The Senate

Standing Committee on Legal and Constitutional Affairs

Copyright Amendment Bill 2006 [Provisions]

November 2006

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TABLE OF CONTENTS

ABBREVIATIONS

ABC	Australian Broadcasting Corporation
ACC	Australian Copyright Council
ADA	Australian Digital Alliance
AFACT	Australian Federation Against Copyright Theft
AFP	Australian Federal Police
ALCC	Australian Libraries' Copyright Committee
APA	Australian Publishers Association
ARIA	Australian Recording Industry Association
ASTRA	Australian Subscription Television & Radio Association
AUSFTA	Australian-United States Free Trade Agreement
AVCC	Australian Vice-Chancellors' Committee
the Bill	Copyright Amendment Bill 2006
BSAA	Business Software Association of Australia
CAG	Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs
CAL	Copyright Agency Ltd
CCIG	Copyright and Cultural Institutions Group
CD	Compact Disc
Copyright Act	*Copyright Act 1968*
Copyright Regulations	*Copyright Regulations 1969*
Criminal Code	*Criminal Code Act 1995*
Department	Attorney-General's Department
DPP	Commonwealth Director of Public Prosecutions
DVD	Digital Versatile Disc

EFA	Electronic Frontiers Australia
EM	Explanatory Memorandum
IIPA	International Intellectual Property Alliance
RIS	Regulation Impact Statement
SBS	Special Broadcasting Service
SPAA	Screen Producers Association of Australia
TPMs	Technological Protection Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

RECOMMENDATIONS

Recommendation 1

3.144 The committee recommends that the Federal Government conduct a public awareness campaign and develop a 'plain English' consumer guide on the meaning and effect of the amendments contained in the Bill in order to assist people to understand their copyright rights and obligations under the *Copyright Act 1968*.

Recommendation 2

3.145 The committee recommends that the Federal Government re-examine with a view to amending the strict liability provisions in Schedule 1 of the Bill to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.

Recommendation 3

3.146 The committee recommends that, in developing guidelines for management of the Bill's strict liability offences and infringement notice scheme, consultation should take place with appropriate bodies representing those to be regulated under the proposed regime, and relevant user-interest groups.

Recommendation 4

3.147 The committee recommends that proposed subsection 111(1) be re-drafted to make absolutely clear that individual consumers are not restricted to watching and listening to broadcast recordings in their own homes.

Recommendation 5

3.148 The committee recommends that Schedule 6 of the Bill be amended with respect to format-shifting to specifically recognise and render legitimate the ordinary use by consumers of digital music players (such as iPods and MP3 players), and other similar devices.

Recommendation 6

3.149 The committee recommends that the proposed amendments to the fair dealing exception for research and study in Schedule 6 of the Bill be clarified to make clear that only reproductions deemed to be fair dealings will be restricted and that the scope of the provision allowing any other amounts of reproduction will not be affected, if they are considered to be fair.

Recommendation 7

3.150 The committee recommends that Schedule 6 of the Bill be clarified to make it absolutely clear that libraries, archives and cultural institutions are able to make sufficient copies for the purposes of preservation.

Recommendation 8

3.151 The committee recommends that the scope of the exception for 'key cultural institutions' in Schedule 6 of the Bill be clarified to specifically include the ABC, SBS, the Australian Film Commission, universities, research institutions, and other like institutions which hold significant historical and cultural material.

Recommendation 9

3.152 The committee recommends that proposed section 28A in Schedule 8 of the Bill should be amended to clarify that the same range of copyright material currently covered by section 28 of the Copyright Act is included; that is, that section 28A should apply to communication of a work or subject matter as encompassed in section 28, and not only to a sound recording or cinematograph film.

Recommendation 10

3.153 The committee recommends that proposed section 200AAA in Schedule 8 of the Bill be clarified to ensure that caching for efficiency purposes (proxy caching) does not infringe copyright; and to ensure that there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made.

Recommendation 11

3.154 The committee recommends that the Federal Government consider the possibility of amending proposed subsection 135ZMB(5) in Schedule 8 of the Bill so that 'insubstantial' copying of works in electronic works need not be 'continuous'.

Recommendation 12

3.155 The committee recommends that the Federal Government consider harmonising the language used in the definition of 'technological protection measure' in Schedule 12 of the Bill with the language used in the definition of 'access control technological measure', by replacing the phrase 'in connection with the exercise of copyright' in the definition of 'access control technological measure' with the phrase, 'prevents, inhibits or restricts the doing of an act comprised in copyright'.

Recommendation 13

3.156 The committee recommends that the specific exception to liability for TPM circumvention to allow for interoperability in Schedule 12 of the Bill be amended to ensure it allows interoperability between computer programs and data to permit interoperable products to be developed.

Recommendation 14

3.157 The committee recommends that Schedule 12 of the Bill be amended to include a prohibition on any agreements purporting to exclude or limit the application of permitted exceptions under the TPMs liability scheme.

Recommendation 15

3.158 The committee recommends that the Federal Government undertake a public review of the impact of the changes made to the *Copyright Act 1968* by the Bill, after a period of two years of operation of the provisions.

Recommendation 16

3.159 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

CHAPTER 1

INTRODUCTION

Background

1.1 On 19 October 2006, the Senate referred the provisions of the Copyright Amendment Bill 2006 (the Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 10 November 2006. On 10 November 2006, the committee resolved to extend the reporting date until 13 November 2006.

1.2 The Bill makes a range of major amendments to the *Copyright Act 1968* (Copyright Act). According to the Explanatory Memorandum (EM) to the Bill, many of the amendments implement outcomes of several copyright law reviews conducted by the Federal Government in 2005-06, and other policy initiatives. The Bill also gives effect to Australia's remaining intellectual property obligations under the Australia-United States Free Trade Agreement (AUSFTA) by implementing a liability scheme for certain activities relating to the circumvention of Technological Protection Measures (TPMs); and by setting out a number of permissible exceptions to that liability scheme.

1.3 In his Second Reading Speech, the Attorney-General stated that the Bill 'introduces significant reforms' to the Copyright Act which demonstrate 'the Howard government's ongoing commitment to having an effective, world-class and up-to-date copyright regime'.[1] According to the Attorney-General, the Federal Government is mindful of the particular challenges to copyright in the digital technology age:

> The government is committed to dealing with these challenges to copyright head-on, while seeking to acknowledge the opportunities technology presents. We want laws in place which mean copyright pirates are penalised for flouting the law. And we want to make sure that ordinary consumers are not infringing the law through everyday use of copyright products they have legitimately purchased.
>
> These important reforms include new exceptions to make our copyright laws more sensible and defensible. The bill also introduces new offences and enforcement measures to ensure that those who seek to undermine the legitimate rights of copyright owners can be brought to account. These balanced and practical reforms will ensure the effectiveness of our copyright laws in the dynamic environment that we face.[2]

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1 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.

2 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.

1.4 The Attorney-General noted that the Bill is 'wide ranging but it is also targeted'. It targets piracy, not the legitimate everyday behaviour of Australian consumers and institutions'.[3]

Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper on 25 October 2006, and invited submissions by 30 October 2006. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 100 organisations and individuals.

1.6 The committee received 74 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.7 The committee held a public hearing in Canberra on 7 November 2006. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.8 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

3 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 2.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter provides a brief general overview of the Bill.[1]

Schedules 1 to 5 – amendments addressing copyright piracy

2.2 The EM states that Schedules 1 to 5 of the Bill introduce significant reforms to Australia's copyright regime which are aimed at addressing copyright piracy. In addition to these amendments, a number of the provisions harmonise the criminal law offence provisions of the Copyright Act with Commonwealth criminal law policy and the *Criminal Code Act 1995* (Criminal Code).[2]

Schedule 1 – Criminal laws

2.3 Schedule 1 creates indictable, summary and strict liability offences for copyright infringement, with a range of penalty options. The strict liability offences will be underpinned by an infringement notice scheme in the Copyright Regulations 1969 (Copyright Regulations). According to the EM, this will give police and prosecutors a wider range of enforcement options, depending on the seriousness of the relevant conduct, ranging from infringement notices for more minor offences, to initiating criminal proceedings in more serious cases. The criminal provisions 'are not aimed at ordinary people, but at copyright pirates who profit at the expense of … creators'.[3]

Schedule 2 – Evidential presumptions

2.4 Schedule 2 contains amendments to evidential presumption provisions in civil and criminal proceedings which aim to assist copyright owners and reduce costs in the litigation process. These provisions allow for presumptions in relation to establishing the subsistence and ownership of copyright. The Bill strengthens these provisions by providing that statements contained on labels, marks, certificates and so on are presumed to be correct unless the contrary is established, rather than on the basis that they are 'admissible as prima facie evidence' (as set out in the existing presumptions). There are also new presumptions recognising the labelling practices of commercially released films and computer software that will apply in both criminal and civil

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1 Most of the text in this chapter is taken directly from the EM to the Bill, and the Second Reading Speech. However, due to the length of the EM, this chapter will contain only a general overview. Further detailed explanations of each of the Bill's provisions are provided in the EM.

2 EM, pp 1-2.

3 Senator the Hon. Santo Santoro, Minister for Ageing, *Senate Hansard*, 6 November 2006, p. 89.

proceedings. The amendments also introduce a presumption of originality for computer programs.

Schedule 3 – Technologically neutral definitions

2.5 Schedule 3 contains amendments to ensure that the definition of 'article' in subsection 10(1) of the Copyright Act can include an electronic reproduction or an electronic copy of a work or other subject-matter for the purposes of civil proceedings. The EM states that this is to overcome doubts about the protection of digital files or their download over the Internet.

Schedule 4 – Civil remedies and commercial-scale infringement online

2.6 Schedule 4 contains amendments to give enhanced powers to courts to grant relief to copyright owners in civil actions which involve commercial-scale electronic infringements, such as in the peer-to-peer context. The new provisions will operate so that, in such cases, a court may take into account likely infringements as well as a proved infringement in determining appropriate relief.

Schedule 5 – Customs seizure of imported infringing copies

2.7 Schedule 5 contains amendments to the Customs 'Notice of Objection' provisions in the Copyright Act. According to the EM, this will reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices. It will also ensure that the Notice of Objection provisions remain consistent with changes made to the *Trade Marks Act 1995*.

Schedule 6 – Exceptions to infringement of copyright

2.8 Schedule 6 contains amendments concerning new copyright exceptions, in response to the Federal Government's recent 'Fair Use and Other Copyright Exceptions' review. The Bill includes exceptions for two kinds of copying for private and domestic use – 'time-shifting' and 'format-shifting', and four new specific exceptions. The four specific exceptions are to be based on the principle of 'fairness', that is, a court would be required to assess whether a use is 'fair' by testing it against new conditions set out in the legislation.

2.9 The EM states that the exceptions will provide flexibility to allow copyright material to be used for socially useful purposes; and will better recognise the rights of consumers to enjoy certain copyright material that they have legitimately acquired, where this does not significantly harm the interests of copyright owners. According to the EM, some of these amendments arose from the Federal Government's Digital Agenda review in 2003-06, others from the Fair Use review in 2005-06, or to achieve compliance with the World Intellectual Property Organization (WIPO) Copyright Treaty.[4]

4 EM, p. 3.

2.10 One of the exceptions contained in Schedule 6 applies to libraries and archives to give the public access to items of historical and cultural significance in the online environment. There is also a new exception for key national cultural institutions related to preservation of collections. This exception aims to allow these institutions to more effectively deal with items of historical and cultural significance to Australia that are in their collections.

2.11 Specifically, the following 'fair use' exceptions are contained in the Bill:

- recording broadcasts for replaying at a more convenient time (time-shifting) – Schedule 6, Part 1;
- reproducing copyright material in a different format for private use (format-shifting) – Schedule 6, Part 2;
- uses of copyright material for certain purposes which, in general terms, are:
  - non-commercial uses by a library or archives (including a museum);
  - non-commercial uses for educational instruction by an educational institution;
  - uses for or by a person with a disability; and
  - uses for parody and satire (Schedule 6, Part 3);[5]
- Schedule 6 also includes amendments which clarify the existing exception related to 'fair dealing' for the purposes of research or study (Schedule 6, Part 4) – the effect of this change is to limit the extent of fair dealing for research or study to the definition of a 'reasonable portion', regardless of whether the work is out of print, or out of print and only available in one library or archive in Australia[6]; and
- changes to exceptions related to official copying of library and archive material (Schedule 6, Part 5).

2.12 The Regulation Impact Statement (RIS) in respect of amendments made in Parts 1-3 of Schedule 6 of the Bill is included in the EM.[7] The RIS notes that the

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5 The Bill brings together four different categories of exceptions and treats them in the same way. The new extended fair dealing exceptions will not apply to uses where an existing exception or statutory licence already operates; it only covers new uses which must comply with the standards of Australia's international treaty obligations under the Berne Convention, the TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights), the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the AUSFTA.

6 A 'reasonable portion' is taken to be one article from a periodical publication; more than one article from the same periodical publication only when those articles are required for the same piece of research or the same course of study; or 10 per cent of the number of pages in a work that consists of more than 10 pages, or one single chapter of the work; or, for a published literary or dramatic work in electronic form (other than a computer program), 10 per cent of the number of words in a work, or the whole or part of a single chapter of the work.

7 EM, pp 5-13.

Federal Government made a commitment to examine the issue of 'fair use' in its 2004 election policy *Strengthening Australian Arts*. The RIS also notes that, on 5 May 2005, the Federal Government published an issues paper seeking public comment on whether the Copyright Act should include a general exception associated with principles of 'fair use' or specific exceptions to facilitate public access.[8]

Schedule 7 – Maker of communication

2.13 Schedule 7 contains an amendment to make it clear that a person who merely accesses or browses the Internet is not considered to be responsible for determining the content of the copyright material accessed online, nor considered to be electronically transmitting the material to him or herself. This matter was raised by the Digital Agenda review. The clarification is intended to remove any doubt that a person does not determine the content of material by merely doing the technical process necessary to receive a communication (for example, by clicking on a hyperlink).

Schedule 8 – Responses to Digital Agenda review

2.14 Schedule 8 contains amendments arising from the Federal Government's response to the review of the 2001 Digital Agenda reforms in relation to the use of copyright material for educational purposes and the educational statutory licences. Amendments to the educational statutory licences are intended to benefit educational institutions dealing with online material.

2.15 Schedule 8 covers the following specific areas:

- communication of works or other subject matters in the course of educational instruction (Schedule 8, Part 1);
- educational copying of communications of free-to-air broadcasts (Schedule 8, Part 2);
- copying 'insubstantial' parts (or 1 per cent) of works in electronic form (Schedule 8, Part 3);
- reproduction and communication of works from electronic anthologies by educational institutions (Schedule 8, Part 4); and
- active caching of websites on a server by educational institutions for educational purposes (Schedule 8, Part 5) – 'active caching' refers to the process of loading selected websites onto a server to store for a particular course of study.

Schedule 9 – Unauthorised access to encoded broadcasts

2.16 Schedule 9 repeals and replaces provisions dealing with encoded broadcasts and includes amendments implementing the Federal Government's review of

8 EM, pp 5-6.

unauthorised access to, and use of, subscription broadcasts; as well as harmonising the provisions with Criminal Code style and Commonwealth criminal law policy.

Schedules 10 and 11 – Copyright Tribunal amendments

2.17 Schedules 10 and 11 contain amendments to enhance the jurisdiction of the Copyright Tribunal. Many of the amendments implement the Federal Government's response to the Copyright Law Review Committee report on the *Jurisdiction and Procedures of the Copyright Tribunal*. The remaining amendments deal with internal administration and operation of the Copyright Tribunal.

