



30 October 2006

Ms Jackie Morris
Acting Committee Secretary
Senate Standing Committee on
Legal and Constitutional
Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms Morris

Inquiry into the Copyright Amendment Bill 2006

The Interactive Entertainment Association of Australia (“IEAA”) welcomes the opportunity to make a submission to the LACA Committee as part of the Committee’s inquiry into the Copyright Amendment Bill 2006 (“Bill”). IEAA has been working with the Attorney-General’s Department on key aspects of the Bill for some time now and is encouraged by the significant progress that has been made since the exposure draft of the Bill was released in early September 2006. IEAA values the consultation that the Attorney-General and his Department undertook prior to the introduction of the Bill into Parliament and thanks both the Attorney-General and his Department for doing so.

IEAA supports the majority of reforms introduced by the Bill. In particular, IEAA welcomes the protection afforded to access control technological protection measures (“TPMs”) and the prohibition on circumventing access control TPMs. IEAA also applauds the new tiered criminal offence regime, the revised evidentiary presumptions for computer programs and the Government’s approach to the time and format shifting exceptions.

Although IEAA endorses the passage of the Bill in its current form, IEAA notes that the Australian Government’s approach to implementing the TPM provisions of the Australia-United States Free Trade Agreement is without precedent in other jurisdictions. As a result, IEAA considers it crucial that the Government closely monitor the efficacy of its approach and the marketplace’s response to the reforms contemplated in the Bill. Consequently, IEAA strongly submits that the LACA Committee should make a recommendation to the Australian Government that it monitor the operation of the amendments introduced by the Bill (including the definitions of access control TPM and TPM) on an ongoing basis to ensure that they are functioning as intended and in accordance with Australia’s international obligations.

IEAA would like to highlight to the LACA Committee two key aspects of the Bill that would benefit from further consideration.

1 Tiered offence regime and the TPM offences

(Proposed sections 132APC, 132APD and 132APE, Schedule 11 of the Bill)

- 1.1 IEAA strongly supports the introduction of a tiered criminal offence regime. IEAA's experience with games piracy in Australia has been that illegal activity occurs on a spectrum ranging from full-scale commercial operations to small-scale operations. A tiered enforcement regime arms police and prosecutors with a range of enforcement options that are capable of reflecting the seriousness and moral culpability of the conduct involved.
- 1.2 Given this clear benefit of a tiered offence regime, and the importance of complying with Commonwealth criminal law policy *throughout* the Copyright Act, IEAA is surprised to observe that the TPM offences in proposed sections 132APC, 132APD and 132APE (see Schedule 11 the Bill) are not tiered in the same way that the non-TPM offences in Schedule 1 of the Bill are: section 132APC only contemplates the enactment of a summary offence, and sections 132APD and 132APE merely contain indictable offences.
- 1.3 IEAA cannot identify any reason why the TPM offences should be treated differently to the non-TPM offences and urges the LACA Committee to address this inconsistency. To do so, the Government would need to supplement:
- (a) proposed section 132APC with indictable and strict liability offences; and
 - (b) proposed sections 132APD and 132APE with summary and strict liability offences.
- 1.4 IEAA also submits that the introduction of the tiered offence regime should be accompanied by a comprehensive education campaign targeting the Australian Federal Police, State and Territory police forces and the judiciary. Those bodies must be made aware of the key features of the new regime if it is to contribute to the increased criminal enforcement of Australia's copyright legislation in the way that IEAA hopes that it will.

2 Exception for active caching for educational purposes

(Proposed section 200AAA, Schedule 8 of the Bill)

- 2.1 Given that IEAA's members are increasingly embracing online business models, IEAA is concerned by the breadth of the exception to infringement in proposed section 200AAA. Contrary to the Government's policy as expressed in the Explanatory Memorandum to the Bill, proposed section 200AAA is drafted broadly enough to apply

to downloading copyright material from the Internet and not merely caching activities. This means that, in certain circumstances, an educational institution could rely on proposed section 200AAA to download a computer game from the Internet in connection with a multimedia course of study and there would be no need to compensate the copyright owner at all. IEAA does not accept that the Government intended proposed section 200AAA to operate in this way and considers that such an exception would unreasonably prejudice the rights of copyright owners in contravention of Australia's international treaty obligations.

- 2.2 Thus, IEAA submits that proposed section 200AAA should be redrafted to apply only to the active caching activities that the Government intended that it would. In addition, the Government should exclude computer programs from section 200AAA in a manner consistent with the exclusion of computer programs from the educational statutory licensing regime in Part VB of the Copyright Act.


3 Monitoring the effect of the Copyright Amendment Bill 2006

- 3.1 IEAA repeats its view that the Government needs to closely monitor the effect of the reforms contained in the Bill. Regular reviews will allow the Government to make any necessary adjustments after the impact of the Bill's reforms become apparent. To this end, IEAA strongly urges the LACA Committee to recommend to the Australian Government that it monitor the operation of the amendments introduced by the Bill (including the definitions of access control TPM and TPM) on an ongoing basis to ensure that they are functioning as intended and in accordance with Australia's international obligations.

4 Further consultation

- 4.1 IEAA thanks the LACA Committee for considering its views on the Bill and would welcome the opportunity to appear before the Committee. To arrange for IEAA to do so, please contact me on (02) 9209 4325 or email chris@ieaa.com.au.

Yours sincerely



Chris Hanlon
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