Internet Industry Association

Submission to the Senate Legal and Constitutional Affairs Committee on the Copyright Amendment Bill 2006

30 October, 2006

The Internet Industry Association is Australia's national Internet industry organisation. Members include telecommunications carriers; content creators and publishers; web developers; e-commerce traders and solutions providers; hardware vendors; systems integrators; insurance underwriters; Internet law firms, ISPs; educational and training institutions; Internet research analysts; and a range of other businesses providing professional and technical support services. On behalf of its members, the IIA provides policy input to government and advocacy on a range of business and regulatory issues, to promote laws and initiatives which enhance access, equity, reliability and growth of the medium within Australia.

Introduction

The Internet Industry Association (IIA) appreciates the opportunity of submitting to the Committee on matters of relevance to the internet industry in Australia arising from the Copyright Amendment Bill 2006 ("the Bill").

In the relatively short time we have had to review the Bill, we have identified a number of areas of concern which are likely to have a significant adverse impact on Australia's evolution to a more knowledge based, digital economy. We have also noted that, contrary to the Government's often stated objective of remaining technology neutral, in some instances the amendments do not adequately allow for future developments in technology. We direct our comments to those areas of concern, while recognising the government's legitimate aspirations of bringing the law up to date with developments in technology.

The IIA supports copyright and has played a constructive role in the past in lobbying for a balanced treatment of the respective rights of copyright owners, internet users and the internet industry generally. The Australian/US Free Trade Agreement (AUSFTA) negotiations provided us with the opportunity to inform government negotiators on the likely impacts on the internet industry in Australia of the Chapter 17 Intellectual Property provisions of that agreement. While we retain some residual concerns about the scope and effectiveness of the safe harbour regime, now present as Division 2AA of the current Copyright Act, we believe our intercessions resulted in a fairer set of outcomes for internet users and their providers, while still affording rights holders with outcomes consistent with the spirit and letter of the AUSFTA.

On reviewing the current Bill before Parliament however, we note a substantial shift in emphasis away from the traditional balancing of rights inherent in historical copyright law – between the rights of creators to seek legitimate exploitation of their works, and that of society to benefit from the transformation of ideas and their expression in the public domain – towards a regime very much more slanted in favour of the former. We also note that this goes much further than comparable legislation in the US, and beyond what we believe is required by the letter or the spirit of AUSFTA.

At the outset, and to put the issue beyond any shadow of a doubt, the IIA does not condone piracy. We recognise that the internet depends upon the development of content and the incentives for content created. While much of it is user generated, localised and intended for free distribution without remuneration, equally there is much commercial content which needs to be protected. Large scale, deliberate, profit oriented piracy operations ought be accorded harsh criminal treatment, as is the case prior to this Bill, and now within this Bill in an extended way. The acts of individuals in their homes requires a more considered approach addressing the drivers of inappropriate

behaviour and the capacity of any law to effectively modify such behaviour without fundamentally tearing at the fabric of what it means to be a free society.

The fact is we live in a time of great social and economic transformation fuelled in part by the empowering nature of the internet. The consequence of this, as we have seen in many industries, is to bring the means of production (particularly of digital content and ideas) much closer to the point of consumption by users. This disintermediation process, whereby traditional intermediaries (for example distributors and publishers) are made increasingly redundant is attributable largely to the digitisation of information. This makes its reproduction and dissemination a relatively seamless process with no loss of quality and vastly superior economic efficiencies in the delivery to end users. That a proportion of end users have taken advantage of this phenomenon to misappropriate content is regrettable, but is in our view a transitional problem which will resolve as traditional industries re-engineer business models to adapt to the new communications environment.

We have already witnessed this in instances such as Apple iTunes, and more recently with the announcement by YouTube and Warner Music[1] to permit users (who now number in the tens of millions) to upload self created video content with commercial soundtracks (owned in this case by Warner), in return for a revenue share arrangement on advertising. We anticipate that these novel instances will continue to evolve, culminating in a win/win for content producers and consumers. Without doubt, this is a very new and challenging model for market growth which could not have evolved without a flexible approach to how consumers use, access and disseminate copyrighted material.

