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

Dear Secretary

COPYRIGHT AMENDMENT BILL 2006

We, the below signed, are writing to express our concerns with the Copyright Amendment Bill 2006, which was introduced to Parliament on 19 October 2006, and the process by which the Government is seeking to pass the Bill as law.

If passed in its current form, this Bill will substantially shift the balance struck by current copyright law in favour of copyright owner interests, to the detriment of consumers. It seeks to introduce broad-ranging amendments to the *Copyright Act 1968* which will bolster the power of copyright interests through the introduction of a series of new criminal offences and the extension of prohibitions on circumventing technological locks. These significant changes are ostensibly “balanced” by the introduction of a number of narrowly defined new user rights. Yet other changes introduced by the Bill actually reduce the scope of the existing fair dealing exception for research and study, arguably the most important and commonly used of the current exceptions.

To compound these problems, the Bill is being rushed through Parliament in a manner which does not allow for adequate public scrutiny of the proposed changes, despite the fact that there is no justification for the rushed timetable in relation to the vast majority of its amendments.

Our concerns with the Bill are set out in full in the document provided at Attachment A. However, in summary, our principle comments are as follows:

- The elements of the Bill that do not relate to Australia’s commitments under the Australia-United States Free Trade Agreement (AUSFTA) – ie the elements that do not relate to technological protection measures (TPMs) – should be excised from the Bill and re-introduced to Parliament at a later date when adequate public scrutiny and debate can be afforded;

- at the very least, the new “low bar” criminal provisions should not be introduced until a full debate has occurred as to appropriateness of applying broad criminal offences, and in particular offences of strict liability, to copyright infringement;
- the definitions of TPM and access control TPM included in the exposure draft should be reinstated, to ensure that a clear link remains between devices protected by copyright law and the prevention or inhibition of copyright infringement;
- a provision should be inserted into the Bill that stipulates that an agreement that seeks to exclude or limit the operation of the defences to the TPM provisions has no effect;
- the proposed restrictions on the already narrowly defined fair dealing exception for research and study should be removed; and
- the language of the user rights provisions (eg the exceptions for format and time shifting, parody and satire etc) should be simplified and aligned with the existing fair dealing provisions.

The Copyright Amendment Bill 2006 will substantially affect the rights of Australian consumers. We trust the concerns that we outline below will be taken into account in your consideration of the Bill.

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**SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY
INTO PROVISIONS OF THE COPYRIGHT AMENDMENT BILL 2006**

**Professor Brian Fitzgerald, Jessica Coates, Nic Suzor, Damien O'Brien
and Bjorne Bednarek**

Process

The Government is seeking to introduce this 213 page Bill via a process which allows little time for the public to understand, let alone comment thoughtfully upon, its extremely complex provisions. Exposure drafts containing some of the proposed amendments (including the TPM amendments and the exceptions to infringement of copyright) were released over the last few months; however, large sections of the Bill have never before been seen by the public. Even those sections that were released previously have been subject to fundamental changes in the interim, without any explanation as to the reasoning behind these changes or the release of the public submissions on the exposure drafts that might have motivated them.

The Government justifies this shortened timetable with reference to Australia's commitment under the AUSFTA to amend the law in relation to TPMs before 1 January 2007. Yet this commitment does not extend to any of the other amendments included in the Bill. Furthermore, there is no necessary link between these other amendments and the TPM amendments that would require them to be introduced simultaneously – as is demonstrated by the fact that the TPM amendments were released as a separate exposure draft on 1 September 2006 

We therefore submit that the elements of the Bill that do not relate to Australia's commitments under the AUSFTA – ie the elements that do not relate to TPMs – should be excised from the Bill and re-introduced to Parliament at a later date when adequate public scrutiny and debate can be afforded.

New criminal laws – Schedule 1 to the Bill

The proposed amendments to the criminal provisions of the Copyright Act serve to substantially “lower the bar” in relation to criminal liability for copyright infringement in Australia, and in doing so greatly increase the chances of consumers being held criminally liable for everyday behaviour. These provisions include the introduction of:

- strict liability offences that can result in fines of up to \$6,600 without any requirement to prove that the person had any intent to infringe, or indeed any knowledge that an infringement was occurring; and
- summary offences (ie court offences tried without a jury) with penalties of up to two years in jail where a person is merely “negligent” as to their actions.

