



AFACT

AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT



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Submission to the Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Dear Senators,

I thank Ms Weatherall for copying me on her submission.

Her paper adopts the basic premise that copyright infringement should be considered acceptable unless it is on a commercial scale and that the law should be changed to reflect that belief. That it should be reasonable to record the film or concert 'you are enjoying' – completely ignoring the fact that over 90% of the 13 million pirate movies sold or the 11 million downloaded in Australia in 2005 started life with a person copying the film in a cinema with an ordinary camcorder. She implies that the existing civil and criminal laws are adequate to address this problem – they manifestly are not.

It is simply wrong and deeply flawed to suggest that theft is not a crime because the motivation is for 'personal use'.

The argument has even less merit when the justification is not even argued to be based in "need", but is based on a self indulgent appeal to personal gratification. Surely Ms Weatherall can not seriously champion a right to infringe copyright on the basis that one is 'enjoying' a concert or because one is a 'fan': "I like it so I should be permitted to just take it..."

Tax evasion has a purely personal benefit.

Shop stealing is no less a crime if you steal the goods for your own use.

Fishing when it is prohibited is a crime regardless of any intention to sell or eat the catch.

Why ? Because if we **all** stole from our local store or **all** caught the fish the resulting damage would be too great.

Ordinary Australians break the law when they drink drive, when they don't pay their tax, when they park in the wrong place. In the same way ordinary Australians will risk breaking the laws when it comes to film piracy.

The reality is more than 1/5 of Australians are currently involved in the types of infringing behaviour the Government expressly intends and needs to deter. This means ordinary everyday Australians from all walks of life and of varying ages. Ordinary people who make illegal copies of film and television programs for work colleagues and friends. Doctors, lawyers, factory workers, mothers, students using ordinary equipment engaged in pirate movie uploading, copying, swap clubs and 'Bali parties'.

These are not appropriate or acceptable 'consumer' or 'small business' behaviours but they are growing rapidly.

Further, the proposed infringements are being demonised as criminalising this behaviour. The proposed legislation does not go that far.

Rather, the effect of the Bill is that behaviour be **regulated** not criminalised

The AGD has made very clear that the proposed fines are a regulatory measure, **they do not generate a criminal record of any kind** and must by law be underpinned by strict liability.

Strict liability penalties and fines to deter the behaviour [with the appropriate right for the person to question the fine in court] is the most efficient, effective way for society and police to respond to the lower range of these types of offences.

Ms Weatherall's suggested changes to the proposed strict liability and infringement notice scheme would not discourage copyright infringement in Australia - it would enshrine the practice.

Her submission regarding sections 132AD, AF, AG, AH, AI, AJ, PJ and QE have no merit on the arguments put forward as they clearly apply only to activity for profit, trade or distribution to an extent that is prejudicial to the copyright owner.

An appropriate response to the concern that penalties in sections 132 AN, AO, PA and PE are too high for behaviours that could be considered to be "innocent" or merely misguided [in the sense they are not believed to be motivated by a desire for an unacceptable level of profit], would be to introduce a simple "first infringement" provision limiting the strict liability penalty to one single infringement once only, carrying a smaller fine, with a "second or subsequent infringement" provision arising from a later repeat of the same behaviour carrying the currently proposed levels of penalty.

This would meet Ms Weatherall's concerns and remove the public's perception that such behaviour is acceptable because it will never be penalized. It will allow for corrective action to be commenced at a very low level, with an appropriate response for continuing infringement, and without creating a deeply flawed defence to the advantage of flagrant and serious offenders.

Virtually all DVD burning operations closed down under our existing laws by police have been located in the offender's home using ordinary computer equipment and an internet connection. It is patently unreasonable and scare mongering to suggest police will use the infringement notice scheme to fine people for merely owning a computer or suggest police cannot or should not be relied upon to exercise judgment when using these laws.

Proving these offences by reference to size of the operation, or specialised commercial scale 'devices' has been made impossible by the developments in ordinary technology. One burner in one PC can produce pirate DVDs worth \$2000 a week, burned to order with no special equipment or stockpile of incriminating infringing copies.

It is an essential part of the investigation and charging process that Police make judgments about the nature and extent of activities based on the evidence they uncover. Police therefore are perfectly placed to make judgments about the scope and nature of these activities in the ordinary course of their work. Where there is doubt, Police also have access to assistance from the law offices of the CDPP.

The Schedule 1 low penalty regulatory fine regime allows police to discourage damaging behaviour before it escalates into more significant criminal activity. The alternative would be to make these fines available for copyright owners to lay without recourse to police resources.

The suggestion that we limit our criminal law so it does not apply to small to medium sized businesses [whose business presumably benefits from using or making infringing copies of copyright works] suggests it is acceptable for petty crime to benefit small commercial businesses but the criminal law should be applied in full force to large businesses ! Does Ms Weatherall intend the law should apply differently to rich and poor people ?

There are many precedents in Australia's criminal law and infringement notice schemes for the regulatory regime outlined in Schedule 1 and I submit the Schedule should not be altered and should pass through with the entire Bill.

I do however agree that the criminal and regulatory provisions of the Copyright Act should be the subject of police and public guidelines, and ongoing scrutiny and review to monitor the outcomes in the real world. I would welcome such a recommendation by the Committee. I also welcome the suggestion that guidelines be made available to all stakeholders.

I submit the Committee have regard to the AGD and the CDPP as being experts in the interpretation, scope and operation of Australia's criminal and regulatory law, and would be pleased to provide specific commentary on the legal analysis and drafting of any particular proposal in Ms Weatherall's submission on request.

Yours Faithfully,

Adrianne Pecotic
Executive Director