New models of what is now referred to as 'hyperdistribution' where, for example, advertising is embedded in the content, will provide unprecedented opportunities for advertisers to reach a more targeted market. This provides opportunities to remunerate content creators in ways that are directly related to consumption of their works, but may be vastly different from traditional systems of commercial exploitation.

Our view overall is that Australia need not assume a punitive approach to online content distribution, but should create a legal environment where new business models can flourish, creators can be rewarded, consumers can be offered choice and low prices and we can progress to become a fully fledged information economy leveraging our high levels of education, our propensity to embrace new technologies, our natural attributes as innovators and our desire to engage the world.

This promise is at risk if, instead, we succumb to pressures to preserve old, outmoded business models and unduly restrict the activities of our citizens and our businesses to take full advantage of the empowering nature of the internet. Importantly, we need to maintain a regulatory environment that does not present

[1] Reported at http://news.bbc.co.uk/1/hi/entertainment/5357390.stm

a barrier to investment, innovation, uptake and diversity, and is at odds with our major international competitors.

The choice for legislators is a clear one. Do we mortgage our future in the name of protecting traditional methods of content distribution based on what we are familiar with and the substantial pressure these industries bring to bear in maintaining the status quo. Or do we create a system which, while it retains the historical philosophical balance underpinning copyright law, allows for Australians to access the benefits of the digital revolution with confidence and without fear of repression.

Specific Comments on the Bill

1. **Support 'Maker of a Communication' clarification to exempt activities such as web browsing (the new s 22(6A) of Schedule 7)**
   We appreciate the clarification on this point. This allays doubts identified when the provision was first introduced as to copyright liability arising from the mere visitation of websites.

2. **Fair dealing exceptions – a lost opportunity for Australia's digital economy, innovation and investment**

   We regret that the supposed introduction of a more flexible regime for the use of new digital devices seems to have resulted in a narrowly confined exceptions, which are not only likely to become dated (due to their technological specificity) but also may not deliver the legitimacy to common activities for which they are intended. The 'main copy' rule in relation to MP3 players has failed to take into account the actual method by which format shifting occurs, with the result that the use of iPods, for example, for most Australians will remain in breach of the Act.[2]

   The reforms promised by the Government ought to have resulted in an environment where permitted uses were clear and technologically neutral, allowing for the uptake of new digital services and devices as they emerge. We remain hamstrung by a tortured set of provisions, highly

[2] We understand that the process of format shifting for this purpose requires the retention of a main copy on the computer to which either a CD has been ripped, or music downloaded. A second 'main copy' is transferred to the device. Under the current provisions, the first 'main copy' is required to be deleted, but in doing so this would delete the supposedly permitted copy from the device upon the next synchronisation. The result remains Australians with infringing copies on their portable devices. In rectifying this oversight, we would caution against too technologically specific a 'fix' on the basis that next year's devices may require an entirely different process of format shifting. There is a need for a substantial reworking of the provisions to provide a degree of future proofing for Australian consumers.

technical in nature, numbering some 30 pages of legislation and well beyond the means of most users to interpret.

Regrettably, Australia will remain in a position where the so called harmonisation with US law under the AUSFTA has delivered us the restrictions, but few if any of the liberalisations. The stated objective of the AUSTFA Chapter 17 (Intellectual Property) Provisions was stated by the Government as follows:

> *The inclusion of the Intellectual Property Chapter recognises the importance of a strong intellectual property regime to economic growth through trade and investment. Australians will benefit through closer harmonisation of our already strong intellectual property regime with that of the largest intellectual property market in the world.*
>
> *Closer alignment in intellectual property laws and practices will provide Australian exporters with a more familiar and certain legal environment for the export of value-added goods to the US. Likewise, the ability of Australian innovators to attract investment from the US will be enhanced through greater familiarity and confidence of those investors with our legal system.*[3]

We would take issue with that characterisation. The US Fair Use exceptions will continue to deliver US innovators a broader canvas on which to develop exciting new digital products and services, while Australia remains consigned to a nation of importers and consumers of such innovation – and even there, it is questionable that usage (if the iPod example above is any guide) could remain within a grey area under our amended copyright regime.

