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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Sir/Madam

Inquiry into the Copyright Amendment Bill 2006

We enclose herewith submission from Electronic Frontiers Australia Inc. to the Committee's inquiry.

Enquiries or questions related to the attached submission may be directed to the Convenor of EFA's Intellectual Property Committee, Mr Dale Clapperton.

Yours faithfully

Irene Graham
Executive Director
Electronic Frontiers Australia Inc.

Encl: Submission in RTF format.

Electronic Frontiers Australia Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Provisions of the *Copyright Amendment Bill 2006*

About EFA

Electronic Frontiers Australia Inc (EFA) is a non-profit national organisation concerned with the protection and promotion of the civil liberties of users of computer based communications systems and of those affected by their use. EFA was established in 1994, is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties.

Intellectual property issues have increasingly become the concern of computer and Internet users, and developers of related technologies. EFA members and supporters come from all parts of Australia and from diverse backgrounds. They have a common interest in ensuring that copyright law, particularly as it applies in the digital environment, provides an appropriate balance between ensuring protection for copyright developers and freedom for copyright users and other developers.

Introduction

EFA believes that copyright law is and should be for the purpose of promoting creativity, innovation and development. The traditional means for achieving that end has been the granting of economic incentives through copyright ownership. It should be borne in mind that the "making and enforcement of law are not ends in themselves"[1] and that rights granted under copyright law should be treated as *means* and not as *ends*.

The provisions of the *Copyright Amendment Bill 2006* (the Bill) continue the unfortunate modern trend of treating rights under copyright as ends rather than means. This submission seeks to articulate our major concerns about the Bill, but due to the very short timeframe available to prepare this submission, and other demands upon the time of EFA's volunteer board members, should not be taken as an exhaustive statement of our concerns.

We have had the advantage of reading the submission of Mr Dale Clapperton and Professor Stephen Corones from Queensland University of Technology (the 'Clapperton/Corones submission') in draft form, and we endorse the issues raised and recommendations made by that submission.[2]

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[1] Mason P, speaking extra-judicially at the 3rd Annual Conference of the Association for Compliance Professionals of Australia Inc, 23 September 1999:
< http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_230999 >

[2] Mr Clapperton is a board member of EFA and contributed to the production of this submission.

We have also had the advantage of reading the thoughts of Ms Kimberlee Weatherall as expressed in her blog.[3] While we do not concur with her assessment of the Bill in every respect, we concur with and endorse her views on the criminal liability provisions of the Bill,[4] and on the changes to fair dealing for research or study.[5]

Last but by no means least; we endorse the issues raised by Professor Brian Fitzgerald in his online opinion piece.[6]

Stevens v Sony

A useful starting point in any discussion of anti-circumvention laws in the Australian context is the decision of the High Court of Australia in the case of *Stevens v Sony.*[7] Delivered in 2005, this decision was in part a warning of the potential effects of giving the protection of anti-circumvention laws to devices which control access to copyrighted works, instead of devices which prevent infringing copying of those works.

In his judgment, Kirby J discussed one effect of the purported TPM:

> By their line the Popes of old divided the world into two spheres of influence. Sony, it appears, has divided the world (for the moment) into at least three spheres or markets. By the combined operation of the CD ROM access code and the boot ROM in the PlayStation consoles, Sony sought to impose restrictions on the ordinary rights of owners, respectively of the CD ROMS and consoles, beyond those relevant to any copyright infringement as such. In effect, and apparently intentionally, those restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit.

Kirby J went on to discuss the effect of giving anti-circumvention protection to technologies which control access to copyright material:

> If the definition of TPM were to be read expansively, so as to include devices designed to prevent access to material, with no inherent or necessary link to the prevention or inhibition of infringement of copyright, this would expand the ambit of the definition beyond that naturally indicated by the text of s 10(1) of the Copyright Act. It could interfere with the fair dealing provisions in Div 3 of Pt III of the Copyright Act and thereby alter the balance struck by the law in this country.

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[3] http://weatherall.blogspot.com

[4] http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116099974198599060

[5] http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116160341318821312

[6] http://www.onlineopinion.com.au/view.asp?article=5068

[7] [2005] HCA 58.

