



Copyright Amendment Bill 2006

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Law and Bills Digest Section

Contents

Purpose	1
Background	1
Basis of policy commitment	1
Senate Standing Committee on Legal and Constitutional Affairs report on the Bill	2
Position of significant interest groups	2
Australian Labor Party	2
Australian Democrats	3
Any consequences of failure to pass	3
Financial implications	3
Scope and structure of the Bills Digest	3
General comment on complexity of the Bill	4
Part 1—Schedules 1–5 Enforcement	4
Schedule 1—Criminal laws	4
Offences—Physical elements and fault elements	4
Strict liability	5
Indictable and summary offences	6
Main Provisions	6

Tiered regime of the offence provisions	6
Penalties.	8
Infringement notices	8
Summary of offence provisions in Schedule 1.	8
Comments on Schedule 1 — The Senate Committee report	11
Schedule 2—Presumptions	13
Schedule 3—Technologically neutral definitions.	13
Schedule 4—Civil remedies and commercial-scale infringement online	14
Schedule 5—Customs seizure of imported infringing copies	15
Part 2—Schedules 6, 7 and 8	16
Background to Schedules 6, 7 and 8	16
New ‘Fair Use’ exceptions.	16
Digital Agenda reforms.	17
Main provisions	18
Schedule 6 — Exceptions to infringement of copyright	18
Part 1 of Schedule 6 — Recording broadcasts for replaying at a more convenient time (‘time-shifting’)	18
Part 2 of Schedule 6 — Reproducing copyright material in different format for private use (‘format-shifting’)	19
Part 3 of Schedule 6 — Uses of copyright material for certain purposes	20
Part 4 of Schedule 6 — Fair dealing for research and study	22
Comment	22
Part 5 of Schedule 6 — Official copying of library and archive material.	23
Schedule 7 — Maker of communication.	24
Schedule 8 — Responses to Digital Agenda review.	24
Part 3 — Schedule 9 Unauthorised access to encoded broadcasts	26
Part VAA	26
Part 4—Schedules 10 and 11 The Copyright Tribunal	27
Background	27
Main provisions	27

Schedule 10 — Copyright Tribunal: amendments commencing first.	27
Part 1 of Schedule 10 — Remuneration required by Parts VA and VB	27
Part 2 of Schedule 10 — Declarations of collecting societies	28
Part 3 of Schedule 10 — Tribunal name	30
Part 4 of Schedule 10 — Registrar	30
Schedule 11 — Copyright Tribunal: amendments commencing second.	30
Part 1 of Schedule 11 — Licences and licence schemes.	30
Division 2 — Substituting licence schemes.	31
Division 3 — Involvement of the Australian Competition and Consumer Commission	31
Part 2 of Schedule 11 — Distribution of amounts collected by declared collecting societies.	32
Part 3 of Schedule 11 — Manner of paying royalty for copying musical works.	33
Part 4 of Schedule 11 — Records notices	33
Part 5 of Schedule 11 — Alternative dispute resolution	34
Part 6 of Schedule 11 — Determination of questions relating to Parts VA and VB	35
Concluding comments to Schedules 10 and 11	35
Part 5—Schedule 12 Technological protection measures	36
Background to Schedule 12	36
Current law regarding technological protection measures (TPMs)	36
What is a TPM?	36
<i>Copyright Act 1968</i>	36
AUSFTA requirements regarding TPM circumvention devices	37
Exceptions allowed under AUSFTA.	38
House of Representatives Legal and Constitutional Affairs Committee—Review of Technological Protection Measures Exceptions.	38
<i>Stevens v Kabushiki Kaisha Sony Computer Entertainment</i>	39
Main provisions	39
Schedule 12—Technological protection measures.	39
Definitions relating to TPMs	39

Civil actions regarding TPMs	41
Circumventing an access control technological protection measure	41
Exceptions to liability	41
Manufacturing a circumvention device for a TPM	42
Exceptions to liability	42
Providing a circumvention service for a technological protection measure	43
Exceptions to liability	43
Remedies	43
Criminal actions regarding TPMs.	43
Exception—prescribed acts	44
Comments on Schedule 12.	45
Exceptions and defences to liability	45
The proper exercise of the exception for circumventing an access control TPM	45
Anti-competitive uses of TPMs	46
Additional exceptions in the draft regulations	46
Concluding comments on Schedule 12	47
Endnotes	48

Copyright Amendment Bill 2006

Date introduced: 19 October 2006

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent. The substantive provisions commence on various dates. Schedule 1, Part 1 and Schedules 2, 3, 4, and 5 commence on 1 January 2007. Schedules 6, 7, 8 and 10 commence the day on which this Act receives the Royal Assent. Schedule 9 commences 28 days after Royal Assent and Schedule 11 commences immediately after the commencement of Schedule 10. Commencement of Schedule 1, Part 2 and Schedule 12 are triggered on commencement of the *Archives Amendment Act 2006*.

Purpose

The Bill proposes to make significant changes to the *Copyright Act 1968* affecting provisions dealing with enforcement, copyright exceptions, technological protection measures (TPMs) and the Copyright Tribunal. The Explanatory Memorandum states that the policy aims behind these amendments include:

- the need for copyright to keep pace with developments in technology and rapidly changing consumer behaviour
- the need to recognise reasonable consumer use of technology to enjoy copyright material— Australian consumers should not be in a significantly worse position than consumers in similar countries
- copyright laws should not be brought into disrepute with technical and out of date provisions
- reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners, and
- a recognition that copyright piracy is becoming easier and the law needs to be constantly updated to tackle piracy.¹

Background

Basis of policy commitment

The Explanatory Memorandum states that many of the amendments implement outcomes of several copyright law reviews conducted by the Federal Government in 2005–06 and

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other policy initiatives. The Attorney-General in the second reading debate in the Parliament elaborated on this statement noting that the Bill includes the Federal Government's responses to:

... the fair use and other exceptions review, the review of the Digital Agenda Act amendments, the review of protection of subscription broadcasts, the Intellectual Property and Competition Review Committee's review of copyright under the competition principles, the Copyright Review Committee's review of jurisdictional procedures of the Copyright Tribunal, the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on technological protection measures, and the technical review of all Australian legislation to ensure consistency with the Australian Criminal Code.²

Senate Standing Committee on Legal and Constitutional Affairs report on the Bill

On 19 October 2006, the Senate referred the Bill to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report. In the report, tabled on 13 November 2006 the Committee made 17 recommendations, which in the main were suggestions for amendments to provisions dealing with enforcement, fair dealing, copyright exceptions and TPMs. Subject to these recommendations, the Committee recommended that the Bill be passed by the Senate.³

The Bills Digest draws on material from both the report and the submissions to Senate Committee Inquiry. For further information, the reader is referred to the [report](#).

Position of significant interest groups

The Senate Committee report noted that during the inquiry, divergent views emerged with respect to key elements of the Bill which accord with the interests of particular stakeholders. Generally speaking, for example, groups representing copyright owners or rights holders tended to support parts of the Bill which strengthen copyright protection, while often opposing, or offering only qualified support to, provisions which seek to create wider exceptions to copyright infringement.⁴ Conversely, those advocating consumer rights and the importance of fostering creativity and innovation argued that the Bill is weighted towards copyright owners and rights holders to the ultimate detriment of individual consumers and the wider community.⁵

Further comment from different interest groups is provided throughout the Bills Digest.

Australian Labor Party

The Labor Senators on the Committee inquiring into the Bill provided a supporting report. While endorsing the majority report's recommendations, Labor Senators were also of the view that the majority report did not place adequate emphasis on a number of significant matters.

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Amongst other things, the Labor Senators made recommendations that the strict liability provisions in Schedule 1 be removed pending further examination; that the time-shifting and format-shifting provisions of Schedule 6 be significantly amended; that the proposed changes to the copyright exception relating to fair dealing for research and study in Schedule 6 be removed; and that the 'commercial availability test' in the exception relating to official copying of library and archive material also be removed.⁶

Australian Democrats

Senator Andrew Bartlett, the Australian Democrat Senator on the Committee inquiring into the Bill, made a dissenting report. Like many submissions to the Committee, Senator Bartlett's concern was with the haste in which such complex and important legislation is being considered by the Parliament. The Senator therefore recommended that the legislation be split to allow the provisions relating to the Australia-United States Free Trade Agreement (AUSFTA) to be passed this year, while further consultation and consideration be given to the remaining provisions during the first parliamentary session of 2007.⁷

Any consequences of failure to pass

Schedule 12 (Technological protection measures) must pass by 1 January 2007 in order to implement Australia's remaining intellectual property obligations under the Australia-United States Free Trade Agreement (AUSFTA).

Financial implications

The Explanatory Memorandum states that the Bill is expected to have minimal direct impact on Commonwealth expenditure or revenue.⁸

Scope and structure of the Bills Digest

The Bill is an amendment Bill to the current *Copyright Act 1968*. The Bill is made up of 12 Schedules. In keeping with the structure of the Schedules, the Digest has been written in 5 discrete parts:

- Part 1—Schedules 1, 2, 3, 4 and 5 at pages 4–16
- Part 2—Schedules 6, 7 and 8 at pages 16–25
- Part 3—Schedule 9 at page 26
- Part 4—Schedules 10 and 11 at pages 27–35, and
- Part 5—Schedule 12 at pages 36–48.

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Each Part contains background, main provisions and concluding comments sections.

General comment on complexity of the Bill

The Bill is difficult for the reader to follow. The current style of multiple references back to the definitions sections is a problem in the Copyright Act as definitions are scattered throughout the Act and many terms are defined. This is a significant issue because a range of end-users will be relying on the legislation to interpret their obligations under the Act. The Digital Agenda review recommended⁹ adoption of codes of practice to clarify issues concerning exceptions to copyright infringement. Adoption of such codes could supplement the Act for institutional purposes to provide greater certainty than currently exists. A 'plain English' guide to exceptions for institutional use would enable and encourage proper assessments to be made on a case by case basis as to whether a particular use is 'fair'.

Part 1—Schedules 1–5 Enforcement

Schedule 1—Criminal laws

Schedule 1 proposes a significant number of amendments to the criminal offence provisions in the Copyright Act. In summary, the amendments:

- repeal the main criminal offence provisions set out in section 132 and other Parts of the Act and replace them with a tiered regime of indictable, summary and strict liability offences that carry a range of penalties
- make provision for an administrative infringement notice scheme to be included in the Copyright Regulations
- re-structure and re-word offence provisions by identifying their constituent physical elements to ensure the offences comply with Commonwealth criminal law policy and the Criminal Code, and
- remove terminology that is inconsistent with the Criminal Code.

For the purposes of understanding Schedule 1, some major aspects of criminal responsibility relevant to the Bill are described below.

Offences—Physical elements and fault elements

The Criminal Code provides that an offence consists of physical elements and fault elements. Physical elements relate to external events such as conduct or the result of conduct. Fault elements relate to a person's state of mind eg intention, knowledge, recklessness and negligence.

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The Criminal Code defines the physical elements of an offence to be conduct, the circumstances in which it occurs and the results of conduct.¹⁰ An omission to act can be a physical element if there is appropriate statutory provision or if it is the result of a breach of duty to act.¹¹ Each offence must contain at least one physical element, but any combination of physical elements may be present in an offence provision.

In general, for every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code establishes four fault elements—intention, knowledge, recklessness and negligence¹²—in descending order of culpability. Where the physical element of an offence consists of conduct, intention is the default fault element. However, if the physical element is a circumstance or a result of conduct the default fault element is recklessness.¹³ The Code does not prevent an offence from specifying an alternative fault element,¹⁴ but indicates that the default fault element will apply in the absence of a specified fault element.¹⁵

In the main, the Bill amends offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code. In the process of applying appropriate fault elements, the amendments also restructure offence provisions so that their constituent physical elements are clearly identified and the Code's default fault elements can be applied to them.

Strict liability

At common law, there is a presumption that every offence contains a mental element. However, an increasing number of statutory offences dispense with fault elements.¹⁶ Whether an offence is a strict liability offence depends on the interpretation of the offence provision. Working from common law principles, Chapter 2 of the Criminal Code requires offences of strict liability to be expressly identified as such.¹⁷ Failure to do so means that fault elements are applied to all the physical elements in the offence.

Strict liability is most often used in minor or regulatory offences attracting small penalties where requiring the prosecution to prove a fault element would render the legislation unenforceable because it would inhibit prosecution and make the hearing of cases more complex and lengthy.

The Bill creates a large number of strict liability offences— the Government's rationale being that this will give police and prosecutors a wider range of enforcement options depending on the seriousness of the relevant conduct.¹⁸ A number of submissions to the Senate Committee inquiry raised concerns with this approach. Further discussion of this issue can be found at page 13 of the Bills Digest.

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Indictable and summary offences

The Crimes Act provides that an offence is indictable if it is punishable by imprisonment for a period exceeding 12 months. An offence that is punishable by 12 months imprisonment or less, or by a fine only, is summary.¹⁹ Summary offences are heard in lower courts, allowing for a quicker and more resource effective resolution.

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*²⁰ states that departures from this well-established dividing line between indictable and summary offences have been rare and should only be made where there is a clear reason for such a departure.²¹ The Bill *does* depart from this rule in that the penalty for most of the summary offences is 2 years rather than 1 year imprisonment. The Explanatory Memorandum states the reason for this departure is that the inherent seriousness of the offences, even at summary level, provides cause for the higher than usual maximum penalty. It also notes that this penalty level is lower than the maximum penalty of 5 years imprisonment for the summary offences in existing section 132.²²

Main Provisions

Tiered regime of the offence provisions

Schedule 1 consists of 77 pages of amendments. The majority of these amendments replace existing offence provisions with a tiered regime of indictable, summary and strict liability offences and with a corresponding tier of penalties. For the purposes of this Digest it is not possible to consider all amendments— rather a few have been selected as examples.

To explain the operation of the tiered approach, the Digest focuses on **new section 132AD** which is a central offence provision in terms of infringing material. It is to replace paragraph 132(1)(a) and subsection 132(6AB).

The Bill sets out the new *indictable offence* in the following way:

Clause 132AD Making infringing copy commercially

Indictable offence

(1) A person commits an offence if:

(a) the person makes an article, with the intention of:

(i) selling it; or

(ii) letting it for hire; or

(iii) obtaining a commercial advantage or profit; and

(b) the article is an infringing copy of a work or other subject-matter; and

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(c) copyright subsists in the work or other subject-matter when the article is made.