As an example of where innovation could be enhanced by changes to the Bill, it is our view that temporary copies should be protected under a more expansive fair use provision. For example, copies made during a process for which the end result does not infringe copyright should be permitted. This could be achieved by an additional enumerated exception, or more preferably a relaxation of the fair dealing provisions to provide for a flexible category supporting future uses *where there is no detriment* to copyright owners. This would obviate the need for innovators to have to license content which is to be transformed in ways that ultimately bear no resemblance to the initial inputs. The fact is that new information services rely on creative applications of existing information, transforming existing content into new forms with high economic value and utility to end users. Search engines are a classic example of such technologies and we believe that Australia is

[3] See: http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html

theoretically well placed to take advantage of a regulatory environment that is pro-innovation in this way.

We observe that the narrowly confined exceptions appear to be designed to meet the concerns of existing rights holder interests to the exclusion of other more progressive constituents. This is evident by comparing the amendments with the positions put by such groups. The Explanatory Memorandum to the Bill in explaining the different stakeholder positions states:

> *All [corporate rights-holders and distribution industries] interests oppose an open-ended 'fair-use' exception and statutory licences for private copying <u>because they would disrupt markets</u>.* [emphasis added]

But innovation is by nature disruptive. Can we envisage parliament passing laws protecting horse drawn carriages from the threat of automobiles of the early 20th century. It would seem ludicrous now, but clearly carriage makers of the early 1900's would have advanced the identical arguments.

Innovation will still occur – just not in Australia. We will remain confined as consumers of overseas technology, net importers. Meanwhile, consumers will remain in the position they currently inhabit – wishing to adopt new digital technologies, but all the while unsure of their standing under unpopular, indecipherable and ultimately, unenforceable laws.

International law does not require this escalation in control, nor US law, nor the AUSFTA. We are forced to ask, where is the pressure coming from, and where is the justification for this fundamental shift in policy.

3. Criminal offence provisions – a heavy handed approach

We do not share the view of the Attorney-General that the amendments will avoid everyday consumers being treated like pirates.[4] The effect of the new criminal offence provisions, whether intentional or not, will result in a much broader scope for liability for Australians engaging in activities which they would not traditionally regard as illegal.

Previously, infringements would have been civil in nature, but the criminalisation of acts such as possession of a device used for copying a work (s132AL), airing of works (s132AN), or causing a recording or film to be heard or seen in public (s132AO) coupled with the introduction of

[4] Attorney-General's news release, 14 May 2006

strict liability will expose many more Australians to potential action and heavy penalties than ever before.

If the intention is not to enforce these new provisions which on their face will inculpate hundreds of thousands of Australians – from the possession of digital recording devices with the potential to copy works, to the playing of radios in public parks, through to the publishing of videos of school concert performances onto their websites – then we would ask how are we any better off than what has happened in the past with home recording of TV programs, or more recently the transfer of music onto iPods and other MP3 players.

We suggest the Committee consider a recommendation for the introduction of a substantial non-infringing use test to be applied to the making and possession of recording devices offences under s132AL, if they are to remain. This accords with US case law in Betamax[5] where the presumption is exercised in favour of the non-infringing use in the absence of clear evidence to the contrary. Otherwise we face the perilous situation of manufacturers of computers, recording devices and mobile phones facing suspicion by virtue of the fact that their products are capable of making infringing copies. The same will apply to the users of such technologies, which these days would count for most Australians. This clearly cannot be the Government's intent, yet the draft provisions on their face would permit such an interpretation.