Even more concerning is the application of such easy-to-establish offences to vaguely worded actions which include no commercial or commercial-scale requirement such as:

- “distributing an infringing copy in a manner that affects prejudicially the owner of copyright” (s132AI);
- “possessing a device for making an infringing copy” (s132AL); or
- “causing a work to be performed in a place of public entertainment” (s132AN).

Add to this remodelled evidentiary presumptions that favour copyright owners (see the Bill, Schedule 2 - Presumptions), and these provisions have the potential to result in criminal penalties being applied to the actions of everyday Australians in homes and businesses across the country on a scale not previously witnessed.

Actions that will potentially be punishable under these new provisions include:

- a 14 year old girl videoing herself lip-synching to her favourite pop tune and uploading this to a video sharing website such as YouTube;
- a 15 year old giving copies of a CD to her friends in the playground;
- owning a computer that you use to copy music onto both your and your son’s iPod;
- playing a radio in a park that is used for public entertainment;
- possessing a radio that you plan to play in a park that is used for public entertainment; and
- possessing a video tape on which you plan to tape a television program to lend to a friend.

Some of these acts may in theory fall within the scope of the existing criminal provisions of the Copyright Act. However, these existing provisions all require costly court proceedings to be brought, and place far higher burdens of proof on copyright owners by requiring them to prove that the person in question was acting “recklessly”. These factors serve as natural barriers to the application of the current criminal provisions, which act to counter the broad language of provisions and prevent their use against private individuals acting in an ordinary manner. Under the new provisions no such barriers will exist.

The ramping up of criminal responsibility for copyright infringement follows a trend most explicit in the US of prosecuting and jailing copyright infringers. This is a major shift for copyright law which has traditionally remedied infringement with civil liability, such as damages. The criminalisation of copyright infringement which has been evolving over the last few years makes sense with regard to organised crime syndicates producing and selling large quantities of CDs and DVDs. However, it seems outrageous when we think of the possibility of a 14 year old child being labelled a criminal for distributing an infringing copy of a song in a way that “affects prejudicially the owner of the copyright”.

Copyright owner interests will argue that such examples are facetious, and that they would not seek to have Government authorities impose strict fines or jail term on individuals in such minor cases. However, such an argument only emphasises the problems with enacting such easily-established and broadly defined criminal offences, without adequate safeguards against their misuse. This is particularly the case in light of the current copyright law-enforcement climate, in which private organisations can exercise significant influence over Government decisions to bring actions against copyright offenders¹ and overseas copyright owners are increasingly willing to sue private individuals of all ages acting out of their own home².

Even trusting that the new criminal penalties will primarily be used to target commercial or pseudo-commercial ventures, their potential effect on commercial markets and technological innovation is alarming. One thing that the Internet revolution has shown is that there is an enormous economy in services that provide people with the ability to access and use information. Some of the highest valued corporations on the planet are information service companies like Google, MySpace and YouTube. These businesses dared to do something different and provided interesting new services and spaces; yet any new Australian start-up trying to emulate similar business models after 1 January 2007 will most likely find themselves before the criminal courts or paying out substantial on-the-spot fines. At the very least, it is not far-fetched to imagine that the threat of enforcement of these broad provisions will chill innovation. If we are to be competitive in the global services economy this seems an odd way to achieve it.

We therefore submit that no changes should be made to the current criminal provisions of the act until a full debate has occurred as to appropriateness of applying broad criminal offences, and in particular strict liability, to copyright infringement.

Technological Protection Measures – Schedule 12 to the Bill

Definitions of technological protection measure (TPM) and access control technological protection measure (ACTPM) – proposed amendments to s10(1)

Australian anti-circumvention law as it currently stands requires that to receive protection under the Copyright Act a TPM must “prevent or inhibit copyright infringement” (Copyright Act s10). This requirement is intended to ensure that copyright owners cannot use technology to extend their control over creative material beyond the limits of copyright law. In other words, the Copyright Act should not be used to protect technologies that are merely designed for market segmentation or product differentiation, and which do not serve to

¹ See for example, evidence provided by the Department of Public Prosecutions to the 2000 enquiry House of Representatives Committee on Legal and Constitutional Affairs (LACA) *Cracking down on copycats: enforcement of copyright in Australia*, that “subject to AFP investigative priorities, industry bodies have a large influence on where law enforcement resources are expended.” LACA Report, p.86

² See, for example, the launching of suits against 8,000 individuals by recording industry bodies on 17 October 2006 - <http://www.ifpi.org/site-content/press/20061017.html>

protect copyright. This reasoning was re-enforced by the decision in the landmark High Court case of *Stevens v Sony* (*Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58*), in which Kirby J states that “what is to be prevented or inhibited is not, as such, “access” to a work or subject matter that is entitled to copyright. It is the infringement of copyright in that work that is to be prevented or inhibited” (at 203).