(2) An offence against subsection (1) is punishable on conviction by a fine of not more than 550 penalty units or imprisonment for not more than 5 years, or both.

This offence has been re-drafted in accordance with the preferred Criminal Code style of separating different physical elements into separate paragraphs.

In relation to this offence, the prosecution must prove:

- the *physical element of conduct* that the Defendant made an article. The *fault element* applicable is that the Defendant made the article with the *intention* of selling (or letting etc).
- the *physical element of a circumstance* that the article was an infringing copy of a work or other subject-matter. The *fault element* applicable is *recklessness*²³ and;
- the *further physical element of a circumstance* that copyright subsisted in the work or other subject-matter when the article was made. The *fault element* applicable is *recklessness*.²⁴

The *indictable offence* is differentiated from the summary and strict liability offences in the fault elements that attach to the physical elements of the offence. In the *indictable offence* the defendant, in order to commit an offence, must make the article with the *intention* of selling, letting for hire or obtaining a commercial advantage or profit, and *must be reckless* as to the article being an infringing copy of a work or other subject-matter, and *be reckless* as to copyright subsisting in the work or other subject-matter when the article is made.

The word reckless is not used in the provision but recklessness is the fault element that applies to the circumstances set out above by virtue of the principles set out in the Criminal Code.²⁵

By way of contrast, the *summary offence* again provides that the person must make the article with the *intention* of selling, letting for hire or obtaining a commercial advantage or profit, however it requires that a person *must be negligent* as to the article being an infringing copy of a work or other subject-matter and *negligent* as to copyright subsisting in the work or other subject-matter when the article is made.

The fault element of “*negligent as to that fact*” is stated in the provision and therefore it is that specified fault element that attaches to the physical elements of the circumstances in the offence. Negligence is a ‘lesser’ fault element than recklessness or intention and it is on this basis that the indictable and summary offences are differentiated with the summary offence having a lesser penalty.²⁶

The *strict liability offence* is set out in the following way:

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Strict Liability offence

(5) A person commits an offence if:

(a) the person makes an article in preparation for, or in the course of:

(i) selling it; or

(ii) letting it for hire; or

(iii) obtaining a commercial advantage or profit; and

(b) the article is an infringing copy of a work or other subject-matter; and

(c) copyright subsists in the work or other subject-matter when the article is made.

Penalty: 60 penalty units

The offence has the same physical elements as the indictable and summary offence, but as a strict liability offence it has no fault elements— i.e. the prosecution does not need to prove intention, recklessness, negligence etc). The offence is expressly identified as a strict liability offence²⁷ and a defence of mistake of fact is available²⁸

Penalties

The tiered structure of offences also provides a range of penalties. Indictable offences carry a penalty of 550 penalty units²⁹ and/or 5 years imprisonment, whilst summary offences carry 120 penalty units and/or 2 years imprisonment. As noted above, Commonwealth summary offences generally carry a penalty not exceeding 12 months imprisonment. However, the Explanatory Memorandum notes that the inherent seriousness of the offences, even at summary level, provide cause for the higher than usual maximum penalty for the summary offences.³⁰ Strict liability offences carry a penalty of 60 penalty units.

Infringement notices

New sections 133B and **248SA** are also important provisions. They provide for regulations to be made to establish an infringement notice scheme to be used in conjunction with the strict liability offence provisions. As an alternative to prosecution, an infringement notice and fine could be issued for a person alleged to have committed a strict liability offence. The penalty must equal one-fifth of the maximum fine that a court could impose on the person as a penalty for that offence. Accordingly the infringement notice must equal 12 penalty units (\$1320).

Summary of offence provisions in Schedule 1

The tiered approach displayed in **new section 132AD** and described in some detail above, is the template used for many of the offence provisions contained in **Schedule 1**. An

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outline of those provisions is set out below.³¹ The reader should note that in the main, these offence provisions propose to replace existing offence provisions. The significant difference is that each summary offence in the existing provisions is now drafted as three separate offences—indictable, summary and strict liability.

Subdivision B (of Part V) – Substantial infringement on a commercial scale

New section 132AC provides that it is an offence to engage in conduct that results in one or more infringements of the copyright in a work or other subject-matter in circumstances where the infringement has a substantial prejudicial impact on the owner of the copyright and where the infringements occur on a commercial scale.

This offence addresses conduct that has a substantial prejudicial impact on a copyright holder notwithstanding there may be no profit motive involved in the conduct that has allegedly been engaged in by the defendant. In determining whether the infringement has occurred on a commercial scale the volume and value of any articles that are infringing copies that constitute the infringement or infringements and any other relevant matters are to be taken into account (**new subsection 132AC(5)**).

New subsection 132AC(1) and **(3)** provide for indictable and summary offences respectively, however, there is no strict liability offence. The Explanatory Memorandum notes this offence is inherently serious and therefore a strict liability offence or an on-the-spot fine does not contain a sufficiently high maximum penalty to provide an appropriate deterrent.³²

Subdivision C (of Part V) – Infringing copies

Subdivision C contains a large number of criminal offences relating to copyright infringement that address different situations relating to infringing copies. **New section 132AD** (as described above) provides that it is an offence to make an article to sell, let for hire or to obtain a commercial advantage or profit, in circumstances where the article is an infringing copy of a work or other subject-matter and when copyright subsists in the work or other subject-matter when the article is made. It is also an offence to sell or let for hire an article that is an infringing copy of a work or other subject-matter where copyright subsists in the work or other subject-matter when the article is made (**new section 132AE**).

New section 132AF prohibits offering an infringing copy for sale or hire, whilst **new section 132AG** prohibits exhibiting an infringing copy in public commercially. **New section 132AH** provides that it is an offence to import an infringing copy with the intention of selling it or distributing or exhibiting it in public to obtain a commercial advantage etc. **New section 132AI** provides that it is an offence to distribute an infringing copy, and **new section 132AJ**, that it is an offence to possess an infringing copy for various commercial activities as set out, in circumstances where copyright subsists in the work or other subject-matter.

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It is also an offence to make or possess a device for making an infringing copy (**new section 132AL**) and for advertising for the supply in Australia of an infringing copy (**new section 132AM**).

Aggravated offences

Importantly, **Subdivision C** also provides that the indictable offences in this subdivision (except sections 132AL and 132AM) are *aggravated offences* if the infringing copy was made by converting a work or other subject-matter from a hard copy of analog form into a digital or other electronic machine-readable form. Aggravated offences carry a maximum penalty of 5 years imprisonment, a fine of not more than 850 penalty units (\$93,500), or both (**new section 132AK**).

Subdivision D (of Part V) – Airing of works, sound recordings and films

Subdivision D contains offences in relation to the airing of works, sound recordings and films. It is an offence to cause a literary, dramatic or musical work to be performed publicly in circumstances where the performance infringes copyright in the work (**new section 132AN**). It is also an offence to cause a sound recording to be heard or images or sound from a cinematograph film to be seen or heard in circumstances where the hearing or seeing occurs in public at a place of public entertainment and the hearing or seeing infringes copyright in the work (**new section 132AO**).

Subdivision F (of Part V) – Electronic rights management information

Subdivision F contains offences relating to electronic rights management information. Offences include the removal or alteration of electronic rights management information from or relating to a work or other subject-matter without the permission of the owner or exclusive licensee of the copyright in circumstances where the removal or alteration will induce, enable, facilitate or conceal an infringement of the copyright (**new section 132AQ**).

There are also offences of distributing, importing or communicating copies after the removal or alteration of electronic rights management information (**new section 132AR**) and of distributing or importing electronic rights management information with the intention of trading or obtaining a commercial advantage or profit without the permission of the owner or exclusive licensee of the copyright (**new section 132AS**).

Subdivision G (of Part V) - Evidence

Many of the offences in the Division include an element of an activity to obtain a profit. **New section 132AA** provides that “profit” does not include any advantage, benefit, or gain, that:

- is received by a person, and

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- results from, or is associated with, the person's private or domestic use of any copyright material.

New section 132AU provides that if in a prosecution of an offence against this Division it is relevant whether the defendant intended to obtain a profit or did something for, in preparation for, or in the course of, obtaining a profit, the prosecution has the burden of proving that any advantage, benefit or gain does not result from or is not associated with, any private or domestic use of the copyright material. This is similar to the current position in subsection 132(11) of the Act.

Subdivision I (of Part V) – Procedure and jurisdiction

The Bill does not propose any changes in relation to the courts in which copyright offences may be prosecuted. Copyright offences may be prosecuted in the courts of the States and Territories exercising federal jurisdiction or in the Federal Court. The proposed indictable offences would be heard in the courts of the States and Territories. **New paragraph 133A(3)(b)** provides that the Federal Court of Australia has jurisdiction in relation to determining the newly created strict liability offences.

Subdivision A (of Part XIA) - General offences

New sections 248PA - 249PM provide for a range of structured offences relating to sound recordings during the protection period of the performance. They cover conduct such as direct and indirect recording, unauthorised communication, possessing equipment, copying etc.

Subdivision B (of Part XIA) – Acts relating to sound recordings of performances given before 1 July 1995

New sections 248QB –248QH provide for a range of structured offences relating to these performances.

Comments on Schedule 1 — The Senate Committee report

Several submissions to the Senate Committee inquiry argued that the Bill's introduction of strict liability offences for copyright infringement is unprecedented and troubling, to the extent that Schedule 1 of the Bill should not be passed in its current form. In other common law countries such as the United Kingdom, Canada and the United States, offences of strict liability do not exist in copyright law. Significantly, the AUSFTA does not require the creation of offences of strict liability for copyright, and offences of strict liability do not exist in patent or trade mark law in Australia.³³

Many expressed the view that strict liability for copyright infringement should be rejected as a matter of principle. Kim Weatherall, Associate Director (Law) of the Intellectual

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Property Research Institute of Australia, argued that ordinary Australian citizens, engaging in non-commercial activities, should not risk criminal liability, particularly where copyright infringement has taken place unknowingly. Further, Ms Weatherall noted the inherently different nature of copyright property compared to other forms of property:

[...] the harm caused by copyright infringement, while serious in some cases, is commercial, not physical; no one is permanently deprived of property or the ability to use their property by copyright infringement, and it is highly questionable whether society fundamentally condemns unknowing, unthinking infringement of copyright.³⁴

Ms Weatherall pointed to many deficiencies with the proposed criminal liability provisions, both from a policy level and in relation to their likely practical impact. In her view, the reach of the provisions is overly broad and most problematic where they apply to:

- acts not done for a commercial purpose or in a commercial context;
- conduct that is a necessary part of conducting ordinary, legitimate business; and
- acts that might be done by ordinary Australians innocently.³⁵

The Australian Digital Alliance (ADA) predicted that the effect of the Bill's criminal liability provisions will be that copyright 'crimes' will be the subject of substantially higher penalties than other property crimes, in circumstances where the public does not necessarily perceive these sorts of activities as crimes.³⁶ According to some, the result will be that many more people, probably including a disproportionate number of younger people, will at worst be facing jail time, and at best have their records and career prospects marked by criminal convictions.³⁷

On the other hand, advocates of copyright owners were supportive of the new criminal provisions. For example, the Australian Federation Against Copyright Theft (AFACT) expressed strong support for Schedule 1 of the Bill. It applauded the Bill's introduction of a new way of dealing with existing offences to recognise that criminal activity ranges from very serious to lower level matters.³⁸

The Commonwealth Director of Public Prosecutions supported the amendments in Schedule 1 and submitted that the offences and their elements are more clearly articulated as separate offences rather than being incorporated within one offence provision and that this should be of assistance to practitioners working in this area. Further, 'the tiered regime of indictable, summary and strict liability offences affords an opportunity to focus on the varying levels of seriousness of the offences and on the elements of the offence that must be proven beyond reasonable doubt in order to establish a criminal offence.'³⁹

The Committee, in its report, agreed with arguments raised in relation to the proposed strict liability provisions that there is merit in attempting to limit the scope of these provisions to the actual activities that the Committee understands they are intended to

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target. The Committee was of the view that the strict liability provisions could be narrowed in a way that would significantly reduce the risk of their application to ordinary Australian and legitimate businesses. The Committee therefore recommended that the Federal Government examine the possibility of narrowing the strict liability offences in such a way. This could be done by introducing a ‘first infringement’ or ‘warning scheme’ or by the introduction of guidelines.⁴⁰

Schedule 2—Presumptions

Schedule 2 contains amendments to evidential presumption provisions in civil and criminal proceedings.

For example, section 132A of the Act currently provides for an evidentiary presumption to assist in relation to establishing the subsistence and ownership of copyright in order to prosecute. This presumption recognises that copyright is a highly technical area and marshalling the evidence necessary to prosecute matters is a difficult and lengthy process.⁴¹

Essentially, the Bill, in **new subsections 132A(2), (3), (4), and (5)** strengthens the offence provisions, by providing that statements contained on labels, marks, certificates or chain of ownership documents are presumed to be correct unless the contrary is established. The existing provision, in contrast, provides that they are admissible as prima facie evidence so stated. The Explanatory Memorandum notes that the current formulation is inconsistent with the stronger formulation used in other presumptions in the Act such as subsection 127(1)).⁴²

In addition, Schedule 2 introduces amendments to provide for evidential presumptions for civil and criminal proceedings with respect to computer programs (**new sections 129A and 132AAA**), sound recordings (**new sections 130 and 132B**), and film (**new subsections 131(2)–(4) and new section 132C**). The Explanatory Memorandum states that these provisions are intended to more accurately reflect common labelling practices used in these industries.⁴³

Schedule 3—Technologically neutral definitions

Schedule 3 contains amendments to standardise the definition of ‘article’ for the purposes of both civil and criminal proceedings. ‘Article’ is defined in the criminal offence provisions (**new section 132AA**⁴⁴) to specifically include a ‘reproduction or copy in electronic form’. This definition is currently not adopted in the related civil action provisions in sections 38 and 103. The Explanatory Memorandum states that the result is that under the existing definitions, online distribution, or the offer to sell, an infringing electronic reproduction may have constituted a criminal offence, but not necessarily a civil infringement under the Act.⁴⁵

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Items 3 and 9 insert into sections 38 and 103 a definition of ‘article’ that includes ‘a reproduction or copy in electronic form’.

