



09 November 2006

Ms Jackie Morris
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

BY EMAIL: legcon.sen@aph.gov.au

Dear Ms Morris

Supplementary comments on Copyright Amendment Bill 2006

The Copyright Advisory Group (CAG) would like to thank the Committee for the opportunity to appear to discuss CAG's support for, or concerns with, aspects of the Copyright Amendment Bill 2006.

CAG is conscious of the short time available to the Committee to consider these issues prior to finalising the Committee's report. However, CAG would like to make three additional points to clarify certain issues that were discussed at the hearing on Tuesday.

1. Copyright Tribunal – jurisdiction over records notices

CAG notes the comments of Mr Simon Lake (Hansard, L&CA20) supporting the Government's intention that every aspect of the operation of the statutory licence be subject to the Tribunal's jurisdiction (Schedule 11 of the Bill). CAG does not oppose the extension of the Tribunal's jurisdiction to the records notice system, nor does it oppose the Tribunal being given oversight of compliance issues in relation to the records notices kept by educational institutions.

CAG's concern with this Bill is that in creating Tribunal jurisdiction over the records notice system, the existing provisions setting out the detail of the records system have been removed. For example, Schedule 11 Part 4 item 40 (page 171) repeals the existing marking and record keeping requirements in the Part VA statutory licence and provides that a record keeping system from now on must be as agreed by the parties or, in the absence of agreement, as determined by the Copyright Tribunal.

CAG is concerned that this removes a 'fall back' or 'default' position, whereby institutions have clear rules to follow in either the absence of an agreed system, or while such a system is being resolved by Tribunal proceedings. This also precludes an individual institution from using the records system as a clearly defined default position if other institutions wish to negotiate a more comprehensive monitoring system with the collecting society. CAG submits that these default rules should remain, but has no objection to the Tribunal being granted oversight of an institution's compliance with those default rules.

2. Insubstantial part

The Copyright Agency Limited's submission in relation to insubstantial portions (section 135ZMB, Schedule 8 of the Bill, pages 121-122) refers to the 1999 House of Representatives Committee report which recommended that the insubstantial portion provisions (including s.135ZMB) be removed from the Bill.

CAG refers the Committee to the joint submission made at the time by the Attorney-General's Department and the Department of Communications, Information Technology and the Arts on this issue, which noted that it is a fundamental principle of copyright law that an act in relation to an insubstantial part of a work cannot be an infringement of copyright. These provisions merely reflect that principle in the context of the statutory licence, providing guidance to educational institutions as to what is regarded as an insubstantial part, and reflecting what the Government considered to be desirable for the benefit of education. CAG understands that it was for these reasons that the Government rejected the recommendations of the House of Representatives Committee.

CAG submits that these reasons are equally relevant today, and that proposed section 135ZMB(5) should be removed from the Bill as being contrary to fundamental principles of copyright law.

3. Enforcement provisions

CAG has serious concerns with the new strict liability offences set out in Schedule 1, specifically sections 135AL, 135AN and 135AO. These are of particular concern to the Independent Schools Council and the National Catholic Education Commission.

Non-Government schools are concerned that the new strict liability offences impose a new criminal liability on schools where the teacher or student commits a copyright infringement and lacks the requisite knowledge or intention. Some examples are set out below:

- a teacher uses the school computer to copy a DVD for teaching purposes
- a teacher uses a school photocopier to copy 2 chapters of a textbook to include in a teaching resource

- a teacher plays a commercially purchased DVD in the school hall on a rainy day or at a school camp.

It is very easy for a teacher or a student to inadvertently infringe copyright, particularly when schools are subject to a complex and confusing education licensing system and broad new fair dealing provisions.

We note that most Government schools would be protected from prosecution by section 7 of the *Copyright Act 1968 (Cth)*, which provides that the Crown cannot be prosecuted for an offence. Victorian school councils, however, may be criminally liable under these provisions because many Victorian government school staff are employed by school councils rather than the Victorian Department of Education and Training.

It is unfair that Catholic and Independent schools, and perhaps Victorian Government schools, will have stricter compliance obligations than Government schools in other states and territories.

We endorse the approach of the Australian Vice-Chancellors' Committee and recommend that:

- all of the proposed new enforcement provisions be subject to an educational institution defence; and
- such defence be clarified to ensure that educational institutions will not be exposed to criminal liability merely because they are found to have inadvertently authorised a staff member or student to reproduce or communicate copyright works or other subject matter.

CAG thanks the Committee for its consideration of these issues.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Delia Browne', with a long horizontal flourish extending to the right.

Delia Browne
National Copyright Director
Ministerial Council on Employment, Education, Training and Youth Affairs