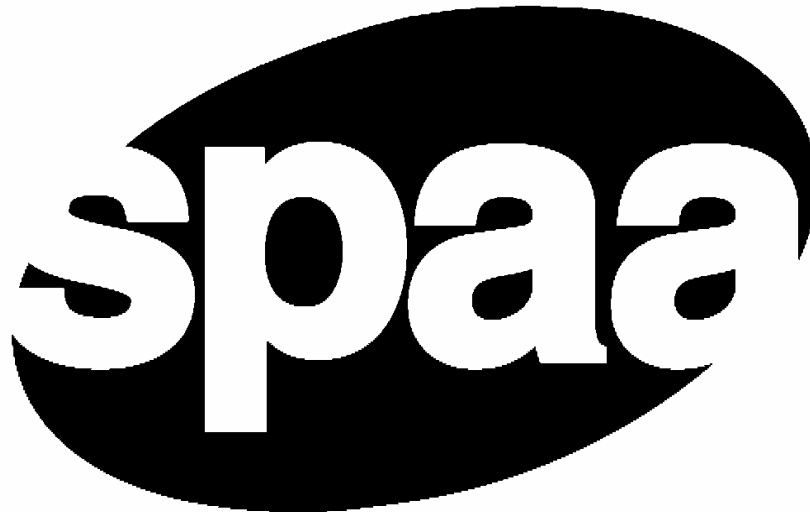


**SUBMISSION TO THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

THE SENATE

COPYRIGHT AMENDMENT BILL 2006

30 OCTOBER 2006



Screen Producers Association of Australia

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SPAA

The Screen Producers Association of Australia (SPAA) is the industry body that represents Australian independent film and television producers on all issues affecting the business and creative aspects of screen production. SPAA members include television, feature film, animation, documentary, TV commercial and interactive media production companies as well as services and facilities providers such as post-production, finance, distribution and legal services.

Through our activities and initiatives we wish to promote a vibrant screen production sector in Australia so that Australian culture can be enjoyed both here and overseas.

We represent a number of very substantial employers who contribute a great deal to the Australian economy.

Our submission will be limited to a discussion of those elements within the *Copyright Amendment Bill 2006* which affect our members.

Executive Summary

- SPAA commends the introduction of new and extended penalties and criminal liability proposed to be introduced into the Copyright Act;
- SPAA commends the introduction of new provisions with regard to the circumvention of technological protection measures;
- SPAA repeats its previously expressed concerns with regard to the reforms which the government intends to implement with regard to copyright, not only because of the economic damage that it may do to a number of companies and markets which have recently been established, but also because of the significant uncertainty likely to be created by some of the provisions within the Bill.
- The private copying exceptions do not comply with Australia's international treaty obligations because of the fact that they have the potential to damage new and existing markets;
- SPAA is generally opposed to the new time-shifting provisions to be inserted into Schedule 6, Part 1, however, if they are to be implemented we would submit

- that there should be a sunset clause on the number of days a copy can be kept such as fourteen (14) days;
- SPAA is generally opposed to the new format shifting provisions contained in Schedule 6, Part 2 as it seems to be closing up the exploitation of markets which still exist for copyright owners;
 - SPAA questions the drafting of Schedule 9, Part 1 - Communication in the course of educational instruction. In particular we are concerned that the current drafting of proposed sections 28A and 200AAA do not reflect the intended government policy;

New Criminal Protections

SPAA commends the government's commitment to greater protection for copyright owners through tougher criminal sanctions.

In particular, we note that the Bill contains:

- New offences for pay TV piracy;
- The ability to strip pirates of the profits of their crimes;
- New offences where there has been a commercial pirate operation;
- New presumptions of copyright ownership;
- On the spot fines for offences under the Act (if passed)

We believe that if properly implemented these changes will make it harder for commercial scale pirates to do business and will give producers greater protection against those who are undermining their businesses.

