



AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT



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31 October 2006

AFACT SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

'PROVISIONS OF THE *COPYRIGHT AMENDMENT BILL 2006*' INQUIRY

AFACT strongly supports the introduction of this Bill and believes the package of reforms will encourage copyright businesses to provide more, and more flexible ways, for consumers to access digital content. AFACT seeks one amendment, as set out below, to ensure the Bill more effectively combats film piracy, and encourages the Committee to support this significant legislation.

The Australian Federation Against Copyright Theft (AFACT) works closely with industry, government, police and educational institutions to address copyright theft and protect the interests of the Australian film and TV industry as well as consumers.

AFACT represents the 50,000 Australians employed in the film and TV industry and who are adversely affected by copyright theft. These include local independent cinemas, video stores, filmmakers, production houses, broadcasters (free-to-air and subscription) and distributors.

AFACT's members include: Village Roadshow; Buena Vista International Inc; Paramount Pictures Corp; Sony Pictures Releasing International Corp; Twentieth Century Fox International Corp; Universal International Films Inc; and Warner Bros. Pictures International (a division of Warner Bros. Pictures Inc).

Many cinemas, nearly all Australian filmmakers, & over 85% of video stores are small independent businesses.

75 – 81% of industry jobs are casual or part time and particularly vulnerable to economic loss and production downturn. 94% of cinemas & video stores are located in suburban & regional areas (39% in the country).

The scale of the problem

A global report into piracy was commissioned by the Motion Picture Association (MPA) and conducted by L.E.K. Consulting over 18 months in 22 countries including Australia. The study found that Australian film industry businesses lost an estimated \$233 million to pirates illegally duplicating and downloading movies last year, with the number of counterfeited DVDs in circulation almost equalling legitimate copies.

In 2005, over \$20 million per annum was lost in Australia in GST tax revenue alone.

Highlighting the impact that piracy is having on the Australian rental/retail sector, the L.E.K. report estimates that **more than 47 million illegal copies of DVD movies were in circulation in Australia in 2005**. According to official industry figures, Australian consumers bought 52.3 million genuine DVDs last year.

The home entertainment sales sector lost an estimated \$107 million as a result, while cinemas and film distributors lost \$65 million and the rental/retail sector \$61 million.

The results do not take into account losses flowing from movies on free-to-air television or television programs and only account for movies on pay-per-view subscription television, not standard subscription television. Nor do they take into account the economic and social costs to individuals who work in the industry.

The illegal distribution of unauthorized copies of movies rose from 4% in 2000 to around 10% of the legitimate market in 2004.

Police jurisdictions now recognize organized crime involvement in film piracy. Organized crime links to movie piracy in Australia were first uncovered following a raid on Malaysia-linked movie pirates in 2002.

Film piracy in the digital age has become more profitable than drug dealing. Recent copyright prosecutions in Australia show connections between film piracy and ALL the below crimes, also known to involve and attract organized crime syndicates:

- Illegal Pornography
- Child exploitation
- Child pornography
- Classification Offences
- Stolen goods
- Internet based crimes
- Software & games piracy
- Counterfeit goods
- Social security fraud
- Drug dealing and supply.

In this environment, AFACT welcomes the attention of the Government and this Senate Committee, in developing robust enforceable legislation to combat piracy.

AFACT strongly supports the introduction of this Bill, which introduces a new tiered criminal liability scheme for copyright crimes in Australia.

Australian attitudes to piracy

It is well recognised by law enforcement and industry groups in Australia that copyright crimes are not well understood by the public, and are rapidly increasing in prevalence due to their highly profitable nature and the strong public demand for copyright products¹.

It is also recognized that due to the lack of police resources allocated to these crimes, very few matters are prosecuted each year compared to the amount of infringing activity taking place and the lack of visible enforcement in turn reinforces public complacency to these crimes².

The problem of copyright piracy in Australia is a real one.

The findings of a study into Australian consumer attitudes towards piracy was commissioned last November by the local film and television industry as part of a united push to create better public awareness of the impact of piracy on industry and society.

¹ AFACT estimates that film piracy has tripled since 2000 due mainly to changes in the digital technologies which facilitate the crime. A LEK Global Research Study found damage in Australia at \$233 million in 2005 with illegal DVDs in circulation here almost equal to the number of legal discs sold.

² See Bergent Market Intelligence Research into Australian attitudes to film copyright theft November 2005

Conducted by Bergent Market Intelligence in November 2005, involving 12 focus groups [108 active 'pirates' aged 16 – 45 broad socio-economic demographic], one of the study's key conclusions was that **nearly one fifth of Australians last year watched a movie on pirated DVD before its cinema release.**

AFACT's philosophy is that this serious problem of copyright piracy in Australia must be addressed through three strategic and complementary approaches:

- industry and Government commitment to consumer education about the law, the importance of copyright industries and the harm caused by copyright piracy;
- effective criminal laws to ensure appropriate deterrence;
- effective and efficient enforcement of the law.