Schedule 12 – Technological protection measures

2.18 Schedule 12 contains amendments to implement obligations under the AUSFTA in relation to Technological Protection Measures (TPMs). Under the AUSFTA, the Federal Government provided undertakings to implement a new liability regime for circumventing TPMs within two years from the date of entry into force of the AUSFTA; that is, by 1 January 2007.

2.19 In September 2006, the Federal Government released an exposure draft of the Copyright Amendment (Technological Protection Measures) Bill 2006, expressing the hope that such legislation would be 'Good News for Consumers, Bad News for Pirates'. The provisions in that exposure draft have been amended and incorporated in the Bill at Schedule 12.[9]

2.20 TPMs or anti-circumvention devices are certain types of technology that are associated with copyright material and are used for the purpose of preventing copyright material from being copied or accessed. They commonly include password, encryption and DVD region encoding mechanisms. TPMs can be circumvented in several ways, for example, as a result of the unauthorised distribution of passwords and serial numbers, or by employing more sophisticated hacking utilities like password cracking tools and software decompilation programs.

2.21 Apart from protecting copyright material, TPMs can also be used for other purposes. For example, they may be used to restrict competition in markets for non–copyright goods and services, or to prevent the improper use of goods lawfully acquired.

2.22 The Copyright Act currently prohibits, amongst other things, the importation, dealing and manufacturing of TPM circumvention devices (section 116A, for civil liability and subsections 132(5A) and (5B) for criminal liability). However, the Copyright Act does not prohibit the actual *use of* a TPM circumvention device. The Copyright Act also provides that the prohibitions relating to the manufacturing and the

9 The following background to the provisions related to TPMs is taken directly from Parliamentary Library, In progress Bills Digest no. 51, 2006-07, Copyright Amendment Bill 2006 at http://libiis1/library_services/pubs/bd051-2006-07.pdf (accessed 3 November 2006).

trafficking of circumvention devices do not apply for certain 'permitted purposes' (subsections 116A(3) and (7)). These permitted purposes or exceptions include:

- reproducing computer programs to make interoperable products;
- reproducing computer programs to correct errors;
- reproducing computer programs for security testing;
- copying by Parliamentary libraries for members of Parliament;
- reproducing and communicating works by libraries and archives for users;
- reproducing and communicating works by libraries and archives for other libraries and archives;
- reproducing and communicating works for preservation and other purposes;
- use of copyright material for the services of the Crown; and
- reproducing and communicating works etc by educational and other institutions.

2.23 The current scheme will be repealed and the new law, which will be in the form of amendments to the Copyright Act, will impose civil and criminal penalties, on any person who:

- knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or
- manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
    - are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
    - have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
    - are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

2.24 In short, Australia is required to tighten its law regarding circumvention of TPM devices to prohibit not only manufacturing and dealing but, also, the actual *use of* a circumvention device. In addition the number of exceptions or 'permitted purposes' which can be included in the regime are strictly limited.

2.25 The new law required by the AUSFTA will replace the 'permitted purposes' for which circumvention devices may be dealt with under the current law, with several narrow exceptions. Those exceptions are set out in the AUSFTA (Article 17.4.7(e)(i) to (viii)) and generally relate to the following categories:

- reverse engineering for the purposes of achieving interoperability;

- security testing of encryption technologies;
- parental control locks;
- security testing of computers/networks;
- privacy issues;
- law enforcement and national security;
- libraries for making acquisition decisions; and
- other exceptions identified under a legislative or administrative review as addressing a credibly demonstrated actual or likely adverse effect on non-infringing use.

2.26 The House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs held in 2005 was an administrative review for the purpose of this last category.[10]

2.27 According to the Attorney-General's Second Reading Speech, the Bill provides for more effective protection for TPMs to encourage distribution of copyright material online and increase the availability of music, film and games in digital form. It is envisaged that this will, in turn, foster development of new business models and provide enhanced choice for consumers.[11]

2.28 The EM explains that the liability scheme set out in the Bill will target people who circumvent TPMs, in addition to those who manufacture or supply devices or services used for circumvention. However, the liability scheme will provide for specific exceptions in the Bill and additional limited exceptions in the Copyright Regulations on a case-by-case basis.

2.29 The Second Reading Speech states that these exceptions are in accordance with recommendations contained in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs relation to review of TPMs exceptions.[12] For example, exceptions to liability for circumventing TPMs will be provided where it is in the public interest or where a special case has been made out. Any additional exceptions cannot be granted where they would undermine the adequacy and effectiveness of the legal remedies provided under the scheme.[13]

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10 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of technological protection measures exceptions*, February 2006.

11 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.

12 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 2. See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of technological protection measures exceptions*, February 2006.

13 Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", p. 1.

2.30 Schedule 12 also specifically creates an exception for 'region coding' devices and allows Australian consumers to use multi-zone DVD players.[14]

14 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.

CHAPTER 3

KEY ISSUES

3.1 The committee received evidence covering a wide range of issues and which provided analysis of the Bill from the perspective of many key stakeholders.

3.2 Evidence was received from groups representing a variety of sectors and industries, including artists/authors representative groups, corporate rights holders and distribution industries, copyright-related industries, and consumers. These groups have generally raised issues and concerns in relation to aspects of the Bill which most significantly affect their interests. Some of the groups represented in submissions include: authors; publishers; visual artists; film industry; music industry; IT industry; television/pay television industries; libraries; educational institutions; and cultural institutions.

3.3 A number of the broad issues and concerns identified in the course of the committee's inquiry, including opposing arguments related to particular aspects of the Bill, are examined below. The vast majority of evidence received by the committee related to Schedules 6, 8 and 12 of the Bill.

Balancing of interests

3.4 Typically, divergent views emerged with respect to key elements of the Bill which accord with the interests of particular stakeholders. Generally speaking, for example, groups representing copyright owners or rights holders tended to support parts of the Bill which strengthen copyright protection, while often opposing, or offering only qualified support to, provisions which seek to create wider exceptions to copyright infringement.[1] Conversely, those advocating consumer rights and the importance of fostering creativity and innovation argued that the Bill is weighted towards copyright owners and rights holders to the ultimate detriment of individual consumers and the wider community.[2]

3.5 Such opposing views have been recognised by the Federal Government in its formulation of the Bill:

> It is inevitable in making amendments in this area that there will be areas of disagreement between stakeholders. Not all amendments are well received by copyright owners and not all are well received by users but, as ever, one has to balance rights in the public interest and we believe that this bill goes

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1 For example, see Copyright Agency Limited, *Submission 29*; Australian Recording Industry Association, *Submission 38*; Australian Publishers Association, *Submission 43*; Australian Federation Against Copyright Theft, *Submission 57*.

2 For example, see Electronic Frontiers Australia, *Submission 44*; Australian Digital Alliance, *Submission 50*; Ms Kimberlee Weatherall, *Submission 54*; Internet Industry Association, *Submission 66*.

> a long way to achieving that fair compromise and balance. We have drawn on direct consultations with a wide range of stakeholders including private individuals, peak groups representing people with disabilities, owners of copyright works, broadcasters, distributors, copyright collection societies, academics and those in industry.[3]

Consultation

3.6 In the Second Reading debate, the Attorney-General stated that 'the (B)ill is a result of extensive consultation and … delivers on a number of copyright reviews undertaken in the past few years'. In particular, he noted that the Bill includes the Federal Government's responses to:

> … the fair use and other exceptions review, the review of the Digital Agenda Act amendments, the review of protection of subscription broadcasts, the Intellectual Property and Competition Review Committee's review of copyright under the competition principles, the Copyright Review Committee's review of jurisdictional procedures of the Copyright Tribunal, the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on technological protection measures, and the technical review of all Australian legislation to ensure consistency with the Australian Criminal Code.[4]

3.7 The Attorney-General's Department (Department) provided the committee with a detailed chronology of consultation undertaken by the Federal Government in relation to various parts of the Bill. This chronology appears at Appendix 3.

3.8 The committee notes that the consultation processes were comprehensive and wide-ranging in relation to most aspects of the Bill. However, the committee is mindful of evidence raised during its inquiry which argued that public consultation has not been adequate in relation to certain specific parts of the Bill. In particular, submissions and witnesses expressed concern that the Bill proposes 'unexpected' changes in the following areas:

- introduction of the new tiered system of criminal offences relating to infringement of copyright, in particular the introduction of strict liability offences and an infringement notice scheme;[5]
- introduction of a 10 per cent 'cap' in Schedule 6 in relation to the current fair dealing exception for research and study purposes;[6]

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3 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech in reply, *House of Representatives Hansard*, 1 November 2006, p. 31.

4 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech in reply, *House of Representatives Hansard*, 1 November 2006, p. 31.

5 See Ms Kimberlee Weatherall, *Committee Hansard*, 7 November 2006, pp 29 & 33.

6 See Miss Sarah Waladan, Australian Digital Alliance, *Committee Hansard*, 7 November 2006, p. 10; Mr John Mullarvey, Australian Vice-Chancellors' Committee, *Committee Hansard*, 7 November 2006, p. 16.

- a new requirement under subsection 135ZMB(5) in Schedule 8 that 'insubstantial' copying of works in electronic form be 'continuous';[7]
- changes to the 'records notices' provisions relating to the Copyright Tribunal in Schedule 11;[8] and
- removal of a 'clear and direct link (contained in the Exposure Draft) in Schedule 12 between TPM protection and preventing or inhibiting the infringement of copyright.[9]

3.9 The committee also received evidence suggesting that the 'drivers' for some provisions of the Bill have not been adequately explained. For example, Ms Libby Baulch from the Australian Copyright Council (ACC) noted that:

> … we do not know what the origins of … amendments [relating to format-shifting for books, newspapers, magazines and photographs] are. We were not able to find those in the issues paper for the fair use inquiry or in the submissions to it. We have similar concerns about the application of proposed section 200AB to the activities of educational institutions and libraries where we have sought some information from government about what sorts of activities they regard as not being allowed at the moment which they think should be allowed … With some sort of explanation like that of the sorts of activities that they want to address, we may be able to look at better expressed purposes for this exception to apply … It is difficult to make alternative proposals if you do not know what the problem is that these amendments are intended to address.[10]

3.10 The committee also heard arguments that Parliament's consideration of the Bill is being rushed.

3.11 For example, Mr Dale Clapperton and Professor Stephen Corones argued that the only provisions of the Bill 'which have a deadline for implementation, or could otherwise be considered urgent, are the TPM provisions contained within Schedule 12'. In their view, the 'remainder of the … Bill introduces significant changes to Australia's copyright laws' and 'an unhurried committee review with sufficient time to conduct meaningful public consultation and hearings' is therefore warranted.[11]

3.12 Ms Kimberlee Weatherall made a similar argument:

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7 See Ms Delia Browne, Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG), *Committee Hansard*, 7 November 2006, p. 16.

8 Mr John Mullarvey, Australian Vice-Chancellors' Committee, *Committee Hansard*, 7 November 2006, p. 16.

9 Electronic Frontiers Australia, *Submission 44*, p. 4; Professor Brian Fitzgerald, *Committee Hansard*, 7 November 2006, p. 21.

10 *Committee Hansard*, 7 November 2006, p. 10.

11 *Submission 42*, p. 14.

> 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 remainder of this Bill should be deferred so that a proper analysis and discussion of the provisions can be undertaken.[12]

Department response

3.13 In response to arguments about perceived deficiencies in the consultation process and the apparent haste with which amendments not related to the AUSFTA are being considered, a representative from the Department explained that it is '(t)he government's preference … to do it as one major copyright reform bill and to get it all through this year'. She also noted that, apart from amendments relating to TPMs which are required to implement Australia's obligations under the AUSFTA:

> … there are also some other minor amendments in there that will allow us to accede to the World Intellectual Property Organisation Copyright [WIPO] Treaty, and that is a requirement under both the Australia-US Free Trade Agreement and the Singapore-Australia Free Trade Agreement.[13]

3.14 However, the representative acknowledged that accession to the WIPO Treaty is an 'indirect' issue; the WIPO Treaty requirements relate to the issue of 'reasonable portion' and how 'administrative purposes' are defined under the library provisions of the Bill.[14]

3.15 With respect to the criminal liability provisions (discussed in greater detail below), the Department informed the committee that 'a range of consultation' has occurred which 'has identified a number of issues that the Government is currently considering'. Further, '(t)here would be little value in delaying the passage of these amendments for any further consultation'.[15]

Schedules 1 and 2 – criminal liability

3.16 Several submissions argued that the Bill's introduction of strict liability offences for copyright infringement is unprecedented and troubling, to the extent that Schedule 1 of the Bill should not be passed in its current form. In other common law countries such as the United Kingdom, Canada and the United States, offences of strict liability do not exist in copyright law. Significantly, as Ms Weatherall noted, the AUSFTA does not require the creation of offences of strict liability for copyright, and offences of strict liability do not exist in patent or trade mark law in Australia.[16]

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12 *Submission 54*, pp 1-2.

13 *Committee Hansard*, 7 November 2006, p. 44.

14 *Committee Hansard*, 7 November 2006, p. 48.

15 *Submission 69A*, p. 10.

16 *Submission 54*, pp 11 & 15.

3.17 Many expressed the view that strict liability for copyright infringement should be rejected as a matter of principle. Ms Weatherall argued that ordinary Australian citizens, engaging in non-commercial activities, should not risk criminal liability, particularly where copyright infringement has taken place unknowingly.[17] Further, Ms Weatherall noted the inherently different nature of copyright property compared to other forms of property:

> Whichever way you look at it, 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.[18]

3.18 Ms Weatherall pointed to many deficiencies with the proposed criminal liability provisions, both from a policy level and in relation to their likely practical impact.[19] In her view, the reach of the provisions is overly broad and most problematic where they apply to:

- acts not done for a commercial purpose or in a commercial context;
- conduct that is a necessary part of conducting ordinary, legitimate business; and
- acts that might be done by ordinary Australians innocently.[20]

3.19 The Australian Digital Alliance (ADA) predicted that the effect of the Bill's criminal liability provisions will be that copyright 'crimes' will be the subject of substantially higher penalties than other property crimes, in circumstances where the public does not necessarily perceive these sorts of activities as crimes.[21] According to some, the result will be that many more people, probably including a disproportionate number of younger people, will at worst be facing jail time, and at best have their records and career prospects marked by criminal convictions.[22]

3.20 There was also concern that the strict liability provisions will make reasonable, good faith commercial activities illegal.[23]

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17 *Submission 54*, p. 11.

18 *Submission 54*, pp 14-15.

19 See *Committee Hansard*, 7 November 2006, pp 30-31; *Submission 54*; *Submission 54A*.

20 *Submission 54A*, p. 2.

21 Australian Digital Alliance, *Submission 50*, p. 15.

22 For example, see Electronic Frontiers Australia, *Submission 44*, p. 7.

23 Open Source Industry Australia Limited, *Submission 21*, p. 6; Mr Dale Clapperton and Professor Stephen Corones, *Submission 42*, p. 11.

