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Copyright Amendment Bill 2006

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The primary concern of the Australian Parliament in considering the *Copyright Amendment Bill 2006* should be to ensure that Australia fully complies with its international treaty obligations under the Australia-United States Free Trade Agreement (AUSFTA), the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The Copyright Amendment Bill is likely to be controversial, particularly in relation to technology protection measures (TPMs), fair dealing and the new criminal provisions.

The Access Right

In a previous submission to the Attorney-General's Department I have dealt with the possible emergence of an access right in detail in relation to the exposure draft on TPMs. I note that there has been a clear revision of the definition of access control technological protection measure (ACTPM) from the exposure draft to the Copyright Amendment Bill. In my view the exposure draft was unlikely to comply with Australia's obligations under article 17.4.7 of the AUSFTA because it required a direct link between the employment of an ACTPM and copyright infringement. The Copyright Amendment Bill does not require such a direct link, requiring only that the ACTPM be used "in connection with the exercise of the copyright."

There may be an argument that even the Copyright Amendment Bill is not in compliance with the terms of the AUSFTA in that article 17.4.7 could be interpreted as requiring that copy controls relate to that part of the chapeau of article 17.4.7(a) which refers to "the exercise of their rights" and that access controls relate to the part that requires laws to "restrict unauthorized acts" in respect of a copyright owner's works, performances or phonograms. This argument would be based on the fact that access controls are primarily concerned with giving effect to an authorisation right that the AUSFTA appears to vest in copyright owners. However, this argument would depend greatly on how the chapeau of article 17.4.7 is constructed and in my view there is room at least for two separate interpretations one of which would support the compliance of the Copyright Amendment Bill with the AUSFTA. I do not propose to explore the non-compliance argument in great detail at this stage, rather I would raise with the Committee the possibility that there is an argument in relation to non-compliance. However, I note that the International

Intellectual Property Alliance has also raised the issue of compliance in relation to ACTPMs. In this regard, it would be useful if the Committee could request that the Government substantiate its argument that the Bill is in compliance with the AUSFTA.

I understand that there would be concern from stakeholders in relation to the “spectre” of an access right. Such concern is likely to emanate from the prospect that the Bill may give copyright owners new rights, which may interfere with the existing property rights of consumers. These concerns need to be addressed in depth and a serious attempt must be made before the implementation of Australia’s outstanding AUSFTA requirements to arrive at a clear and plain English interpretation of the provisions of the Copyright Amendment Bill in relation to TPMs such that consumers have a clear understanding of their rights and obligations under the new laws.

I would suggest that there is an inconsistency in the position of those stakeholders who rely upon advances in digital technology as the basis for calling for changes in the law in relation to the access and dissemination of copyright materials. The same stakeholders seem to discount that the advances in technology have lead to greater levels of copyright infringement and that accordingly there may also be a basis for law reform that supports copyright owners in using technology to protect and reinforce both their contract and copyright rights.

There will also be concern that an access right is something that goes beyond copyright. US academic, Professor Jane Ginsburg, has written persuasively on this topic suggesting that the emergence of new technologies could justify granting copyright owners a greater degree of control over their works.¹ Whilst this control could be derived from technology it would be effectively obsolete in the digital world unless it was backed up by adequate legal measures. Critics of this approach have suggested that an access right would be “paracopyright.” That is, something beyond the notion of what we traditionally consider to be copyright and as such, illegitimate. However, both moral rights and performer’s rights are neighbouring rights to copyright and could conceivably fall within the same category yet are not considered to be illegitimate.

One very legitimate criticism of the extension of Australia’s TPM laws is that they are not regulate by competition law. I would suggest that the Government needs to look further into the inter-relationship between copyright laws and competition laws, particularly in relation to competition law.

Finally, given the decision of the High Court in *Stevens v Sony* it is possible that Australia may comply with the requirements of the AUSFTA in relation to the Copyright Act 1968 but that an issue of non-compliance might arise if a court reads down the new TPM provisions.

¹ See further Jane Ginsburg, *Copyright and Control*, 101 Columbia Law Review (2001).

Three Step Test

I note that the three step test from the Berne Convention for the Protection of Literary and Artistic Works has been imported into the Copyright Amendment Bill. The three step test is designed to assess the adequacy of a nations domestic laws in relation to its international obligations. It is difficult to see how it could operate effectively as a domestic law when it was specifically designed for a different purpose. Given the disagreement and uncertainty that has attended its interpretation it is further difficult to see how domestic courts, industry and copyright users can clearly interpret it so as to know with any certainty what rights and obligations actually exist under the Copyright Act.

In regard to the tightening of the fair dealing laws, I would suggest that these measure should be construed as necessary in order to ensure that Australia fully complies with its international treaty obligations. That said, it is an issue for further debate as to whether the three step test is actually an appropriate international norm for the copyright environment of the 21st century.

Criminal Provisions

I note with concern the greater advancement of criminal provisions in relation to copyright law. Traditionally copyright law has been the subject of civil laws and the encroachment of criminal laws into this domain is not something that should be uncontested. I recognize that Australia must implement its AUSFTA obligations in good faith. However, there should be a further review of how these provisions operate and it may legitimately be grounds for a re-negotiation of Chapter 17 in the future.

Conclusion

In conclusion, I would commend the Attorney-General's Department for their hard work in preparing the Copyright Amendment Bill. I trust that my comments will be of assistance to the Committee.

Sincerely

Dilan Thampapillai