (or be influenced by) the views of copyright owners. Uncertainty in the guidelines is likely to breed conflict and friction further down the chain.

It is difficult to provide guidance on such matters the abstract. However, it is not unreasonable to expect that the Department, or the Department in consultation with relevant law enforcement agencies, already possesses, or can develop some sense of the appropriate use of Infringement Notices. For example, it is submitted that the Department ought to have or form a view on the appropriate application of Infringement Notices in this situation:

An operator of a market stall is found to possess, and be offering for sale, 500 counterfeit Hollywood film DVDs. The DVDs are obviously counterfeit (the covers have spelling errors, for example). The same operator has the previous fortnight, at the same market, been given a warning by officers.

In these circumstances, the appropriate course of action is [...]

Is the appropriate course of action here one Infringement Notice, or ten, or five hundred? Or is it prosecution? If the Department does not have a view on the appropriate application of the scheme in these circumstances, one wonders how it can be appropriate to delegate the

⁵ *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004) at 47. This is the reason for the 1/5 specification (that the Infringement Notice represent 1/5 of the maximum penalty for the offence). The difficulty in the copyright area of course is that in commercial mass copying cases, there is no way any Australian court would ever apply the maximum penalty (say, \$660,000 for 100 infringements). Thus a fine of 1/5 of the maximum penalty, literally applied, is in some cases at least more than any court would impose – giving the rational and informed defendant no incentive to pay the Notice (whether any defendants are fully informed in these situations is highly questionable).

matter entirely to non-specialist police officers, and to different police organisations located in each Australian State.

It should be noted that other Commonwealth Guidelines have provided specific numbers in relation to the issue of Infringement Notices. This suggests that providing numbers – as guidelines, rather than strict rules – is neither unprecedented nor impossible. For example, the Customs Infringement Notice Guidelines specifically provide that indicators in favour of issuing infringement notices for false or misleading statements would include:

- Where the loss of duty caused by the statement is \$1250 or more
- Where there are 5 or more false or misleading particular omissions in a certain kind of report (or, in the case of a different kind of report, 3 or more false or misleading statements).

It is therefore submitted that guidelines on the appropriate number of Notices, or at the very least, fully worked examples (such as that above, with a proposed result) would be appropriate for the better information of both officers and stakeholders.

It is further submitted that, if the intention is that Infringement Notices should provide a penalty set at an appropriate level to provide deterrence without being so excessive as to prompt infringers to challenge matters in court, it would be appropriate to ascertain the levels of fines that courts *do* impose in these circumstances. Such statistics are not readily available to the public. It is therefore submitted that the Department ought to ascertain, and publish, information on fines which have been imposed by criminal courts, as providing the best guide for officers as to what is reasonable, in their application of the Infringement Notice Scheme. Such information should be made public so that recipients of Infringement Notices may make an informed decision whether to challenge, or seek withdrawal of, the Notice.

It is further noted that the assertion at paragraph 31 of the Draft Guidelines that ‘Technically, for each song, there would be a separate breach’ may not be accurate as a matter of law. I have read in draft a submission on the law on this matter by the Law Council of Australia, and agree, for the reasons given in that submission, that there is at least a question about the application of the law in these circumstances.

Forfeiture

I have read in draft a submission on the scope of the concept of ‘infringing devices’ to be made by the Law Council of Australia IP Subcommittee. I agree with that submission, to the extent that it notes that, on the face of the legislation, the power of police officers, in the context of the issue of an Infringement Notice, to require forfeiture of devices under s 133B covers a narrower range of devices than the equivalent power of the courts under s 133 of the Act.

Clarity on both the term ‘infringing device’ and ‘infringing article’ is critical in light of the fact that an Infringement Notice may not be issued unless the person agrees to forfeiture.

As a result, it is submitted that:

- (1) The government should make clear the intended scope of the power of forfeiture, either through amendment of the Act, or (if a narrower scope is intended) otherwise, for example by amending the Explanatory Memorandum;
- (2) In any event, the Guidelines, which fail to make clear, or comply with, the scope of the power under s 133B, require amendment to be consistent with the current drafting of s 133B.

- (3) The Guidelines must provide a list of examples of the kinds of things which would constitute infringing devices, for the avoidance of all doubt.

I note that the narrower scope of the police power may be consistent with the Commonwealth policy, which requires that all matters to be judged by police officers issuing Infringement Notices should be matters on which an officer can make a reliable assessment.⁶ The difficulty with allowing for forfeiture of general purpose consumer electronics devices may be that (a) it may not be possible to reliably assess whether they have been used for the purposes of infringement, and (b) they may belong to someone other than the infringer. Requiring forfeiture by a third party non-infringer would potentially be an extraordinary extension of power. In addition, requiring forfeiture of, for example, a laptop may, at least where only one Infringement Notice is being issued, as much as triple the financial implications of the penalty being applied to an individual. As such, it is a power that should be exercised with care and with strict limits.