Such changes are needed and we would urge the committee to support them.

Technical Protection Measures

SPAA commends the government on its efforts to give effect to its international treaty obligations with regard to technical protection measures.

SPAA welcomes the enhanced criminal and civil sanctions contained in the legislation.

Time Shifting

Schedule 6 Part 1 of the Bill deals with new exceptions for time shifting.

This section concerns SPAA because it will interfere with new markets which are emerging for time shifted material. In particular "Catch Up TV", which allows a consumer who has missed an episode of a series to log on to a website and download the missed episode to their computer for a fee. The downloaded episode can only be viewed for a limited period, after which it is useless.

Catch Up TV is currently being used by *McLeod's Daughters*, one of Australia's most successful long form high-end dramas, which can be downloaded from the Internet for \$1.95. The production company which produces *McLeod's Daughters*, Millenium Pictures, is a member of SPAA and is a small independent production company. This Bill has the potential to adversely affect a new market for that company.

We believe that tools like Catch Up TV have the potential to expand to all programs and provide a credible alternative to time shifting. The Bill has the potential to end that market before it has had an opportunity to flourish.

Tripping Over will also be available for download from the net at a cost of \$2.95

Moreover, in our view the Bill, whilst creating the new exception, does not inform the user of the scope of that new exception. Whilst it is government policy to have a limitation on how long the material can be used and the Explanatory Memorandum makes clear that it is not intended to allow people to create large libraries of material to be kept for an indefinite period, we note that there is no limit on what that period might be.

In our view, if the government wishes to see its policy of a limitation implemented, it would be best if a sunset clause were inserted into the Bill. Perhaps a period of fourteen (14) days might be a reasonable period to allow a

user to keep a copy of the material which has been time shifted. This would create certainty for all involved.

The effect of the current wording would be to allow users to keep copies indefinitely to use over and over as a substitute to buying a commercial copy. This would negatively impact on producers.

We agree with the submissions of the Copyright Council of Australia regarding their suggested amendments to the Bill in circumstances where it is decided to proceed with the time shifting exceptions.

Format Shifting

Schedule 6, Part 2 of the Bill deals with new exceptions for format shifting.

This section is particularly concerning for us as it tends to interfere with existing markets for programs in different formats.

The underlying assumption of this section of the Bill must be that when a user has bought a product, they would be unwilling to buy a copy in another format. For instance if they have bought a music CD, they would be unwilling to buy an electronic copy through iTunes.

SPAA believes that this is incorrect and that a consumer may wish to have copyright material in several formats and indeed are sometimes willing to pay for the copyright material in several formats.

Moreover, we are concerned that there is no real justification for this particular position. The opinion of the government would seem to be that if a person buys material in one format, they should be able to do what ever they want with that material including copying it to other formats.

If the policy is to be enacted, we can see no impediment to the implementation of a levy system. We believe that a private copying levy could be enacted and done in such a way as to avoid legal characterisation of it as a tax. Such a levy would not be harmful to the market for copying devices.

We note the absence of any suggestion that such a levying system is likely to be pursued. As such, whilst the law will allow for copying of copyright materials by consumers it will not provide for any compensation for copyright producers, even though there is a clear value placed on the copyright material by consumers.

We would suggest that there ought to be further safeguards for the industry within the bill such as a requirement for the consumer to check whether or not the material being copied is commercially available in the relevant sought after format.

Also whilst there is no scope under the Act for swap clubs to develop, we believe that there ought to be specific prohibitions on swap clubs and penalties in place to deter them.

Moreover, the uncertainty created by the contradiction between the Bill and the explanatory memorandum needs to be addressed. The Explanatory memorandum states that merely because the new copy is to be used "instead of" the original, this does not mean that the original needs to be destroyed or otherwise stored and that in fact it can be used as well as the original.

Section 28A - Communication of works or other subject matter in the course of educational instruction

On this subject, we support the submissions from Screenrights regarding the drafting of the clause and its possible unintended consequences.