AFACT is working with industry and Government to implement the first part of this strategy through initiatives such as the "Movie Piracy: It's A Crime" campaign supported in cinemas, video stores and on DVD.

However, education by itself is not sufficient to address this serious and growing problem. Education initiatives can only go so far, and need to be backed up by committed and effective enforcement.

SCHEDULE 1 – CRIMINAL LAWS

It is for this reason that AFACT is so pleased to see the introduction of this important package of reforms which tackle the damaging increase in copyright theft in an innovative and effective manner that balances the rights of the prosecutor and defendant, whilst stopping short of making the mere possession and purchase of illegal copies an offence.

Schedule 1 introduces a new way of dealing with the existing offences that recognises that criminal activity ranges from very serious to lower level matters and provides a tiered system including regulatory strict liability offences to address lower level crimes.

The particularly beneficial feature of these amendments is that copyright crimes in Australia will be able to be prosecuted according to three tiers of liability – strict liability offences, summary offences and indictable offences. This will enable law enforcement officers to address copyright crime at a level appropriate to the offence committed. For example, police can elect to prosecute a first time offender under a strict liability provision or issue an on-the-spot fine.

The proposed laws will:

- allow the police to lay charges appropriate to the level of activity undertaken by the defendant,
- provide a visible deterrence to copyright crimes for 'one off' offenders and to ensure those crimes do not escalate due to a lack of appropriate, low cost tools in the hands of police;
- remove the burden on prosecutors and the courts that currently deters prosecution of these crimes under the current system.

The proposed strict liability laws also provide a significant advancement over the current position for defendants, as they remove the need for police to always lay charges with a potential jail penalty attached, whilst still providing a low - whilst still deterrent and clearly specified - penalty for 'one off' offenders. The amendments also ensure that the defendant can challenge any charges or infringement notice by recourse to the Local Court.³

³ The tiered criminal and strict liability offences appear to follow a precedent for similar approaches to allow flexibility in dealing with minor and major drug matters, or to deal with certain types of traffic infringements.

AFACT believes that the enforcement provisions in the Bill are a balanced and workable package. They will provide significant advancement in deterring copyright crimes in Australia in a manner that ensures that the police are able to form appropriate judgments about when a particular person should be issued a fine rather than face a formal prosecution.

SCHEDULE 12 - TECHNOLOGICAL PROTECTION MEASURES

Schedule 12 of the *Copyright Amendment Bill 2006 (Bill)* contains a number of provisions designed to align Australia's copyright legislation with the requirements of the Australia-United States Free Trade Agreement (AUSFTA). AFACT believes that these provisions should be applauded in their own right, as an important mechanism for ensuring that copyright industries can continue to invest in the innovative delivery of copyright products to Australian consumers.

Technological protection measures (**TPMs**) underpin the practical operation of the digital content delivery systems used by the film and television industries – and other copyright owners - to safely make copyright content available to consumers in digital formats.

AFACT was extremely pleased to see that many of its concerns about some aspects of the Exposure Draft *Copyright Amendment (Technological Protection Measures) Bill 2006 (Exposure Draft)* have been addressed in the Bill as introduced into Parliament. AFACT commends the Government on its consultation on the Exposure Draft and its willingness to address industry concerns. AFACT strongly supports the Bill in its current form, and urges this Committee to recommend its passage through Parliament.

AFACT's concerns with the Exposure Draft

AFACT was appreciative of the opportunity to comment on an Exposure Draft of these important reforms. It enabled AFACT to identify a number of issues with the drafting of some provisions of the Bill, which AFACT believed were likely to have serious – and unintended – consequences for the Australian film and television industries. AFACT believes that the Bill in its current form largely addresses these concerns.

AFACT was particularly concerned with the Exposure Draft's definition of "access control technological protection measure". AFACT understands from consultation with the Attorney-General's Department that this definition was created to reflect two policy decisions made by the Government following an inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs: that TPMs should have a "direct link to copyright", and that Australian law should not protect region coding technologies.

A link to copyright

AFACT agreed with the Government that TPMs should be required to have a "direct link to copyright". However, the technical implementation of this objective in the Exposure Draft may have led to the situation where the TPMs that enable several key digital content delivery systems may not have been protected in Australia.

Two digital delivery systems that may have been at risk in Australia were:

- timed download services, which enable consumers to select the length of time they would like to watch a downloaded film; and
- geo-location or geo-filtration tools, which enable service providers to ensure that the content they deliver to consumers complies with licence agreements or complies with local classification laws.

An example of a timed download service is a website that enables a consumer to select the length of time they wish to 'rent' a film from the website. For example, if the consumer chooses to view the film for three days, the TPM will implement a time based 'self-destruct' function which will make the digital file containing the film unwatchable after three days. These timed

download delivery systems are an important tool for ensuring access to film and television products is made available in the most flexible way possible to provide the greatest possible range of options for the public. Legal businesses have been announced or established in Australia in the last twelve months that rely on these content delivery systems to support their business.

