



Attorney General's
department of nsw

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Attn: Mr Nicholas Horne *NH*
Inquiry Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

BY EMAIL: Nicholas.Horne.Reps@aph.gov.au

Dear Mr Horne

This submission comes from the States and Territories Copyright Group ("Copyright Group"), which is comprised of representatives from each State and Territory government and is responsible for jointly negotiating terms with the various copyright collecting societies in respect of government use of third party copyright material. The Copyright Group appreciates the opportunity to make this supplemental submission to the House Standing Committee on Legal and Constitution Affairs in regard to its inquiry into technological protection measures (TPM) exceptions. This submission is supported by the following States and Territories and respective departments: New South Wales (Attorney General's Department); ACT (whole-of-government); South Australia (Attorney General's Department); Queensland (Department of Public Works); Tasmania (Department of Justice); Victoria (Department of Justice); and Western Australia (Department of the Premier and Cabinet).

This supplemental submission addresses two issues raised in the Committee's public hearings in Sydney on 14 November 2005.

- The interaction between the statutory licence schemes in the *Copyright Act 1968* and the technological protection measures contained in the Australia United States Free Trade Agreement (FTA)
- The Copyright Group's views as to whether the Copyright Tribunal is the appropriate body to review and recommend exceptions to the TPM provisions under Article 17.4.7(e)(viii) of the FTA

1. Government statutory licences

Section 183 provides that the Commonwealth or a State (including Territories) does not infringe copyright so long as the use of the copyright materials is for the services of the Commonwealth or State. This statutory licence was enacted into law in 1968 in response to the recommendations of the Spicer Committee, which

formed the view that the government should be entitled to use copyright material for any purpose of the Crown, subject to agreement on terms with the copyright owner, or failing agreement, on terms set by the Copyright Tribunal. The statutory licence allows the government to use copyright materials without first obtaining permission from each copyright owner.

Recognising the impracticality of recording each use of copyright (as well as the reaching agreement on terms and payment to each owner), the Act was amended in 1998 and requires the government to pay equitable remuneration to the relevant declared collecting society for government copying. The provisions in s 183A dispense with the need to notify and negotiate with each separate copyright owner and allow the government to fulfil its statutory obligation of payment through the declared collecting society.

In practice, and using the copying of print materials as an example, the statutory licence works as follows: Copyright Agency Limited (CAL) is the declared collecting society. Each government negotiates with CAL and agrees on terms, including equitable remuneration. CAL then carries on occasional sampling with the government in order to gather copying data, which is used for two purposes: (1) to determine the amount of equitable remuneration, given that s 183A(3) mandates that such method must take into account the estimated number of copies made for the services of the government; and (2) to assist CAL with the distribution of the fees to copyright owners. CAL then invoices the government based on the agreed method of calculating equitable remuneration. The government pays CAL on an annual basis. CAL distributes the fees (less CAL's administrative costs) to the copyright owners based on the results of the sampling.

Under the statutory licence, and for those materials covered by a declared collecting society, the government need not notify the copyright owner of the government's copying of its materials. No prior or subsequent permission is needed.

The premise of the statutory licence is access to the copyright material. If the material is locked up by a TPM and the government is prohibited from using anti-circumvention devices, the purpose of the statutory licence is defeated. The statutory licence allows the government to use copyright materials without notifying or receiving permission from the owner. If that material is locked, the government will be forced to contact each and every copyright owner and arrange for access to the material. Such a process will not only be directly contrary to the purpose of the statutory licence, it will be costly in time and may give rise to additional fees or costs.

For these reasons, and for the reasons previously stated in the earlier submissions from the States and Territories, the Copyright Group strongly urges the Committee to recommend exceptions to the TPM provisions which will allow the government to use circumvention devices, similar to the exception currently contained in s116A of the *Copyright Act*.

2. The Copyright Tribunal

At the hearings in Sydney, the Committee asked several witnesses whether the Copyright Tribunal would be an appropriate body to undertake a review process regarding proposed exceptions to the TPM provisions under Article 17.4.7(e)(viii) of the FTA.

The Copyright Group does not believe that the Copyright Tribunal would be an appropriate body for this task, and it strongly opposes any suggestion that this should be the case. First, the Copyright Tribunal focuses on the narrow issue of equitable remuneration, it does not consider the policy underlying the *Copyright Act*. Second, the formal procedural nature of the Copyright Tribunal does not suit the review process as envisaged under the FTA.

The Copyright Tribunal's jurisdiction and function is narrow in scope. It currently only has jurisdiction over the terms and conditions of statutory licences in the Act. In its final report on the jurisdiction and procedures of the Copyright Tribunal, the Copyright Law Review Committee found that the Copyright Tribunal generally had the function of determining remuneration payable under statutory licences (such as the remuneration payable by the government to a collecting society).

According to Justice Lindgren, the current President of the Copyright Tribunal, the Tribunal's task is to engage in "judicial estimation" to determine the equitable remuneration payable under a statutory licence. The Copyright Tribunal takes into account market factors and comparable licensing situations and ultimately arrives at a conclusion. The Copyright Tribunal's expertise, if any, is based in economics, not copyright law or policy.

The Copyright Tribunal has no experience in weighing or balancing competing policy claims from copyright stakeholders. It is not within the Copyright Tribunal's jurisdiction to consider the balance between copyright users and creators, and the ways in which the balance is reflected in the *Copyright Act*.

The Copyright Tribunal operates very much like a Court. The President of the Tribunal must be a judge of the Federal Court of Australia and the Deputy Presidents must be or have been a judge of a federal or Supreme Court. The Tribunal's members have been almost exclusively lawyers. The procedure of the Tribunal mimics a Court: a party must make an application for a matter to be heard before it, and parties are represented and submit evidence in very similar ways to a matter heard by a Court. A Tribunal that runs along the same lines as a Court is not the appropriate forum for the type of review required under the FTA. A more appropriate forum would be one that has experience in public hearings and policy considerations.

* Justice KE Lindgren, "Market power, collecting societies and the role of the Copyright Tribunal", (2005) 79 ALJ 561, 576.

Conclusion

The NSW Attorney General's Department, on behalf of the Copyright Group, is happy to provide any additional information or comments on this matter. Thank you once again for providing us with the opportunity to make this supplemental submission.

Yours faithfully



for **Director General**