3.21 In the context of educational institutions, the AVCC expressed concern that the criminal liability provisions may have an unintended impact, namely that educational institutions might be held strictly liable for inadvertent acts by their teachers and lecturers, and by students enrolled in educational institutions.[24]

3.22 On the other hand, the strengthened criminal liability provisions garnered ardent support from certain sectors. For example, the Screen Producers Association of Australia (SPAA) commended the Federal Government on the Bill's measures and argued that, if properly implemented, these changes will make it harder for commercial scale piracy to take place, and will give film and television producers greater protection against those who undermine their business.[25]

3.23 The Australian Recording Industry Association (ARIA), while broadly supportive of the proposed provisions relating to criminal liability, argued that in some cases they do not extend far enough. ARIA also expressed concern that:

> … police and prosecutors, given the option, may tend to favour charging offenders under the summary and strict liability offences, thereby avoiding the use of the indictable offences, which would amongst other things require a trial by jury. This is of particular concern to ARIA given the wide disparity between the penalties for the indictable offences ($60,500 and a maximum 5 years imprisonment), summary offences ($13,200 and a maximum 2 years imprisonment) and the on-the-spot fines ($1230). If police and prosecutors do tend to favor the charging of offenders under the summary and strict liability offences then the penalties that offenders will face in most instances will be significantly less than the current $60,500 and a maximum 5 years.[26]

3.24 The Australian Federation Against Copyright Theft (AFACT) expressed strong support for Schedule 1 of the Bill. It applauded the Bill's introduction of a new way of dealing with existing offences to recognise that criminal activity ranges from very serious to lower level matters. In its view, the particularly beneficial feature of the amendments is that copyright crimes in Australia are able to be prosecuted according to three tiers of liability which will enable law enforcement officers to address copyright crime at a level appropriate to the offence committed.[27]

3.25 At the hearing, Ms Adrianne Pecotic from AFACT provided the committee with cogent arguments for the inclusion of strict liability offences in the Bill. In her view, strict liability offences are necessary in the context of copyright law:

> Strict liability is a lower penalty aimed at low-range offences that equip police to make judgements about the nature of the activity that they are

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24 *Submission 58*, pp 5-6; see also Ms Delia Browne, CAG, *Committee Hansard*, 7 November 2006, p. 19.

25 *Submission 19*, p. 2.

26 *Submission 38*, p. 3.

27 *Submission 57*, p. 3.

> trying to deal with and make it easy to respond in a measured way to copyright crimes that are, in many instances, unfortunately out of control in the Australian environment. The sorts of activities that they are aimed at addressing are things like low-scale crimes that escalate into organised crime if they are not stopped at an early stage and the low-scale backyard operator type of crimes that are spreading out of control in a way that is adding up to a very significant amount of damage for copyright owners.[28]

3.26 Ms Pecotic did not believe that the strict liability offence would be used in the case of 'innocuous' purposes unrelated to commercial exploitation of copyright works.[29]

3.27 The Commonwealth Director of Public Prosecutions (DPP) submitted that the approach of providing for a range of offences with varying penalty levels provides 'considerable flexibility and enables charges to be selected based on the particular conduct that is being assessed'. The DPP noted that the choice of charge is a matter that is addressed in the Commonwealth's Prosecution Policy: if, after assessing the evidence, the DPP considers that there is sufficient evidence to lay charges, the DPP will choose the most appropriate charge or charges in accordance with that policy.[30]

3.28 At the hearing, the Senior Assistant Director expanded on the DPP's view of the criminal liability provisions:

> From our perspective, we see the amendments to the offence provisions very much in two ways. Firstly, they clarify the elements of the offences and the structuring of the offences and, in our submission, very helpfully set out the elements of the offences, clarify the elements and so on. We see that as useful.
>
> …
>
> Secondly, we think that structuring the offences in the way that they do—indictable summary and strict liability, and the addition of the strict liability and infringement regime—is a very useful adjunct to the criminal offences that are currently in the Act. We would certainly support that measure as part of the overall enforcement of copyright.[31]

3.29 The Senior Assistant Director also noted that the proposed strict liability offences do not alter dramatically the existing offence provisions in the Copyright Act:

> … our support for these is on the basis of ensuring effective enforcement of the policy objectives that are currently contained in the Copyright Act

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28 *Committee Hansard*, 7 November 2006, p. 32.

29 *Committee Hansard*, 7 November 2006, p. 32.

30 *Submission 53*, p. 7.

31 *Committee Hansard*, 7 November 2006, p. 29.

> rather than on the basis of an extension into new areas in terms of copyright policy.[32]

3.30 Several submissions and witnesses endorsed the introduction of guidelines with respect to the management of the strict liability offences and the infringement notice scheme.[33] Ms Weatherall suggested that, in developing such guidelines, consultation should take place with bodies representing those to be regulated under the proposed provisions, such as the Business Council of Australia, the Law Council of Australia, and user-interest groups (such as the ADA and the AVCC).[34]

3.31 The committee notes that the Australian Federal Police (AFP) consider that the amendments proposed in relation to Schedule 2 of the Bill will provide a more comprehensive range of tools for law enforcement to tackle copyright offending. The AFP informed the committee that the amendments will assist it in evaluating the seriousness of copyright matters that are referred, and in taking appropriate action against matters that are accepted for investigation.[35]

3.32 The AFP advised the committee that it is still developing an informed view on Schedule 1 of the Bill.[36]

Department response

3.33 The Department's response to concerns about the proposed strict liability offences was as follows:

> The introduction of new strict liability offences as part of a tiered offences system is intended to provide police and prosecutors with a wider range of penalty options to pursue against suspected offenders, depending on the seriousness of the conduct. By targeting lower level criminal offenders (eg market sellers), they will significantly enhance the effectiveness of the enforcement regime and result in stronger deterrence at the lower level. They will allow a more cost-effective administration of the existing enforcement provisions by enabling offences to be dealt with expeditiously.[37]

3.34 Further:

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32 *Committee Hansard*, 7 November 2006, p. 34.

33 For example, see Ms Adrianne Pecotic, AFACT, *Committee Hansard*, 7 November 2006, p. 32; ARIA, *Submission 38*, p. 3.

34 Ms Kimberlee Weatherall, *Submission 54A*, pp. 4-5.

35 *Submission 74*, p. 1.

36 *Submission 74*, p. 1.

37 *Submission 69A*, pp 10-11.

> The strict liability offences are not intended to target one particular group of the community and will be applied by law enforcement agencies in the normal way along with all other criminal offences.[38]

3.35 The Department is aware of other countries that have introduced administrative penalties which can be imposed for less serious activities, and noted that there is an increasing international trend for countries to create a wider range of penalty options to law enforcement and government agencies in addressing copyright offences.[39] The committee understands that administrative penalty systems for copyright are in place in countries such as Germany, Italy, China, Mexico and the Philippines.

3.36 The Department also informed the committee that it is not aware of international precedents of strict liability fines with respect to copyright, particularly in common law countries. However, it noted that the creation of strict liability offences in Australia underpinned by an infringement notice scheme for lower level criminal transgressions of certain regulatory offences is not an unusual feature of Australia's criminal law system. The Department also pointed out that, in addition, if a person refuses to pay an infringement notice penalty, they should be liable to face court only for a strict or absolute liability offence, which is consistent with recommendations of the Senate Standing Committee for the Scrutiny of Bills and the Australian Law Reform Commission.[40]

Schedule 6 – Exceptions to infringement of copyright

3.37 Some of the arguments for and against the exceptions contained in Schedule 6 are outlined below.

Time-shifting – Part 1

3.38 Submissions and witnesses who commented on the proposed time-shifting exception were generally divided between those who welcome the changes as long overdue, and those who opposed them as a matter of principle. Some, however, contended that the Bill provides a broadly balanced approach.[41]

3.39 The Australian Subscription Television & Radio Association (ASTRA) supported the provisions pertaining to time-shifting, given that they reflect the daily reality of millions of private households that engage in the copying of television programs for the purpose of viewing such programs at a more convenient time. However, it argued that the right to time-shift should be subject to the exercise of a

38 *Submission 69A*, p. 11.

39 *Submission 69A*, p. 11.

40 *Submission 69A*, p. 11.

41 See, for example, Apple Computers, *Submission 63*.

broadcaster's right to implement a technological protection measure on their broadcasts.[42]

3.40 SBS supported the time-shifting (and format-shifting) amendment for private use.[43]

3.41 The Australian Digital Alliance (ADA) argued that the time-shifting provisions do not go far enough:

> The provision does not allow time-shifting of new and emerging digital forms of technology, such as podcasts and webcats. Rather, the provision is limited to broadcasts only, and therefore is technologically specific rather than neutral. This will be confusing for consumers and[,] as technologies develop and use of podcasts and webcasts become more common[,] this will lead to disregard for copyright law.[44]

3.42 The Screen Producers Association of Australia (SPAA) expressed its opposition to the time-shifting provisions. However, it suggested that if they were to be implemented, a sunset clause on the number of days a copy can be kept (such as 14 days) should apply.[45]

3.43 ARIA submitted that the record industry considers that there is no demonstrated need for format-shifting and time-shifting exceptions and that any such exceptions should be limited so as not to undermine legitimate market activities.[46]

3.44 At the hearing, Ms Libby Baulch from the Australian Copyright Council argued that the time-shifting and format-shifting exceptions will interfere with current and future markets for copyright works and that 'insufficient regard has been paid to the way that technology and markets are going to develop'.[47] Further:

> All other developed countries that we are aware of which allow private copying, including the United States, have levy schemes that ensure compensation to copyright owners for private copying by consumers.[48]

3.45 According to Ms Baulch, the introduction of exceptions for time-shifting and format-shifting, without corresponding compensation for copyright owners, does not

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42 *Submission 28*, pp 2 & 3.

43 *Submission 33*, p. 3.

44 *Submission 50*, p. 5.

45 *Submission 19*, pp 1-2.

46 *Submission 38*, pp 2 & 9.

47 *Committee Hansard*, 7 November 2006, p. 2.

48 *Committee Hansard*, 7 November 2006, p. 2.

meet the three-step test contained in international treaties such as the Berne Convention.[49]

3.46 Such arguments were supported by others. Mr Michael Fraser from the Copyright Agency Limited (CAL) agreed that copyright owners should be compensated alongside any broadening of copyright exceptions, particularly in the context of the emerging digital download environment:

> If one institutes a free exception then copyright owners are going to be very concerned about whether it is one person or 14 days or their family or whether they are allowed to make a backup copy. But if one has a broad principle that these kinds of users should be permitted in return for a reasonable return, which can be subject to the Copyright Tribunal, say, then trying to shape up the exact framework of the market no longer becomes a question, because you leave it to the market to develop under a broadly based three-step test exception.
>
> The problem now is trying to delineate a market which is in the process of forming. By doing that without compensation you prevent that market from developing at all—copyright owners will not invest in making these very services available. So compensation I think is the linchpin … [A]ll those countries that value their creative industries that make an exception for private use provide for payment to the copyright owner for what is a large part of their developing online markets.[50]

3.47 Mr Fraser argued further with respect to the digital environment that there are problems in trying to create exceptions to deal with a market that is still in a state of development:

> We are getting to the point of how many angles on the head of a pin in trying, very early in the digital revolution, to extend fair dealing exceptions to private use, library use, private copying—trying to shape up a market that is in a state of incredible creativity itself … [It is difficult] to say what exception should be allowed for free and what exception should be allowed but paid for and to say where the market now exists. Where the market will be in six months is going to be very different from where it is now. Our

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49 *Committee Hansard*, 7 November 2006, p. 3. However, the committee notes the strong divergence of views in relation to interpretation and implementation of the three-step test, including arguments that the three-step test allows for adequate exceptions to be introduced in order to enable effective operation of the digital environment and the Internet: see, for example, Miss Sarah Waladan, ADA, *Committee Hansard*, 7 November 2006, p. 8. The committee also notes evidence pointing out that the compensation or levy systems in other countries relate to a different kind of private copying to the exceptions proposed in the Bill, that is, a broader general right to copy. Conversely, the exceptions proposed in the Bill are very narrow and specific: see, for example, Ms Kimberlee Weatherall, *Committee Hansard*, 7 November 2006, p. 7; Miss Sarah Waladan, ADA, *Committee Hansard*, 7 November 2006, p. 8. The committee considers the three-test step in further detail below.

50 *Committee Hansard*, 7 November 2006, p. 4.

> members are very keen to provide the very services that these exceptions are designed to ensure.[51]

Department response

3.48 In response to questioning by the committee in relation to uncertainty about use of the term 'domestic premises' in proposed paragraph 111(1)(a), a representative from the Department informed the committee that, while there is an obligation to make a recording in domestic premises, there is no restriction on where a person watches or listens to the recording. The phrase 'private and domestic use' in proposed paragraph 111(1)(b) is not intended to restrict people to watch or listen to recordings in their own homes. The departmental representative noted that there is no definition of the term 'domestic premises', however he stated that:

> I would have thought the term 'domestic premises' was going to be fairly obvious in most circumstances. You may be able to find spots around the edges where you might have a bit of doubt, but for most people it will be fairly clear what their domestic premises are. I believe that term is used in the current UK provision which permits time-shifting and we are not aware that that has caused any great confusion in the UK.[52]

Format-shifting – Part 2

3.49 The Media Entertainment & Arts Alliance noted that Australia would be the only country in the developed world to introduce a format-shifting exception to the protections afforded copyright owners without simultaneously introducing a system of equitable remuneration to those copyright owners.[53]

3.50 The Australian Society of Authors submitted that the proposed 'format shifting' exception should not apply to books at this stage but instead be monitored and reviewed in two years time with respect to audiovisual material; its view was that some of the proposed exceptions to copyright infringement may impede or interfere with emerging markets in the digital environment.[54]

3.51 The Screen Producers Association of Australia expressed its opposition to the proposed format-shifting provisions, arguing that they inhibit the exploitation of markets which still exist for copyright owners.[55]

3.52 Viscopy (representing the copyright interests of visual artists) also opposed the introduction of the format-shifting exception. In its view, the justification for copying books, newspapers, periodicals and photographs, in particular, is not clear.[56]

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51 *Committee Hansard*, 7 November 2006, pp 4-5.

52 *Committee Hansard*, 7 November 2006, p. 40.

53 *Submission 60*, p. 1.

54 *Submission 4*, p. 2.

55 *Submission 19*, p. 2.

3.53 The Internet Industry Association noted the potentially limiting nature of the proposed exceptions in their application to the digital environment:

> … the supposed introduction of a more flexible regime for the use of new digital devices seems to have resulted in narrowly confined exceptions, which are not only likely to become dated (due to their technological specificity) but also may not deliver the legitimacy to common activities for which they are intended. The 'main copy' rule in relation to MP3 players has failed to take into account the actual method by which format shifting occurs, with the result that the use of iPods, for example, for most Australians will remain in breach of the [Copyright] Act.[57]

3.54 A number of submissions commented on the Bill's failure to cover the use of iPods, which require the making of more than one permanent copy of a sound recording to work.[58] The restriction in proposed paragraph 109A(1)(e), that an individual can only make one copy in any given format, means that if an individual makes an MP3 copy to put in their iPod, then they cannot also keep the MP3 copy on their laptop.

Department response

3.55 The Department is aware of concerns raised in relation to format-shifting, particularly in the context of the Bill's perceived failure to adequately deal with legitimate use of iPods. The Department justified the present drafting of the format-shifting provisions as follows:

> The present conditions for format-shifting of sound recordings allow the owner to make one copy in each different format. There are good reasons for this. The exception is not intended to be an open-ended licence that allows a person who buys one copy of a sound recording to make unlimited copies. The 'one copy in each format' condition is to protect copyright owners from this exception being abused, as well as to ensure that the exception complies with the three-step test. In effect, this condition will limit a person to making one copy for each playing device that uses a different audio format to that of the original sound recording.[59]

3.56 The Department clarified that the current drafting recognises that, in transferring music from a CD to a portable playing device, it is necessary to make an 'intermediate' copy in a personal computer. However, section 109A requires that this intermediate copy should be deleted after the transfer is completed.[60]

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56 *Submission 39*, p. 2.

57 *Submission 66*, p. 3.

58 For example, see Ms Kimberlee Weatherall, *Submission 54*, p. 3.

59 *Submission 69A*, p. 3.

60 *Submission 69A*, p. 3.