> [Protecting access controls] would enable rights holders effectively to opt out of the fair dealing scheme of the Act. This would have the potential consequence of restricting access to a broad range of material and of impeding lawful dealings as permitted by Div 3 of Pt III of the Copyright Act. The inevitable result would be the substitution of contractual obligations inter partes for the provisions contained in the Copyright Act — the relevant public law. Potentially, this could have serious consequences for the operation of the fair dealing provisions of that Act.

Notwithstanding these warnings, the Australia-United States Free Trade Agreement (FTA) obligates Australia to extend legal protection to devices which control access to copyright material.[8]

The critical question is how far that protection must go.

Changes to the anti-circumvention provisions from the exposure draft

The legislation which would implement Australia's anti-circumvention obligations under the FTA was first publicly released as an exposure draft of the *Copyright Amendment (Technological Protection Measures) Bill 2006* (the 'exposure draft') by the Attorney-General's Department on 4 September 2006. Similar provisions form Schedule 12 of the Bill.

The Attorney-General, in his second reading speech on the Bill, stated:

> Exposure drafts of most of the amendments were made available to the public from my department's website prior to introduction of the bill to give interested parties the opportunity to consider them and prepare any comments for submission to the Senate committee. I look forward to the committee's report.

What the Attorney-General failed to say is the provisions within Schedule 12 had undergone serious and fundamental changes from what was contained in the exposure draft. These changes were unannounced, unexplained, and only came to light after doing a side-by-side comparison of the provisions of Schedule 12 with the provisions of the exposure draft.

Any comments on the anti-circumvention provisions which were made to the Attorney-General's Department, or prepared for the Committee, on the basis of the exposure draft would be largely invalidated by these changes. Interested parties instead had a mere 7 business days to prepare submissions to the Committee on the radically different provisions within Schedule 12.

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[8] EFA opposed these provisions of the FTA at the time, and remains opposed to them. See generally our submission to the Joint Standing Committee on Treaties (http://www.aph.gov.au/house/committee/jsct/usafta/subs/SUB50.pdf) and our submission to the Senate Select Committee on the FTA (http://www.aph.gov.au/senate/committee/freetrade_ctte/submissions/sub282.pdf).

The anti-circumvention provisions themselves

The anti-circumvention provisions of the exposure draft were, in our view, about as good as we could reasonably have expected, given the obvious need for compliance with the text of the FTA.

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.[9]

Despite this recommendation, and the government accepting the recommendation in their response to that Committee's report,[10] this vital link was abandoned in the Bill currently before this Committee. No announcement or explanation of this change was given.

We respectfully submit that such a radical policy reversal from the exposure draft to the Bill demands explanation by the Attorney-General's Department.

For the sake of brevity, rather than setting out our thoughts on the substance of the linkage issue, we adopt the comments of the Clapperton/Corones submission on this issue.

The fair use review

The Attorney-General's department in May 2005 announced a review of fair use and other copyright exceptions, and released an issues paper soliciting submissions.

'Fair use' is the open-ended exception which exists under the copyright law of the United States, which courts have held to protect activities such as:

1. Recording television broadcasts ('time-shifting');
2. Copying material from one format to another ('format-shifting');
3. Reverse engineering computer software to produce interoperable products;
4. Copying computer software to avoid anti-competitive restraints in the market for printer toner cartridges; and
5. Reusing copyright material in parody.

The US courts in each case evaluated the activity under the relevant legislative tests (the purpose and character of the use, including whether of non-commercial nature or for non-profit educational purposes; the nature of the copyright work; the amount and substantiality of the portion used in relation to the work as a

[9] http://www.aph.gov.au/house/committee/laca/protection/report/fullreport.pdf at [2.61], [2.75].
[10] http://tinyurl.com/yknsz6

whole; and the effect on the potential market for or value of the copyright work) and determined that it was a fair use, without resort to the legislature enacting a specific exception to protect the use in question.

This flexible approach is of fundamental importance to the development of new technologies and new uses of copyright material. Reliance on the legislature to keep copyright exceptions in pace with new technology is an approach which is doomed to fail.

This is best illustrated by the fact that time-shifting is unlawful in Australia. Since the introduction of the Betamax videocassette recorder in 1975, practically every Australian citizen who has recorded a television broadcast for later viewing has done so unlawfully. Despite knowledge of this problem, and time-shifting being established as fair use in the United States since a test case in 1984, it has taken until today for the government to take steps to fix this problem.

