

UNION INTERNATIONALE DES EDITEURS  
INTERNATIONALE VERLEGER - UNION

INTERNATIONAL PUBLISHERS ASSOCIATION  
UNION INTERNACIONAL DE EDITORES

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

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27 October 2006

Dear Sir or Madam,

**Copyright Amendment Bill 2006: Concerns of the International Publishers Association (IPA)**

The International Publishers Association appreciates this opportunity to comment on the Copyright Amendment Bill 2006 (the “Bill”) and its 11 Schedules currently under consideration by the Senate Legal and Constitutional Affairs Committee.

The International Publishers Association (IPA) is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, IPA now counts 73 national, regional and specialised publishers associations from 65 countries - including the Australian Publishers Association - among its members, and therefore the great majority of publishers together generating world-wide sales of USD 88 billion. IPA is an accredited non-governmental organisation enjoying observer status to United Nations organisations, including the World Intellectual Property Organisation. IPA’s main goals are the promotion of literacy and reading, and the development and protection of copyright.

IPA believes that parts of the Bill violate international copyright agreements to which Australia is, or agreed to become, a party, and in particular the “three step test” set out in all of these agreements. In this submission, we therefore focus on Schedules 6 and 8 of the Bill dealing with the limitations of copyright. We reserve the right to make further or additional comments at a later stage. We note that other organisations representing creators, including the Australian Publishers Association, are submitting comments addressing general rightsholder concerns, and we commend these comments to your attention.

In the area of copyright, Australia has legal obligations under public international law e.g. by acceding to the Berne Convention, by joining the WTO and its TRIPS Agreement, and, bilaterally, by concluding the AUSFTA (which moreover obliges Australia to join the WIPO Copyright Treaty). Pursuant to these treaties, Australia must grant authors of literary and artistic works an exclusive right of authorising the reproduction of these works in any manner or form, but can permit the reproduction of such works provided three criteria are cumulatively satisfied (“three step test”): The reproduction is (1) limited to certain special cases, and (2) does not conflict with a normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author [see Article 9 Berne Convention, Article 13 TRIPS, and Art. 17.1.4 AUSFTA containing a covenant to join the WIPO Copyright Treaty, which enshrines the three step test in its Articles 1(4) and 10].

The Bill expressly recognises the three step test in Schedule 6, Section 200AB(1) in relation to the general copyright exceptions carved out for libraries, archives, educational institutions, disabled persons *et al.* The express recognition of this fundamental principle reassures the international publishing community of Australia’s intention to legislate within the framework of public international law with regard to classic copyright exceptions. [However, this does not mean that the more detailed copyright limitations or exceptions contained in the Bill can go beyond what is permitted by the three step test; each Article must in itself pass all three steps of the test. IPA has concerns that not all of the provisions of the Bill, including those in Schedule 6, would satisfy this test, but leaves it to the national rightsholder associations to elaborate on this. We are happy to further outline our concerns upon request.]

We are concerned that Schedule 8 of the Bill purporting to create exceptions for communicating copyrighted works in prescribed ways does not make any express reference to the right of communication being limited by the three step test. Our concerns are partly due to the uncertainty on how the meaning of “use” (Schedule 6) relates to the meaning of “communication” (Schedule 8). Schedule 8 could either be subsumed under Schedule 6, as “communication” is a type of “use”. Alternatively, Schedule 8 could be seen as a “*lex specialis*” to which Schedule 6 does not apply (*specialis derogat legi generali*).

If Schedule 6 and its Section 200AB(1) also apply to Schedule 8, the Bill should clearly state this. If Schedule 8 is not subject to Section 200AB(1) and hence the three step test, Australia will be in violation of its international obligations as the proposed exceptions clearly go beyond the framework set by the test. The page number limitations contained in the proposed Section 135ZMB(2) are not equivalent to an express recognition of the three step test, as they do not provide the same degree of flexibility, nor the possibility to take individual circumstances into account. This provision in the Bill assumes that the unit of trade of the publishing industry remains the “book” as a bound paper copy. In fact, recent developments, including the expansion of the use of course packs in Australia and the services consequently provided by the Copyright Agency Limited (CAL), demonstrate that the unit of trade is changing, and that individual chapters, articles, sometimes even individual images and graphs in themselves can become elements of trade.

Even if the page number limitation in Section 135ZMB(2) was to be regarded as equivalent to adhering to the three step test, logic would command that such a provision should also be binding on other entities communicating copyrighted work to the public, such as libraries. This is also a requirement contained in Articles 8 and 10 of the WIPO Copyright Treaty which Australia contracted to join.

We therefore call upon the Australian legislator to clarify the relationship between Schedules 6 and 8 and to clearly subject Schedule 8, as well as all other parts of the Bill dealing with copyright limitations or exceptions, to the three step test.

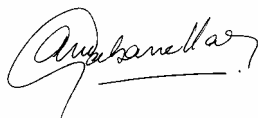
As a further step, the Australian legislator should carefully assess whether the proposed detailed copyright limitations and exceptions do not go beyond what is permitted by the three step test. In IPA's view, some of the provisions contained in Schedules 6 and 8 clearly cannot withstand the application of this test and we again refer to the submissions of Australia's national rightsholder representatives for details.

IPA's call on behalf of the international publishing industry is of particular urgency given the worrying international implications of the Bill. Communications online and uploading onto web sites have particular international implications, because of the facility to reach users in other jurisdictions. It must be made clear in the legislative text that all copies that leave Australian territory are then subject to the national laws of the country in which the recipient receives his or her copy. It would be a violation of the aforementioned international treaties if Australian law appears to permit uses abroad under its exceptions.

Finally, IPA voices its concerns on the sometimes overly detailed provisions of the Bill. It is apparent that specific uses, or desired uses, by certain lobby groups, were the reason for bringing forward the copyright exceptions as they are presented today. The digital landscape is changing rapidly. Publishers must constantly adapt their business models to ensure that their services meet the needs and expectations of their customers/users in an ever changing technological environment. The Australian legislator should provide a framework which allows for the relationship of creators/rightsholders and users to develop, and closer cooperation between users and creators/rightsholders to flourish.

IPA appreciates your consideration of our views. If we can provide further information or answer any questions about this submission, please contact either me, or IPA's Legal Counsel Antje Sorensen at [sorensen@ipa-UIE.org](mailto:sorensen@ipa-UIE.org).

Yours faithfully,



Ana Maria Cabanellas  
IPA President