I also note that the Guidelines do not deal in any way with the question of whether ‘forfeiture’ of *electronic* infringing copies can ever be required (for example, deletion from the hard drive of a computer). It is not entirely clear whether ‘article’, as used in the Regulations, is intended to import the extended definition found in the *Copyright Act* (to include electronic files). It is submitted that some attempt to address this question should be made in the Final Guidelines.

In summary, for the sake of clarity and consistency with the law, in addition to the suggestions above, the Guidelines must be amended:

- (1) At paragraphs 7, 20 and 21 so as to ensure the definition of ‘infringing device’ is consistent with s 133B of the Act;
- (2) To provide guidance to officers on what to do when an alleged infringer states that the equipment belongs to someone else; and
- (3) To address whether ‘forfeiture’ applies to electronic copies of copyright content where the device (for example, a general purpose computer) is not to be forfeited.

Reporting and Record-Keeping

While there are suggestions in the Guidelines that records of Infringement Notices will be kept (in particular, past history is relevant to the discretion whether to issue an infringement notice), there is no explanation of the conditions under which such records will be kept, whether they ‘expire’, what the records may be used for and who may access them. It may be the view of the Department that such matters are ‘operational matters’ not dealt with in the Guidelines. It is submitted that, even if the information is not to be included in the Guidelines, such information should be provided, for example, on the Department’s website for the benefit of recipients of Infringement Notices. It is reasonable that people will seek information on the record keeping in relation to infringement notices, and it is also reasonable to expect that the Department is the first place that people will turn for such information.

More broadly, no information has been provided regarding what kind of reporting will be done on the operation of the new Infringement Notice scheme. Once again, while such information need not be provided in the Guidelines, somewhere consideration should be given, and information provided to the public, regarding the intended system for recording, and reporting, as a statistical matter:

- (1) Generalised/anonymised statistics on the frequency of issue of infringement notices;

⁶ *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004) at 45.

- (2) The number of infringement notices issued, and the offences for which they are issued.

Against whom will notices be issued?

An interesting question is which individual human beings ought to be issued with Infringement Notices. In the copyright area, it would seem unlikely that notices will be issued only against corporate offenders.⁷ In the situation of a market stall selling counterfeit product, will Infringement Notices be issued to every individual who appears to be employed, or the person running the stall? Will there be any circumstances in which the owner or manager of a market where infringing items are sold will be issued with an Infringement Notice?

It is submitted, once again for the sake of consistency, that the Final Guidelines would benefit from examples discussing which individuals should be issued with a notice.

The role of third parties (copyright owners and representative organisations)

A further matter of interest which is nowhere addressed in the Draft Guidelines is the appropriate relationship between the officers issuing infringement notices, and intellectual property owners and owner representative bodies. It is well known that in the past, police officers have found it helpful, even necessary to work with representative bodies, which play an important role in both identifying infringers and particular infringements. It is reasonable to expect that this working relationship will continue. In this context, it is not inappropriate (for the avoidance of doubt, and to promote the transparency of the process) to delineate, in the Final Guidelines, the boundaries of the role of such third parties. For example, it is suggested that such third party groups are not appropriate sources of guidance on whether Infringement Notices should be issued, or how many.

The availability of legal advice

No mention is made in the Draft Guidelines of whether an accused infringer, being offered the possibility of one or more infringement Notices rather than prosecution, ought to be given the opportunity to obtain independent legal advice. Such advice might be sought by an alleged offender particularly in circumstances where they are informed that they will have to forfeit physical items and equipment prior to being issued with an Infringement Notice.

It would be helpful if the Guidelines would clarify whether it is appropriate to offer such an opportunity to an accused infringer on the spot, or whether the only opportunity for legal advice is to follow issue of the Infringement Notice, prior to payment.

The defence of honest and reasonable mistake of fact

There is a defence, to all strict liability offences under Commonwealth criminal law, where the accused operates under an 'honest and reasonable mistake of fact'.

The Draft Guidelines make no attempt at all to identify when this defence might apply to a copyright infringement offence; this compares unfavourably with the Guidelines for other

⁷ Cf a number of other Infringement Notice Schemes, such as the Customs scheme or the schemes administered by ASIC or the CASA.

Infringement Notice Schemes, such as the Customs Scheme Guidelines, which go to some trouble to lay out what defences exist and the circumstances in which the defences might apply.

Even as an expert in copyright law I have difficulty understanding when the defence could apply. It is therefore submitted that, as a matter of importance, some discussion of the defence ought to be provided in the Guidelines.