When the Exposure Draft of the proposed amendments was circulated three weeks ago the new definitions of TPM and access control TPM (ACTPM) retained this important requirement ie that in order to receive protection a device must prevent or inhibit copyright infringement. However, when the legislation was introduced to Parliament last week that requirement had disappeared. Instead the definition of TPM has now been expanded to protect devices that merely “restrict” copyright infringement – explicitly circumventing the *Stevens v Sony* decision to provide protection for a far broader range of additional technologies. Even more concerning, the definition of the new category of protected devices, ACTPMs, has been amended to apply to any technology used by a copyright owner “in connection with the exercise of copyright” – arguably permitting it to cover almost any technology applied by copyright owners when they exercise their copyright rights (eg publish their material), regardless of the existence of any link to preventing copyright infringement.

Presumably in an effort to limit the potential damage of these changes, the Government has also introduced new provisions into the Bill that explicitly exclude from the definition of ACTPM:

- the regional coding of DVDs or computer programs, including computer games; and
- technologies that restrict the use of generic goods and services (eg prevent the use of components such as printer cartridges in relation to a device, merely because they are produced by a market competitor).

However, these exceptions are extremely narrow, and do little to restore the balance provided by *Stevens v Sony*. For example, they do not prevent the use of regional coding in relation to songs or e-books. Neither do they exclude technologies used to distort the market with reference to factors other than geographic location eg restricting the playing of material to authorised platforms or a set number of times. It is unlikely that competition law will provide an adequate remedy in such cases, as the intersection between competition and copyright law is extremely uncertain and competition protections difficult to invoke.³ Without a specific provision stating that the new anti-circumvention provisions are subject to competition law, it is unclear what assistance they may have.

This has enormous consequences for Australian consumers. Under *Stevens v Sony* a person was free to use a legitimately purchased copy of a copyright

³ Dale Clapperton and Stephen Coronos, ‘Locking –in Customers, Locking-out Competition: Anti-circumvention laws in Australia and their potential effect on competition in high-tech markets’ (forthcoming in *Melbourne University Law Review*, 2006).

work in any way so long as they did not infringe the rights of the copyright owner to, say, reproduce or communicate it. In making this decision, the High Court highlighted the importance of ensuring Australians have the liberty to use their legally acquired property as they wish. The Bill as currently drafted will undermine this decision, giving copyright owners wide-ranging powers to restrict the use of copyright materials as they see fit. This is a fundamental reshaping of consumer law under the guise of copyright protection – so fundamental, in fact, that Kirby J warned in *Stevens v Sony* (at 216) that such legislation may even violate the Constitution.

Presumably, these amendments have been introduced at the behest of those who argue that they are required by the text of the AUSFTA. Yet in its *Inquiry into technological protection measures (TPM) exceptions* released earlier this year, the House of Representatives Committee on Legal and Constitutional Affairs (LACA) held that the AUSFTA permitted the retention of the *Stevens v Sony* language (see recommendation 3 at para 2.75). The Government's own legal advice from the Office of International Law prior release of the exposure draft presumably reached the same conclusion. Furthermore, the previous language was in line with case law regarding the United States' equivalent provisions.⁴

It is not clear what has changed in the last few weeks to undermine the Government's own clear opinion that the retention of the consumer friendly principle of *Stevens v Sony* was both necessary and permitted by the AUSFTA. The Government has provided no public reason or justification, and has chosen not to release submissions on the exposure draft, which might have provided some clue as to which interests lobbied for the change and their arguments in favour of it.

We therefore submit that the definitions of TPM and ACTPM included in the exposure draft be reinstated, to ensure that the High Court's requirement of a clear link between devices protected by copyright law and the prevention or inhibition of copyright infringement is retained.

Protection of exceptions from exclusion by agreement

It is now common practice in consumer transactions for digital media to be governed by standard term contracts, or End User Licence Agreements (EULAs). The full terms of these agreements are often located within the sealed package of the media product ('shrink-wrap' agreements) or are listed on a website from which the product can be purchased ('click-wrap' or 'browse-wrap' agreements). Consumers are deemed to have agreed to the terms and conditions contained within these contracts through the act of using or downloading the software or media product.