3.57 The Department pointed out that the Attorney-General noted in his Second Reading Speech that the Federal Government will listen to, and consider, relevant comments related to this issue, and make any necessary technical changes to ensure that the Bill achieves the Federal Government's objectives in this area.[61] The committee welcomes this undertaking.

Use of copyright material for certain purposes – Part 3

3.58 The committee notes that exceptions and limitations to the rights of copyright owners must comply with Australia's international treaty obligations. The provisions in these treaties provide for a 'three-step test' for permitted exceptions: limitations or exceptions to exclusive rights should only be in *certain special cases* which do not conflict with a *normal exploitation* of the work and do *not unreasonably prejudice* the legitimate interests of rights holders.[62]

3.59 The committee received evidence which highlighted opposing views on how the three-step test should be implemented in domestic legislation. Proposed section 200AB seeks to provide an open-ended exception in line with the US model, and to allow courts to determine if other uses should be permitted as exceptions to copyright. Some particular concerns were raised in relation to the Bill's approach to the three-step test.

3.60 The Australian Publishers Association (APA) noted several drafting issues with respect to proposed section 200AB. For example, the APA pointed to the likely uncertainty as to the scope of the new exceptions until case law is developed to interpret the open-ended exception. The APA commented that the move by the Federal Government towards 'a lawyer-based copyright regime – a litigious model – instead of staying with a regime based on clearer legislative exceptions' is 'odd'.[63]

3.61 The ADA and the Australian Libraries' Copyright Committee (ALCC), on the other hand, expressed the view that proposed section 200AB is unnecessarily limited by the 'commercial advantage' test which is unclear in meaning. Further, the requirement that the provision be limited to 'certain special cases' within the scope of the special cases of education, library and archive uses, parody and satire and uses for people with disabilities, confuses the meaning of the provision. According to the ADA and the ALCC, this additional limitation is not required by the three-step test or indeed the AUSFTA.[64]

3.62 Others disagreed with this approach. For example, the International Association of Scientific, Technical & Medical Publishers argued that the three-step

61 *Submission 69A*, p. 4.

62 See Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.

63 *Submission 43*, p. 5.

64 *Submissions 50A and 51A*.

test demands that *all* exceptions be subject to the three-step test.[65] Similarly, CAL argued that 'there is inherent confusion in the approach of combining explicit recognition of the three step test in one exception with other exceptions in the [Copyright] Act'.[66]

Department response

3.63 A representative of the Department commented on the Bill's implementation of the three-step test as follows:

> … we are aware that there are a range of views … including [in relation to the inclusion of the 'commercial advantage'] condition in the new 200AB. We are aware that some user interests think that it is unduly restrictive. Given that the three-step test already has to be complied with, there is an argument that should be enough, that the government should go as far as the three-step test allows. But we note in passing that the three-step test is not an obligation; you only have to go as far as you can go under the treaty obligations. The government is also aware that some copyright owner interests think that the provision is too broad and that the commercial advantage test should be narrowed even further. In the present drafting the government has sought to find a balance between those interests, recognising that this is a new exception that is different in form to some of the specific exceptions already in the Copyright Act. Therefore, the government is minded to try to balance what are reasonable interests on both sides—the copyright owners and users.[67]

3.64 Further:

> The first part of the 'three-step' test requires that an exception must be limited to 'certain special cases'. Other types of exceptions (both in Australia and in other jurisdictions) set narrower conditions than simply that the use is for a particular purpose or by a particular person or organisation, for example, by a library. Those exceptions generally allow use of identified copyright material for a particular purpose, subject to various other conditions or limitations. In total, all the legislated conditions will define 'cases' which are more certain but are very restricted.[68]

3.65 In relation to concerns raised about the 'commercial advantage' test contained in elements of proposed section 200AB, the Department noted the differences in opinion between copyright user interests and copyright owners or rights holders:

> This condition is questioned by some copyright user interests as unnecessary because s 200AB already requires that a permitted use must comply with the three-step test. It is argued that the three-step test provides

65 *Submission 55*, p. 3.

66 *Submission 29*, p. 8.

67 *Committee Hansard*, 7 November 2006, p. 42.

68 *Submission 69A*, p. 2.

> all the protection for copyright owners required by international treaty obligations. User interests also contend that a 'commercial advantage' condition is too restrictive and uncertain given that institutions may charge instructional fees or engage in money rasing activities.
>
> The Government introduced the 'commercial advantage' test in recognition of concerns about the potential scope of the new exception. Indeed the Government notes arguments on behalf of some copyright owners that s 200AB is presently too wide in being potentially available to for profit schools and libraries in commercial companies and should be narrowed so that no commercial advantage, direct or indirect, can be obtained from reliance on this section.[69]

3.66 The Department acknowledged that the current form of proposed section 200AB was an attempt to balance these competing interests by indicating that the prohibition on gaining a commercial advantage should not necessarily prevent cost recovery by an eligible institution or person.[70]

Exception allowing use of copyright materials for parody or satire

3.67 Some submissions and witnesses commented specifically on the exception relating to use of copyright material for parody or satire.

3.68 ASTRA submitted that the elements of satire and parody are valid forms of expression that are recognised within the fair use doctrine established by US courts and (save for satire) in the European Union Information Society Directive (Article 5(3)). It supported the extension of the fair dealing rights to include these forms of expression, arguing that the Bill will create greater certainty for copyright users while not diminishing the rights of copyright owners.[71]

3.69 On the other hand, the Copyright Agency Limited (CAL) offered qualified support for the inclusion of an exception for parody – as long as it does not conflict with the ability of copyright owners to license such uses. CAL did not support the extension of the exception to cover satire.[72]

3.70 While commending the inclusion of satire and parody as exceptions, the ABC and SBS argued that the use of the three-step test to qualify the parody or satire exception is a wrong application of the test. As SBS explained:

> The "three step test" under copyright treaties such as Berne and TRIPS is appropriate to consider when deciding whether to introduce a new, previously unspecified exception. It is not appropriate as an internal limitation in a national Copyright Act to an already specified exception. For

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69 *Submission 69A*, p. 2.

70 *Submission 69A*, p. 2.

71 *Submission 28*, p. 3.

72 *Submission 29*, p. 9.

> example, the application of the first limb of the three step test to parody or satire (in subsection 200AB(1)(a)) effectively requires the court to find a "special case within a special case".
>
> To our knowledge no other jurisdiction applies the "special case" test internally within its legislation for the parody exception. Nor does the "special case" limitation apply to any other exception within our Copyright Act. [73]

3.71 SBS argued that parody or satire should be placed in the fair dealing exceptions alongside related exceptions such as criticism and review.[74]

Department response

3.72 The Department informed the committee that it is considering the removal of the exception for parody and satire from proposed section 200AB and, instead, adding new exceptions to Parts III and IV of the Copyright Act to provide that a fair dealing with a work or other subject matter for the purpose of parody or satire is not an infringement of copyright.[75]

Limitation on 'fair dealing' exception for purposes of research or study – Part 4

3.73 Many submissions and witnesses expressed concern at the Bill's limitation on copying for the purposes of research and study to a 'reasonable portion' (10 per cent or one chapter) of a published literary, dramatic or musical work.

3.74 The Law Council of Australia submitted that there is no reason to change the current exceptions in the Copyright Act related to fair dealing as they already adequately cover the relevant subject matter.[76]

3.75 The Flexible Learning Advisory Group argued that the Bill proposes a radical and unwarranted departure from the existing fair dealing regime which will dramatically curtail the fair dealing rights of students and academics.[77]

3.76 Ms Weatherall noted the apparent disparity between the Bill, on the one hand, allowing format-shifting and time-shifting without a quantitative limit (to consume media, a person may copy the whole work) and, on the other, imposing a quantitative limit (10 per cent) on copying for research and study.[78]

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73 *Submission 33*, p. 6.

74 *Submission 33*, p. 5.

75 *Submission 69A*, p. 5.

76 *Submission 35*, p. 5.

77 *Submission 52*, p. 1.

78 *Submission 54*, p. 10.

3.77 Ms Sally Hawkins pointed to the inconsistency between copying for personal purposes and copying for research or study purposes:

> Changes to the law in relation to education include the restriction of fair dealing for research or study with a stricter adherence to the 10% copying rule, this means that a person can make a full copy of a book for personal purposes but can't make more than 10% of a copy for research purposes. This is ridiculous. There should be absolutely no limitation on the quantity of material that can be copied for research purposes. It is against the wider public interest that such a limitation exists in the first place and stupidity that it should be reinforced any further.[79]

3.78 The ADA and the ALCC submitted that the narrowing of fair dealing for research and study will seriously disadvantage libraries and cultural institutions and particularly their clients 'who will not be able to copy rare or out of print materials to take away with them for research or study purposes, despite the fact that those materials are not commercially available'.[80]

Department response

3.79 The Department indicated that it is considering a possible redraft of the amendments relating to fair dealing for the purposes of research or study:

> To overcome misunderstandings apparent from several submissions to the Department and to the Senate Legal and Constitutional Affairs Committee about the intended effect of the amendments, there may be redrafting of amendments to section 40 (fair dealing for research or study) to clarify the intended effect, which is that the reproductions *deemed* to be fair dealings will be slightly restricted but *without affecting* in any way the scope of the provision allowing any other amounts of reproduction if *considered* to be fair.[81]

3.80 The Department explained that the Federal Government's decision to limit the quantity of copying of a work that is, under section 40, *deemed* to be fair dealing is based on amendments necessary to enable accession to the WIPO internet treaties (WCT and WPPT). The Department also noted that Australia is required under the Singapore and AUSFTA to become party to those WIPO Treaties.

3.81 According to the Department, there must be appropriate limits to unremunerated copying automatically allowed under section 40 to ensure compliance with the three-step test in the Berne Convention and the WCT.

3.82 For the purposes of *deemed* fair dealings under the new section 40(5), it is intended that the quantification of reasonable portion in subsections 10(2) and 10(2A)

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79 *Submission 1*, p. 2.

80 *Submissions 50A and 51A.*

81 *Submission 69A*, p. 5.

should be exhaustive in relation to the works which they cover (that is, literary works, dramatic works and musical works in hard copy, and literary and dramatic works in electronic form, in both cases excluding computer programs and electronic databases.)

3.83 The Department advised that greater amounts of copying of any work for research or study will still be allowed under subsection 40(1) if a court judges the copying to be fair, having regard to the matters listed in subsection 40(2); both those provisions are unaffected by the amendments in the Bill.[82]

Official copying of library and archive material – Part 5

3.84 The Copyright and Cultural Institutions Group (CCIG) applauded the intent behind the exception applying to cultural institutions. However, it argued that there is a lack of certainty in terms and terminology used in the Bill which undermine the usefulness of the exception. In particular, the exception's limitation on one copy/reproduction does not accord with the technical processes of preservation.[83]

3.85 The National Library of Australia submitted that the Bill does not make adequate provision for the preservation of digital works and creates a significant impediment to the preservation of commercial works in digital form.[84]

3.86 The ADA and the ALCC noted that 'whatever the policy intentions of the Government may be, the result of the legislation will be that many practices which cultural institutions undertake in order to fulfil their mandates, will remain technically in breach of the law'.[85] The ADA and the ALCC also noted that best practice standards for preservation recommend that 'multiple copies' be made and stored in different locations. For example, the UNESCO *Guidelines for the preservation of digital heritage* recommend 'multiple copies'.[86]

3.87 The ABC and SBS both expressed concern that they, as national broadcasters and holders of valuable audio and audio-visual cultural material, may not be covered by the Bill's definition of 'cultural institution'. They argued that they should be specifically included in the concept of 'key cultural institution'.[87] The Australian Film Commission also argued that it should be deemed a 'key cultural institution' for the purposes of the exception.[88]

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82 *Submission 69A*, pp 7-8.

83 *Submission 68*, p. 2.

84 *Submission 26*, p. 1.

85 *Submissions 50A and 51A*.

86 *Submission 50*, p. 7; *Submission 51*, p. 6.

87 ABC, *Submission 32*, pp 9-10; SBS, *Submission 33*, pp 3-4.

88 *Submission 13*, p. 7.

Department response

3.88 The Department provided advice to the committee indicating that the term 'first copy' in proposed section 110BA of the Bill will be clarified in further drafting changes.[89] However, the committee is unsure of the extent of this clarification and remains concerned that the scope of the proposed provision may still not be wide enough to capture ordinary preservation processes undertaken by cultural institutions. While the committee understands that multiple copies for the purposes of preservation may be allowed under the specific exception for libraries and archives in proposed section 200AB, the committee considers that this should be made absolutely clear in the Bill.

Schedule 8 – Responses to Digital Agenda review

3.89 A number of concerns were raised in relation to proposed sections 28A (communication of works in the course of educational instruction) and 200AAA (caching on a server for educational purposes).

3.90 In relation to proposed section 28A, some argued that, as currently drafted, it might inadvertently operate to exempt from copyright obligations a variety of communications which are currently, and should clearly be, regarded as communications to the public, and which are therefore covered by the educational statutory licence in Part VA of the Copyright Act.[90]

3.91 On the contrary, CAG argued that the range of copyright material covered by section 28A does not correspond with the range of copyright material currently covered by section 28 of the Copyright Act. According to CAG, the practical effect of this will be that schools will be able to use new technologies for some kinds of copyright material but not others.[91]

3.92 Some also argued that proposed section 200AAA appears to provide a virtually blanket exemption to educational institutions to download and communicate material from the Internet, and then to keep that material for an unlimited period of time. This could have the effect of allowing the continuous caching of Internet content and may potentially undermine licensing arrangements.[92] Some also argued that this conflicts with the three-step test. As the Australian Publishers Association argued, '(i)t is difficult to see that there is a special case, the activity conflicts with a normal

89 *Submission 69A*, p. 4.

90 For example, Screenrights, *Submissions 8 and 15*; Australasian Performing Right Association Limited (APRA)/Australasian Mechanical Copyright Owners' Society Limited (AMCOS), *Submission 45*, p. 6.

91 *Submission 25*, p. 3.

92 For example, Screenrights, *Submissions 8 and 15*; Screen Producers Association of Australia, *Submission 19*, p. 6; Australian Publishers Association, *Submission 43*, p. 20.

exploitation of the work and would unreasonably prejudice the legitimate interests of the rights holder'.[93]

3.93 The Business Software Association of Australia (BSAA) argued that the words of proposed section 200AAA appear to extend far beyond active caching of websites. It expressed concern that the exception, as drafted, could be used to justify downloading a copy of a computer program onto a server and making it available to students for the purposes of an educational course. This would, in turn, have the effect of severely damaging the educational market for software companies and would jeopardise the heavily discounted pricing on products offered to educational institutions.[94]

3.94 The International Intellectual Property Alliance (IIPA) argued that the 'most troubling feature' of proposed section 200AAA is that:

> … it appears irrelevant whether a voluntary license – or for that matter a statutory license – is already available, or even already in force, under which the educational institution would be able to make the use but would have to pay for it.
>
> …
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> … there is certainly a strong argument to be made that in its current form, Section 200AAA threatens to conflict with the normal exploitation of works which are already available to educational institutions under licenses that could cover the use labeled as "active caching." Indeed, one wonders why an educational institution would ever enter into such a license in the future if Section 200AAA were enacted.[95]

3.95 Conversely, educational institutions and other groups representing consumer interests have argued that the exemption in proposed section 200AAA does not go far enough. They argued that the proposed section, while clarifying the position of active caching for educational purposes, does not provide for the most common form of caching which occurs widely for Internet efficiency purposes in a broad range of organisations that provide Internet access – namely 'passive' or proxy caching.[96]

3.96 The Australian Vice-Chancellors' Committee (AVCC) noted that some copyright owner groups, such as the Copyright Agency Limited, have argued that caching for these purposes does not come within the temporary copy exception

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93 *Submission 43*, p. 20.