Item 1 amends the definition of ‘infringing copy’ in subsection 10(1) so that the reference to ‘article’ is extended to include ‘an electronic reproduction or copy’. Again, this is to ensure consistency in the use of the term ‘article’.

Item 2 repeals and replaces the definition of ‘record’ to include a ‘file or other device in which sounds are embodied’.

The remaining amendments are either consequential drafting amendments or clarification notes to ensure that the new definition of ‘article’ is not applied inappropriately to other provisions in the Copyright Act.

Schedule 4—Civil remedies and commercial-scale infringement online

Schedule 4 contains amendments to give a court enhanced power to grant relief to copyright owners in civil actions which involve commercial-scale electronic infringements. The new provisions will operate so that, in such cases, a court may take into account *likely* infringements as well as a *proved* infringement in deciding what relief to grant.

Under existing section 115, the relief that a court may grant in an action for an infringement of copyright includes an injunction and either damages or an account of profits. In assessing damages, the court may also award such additional damages as it considers appropriate in the circumstances having regard to certain matters outlined in subparagraphs 115(4)(b)(i) – (iv). These include the flagrancy of the infringement, the need to deter similar infringements of copyright and whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form.

Item 1 inserts **new subsections 115(5), (6), (7) and (8)**, under a new heading ‘consideration for relief for electronic commercial infringement’. **New subsections 115(5)-(8)** give a court additional power to grant relief in civil actions to copyright owners in certain commercial scale Internet infringement cases. This applies where the court is satisfied that:

- the respondent has committed a *proved* infringement
- it involved a communication of a work or other subject-matter to the public
- because of this communication, it is likely there were other infringements of the copyright by the defendant that the plaintiff did not prove, and
- taken together, the proved infringement and the likely infringements occurred on a commercial scale.

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Where a court is satisfied of these matters, it may have regard to the high probability of the *likely infringements* (as well as the proved infringements) in deciding what relief to grant in the action.

The Explanatory Memorandum states that the purpose of these amendments is to deal with issues that have arisen in cases involving large numbers of likely infringements over the Internet.⁴⁶ It is also the intention of the Bill that the determination of ‘commercial scale’ not be limited to proven infringements only. ‘There are cases where it is appropriate to point to likely infringements to enable a plaintiff to meet the “commercial scale” threshold.’⁴⁷

New subsection 115(8) inserts a definition of ‘article’, consistent with amendments made by Schedule 3 and discussed above.

Schedule 5—Customs seizure of imported infringing copies

The Explanatory Memorandum states that the purpose of **Schedule 5** is to:

amend the Customs ‘Notice of Objection’ provisions in the Act to reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices. It will also ensure that the Notice of Objection provisions remain consistent with changes made to the Trade Marks Act 1995 in the current Parliamentary sittings.⁴⁸

Section 135 of the Copyright Act is the main provision that deals with the ‘Notice of Objection’ scheme. The scheme allows officers of the Australian Customs Service (Customs) to seize copies of infringing copyright material where copyright owners have given written notice objecting to their importation. At the time of applying, the copyright owners (the objectors) normally lodge a security currently set at \$10,000.

The amendments in **Schedule 5** propose that:

- the period in which a Notice of Objection remains in force be extended from two to four years unless otherwise revoked (**item 1**).
- existing section 135AA be repealed and replaced with the effect that the Chief Executive Officer (CEO) of Customs could refuse to seize goods unless the objector gives a written undertaking that expenses for the seizure will be repaid (**item 3**). Under existing 135AA, a deposit amount or a security from the objector is required before the CEO undertakes the seizure. Under **new section 135AA**, the CEO may require a deposit of security before seizing infringing copies in cases where the objector has previously defaulted on an undertaking to repay expenses.
- existing section 135AJ be repealed and replaced with a **new section 135AJ** which outlines the consequences of failing to meet the Commonwealth’s expenses of seizure. If an amount payable under an undertaking is not paid, the CEO may decide not to

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seize copies under the Notice of Objection. Decisions made by the CEO under this section are subject to review by the Administrative Appeals Tribunal (**item 5**).

Part 2—Schedules 6, 7 and 8

Background to Schedules 6, 7 and 8

The Copyright Act currently contains a number of exceptions to copyright known as the ‘fair dealing’ exceptions. Their purpose is to allow the limited use of copyright material without the permission of the copyright owner, in specific circumstances and under certain conditions. The exceptions are based on a concept of ‘fairness’ and are confined to four specific purposes, namely study, criticism, news reporting and judicial proceedings.⁴⁹ The fair dealing exceptions have been examined recently by at least four government and parliamentary committees. The Copyright Law Review Committee (CLRC) in its Simplification Report⁵⁰ produced a detailed analysis of the fair dealing exceptions with recommendations about their simplification and expansion into the digital environment. The Joint Standing Committee on Treaties⁵¹ and the Senate Select Committee on the Australia – US Free Trade Agreement,⁵² addressed the inadequacy of the current exceptions to copyright infringement specifically in the context of the free trade agreement with the United States. In May 2005, the Government invited comment on whether the Copyright Act should include a general exception associated with the principle of ‘fair use’ as understood in United States copyright law, or whether there were additional, specific exceptions that would facilitate the public’s access to copyright material in the digital environment.⁵³

New ‘Fair Use’ exceptions

The Bill introduces several new exceptions in response to the Government’s ‘Fair use’ review that was carried out by the Copyright Law Branch of the Attorney-General’s Department in 2005 and 2006.⁵⁴ The review invited those making submissions to consider ten matters, including the following:

- the operation of the fair dealing exceptions in providing a balance between the interests of copyright owners and copyright users
- whether the fair dealing exceptions should be consolidated, following the model recommended by the CLRC,⁵⁵ and
- whether the present fair dealing exceptions should be replaced with a model that resembles the open-ended fair use exceptions in United States copyright law.⁵⁶

The 162 submissions made to the review are available on the Attorney-General’s Department website.⁵⁷ No report was published after the review. However, the Attorney-General said on 14 May 2006 in a press release entitled ‘Major copyright reforms strike

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balance',⁵⁸ that 'stakeholders' support Australia's unique fair dealing regime and do not want to see it replaced with a US style fair use regime.'⁵⁹ The Explanatory Memorandum to this Bill summarises the position of the different groups that made submissions to the review.⁶⁰

The new fair use exceptions introduced by this Bill are:

- time-shifting (taping a broadcast program to watch or listen to later)
- format-shifting (making a copy in another format)
- some new exceptions that allow schools, universities, libraries and archives to use copyright material for non-commercial purposes
- new exceptions for people with disabilities to access copyright materials, and
- an exception to allow the use of copyright materials for parody or satire.

It has been suggested that the Government's intention has been to identify those instances where US law might be more generous to users than Australian law,⁶¹ and then to encode those instances in specific language. In the Bill, this approach has resulted in some private copying exceptions, and in the exception for parody and satire. However, in total, the Australian exceptions provide less than what is provided for under the notion of 'transformative use' in US copyright law.⁶²

Digital Agenda reforms

The *Copyright Amendment (Digital Agenda) Act 2000* received Royal Assent on 4 September 2000 and the amendments to the Copyright Act commenced on 4 March 2001. On 1 April 2003 the Attorney-General announced that the law firm Phillips Fox had been selected to conduct a major part of the Government's broader review of the digital agenda reforms, and to analyse key aspects of the reforms from legal, economic and technical points of view.⁶³ Phillips Fox prepared issues papers and undertook public consultations during the second half of 2003. Their final report on the digital agenda reforms was released by the Government in April 2004. A copy is available on the Attorney-General's Department website.⁶⁴

The changes that this part of the Bill introduces seem to be about clarifying those parts of the Digital Agenda reforms that were unclear or unhelpful. There are also:

- changes to the exceptions applying to libraries and archives, including a new definition of the term 'library' that may allow libraries that are part of a commercial enterprise (eg. a law firm) to rely on the exceptions
- a new exception for national cultural institutions to help them preserve their collections and give the public access to items of historical and cultural significance through 'virtual' means, and

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- changes to the educational statutory licences for the benefits of schools dealing with online material.

Main provisions

Schedule 6 — Exceptions to infringement of copyright

The Bill includes exceptions for two kinds of copying for private and domestic use — time-shifting and format-shifting, and four new specific exceptions that would permit:

- fair dealing with copyright material by libraries and archives
- format-shifting of copyright material for non-commercial and teaching purposes by educational institutions
- fair dealings with copyright material for the benefit of people with disability, and
- fair dealings with copyright material for the purpose of parody and satire.

The four specific exceptions are to be based on the principle of ‘fairness’, that is, a court would be required to assess whether a use is ‘fair’ by testing it against new conditions set out in the legislation.

Part 1 of Schedule 6 — Recording broadcasts for replaying at a more convenient time (‘time-shifting’)

Item 1 repeals the existing section and substitutes a **new section 111** that allows an individual to tape a broadcast of a radio or television program at home, for their private and domestic use, to watch or listen at a more convenient time. The Government has said that ‘everyday consumers shouldn’t be treated like copyright pirates’.⁶⁵ It is permissible to lend a recording to a member of the lender’s family or household for that person’s private and domestic use (**new subsection 111(4)**). However, an infringement occurs if a copy is sold, let for hire, offered for sale or hire, or distributed for trade or other purposes. If any of these actions occurs, then the recording becomes an infringing copy, both in respect of its making and subsequent dealing (**new subsection 111(3)**).

Item 2 expands the definition of ‘exempt recording’ in the part of the Act that deals with Performers’ Rights. The amendments to **subsection 248A(1)** extend the definition of an ‘exempt recording’ to include an indirect film or sound recording made in domestic premises from a broadcast for private and domestic use by watching or listening to the performance at a more convenient time. Without this amendment, a performer might be able to bring an action for an unauthorised use of a performance against a person who records a broadcast of a performance under **new section 111**.

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Part 2 of Schedule 6 — Reproducing copyright material in different format for private use ('format-shifting')

The intention of **items 6, 7, 8 and 9 of Schedule 6** is to allow private copying into different formats. The proposed legislation places restrictions on the type of format-shifting that an individual can engage in. It is permissible to copy, without infringing copyright:

- the content of a book, newspaper or periodical that one owns into another format (**new section 43C**)
- a photograph from hardcopy into electronic format, or from electronic format into hardcopy form (**new section 47J**)
- a sound recording from CD, tape, record, or digital download to any other format (**new section 109A**), except podcasts (**new paragraph 109A(1)(b)**), and
- a film from video to electronic format (**new section 110AA**).

The legislation refers to the reproduced, or 'format-shifted', copy as the 'main copy'.

The legislation enumerates the conditions that must be met for the new exceptions to operate. The conditions are similar for each of the different formats. Firstly, an individual can only copy from a legitimately purchased or owned original; it is not permissible to copy from a borrowed or pirated copy. Secondly, an individual may only copy for their own 'private and domestic use'. The owner is not required to store the original, and may choose to read, view or listen to the original or the main copy. However, the main copy must be in a different format to the original. Thirdly, it is not permissible to sell, hire, trade or distribute the main copy except as a loan to a member of the lender's family or household for the member's private use. Fourthly, an individual may make only one copy in any given format, and fifthly, an individual may not make 'serial' copies, that is, further copies from the main copy. An exception is provided where a temporary reproduction of a work is made incidentally as a necessary part of the technical process of making the main copy. The temporary reproduction is to be destroyed at the first practical time during or after the making of the main copy.

The main copy becomes an infringing copy if the owner disposes of the original to another person. This is said to avoid the situation where a person could acquire an article, make a free copy of it for ongoing use and dispose of the original to another person who might repeat the process.

Comment: The Government has given two reasons why an individual might want to copy material into a different format.⁶⁶ One is to have a private copy to carry around, for example, a music performance in an iPod instead of the original CD form. The second reason for format-shifting is because one format has become obsolete, and an individual wants to move their collection of music into a new format (for example, vinyl records to CDs). The restriction in **proposed paragraph 109A(1)(e)**, that an individual can only

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make one copy in any given format, means that if an individual makes an MP3 copy to put in their iPod, then they cannot also keep the MP3 copy on their laptop. According to an article in *The Age*, in order to maintain song libraries on their iPods, users need to keep a copy on their iPod and another on their computer.⁶⁷ Similarly, the restriction on making 'serial' copies, will restrict individuals from copying their collection progressively from format to format, as one becomes obsolete and is replaced by another format.

The Attorney-General's Department indicated to the Senate Committee inquiry that it is aware of concerns raised in relation to the format-shifting provisions. In response, the Department said that:

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.⁶⁸

The Government has said that it will monitor the implementation of the scope of the format-shifting exception and review it in two years' time, to see whether the scope can be expanded to digital audio-visual materials in a way that complies with Australia's international obligations.⁶⁹

Part 3 of Schedule 6 — Uses of copyright material for certain purposes

In this Part, the proposed legislation brings together four different categories of exceptions and treats them in the same way. The set of exceptions cover:

- non-commercial uses by libraries or archives (**new subsection 200AB(2)**)
- non-commercial uses by educational institutions for educational instruction (**new subsection 200AB(3)**)
- uses for or by a person with a disability (**new subsection 200AB(4)**), and
- uses for parody and satire (**new subsection 200AB(5)**).

The new extended fair dealing exceptions covered by this part will not apply to uses where an existing exception or statutory licence already operates (**new subsection 200AB(6)**). It only covers new uses which must comply with the standards of Australia's international treaty obligations.⁷⁰

The basic structure of the proposed legislation is that a court decides whether a use, falling in one of the following general categories, should be covered by the extended fair dealing exceptions. A court decides by looking at the four conditions provided in the **new section 200AB**. A use is allowed if all of the following conditions exist:

- it is a special case (new paragraph 200AB(1)(a))

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- it is for one of the specific categories listed in the bullet points above (**new paragraph 200AB(1)(b)**)
- it does not conflict with the normal exploitation of the work (**new paragraph 200AB(1)(c)**), and
- it does not ‘unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright’ (**new paragraph 200AB(1)(d)**).