⁴ See, for example, *The Chamberlain Group, Inc v Skylink Technologies, Inc.* 381 F 3d 1178 (Fed Cir, 2004) and *Lexmark International, In. v Static Control Components, Inc.* 387 F 3d 522 (6th Cir, 2004).

While EULAs are commonly relied upon by copyright owners, it is clear that they are rarely read, and even more rarely understood, by consumers. These documents are usually dense and contain many technical legal terms, and are generally ignored by consumers. As a result, consumers tend not to fully appreciate the terms upon which they are acquiring media products.

Even where consumers do read and understand the terms and conditions in media contracts, they are unable to negotiate those conditions. Unlike commercial transactions, consumers are rarely in a position of equal bargaining power with copyright owners. Software and media products are not highly substitutable, and are rarely offered on different terms – consumers are simply not able to acquire the same product on more acceptable terms, or to acquire a similar product with acceptable terms. The lack of choice in the market is a signifier of market failure, and necessitates intervention to avoid the unfair treatment of consumers.

The LACA committee recognised the importance of this in its 2006 *Review of technological protection measures exceptions*, stating that “the widespread use of exclusionary or limiting agreements, particularly when presented to copyright users as virtual *faits accomplis* in the form of end user licence agreements, could easily render the very concept of permitted exceptions meaningless” (para 4.238). The Committee therefore recommended that the legislation implementing [the TPM provisions of the AUSFTA should “nullify any agreements purporting to exclude or limit the application of permitted exceptions under the liability scheme” (Recommendation 33). In its response to this report, tabled at the same time as the Bill, the Government accepted this recommendation “in principle”⁵; yet there is nothing in the Bill to reflect this acceptance.

As currently drafted, the Bill provides no protection from contracting out of the defences to liability set out in the new TPM provisions (ie ss116AK, 116AL, 116AM, 132APA, 132APB and 132APC). Given the imbalanced bargaining positions in consumer licensing, each of the exceptions to liability should be protected from exclusion by contract. The exceptions contained within the Act and the Regulations are of little value if they are able to be contractually waived. Conversely, there is no identifiable public benefit to allowing copyright owners to require users to contract out of the defences to liability. As the AUSFTA is silent on this matter, such a move would be consistent with Australia’s obligations, and would significantly increase the effectiveness of the exceptions and the protection afforded to consumers under the new provisions.

We therefore submit that the Bill be amended to implement Recommendation 33 of the LACA Review (p.135) by inserting a provision

⁵ *Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report “Review of technological protection measures exceptions”*
<[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(4341200FE1255EFC59DB7A1770C1D0A5\)~Government+response+to+LACA+TPMS+\(final\).DOC/\\$file/Government+response+to+LACA+TPMS+\(final\).DOC](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(4341200FE1255EFC59DB7A1770C1D0A5)~Government+response+to+LACA+TPMS+(final).DOC/$file/Government+response+to+LACA+TPMS+(final).DOC)> at 30 October, p.17

into the legislation that stipulates that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of the defences, has no effect.

User rights provisions – Schedule 6 of the Bill

Fair dealing amendments – proposed s40(5)

Many Australians believe that in signing up for the AUSFTA we should have received a liberating US styled fair use provision, not just the more onerous copyright term and infringement provisions of US law. Fair dealing and fair use provisions allow people to, for example, reproduce and communicate material in certain circumstances without permission from the copyright owner, as long as the reproduction is “fair”. They are seen by many as an engine of free expression as well as a driver of creative innovation. They are also an important tool for limiting the negative effects of criminal provisions such as those listed above, in that they provide courts the discretion to find a defence where a person is acting in a manner that most would regard as reasonable.

The current Australian fair dealing provisions are very narrow (when compared to their US equivalent) and one might have thought that by not adopting a broader fair use provision Australia is further disadvantaging itself in the new knowledge economy. Yet, rather than increasing the flexibility of Australia’s fair dealing exceptions to balance the strengthened enforcement laws, the new provisions actually restrict the application of what is arguably Australia’s most important and commonly used exception - fair dealings for research and study (s40).