94 *Submission 41*, p. 2.

95 *Submission 7*, p. 10.

96 For example, Australian Digital Alliance, *Submission 50*, p. 14; Australian Vice-Chancellors' Committee, *Submission 58*, p. 3.

contained in section 43A of the Copyright Act.[97] However, the AVCC noted that no court appears to have determined that this is so. In any case, uncertainty regarding the legal status of such caching is a matter of great concern to educational institutions due to the risk of being sued for copyright infringement in respect of caching and having to engage in the expense of defending such a claim.[98]

3.97 The AVCC understands that the Federal Government intended that proxy caching does come within the exception contained in section 43A. It argued that, if this is the case, some words to this effect in the EM would put beyond doubt that caching of this kind does not infringe copyright. If the Federal Government is not minded to make such a statement, the AVCC urges that the proposed education sector caching exception be broadened to ensure that it can be relied on by educational institutions in respect of forward or proxy caching.[99]

3.98 As Ms Anne Flahvin from the AVCC explained at the hearing:

> What we are saying is that there needs to be some clarification to ensure that, when we cache for the purposes of efficiency, cost savings, technical efficiency or efficient use of bandwidth, we are not infringing copyright.
>
> …
>
> … the reasons we need to go out on a limb is that we are about the only place in the world that I know of where there has been a suggestion that caching for efficiency purposes exercises a right of copyright.[100]

3.99 Screenrights (the Audio Visual Copyright Society) and the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG) provided the committee with a joint approach to overcome some of their perceived concerns in relation to proposed sections 28A and 200AAA. While their concerns differ – Screenrights is concerned that the proposed sections go beyond the specific policy intention, and CAG is concerned that they do not clearly cover some particular uses mentioned in the EM – they have identified possible solutions which they believe address each of their concerns.[101]

3.100 As Mr Simon Lake from Screenrights told the committee:

> Within the submission, ABC, SBS, APRA, the Screen Producers Association of Australia and other copyright interests have all had a look at

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97 However, note that there is a common view that passive caching does fall within the temporary copying exceptions contained in sections 43A and 43B of the Copyright Act: see further Australian Digital Alliance, *Submission 50*, p. 14.

98 *Submission 58*, p. 4.

99 *Submission 58*, p. 4.

100 *Committee Hansard*, 7 November 2006, p. 14.

101 See further, *Submissions 8, 15 and 25*.

> this. One of the things they have said is that, whilst, again, they do not love the policy behind it, they think that what we have proposed is a workable solution. They have also commented that they think it is a good thing that the schools and Screenrights, as the copyright representative, are working together to get those shared solutions. We have shown it, and the response has been positive.[102]

3.101 CAG and Screenrights' suggested solution to the problem is to delete proposed section 28A and to create a new subsection to section 28 to exempt communications made merely to facilitate a performance under section 28. They believe this approach meets their stated policy intention, and also addresses their concerns.[103]

Department response

3.102 The Department informed the committee that it is considering changes to address the concern expressed by copyright owners and educational bodies that, as drafted, section 28A goes further than current section 28 and extends to general exercise of the communication right. The Department acknowledged that this is unintended. It is proposed to amend the drafting of section 28A to deem a communication of a work or subject matter, other than a work in the circumstances of subsections 28(1) to (4) inclusive, not to be a communication to the public.[104]

3.103 With respect to the caching issue, the committee notes advice from the Department that it is considering drafting changes to proposed section 200AAA to clarify that caching for efficiency purposes does not infringe copyright; and to ensure that there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made. The Department also informed the committee that it is proposed that copies should be destroyed within 14 days of the end of a course. Such destruction could be by either direct human intervention or indirectly by an automated process.[105]

3.104 In order to address the fact that a copy of a cached or copied website resides in cache or storage after it is deleted, the Department noted that subsection 200AAA(3) could provide that subsection 200AAA(2) does not apply unless the reproduction is destroyed or access to the copy removed, rather than requiring the copy to be removed.[106]

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102 *Committee Hansard*, 7 November 2006, p. 17.

103 See *Submission 15*, p. 2 and Attachment B, p. 1.

104 *Submission 69A*, p. 4.

105 *Submission 69A*, p. 4.

106 *Submission 69A*, p. 4.

Schedule 12 - Technological protection measures

3.105 The committee notes the complex and technical nature of the Bill's provisions relating to TPMs.

3.106 Some submissions and witnesses expressed strong support for the provisions as a means of preventing copyright infringement and ensuring that copyright industries can continue to invest in the innovative delivery of copyright products to Australian consumers.[107]

3.107 However, the committee also received evidence that the proposed changes to copyright law in respect of TPMs would be significantly detrimental to some industries and to consumers.[108]

3.108 Others raised concerns with particular aspects of these provisions. For example, some submitted that the Bill's definition of 'technological protection measure' is undesirably broad, confusing, and is inconsistent with the AUSFTA, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and Australian case law.[109] The Business Software Association of Australia commented on the offences relating to TPMs, noting that, as drafted, they limit the capacity of law enforcement to respond in an appropriate way to the severity of an infringement of the Copyright Act because they do not enact the full range of offences – indictable, summary and strict liability – that have been developed for the non-TPM offences in the Copyright Act.[110]

3.109 In their submission, Mr Dale Clapperton and Professor Stephen Corones from the Queensland University of Technology argued broadly that the anti-circumvention provisions of the AUSFTA, as implemented by the Bill, will have a far broader effect in Australia than in the United States due to, in part, disparity in the protection for functional elements of computer software, and the lower standard of originality in Australia. Significant differences in the exceptions to copyright between the two countries exacerbate the problem.[111]

3.110 Electronic Frontiers Australia (EFA) pointed to Schedule 12 having undergone 'serious and fundamental changes' from what was contained in the Exposure Draft of the Bill. It argued that these changes 'were unannounced, unexplained, and only came to light after doing a side-by-side comparison' of the provisions of Schedule 12 and the Exposure Draft.

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107 For example, see Screen Producers Association of Australia, *Submission 19*, p. 1; Australian Federation Against Copyright Theft, *Submission 57*, p. 4.

108 For example, see Open Source Industry Australian, *Submission 21*.

109 For example, see Graham Greenleaf et al, *Submission 37*, p, 3; Apple Computers, *Submission 63*, p. 2.

110 *Submission 41*, p. 2.

111 *Submission 42*, p. 7.

3.111 EFA submitted that, in its view, the anti-circumvention provisions of the Exposure Draft contained a clear and direct link between TPM protection and preventing or inhibiting the infringement of copyright. Such a link was recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs report into TPM exceptions. Despite this recommendation, and the government accepting the recommendation in their response to that committee's report, this 'vital link' has been abandoned in the Bill.[112]

3.112 Similar arguments were raised by others in relation to the absence of the incorporation of a link to preventing or inhibiting copyright infringement. At the hearing, Professor Brian Fitzgerald and Mr Dale Clapperton contended that the correct interpretation of Article 17.4.7 of the AUSFTA requires a direct link between any effective TPM and the prevention of copyright infringement. They argued that this interpretation is consistent with the initial wording in the Exposure Draft which has been replaced with the words 'in connection with the exercise of copyright' contained in the current version of the Bill. In their view, this new wording could 'arguably be interpreted to allow almost any restriction imposed by the copyright owner' to be protected by anti-circumvention law.[113]

3.113 Professor Fitzgerald and Mr Clapperton also argued that this interpretation aligns with the interpretation of the AUSFTA put forward by the Attorney-General's Department before the House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs held in 2005, that committee's findings in that inquiry, the Federal Government's acceptance of relevant recommendations in that inquiry, and current US case law.[114]

3.114 Many also pointed to the *Stevens v Sony* case[115] which also emphasised the need to link any TPM protected by the Copyright Act to the prevention and inhibition of copyright infringement, and where the High Court cautioned against allowing copyright owners to use copyright law to further 'non-copyright' agendas'.[116]

3.115 In this vein, Professor Fitzgerald argued that copyright law is not appropriate to effectively provide legislative protection for business models and endorse a preference in the marketplace for certain business activities:

> Australian consumers, once they lawfully purchase a copyright item, have the right to use that item subject to controls that limit or prevent copyright infringement. Copyright infringement should be the touchstone of technological protection measures protected under the Copyright Act. If they are to be protected at all for other reasons, we should be looking at

112 *Submission 44*, p. 4.

113 *Committee Hansard*, 7 November 2006, p. 21; *Submission 42A*, p. 5.

114 See *Committee Hansard*, 7 November 2006; *Submission 42A* (supplementary), p. 2.

115 [2005] HCA 58.

116 For example, see Professor Brian Fitzgerald, *Committee Hansard*, 7 November 2006, p. 21.

> them under the other particular heads—whether it is consumer legislation or whether it is content legislation—but not under the Copyright Act.[117]

3.116 However, others expressed strong disagreement with this argument. For example, Mr Maurice Gonsalves from the Interactive Entertainment Association of Australia argued that 'there is no link to copyright infringement, and that link is not in the [AUS]FTA, in US law or in the law of most other jurisdictions'.[118] Mr Gonsalves was of the view that, in the online environment, where a copyright owner is exercising the copyright owner's right of communication to the public:

> … there is no other way of protecting the copyright work other than using the technological protection measure. So without protection like this, that potential distribution model is eliminated altogether potentially—which is detrimental to consumers because those models will not evolve.[119]

3.117 A number of submissions commented on the exceptions to circumvention of TPMs contained in the Bill. In particular, there was concern that the provisions of the Bill dealing with TPMs might be used to prevent the interoperability of data or the creation of software programs which can access other people's data.[120] There was also concern that the exceptions would not be wide enough to prevent anti-competition uses of TPMs.

3.118 As Mr Brendan Scott from the Open Source Industry Australia argued:

> We are very concerned that it does raise competition issues under the TPM provisions. We are concerned that they can be used to lock customers out of their own data or to require customers to be locked into a specific vendor. We were hoping to find an exception in the permission provision, which says that if you are the copyright owner you can give permission. But the issue for us there is just because I save a document it does not mean that I am the only person who owns copyright in the saved document. And that flows on to our main concern which is the interoperability exception.[121]

3.119 The Open Source Industry Australia contended further that the absence of a clear exception for interoperability to permit access to a customer's data would 'pose a substantial threat to our member's ability to compete in the software market' and would have 'a substantive adverse effect on competition and innovation'.[122]

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117 *Committee Hansard*, 7 November 2006, p. 28.

118 *Committee Hansard*, 7 November 2006, p. 23.

119 *Committee Hansard*, 7 November 2006, p. 26.

120 See, for example, Mr Graham Greenleaf et al, *Submission 37*; Open Source Industry of Australia, *Submission 21*.

121 *Committee Hansard*, 7 November 2006, p. 27.

122 *Submission 21A*, pp. 1 & 2.

3.120 There was also some concern with respect to the absence of a permission exception in Schedule 12. Ms Carolyn Dalton from CAG explained the potential problem as it applies to the education sector:

> In the TPM provisions in relation to the ban on the use of a circumvention device, there is an exception there that says you can circumvent if you have the permission of the copyright owner. In relation to the other set of bans or criminal and civil provisions in relation to dealings with circumvention devices—for example, sale, manufacture etcetera—there has not been that exception for permission translated across. So if, for example, in a school or a university you have been given the right to use a circumvention device, there is no equivalent exception to enable the sale or manufacture so that someone can sell you a device to use that exception. We understand that that is a requirement of the free trade agreement … but the absence of a permission exception means that the school or university cannot even contact the copyright owner. They cannot pick up the phone and say, 'Would you mind?' We think that is an interesting gap, because it can effectively mean that the provisions that have been given to educational institutions to use these devices might not be workable even in the context where specific permission has been sought from the copyright owner to undertake such acts.[123]

Department response

3.121 The Department responded to some of the issues raised by submissions and witnesses with respect to the TPMs provisions. In relation to arguments that the current version of Schedule 12 removes the link to copyright infringement that was contained in the Exposure Draft, a representative of the Department explained that Article 17.4.7 of the AUSFTA 'requires liability for TPMs to be independent of copyright infringement'.[124] She told the committee that the Federal Government's view is that the AUSFTA 'clearly states that the TPM liability that we provide should be independent of whether copyright infringement has occurred'.[125]

3.122 The representative also noted that there has not been a significant change between the Exposure Draft of the TPMs provisions and the current Bill. She explained that certain interpretations of the Exposure Draft did not reflect the Federal Government's intention:

> The intention of the exposure draft was to provide liability where there was a possibility that copyright infringement might occur, and it did not look at a particular situation as to whether an exception under the Copyright Act would have applied. It was an objective test. The government's intention in the exposure draft was not read by the public. In the submissions we saw that there was a lot of confusion about the government's intention. Both

123 *Committee Hansard*, 7 November 2006, p. 18.

124 *Committee Hansard*, 7 November 2006, p. 46.

125 *Committee Hansard*, 7 November 2006, p. 46.

> users and owners sought greater clarity and simplicity in the operation of the definitions. They also sought greater certainty in the issue of geographic market segmentation. The drafting approach in the bill is the government's response to those concerns.[126]

3.123 Further:

> It is my understanding that those interpretations would have resulted in Australia not complying with the free trade agreement. That understanding meant that you had to show infringement of copyright for TPM liability to exist. In moving from the government's intention in the exposure draft to where we are today in the bill, it is simply an attempt to provide clarity and simplicity in the operation of the definitions and to move away from the legislative notes that addressed the region coding issue to substantive provisions in the act that address market segmentation and anticompetitive use of aftermarket materials.[127]

3.124 With respect to a possible additional exception to TPMs liability for educational institutions to allow them to provide circumvention devices to other institutions, the Department informed the committee that this would not be possible under the AUSFTA:

> … the Australia-United States Free Trade Agreement (AUSFTA) places clear boundaries on the manufacture and supply of circumvention devices for other people. This is a necessary measure in order to discourage piracy.
>
> The effect of this limitation in the AUSFTA is that there is no scope for the Government to introduce an additional exception to liability for educational institutions to allow them to provide circumvention devices to other institutions.[128]

Committee view

3.125 The committee acknowledges the vast amount, and comprehensive nature, of evidence it has received in the course of its inquiry. This evidence has greatly assisted the committee in its deliberation of the issues raised by the Bill, particularly given the short timeframe within which the committee has been required to undertake its inquiry. The committee also notes the complexity of copyright law and the issues raised by the Bill which, in the context of the short timeframe, has made the committee's task challenging.

3.126 The committee notes the importance of balancing the interests of various stakeholders and recognises the difficulties in achieving such balance in the area of copyright law. The committee acknowledges that the Government has endeavoured to ensure that there continues to be strong economic incentives for the creation of new

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126 *Committee Hansard*, 7 November 2006, pp 46-47.

127 *Committee Hansard*, 7 November 2006, p. 47.

128 *Submission 69A*, p. 9.

material to protect copyright, while at the same time providing greater recognition to the interests of consumers to reasonably use copyright material that they purchase or legitimately access. The committee considers that, on the whole, the Bill represents a balanced approach between all competing interests.

3.127 Nevertheless, the committee is inclined to make suggestions which it considers may help clarify some of the remaining areas of contention, as well as address uncertainty with respect to certain aspects of the Bill and their likely impact. In doing so, the committee notes that many of these suggestions are already in the process of being considered by the Department, and by the Attorney-General.