In particular the breadth of drafting is unsatisfactory. The drafting has the potential to cover other forms of communication which are in part, for the purpose of communicating within the classroom, but have further uses which might otherwise be captured by the statutory licence and would be remunerated.

Screenrights, in co-operation with the Copyright Advisory Group has written to the Attorney-General with suggested drafting for the new section 28A. The suggested drafting adds a subsection (5) to the section which reads:

(5) A communication of a literary, dramatic or musical work, broadcast, sound recording or cinematographic film,

and of any work or other subject-matter included in the broadcast, recording or film made merely:

- (a) to perform a work in circumstances where the performance is deemed by this section not to be a performance in public; or
- (b) to cause a recording to be heard or a film to be seen or heard, in circumstances where the causing of the recording to be heard or the film to be seen or heard is deemed by this section not to be a performance in public,

is deemed not to be a communication to the public.

SPAA supports this drafting and the reasons given by Screenrights for this drafting.

Section 200AAA - Caching on servers for educational purposes

We share the concerns expressed by Screenrights that if the current drafting is left in tact, it could have the effect of allowing the continuous caching of internet content which could have the potential to undermine licensing.

Screenrights in association with the Copyright Advisory Group have suggested the following wording:

200AAA Automated caching for educational purposes

- (1) This section applies if:
 - a. Copyright subsists in a work or other subject-matter;
 - b. An educational institution provides access to the Internet (in whole or in part) to its students or staff for educational purposes; and
 - c. Merely as an incidental aspect of the efficient technical provision of such Internet access, the educational institution caches a reproduction of the work or a copy of the other subject matter (the cache reproduction or cache copy) on a server, system or network:
 - i. That is operated by or on behalf of the body administering the educational institution; and

- ii. That makes the cache reproduction or cache copy available to those staff and students in a way that limits its availability, using the server system or network, to those staff and students.
- (2) If subsection (1) applies, the copyright in the work or other subject matter is not infringed by:
- a. The making of the cache reproduction or cache copy; or
 - b. The communication, using the server, system or network, of the cache reproduction or cache copy to any of those staff or students.
- (3) In this section:

Caches means an act of reproducing, copying and/or communicating a work or other subject matter made on a server, system or network connected to the Internet:

- a. through an automatic process in response to an action by a user in order to facilitate efficient access to the work or other subject matter by that user or other users; and
- b. in a manner that does not make substantive modifications to the cached work or other subject matter as it is transmitted to subsequent users (other than modifications made as part of a technical process); and
- c. where the cache reproduction or cache copy is not purposefully retained after the copyright subject matter is no longer the subject of the communication from which it was derived.

200AAB Temporary Storage for safe Internet browsing in certain educational institutions

- (1) This subsection applies if:
- a. Copyright subsists in a work or other subject matter that is made available on the Internet;
 - b. A reproduction of the work, or copy of the other subject matter (a safe copy) is made:
 - i. By, or on behalf of an educational institution providing primary education or education at pre-school or kindergarten standard; and
 - ii. Merely for the purpose of providing a safe Internet learning environment for pre-

school, kindergarten or primary students who are receiving educational instruction;

- c. the safe copy is not communicated for longer than fourteen (14) days from the date the safe copy was made.
- (2) If subsection (1) applies, the copyright in the work or other subject matter is not infringed by:
- a. The making of the safe copy; or
 - b. The communication, using the server, system or network, of the safe copy to any of those staff or students,

For the educational purposes of the institution.

- (3) Where a safe copy is communicated for longer than the fourteen (14) day period provided for in subsection (1), subsection (2) does not apply, and shall be taken never to have applied, to the making or the communication of the safe copy.

SPAA supports this drafting and the reasons given by Screenrights for this drafting.

Should you wish to discuss our submissions, please feel free to call our office.

Yours sincerely

Geoff Brown
Executive Director