Factors relevant to the withdrawal or amendment of notices

It is possible that the inevitable discretion of officers on the issue of how many infringement notices to issue on a single occasion, may miscarry on occasion: that is, that an individual officer will make an unreasonable decision to issue more than one notice at once, leading to the unequal application of the law to individuals in similar circumstances. It is submitted that should this occur, it would be appropriate for a nominated person to withdraw one or several notices, taking into account the full circumstances.⁸ It is further submitted that this possibility should be explicitly discussed in the guidelines, both for the benefit of nominated persons, and for any members of the public issued copyright infringement notices, who may refer to the guidelines in determining whether to seek withdrawal of the notice. The possibility is not presently mentioned in [66] – [67].

Information to be provided to recipients of Infringement Notices

I have previously submitted that the prescribed form, and the information to be provided to recipients of Infringement Notices, is unclear and unsatisfactory compared to forms provided under similar Commonwealth Schemes: see my letter to Helen Daniels dated 28 November 2006. In that letter I submitted that:

- (1) The prescribed form of the infringement notice states (paragraph 6) that the ‘maximum penalty that a court may impose for this offence is 60 penalty units...’. Ordinary people are unlikely to be aware what a penalty unit is. The penalty should be stated in words and figures. The prescribed forms attached to the *Infringement Notice Guidelines, Customs Act 1901, Part XIII, Div 5* (Appendix C, page 5-6) are an example of how this could be done; and
- (2) The notice should clearly state that the person is not obliged to pay the Penalty in the notice, and that they have a right to have the matter dealt with by the courts. This is implied, but not clearly stated, in the form;

I further submitted that there should be an **information sheet** drafted to accompany the Infringement Notice, which ought to be written in plain English, and ought to include:

- (1) Information about defences, in particular, the defence of ‘honest and reasonable mistake of fact’: and that, in particular, it does not matter whether you knew you were infringing copyright: that it matters whether you thought the copies you were dealing with were unauthorised or not.
- (2) Information about matters which would be relevant to the exercise of the discretion to withdraw the notice. According to Commonwealth’s *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004),

⁸ The unreasonable exercise of discretion would be another ‘relevant matter’ within the meaning of Regulation 23W(4)(d).

the Notice should ‘explain the right to seek withdrawal of the notice’. Further, under ‘administrative law considerations’, that Guide states that a matter which may be appropriate for an infringement notice scheme for administrative law reasons is ‘a requirement to indicate some of the grounds upon which the discretion to withdraw a penalty notice may be exercised’. It seems to me that simply informing people that ‘you may seek withdrawal’ is insufficient in the case of copyright, which is not a simple area of law and is poorly understood. Stating only that is likely to lead people to write to their ‘nominated person’, arguing that ‘I didn’t know I was infringing’ – which is, of course, not enough to avoid liability and would hence not be grounds for withdrawing a notice. If matters are clearly explained, any applications to withdraw notices are much more likely to be relevant, and useful to the decision-maker.

A model is provided by the form in Appendix C to the *Customs Infringement Notice Guidelines*, page 7. That document is entitled ‘**What to do if you receive an infringement notice from Customs**’. This simple question answer, plain English language statement would be a good model for similar forms for Copyright.

Information for the Public

Finally, I would like to raise the question of what guidance on the criminal provisions, and the Infringement Notice Scheme in general, are to be provided to members of the public who may receive such notices. At present, members of the public, short of actually consulting a copyright lawyer, have the following sources of information:

- (1) The Attorney-General’s Department Fact Sheet on the new criminal provisions;⁹
- (2) Information Sheets published by the Australian Copyright Council (in particular, G063 and G052) which deal with copyright infringement, including criminal infringement; and
- (3) Other random commentary, such as that found on my erstwhile weblog, *Weatherall’s Law*, and other web logs or websites.

None of these sources have any detailed discussion regarding the kinds of issues which might be of particular concern to a recipient of a notice, for example:

- (1) What kinds of things are subject to forfeiture (what counts as an ‘infringing article’ or an ‘infringing device’)
- (2) What level of on-the-spot fine might be considered ‘reasonable’ or within the ordinary bounds of a police officer’s discretion;
- (3) What factors might be relevant to a decision on the part of a nominated person to withdraw or otherwise alter an Infringement Notice;
- (4) What might constitute an ‘honest and reasonable mistake of fact’ (which would provide a defence under the strict liability provisions of the Copyright Act, in accordance with the Criminal Code).

⁹ I should note also that these fact sheets are far from simple to find: they do not turn up on a simple Google search of ‘copyright Infringement Notices’ or similar searches: in fact, the search term I used to find them in the end was “Copyright Amendment Act 2006” – not necessarily the first search a member of the public would consider!