The implications for Internet Service Providers is by no means clear. What is the interaction between these new offences and the Division 2AA safe harbours; are ISPs likely to face criminal liability for the acts of their customers? Clearly 2AA was never designed for criminal conduct, the current language is clear that it shields only against actions for damages.

If it is the case that Parliament (implementing the AUSFTA) intended to limit ISPs' liability in the civil context, it certainly cannot intend to impose a higher level of criminal liability through a backdoor approach that might operate here as a consequence of the interactions between the provisions. We therefore seek urgent clarification in the Bill if it is to proceed, that criminal liability is expressly excluded, except obviously for direct, intentional acts of infringement by ISPs acting in their own right (and not as a conduit on behalf of their subscribers).

Similarly the interaction between the new offences and current s36 authorisation liability remains equally unclear. Broadening the base of liability for users could conceivably impact on carriage service providers (including ISPs), content hosts and possibly search providers. The latter two categories are currently unable to avail themselves of the safe

[5] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

harbours as they fail to fall within the definition of carriage service providers.

These are matters which require attention, and we would urge the Committee to recommend as part of its findings that, should the Bill proceed, it must be with amendments to:

i) allow entities with networks and online facilities supporting third party content to take advantage of the provisions.
ii) shield against criminal as well as civil liability arising from the acts of third parties.

We would also recommend against the imposition of strict liability offences, particularly in cases where there is no commercial motive or scale involved.

We are unclear how the tests that apply to some of the offences will apply under Australian law. The "prejudicially affecting the copyright owner" test that appears in subsection 132AI (8) infringement for example, derives from the Berne Convention. This language was not intended to be interpreted by courts, but rather by legislatures in implementing the convention into domestic law. The threshold for this might be quite low, and the Bill certainly provides no guidance on where the bar is to be set. Coupled with the fact that this offence does not require a commercial motive, indeed as a strict liability offence, it requires no fault element at all, and carries very heavy penalties and we are forced to ask what is the Government's intent and justification here.

Strict liability offences of this nature are not required by the AUSFTA. We are advised that in the US, criminal liability (for example, 17 USC 506) conditions criminal liability on those who undertake *intentional* acts. Therefore, for example, Section 506 of the US copyright law states that criminal liability will attach only for those who act willfully for purposes of financial gain or commercial advantage. Similarly, Section 1201 and 1202 of the DMCA dealing with anti-circumvention provisions of technological protection measures only imposes criminal liability for those who *willfully* violate the law for purposes of commercial advantage or financial gain.

We submit that in the absence of a qualitative test for detriment, the extent of penalties is out of proportion to the harm. Each infringement is a separate offence. As one commentator has recently pointed out, if you copy 10 CD's each with eight tracks on it, you face a maximum fine of $500,000 or on the spot fines of $105,600.[6] In contrast, we submit that if

[6] Kim Weatherall at: http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html#116098203832627328

you walk into a music store and physically steal 10 CD's, you will probably be charged with a single offence for which a first offender is likely to be to have the charge dismissed or left with a nominal penalty.

Conclusion

It is our view that the wide ranging nature of the present reforms and their impact on Australian society warrant a far greater degree of public scrutiny than has ensued to date.

In particular the new criminal penalties regime needs to be fully appreciated by the public, and the unintended consequences, which may be legion, need to be more fully appreciated and where possible, neutralised before Parliament is asked to vote on the Bill.

While we appreciate the timetable imposed by the AUSFTA requires the Technological Protection Measures amendments to be in place by 2007, however the majority of the amendments in the Bill are unrelated to this endeavour and ought be excised and reintroduced once adequate public debate has occurred, and the Government is better able to justify why many of these far reaching changes are required.

We consider the current Bill if passed in its present form will fundamentally reshape the copyright landscape in Australia, and we remain unconvinced on the need for haste when our participation in the global digital economy is so much at stake.

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