Australian Government
Attorney-General's Department

Information Law and
Human Rights Division

06/16504

8 November 2006

Senator Marise Payne
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Madame Chair

Departmental Response - Questions from Senator Ludwig and Response and Questions taken on Notice at Public Hearings on Copyright Amendment Bill 2006 on 7 November 2006.

Prior to the Public Hearings, Senator Ludwig through the Committee Secretariat, requested that this Department provide a response to a number of questions in relation to the Copyright Amendment Bill 2006. The Department's response to those questions is set out at Attachment A.

During the Committee's public hearing on the Bill 2006 on 7 November 2006, the Department also took on notice, a number of questions from Senator Ludwig, Senator Crossin and Senator Lundy. Some of the questions from Senator Ludwig duplicate those asked earlier and are answered in Attachment A. The response to the remainder of Senator Ludwig's questions and those of Senator Crossin and Senator Lundy are contained in Attachment B.

The action officer for this matter is Ms Elena Down, who can be contacted by email on elena.down@ag.gov.au or on (02) 6250 6608.

Yours sincerely

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Attachment A

Response to Senator Ludwig's questions on Copyright Amendment Bill 2006

1. Three-Step Test

New s 200AB is an innovative approach which will provide a wide, flexible exception to enable any copyright material to be used for certain socially beneficial purposes, while remaining consistent with Australia's international treaty obligations. The exception is a defence to copyright infringement. Before deciding whether a particular use is outside of the copyright owner's control, a court would need to satisfied that the particular use complies with the conditions set out in s 200AB(1), including that the use is for one of the four 'certain purposes'.

The first part of the 'three-step' test requires that an exception must be limited to 'certain special cases'. Other types of exceptions (both in Australia and in other jurisdictions) set narrower conditions than simply that the use is for a particular purpose or by a particular person or organisation, for example, by a library. Those exceptions generally allow use of identified copyright material for a particular purpose, subject to various other conditions or limitations. In total, all the legislated conditions will define 'cases' which are more certain but are very restricted.

The Government will consider any relevant recommendations of the Senate Committee on the inclusion of the 'three-step' test in s 200AB.

However, the three-step test is the standard for exceptions to copyright under international copyright treaties (both multilateral and bilateral). It has been a part of the international copyright system since the 1960s. Interpretation of the three-step test is part of international jurisprudence. The Government believes Australian courts are able to apply this test if a dispute arises.

2. Commercial advantage

New s 200AB requires that uses, other than for parody or satire, are not done 'partly for the purpose of obtaining a commercial advantage.' This condition is questioned by some copyright user interests as unnecessary because s 200AB already requires that a permitted use must comply with the three-step test. It is argued that the three-step test provides all the protection for copyright owners required by international treaty obligations. User interests also contend that a 'commercial advantage' condition is too restrictive and uncertain given that institutions may charge instructional fees or engage in money rasing activities.

The Government introduced the 'commercial advantage' test in recognition of concerns about the potential scope of the new exception. Indeed the Government notes arguments on behalf of some copyright owners that s 200AB is presently too wide in being potentially available to for profit schools and libraries in commercial companies and should be narrowed so that no commercial advantage, direct or indirect, can be obtained from reliance on this section.

The present wording seeks to balance these competing interests by indicating that the prohibition on gaining a commercial advantage should not necessarily prevent cost recovery by an eligible institution or person.

3. Parody and satire

New s 200AB establishes circumstances in which the use of copyright material for parody or satire will not infringe copyright. Recognition of parody would bring Australian copyright law more in line with US case law which recognises parody as a 'fair use.

In the US, parody is irony or sarcasm directed as comment on the original work where as satire is targeted at some general comment on society or general vice or folly. From our understanding, satire has not been recognised as a fair use by US case law. However, US 'fair use' does recognise the 'transformative' use of copyright material in making a new work (ie more than mere copying of the original work).

At present Australian case law tends to draw a distinction between parody and satire. Parody is regarded as an imitation of the item being parodied whereas satire is described as a form of ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses, but not by way of an imitation or take-off. On this approach, a new copyright exception would strictly need to cover only parody since satire, in avoiding imitation of a prior item, would not involve risk of copyright infringement.

The Bill provides for the possibility that Australian case law may follow the US approach. Many submissions seem to assume the US approach is relevant. These submissions argue that parody is reasonable because it is closely connected to the original work but not satire.