I would suggest that consideration be given to whether (a) the Finalised Guidelines are to be placed online (as, for example, the guidelines under the Customs Infringement Notice Scheme are), and (b) whether or not the Finalised Guidelines will be placed online, what information will be provided either as context, or in substitution for, these guidelines directed at members of the public. It has been noted earlier in these comments that copyright law is hard even for specialists to understand, let alone ‘copyright laypersons’. Information on these specific issues of concern under the Infringement Notice Scheme ought to be readily accessible and written in plain English. Further, in order to ensure that this information is both balanced and authoritative view, the Attorney-General’s Department ought to be the author and publisher of such information.

Appendix A: Examples of the kinds of hypothetical scenarios which could be used for worked examples in the Final Guidelines

Hypothetical	Issues raised
<p><i>An operator of a market stall is found to possess, and be offering for sale, 500 counterfeit Hollywood film DVDs. The DVDs are obviously counterfeit (the covers have spelling errors, for example). The same operator has the previous fortnight, at the same market, been given a warning by officers. There is another person present and apparently working at the stall.</i></p>	<p>(1) Is this an appropriate case for: (a) A warning? (b) Prosecution? (c) Infringement Notice(s)? (2) How many Infringement Notices should be issued? (3) Should Infringement Notices be issued to both individuals at the stall, or only the person apparently ‘in charge’?</p>
<p><i>An operator of a market stall is found to possess, and be offering for sale, 100 CDs. According to information provided by a representative of Music Industry Piracy Investigations present, the CDs are unauthorised copies.</i></p> <p><i>The operator of the market stall says that he believes that they are authorised parallel imports, pointing to the fact that they are good quality copies with identical covers to the authorised copies.</i></p> <p><i>The operator of the stall asks if they can call their lawyer.</i></p>	<p>(1) Is this an appropriate case for: (a) A warning? (b) Prosecution? (c) Infringement Notice(s) (if so, how many?) (2) Is this an appropriate role for the MIPI representative? What more can the MIPI representative do? (3) Is this a situation in which the defence of honest and reasonable mistake of fact might apply? If so, is the person told to raise that seeking withdrawal of the notice, how is information about that process provided? Is the person told to proffer proof in seeking withdrawal? (4) Are the police required to provide an opportunity to call independent legal advice?</p>
<p><i>A person is found to have 100 electronic files of movies on their laptop, a separate DVD burner, and a box pile of blank Recordable DVDs.</i></p> <p><i>AFACT representatives say that the person offered to sell a copy of a movie to their agent. The person denies that this happened.</i></p>	<p>(1) Is this a situation where the police have reasonable grounds to believe an offence has been committed? (2) Is this an appropriate role for the AFACT representative? What more can the AFACT representative do? (3) Is the laptop, or the DVD burner, an infringing device? Must the police require forfeit of either or both?</p>

<p><i>The person also says that the laptop belongs to their sister.</i></p>	<ol style="list-style-type: none"> (4) Can the police require forfeit of the blank recordable DVDs? (5) Can the police require forfeiture of the DVD burner and require the person to delete the infringing copies of movies from the laptop? (6) If anything is forfeited, what information is provided to the person about seeking recovery of the property and the grounds on which the property may be returned? (7) Is a warning or an Infringement Notice appropriate in these circumstances? Can/should the officer issue more than one Infringement Notice? Should the police officer take into account the value of any forfeited property in deciding whether to issue one or more Infringement Notices? (8) In terms of factors relevant to the officer's discretion, can it be said that this offence was 'organised'?
<p><i>Copyright owners have traced an amateur website with 4 infringing copies of recent release movies to a University student. The copyright owner says that they have already sent a letter to the student asking them to take down the materials, but have not received a response (they have a copy of the letter).</i></p>	<ol style="list-style-type: none"> (1) Is this an appropriate situation for police to become involved? (2) Should an Infringement Notice be issued to the student? (3) Is this a 'significant' breach? (4) What is the relevance of the letter – would this constitute a 'previous warning' relevant to the exercise of the officer's discretion? (paragraph 26).
<p><i>Consider the following devices:</i></p> <ul style="list-style-type: none"> • <i>A general purpose laptop computer with an inbuilt DVD burner</i> • <i>A general purpose laptop computer with a separate DVD burner;</i> • <i>A general purpose laptop computer with specialised software installed for the ripping and copying of Hollywood movies;</i> • <i>A general purpose laptop computer with copies of 500 CDs in its iTunes library;</i> • <i>A commercial DVD burner with 'slots' for two DVDs (original and recordable).</i> 	<ol style="list-style-type: none"> (1) Which of these devices is an 'infringing device' within the meaning of s 133B and the Regulations? (2) If, in the case of computers with specialised software installed, the person offers to remove the software in the presence of an officer, is that sufficient to constitute 'forfeiture' allowing an Infringement Notice to be issued (noting that forfeiture is <u>required</u> before an Infringement Notice can be issued)?