



**SUBMISSION TO THE
SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS'
INQUIRY INTO THE COPYRIGHT AMENDMENT BILL 2006**

October 2006

1 Preliminary comments

- 1.1 The Business Software Association of Australia (“BSAA”) welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs (the “Committee”) in connection with its inquiry into the Copyright Amendment Bill 2006 (the “Bill”).
- 1.2 BSAA is supportive of many of the reforms introduced by the Bill and understands the policy objectives of the Government that are being implemented in this package. The BSAA in particular welcomes the Government’s introduction of those provisions in the Bill that relate to enforcement. The effective enforcement of Australia’s copyright legislation is important in circumstances where an estimated 31% of PC software used by business is unlicensed, resulting in losses to the software industry of approximately AUD\$446 million.¹ In this regard, BSAA applauds the following improvements:
- (a) the introduction of protection for access control technological protection measures (“TPMs”);
 - (b) the introduction of a prohibition on circumventing access control TPMs;
 - (c) the creation of a tiered criminal offence regime; and
 - (d) the revision of the evidentiary presumptions for computer programs.
- 1.3 BSAA considers that the Bill’s time and format shifting exceptions are well drafted and appear to achieve the Government’s policy objectives without unreasonably prejudicing the legitimate interests of copyright owners.
- 1.4 BSAA is appreciative of the extensive consultation that the Attorney-General and his Department carried out with interested parties prior to the Bill’s introduction into Parliament. In BSAA’s view, this consultation has resulted in both better legislation and a greater appreciation of the implications of the legislation for owners and users of copyright.
- 1.5 While supportive of the passage of this Bill, BSAA has identified some aspects of the Bill that could be further improved and wishes to draw these aspects of the Bill to the Committee’s attention.

2 Exception for active caching for educational purposes

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

- 2.1 BSAA believes that the terms of the legislation do not implement the Government’s policy intent as expressed in the Explanatory Memorandum to the Bill in so far as the active caching exception for educational institutions is presently drafted.
- 2.2 The Explanatory Memorandum to the Bill at paragraph 8.25 clearly delineates the Government’s policy intent in this exception when it provides that “[t]o achieve a balance between copyright owner and user interests, [item 10 of the Bill] amends the Act to allow the active caching of websites by educational institutions under certain conditions”.

¹ International Data Corporation (IDC), Global Piracy Study 2005. Conducted on behalf of the Business Software Alliance. Released May 2006.

- 2.3 It is clear that the Government's intention is to limit the exception to the active caching of websites. Yet, the words of proposed section 200AAA appear to extend far beyond active caching of websites. BSAA is concerned that the exception as drafted could be used to justify downloading a copy of a computer program onto a server and making it available to students for the purposes of an educational course. This would have the effect of severely damaging the educational market for software companies and would jeopardise the heavily discounted pricing on products offered to educational institutions..
- 2.4 To avoid these undesirable consequences, BSAA urges the Committee to recommend that the Government amend proposed section 200AAA to make it clear that it only applies to active caching activities (as opposed to activities that involve downloading copyright material from the Internet).
- 2.5 In addition, proposed section 200AAA should be amended so that it does not apply to computer programs. This latter solution reflects BSAA's view that it is highly unlikely that the Government intended that its active caching exception would apply in respect of computer programs made available online. It would also be consistent with the exclusion of computer programs from the educational statutory licensing regime in Part VB of the Copyright Act.²

3 Tiered offence regime and the TPM offences

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

- 3.1 The technological protection measure offences are set out in Schedule 11 of the Bill. As drafted they limit the capacity of law enforcement to respond in an appropriate way to the severity of an infringement of the Act. This is because the TPM offences do not enact the full range of offences - indictable, summary and strict liability - that have been developed for the non-TPM offences in the Copyright Act:
- (a) proposed section 132APC (circumvention of an access control technological protection measure) merely contains a summary offence; and
 - (b) proposed sections 132APD (dealing in circumvention devices) and 132APE (providing circumvention services) merely contain indictable offences.
- 3.2 The circumstances in which TPM offences are likely to be committed suggest that the enactment of the full range of offences will aid the effective enforcement of the TPM liability regime. It is not unusual for circumvention devices to be sold at markets and in other situations where the issuance of an infringement notice (for a strict liability offence) would constitute a swift and effective enforcement method; summary offences would be relevant to target intermediate offending such as where a person deals in circumvention devices and is negligent as to whether the device will be used to circumvent a TPM. Finally, indictable offences would be appropriate where a person circumvents an access control TPM in order to engage in large scale piracy, for example.
- 3.3 Thus, in the interests of consistency and due recognition of the equal importance of TPM and non-TPM offences, BSAA urges the Committee to recommend that the Bill be amended as follows:
- (a) proposed section 132APC be supplemented with indictable and strict liability offences; and

² See section 135ZE of the *Copyright Act 1968* (Cth).

- (b) proposed sections 132APD and 132APE be supplemented with summary and strict liability offences.

4 Ongoing review of the provisions of the Copyright Amendment Bill 2006

- 4.1 BSAA recognises that many of the issues that the Government has sought to address in the Bill are complex, and that in some cases it has been necessary for the Government to adopt novel solutions.
- 4.2 To ensure that Australia's copyright regime functions as intended after the enactment of the Bill, BSAA urges the Committee to recommend an ongoing review of the amendments made by the Bill. This will allow Government, industry representatives and other stakeholders to come forward with any difficulties they may experience once the Bill has been enacted and adjustments in the marketplace have occurred.

5 Further consultation

- 5.1 BSAA thanks the Committee for considering its views on the Bill and welcomes the opportunity to appear before the Committee. To arrange to for BSAA to do so, please contact Maurice Gonsalves of Mallesons Stephen Jaques on (02) 9296 2166 or maurice.gonsalves@mallesons.com.