Comment: Exceptions and limitations to the rights of copyright owners must comply with Australia’s international treaty obligations.⁷¹ The provisions in these treaties provide for a ‘three-step test’ for permitted exceptions. In the words of Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works:

Members shall confine limitations or exceptions to exclusive rights to *certain special cases* which do not conflict with a *normal exploitation* of the work and do *not unreasonably prejudice* the legitimate interests of rights holders. (*emphasis added*).⁷²

The provisions in **new section 200AB** are an attempt to provide an open-ended exception in line with the United States model, and to allow the courts to determine if other uses should be permitted as exceptions to copyright.⁷³ The conditions listed above come from international treaties and, as yet, have no basis in Australian jurisprudence. There may be uncertainty as to the scope of the new open-ended exceptions until case law is developed. The Government has said that it will be monitoring the development of case law with respect to the open-ended exception.⁷⁴

According to Ms Kimberlee Weatherall, Associate Director of the Intellectual Property Research Institute of Australia (IPRIA) at the Melbourne University Law School, putting together the four categories of exceptions does nothing to enhance the certainty of the legislation.⁷⁵ She writes that:

Most confusing of course is the fact that the parody/satire exception is subject to these conditions. Meanwhile, the exception for ‘fair dealing for the purposes of criticism and review’ is not subject to these conditions, but instead, subject to the traditional ‘fair dealing’ analysis. So if you have something that might be a parody, you will have to go through two, entirely separate analyses, one using traditional jurisprudence, the other using international jurisprudence coming out of the WTO mostly.⁷⁶

Ms Weatherall suggests that it might have been better to use the set of conditions in the Act at section 40(2), the research and study fair dealing exception, and to identify any ‘special cases’. She says that, at least in the case of parody, there is already a ‘special case’. Many countries around the world have parody defence, without the kind of limitations or conditions that are placed by this proposed legislation.⁷⁷

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Part 4 of Schedule 6 — Fair dealing for research and study

The Copyright Act provides an exception for the reproduction of a ‘reasonable portion’ of a literary, dramatic or musical work (or of an adaptation of such a work) for the purpose of research or study. **Item 11** repeals existing subsections 40(3) and (4) and substitutes new provisions to clarify the meaning of ‘reasonable portion’ for the purposes of section 40, and to align the definition with that used elsewhere in the Act (in section 10 ‘Interpretation’).

It is taken to be fair dealing to reproduce, for the purpose of research or study:

- one article from a periodical publication (**new subsection 40(3)**)
- more than one article from the same periodical publication only when those articles are required for the same piece of research or the same course of study (**new subsection 40(4)**)
- a ‘reasonable portion’ of a published literary, dramatic or musical work (or of an adaptation of such a work). The test of ‘reasonable portion’ in section 10(2) is ten per cent of the number of pages in a work that consists of more than ten pages, or one single chapter of the work. For a published literary or dramatic work in electronic form (other than a computer program), the ‘reasonable portion’ test is in subsection 10(2A), and defines a reasonable portion as ten per cent of the number of words in a work, or the whole or part of a single chapter of the work.

The effect of the proposed changes appears to limit the extent of fair dealing for research or study to the definition of a ‘reasonable portion’, regardless of whether the work is out of print, or out of print and only available in one library or archive in Australia.

Comment

The Senate Committee inquiry received many submissions that expressed concern at the proposed new limits on copying for the purpose of research and study.⁷⁸ Some submitted that the narrowing of fair dealing for research and study will seriously disadvantage libraries and cultural institutions and particularly their clients ‘who will not be able to copy rare or out of print materials to take away with them for research or study purposes, despite the fact that those materials are not commercially available’.⁷⁹

In response, the Attorney-General’s Department indicated that it is considering a possible redraft of these proposed amendments ‘to overcome [apparent] misunderstandings’.⁸⁰ However, the Department explained that the Government’s decision to limit the quantity of copying for research and study is necessary to comply with Australia’s international treaty obligations.⁸¹

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The Copyright Act contains no definition of the term ‘research or study’. The courts have consistently held that it is the purpose of the person making the dealing, rather than the ultimate use to which the material is put, that is relevant when assessing whether the dealing can be regarded as a fair dealing for the purpose of research or study. According to the Attorney-General’s Department Issues paper on ‘Fair Use’,⁸² the Australian courts have yet to consider whether copying and other such use of copyright material for the purpose of commercial research and development could be regarded as fair dealing for research or study. The Government is currently considering an Australian Law Reform recommendation to amend the Copyright Act to provide that commercial research is ‘research’ for the purposes of the fair dealing exceptions.⁸³

Part 5 of Schedule 6 — Official copying of library and archive material

Item 15 inserts a new definition of ‘library’ in **subsection 49(9)**. The *Copyright Amendment (Digital Agenda) Act 2000* added a definition of ‘library’ that made a distinction between libraries that are attached to a business run for profit (other than educational institutions) and libraries in the non-profit sector. The effect of this definition was to ensure that libraries attached to industry, business and for-profit organisations (for example, private hospitals, law firms and financial institutions) would not be able to rely on the exceptions conferred by sections 49, 50 and 51A of the Act. These are the exceptions that enable non-profit libraries in certain specified circumstances to make a copy of a journal article or a reasonable portion of a work for the purpose of research or study by a library user (section 49), to request or provide a copy of a work to another library (section 50), and to copy works for preservation (section 51A), without infringing copyright. The Digital Agenda changes were contrary to a recommendation, made in 1998, by the CLRC, that all libraries, whether they are conducted for profit or not, should be permitted to rely on all the library provisions regulating royalty-free copying.⁸⁴ Libraries were dismayed by this change in 2000, because it meant that public sector libraries were no longer able to request inter-library loans of printed material from corporate library collections, and that important research collections became inaccessible to researchers and other users outside the corporations.⁸⁵ The amendments in **proposed subsection 49(9)** will limit the application of the exceptions in sections 49 and 50 to libraries and archives where all or part of their collections are directly accessible to the public, or in the case of libraries, indirectly accessible through inter-library loans.

Items 26, 27 and 29 of Schedule 6 provide three new exceptions that are intended to widen the scope of the existing preservation exceptions as they apply to key Australian cultural institutions and as they apply to copyright material ‘of historical and cultural significance to Australia’. These new exceptions only apply to particular libraries and archives and are separate and additional to the exceptions applicable to libraries and archives more generally. There are two qualifying criteria to fall within the new exceptions:

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- the work must be one that is held in a library or archives that has a statutory function (under Commonwealth, State or Territory law) to develop and maintain a collection of material that may include works or other subject matter that is protected under the Act, and
- an authorized officer of the relevant library or archives must be satisfied that the work is of historical or cultural significance to Australia.

The new provisions permit an authorized officer of the library or archives to make a single reproduction of a work that is of historical and cultural significance to Australia, including a reproduction or copy in electronic form. Some conditions are imposed. An officer must be satisfied that there is an appropriate justification for the reproduction of a particular work held in the collection. Where a work is in a fragile state and any handling of it would risk damage or deterioration, the reproduction or copy made under this exception will ensure that the original item is better preserved by minimising the need for handling that particular item. In other provisions, the exception is subject to a commercial availability test, that is, reproduction or copying is permitted only if the officer is satisfied that a new copy of the work cannot be obtained within a reasonable time at an ordinary commercial price. When considering the commercial availability of new copies, the authorized officer must also take into account whether an electronic copy can be obtained within a reasonable time at an ordinary commercial price.

Schedule 7 — Maker of communication

The purpose of the amendment in **item 1** of **Schedule 7** is to make it clear that a person who merely accesses or browses material online is not considered to be responsible for determining the content of the communication. This matter was raised by the Digital Agenda review.⁸⁶ According to the Explanatory Memorandum, when the right to communicate works and other subject matter to the public was inserted into the Act by the *Copyright Amendment (Digital Agenda) Act 2000*, a definition of ‘communicate’ was inserted into subsection 10(1) which was stated to mean ‘make available online or electronically transmit ... a work or other subject matter, including a performance or live performance’. Subsection 22(6) supplements that definition by providing that a communication is taken to have been made by the person responsible for the content of the communication. The Explanatory Memorandum explains:

Although it was never intended that a person doing no more than merely accessing copyright material online could be considered to be exercising the communication right in relation to what was accessed, some have argued that this interpretation is possible.⁸⁷

Schedule 8 — Responses to Digital Agenda review

The amendments included in **Schedule 8** relate to the use of copyright material for educational purposes and the educational statutory licence scheme. These amendments arise from the Government’s response to the review of the 2001 Digital Agenda reforms.⁸⁸

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Some of the amendments seek to clarify provisions already in the Act (**Part 1**) and to bring greater consistency between copyright treatment of electronic and hardcopy media in educational institutions. **Parts 3** and **4** implement Recommendation 10 and Recommendation 9(iii) of the Digital Agenda review respectively.

Part 2 extends the statutory licence used by educational institutions to copy broadcast material to include copying of this material from online sources. It implements recommendation 9(i) of the Digital Agenda review. According to the Explanatory Memorandum,⁸⁹ this change is a response to the increasing trend of broadcasters to make the content of their broadcasts available online, either simultaneously or at a later time, through services commonly referred to as web-casting or pod casting, for example. The aim of **new section 135C** is to extend Part VA of the Act to facilitate the use by educational institutions of free-to-air broadcast material from online sources made available by broadcasters, in the same way as Part VA currently permits copying and communication of broadcasts under statutory licences. This will enable educational institutions to use broadcast material made available online, while ensuring that copyright owners are appropriately compensated for the use of their material. This amendment will only apply to the content of material provided in free-to-air broadcasts, as defined in the definition which is inserted in subsection 10(1) by **item 2**.

Part 5 amends the Act to allow educational institutions to load selected websites onto a server and store them for a particular course of study ('active caching'), under certain conditions.⁹⁰ **New section 200AAA** will allow educational institutions to engage in active caching where cached material is not altered and not retained beyond the minimum period required for the particular course. **New paragraph 200AAA(1)(ii)** requires that the material must be restricted to the relevant staff and students giving or receiving the course, and requires that access to the material must be available from the server in a way that is intended to limit its availability only to those staff and students. **New subsection 200AAA(3)** provides that where the work or subject-matter is retained on the server beyond the end of the relevant course or educational instruction, then the reproduction of the material and its communication from the server will amount to an infringement, not only from the time after the instruction ceased, but from the time it was originally reproduced and made available on the server. These amendments accord with the Government's response to Recommendation 16 of the Digital Agenda review.⁹¹

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Part 3 — Schedule 9 Unauthorised access to encoded broadcasts

Schedule 9 contains amendments that repeal Part VAA (Broadcast decoding devices) and substitute a **new Part VAA** (Unauthorised access to encoded broadcasts).

Part VAA

Part VAA was inserted by amendments to the Copyright Act in 2001. Its purpose is to provide civil remedies and criminal offences in relation to the manufacture, importation, sale and other dealings with ‘broadcast decoding devices’ that facilitate unauthorised access to subscription broadcasts.⁹² The range of civil remedies and criminal offences was extended in January 2005 when amendments to implement obligations under the Australia-United States Free Trade Agreement (AUSFTA) came into effect.

In 2005, the Attorney-General’s Department issued a Discussion Paper, *Protecting Subscription Broadcasts: Policy review concerning unauthorised access to and use of subscription broadcasts*. The purpose of this paper was to invite submissions on questions of whether various activities involving unauthorised access to and use of subscription broadcasts that are not currently criminal offences under Commonwealth law ought to be made offences.

On 30 June 2005, the Attorney-General announced that the Government would be introducing amendments to make it a criminal offence to dishonestly access a subscription broadcast without authorisation and payment of the subscription fee. The Government also announced that it should be an offence for pay TV subscribers to distribute a subscription broadcast to others or use it for commercial purposes without the broadcaster’s authorisation.⁹³

Schedule 9 implements this announcement and includes the following amendments.

- The existing civil remedy and offence provisions have been simplified and redrafted to conform with current Commonwealth criminal law policy.
- There are new civil action and offence provisions including:
 - ~ **New section 135AOB** which creates a civil cause of action that may be brought for making a decoding device available online
 - ~ **New section 135ASI** which creates an indictable offence of gaining unauthorised access to a subscription broadcast. It carries a penalty of 60 penalty units (\$6,600), and
 - ~ **New section 135ASJ** which creates three separate indictable offences relating to causing unauthorised access to a decrypted encoded broadcast in different contexts. They correspond to civil actions in **new sections 135AOD** and **135AOC**. The maximum penalty is a fine of 550 penalty units and/or 5 years imprisonment.

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Part 4—Schedules 10 and 11 The Copyright Tribunal

Background

The Copyright Tribunal is an independent body established by section 138 of the Copyright Act. The Act and the Copyright (Tribunal Procedure) Regulations set out its membership, functions, powers and procedures. The Copyright Tribunal presently consists of a President and a Deputy President and three other members appointed by the Governor-General.⁹⁴ The President must be a judge of the Federal Court of Australia.⁹⁵ The Tribunal undertakes a variety of mainly arbitral functions. It determines applications and references made to it.

A review of the jurisdiction and procedures of the Copyright Tribunal was carried out by the Copyright Law Review Committee in 2000. The review found that the great majority of matters heard by the Tribunal involved disputes between large institutional users of copyright material and collecting societies in relation to licence schemes.⁹⁶ The review recommended that the Copyright Act be amended so that the jurisdiction of the Tribunal be extended to apply to collectively administered licences concerning all types of material and copyright users.⁹⁷ The purpose of Schedules 10 and 11 of the Bill is to give effect to this and other recommendations relating to the membership and jurisdiction of the Copyright Tribunal.

Collecting societies⁹⁸ act on behalf of copyright owners both to facilitate the commercial exploitation of their copyright and to prevent unauthorised use of copyright materials. The Act provides for a monopoly to be conferred on a body that is declared to be the collecting society for all or some classes of relevant copyright owners.⁹⁹ For copyright users, collecting societies provide relatively easy access to an extensive range of material without the need to identify and locate individual authors or copyright owners.¹⁰⁰ However, as the Australian Competition Tribunal acknowledged in 1999:

a legislative purpose of the Copyright Tribunal in Australia is to act as a curb on potential abuse of the monopoly power or near monopoly power gained by a voluntary collecting society by aggregating the rights of individual copyright owners.¹⁰¹

Main provisions

Schedule 10 — Copyright Tribunal: amendments commencing first

Part 1 of Schedule 10 — Remuneration required by Parts VA and VB

Part VA of the Copyright Act deals with copying and communication of broadcasts by educational institutions and institutions assisting people with disabilities. Part VB deals with reproducing and communicating works and other copyright material by educational

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and other institutions. Educational institutions and institutions assisting people with a disability may be required to pay the relevant copyright collecting society a remuneration for making or communicating copies of broadcasts. **Item 2 of Schedule 10** deals with the determination of the amount per copy payable to the collecting society by the body administering educational institutions or institutions assisting people with disabilities, for making copies of copyright materials. **New subsection 135ZV(2)** allows different amounts to be determined in relation to different classes of materials copied, as well as in relation to different institutions administered by the administering body or different classes of students of an institution administered by the administering body.