Strict liability provisions

3.128 In particular, the committee agrees with arguments raised in relation to the proposed strict liability provisions that there is merit in attempting to limit the scope of these provisions to the actual activities that the committee understands they are intended to target. The committee is of the view that the strict liability provisions could be narrowed in a way that would significantly reduce the risk of their application to ordinary Australians and legitimate businesses. The committee therefore recommends that the Federal Government examine the possibility of narrowing the strict liability offences in such a way. The committee considers that one possible approach to concerns raised in relation to innocent and misguided infringements of copyright might be to introduce a 'first infringement' or 'warning' scheme where only a subsequent infringement of the same kind might carry the current proposed levels of penalty.[129]

3.129 The committee also supports the introduction of guidelines relating to management of the strict liability offences and the infringement notice scheme, and agrees with suggestions that consultation should take place with appropriate bodies in the development of those guidelines. The committee considers that this should occur prior to Schedule 1 being implemented.

3.130 Further, the response from the AFP indicated that it is yet to develop an informed view on Schedule 1. In any case, in accordance with the AFP's Case Categorisation and Prioritisation Model, these types of offences may be categorised as 'low' impact.

Time-shifting

3.131 The committee considers that the meaning and scope of the terms 'domestic premises' and 'private and domestic use' in proposed subsection 111(1) is unclear. The committee recommends that proposed subsection 111(1) be re-drafted to make absolutely clear that individual consumers are not restricted to watching and listening to recordings in their own homes.

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129 See further Australian Federation Against Copyright Theft, *Submission 57B.*

Format-shifting – use of iPods and similar devices

3.132 The committee also notes concerns raised by submissions and witnesses in relation to the proposed exception for format-shifting, particularly as it is likely to impact upon legitimate iPod use. The committee considers that all aspects of the use of iPods and similar devices, which includes storage of music collection libraries on personal computers, should be included in the Bill. The committee suggests that the Federal Government amend the Bill to recognise the ordinary use of iPods and similar devices by consumers.

Fair dealing for research and study

3.133 The committee expresses concern at the Bill's limitation on copying for the purposes of research and study to a 'reasonable portion' (10 per cent). The committee does not consider this to be appropriate, or consistent with the quantitative scope of other exceptions, such as time-shifting and format-shifting. However, the committee's concerns are allayed by advice from the Department that the Federal Government may redraft these provisions to clarify their intended effect. The committee understands that the intended effect is that only reproductions deemed to be fair dealings will be slightly restricted and that the scope of the provision allowing any other amounts of reproduction will not be affected, if they are considered to be fair.

Official copying of library and archive material

3.134 The committee also notes arguments made by and on behalf of cultural institutions that the Bill does not make adequate provision for technical processes related to preservation. In this regard, the committee notes that best practice standards for preservation, including the UNESCO *Guidelines for the preservation of digital heritage*, recommend that 'multiple copies' be made and stored in different locations.

3.135 The committee is encouraged by advice from the Department that the term 'first copy' in proposed section 110BA will be clarified. The committee understands that it may be possible for libraries and archives to make additional copies for the purposes of preservation under the specific exception in proposed section 200AB (unless determined otherwise by a court). If this is the case, the Bill should be clarified to put it beyond doubt.

3.136 The committee also expresses the view that the scope of the exception might be usefully clarified by specifically including such bodies as the ABC, SBS, the AFC and other similar institutions which hold significant historical and cultural material.

Educational instruction and caching

3.137 The committee notes concerns raised in relation to proposed sections 28A and 200AAA. It also applauds the collaborative approach taken by CAG and Screenrights in relation to a possible solution to address some of the perceived problems with these sections. The committee acknowledges advice from the Department that it is considering changes to these provisions.

3.138 The committee also expresses concern at the new requirement under subsection 135ZMB(5) in Schedule 8 that 'insubstantial' copying of works in electronic works be 'continuous'. The committee suggests that the Federal Government consider further the possibility of amending this proposed subsection to limit the potential budgetary impact on educational institutions.

Technological protection measures

3.139 The committee notes the conflicting evidence between some submissions and witnesses, on the one hand, and the Department, on the other, in relation to the necessity to link any TPM protected by the Copyright Act to the prevention of infringement of copyright. The committee accepts the Department's explanation of the need to ensure compliance with the AUSFTA. However, the committee notes the apparent divergence between the view expressed by the Department in the course of the inquiry, and other previous interpretations of the AUSFTA put forward by the Department and the Federal Government.

3.140 The committee suggests that, at the very least, the language used in the definition of 'technological protection measure' be harmonised with the language used in the definition of 'access control technological measure'. That is, that the phrase 'in connection with the exercise of copyright' in the definition of 'access control technological measure' be replaced with the more restrictive phrase, 'prevents, inhibits or restricts the doing of an act comprised in copyright', which is used in the definition of 'technological protection measure'. As the language used in the definition of 'technological protection measure' is presumably compliant with the AUSFTA, the committee considers that the same language could overcome some of the perceived problems related to the absence of a direct link to copyright infringement in the Bill.

3.141 The committee also considers that a clear exception for interoperability should be included in the Bill. In this vein, the committee notes Recommendation 15 of the House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs which suggested that there be an exception for interoperability between computer programs and data. The committee notes that the Federal Government has accepted this recommendation.[130]

3.142 Further, the committee notes evidence suggesting that there should be a prohibition on contracting out of TPMs exceptions to protect consumers from contracting away their rights.[131] The House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs specifically recommended that legislation implementing Article 17.4.7 of the AUSFTA should nullify any agreements purporting to exclude or limit the application of permitted exceptions

130 Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", p. 10.

131 See, for example, Mr Dale Clapperton, *Committee Hansard*, 7 November 2006, p. 25.

under the TPMs liability scheme (Recommendation 33). The committee understands that the Federal Government has accepted this recommendation in principle.[132] The committee also notes that section 47H of the Copyright Act contains a specific prohibition on contracting out in the context of literary, dramatic, musical and artistic works; the committee therefore considers that an explicit prohibition on contracting out in the context of TPMs should be included in the Bill.

Review of impact of changes

3.143 The committee recognises that the changes proposed by the Bill are wide-ranging and will have a significant impact on copyright law in Australia. In light of this, the committee considers that the changes made to the Copyright Act by the Bill should be reviewed, and publicly reported on, after a period of two years.

Recommendation 1

3.144 The committee recommends that the Federal Government conduct a public awareness campaign and develop a 'plain English' consumer guide on the meaning and effect of the amendments contained in the Bill in order to assist people to understand their copyright rights and obligations under the *Copyright Act 1968*.

Recommendation 2

3.145 The committee recommends that the Federal Government re-examine with a view to amending the strict liability provisions in Schedule 1 of the Bill to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.

Recommendation 3

3.146 The committee recommends that, in developing guidelines for management of the Bill's strict liability offences and infringement notice scheme, consultation should take place with appropriate bodies representing those to be regulated under the proposed regime, and relevant user-interest groups.

Recommendation 4

3.147 The committee recommends that proposed subsection 111(1) be re-drafted to make absolutely clear that individual consumers are not restricted to watching and listening to broadcast recordings in their own homes.

Recommendation 5

3.148 **The committee recommends that Schedule 6 of the Bill be amended with respect to format-shifting to specifically recognise and render legitimate the**

132 Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", p. 17.

ordinary use by consumers of digital music players (such as iPods and MP3 players), and other similar devices.

Recommendation 6

3.149 The committee recommends that the proposed amendments to the fair dealing exception for research and study in Schedule 6 of the Bill be clarified to make clear that only reproductions deemed to be fair dealings will be restricted and that the scope of the provision allowing any other amounts of reproduction will not be affected, if they are considered to be fair.

Recommendation 7

3.150 The committee recommends that Schedule 6 of the Bill be clarified to make it absolutely clear that libraries, archives and cultural institutions are able to make sufficient copies for the purposes of preservation.

Recommendation 8

3.151 The committee recommends that the scope of the exception for 'key cultural institutions' in Schedule 6 of the Bill be clarified to specifically include the ABC, SBS, the Australian Film Commission, universities, research institutions, and other like institutions which hold significant historical and cultural material.

Recommendation 9

3.152 The committee recommends that proposed section 28A in Schedule 8 of the Bill should be amended to clarify that the same range of copyright material currently covered by section 28 of the Copyright Act is included; that is, that section 28A should apply to communication of a work or subject matter as encompassed in section 28, and not only to a sound recording or cinematograph film.

Recommendation 10

3.153 The committee recommends that proposed section 200AAA in Schedule 8 of the Bill be clarified to ensure that caching for efficiency purposes (proxy caching) does not infringe copyright; and to ensure that there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made.

Recommendation 11

3.154 The committee recommends that the Federal Government consider the possibility of amending proposed subsection 135ZMB(5) in Schedule 8 of the Bill so that 'insubstantial' copying of works in electronic works need not be 'continuous'.

Recommendation 12

3.155 The committee recommends that the Federal Government consider harmonising the language used in the definition of 'technological protection measure' in Schedule 12 of the Bill with the language used in the definition of 'access control technological measure', by replacing the phrase 'in connection with the exercise of copyright' in the definition of 'access control technological measure' with the phrase, 'prevents, inhibits or restricts the doing of an act comprised in copyright'.

Recommendation 13

3.156 The committee recommends that the specific exception to liability for TPM circumvention to allow for interoperability in Schedule 12 of the Bill be amended to ensure it allows interoperability between computer programs and data to permit interoperable products to be developed.

Recommendation 14

3.157 The committee recommends that Schedule 12 of the Bill be amended to include a prohibition on any agreements purporting to exclude or limit the application of permitted exceptions under the TPMs liability scheme.

Recommendation 15

3.158 The committee recommends that the Federal Government undertake a public review of the impact of the changes made to the *Copyright Act 1968* by the Bill, after a period of two years of operation of the provisions.

Recommendation 16

3.159 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair

SUPPLEMENTARY REPORT BY THE AUSTRALIAN LABOR PARTY

1.1 Labor Senators support the majority report's consideration of the evidence in most areas and endorse the majority report's recommendations. Labor Senators recognise that the recommendations are an attempt to rectify certain drafting and technical problems in the Bill, and are of the view that these recommendations will assist in improving relevant aspects of the Bill's practical operation.

1.2 However, Labor Senators are of the view that the majority report does not place adequate emphasis on a number of significant matters. First and foremost, Labor Senators are seriously concerned about the short timeframe set by the Government for this inquiry. The Bill proposes major amendments to copyright law in Australia and raises many complex issues. Further, and predictably, the committee received a large volume of detailed and lengthy submissions. Labor Senators consider that the complex nature of the issues, coupled with the extremely short timeframe set by the Government for the inquiry, has seriously hampered the committee in its efforts to comprehensively consider, and report on, all the evidence before it.

1.3 As highlighted in the majority report, consultation in relation to many of the amendments contained in the Bill has been inadequate, or in some cases non-existent. The Bill proposes 'unexpected' changes in some areas; these changes were not contained in the Exposure Draft of the Bill, nor were they the subject of public consultation processes. Labor Senators consider that some of the more contentious issues raised by the Bill might have been resolved at an earlier stage if adequate exposure and consultation had occurred. Labor Senators note that the committee has continued to receive submissions right up to its reporting date – this would appear to indicate that stakeholders are concerned that they have been unable to fully articulate their arguments. Labor Senators are also concerned that the inadequate consultation and short timeframe of this inquiry has prevented the information and communications technology industry, in particular the open source software sector, from having their concerns about innovation and competition heard and possibly addressed through the course of this inquiry.

1.4 Labor Senators agree that only those provisions of the Bill related to implementation of the AUSFTA could be considered 'urgent'. Ideally, consideration of several significant aspects of the Bill should be deferred until proper analysis and deliberation takes place by all interested parties, and by Parliament.

Strict liability provisions

1.5 Labor Senators agree with the majority report's conclusions in relation to the Bill's strict liability provisions. Nevertheless, Labor Senators express the view that these provisions should be put on hold pending further consideration of how they will operate in practice. The committee has not been able to fully consider the impact of the provisions due to the short timeframe for the inquiry.

1.6 Labor Senators are particularly concerned about the potential impact of the strict liability provisions on the ordinary use of legitimately acquired products by consumers. Since the proposed provisions introduce new laws with potentially broad implications, a thorough consideration of their likely effect is required.

1.7 Labor Senators also remain concerned that the AFP indicated to the committee that it is yet to form a view on Schedule 1 of the Bill. This is a very good reason to defer implementation of these provisions until their full impact can be assessed.

Time-shifting and format-shifting

1.8 Labor Senators consider that new and emerging technologies should be encompassed in any format-shifting exceptions to copyright infringement. However, they concede that this is not possible, due to the restrictive nature of the exceptions-based regime contained in the Copyright Act. Labor Senators also note the choice by the current Government to pursue specific exceptions rather than general 'fair use' exceptions for private use. It is extremely difficult for Labor Senators to consider the alternative path and recommend amendments to the Bill to establish a fair use regime, particularly in the timeframe permitted. In this context, Labor Senators note that further specificity with exceptions creates difficulties from the perspectives of both copyright holders and consumers, further enhancing the argument for a private 'fair use' regime.

1.9 Given the timeframe, however, Labor Senators have opted to recommend expansion of copyright exceptions, at the same time acknowledging that this will not solve the fundamental and ongoing problem of Australian copyright law's inability to recognise rapid changes in technology and the use of new technology by consumers.

1.10 Therefore, Labor Senators express the view that the use of currently available technologies (such as format-shifting to and from DVDs, and the use of podcasts, and webcasts) needs to be adequately recognised and addressed in the exceptions-based regime.

1.11 Labor Senators are also of the view that copying for personal and domestic use should be allowed in places other than the home. While supporting the majority's recommendation that the Bill be amended to make absolutely clear that consumers are not restricted to watching and listening to recordings in their own homes, Labor Senators also believe that consumers should not be restricted to making copies in 'domestic premises' only.

1.12 Further, Labor Senators believe that there is a need for the Copyright Act to explicitly recognise that time-shifting and format shifting often legitimately involves more than one copy being made. Otherwise, the real life usage of products that consumers have legitimately purchased will not be reflected in the legislation, and people will continue to break the law through normal and accepted usage.

Three-step test

1.13 Labor Senators also note the difficulties and competing interests with respect to implementation of the three-step test in domestic legislation. However, Labor Senators are of the view that the particular way the Government has chosen to embody the three-step test in the Bill is problematic and an example of poor drafting that will no doubt lead to confusion and uncertainty in practice. Not only will judges be required to interpret the three-step test, but so will the users to which the exceptions apply. This is not only impractical, but also potentially costly to those user groups who may have to seek expert advice on how to properly interpret the three-step test.

1.14 Labor Senators are of the view that the legislative embodiment of the three-step test requires further critical examination by the Government.

Fair dealing for research and study

1.15 Labor Senators are of the view that the recommendation contained in the majority report in relation to fair dealing for research and study is an inadequate way of dealing with the issue. Labor Senators consider that arguments for the inclusion of a quantitative limit on 'deemed' reproductions to accord with international obligations are weak. Moreover, Labor Senators understand that there are conflicting legal opinions as to whether this is a correct interpretation. The majority's recommendation implies that the disadvantage the amendment creates ought to be 'clarified' to remove its negative impact. Labor Senators are of the view that a preferable approach would be to retain the existing provisions of the Copyright Act in their entirety.

Official copying of library and archive material

1.16 Labor Senators expresses the view that the 'commercial availability test' contained in this exception that requires cultural institutions to take into account whether an electronic reproduction of a work can be obtained within a reasonable time, at an ordinary commercial price, may interfere with ordinary collections policies of cultural institutions. Labor Senators recommend that this requirement be removed from the Bill.