Currently this exception allows users to reproduce and communicate material for the purpose of research and study in any circumstances in which the use is “fair”. Although the existing provisions deem certain dealings to be acceptable (eg reproducing a “reasonable portion” of a hardcopy literary, dramatic or musical work – see ss40(3) and 10(2)-(2A)) this deeming is not exhaustive and, as with Australia’s other fair dealing provisions (ie s41, criticism and review; s42, reporting the news; and s43, judicial proceedings) the current research and study provisions also allow the exception to be applied flexibly in any other circumstances that the courts consider fair. The proposed s40(5) removes this flexibility, limiting the copying of books and electronic documents to a strict mathematical formula. After these amendments come into force, only the strict portions (ie 10%, or one chapter) of literary, dramatic and musical works in hardcopy form and literary and dramatic works in electronic form permitted under the s10 definitions of “reasonable portion” will be able to be copied. One page more than this amount, no matter how obscure the work or how difficult to obtain, and researchers will be restricted from copying. This amendment has not been widely discussed and was somewhat of a surprise when it appeared in the Exposure Draft. It is a major alteration to the rights Australian researchers have always enjoyed under Australian copyright law, and subverts the spirit of

the Backing Australia's Ability agenda by increasing the barriers to students and researchers accessing the knowledge that is necessary for further innovation.

The Government has presumably "tightened up" the provisions in this manner in response to advice that it is required to satisfy Australia's international obligations under the World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and in particular the so called "Berne three step test" (TRIPS Article 13). The Berne three step test states that exceptions to the exclusive rights of copyright owners must be limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Yet any argument that this test requires Australia to limit reproductions of literary, musical and dramatic works to certain specified amounts is inconsistent both with the equivalent laws in other countries and with the Government's own policy decisions. Australia's international peers such as the US and Canada are subject to the same TRIPS obligations, yet do not place similar "formulaic" restrictions on their equivalent exceptions. Indeed, Canadian courts have recently stated that:

Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. ... the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. ... For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision.⁶

Furthermore, similar restrictions are not imposed upon Australia's other fair dealing provisions, or upon fair dealings with copyright material (eg artistic works, computer programs, films or sound recordings) other than the prescribed musical, literary and dramatic works. As a result, these proposed restrictions will put Australian researchers at a disadvantage to researchers in other countries, and to Australian lawyers, news reporters and even film critics, who all keep their flexible fair dealing exceptions under the new legislation.

We therefore submit that s40(5) and its proposed restrictions on the application of the already narrowly defined fair dealing exception for research and study be removed from the Bill.

Three step test exceptions – proposed s200AB

While the government has decided not to introduce an open ended fair use provision modelled on that of the US, and has chosen to restrict the application of Australia's existing fair dealing provisions, it has sought to

⁶ CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13 at para 56.

introduce some additional latitude for Australian users by introducing a number of new exceptions, including a group of exceptions specifically modelled on the Berne three step test (see above). This new subset of general exceptions, set out in proposed s200AB, include long-overdue exceptions for parody and satire and for uses to assist those with disabilities. Exceptions addressing these important uses are most welcome. However, their incorporation of the language of the Berne three step test is concerning.

These provisions adopt almost verbatim the wording of the Berne test, requiring that in order to be permitted a use must be:

- a special case;
- that is covered by certain prescribed uses (eg parody and satire);
- that does not conflict with a normal exploitation of the work or other subject matter; and
- that does not unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright (ss200AB(1)).

We would question whether a nebulous test intended to provide guidance for the policy decisions of member states is rightly suited as a determinant of the actions of individuals, especially in relation to the fast paced world of internet innovation. In particular, we are concerned with the uncertainty of the language of the new exceptions and their lack of connection to any established concepts in Australian copyright law, such as “fair dealing”. As a result, it will remain extremely unclear how these provisions apply until they have been taken before the courts. This uncertainty can only act to stifle expression and creativity as, for example, risk-averse media outlets choose not to publish a regular column parodying topical subjects in fear that this will not be considered a “special case”.

We therefore submit that the language of the proposed three step test provisions in s200AB be simplified and aligned with Australia’s existing fair dealing provisions.