Part 2 of Schedule 10 — Declarations of collecting societies

Currently, the Attorney-General may, by notice in the *Gazette*, declare a body to be a copyright collecting society for the purposes of Part VA of the Copyright Act. Only one body may be named in a declaration at any one time.¹⁰² The amendments proposed by **items 4-33 of Schedule 10** implement recommendations 13.15 and 13.16 of the Copyright Law Review Committee's review of the jurisdiction and procedures of the Copyright Tribunal.¹⁰³

Item 4 of Schedule 10 substitutes new provisions that require the Minister, on receiving an application by a body for declaration under subsection 135P(1) of the Copyright Act, to make or refuse the declaration, or to refer the application to the Copyright Tribunal, which is given the power to make a declaration. Similarly, **item 11 of Schedule 2** inserts new provisions to allow the Minister not only to revoke the declaration of a body as a collecting society for the purposes of Part VA, but also to refer the question of revoking the declaration to the Copyright Tribunal. The Tribunal is given the power to revoke the declaration, provided that it is satisfied that any one of the reasons for revocation, set out in section 135Q, applies to the body. **Items 13-24** give similar powers to the Copyright Tribunal to declare and to revoke the declaration of a copyright collecting society in respect of Part VB of the Copyright Act. Provision is made for different collecting societies to be declared for various classes of owners (**new subsection 135ZZB(1D)**). However, only one collecting society may be declared at any one time in relation to a specified class of owners (**item 14**).

Part VC of the Copyright Act deals with the retransmission of free-to-air broadcasts. A person who makes a retransmission of a free-to-air broadcast may be required to pay equitable remuneration to the relevant collecting society under a statutory licence scheme. **Items 25-33** give similar powers to the Copyright Tribunal to declare and to revoke the declaration of a copyright collecting society in respect of Part VC of the Copyright Act.

Comment: Under section 153F of the Copyright Act, the Copyright Tribunal already has the power to declare and revoke the declaration of a copyright collecting society for the use of copyright material by government.¹⁰⁴ This was done to avoid the potential of a

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conflict of interest, were the Attorney-General to exercise the function in relation to government copying.

The effect of the changes proposed by **items 4-33 of Schedule 10** is to leave the power to declare a collecting society under Parts VA, VB and VC of the Act, with the Attorney-General, but to provide a discretion for the Attorney-General to refer an application to the Copyright Tribunal. The Copyright Law Review Committee argued in its report that this broad discretion is appropriate. It considered that there are advantages in the Attorney-General having the discretion of referring an opposed application to the Tribunal, and that the exercise of this discretion would be particularly useful if a fact-finding process were required.¹⁰⁵ Several collecting societies, including Screenrights and the Australasian Performing Rights Association (APRA), as well as the Australian Vice-Chancellors' Committee, opposed the Committee's suggestion on the grounds that the process of seeking a declaration from the Tribunal would be more complex and time-consuming than a similar application to the Attorney-General.¹⁰⁶ However, according to the Committee's final report in December 2000:

no evidence was submitted to the Committee on whether the process of declaration of a collecting society would be slower, or more complex, if handled by the Tribunal, instead of the Attorney-General. The Committee considers that it is unlikely than an application for declaration as a collecting society made to either the Attorney-General or the Tribunal would, if unopposed, be a lengthy process (especially as interests themselves have generally acknowledged that delays before the Tribunal are largely the responsibility of the parties).¹⁰⁷

Items 37-42 deal with the procedures to be followed by the Copyright Tribunal if the Attorney-General refers to it an application either to declare a body to be a copyright collecting society or to revoke such a declaration. The Tribunal may make any person a party to the reference who applies to be such and who the Tribunal thinks has sufficient interest in whether the declaration that is sought should be made. Persons who have an interest in whether an existing society's coverage of copyright owners should be displaced as a consequence of the declaration being made, may also be parties to the reference. The Tribunal is to allow the applicant for the declaration, and any other party to present their cases, and then must either make or refuse the declaration sought. The Registrar of the Copyright Tribunal is to notify the declaration, if made, in the *Gazette*.

Similar procedures are to be followed when the matter referred is the question of whether the declaration of a collecting society should be revoked. As well as the Minister and the collecting society, the parties to the reference can include any person who is, on request, made a party by the Tribunal and who it thinks has sufficient interest in the question. After allowing the parties to present their cases, the Tribunal must either revoke the declaration or refuse to do so. The revocation must specify its date of effect and be published in the *Gazette* by the Registrar.

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Under section 195B of the Copyright Act, a decision of the Attorney-General either to refuse to make a declaration of a body as a collecting society under Parts VA or VB or to revoke such a declaration may be reviewable by the Administrative Appeals Tribunal. **Items 45 and 46** insert new paragraphs, the effect of which is to make reviewable by the Administrative Appeals Tribunal, a decision of the Minister either to refuse to make a declaration of a body as a collecting society for Part VC or to revoke such a declaration.

Part 3 of Schedule 10 — Tribunal name

Item 50 changes the name of the Tribunal to the Copyright Tribunal of Australia.

Part 4 of Schedule 10 — Registrar

Item 57 repeals existing section 170 for the appointment of the Secretary and other Tribunal staff, and substitutes **new sections 170 and 170A**. **New subsections 170(1) and (2)** establish the position of Registrar of the Tribunal, to be occupied by a person engaged under the *Public Service Act 1999* or whose services are made available under that Act, and appointed by the Minister. The position is not a public office under the *Remuneration Tribunal Act 1973* (**new subsection 170(3)**). Other provisions provide for the resignation of the Registrar, the termination of the Registrar's appointment by the Minister, and the termination of the appointment if the Registrar ceases to have the required connection under the Public Service Act. **New section 170A** maintains the existing requirement that other Tribunal staff may be engaged under the Public Service Act or be persons whose services are made available under that Act.

Item 59 extends the protection and immunity of a High Court Justice to the Registrar when summoning the appearance of persons or the production of documents or certifying as to costs or copies of orders in Tribunal proceedings (**new subsection 171(1B)**).

Schedule 11 — Copyright Tribunal: amendments commencing second

This Schedule implements further recommendations of the review of jurisdiction and procedure of the Copyright Tribunal completed in December 2000. In particular, Schedule 11 implements the recommendations dealing with licences (11.12 and 11.67), manner of paying royalty for copying musical works, record-keeping and inspection of records under statutory licences (11.20), and alternative dispute resolution (21.23 and 21.24). The items in this Schedule are to commence immediately after the commencement of Schedule 10.

Part 1 of Schedule 11 — Licences and licence schemes

The Copyright Tribunal has the function of determining the remuneration payable, and associated matters, under the statutory licence schemes in the Act. In respect of non-

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statutory licences, the Tribunal also has jurisdiction in relation to a ‘licence scheme’ (as defined in section 136), and licences or proposed licences where a licence scheme does not apply and where an application has been made to it by a party. The Copyright Law Review Committee recommended in 2000 that:

the Act be amended so that the jurisdiction of the Tribunal applies to collectively administered licences (whether statutory or non-statutory licences) concerning all types of copyright material and copyright uses.¹⁰⁸

Item 1 of Schedule 11 repeals the definition of ‘licence’ in subsection 136(1) and substitutes a new definition that changes the range of licences that can be subject to an application to the Copyright Tribunal. The new definition covers a licence to do any act comprised in the copyright in any work or other subject-matter. **Item 2** substitutes a new definition of ‘licensor’ in subsection 136(1). The purpose of the amendment is to limit the licences and licence schemes that can be the subject of an application or reference to the Copyright Tribunal to those that are collectively administered. Accordingly, a licensor must be able to grant licences for a substantial number of copyright works or other subject-matter in a class of such materials, for example, literary works or musical works or sound recordings which were made by various different creators. The licensor must have that authority as owner of the relevant copyrights, as exclusive licensee or as agent for the owners.

Division 2 — Substituting licence schemes

This Division extends the Tribunal’s jurisdiction in line with a recommendation of the Copyright Law Review Committee (11.129). Under current legislation, the Tribunal’s power is limited to making amendments or alterations to a licensing scheme. The amendments proposed in this Division would give the Tribunal a broader jurisdiction to substitute a licence or licence scheme, being one put forward by a party to the reference, in relation to applications made under sections 154, 155 and 157 of the Act. The Committee considered that such an extension to the Tribunal’s jurisdiction would build logically on the Tribunal’s current jurisdiction to confirm or vary a licence scheme¹⁰⁹ or to specify changes and conditions that it considers reasonable in the circumstances.¹¹⁰

Division 3 — Involvement of the Australian Competition and Consumer Commission

Chapter 10 of the review of the jurisdiction and procedure of the Copyright Tribunal considered the interaction of the competition regulators, particularly the Australian Competition and Consumer Commission (the ACCC) and the Australian Competition Tribunal, with the specialist role of the Copyright Tribunal. Some overseas jurisdictions also have specialist tribunals or administrative bodies to regulate the monopoly or potential monopoly position of collecting societies, while others rely on competition law. The review did not support the proposal of the *National Competition Policy: Report by the*

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Independent Committee of Inquiry (the Hilmer Report) that competition policy across all Australian industries should desirably be administered by a single body.¹¹¹ Instead they suggested that the jurisdictions of the Australian Competition Tribunal and the Copyright Tribunal are complementary.

Item 27 of Schedule 11 inserts **new sections 157A and 157B** which enable the involvement of the ACCC in applications regarding licences or licence schemes. **New section 157A** provides that, when making a decision on a reference or application regarding licences or licence schemes, the Copyright Tribunal may have regard to any relevant guidelines made by the ACCC. **New section 157B** provides that, in a reference or application regarding licences and licence schemes, the Copyright Tribunal may make the ACCC a party to the reference or application if the ACCC asks to be made a party and the Tribunal is satisfied that it is appropriate to do so.

Part 2 of Schedule 11 — Distribution of amounts collected by declared collecting societies

The Copyright Act requires a collecting society to ensure that the interests of its members or their agents are protected adequately.¹¹² **Part 2 of Schedule 11** implements recommendation 12.22 of the Copyright Law Review Committee that a declared collecting society have the ability to make an application to the Tribunal for an order confirming, varying or substituting an existing or proposed scheme of distribution of payments collected.¹¹³ This is a further extension of the Tribunal's existing jurisdiction into an area of rights and obligations between collecting societies and their members. According to the Committee's report, copyright owners generally support such an extension because most have no choice but to become members of a collecting society.¹¹⁴ On the other hand, collecting societies submitted to the Committee, that it would be inappropriate and unnecessary for the Tribunal to have such an expanded jurisdiction, and that there were existing mechanisms for members to pursue grievances.¹¹⁵ Since 2002, the main copyright collecting societies have also voluntarily adopted a code of conduct.

The Committee acknowledged that most of the existing grievance mechanisms require court proceedings to be taken, and that those proceedings may not be appropriate to deal with grievances by members of collecting societies, other than large organisations or representative bodies.¹¹⁶ Moreover, the Committee noted that involving a court in disputes regarding the distribution of payments, would have the potential to cause disruption and delay in payments to the members of the collecting society.¹¹⁷ The Committee considered that this concern might be addressed to some extent if a collecting society had the ability to make an application to the Tribunal in relation to a proposed or existing scheme of distribution, for an order confirming or varying that scheme.

Items 28-35 of Schedule 11 implement this recommendation under parts VA, VB, and VC of the Act. The Bill does this by inserting new sections that allow a declared collecting society, or a member of the society, to apply to the Copyright Tribunal for a review of the arrangement that the society has adopted or proposes to adopt, for allocating and

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distributing payments collected to those members whose material has been copied. The Bill provides that if the Tribunal varies the arrangement or substitutes a new arrangement, the arrangement reflecting the Tribunal's order will operate as if it had been adopted by the society. The Bill provides for the procedures to be followed when an application is made.

Part 3 of Schedule 11 — Manner of paying royalty for copying musical works

At present the legislation provides:

that the manner of paying the royalty for making records of copyright musical works under section 55 is to be agreed between the record producer and the copyright owner or, failing agreement, is to be determined by the Copyright Tribunal or, if there is no agreement or determination, is as prescribed in the regulations.¹¹⁸

Item 36 of Schedule 11 removes the last option.

Part 4 of Schedule 11 — Records notices

Statutory licences under Parts VA and VB for copying by educational and other institutions have detailed provisions in relation to marking, record-keeping and inspection of records. The Copyright Law Review Committee received submissions that the provisions for record-keeping under Parts VA and VB allow little flexibility and are onerous for parties seeking to comply with the scheme.¹¹⁹ The Committee's draft report recommended that the detailed requirements for marking, record-keeping and inspection of records under Parts VA and VB be repealed, in favour of a provision that those details should be left to the agreement of the parties or, failing agreement, determination by the Copyright Tribunal. The Committee envisaged that an approach which encouraged broad agreement between the parties would result in fewer matters being brought before the Tribunal. The Committee also observed that similar details are not a feature of other statutory licences under the Act, (for example, the statutory licence for the use of copyright material for the Crown) and that there did not appear to have been any problem in the administration of those licences as a result.¹²⁰

The Australian Vice-Chancellors' Committee, CAL and Screenrights opposed the Committee's draft recommendation on the basis that the provisions for record-keeping in Parts VA and VB represent minimum requirements for collecting societies administering the statutory schemes. CAL also argued that provisions for marking and record-keeping were necessary to ensure that records were kept prior to an agreement being reached, because an educational institution can copy prior to such an agreement under Parts VA and VB.¹²¹ While the Committee was initially in favour of removing the detailed requirements for marking, record-keeping and inspection of records, it reconsidered the matter because those interests which would be primarily affected by the proposed change, did not support the removal of the detailed requirements.

