



INQUIRY INTO THE ENFORCEMENT OF COPYRIGHT IN AUSTRALIA

**Queensland Government Submission to the
House of Representatives Standing Committee
on Legal and Constitutional Affairs**

June 1999

INTRODUCTION

The Commonwealth Attorney-General, the Honourable Daryl Williams AM QC MP, has asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to inquire into and report on issues relevant to the effective enforcement of copyright in Australia.

The Chair of the Committee, Mr Kevin Andrews MP, wrote to the Premier, the Honourable Peter Beattie MLA, on 19 April 1999 inviting the Queensland Government to make a submission to the inquiry.

Under Australia's constitutional arrangements, the Commonwealth Parliament has responsibility for intellectual property issues, including copyright. However, in the interests of Queensland business and industry and as a user and creator of copyright material, the Queensland Government has an interest in the administration and enforcement of copyright.

The Queensland Government, through its various departments and agencies, creates large volumes of copyright material. Copyright in this material is often infringed, particularly regarding the commercial delivery of training programs based on the reproduction and adaptation of training materials and programs created by departments and agencies.

In previous submissions on amendments to the *Copyright Act 1968*, the Queensland Government has stressed that any reform to copyright law should maintain the balance between the creators of copyright material and the users of copyright material. The Queensland Government supports efforts to clarify the enforcement of copyright law.

A whole-of-government response was prepared to the exposure draft of the *Copyright Amendment (Digital Agenda) Bill 1999*. Input from major stakeholders in the Queensland Government (Departments of Communication and Information, Local Government and Planning, Natural Resources, Education and TAFE) was sought and this was incorporated into the Queensland Government Submission. The Crown Law Division of the Department of Justice and Attorney-General provided comments on the legal issues raised by the discussion paper.

The Queensland Government submission prepared in relation to this matter was generally supportive of the current amendments to copyright enforcement measures contained in the *Copyright Amendment (Digital Agenda) Bill 1999* that are currently before the House of Representatives. Included in the amendments are new copyright enforcement measures that provide:

- criminal sanctions and civil remedies for the making of, and commercial dealings, in devices for the circumvention of technological copyright protection measures; and
- criminal sanctions against tampering with electronic rights management information.

The Queensland Government submission also supported the Commonwealth Government's intended introduction of criminal sanctions and civil remedies against the circumvention of technological protection measures in the current Bill. This includes an exception for the sale of circumvention devices to a non-profit library, when they are used for activities specified under the library and archive exceptions. This is to ensure that the exemptions available to copyright users in the current *Copyright Act* are maintained in the electronic environment.

The Department of the Premier and Cabinet prepared this submission in consultation with all State departments and agencies. The following Departments have contributed to the submission:

- Department of Employment, Training and Industrial Relations;
- Department of Public Works;
- Department of Emergency Services; and
- Queensland Health.

Due to the short timeframes for making submissions and considering the fact that copyright is a Commonwealth responsibility, the submission does not attempt to address all the terms of reference.

THE TYPES AND SCALE OF COPYRIGHT INFRINGEMENT

The **Department of Employment, Training and Industrial Relations** has advised that there is widespread anecdotal evidence of copyright infringement within the vocational education and training sector. This involves the reproduction or adaptation of curriculum and delivery materials.

Where the facts have been more compelling, policy considerations, possible public relations outcomes and the cost of litigation may have constrained the response of TAFE Queensland. An overall assessment of damages suffered has not been made.

The concerns of the public provider of training are likely to be heightened by the trend towards an increasingly competitive training environment, expansion of business into overseas markets and the on-line delivery of training.

The **Department of Emergency Services** has raised concerns regarding the large volume of intellectual property it creates as a result of its in-house training programs which then often form the basis of commercially delivered training.

OPTIONS FOR COPYRIGHT OWNERS AND ADEQUACY OF THE LAW

The **Department of Employment, Training and Industrial Relations** has adopted the following strategies to protect its copyright assets:

- (a) The Department has invested in a legal capacity in-house. The legal capacity provides for efficient and effective contract management including the protection of copyright assets.
- (b) The Department has developed a robust Directors' and Officers' Self-Paced Course designed to address all issues associated with corporate governance. The Course is focussed from the point of view of public sector employees or representatives participating in commercial activities. The Course involves nine modules with one module dedicated to examining the impact of intellectual property issues. The learning outcomes of this module include:
 - Outlining the scope of intellectual property by identifying what intellectual property is involved in the organisation;
 - Identifying issues impacting on the development of intellectual property;
 - Describing the mechanisms for protecting and exploiting intellectual property (for example, outlining ways of evaluating intellectual property and explaining liability for intellectual property);
 - Remedies available to the organisation; and
 - Identifying compliance requirements.
- (c) To complement the Self-Paced Directors' and Officers' Course, the Department promotes and delivers face-to-face training using the course material as a guide. The training is tailor-made in consultation with the customer.
- (d) The advent of technologies such as the Internet is making it easier to disseminate, reproduce and adapt information. The Australia vocational education and training sector has been working on a solution to the licensing problems for materials in use throughout the sector.
- (e) AEShare Net is an innovative approach to licensing, which addresses difficulties identified in the vocational education and training sector. These difficulties include identifying owners of different layers of intellectual property, constant exchange of materials, re-use of materials, and redevelopment of standard core materials. A major problem has occurred in the vocational education and training sector because the creation of derivative works may fragment ownership under copyright law.
- (f) The Commonwealth Department of Education, Training and Youth Affairs, in conjunction with the Commonwealth Government Solicitor

and each of the State Ministers responsible for vocational education and training, has been working on a major national project to implement AShareNet.

- (g) When this system is fully implemented it will have provided specific benefits for both providers and users and would have broader “public goods” benefits in the vocational education and training sector as a whole.

As a creator of Crown copyright, the TAFE system adopts standard practices to protect its material and ensure a level of awareness amongst staff. The extent to which TAFE Queensland would go to assert ownership and seek damages for infringement has not been tested. It follows that the adequacy of the law in this area has not been questioned.

TAFE Queensland itself manages the risk of infringing the copyright of others by making payments to the copyright collecting societies that administer the statutory licenses in Parts VA and VB of the *Copyright Act 1968*. These payments amounted to over \$1.14 million in 1998.

TAFE Queensland libraries do not rent out computer programs or sound recordings to clients. This is the only point where the Agreement on Trade Related Aspects of Intellectual Property Rights may have impinged on TAFE Queensland.

Acquisition of overseas publications by TAFE Queensland libraries does not run counter to any restrictions on parallel importation.

Queensland Health has raised concerns regarding the lack of existing measures to ensure that intellectual property is not misused or improperly applied, that is, it may be partially implied and therefore, in a contextual sense, incorrect and misleading.

AMENDMENTS TO ASSIST COPYRIGHT OWNERS

It is noted that one of the factors driving the Inquiry is a complaint from the film industry about evidentiary difficulties in criminal proceedings. According to the background information provided by the Committee, two criminal cases substantially failed because the defendant put the crown to proof of the ownership of the copyright in question. According to the Committee, the Courts found that the “*affidavits and documentation, obtained at very considerable expense and difficulty, were insufficient to prove the ownership claim. While the film industry asserts that the issue of the ownership of the films was never really an issue in criminal matters, the expense and difficulty of proving ownership can successfully operate as a bar to criminal actions being commenced.*” According to the background information, the film industry proposes placing the burden of proof in criminal trials on an accused.

The terms of reference state that the Committee will be investigating the desirability of amending the *Copyright Act 1968*. It is considered that actions that appear to be less than optimal administration of copyright works by the film industry, do not

necessarily justify the reversal of the burden of proof in criminal cases or any amendments to the *Copyright Act 1968*. The internal management concerns of film and entertainment corporations which are, for the most part, foreign owned, appears to be an insufficient reason to overturn long standing, domestic legal principles which are designed to safeguard people from the rigours of criminal sanctions. The onus of proof in criminal proceedings is rightly placed on the prosecution. A question needs to be raised as to whether the film industry is entitled to have the presumption of innocence removed to avoid the need for diligent management of intellectual property.

Users of copyright in an educational or training context have concerns over the use of technological means to deny free access to electronic publications. In the traditional print environment, content can usually be accessed for evaluation, prior to being reproduced, in part, under the fair dealing or educational provisions of the *Copyright Act 1968*.

It is hoped that recently proposed digital data agenda reforms will not legitimise the introduction of harsh copyright enforcement measures that are against the wider public interest.

POSSIBLE EFFECT OF PROPOSED AMENDMENTS TO THE COPYRIGHT ACT 1968 ON OPERATION OF GOVERNMENT AND PRIVATE SECTOR ORGANISATIONS

There should be no amendment to section 183 of the *Copyright Act 1968*. Section 183 deals with copying for services of the State, and operates so that such copying does not constitute an infringement of the copyright in the work, and does not constitute the doing of an act comprised in a copyright work. Section 183 provides a fair and adequate means for appropriate compensation to the copyright holders for any copying by the State. If section 183 were to be repealed, the cost of government administration would rise and the efficiency of government administration could diminish. The taxpayer would ultimately bear the burden of any such change, and amendments to the Act cannot be readily be justified because of concerns from, largely foreign owned, film corporations about failed criminal prosecutions for alleged copyright privacy.