The Government considers satire should also be included. First, satire may be far less damaging to the creator. In some circumstances parody of a creator may destroy his or her market in a way satire will not. Secondly, satire may have a more useful social benefit in adding to political social discussion. While the Government does not intend to legislate to allow all 'transformative uses', it considers satire is a particularly type of transformative use which may be justified, with appropriate safeguards to protect copyright owners.

4. Format-shifting music – one copy per format (iPod compatibility)

The amendments include a new exception (s 109A) which will allow a legitimate owner of a sound recording to copy it in a different format to use instead of the original recording. This exception recognises that many consumers use music they buy with different playing devices, particular portable digital players such as the iPod.

The present conditions for format-shifting of sound recordings allow the owner to make one copy in each different format. There are good reasons for this. The exception is not intended to be an open-ended licence that allows a person who buys one copy of a sound recording to make unlimited copies. The 'one copy in each format' condition is to protect copyright owners from this exception being abused, as well as to ensure that the exception complies with the three-step test. In effect, this condition will limit a person to making one copy for each playing device that uses a different audio format to that of the original sound recording.

Current drafting recognises that in transferring music from a CD to a portable playing device it is necessary to make an 'intermediate' copy in a personal computer. However, s 109A requires that this intermediate copy should be deleted after the transfer is completed.

The Government is already aware that there has been public comment on this condition. There are essentially two objections:

a. many individuals keep permanent copies of their all music collection on a personal computer for playing and/or as a permanent library and are unlikely to delete copies from their computer; and

b. the popular Apple iPods allows a 'sync' mode to be selected by which each time it is docked with the owner's personal computer the music list in the iPod automatically synchronises with the iTunes play list in the personal computer ie a track music in the memory of the iPod will be deleted if it is not also present in the play list of the personal computer.

The Attorney-General noted in the Second Reading Speech that the Government will listen to and consider comments and make any necessary technical changes to ensure the Bill achieves the Government's objectives.

5. Communication in the course of educational instruction

The Department is considering changes to address the concern expressed by copyright owners and educational bodies that, as drafted, s.28A goes further than s.28 and extends to general exercises of the communication right. This is unintended.

It is proposed to amend the drafting of s 28A to deem a communication of a work or subject matter other than a work in the circumstances of ss 28(1) to (4) inclusive not to be a communication to the public.

6. Caching for educational purposes.

The Department is also considering drafting changes to s 200AAA to clarify that:

- caching for efficiency purposes does not infringe copyright; and
- there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made.

It is proposed that copies should be destroyed within 14 days of the end of a course. Destruction could be by either direct human intervention or indirectly by an automated process.

7. 'First copy'– s110BA

The term 'first copy' will be clarified in further drafting changes. An "authorised officer" of the library or archive will be able to make a copy for preservation purposes of the first copy of a film or first record of a sound recording held by the library or archive.

8. Recommendations

Recommendations for further changes to the Bill are dependent on the views of the Attorney-General and subsequent policy approval process. The Attorney-General indicated in his second reading speech areas of the Bill where there were likely to be changes.

Attachment B

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference - Copyright Amendment Bill 2006

PUBLIC HEARING, TUESDAY, 7 NOVEMBER 2006, CANBERRA

Response from the Attorney-General's Department to Questions on Notice

Questions from Senator Ludwig

Q1. So you will take that on notice and provide to the committee the policy issues that you intend to pick up? [Ms Daniels—The drafting issues, yes.] *[Transcript p 38]*

The answer to the Senator's question is set out below. As Ms Daniels made clear (p 34 of the Transcript) the information provided is in relation to issues on which the Department has already briefed the Attorney-General with suggestions for changes, for example where the Government's policy intent is not clear, or that there needs to be some change in wording to make the provisions work as they are intended to.

The Government is exploring the following changes. They have not received policy approval and indicate Departments thinking at this stage. The Government's policy approval will not pre-empt but will be informed by the recommendations made by the Committee.

I. New exceptions - (Schedule 6)

(a) The Bill provides that a use for 'parody and satire' is permitted under new s 200AB(5). The conditions of use are that:

- the circumstances of the use amount to a special case;
- the use does not conflict with a normal exploitation of the work or other subject matter; and
- the use does not unreasonably prejudice the legitimate interests of the owner or licensee.

(The above conditions mirror the three-step test in copyright treaties.)

Possible response

We are considering the removal of the exception for parody and satire from new s 200AB and instead adding new exceptions to Parts III and IV of the Copyright Act providing that a fair dealing with a work or other subject matter for the purpose of parody or satire is not an infringement of copyright.