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The amendments proposed by **Part 4 of Schedule 11** appear to follow the Committee's initial recommendation from its draft report. The Explanatory Memorandum appears not to comment on why the initial recommendation was adopted. The Australian Vice-Chancellors' Committee submitted to the Senate Committee inquiry that changing the record-keeping system would have considerable cost consequences for educational institutions.¹²² Labor Senators, in their report, agreed that 'the proposed amendment gives further bargaining power to copyright owners and undermines the interests of important educational users in Australia who have not been consulted on such a proposal'.¹²³

Items 40 and 48 of Schedule 11 remove the provisions that prescribe the manner in which the administering body must keep records of copies made and communicated under Parts VA and VB respectively. New paragraphs are inserted that require the administering body of an educational or other institution to establish and maintain a records system that has been determined either by agreement between the body and the collecting society or, where there has been a failure to reach agreement, by the Copyright Tribunal. Either the administering body or the collecting society may apply to the Tribunal for a determination of the records system. **Items 41 and 49** provide that unless the administering body complies with the record-keeping requirements that have been agreed to between it and the collecting society, or determined by the Tribunal, any copying, communication or reproduction purportedly done during the relevant period will not be protected from copyright infringement. **Items 53 and 54** provide for the procedure for an application to the Copyright Tribunal to determine a records system under this Part.

Part 5 of Schedule 11 — Alternative dispute resolution

The Copyright Law Review Committee reported that submissions received made a uniform call for the integration of some form of alternative dispute resolution (ADR) into the Copyright Tribunal process.¹²⁴ ADR is seen as a more accessible, efficient and cheaper alternative to litigation. ADR processes may be facilitative (such as mediation, conciliation or facilitation), advisory (expert appraisal) or determinative (expert determination or arbitration) in nature.¹²⁵ In its existing role, the Copyright Tribunal already acts as an arbitrator. The Committee considered that, if the main function of the Tribunal is confined to determining equitable remuneration, and matters closely associated with that function, then mediation is likely to be the most relevant alternative to proceedings in the Tribunal.¹²⁶ The Committee recommended that collecting societies adopt ADR for the resolution of their disputes with copyright users and potential users, as well as their disputes with members. The Committee further recommended that the Copyright Tribunal should encourage the parties to explore ADR and should have the power to compel them to do so where the Tribunal thinks it is appropriate.¹²⁷

The provisions inserted into the Copyright Act by **Part 5 of Schedule 11** are closely modelled on the corresponding provisions in the *Administrative Appeals Tribunal Act 1975*. **Item 55** inserts a new definition of 'alternative dispute resolution processes' that covers conferencing, mediation, neutral evaluation, conciliation and other procedures or

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services added in the regulations. According to the Explanatory Memorandum, the definition could extend to other procedures and services for the resolution of disputes, but expressly excludes arbitration and court procedures or services.¹²⁸ **Item 56** inserts a **new Division 4A** to provide for ADR processes to be available for use in application and references to the Copyright Tribunal. The process is to be compulsory, rather than voluntary, with the Tribunal given the power, in any application or reference, to direct the holding of a conference of the parties, or alternatively, referral of the proceedings to any other form of ADR process.

Part 6 of Schedule 11 — Determination of questions relating to Parts VA and VB

Item 60 inserts **new section 135JAA** providing for a determination by the Copyright Tribunal of any question that is necessary or convenient to help an administering body of an educational or other institution or the collecting society to comply in the future with the requirements of Part VA on copying and communication of broadcasts. The new section also provides for determinations of questions that are necessary or convenient to help the collecting society comply with its rules, required by Part VA, on protecting the interests of relevant right holders in regard to the collection and distribution of remuneration for that copying and communication. It does not apply to questions where the determination is already covered by other provisions in Part VA or regulations made under it. **Item 61** inserts similar provisions in Part VB of the Act relating to reproduction and copying of works and other subject-matter by educational and other institutions.

Concluding comments to Schedules 10 and 11

At present, the Copyright Act does not include a provision for the use of copyright material where the owners of the copyright cannot be located ('orphaned works'). This has become more of an issue since provisions of the Australia-United States Free Trade Agreement extended the term of copyright on works from 50 to 70 years after the author's death. In its report in 2000, the Copyright Law Review Committee acknowledged that the issue of untraceable copyright owners represents a recurring problem for users, particularly in the electronic and multimedia environment, where it seems reasonable to assume that the amount of unsourced material and copyright material where the owner is untraceable will increase.¹²⁹ The Committee considered several options to deal with this issue but decided, on balance, to make no recommendation for extending the Copyright Tribunal's jurisdiction to allow it to consider applications for a licence where the copyright owner is unknown or untraceable. The question of orphaned works remains unresolved by the current Bill.

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Part 5—Schedule 12 Technological protection measures

Background to Schedule 12

In September 2006, the Federal Government released an exposure draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth), expressing the hope that such legislation would be ‘Good News for Consumers, Bad News for Pirates’. The provisions in that exposure draft have been amended and incorporated in the Bill at Schedule 12.

The purpose of the amendments in Schedule 12 is to fulfil Australia’s obligations under the *Australia-United States Free Trade Agreement 2004* (AUSFTA). Under AUSFTA, the Federal Government provided undertakings to implement a new liability regime for circumventing technological protection measures (TPMs) within two years of the agreement.

The drafting of this Schedule has been a difficult endeavour, particularly given the conflicting demands of the executive, the Federal Parliament, and the High Court of Australia.¹³⁰

Current law regarding technological protection measures (TPMs)

What is a TPM?

TPMs are frequently used for the purpose of preventing copyright material from being copied or accessed. They commonly include password, encryption and DVD region encoding mechanisms. TPMs can be circumvented in several ways, for example, as a result of the unauthorised distribution of passwords and serial numbers, or by employing more sophisticated hacking utilities like password cracking tools and software decompilation programs.

Apart from protecting copyright material, TPMs can also be used for other purposes. For example, they may be used to restrict competition in markets for non-copyright goods and services, or to prevent the proper use of goods lawfully acquired.

Copyright Act 1968

The Copyright Act currently prohibits, amongst other things, the importation, dealing and manufacturing of TPM circumvention devices (section 116A, for civil liability and section 132(5A) and (5B) for criminal liability). However, the Act does not prohibit the actual *use* of a TPM circumvention device. The Copyright Act also provides that the prohibitions relating to the manufacturing and the trafficking of circumvention devices do not apply for

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certain 'permitted purposes' (subsections 116A(3) and (7)). These permitted purposes or exceptions include:

- reproducing computer programs to make interoperable products
- reproducing computer programs to correct errors
- reproducing computer programs for security testing
- copying by Parliamentary libraries for members of Parliament
- reproducing and communicating works by libraries and archives for users
- reproducing and communicating works by libraries and archives for other libraries and archives
- reproducing and communicating works for preservation and other purposes
- use of copyright material for the services of the Crown, and
- reproducing and communicating works etc. by educational and other institutions.

AUSFTA requirements regarding TPM circumvention devices

Under AUSFTA, Australia is required to implement a new liability scheme for circumventing TPMs by 1 January 2007. The current scheme will be repealed and the new law, which will be in the form of amendments to the Copyright Act, will impose civil and criminal penalties, on any person who:

- knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure¹³¹ that controls access to a protected work, performance, or phonogram¹³², or other subject matter, or
- manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
 - ~ are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure
 - ~ have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
 - ~ are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

In short, Australia is required to tighten its law regarding circumvention of TPM devices to prohibit not only manufacturing and dealing but, also, the actual *use of* a circumvention device. In addition the number of exceptions or 'permitted purposes' which can be included in the regime are strictly limited.

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Exceptions allowed under AUSFTA

The new law required by AUSFTA will replace the ‘permitted purposes’ for which circumvention devices may be dealt with under the current law, with several narrow exceptions. Those exceptions are set out in the AUSFTA (Article 17.4.7(e)(i) to (viii)) and generally relate to the following categories:

- reverse engineering for the purposes of achieving interoperability
- security testing of encryption technologies
- parental control locks
- security testing of computers/networks
- privacy issues
- law enforcement and national security
- libraries for making acquisition decisions, and
- other exceptions identified under a legislative or administrative review as addressing a credibly demonstrated actual or likely adverse effect on non-infringing use.

The House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs held in 2005 was an administrative review for the purpose of this last category.

House of Representatives Legal and Constitutional Affairs Committee—Review of Technological Protection Measures Exceptions

In its [Review of Technological Protection Measures Exceptions](#), the House of Representatives Standing Committee on Legal and Constitutional Affairs advised that, in the legislation, the definition of a TPM should clearly require a direct link between access control and copyright protection. In its view, the Government should ensure that access control measures are related to the protection of copyright, rather than to the restriction of competition in markets for non-copyright goods and services. The Committee warned that regional coding devices should be specifically excluded from the definition of a TPM in the legislation. The Committee recommended that the Government allow for the broadest possible exceptions for TPMs in relation to a range of activities. The Committee also recommended that future administrative reviews (required under AUSFTA) should be conducted by the Attorney-General’s Department.

The Government, in its response to the Review, accepted the recommendation that the definition of a TPM should require a link between access control and copyright protection. It also acknowledged the need to specifically exclude regional coding devices from the definition of a TPM in the legislation and, accordingly, this is reflected in the Bill. In regard to the Committee’s recommendation that the Government allow broad exceptions for TPMs, the Government response has been more cautious. In particular, the

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Government did not accept several recommendations for exceptions, some of which sought only to maintain existing exceptions under the current TPM scheme.¹³³

Stevens v Kabushiki Kaisha Sony Computer Entertainment

In *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448, the High Court of Australia emphasised the need for clarity in delimiting the scope of TPMs. Kirby J observed that any future iterations of the law with respect to TPMs should deal with a number of essential considerations – including

‘the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage.’

It can be argued that the draft legislation struggles to satisfy the competing imperatives of the international obligations under the AUSFTA, the parliamentary committee recommendations, and the concerns of the High Court of Australia.¹³⁴

Main provisions

Schedule 12—Technological protection measures

At the outset of the discussion of the Schedule 12 provisions, it is of note, that the provisions of AUSFTA regarding TPMs are extremely complex and technical.¹³⁵ Arguably, Schedule 12 exhibits the same complexities. For example, the definitions distinguishing between access control TPMs and other types of TPMs are complex and confusing. Similarly, the exceptions and defences to liability are cumbersome and differ depending on whether the action involves the act of circumvention or dealing in circumvention devices and whether the device is an access control TPM or some other type of TPM. To add to this confusion, the Government is planning to produce another layer of exceptions and defences via regulation.

The scheme of the legislation and explanatory materials could benefit from some of the user guides and plain English summaries that have become a regular feature of modern legislative drafting practice.

Definitions relating to TPMs

Central to the TPM liability scheme for a circumvention device, are the new definitions of ‘technological protection measure’ (**item 5**), ‘access control technological protection measure’ (**item 1**), ‘circumvention device’ (**item 2**), and ‘circumvention service’ (**item 3**).

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An **‘access control technological protection measure’** is defined as:

- ‘a device, product, technology or component (including a computer program) that is used in Australia or a qualifying country¹³⁶
- by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter, and in connection with the exercise of the copyright, and
- controls access to the work or other subject-matter.

The definition excludes geographic market segmentation technologies such as region coding,¹³⁷ and certain types of computer technologies that are aimed at preventing competition in non-copyright goods.¹³⁸

A **‘technological protection measure’** is defined more broadly. It includes an access control TPM and also means:

- a device, product or component (including a computer program) that is used in Australia or a qualifying country¹³⁹;
- by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter, and
- is designed, to prevent or inhibit the doing of an act that would infringe the copyright.

Again, regional coding devices and certain computer devices are excluded from the definition.

A **‘circumvention device’** for a TPM can have any of the following three alternate meanings. It can be:

- a device promoted, or marketed as having the purpose or use of circumventing a TPM (i.e. it does not require a device to have an actual circumvention purpose or use— this reflects an AUSFTA requirement)
- a device with only a limited commercially significant purpose or use other than to circumvent a TPM, or
- a device which is designed or produced to enable or facilitate the circumvention of a TPM.

A **‘circumvention service’** for a TPM is similarly defined. It can be:

- a service promoted, or marketed as having the purpose or use of circumventing a TPM,
- a service with only a limited commercially significant purpose or use other than to circumvent a TPM, or
- a service which is designed or produced to enable or facilitate the circumvention of a TPM.

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Civil actions regarding TPMs

Item 9 repeals section 116A, the provision that currently regulates the use of TPM circumvention devices and substitutes a **new Subdivision A** into Part V. New Subdivision A contains the civil actions and exceptions for:

- circumventing an access control TPM (**new section 116AN**)
- manufacturing a circumvention device for a TPM (**new section 116AO**), and
- providing a circumvention service for a TPM (**new section 116AP**).

These provisions implement Article 17.4.7(a)(i) of the AUSFTA.

Circumventing an access control technological protection measure

New subsection 116AN(1) provides that an owner or exclusive licensee of copyright in a work or other subject matter that is protected by an access control TPM may bring an action against a person who knowingly, or having reasonable grounds to know, circumvents the access control TPM.

By way of comparison, the current TPM regime in section 116A of the Copyright Act places no restrictions on circumventing an access control TPM.

Exceptions to liability

New subsections 116AN(2) – 116AN(9) create exceptions to liability for circumventing an access control TPM. These exceptions are:

- where the person has the permission (either express or implied) of the copyright owner or exclusive licensee to circumvent the access control TPM (**new subsection 116AN(3)**)
- where circumvention is for the sole purpose of:
 - ~ creating interoperable computer programs and where that information is not readily available from another source at the time of circumvention (**new subsection 116AN(3)**)
 - ~ undertaking encryption research (**new subsection 116AN(4)**)
 - ~ testing, investigating or correcting the security of a computer, computer system or computer network (**new subsection 116AN(5)**)
 - ~ providing online privacy (**new subsection 116AN(6)**). The Explanatory Memorandum states that this would permit circumvention in order to identify and disable an undisclosed capability to collect or disseminate personally identifying information about a person's online activities.¹⁴⁰

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- ~ making acquisition decisions by libraries and other institutions (**new subsection 116AN(8)**)
- where circumvention relates to anything lawfully done for the purposes of law enforcement, national security, or performing a statutory function, power or duty of Commonwealth, state or territory governments and agencies (**new subsection 116AN(7)**)
- where an exception to liability for circumvention is prescribed in the Regulations (**new subsection 116AN(9)**). The process for making regulations is contained in **new section 249**.