A geo-location tool may be used by an online content provider to assess the geographic location of a user prior to granting access to that user. For example, an Australian online distribution business may have only acquired the rights to licence film content in Australia. A geo-location tool would allow the business to ensure that only people with an Australian IP address on their computers can enter the website to view the film content made available on the website. An overseas provider could also use geo-location tools to ensure that Australian consumers are not able to access content that has been refused classification in Australia. These TPMs enable service providers to make digital content available to consumers in a manner that ensures their own legal compliance when delivering content online.

The Exposure Draft definition of 'access control technological protection measure' required a technology to *itself* prevent a consumer from committing a copyright infringement before that technology could be protected as a TPM. However, in most circumstances, timed download technologies and geo-location tools do not *themselves* also operate to stop the consumer from making an infringing copy of the film to which they control access.

As such, although these technologies are the very technologies that ensure the safe exercise of the copyright right of communication to the public, they may not have been protected as TPMs in Australia. This would have placed Australia out of step with its major trading partners. More importantly however, failure to give legal protection to these technologies would have threatened the Government's objective, explained in the Second Reading Speech to this Bill and strongly supported by AFACT, of encouraging the legal distribution of copyright material online and increase the legal availability of music, film and games in digital formats.

Region coding

AFACT does not express a view in this submission about the Government's policy decision to exclude region coding technologies from protection as TPMs. However, AFACT was very concerned about the practical implementation of this policy decision in the Exposure Draft, which may have inadvertently excluded many more technologies than intended by the Government's policy decision.

AFACT is pleased to see that the Bill as introduced now contains a clear explanation as to the extent of the Government's policy decision, which should not impact on other non-region coding technologies used by the Australian film and television industries.

One remaining issue of concern

AFACT was very pleased to see that the Bill now provides protection for the content delivery systems discussed above, and more clearly expresses the Government's intention regarding the exclusion of region coding technologies from the definition of TPM.

AFACT would, however, like to draw the Committee's attention to one other aspect of Schedule 12 of the Bill in relation to TPM which is of concern to the Australian film and television industries.

CLOSING A NEW LOOPHOLE – CRIMINAL DEALINGS IN CIRCUMVENTION DEVICES AND SERVICES

AFACT is pleased to see the introduction of proposed sections 132APC, 132APD and 132APE providing criminal sanctions for the commercial dealing (ie, sale, manufacture and distribution) of circumvention tools services.

It is important to recognise that criminal sanctions against these activities have been in place in Australian copyright law since 2001. For example, current subsection 132(5B) contains a criminal offence against several types of dealings in circumvention devices.

AFACT is concerned that the criminal provisions contained in this Bill in fact weaken the criminal enforcement regime that has been in place in Australia since 2001 by the creation of a large and significant loophole in these new offences.

The current criminal provision against dealing in circumvention devices reflects two circumstances where a person's intention in relation to dealing with circumvention tools can be a criminal activity:

- when the person has a commercial intention (ie, selling the device, or offering a device by way of trade); and
- "to the extent that [the dealing] affects prejudicially the owner of the copyright".

However, the fault element in proposed sections 132APC, 132APD and 132APE in this Bill only requires the defendant to engage in the prohibited conduct "with the intention of obtaining a commercial advantage or profit" (see proposed 132APC(1)(d))

AFACT understands that this second limb ('affect prejudicially the owner of the copyright') was included at the time of the Digital Agenda reforms to ensure that persons could be criminally liable for the distribution of circumvention tools in circumstances where they were motivated by non-commercial considerations. For example, a hacker may write a circumvention program and post it on the Internet due to motivations of fame, reputation, philosophical belief or simply malice.

The harm suffered by copyright owners from the wide dissemination of that circumvention tool would be the same, irrespective of whether the hacker is motivated by malice or receives some financial reward from his or her actions. AFACT does not wish to see the creation of a significant loophole to these important provisions to enable people to distribute circumvention tools if they can show that their motivation was non-commercial.

AFACT hopes that the failure to include the existing language of "affect prejudicially the owner of the copyright" was not a deliberate reduction of the protections that have been in place in Australia since the passage of the Digital Agenda reforms six years ago.

AFACT requests the Committee recommend that this important issue be addressed by amending Section 12 of the Bill to ensure that people causing harm that are motivated by non commercial considerations such as malice, continue to be subject to the TPM provisions.

Support for the Bill

AFACT strongly supports the reforms in this Bill and urges the Committee to recommend that this important legislation be passed. AFACT believes that addressing the additional issue raised in this submission would ensure that the reforms operate in the most practical and efficient manner possible.

For the legislation to be fully realised and supported, AFACT would suggest to the Committee that public education on the effect and meaning of the new laws is essential to ensure the new law is understood and respected.

AFACT requests the Committee recommend that the introduction of the new laws be accompanied by a public awareness campaign and consumer guide on the meaning and effect of the new laws.

AFACT appreciates the opportunity to present its views on this important package of reforms and would be pleased to attend public hearings of the Committee or provide any further information that would assist the Committee in its inquiry

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31 October 2006