(b) The Bill provides (in clause 11 of Schedule 6) for amendments to s 40 (fair dealing for research or study)

Possible response

To overcome misunderstandings apparent from several submissions to the Department and to the Senate Legal and Constitutional Affairs Committee about the intended effect of the amendments, there may be redrafting of amendments to s.40 (fair dealing for research or study) to clarify the intended effect, which is that the reproductions *deemed* to be fair dealings will be

slightly restricted but *without affecting* in any way the scope of the provision allowing any other amounts of reproduction if *considered* to be fair.

II. Amendments to 'Digital Agenda' review provisions relating to educational institutions (Schedule 8)

(a) Communication in the course of educational instruction – new s.28A

Possible response

We are considering amending the drafting of s.28A. Section 28 could be amended to include an additional subsection. The new sub-section would deem a communication of a work or subject matter other than a work in the circumstances of ss.28(1) to (4) inclusive not to be a communication to the public.

The heading of s.28 would need to be redrafted to clarify that the provision applies to both the performance and communication of copyright materials in the course of educational instruction.

(b) Caching - new s.200AAA

Possible response

We are considering whether s 200AAA could be clarified so that there is no doubt that the reproduction must be removed after the end of the particular educational course for which it was made. It is proposed that copies should be destroyed within 14 days of the end of a course. Destruction could be by either direct human intervention or indirectly by an automated process.

To address the fact that a copy of a cached or copied website resides in cache or storage after it is deleted, s 200AAA(3) could provide that s.200AAA(2) does not apply unless the reproduction is destroyed or access to the copy removed, rather than requiring the copy to be removed. It may also be clarified that the destruction should not require human intervention ie, it could be automatic or manual.

III. Copyright Tribunal amendments (Schedules 10, 11)

(a) New s.157A inserted by clause 27 of Schedule 11, allows the Copyright Tribunal to have regard to Australian Competition and Consumer Commission (ACCC) guidelines on licensing conditions.

Possible response

We are considering minor redrafting of the provision, to more clearly indicate when the relevant ACCC guidelines need to be taken into account by the Copyright Tribunal.

(b) The Bill provides for proposed new ss.135SA, 135ZZEA and 135ZZWA (inserted by clauses 28-30 of Schedule 11) to allow the Copyright Tribunal make an order varying remuneration distribution arrangements of a collecting society.

Possible response

We are considering insertion of a transitional provision applying to the new ss.135SA, 135ZZEA and 135ZZWA to make any order by the Copyright Tribunal varying remuneration distribution arrangements of a collecting society applicable only to distributions that have not yet begun, so that such order would not apply to distributions already completed or in progress.

(c) Clause 2 of Schedule 11 deletes the definition of 'licensor' in ss.136(1) and substitutes a new definition.

Possible response

To add clarity, we are considering redrafting the substituted definition of 'licensor' in ss.136(1) to ensure that it covers all existing collecting societies but avoids covering other bodies such as film distributors and record companies with a large repertoire.).

IV. Minor drafting amendments to Technological Protection Measures exceptions (Schedule 12)

Possible response

We are considering drafting amendments to the interoperability exceptions in ss.116AN(3), 116AO(3), 116AP(3), 132APC(3), 132APD(3) and 132APE(3) to ensure that the exception only applies where it relates to information that is not readily available to the person doing the act.

Q2. "The word 'format' also seems to get a mention in a number of places, but in [s]109AD the format in which sounds are embodied in the main copy differs from the format in which sounds are embodied in the record. A range of submitters have raised question marks over the definition of 'format' and 'record', as well. Have you had an opportunity to look at those submissions?[…] So what do you intend to do? Can you say that or are you still considering your options?" *[Transcript p 42]*

Please see the Department's response to Senator Ludwig's earlier questions at Attachment A.

Q3. "I take it you will be able to provide a response about [parody and satire] this afternoon or tomorrow." *[Transcript p 44]*

Please see the Department's response to Senator Ludwig's earlier questions at Attachment A.

Q4. "To deal with one issue with [P]art 4—Fair dealing for research or study: is the 10 per cent cap [the 'reasonable portion' issue] one of the matters that the Attorney-General is currently looking at, or has looked at?" *[Transcript p 44]*

The Department is aware of concerns (and some misunderstanding) about the drafting and intended operation of proposed new sub-section 40(5) which refers back to sections 10(2) and 10(2A). The Department will meet with the drafters to ensure that the operation of this provision is clear.