The defendant bears the burden of proof for these exceptions (**new subsection 116AN(10)**). These exceptions correspond to the specific exceptions allowed in Article 17.4.7(e) of AUSFTA.

Manufacturing a circumvention device for a TPM

New section 116AO(1) provides that an owner or exclusive licensee of copyright in a work or other subject-matter that is protected by a TPM may bring an action against a person who manufactures, imports, distributes or offers to the public or otherwise provides to another person, TPM circumvention devices.

Exceptions to liability

New subsections 116AO(2) – 116AO(6) create the exceptions to liability. These exceptions are:

- where the promotion or marketing of the device is done by a person without authority and where the particular device does not actually have a circumvention function (**new subsection 116AO(2)**).
- where circumvention is for the sole purpose of:
 - ~ creating interoperable computer programs and where that information is not readily available from another source at the time of circumvention (**new subsection 116AO(3)**)
 - ~ undertaking encryption research (**new subsection 116AO(4)**)
 - ~ testing, investigating or correcting the security of a computer, computer system or computer network (**new subsection 116AO(5)**)
- where circumvention relates to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty of Commonwealth, state or territory governments and their agencies (**new subsection 116AO(6)**).

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The defendant bears the burden of proof for these exceptions (**new subsection 116AO(7)**).

Providing a circumvention service for a technological protection measure

New subsection 116AP(1) provides that an owner or exclusive licensee of copyright in a work or other subject matter that is protected by a TPM may bring an action against a person who provides a TPM circumvention service to another person or to the public.

Exceptions to liability

New subsections 116AP(2) – 116AP(6) create the exceptions to liability. These exceptions are:

- where a service is promoted as a circumvention service without authority and where the service does not actually have circumvention function (**new subsection 116AP(2)**)
- where the circumvention service is for the sole purpose of:
 - ~ creating interoperable computer programs and where that information is not readily available from another source at the time of circumvention (**new subsection 116AP(3)**)
 - ~ undertaking encryption research (**new subsection 116AP(4)**)
 - ~ testing, investigating or correcting the security of a computer, computer system or computer network (**new subsection 116AP(5)**)
- where the circumvention service relates to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty of Commonwealth, state or territory governments and their agencies (**new subsection 116AP(6)**).

The defendant bears a burden of proof for these exceptions (**new subsection 116AP(7)**).

Remedies

New section 116AQ provides civil remedies where a person circumvents an access control TPM, or manufactures or deals in TPM circumvention devices. A court may grant injunctions, damages or an account of profits, or an order that the circumvention device be destroyed or otherwise dealt with. In assessing remedies, the courts may take account of any relevant matters including those listed in **subsection 116AQ(2)**.

Criminal actions regarding TPMs

Item 11 inserts **new Subdivision E** into Division 5 of Part V. It contains the criminal actions and defences for:

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- circumventing an access control TPM (**new section 132APC**)
- manufacturing a circumvention device for a TPM (**new section 132APD**), and
- providing a circumvention service for a TPM (**new section 132APE**).

The criminal actions are only available where the circumvention, manufacture or dealing is done for the purpose of commercial advantage or profit. These provisions implements Article 17.4.7(a)(i) of the AUSFTA.

The penalty for circumventing an access control TPM is 60 penalty units (\$660). The penalty for manufacturing a TPM circumvention device or providing a TPM circumvention service is 550 penalty units (currently \$60,500) and/or 5 years imprisonment.

Defences to liability for these criminal actions are set out in **new subsections 132APC(2)–132APC(8), 132APD(2)–132APD(7)** and **132APE(2)–132APE(7)**.¹⁴¹ They correspond to the purposes, outlined in the Bill, which have been designated as exceptions under the corresponding civil provision discussed above, with one notable difference. Non-profit libraries, archives, educational institutions and public non-commercial broadcasters have a defence to all three categories of criminal liability— i.e. the act of circumvention; the manufacture of circumvention devices; and the provision of circumvention services. There is, however, no equivalent exemption from civil liability for these institutions, apart from the exception that allows libraries, archives and educational institutions to circumvent access control TPMs when making acquisition decisions.

Exception—prescribed acts

Item 15 inserts **new subsections 249(2)–(9)** to provide for the making of regulations in order to allow additional exceptions in regard to the circumvention of an access control TPM. The Explanatory Memorandum states that the provisions are written to conform with Article 17.4.7(e)(viii) of AUSFTA which allows for the creation of additional exceptions to liability in relation to the circumvention of access control TPMs providing those exceptions comply with certain criteria and the case is credibly demonstrated in a legislative or administrative proceeding.¹⁴² The Minister may only make a decision to grant an additional exception subject to the criteria in **new subsection 249(4)**. These criteria include that a submission must be made to the Minister showing that the use of the TPM has had an adverse impact, and that the circumvention of the TPM will not infringe copyright. A regulation may be varied or revoked, but only according to a similar strict set of criteria (**new subsections 249(6)–(9)**).

In relation to this regulation making power, it is of note that some of the exceptions to liability are contained in the Bill, whereas other exceptions are to be contained in the Copyright Regulations, already released in draft form.¹⁴³ Further comment is provided below on the potential difficulties of this approach.

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Comments on Schedule 12

Exceptions and defences to liability

The exceptions to liability in the three civil and criminal action provisions are highly complex based on the specifications of AUSFTA obligations. There are different exceptions depending on the type of TPM and the category of liability.

For example, the *law enforcement and national security exemption* covers *all* three categories of liability: the act of circumvention, the manufacture of devices and the provision of circumvention services in regard to both access control TPMs and other TPMs

Similarly, the *interoperability exception in relation to computer programs* applies to *all* three categories of liability, meaning that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

In contrast, the *encryption research exception* and the *computer security testing exception* apply to only *two* of the three categories of liability: the act of circumvention and the manufacture of devices and provision of services that circumvent access control TPMs. They do not apply to manufacture of devices and provision of services that circumvent TPMs *other than access control TPMs*.

The exceptions relating to *online privacy* apply only to *one* category of liability, namely the act of circumvention.

Libraries and other non-profit institutions, have a defence in *all three categories of criminal liability*, however in *civil actions*, there is only an exception in *one* category of liability—the exception applies only in relation to the act of circumvention and only in relation to making acquisition decisions.

Finally, the exception that allows *further exceptions to liability to be made via regulations* is only available in relation to the act of circumvention. This is in keeping with AUSFTA obligations that effectively prevent Australia from making further exceptions in regard to both the manufacturing and dealing in TPM circumvention devices.

The proper exercise of the exception for circumventing an access control TPM

A further comment might be made in relation to the logic of the exceptions and defences to liability. While the Bill provides certain exceptions in relation to liability for circumventing an access control TPM, it is not clear how individuals and institutions are meant to take advantage of these exceptions, if they are unable acquire these devices. Are they meant to make home-made circumvention devices? Or are they allowed to procure circumvention devices and services legally? This was a question raised in the LACA inquiry and report as follows:

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Recommendation 12 (paragraph 3.131)

The Committee recommends that the Government devise a workable and adequate solution to the flaw in Article 17.4.7 of the Australia-United States Free Trade Agreement identified at paragraphs 3.117 – 3.119 of this report, for example a statutory licensing system or some other approval regime, to enable the proper exercise of exceptions under Article 17.4.7(e)(v), (vii) and (viii). The Committee also recommends that the solution devised by the Government should be distinct from those identified at paragraphs 3.122 – 3.129 of this report.

The Government's response appears to confirm the difficulty and inconsistency. It states:

The Government notes this recommendation. This is not a drafting error. It is an intentional limitation on the availability of circumvention devices under the liability scheme. The Government notes that individuals and organisations will be able to take advantage of the exceptions granted under the AUSFTA by using existing devices in their possession, making their own devices or importing devices. The legislation implementing the AUSFTA will give effect to its terms in accordance with relevant principles of international law.¹⁴⁴

Anti-competitive uses of TPMs

The Australian Competition and Consumer Commission, the High Court of Australia and the Federal Parliament have all expressed concern that TPMs could be used for anti-competitive purposes.¹⁴⁵ Arguably, the Bill attempts to deal with this concern by excluding certain devices and technologies, such as regional coding devices from the TPM definitions. However, it could also be argued that the legislation does not adequately answer this problem. For example, a regional coding device, with a dual purpose to inhibit copyright infringement, and segment markets, would be protected as a TPM under the Bill.

It is also of note that the legislation does not prohibit regional coding devices, which have the sole purpose of controlling market segmentation. The legislation merely provides that such devices do not have special protection as TPMs.

Additional exceptions in the draft regulations

The Federal Government is proposing to insert additional exceptions identified by the House of Representatives Standing Committee on Legal and Constitutional Affairs in the Copyright Regulations. These are set out in the draft regulations and include provisions to deal with the reproduction of computer programs to make interoperable products; the reproduction and communication of copyright material by educational and other institutions assisting people with disabilities; the reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes; the inclusion of sound recordings in broadcasts and the reproduction of sound recordings for

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broadcasting purposes; access to obsolete or defective products; and the repair of products.¹⁴⁶

The Attorney-General's Department has announced a further review of proposed additional exceptions. Such matters would include making back-up copies of computer programs; correcting errors in computer programs; allowing institutions to assist people with an intellectual disability; making copies of works for inclusion in broadcasts; and making copies of copyright material for criticism, review or news reporting by broadcasters.¹⁴⁷ Given the already exhaustive discussion of TPMs in a variety of policy forums, it could be asked why another review is necessary.

The Attorney General's Department has said that, if need be, such exceptions will be added in the future to the Copyright Regulations. The Government has said that it hopes to respond to dynamic changes in technology and the marketplace through having such exceptions in the Copyright Regulations: 'Including the exceptions in the Regulations provides greater flexibility and improves the responsiveness of the scheme to changes in technology.'¹⁴⁸

Matthew Rimmer, Senior Lecturer at the ANU College of Law, argues that three criticisms could be made of this approach. First, the Government is perhaps over-reaching its powers, by trying to do substantive things — such as create exceptions to TPMs in the regulations. The validity of the regulations would be open to challenge in any litigation. Second, the dualistic approach to exceptions is hardly going to make it any easier for copyright owners and users to understand the complex TPM system. Thirdly, the Government will be able to chop and change the exceptions in the regulations, much more easily than it would if it were in the legislation. Such a process is obviously more vulnerable to lobbying.¹⁴⁹

Concluding comments on Schedule 12

Matthew Rimmer's conclusions about the exposure draft Bill remain relevant to discussion of the Schedule 12 provisions in the Bill. Dr Rimmer states:

Ten of the finest judges in the land struggled to make sense of the provisions dealing with TPMs in the *Copyright Amendment (Digital Agenda Act) 2000 (Cth)*, culminating in the litigation in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448. There were judicial complaints that such legislation was ambiguous, convoluted, and chaotic. It is doubtful whether the Federal Court of Australia or the High Court of Australia will find the proposed *Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth)* any easier to comprehend. The new provisions will add to the opacity, the complexity, and the mystification of technological protection measures. The problem is, in part, one of form. The Office of Parliamentary Counsel has been unable to reconcile the competing instructions and demands of the executive, Parliament, and the High Court in the *Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth)*.

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There are, of course, extenuating circumstances: the topic is a complex one, involving difficult questions of law and technology; and the time dead-lines are tight.

The *Copyright Amendment (Technological Protection Measures) Bill 2006* (Cth) does not necessarily resolve some of the larger policy issues raised by the High Court of Australia and the Federal Parliament. There certainly have been some efforts made in the legislative drafting to ensure that TPMs do not have an adverse effect upon competition, access to information, and privacy. However, stronger measures would be needed to dissuade technology developers from wilfully abusing TPMs. The *Copyright Amendment (Technological Protection Measures) Bill 2006* (Cth) should not only include penalties for those who circumvent TPMs, but there should be countervailing penalties for technology developers who abuse TPMs for illegitimate purposes.¹⁵⁰

Endnotes

1. Explanatory Memorandum, General Outline.
2. The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech in reply, House of Representatives Hansard, 1 November 2006, p. 31.
3. Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006, [Provisions]*, Report, 2006.
4. Senate Committee Report op cit., p. 11. The Report gave the following examples: Copyright Agency Limited, Submission 29; Australian Recording Industry Association, Submission 38; Australian Publishers Association, Submission 43; Australian Federation Against Copyright Theft, Submission 57.
5. Senate Committee Report, op cit., p. 11. For example, see Electronic Frontiers Australia, Submission 44; Australian Digital Alliance, Submission 50; Ms Kimberlee Weatherall, Submission 54; Internet Industry Association, Submission 66.
6. Senate Committee Report, op cit., Supplementary report by the Australian Labor Party.
7. Senate Committee Report, op cit., Supplementary report by the Australian Democrats. Senator Bartlett also made a further recommendation, relating to the broadcasting fee cap. This recommendation would apply if the legislation is not to be split.
8. Explanatory Memorandum, p. 4.
9. *Digital Agenda review: report and recommendations* [electronic resource], Phillips Fox, Recommendation 5. At: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/\\$FILE/FOX+Final+reportpassword.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/$FILE/FOX+Final+reportpassword.pdf)
10. Criminal Code, section 4.1.
11. Criminal Code, section 4.3.
12. 'Knowledge' is not a default fault element but can be applied to the physical elements of circumstance and result—see Criminal Code, section 5.3. 'Negligence' is not a default fault

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element but can be applied to a physical element of an offence—see Criminal Code, section 5.5.