Maker of communication – Schedule 7

1.17 Labor Senators note concerns raised by ISPs and search engines that they will incur additional costs and be vulnerable to liabilities for communications of copyright-infringing activities which are completely out of their control. Labor Senators are of the view that this issue warrants further consideration and urges the Federal Government to closely monitor such activities.

Copyright Tribunal amendments

1.18 Labor Senators support an additional recommendation to resolve an issue raised by the Australian Vice Chancellors' Committee (AVCC) – namely, that the proposed provisions relating to the Copyright Tribunal permit the Copyright Tribunal to impose an expensive burden on educational institutions, about which they were not consulted. The issue of greatest concerns relates to so-called 'records notices'.

1.19 The Bill contains a repeal of the provisions which give effect to a prescribed record keeping system. The AVCC argued that this is despite the fact that the Copyright Law Review Committee considered these provisions in its Simplification Report Part 1, and recommended that they be retained. If the proposed repeal is implemented, the AVCC submitted that an institution issuing a records notice would be required to reach agreement with the collecting society regarding the form of record keeping system or, failing that, apply to the Copyright Tribunal for determination.

1.20 Labor Senators agree with the AVCC's assertion that this will have enormous costs consequences for the education sector and, further, that there appears to be no reason to impose this burden on the education sector when there is no evidence that the current records option is not working. Labor Senators agree that the proposed amendment gives further bargaining power to copyright owners and undermines the interests of important educational users in Australia who have not been consulted on such a proposal.

Review of impact of changes

1.21 Labor Senators support the majority's recommendation in relation to a two-year review on the proposed changes to the Copyright Act by the Bill. However, in making such a recommendation, Labor Senators note that this represents a 'second-best' and belated approach to attempt to counteract the inherent inadequacy of this package of reforms.

Recommendation 1

1.22 Labor Senators recommend that the strict liability provisions in Schedule 1 of the Bill be removed, pending a comprehensive examination by the Federal Government of their intended operation.

Recommendation 2

1.23 Labor Senators recommend that the time-shifting and format-shifting provisions of Schedule 6 of the Bill be amended to recognise all current and legitimate uses of technology, including format-shifting from podcasts and webcasts.

Recommendation 3

1.24 Labor Senators recommend that the time-shifting and format-shifting provisions of Schedule 6 of the Bill be amended to enable copying for personal and domestic use to occur in places other than domestic premises, including legitimate places of business.

Recommendation 4

1.25 Labor Senators recommend that Schedule 6 of the Bill be amended to clarify that the time-shifting and format-shifting exceptions permit sufficient copies to be made and stored for reasonable use of legitimate products.

Recommendation 5

1.26 Labor Senators recommend that Schedule 6 of the Bill be amended to remove proposed changes to the exception relating to fair dealing for research and study, so that existing section 40 of the *Copyright Act 1968* is retained in its entirety.

Recommendation 6

1.27 Labor Senators recommend that Schedule 6 of the Bill be amended to remove the 'commercial availability test' from the exception relating to official copying of library and archive material.

Recommendation 7

1.28 Labor Senators recommend that Schedule 11 of the Bill be amended to remove proposed paragraphs 135K(1)(b)(c) and (d), and proposed paragraphs 135ZX(1)(b)(c) and (d) in relation to records notices.

Senator Patricia Crossin **Senator Linda Kirk**

Deputy Chair

Senator Joseph Ludwig **Senator Kate Lundy**

DISSENTING REPORT BY THE AUSTRALIAN DEMOCRATS

Inadequate time to consider legislation

1.1 This legislation makes a range of major amendments to Australian copyright law. I acknowledge that many of the components of the legislation have been the subject of various consultation processes over a period of time. However, the Senate still has to consider and assess the details of the actual legislative changes that are put before it. Given the complexity of the Copyright Act and the many different issues covered by the proposed changes, it is simply unacceptable to provide the Senate Committee with such a short timeframe to consider the legislation and consult stakeholders and experts on the issues raised.

1.2 The legislation was referred to the Committee sight unseen on 19 October 2006, with a reporting date only three weeks later of 10 November. This gave only 6 working days for the public to provide submissions to the Committee. The Committee had no option but to hold a substantial public hearing whilst the Senate was sitting and debating the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006. Given that the Cloning and Research legislation was being determined by a conscience vote of all Senators, it was particularly undesirable to be holding Committee hearings during debate on that matter.

1.3 Given the complexity of this area of law, the wide range of changes being made and the evidence from a number of submitters that there are 'unexpected' components in the legislation and a lack of clarity in the drafting of some provisions, it is unwise to be proceeding with the legislation in such haste except where it is absolutely necessary.

1.4 Apart from the few segments of the Bill which make amendments to ensure necessary compliance with the AUSFTA by the end of 2006, there was no substantial reason given why the rest of the measures in the legislation needed to be passed in such a rush. In many cases the government has had years to consider and weigh up the various issues involved, yet it is giving the Senate Committee and the community just a few weeks to assess the final product.

1.5 In responding to my question as to why the Senate could not deal with the parts relating to the AUSFTA now and have a proper look at the remainder of the legislation later, the Department's representative said that "the government's preference is to do it as one major copyright reform bill and to get it all through this year."[1]

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[1] Committee Hansard, 7 November 2006, p 44

1.6 No indication was given that any other components of the legislation are urgent. Government 'preference' or convenience is not a strong enough reason to rush consideration of legislation. Given the importance of this area of law, the complexity of the issues and the potential consequences of getting it wrong, I do not believe it is reasonable for the Senate to absolve itself of its normal responsibilities to ensure adequate examination of legislation.

Recommendation 1

1.7 That the legislation be split to allow the provisions relating to the AUSFTA to be passed this year, while further consultation and consideration be given to the remaining provisions which can be considered by the Senate in the first session of 2007.

Alternative approach if recommendation 1 is not accepted

1.8 If the Senate decides to proceed with considering all of the legislation immediately, there is an additional matter which should be included.

1.9 As stated above, it is apparently the government's preference to do one major copyright reform Bill. In such a circumstance, it is reasonable to also include an amendment to Section 152(8) of the Copyright Act to remove the statutory one per cent cap which currently exists on licence fees paid by radio broadcasters for using sound recordings.

1.10 The government announced its intention to remove this cap back on 14 May 2006[2], at the same time as announcing the changes relating to fair use which form a significant part of the legislation currently before the Committee. This decision followed a period of consultation similar to that which was undertaken for the fair use provisions. As the Attorney-General, Mr Ruddock said at the time, "there is no reason why a statute should determine what the rate should be for music played on the radio."

1.11 In asking the Department's representative, Ms Helen Daniels, at the Committee's public hearing why the legislation didn't include the removal of the cap on commercial radio broadcasters, the following exchange occurred:

> **Ms Daniels** "The government has not made a decision as to when that reform will be implemented."
>
> **Senator BARTLETT**—So there has not been a reversal of a decision, it is just not proceeding with it at this time?
>
> **Ms Daniels**—That is right.

[2] "Major Copyright reforms strike balance", Media Release 088/2006, issued by the Attorney-General, 14th May 2006 (see http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006)

> **Senator BARTLETT**—Are you able to give us any bigger reason why not? Given what you have just said about the desirability of getting all the reforms through in one package, this would be a fairly simple one that has been discussed for a very long time, and one which has also had a review process and had a cabinet decision made on it.
>
> **Ms Daniels**—There is very little I can add to what I have said: that the government has decided not to proceed at this stage in the bill with that reform.

1.12 The government has announced six months ago its decision to abolish the one per cent cap on what commercial radio has to pay for the recordings they use. That is still government policy, but for unexplained reasons they are not proceeding with this simple, discrete amendment to the Copyright Act. There is reason to be concerned that, if the change is not made as part of this reform Bill, it may not happen at all prior to next year's election. Given that this cap has been in place since 1968, it is fair to say that the commercial radio industry has already received a more than reasonable benefit from it.

1.13 This cap places a limit on what musicians can earn through royalties paid for the use of their performances. It is particularly appropriate that the cap be lifted as part of this legislative reform package, as the changes made as part of the fair use provisions are likely to lead to a drop in income for some of them. This was confirmed by Ms Libby Baulch from the Australian Copyright Council.

> **Senator BARTLETT**—Is it reasonable to suggest that these changes in this area are likely to lead to a loss of income for artists, performers and such people?
>
> **Ms Baulch**—Certainly the format-shifting and time-shifting provisions will because they will interfere with markets for copyright content. That will have an effect on the income of copyright creators. There may also be those implications from other provisions as well, but certainly there are those for the format-shifting and timeshifting provisions which are not subject to the test of whether or not the material is available.[3]

Recommendation 2

1.14 If the legislation is not split and all Schedules are to be considered prior to the end of 2006, Section 152 of the Copyright Act should be amended to implement the government's promise and policy to remove the one per cent cap on the broadcasting fee required to be paid by commercial radio stations.

[3] Committee Hansard, 7 November 2006, page 10.

APPENDIX 1

SUBMISSIONS RECEIVED

1	Ms Sally J Hawkins
2	National & State Libraries Australasia
3	Ringwood Film and Video Makers Inc
4	Australian Society of Authors
5	Burrabooks
6	The International Publishers Association
7	International Intellectual Property Alliance
8	Screenrights and the Copyright Advisory Group
9	Linux Australia
10	Interactive Entertainment Association of Australia
10A	Interactive Entertainment Association of Australia
11	Mr Neil Foster
12	Google Inc.
13	Australian Film Commission
14	International Federation of Reproduction Rights Organisations (IFRRO)
14A	International Federation of Reproduction Rights Organisations (IFRRO)
15	Screenrights
15A	Screenrights
16	International Disc Duplicating Association (IDDA) & CD ROM Services Pty Ltd
17	Australian Visual Software Distributors Association Ltd (AVSDA)
18	Dilan Thampapillai
19	Screen Producers Association of Australia (SPAA)

20	Mr Tony Clifton
21	Open Source Industry Australia Limited
21A	Open Source Industry Australia Limited
22	Australian Copyright Council
23	Vision Australia
24	ACT Video Camera Club Inc
25	Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG)
25A	Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG)
26	National Library of Australia
27	Centre for Media and Communication Law
28	Australian Subscription Television & Radio Association (ASTRA)
29	Copyright Agency Limited (CAL)
29A	Copyright Agency Limited (CAL)
29B	Copyright Agency Limited (CAL)
30	National Association for the Visual Arts Ltd (NAVA)
31	Mr Richard Bourke
32	Australian Broadcasting Corporation (ABC)
33	SBS
34	Ms Donna Benjamin
35	Law Council of Australia
36	Arts Law Centre of Australia
37	Cyberspace Law and Policy Centre, UNSW
38	Australian Recording Industry Association Ltd. (ARIA)

39	Visual Arts Copyright Collecting Agency (Viscopy Ltd)
40	CAUL (Council of Australian University Librarians)
41	BSAA (Business Software Association of Australia)
42	Mr Dale Clapperton and Professor Stephen Corones
42A	Professor Brian Fitzgerald and Mr Dale Clapperton
43	Australian Publishers Association
44	Electronic Frontiers Australia Inc.
45	APRA/AMCOS
46	Professor Brian Fitzgerald, Ms Jessica Coates, Mr Nic Suzor, Mr Damien O'Brien & Mr Bjorne Bednarek
47	Cyberspace Law & Policy Centre
48	Musicians' Union of Australia
49	Arts Law Centre of Queensland Inc
50	Australian Digital Alliance (ADA)
50A	Australian Digital Alliance (ADA)
50B	Australian Digital Alliance (ADA)
51	Australian Libraries' Copyright Committee
51A	Australian Libraries' Copyright Committee
52	Flexible Learning Advisory Group (FLAG)
53	Commonwealth Director of Public Prosecutions (DPP)
54	Ms Kimberlee Weatherall
54A	Ms Kimberlee Weatherall
55	International Association of Scientific, Technical & Medical Publishers (STM)
56	Independent Schools Council of Australia
57	Australian Federation Against Copyright Theft (AFACT)

57B	Australian Federation Against Copyright Theft (AFACT)
58	Australian Vice-Chancellors' Committee (AVCC)
59	Mr Mark Walkom
60	The Media Entertainment & Arts Alliance (the Alliance)
61	National Museum of Australia
62	Reed Elsevier Australia
63	Apple Computer Australia Pty Limited
63A	Apple Computer Australia Pty Limited
63B	Apple Computer Australia Pty Limited
64	National Gallery of Australia
65	The National Archives of Australia
66	Internet Industry Association (IIA)
67	Copyright Office, Swinburne University of Technology
68	Copyright in Cultural Institutions Group (CICI)
69	Attorney-General's Department
69A	Attorney-General's Department
69B	Attorney-General's Department
70	Free TV Australia
71	Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
72	Mr Alex Steel
73	ACT Legislative Assembly
74	Australian Federal Police

TABLED DOCUMENTS

Documents tabled at the public hearing on 7 November 2006

Copyright Agency Limited

- Response to CAG on insubstantial copying
- Various publications, including school textbooks

Apple Computers

- Suggested amendments to Schedule 6 of the Bill

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Tuesday 7 November 2006

Ms Kimberlee Weatherall

Australian Digital Alliance

Ms Sarah Waladan, Executive Officer

Australian Copyright Council

Ms Libby Baulch, Executive Officer

Copyright Agency Limited

Mr Michael Fraser, Chief Executive Officer

Ms Caroline Morgan, General Manager, Corporate Services

Screenrights

Mr Simon Lake, Chief Executive

Dr David Brennan, Copyright Consultant

Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs (CAG)

Ms Delia Browne, National Copyright Director

Ms Carolyn Dalton, Legal Adviser

Australian Vice-Chancellors' Committee

Mr John Mullarvey, Chief Executive Officer

Ms Anne Flahvin, Legal Adviser

Mr Dale Clapperton and Professor Brian Fitzgerald, Queensland University of Technology

Open Source Industry Australia Limited

Mr Brendan Scott, Director

Interactive Entertainment Association of Australia

Mr Chris Hanlon, Chief Executive Officer

Mr Maurice Gonsalves, Partner, Malleson Stephen Jaques, Legal Representative

Apple Computers

Mr Robert Small, Marketing Director

Mr William Knight, Solicitor

Commonwealth Director of Public Prosecutions

Mr James Carter, Senior Assistant Director

Ms Julie Taylor, Senior Legal Officer

Australian Federation Against Copyright Theft

Ms Adrianne Pecotic, Executive Director

Attorney-General's Department

Copyright Law Branch

Ms Helen Daniels, Assistant Secretary

Mr Christopher Creswell, Consultant

Mr Peter Treyde, Principal Legal Officer

Ms Kirsti Haipola, A/g Principal Legal Officer

Mr Norman Bowman, Senior Legal Officer

Ms Elena Down, A/g Principal Legal Officer

Mr Sam Ahlin, A/g Principal Legal Officer

APPENDIX 3

OVERVIEW OF CONSULTATION ON VARIOUS PARTS OF THE COPYRIGHT AMENDMENT BILL 2006

General Criminal Law Amendments (Schedule 1)

- The amendments in Schedule 1 are being introduced primarily so that the offences comply with Commonwealth criminal law policy and are harmonised with the *Criminal Code Act 1995*.
- A technical review of the criminal law provisions was undertaken in close consultation with the Criminal Law Branch and the Commonwealth Director of Public Prosecutions (CDPP).
- Other government stakeholders were kept up-to-date about the technical review through the IP enforcement IDC.
  Industry stakeholders were given regular progress reports on this review through the Intellectual Property Enforcement Consultative Group.
- Consultations on the draft amendments were undertaken with key industry stakeholders on an in-confidence basis and other government agencies in August 2006.
- An exposure draft of these aspects of the Bill, together with explanatory material was placed on the Department's website on 22 September 2006 for the general public, and a Departmental
  'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.[1]

Evidential presumptions (Schedule 2)

- The Schedule 2 amendments relating to evidential presumptions address a number of concerns raised by copyright industry stakeholders and by the CDPP.
- Film industry stakeholders first raised these issues in December 2004 in meetings with Departmental representatives.
  During the course of 2005, there were written submissions from sections of industry and further meetings on this issue.
- The presumptions relating to computer programs address long-standing concerns of the computer software industry about difficulties of proof of originality.

