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Senate Legal and Constitutional Affairs Committee
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Dear Sir/Madam,

Re: Senate Inquiry - Copyright Amendment Bill 2006

I write with reference to the current Senate Inquiry into the Copyright Amendment Bill 2006 and wish to make comments in relation to circumvention of digital rights management (technical protection measures) as well as changes to fair dealing and similar provisions.

The interoperability provisions do not do enough to ensure open source projects have access and the means to create interoperable software. At a minimum they should be given permission to share a copy of a proprietary program between the software developers to reduce development costs. In other countries, namely France, there was a proposal requiring DRM vendors to provide the means of interoperability. I consider this to be the most positive course of action in this area and would strongly urge that the committee consider this as a preferred measure (for more information see: http://www.freedom-to-tinker.com/?p=997)

In addition, encryption researchers are obliged to seek permission prior to circumventing DRM – permission need not necessarily be forthcoming, but they need to make the effort – this on the face of it appears benign, but in practice could lead to the undermining of research efforts and increased lawsuits against them – although s202A (which pertains to groundless threats) could be some comfort if they make it to court, the point is that they shouldn't even be in the firing line of litigation in the first place nor should they have to disclose what they are researching unless they want to.

Libraries and educational institutions are allowed to break copy protection for the purpose of making acquisition decisions, or for the purposes of their normal lawful functions, making no allowance for the need to preserve open access to culture for future generations. There needs to be a specific provision ensuring that material that is currently within the public domain is legislatively exempt from DRM, and that all users have the lawful right to remove DRM on the expiration of the copyright term.

In my opinion the scale of penalties for circumventing DRM is grossly over stated and a massive overreaction to an activity that is largely already wide spread and has a limited impact on the financial viability of these industries. The degree of penalties is

further misdirected given the placement of the burden of proof on the defendant and the added expense and complications of having to meet this standard.

While the regulations allow for further circumvention grounds to be developed, the Minister has 4 years to make a recommendation to the Governor General from the date an application is made. This is completely inadequate – at a maximum the recommendation should have to be made within 6 months, or perhaps 12 months when an inquiry is conducted. There is simply no excuse for delaying such a move when the Minister can simply reject the application anyway. These provisions do nothing to provide certainty for those lobbying for changes and merely give the Government of the day an excuse to delay and frustrate such applications.

The other bad parts in relation to circumvention are the omissions – I have already covered the public domain. But further to this, there is also no blanket fair dealing exception (time shifting/format shifting) – this is completely unacceptable. The Copyright Act currently contains, and within this Bill seeks to expand, the fair dealing provisions that ensure a balance of copyright policy. It is completely unacceptable that DRM vendors be allowed to alter these arrangements through software architecture. The Government must account to the people. The people must have fair access and use of cultural works and a failure to include such a provision within this Bill is a failure of the highest order. I urge the Senate to insist that protection be put in place for these uses of copyrighted material. As a matter of accuracy, there should also be a provision within the Copyright Act preventing the use of contract law for negotiating away these rights.

Other changes to the Australian Copyright Act, which were largely marketed as the allowances that were being made in exchange for the DRM provisions, also fall well short of the mark.

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.

The wording in relation to the time shifting provisions allowing TV and radio broadcasts to be recorded (s 111) has been altered from only permitting one viewing, to permitting viewing at a 'more convenient time' which will allow people to legally rewind and replay, but which still is demonstrably out of step with the everyday practices of Australians. Every family in Australia has recorded television shows and replayed them repeatedly - the narrowness of these provisions does nothing to alleviate the fact that most Australians will continue to break the law and there will no compensation for copyright holders.

Much the same can be said for the format shifting provisions, particularly those that relate to music (s 109A) which allow you to rip a CD to put on your mp3 player but insist that you then delete the temporary copy from your computer – you cannot legally rip the song on to your lap top and have it on your mp3 player at the same

time. This will simply be ignored, brings the rule of law into disrepute and should be changed to reflect the wider fair use provisions currently enjoyed in the United States.

If anything, the Copyright Act should contain a private copying levy as is in place in Canada and many other countries in the world which seeks to remunerate copyright holders for copies made for personal uses.

The application of conditions insisting that copyright for the purposes of parody and satire can only be enjoyed where it is a special case which does not conflict with the normal exploitation of the work and cannot prejudice the legitimate interests of the copyright holder are completely unsuitable. How exactly does one apply these provisions to parody and satire? Why should they have to when there are no equivalent conditions placed on criticism and review?

Finally, the increased penalties for the distribution of unauthorised sound recordings (s 248QE) are also a gross overreaction. Once again, undoubtedly the use of a compulsory licensing scheme for Internet file sharing is the most productive course of action, remunerating artists whilst minimising social costs. The Government has gotten the policy completely wrong in this regard and shows an intention of bowing to pressure from international mass media corporations rather than representing the interests of the people that have elected them.

I trust you will consider my comments in due course and thank you for the opportunity to contribute to the inquiry,

Sally Hawkins