We also note that of the specific fair uses identified above:

1. Time-shifting is the subject of a proposed specific exception in the Bill;
2. Format-shifting is the subject of a proposed specific exception in the Bill;
3. Reverse engineering of computer software is already the subject of a specific exception in the *Copyright Act 1968*,[11] but this exception was only introduced after a company was sued for so doing, and fought a test case all the way to the High Court, only to lose;[12]
4. Copying of computer software to avoid anti-competitive restraints in the market for printer toner cartridges is and will remain an infringement of copyright; and
5. Parody is the subject of a proposed specific exception in the Bill.

Australia requires a flexible open-ended exception to copyright, such as fair use, to keep pace with new and emerging technologies and reduce the dependence on legislative intervention to fix problems after they have occurred.

Introduction of a fair-use styled exception was also recommended by:

- The Joint Standing Committee on Treaties report on the FTA;[13]
- The Senate Select Committee report on the FTA;[14] and
- The Copyright Law Review Committee report on simplification of the *Copyright Act.*[15]

[11] *Copyright Act 1968* (Cth) s 47D.
[12] *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1.
[13] At p 240.
[14] At p 230.
[15] At [6.10].

Lastly, it is a glaring omission that the FTA, whose objective was to harmonise the laws of Australia and the United States, did not include fair use or a similar provision. This omission amounts to *selective* harmonisation only, and is all the more reason for Australia to introduce a fair use right.

For further information on this point we refer the Committee to our submission to the Attorney-General's Department fair use review.[16]

Criminal provisions of the Bill

While we are not experts in criminal law, we have serious concerns about the criminal provisions of the Bill. As detailed in the Clapperton/Corones submission, s 132AC poses a serious risk to innovators and developers of new technology.

Section 132AL(2) restates the existing offence in s 132(3) of the *Copyright Act 1968*. The effect of s 132(3) is that every Australian who possesses a VCR machine and intends to use it for recording television broadcasts is guilty of a criminal offence and liable to imprisonment for 5 years.

This bizarre situation is the result of apparently minor amendments to s 132(3) which occurred in 1998. The *Copyright Amendment Act (No. 1) 1998* amended s 132(3) by replacing the word 'plate' with the word 'device'.

'Plate', as defined by s 10(1) of the *Copyright Act 1968* 'includes a stereotype, stone, block, mould, matrix, transfer, negative, or other similar appliance' – all things which are only likely to be used in commercial-scale infringements of copyright.

By replacing 'plate' with 'device' in s 132(3), the scope of the provision was expanded dramatically. It now almost certainly applies to any kind of electronic device (eg a VCR machine, an MP3 player, a personal computer, a DVD burner, a dual-tape audio cassette deck), including many devices which are used for infringing personal copying. Section 132(3) makes possession of those devices a criminal offence.

Section 132AI would arguably make distribution of copyright material via the Internet a criminal offence, even where the person responsible had not intended such distribution to occur. Such a situation could easily occur where infringing material is downloaded using a peer-to-peer application by a technologically unsophisticated person, who is unaware that the application also makes the infringing material available to other persons on the Internet. While we do not seek to justify infringement of copyright in this way, we question the appropriateness of criminal sanctions in such a case.

[16] http://tinyurl.com/yg744x

The most significant change in the criminal provisions of the Bill is the introduction of summary offences (for which the fault element is negligence) and strict liability offences (for which there is no fault element) for most offences relating to copyright.

The purpose of these changes is simple – they are designed to lower the standard of proof and make it easier to criminally prosecute people for infringement of copyright. Coupled with the 'infringement notice' scheme mentioned in the explanatory memorandum, the result will be many more people, probably including a disproportionate number of younger people, who will at worst be facing jail time, and at best have their records and career prospects blighted by a criminal conviction.

The timeframe for review of the Bill

The provisions of the Bill make substantial changes to Australian copyright law. These changes, especially the new criminal provisions, deserve lengthy and detailed scrutiny and public debate.

Only the TPM provisions of the Bill - a mere 14% of the whole – needs to be dealt with this year. The majority of the Bill requires more scrutiny than can adequately be provided in the timeframe set for this Committee.

We whole-heartedly agree with the remarks made in the Senate by Senators Bartlett and Ludwig on 19 October concerning the Bill and the inadequate timeframe allowed for consideration of it.

We urge the Committee to recommend that Schedules 1-11 of the Bill be removed and not further considered until they have been fully examined in committee, with a reasonable timeframe for the making of submissions and conducting public hearings.