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[1] See AGD e-news on Copyright, Issue 41 available online at http://www.ag.gov.au/agd/WWW/enewscopyrighthome.nsf/Page/eNews_Issue_41_-_September_2006

These were first raised with the Department in 2003 and again during development of amendments (late 2004) that implemented the copyright enforcement obligations of the AUSFTA.

- The Criminal Law Branch, Civil Justice Division, the Federal Court and the CDPP were consulted in the development of draft evidential presumption amendments.
- Consultation on the draft amendments was undertaken on an in-confidence basis with key industry stakeholders in August 2006.
- The amendments were also included in the exposure draft to the general public placed on the Department's website on 22 September 2006 and a Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.[2]

Technologically Neutral Definitions (Schedule 3)

- The amendments in Schedule 3 of the Bill are designed to address industry concerns about doubts raised in recent court cases that there is no protection in civil proceedings under the Copyright Act for digital files or their download over the Internet.
- Film industry stakeholders first raised these issues in December 2004 in meetings with Departmental representatives.
  During the course of 2005, there were written submissions and further meetings on this issue.
- These were raised by these stakeholders during the consideration of the *Kazaa* and *Cooper*[3] cases. The Department deferred consideration of possible amendments to the Act until after decisions in the cases were handed down. The decision in the *Cooper* case confirmed that there were difficulties for plaintiffs in civil proceedings that involved digital files or their download over the Internet.
- The Civil Justice Division of the Attorney-General's Department was consulted in the development of the amendments that addressed the 'article' issue.
- Consultations on most of these amendments were undertaken with key industry stakeholders in August 2006.
- The revised amendments were included in the exposure draft that was placed on the Department's website on 22 September 2006 and a Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.[4]

Civil remedies and commercial-scale infringement online (Schedule 4)

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[2] See AGD e-news on Copyright, Issue 41 available online at http://www.ag.gov.au/agd/WWW/enewscopyrighthome.nsf/Page/eNews_Issue_41_-_September_2006

[3] Univers*al Music Australia Pty Ltd v Cooper* [2004] FCA 78 (13 February 2004); Universal Music Australia Pty Ltd v Cooper [2005] FCA 1878 (22 December 2005); *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (14 July 2005) ;*Universal Music Australia Pty Ltd v Sharman Networks Ltd [2006]* FCAFC 41 (23 March 2006).

[4] See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

- The amendments in Schedule 4 stem from concerns raised by industry stakeholders that, in large scale Internet infringement cases, it is not possible for a plaintiff to prove every act of infringement committed by the defendant.
- Film industry stakeholders first raised these issues in December 2004 in meetings with Departmental representatives.
- During the course of 2005, there were written submissions and further meetings on this issue.
- The Civil Justice Division of the Attorney-General's Department and the Federal Court were consulted in the development of draft amendments on this issue.
- Consultations on most of these amendments were undertaken with key industry stakeholders on an in-confidence basis in August 2006.
- Amendments were made to the Exposure Draft that was released to the general public on the Department's website on 22 September 2006 as a result of comments made by industry stakeholders during the consultations referred to above.

Customs seizure of imported infringing copies (Schedule 5)

- Schedule 5 contains amendments to the Customs 'Notice of Objection' provisions in the Act to reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices.
- They were prompted after discussions with the Australian Customs Service who had requested similar amendments to the Notice of Objection provisions in the *Trade Marks Act 1995*.
- The amendments to the Trade Marks Act were made when Parliament passed the *Trade Marks Amendment Act 2006* in the Spring sittings. The Schedule 5 amendments will ensure the provisions of the Copyright Act remain consistent with the Trade Marks Act amendments.
- The Schedule 5 amendments were not included in the Bill for the initial industry stakeholder consultations.
- However, they were included in the exposure draft that was placed on the Department's website on 22 September 2006. A Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.[5]

Exceptions to infringement of Copyright (Schedule 6)

- The Election policy 'Strengthening Australian Arts' of 4 October 2004 undertook to review exceptions in the Copyright Act.
- The Department published an Issues Paper to begin public consultations on 5 May 2005.[6]

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[5] See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

[6] http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument

- More than 160 submissions were received from a wide range of stakeholders, including from members of the public, industry stakeholders, educational and cultural institutions, copyright collecting societies, peak bodies representing people with disability, publishers, broadcasters, distributors, cartoonists, government departments and academics.
- The public consultation period ended in mid July 2005.
- On 17 November 2005, the Attorney-General outlined proposed reforms in this area in his speech at the 12th Biennial Copyright Law and Practice Symposium held in Sydney, by the Australian Copyright Council.[7]
- Meetings were held with key stakeholders on an outline of proposals in December 2005.
- On 14 May 2006, the Attorney-General issued a media release announcing the Government's decision on the review.[8]
- Exposure drafts of the Bill and Explanatory Material relating to the new exceptions was released on 22 September 2006 for comment, and made available from the Department's website. A Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.[9]
- No amendments to the exposure draft were made before introduction of the Bill.
- Other provisions arose from the Digital Agenda Review. (See comments for Schedule 8).

Maker of a communication (Schedule7)

- An interpretation issue was raised with the Attorney-General by the Minister for Education, Science and Training (and his Queensland counterpart) in April 2006, and also with the Department by educational interests.
- Amendments were approved by the Government in May 2006 for inclusion in the Bill.
- The amendment clarifies that Internet browsing does not fall within the communication right.
- There was no consultation with stakeholders before the Exposure Draft bill and Explanatory Material was released on 22 September 2006, and publicised in the Departmental 'e-News on Copyright' sent to self subscribers to the e-news on the same date.[10]

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7 http://www.ag.gov.au/agd/www/MinisterRuddockhome.nsf/Page/Speeches_2005_Speeches_17_November_2005_-_Speech_-_Opening_address_Copyright_Law_and_Practice_Symposium

8 http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006

9 See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

10 See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

Digital Agenda Review (Schedule 8)

- The *Copyright Amendment (Digital Agenda) Act 2000* commenced on 4 March 2001.
- The Government announced that it would review the amendments within three years of their commencement.
- Law firm Phillips Fox was selected following a public tender to conduct the Review. As part of that review, it carried out wide public consultation, and public forums were held in Melbourne and Sydney. The final report was completed in February 2004 and released on 28 April 2004.
- A response to the review was not completed in 2004 as the Government gave priority to implementation of the copyright obligations of the Australia-US Free Trade Agreement (AUSFTA) so that those amendments would be in place for the AUSFTA to come into force on 1 January 2005.
- The AUSFTA supersedes some of the Phillips Fox recommendations in areas such as TPM's, and ISP liability for copyright infringements carried out by others on their systems and networks.
- Other issues considered by Phillips Fox were also incorporated into the Fair Use and Other Copyright Exceptions Review.
- The Department considered the outstanding recommendations of the review in 2005 and 2006. On 14 May 2006 the Attorney-General announced that the Government had completed its review of the Digital Agenda reforms.
- The Government's response includes those proposals in the Bill to amend the exceptions applicable to libraries and archives to enable them to conduct their functions more efficiently but without unreasonably prejudicing the legitimate interests of copyright owners.
- Amendments to the educational statutory licences in the Bill are intended to better reflect the needs of educational institutions and copyright owners when dealing with online material. For example, the status of temporarily cached copies of materials used by educational institutions and the use of distributed technologies for classroom teaching will be clarified.
- In relation to caching, the ICPR Committee (Ergas Committee) Report to Government in September 2000 (rec 5) recommended that "caching appears to be of considerable significance to the efficiency of the Internet; and that the transaction costs to secure licences to cache could be prohibitive for ISPs. As a result, Government policy should help ensure that this efficiency-enhancing activity is not prohibited."
- The Government response[11] to this recommendation (which was publicly released in August 2001) agreed that it is desirable to promote the efficient operation of the Internet and notes that the objects section of the Digital Agenda Act includes ensuring that the relevant standards which form the basis of new communication and information technologies, such as the Internet, are not jeopardised.

[11] The Government's response to the Report of the Digital Agenda review is available online at http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP216DCFAA58A8C720CA25705F0081E54D

Unauthorised access to encoded broadcasts (Schedule 9)

- Protection for encoded broadcasts is currently in Part VAA of the Copyright Act, which was inserted by the *Copyright Amendment (Digital Agenda) Act 2000*.
- In 2005, Part VAA was extended as a result of amendments implementing Australia's obligations under the Australia-United States Free Trade Agreement (AUSFTA).
- As part of the AUSFTA amendments, Australia criminalised the use of a broadcast decoding device where the encoded broadcast is then used in a commercial context.
- Following the conclusion of the AUSFTA, and separately from its AUSFTA obligations, the Government undertook to review its policy on the issue of personal use of a broadcast decoding device and other unauthorised activities carried out by subscribers to pay TV broadcasts.
- That review was conducted by the Attorney-General's Department between January and June 2005.
- The Department released a Discussion Paper, *Protecting Subscription Broadcasts*, in May 2005,[12] and invited public comment.
- The Attorney-General announced on 30 June 2005 that dishonestly accessing pay TV services without payment of a subscription fee would be criminalised.[13]
- Pay TV industry stakeholders were consulted on the draft provisions on an in-confidence basis in August 2006.
- An Exposure Draft of the amendments to Part VAA and Explanatory Material were placed on the Department's website for public comment on 22 September 2006, and publicised in
  Issue 41 of the AGD e-News on Copyright sent on the same date.[14]

Copyright Tribunal (Schedules 10 and 11)

- On 20 April 1999 the then Attorney-General asked the Copyright Law Review Committee (CLRC) to inquire into and report on the need for changes to the jurisdiction and procedures of the Copyright Tribunal under Part VI of the *Copyright Act 1968* and report by
  30 April 2000.
- In June 1999 the CLRC published an issues paper, inviting submissions on the matters raised in the terms of reference. It received 20 submissions.
- The CLRC also met with a range of other experts in preparing its report:

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12 http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP46815AB514858C33CA2570600083AA29

13 http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Second_Quarter_27_May_2005_-_Unauthorised_pay_TV_use_under_review_-_1012005

14 See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

- Justice Burchett and former Justice Sheppard, the then current and past Presidents of the Copyright Tribunal for insight into the practical workings of the Tribunal;
- Mr Shane Simpson, author of the *Review of Australian Copyright Collecting Societies;*
- Mr Henry Ergas, the Chairman of the Intellectual Property and Competition Review Committee (IPCRC); and
- In September 1999 the CLRC held a half-day forum in with interested parties.

- The CLRC released a draft report in February 2000 and received 15 submissions.
- Its Final Report was presented to the then Attorney-General on 21 April 2000. The CLRC indicated in its report that the small number of submissions it received in response to the draft report indicated that its recommendations were largely uncontroversial.
- The CLRC's terms of reference, its Discussion paper and Interim and Final reports are available online.[15]
- The Intellectual Property Competition Review Committee (IPCRC), under terms of reference given to it by the Attorney-General and the Treasurer, also reviewed intellectual property legislation under the Competition Principles Agreement, including the Copyright Act. It presented its final report to Ministers on September 2000 (the Ergas Report). Recommendation 9, addressed matters relating to collecting societies, ACCC guidelines and alternative forms of dispute resolution for matters arising between collecting societies and their members.
- The Government's Response to the Ergas Report was tabled in August 2001, and is available online.[16] The Response accepted the IPCRC recommendation in part, and agreed:
  - to review relevant provisions of the Act, regulations and guidelines relating to the requirements for declaration, revocation and compliance by collecting societies operating under the statutory licences as raised by the IPCRC;
  - in relation to the proposed ACCC mechanism, that
    (i) The ACCC be required by statute to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration and other conditions of licenses that currently can or will be able to be the subject of determination by the Copyright Tribunal under Part VI of the Copyright Act; and
    (ii) the Copyright Act be amended to ensure that the Copyright Tribunal has the discretion to take account of the ACCC guidelines and admit the ACCC as a party to Tribunal proceedings. It noted that the nature of ACCC's guidelines would be advisory, not determinative - in the event that negotiations failed and one or other party applied to the Tribunal, recourse to the Tribunal would not be restricted in any way; and

[15] http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Jurisdiction_and_Procedures_of_the_Copyright_Tribunal

[16] http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP216DCFAA58A8C720CA25705F0081E54D

- that ADR mechanisms for copyright owners, collecting societies and users should be encouraged as part of these processes to ensure access to affordable and equitable alternative means of resolving disputes between parties in a licensing or potential licensing agreement. It noted the Government was exploring avenues to provide for ADR, and that ACCC guidelines may be of assistance.

- The Government developed its response to the majority recommendations in the CLRC report during 2004, however other priorities subsequently meant that these reforms were deferred.
- During preparation of the draft legislation, consultations were held with the Copyright Tribunal, with the Civil Justice Division of the Department (relating to courts and tribunals) and with the ACCC.
- Exposure Drafts of the Copyright Tribunal aspects of the Bill and explanatory material were placed on the Department's website for public comment on 11 October 2006, and publicised in Issue 42 of the AGD e-News on Copyright sent on the same date.[17]

Technological Protection Measures (Schedule 12)

- Protection for technological protection measures (TPMs) is currently found in s116A and ss132(5A) and (5B) of the *Copyright Act 1968*, which was inserted by the *Copyright Amendment (Digital Agenda) Act 2000*.
- Australia is obliged to implement Article 17.4.7 of the Australia-United States Free Trade Agreement (AUSFTA), which relates to TPM protection, by 1 January 2007.
- The TPM obligations in the AUSFTA were considered by the Joint Standing Committee on Treaties and the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America in 2004.
- The issue of TPM exceptions was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs on 19 July 2005. The Committee accepted submissions and undertook public hearings on the TPM provisions in the AUSFTA.
- Following the tabling of the Committee's Report on 1 March 2006, the Department accepted written views of stakeholders on the Committee's recommendations.
- The Department held in-confidence discussions with key stakeholders on the Government's proposed approach on 27 July 2006.
- The Department also held discussions with US Government officials on the proposed approach and the Exposure Draft.
- An Exposure Draft of the Bill was made available on the Department's website on 8 September 2006 for comment for three weeks, and publicised by the AGD e-news on Copyright on 4 September 2006.[18] Comments on the Exposure Draft were due on 22 September 2006. Approximately 45 submissions were received.

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[17] http://www.ag.gov.au/agd/WWW/enewsCopyrightHome.nsf/Page/eNews_Issue_42_-_October_2006

[18] See Issue 40 at http://www.ag.gov.au/agd/WWW/enewscopyrighthome.nsf/Page/eNews_Issue_40-September_2006

- An Exposure Draft of the Regulations was made available from the Department's website for comment on 15 September 2006. Comments were due on 6 October 2006. Three submissions were received. Seventeen submissions on the Exposure Draft of the Bill also commented on the Regulations.
- On 4 September 2006, in Edition 40 of the e-News on Copyright,[19] the Department called for submissions and further evidence in support of granting a limited number of further exceptions to the TPM scheme. Initial submissions were due by 25 September 2006. Eight submissions were received. Reply comments in response to submissions (which have been placed on the Department's website) were due by 24 October 2006. Six submissions were received.

[19] See Issue 40 at http://www.ag.gov.au/agd/WWW/enewscopyrighthome.nsf/Page/eNews_Issue_40-September_2006