The Government's decision to limit the quantity of copying of a work that is, under s 40, *deemed* to be fair dealing is based on amendments necessary to enable accession to the WIPO internet treaties (WCT and WPPT). Australia is required under the Singapore and US Free Trade Agreements to become party to those WIPO Treaties.

There must be appropriate limits to unremunerated copying automatically allowed under s 40 to ensure compliance with the 3 step test in the Berne Convention and the WCT.

For the purposes of *deemed* fair dealings under the new s 40(5), it is intended that the quantification of reasonable portion in sections 10(2) and 10(2A) should be exhaustive in relation

to the works which they cover (ie. literary works, dramatic works and musical works in hard copy, and literary and dramatic works in electronic form, in both cases excluding computer programs and electronic databases.)

Greater amounts of copying of any work for research or study will still be allowed under s 40(1) if a court judges the copying to be fair, having regard to the matters listed in s 40(2); both those provisions are unaffected by the amendments in the Bill.

Further Questions from Senator Ludwig (sent by Secretariat on 7 November 2006, not asked at the hearing)

Q5(a) The Department said it was going to get back to the Committee by tomorrow on issues it had put to the Attorney-General. Of the issues that were raised in the submissions and the hearing, which were not put to the Attorney-General and why not?

Please see the answer to Senator Ludwig's question (at Q1) above.

Q5(b) In particular, does the Department consider that Schedule 6 will make obtaining a copy of a record through a digital download and then making a copy of this on an i-Pod or similar device lawful? Does the Department consider that Schedule 6 will make it lawful to copy music from CD to an i-Pod?

Please see the Department's response to Senator Ludwig's earlier questions at Attachment A.

Q6. How does the Department respond to the submission of the International Publishers Association that the interaction between s200AB(1) in Schedule 6 and s28A(1) in Schedule 8 is unclear (see sub 6 p.2-3)?

Section 200AB(6) makes it clear that s.200AB(1) does not apply if because of another provision of the Copyright Act the use is not an infringement or the use would not be an infringement assuming the conditions or requirements of that other provision were met. Accordingly, it has no operation in the limited circumstances in which s.28A(1) applies.

Q7. Can the Department explain the incorporation of the three step test in the Bill in light of the submissions from the two international organisations (International Publishers Association, submission 6 and International Intellectual Property Alliance, submission 7)?

Please see the Department's response to Senator Ludwig's earlier questions at Attachment A.

Question from Senator Crossin *(Transcript p 45)*

Q1. "Are you strictly limited by what the [Australia-US] FTA says or, in the operation of just common sense and good educational use of resources, could you have that flexibility? [...] I am asking whether the Department or the Government have sufficient flexibility to ensure that schools are part of those [TPM] exemptions. If they are, can they put into the legislation measures that would alleviate your [sic] concerns? [...] Can you go back and have a look and see if there is an ability to have that flexibility?"

Although the Bill provides increased protection in relation to the use of, manufacture and other dealings with circumvention devices and services, the Government also recognises the legitimate needs of educational institutions to have reasonable access to copyright material in accordance with the exceptions in the Act.

The Bill provides a limited exception to the prohibition on the act of circumvention for educational institutions for the purpose of making acquisition decisions. The Regulations will also provide an exception for educational institutions for the purpose of using the statutory licence under the Copyright Act that allow them to reproduce and communicate copyright material.

The Bill ensures that criminal remedies will not apply against an educational institution that circumvents a technological protection measure, or deals with a circumvention device or service if it is done for a lawful purpose.

The Bill provides that non-commercial manufacture or importation of circumvention devices will not be prevented by the provisions. This ensures that educational institutions can have access to circumvention devices for the purposes of undertaking legitimate activities under the existing exceptions in the Act.

However, the Australia-United States Free Trade Agreement (AUSFTA) places clear boundaries on the manufacture and supply of circumvention devices for other people. This is a necessary measure in order to discourage piracy.

The effect of this limitation in the AUSFTA is that there is no scope for the Government to introduce an additional exception to liability for educational institutions to allow them to provide circumvention devices to other institutions.

Questions from Senator Lundy

Q1. "Would you be able to provide the Committee with the submissions received by the Government that influenced their decision to change their policy beyond this matter, including the legal advice?"
[Ms Haipola—We are happy to provide the submissions.] *[Transcript, p 47]*

As agreed, the Department provided to the Committee Secretariat a folder containing copies of 22 submissions on the issue raised by Senator Lundy, by hand delivery on 8 November 2006.