- 13 Criminal Code, section 5.6. If ‘recklessness’ is the fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element—Criminal Code, subsection 5.4(4).
- 14 Criminal Code, subsection 5.1(1).
- 15 Criminal Code, section 5.6.
- 16 *He Kaw Teh v. R* (1985) 157 CLR 523.
- 17 Criminal Code, subsection 6.1(1).
18. Explanatory Memorandum, p. 2.
19. Section 4G.
20. Issued by authority of the Minister for Justice and Customs, February 2004.
21. *ibid.*, paragraph 5.3.
22. Explanatory Memorandum, p. 22.
23. Section 5.6(2) of the Criminal Code.
24. Section 5.6(2) of the Criminal Code.
25. Subsection 5.6(2) of the Criminal Code
26. See section 5 of the Criminal Code.
27. Subsection 6.1 of the Criminal Code.
28. Subsection 9.2 of the Criminal Code.
29. A penalty unit equates to \$110 according to section 4AA of the *Crimes Act 1914*.
30. Explanatory Memorandum, p. 23. The reader should note that in addition, there are some summary offences that carry lesser only monetary penalties and do not carry terms of imprisonment: see **new sections 135ASI and 132APC**. These offences involve fault and are not strict liability offences.
31. The summary is extracted from the submission by the Commonwealth Director of Public Prosecution to the Senate Committee inquiry.
32. Explanatory Memorandum, p. 20.
33. Senate Committee Report, *op cit.*, pp. 14–15.
34. Submission 54, pp. 14-15 in the Senate Committee Report, *op cit.*, p. 15.
35. Submissions 54 and 54A quoted in the Senate Committee Report, *op cit.*, p. 15.
36. Submission 50, quoted in the Senate Committee Report, p. 15.
37. Electronic Frontiers Australia, Submission 44, quoted in the Senate Committee Report, *op cit.*, p. 15.

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38. Submission 57, p. 3, quoted in the Senate Committee Report, op cit., at p. 16.
39. Commonwealth Director of Public Prosecutions, Submission, p. 4.
40. Senate Committee Report op. cit., p. 39.
41. Commonwealth Director of Public Prosecutions, Submission, p. 7.
42. Explanatory Memorandum, p. 81.
43. ibid., p. 82.
44. Existing section 132(9).
45. Explanatory Memorandum, p. 86.
46. ibid., p. 90.
47. ibid., p. 91.
48. ibid., p. 93.
49. *Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the digital age: issues paper* May 2005 [electronic resource], Attorney-General's Dept., 2005. Available at http://dpl/Books/2005/AttorneyGeneral_FairUse.pdf (accessed 30/10/06). The four fair dealing exceptions are included in Part III Division 3 — 'Acts not constituting infringements of copyright in works'. They are: Fair dealing for purpose of research or study (section 40); for purpose of criticism or review (section 41); for purpose of reporting news (section 42); and reproduction for purpose of judicial proceedings or professional advice (section 43).
50. Copyright Law Review Committee, *Simplification of the Copyright Act: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, Canberra, 1998, paragraph 6.12.
51. Joint Standing Committee on Treaties, *Report 61: the Australia – United States Free Trade Agreement*, 2004. At: <http://www.aph.gov.au/house/committee/jsct/usafta/report/fullreport.pdf> (accessed 30/10/06)
52. Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report*, 2004. At: http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/report.pdf (accessed 30/10/06)
53. *Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the digital age: issues paper*, May 2005, op. cit., p. 4.
54. Hon. Philip Ruddock, 'Government examines 'fair use' of copyright material', *News release*, 5 May 2005. A copy of the Issues Paper issued by the Attorney-General's Department entitled: *Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the digital age: issues paper*, May 2005 is available at: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf)

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55. Copyright Law Review Committee, *Simplification of the Copyright Act: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, Canberra, 1998.
56. Attorney-General's Department, *Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the digital age: issues paper*, May 2005, p. 36.
57. At:
<http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>
58. Hon. Philip Ruddock, Attorney-General, 'Major copyright reforms strike balance', *News release*, 14 May 2006.
59. *ibid.*, p. 3.
60. Explanatory memorandum, pp. 11–12.
61. Dr Matthew Rimmer on:
http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html
62. *ibid.*
63. Attorney-General's Department, 'Review of Copyright Digital Agenda reforms'.
64. *Digital Agenda review: report and recommendations* [electronic resource], Phillips Fox, At:
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/\\$FILE/FOX+Final+reportpassword.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/$FILE/FOX+Final+reportpassword.pdf)
65. Hon. Philip Ruddock, Attorney-General, 'Major copyright reforms strike balance', *News release*, 14 May 2006.
66. Explanatory memorandum, p. 6.
67. Kenneth Nguyen, 'Drawing board beckons anew for flawed iPod bill', *The Age*, 19 October 2006, p. 6.
68. Attorney-General's Department, *Submission [69A] to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Copyright Amendment Bill 2006*, 8 November 2006, p. 3.
69. Hon. Philip Ruddock, Attorney-General, 'Major copyright reforms strike balance', *News release*, 14 May 2006, p. 4. According to the Explanatory memorandum, the Government 'will review the new arrangements if necessary'. Explanatory memorandum, p. 13.
70. Explanatory memorandum, p. 112, at paragraph 6.63.
71. The relevant treaty obligations include Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (<http://wipo.int/treaties/en/ip/berne/>); Article 13 of the TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights http://www.wto.org/english/tratop_e/trips_e/trips_e.htm); Article 10 of the WIPO Copyright Treaty (<http://www.wipo.int/treaties/en/ip/wct/index.html>); Article 16 of the WIPO Performances and Phonograms Treaty (<http://www.wipo.int/treaties/en/ip/wppt/>); and Article 17.4.10(a) of the Australia–US Free Trade Agreement <http://www.dfat.gov.au/trade/negotiations/us.html> (sites visited 30/10/2006).

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72. Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (<http://wipo.int/treaties/en/ip/berne/>).
73. Explanatory memorandum, p. 109, at paragraph 6.53.
74. *ibid.*, p. 13.
75. Dr Matthew Rimmer on:
http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html
76. At http://weatherall.blogspot.com/2006_10_01_weatherall_archive.html.
77. According to Dr Rimmer, the Information Society Directive in the European Union specifically allows Member States to provide an exception applying to ‘use for the purpose of caricature, parody or pastiche’. France has a specific exception for ‘parody, pastiche and caricature, observing the rules of the genre’. Spanish copyright law provides an exception for ‘parody provided that it involves no risk of confusion with that work and does no harm to the original work or its author’.
78. Senate Committee Report *op cit.*, November 2006, pp. 27-28.
79. *ibid.*, p. 28. Submissions from the Australian Digital Alliance and the Australian Libraries’ Copyright Committee.
80. *ibid.*, p. 28.
81. *ibid.*, pp. 28–29.
82. Attorney-General’s Department, *Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the digital age: issues paper*, May 2005, p. 13.
83. Australian Law Review Commission, *Gene patenting and human health*, June 2004.
84. Copyright Law Review Committee, *Simplification of the Copyright Act: Part 1*, p. 102.
85. Public sector law libraries, in particular, were concerned that the changes created a significant extra cost and effort as licences had to be obtained from CAL and, where copyright owners were not CAL members, they had to be located and their consent obtained to copy their works.
86. Digital Agenda Review – Government responses to Phillips Fox recommendations and related matters, May 2006. ‘Additional matters considered as part of the Digital Agenda review’, p. 13.
87. Explanatory memorandum, p. 130.
88. Digital Agenda Review – Government responses to Phillips Fox recommendations and related matters, May 2006
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(67A327E36EF3F6D494E4EC9E698F2E51\)~Government+Response+to+Digital+Agenda+Review+\(2\).doc/\\$file/Government+Response+to+Digital+Agenda+Review+\(2\).doc](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(67A327E36EF3F6D494E4EC9E698F2E51)~Government+Response+to+Digital+Agenda+Review+(2).doc/$file/Government+Response+to+Digital+Agenda+Review+(2).doc) (site visited 31/10/2006)
89. Explanatory memorandum, p. 132.
90. Caching has been defined as ‘an activity, performed by machine or human being, with the goal of reducing communication and data processing costs, adapting to limited bandwidth,

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or providing a safe or otherwise regulated online environment'. Referred to in the submission of the Australian Digital Alliance to the 'Fair Use' review, July 2005, p. 13, and quoted from a paper by D. Whitehead entitled 'Caching: an issues paper'. This paper was presented at the Australian Digital Alliance Forum *ADA fair dealing review strategy forum* held at the National Library of Australia on 26 May 2005.

91. Recommendation 16 of the Digital Agenda review was: 'That the educational statutory licence provisions be amended to allow an education institution to make active caches of copyright material for the purpose of a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner'. The Government did not support this recommendation. The Government response was: 'Instead the Copyright Act will be amended to allow the active caching of web sites by educational institutions where cached material is not altered and not retained beyond the minimum period required for the particular course of educational instruction'.
92. The relevant amendments were made by the *Copyright Amendment (Digital Agenda) Act 2000*. The term 'broadcast decoding device' is defined in section 135AL of the Copyright Act.
93. Hon P. Ruddock, 'Pay TV signal theft to be criminal offence', *Media Release*, 30 June 2005.
94. Attorney-General's Department website at:
http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Department_Civil_Justice_and_Legal_Services_Group_Information_Law_and_Human_Rights_Division_Copyright_Law_Branch_Copyright_Law_Branch_publications_Copyright_Tribunal (accessed 7/11/2006).
95. *Copyright Act 1968* section 140(1).
96. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000. Copy available at:
http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Jurisdiction_and_Procedures_of_the_Copyright_Tribunal
97. *ibid.*, para. 11.12.
98. Copyright collecting societies operating in Australia include the Australasian Mechanical Copyright Owners' Society (AMCOS), Australasian Performing Rights' Association (APRA), Copyright Agency Limited (CAL), Phonographic Performance Company of Australia (PPCA), Screenrights, and Vi\$copy. More details on each one of these is provided in the Copyright Law Review Committee's report entitled *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, pp. 28-32.
99. *Copyright Act 1968*, section 183 and Part VA and VB.
100. The nature of the main copyright collecting societies and their licensing activity in Australia was addressed in the *Review of Australian Copyright Collecting Societies: a report to the Minister for Communications and the Arts and the Minister for Justice* by Shane Simpson, 1995.
101. *Re Applications by Australasian Performing Right Association Ltd* (1999) 45 IPR 53 at 73, para. 62.

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102. *Copyright Act 1968*, section 135P(2).
103. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, pp. 106–107.
104. *Copyright Act 1968*, Division 2 of Part VII. CAL was declared a collecting society for government copying by the Copyright Tribunal in January 1999.
105. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, pp. 105-106.
106. *ibid.*, p. 104.
107. *ibid.*, p. 104.
108. *ibid.*, p. 60.
109. *Copyright Act 1968*, subsections 154(4), 155(5) and 156(4).
110. *ibid.*, section 157(6).
111. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, pp. 51-55.
112. *Copyright Act 1968*, sections 135P, 135ZZB and 135ZZT.
113. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, p. 101.
114. *ibid.*, p. 95.
115. *ibid.*, p. 95.
116. *ibid.*, p. 100. See also the introduction of alternative dispute resolution processes by Part 5 of Schedule 11.
117. *ibid.*, p. 101.
118. Explanatory Memorandum, p. 187.
119. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, p. 63.
120. *ibid.*, p. 63.
121. *ibid.*, p. 64.
122. Australian Vice-Chancellors' Committee, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into Copyright Amendment Bill 2006*, 1 November 2006.
123. Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006 [Provisions]*, November 2006.
124. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, p. 155.
125. *ibid.*, Appendix E, pp. 195–197.

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126. *ibid.*, p. 156.
127. *ibid.*, p. 162.
128. *Explanatory Memorandum*, p. 193.
129. Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, p. 133.
130. Matthew Rimmer, 'Digital locks: the new regime for technological protection measures' [Unpublished paper].
131. While the Copyright Act uses the term 'technological protection measure', AUSFTA uses 'effective technological measure' which is also the term used in the WIPO Copyright Treaty.
132. While the Copyright Act uses the term 'sound recording', AUSFTA uses 'phonogram' which is also the term used in the WIPO Performances and Phonograms Treaty.
133. The Government did not accept recommendations 8, 9 and 10 (which set out criteria for identifying exceptions), 15(i), 27(i) and 32 (which set out new exceptions) 15(iii) and 19 (which seek to maintain existing exceptions under the current TPM scheme. See: Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report 'Review of technological protection measures exceptions', 2006. Available at:
[http://centenaryhouseinquiry.gov.au/agd/WWW/rwpattach.nsf/VAP/\(4341200FE1255EFC59DB7A1770C1D0A5\)~Government+response+to+LACA+TPMS+\(final\).DOC/\\$file/Government+response+to+LACA+TPMS+\(final\).DOC](http://centenaryhouseinquiry.gov.au/agd/WWW/rwpattach.nsf/VAP/(4341200FE1255EFC59DB7A1770C1D0A5)~Government+response+to+LACA+TPMS+(final).DOC/$file/Government+response+to+LACA+TPMS+(final).DOC)
134. *ibid.*
135. The relevant provisions are in Article 17 located at:
http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html
136. A 'qualifying country' is defined in s 10(1) and explained in the Explanatory Memorandum, at p. 201.
137. The Explanatory Memorandum explains that region coding measures prevent playback of films or electronic games in a geographic location when the film or electronic game is intended to be marketed in a different geographic location. An example of a region coding measure is Regional Playback Control (RPC) which is part of the DVD Content Scrambling System (CSS) used by DVD manufacturers. DVDs are coded for use in one of several regions and DVD players can operate to play only DVDs from a given region.
138. The Explanatory Memorandum at p. 204 provides a fuller explanation.
139. A 'qualifying country' is defined in s 10(1) and explained in the Explanatory Memorandum, at p. 201.
140. Explanatory Memorandum, p. 214.
141. In relation to defences, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility

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- that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt. Explanatory Memorandum, p. 230.
142. Explanatory Memorandum, p. 247.
 143. Attorney-Generals Department website: Exposure Drafts Copyright Amendment (Technological Protection Measures) Bill 2006 and related Regulations. Located at: <http://centenaryhouseinquiry.gov.au/agd/WWW/agdHome.nsf/Page/RWP04FC63D41045DEA5CA2571DF0021BCA3>
 144. Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report 'Review of technological protection measures exceptions', 2006.
 145. See above at pp. 38–39 of the Digest.
 146. Attorney-Generals Department website: Exposure Drafts Copyright Amendment (Technological Protection Measures) Bill 2006 and related Regulations. Located at: <http://centenaryhouseinquiry.gov.au/agd/WWW/agdHome.nsf/Page/RWP04FC63D41045DEA5CA2571DF0021BCA3>
 147. *ibid.*
 148. Explanatory Memorandum, p. 247.
 149. Matthew Rimmer, *op cit.*
 150. *ibid.*

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