The Department also wishes to add that, despite some submissions to the Committee that might suggest otherwise, as made clear by Ms Haipola to the Committee (on p 47 of the hearing transcript), there has in fact not been a significant change from the Exposure Draft of the TPM provisions to those that were subsequently introduced (in Schedule 12 of the Bill).

Some interpretations of the provisions in the Exposure Draft by submissions did not reflect the Government's intention. Those submitters interpreted the provisions as requiring the necessity to

show infringement of copyright in order to establish liability under the TPM provisions. That was not the Government's intention, and those interpretations would have resulted in Australia not complying with the Free Trade Agreement.

The provisions now in the Bill are simply an attempt to provide clarity and simplicity in the operation of the definitions of 'TPM' and 'access control TPM'. They also move away from the legislative notes that addressed the region coding issue to substantive provisions in the Act that address market segmentation and anti-competitive use of aftermarket materials.

Q2. "My final question is about strict liability and the policy intent and the extent of consultation for the purposes of these bills with stakeholders. Many of the submissions make very strong points that there has been inadequate time. Many of the recommendations of many of the submitters are that the vast majority of these provisions—perhaps not the TPMs, because that was expected to be legislated prior to 1 January next year—should be deferred to have further detailed consideration and more time to contemplate the effect, discuss it and debate it." *[Transcript, p 48]*

[The Chair of the Committee asked that the Department respond to this on notice.]

There has been a range of consultation on the enforcement amendments including the strict liability provisions. This has identified a number of issues that the Government is currently considering. There would be little value in delaying the passage of these amendments for any further consultation.

As indicated in the Department's submission to the Committee, in-confidence consultations on the draft enforcement amendments that included the strict liability offences were undertaken with key industry stakeholders and other government agencies in August 2006.

An exposure draft of those amendments, together with explanatory material, was placed on the Attorney-General's Department's website on 22 September 2006.

The Department's 'e-News on Copyright' publicising the criminal aspects of the Bill was sent to subscribers on 22 September 2006.

The Government's view is that the Bill represents a package of important reforms for both copyright owners and copyright users. It is a finely balanced package. The Bill is aimed at strengthening enforcement measures, but also providing for appropriate exceptions.

There have been substantial consultations during the development of the reforms reflected in the Bill.

The Government has made clear that it welcomes comments on amendments necessary to improve the Bill to ensure it achieves its policy objectives. It has received useful comments already as a result of Exposure Drafts of the Bill it made available from the Department's website prior to the Bill's introduction.

The Government will also carefully consider amendments recommended by the Committee, when it reports on 10 November 2006.

Q3. "What is the policy intent behind imposing strict liability clauses and does that mean that kids will be fined?" *[Transcript, p 48]*

The introduction of new strict liability offences as part of a tiered offences system is intended to provide police and prosecutors with a wider range of penalty options to pursue against suspected offenders, depending on the seriousness of the conduct. By targeting lower level criminal offenders

(eg market sellers), they will significantly enhance the effectiveness of the enforcement regime and result in stronger deterrence at the lower level. They will allow a more cost-effective administration of the existing enforcement provisions by enabling offences to be dealt with expeditiously.

They will also enable the creation of infringement notice penalties. Both the Senate Standing Committee for the Scrutiny of Bills and the Australian Law Reform Commission have recommended that administrative penalties issued under infringement notice schemes should apply only to strict or absolute liability offences.

The strict liability offences are not intended to target one particular group of the community and will be applied by law enforcement agencies in the normal way along with all other criminal offences

Q4. "Where else in the world can you get an on-the-spot fine [for copyright offences]?" *[Transcript, p 48]*

The Department is aware of other countries that have introduced administrative penalties which can be imposed for less serious activities. Although these are not currently in common law countries, there is an increasing international trend for countries to create a wider range of penalty options to law enforcement and government agencies in addressing copyright offences.

Q5. "Could you take on notice any international precedents of strict liability fines [for copyright offences]?" *[Transcript, p 48]*

The Department is not aware of international precedents of strict liability fines with respect to copyright, particularly in common law countries. However, the creation of strict liability offences in Australia underpinned by an infringement notice scheme for lower level criminal offenders transgressions of certain regulatory offences is not an unusual feature of our criminal law system. For example, it is commonly used in diverse areas such as corporation offences, income tax, public health and environmental protection.

In addition, if a person refuses to pay an infringement notice penalty, they should be liable to face court only for a strict or absolute liability offence. That is consistent with recommendations of the Senate Standing Committee for the Scrutiny of Bills and the Australian Law Reform Commission.