Our most immediate concern regarding the uncertain application of these provisions relates to the dual requirement that in order to be permitted a use must both be prescribed by ss200AB(2)-(5) and amount to a “special case”. This double-barrelled restriction seems likely to limit the application of the exceptions to such a degree that it will fundamentally undermine any flexibility they grant to permit uses that would be regarded by the ordinary person as fair or reasonable. It would seem to require, for example, that a person copying a textbook to make it accessible to a blind person must prove some additional level of “special” need, beyond the mere fact that their reproduction will obtain a copy of the work in a form that reduces the reading difficulty (as prescribed by s200AB(4)(b)) and is not made partly for the purpose of a commercial advantage (s2000AB(4)(c)). It is extremely unclear what circumstances might amount to such a “special” need. For example:

- Will it be necessary to prove that the text is for a course of study, not merely the person's own enjoyment? If so, is it necessary that it be a prescribed text, or merely recommended reading for their course?
- As each individual use must be judged separately, is it necessary to destroy any residual copy (eg on a computer hard drive) as soon as the disabled person has received their copy – even if the work will be required by other disabled people in the future?
- Can the disabled person who obtained the material supply it to another person with a similar disability, or would such a sequential use prove by default that it is not a “special case”?

Such uncertainty is likely to prevent organisations such as universities or charity organisations from making practical use of the exception in ways that do not interfere with the legitimate commercial interests of the copyright owner and which most people would generally view as reasonable, such as building up a database of frequently used material (eg legislation or textbooks) that is not otherwise available for supply on request to people with a disability, or supplying material for recreational purposes where it has not been made available in an accessible format by the copyright owner.

We would argue that the uses prescribed under s200AB (eg use by or for a person with a disability; use for parody and satire etc) are themselves “special cases” as intended by the Berne three step test, and should be deemed as such by the legislation, rather than being an extra requirement that must be proved in addition to the Berne test requirements. Any suggestion that the Australian Government does not have the right to interpret the Berne test by deeming certain uses to constitute “special cases” in its own legislation would seem to undermine our right as a sovereign state to implement our international obligations under domestic law. It would also seem to imply that while the judiciary has the right to interpret the terms of Australia's international obligations, the democratically elected legislature does not.

We therefore further submit that, if the duplication of the Berne three step test in s200AB is retained, that the uses in ss200AB(2)-(5) be deemed to be “special cases”, and that the additional requirements of s200AB(1)(a) be removed.

Format and time shifting exceptions – proposed ss43C, 47J, 109A, 110AA and 111

We are also concerned regarding the complexity and uncertainty in the drafting of another set of proposed user-rights exceptions that will legalise time shifting (eg recording a television program to watch later) and format shifting (eg copying a CD onto a computer). Once again, in principle such amendments are welcome. As the Attorney-General made clear in the Bill's Second Reading Speech, these provisions are intended to ensure that “ordinary consumers are not infringing the law through everyday use of copyright products they have legitimately purchased”. Yet the provisions proposed by the Government fall far short of this goal, and are drafted in a

manner which no ordinary Australian has a chance of understanding or applying for themselves.

In order to implement the seemingly simple task of allowing people to copy legitimate material (eg broadcasts and purchased products) for more convenient use, the Government has introduced five separate exceptions, each over a page in length and with up to seven different subsections. They have introduced separate format-shifting provisions for copying different kinds of material (eg books and newspapers, photographs, sound recordings and cinematographic films), with slightly different but deceptively similar requirements for each of these categories. Furthermore, they have not provided exceptions to allow the format shifting of musical works (eg printing out a musical score available online), artistic works (eg scanning an artwork contained in a private collection for preservation purposes) or dramatic works.

The complexity of the provisions can be attributed primarily to the Government's apparent desire to carve out only certain narrowly defined uses of the works, excluding a broad range of uses that do not harm the copyright owner's market and that most ordinary people would regard as acceptable. For example, the provisions:

- legalise the recording of a television program onto a video tape for personal use, but not the lending of this tape to a friend or co-worker (ss111(3)-(4));
- legalise the scanning of an out-of-print newspaper article, but not its provision to a friend or family member (s43C(4));
- legalise the copying of a song from a CD to a computer, but not to another CD eg to make a compilation CD to play in the car (s109A(1)(d));
- legalise the copying of a movie onto a computer or DVD from a video tape, but not from any other analogue format eg 35mm or 18mm film (s110AA(1)(a));
- legalise the copying of a song from a CD onto a personal player such as an iPod for personal use, but not the copying of a DVD onto that same iPod (s110AA(1)(a)).

The proposed legislation is also ambiguous in its use of the word "format". It is unclear whether copying a sound recording or cinematograph film "in different format" refers to the technical format of the work or the media on which it is stored, or both. The amendments require that for a copy to be non-infringing, it must differ from the format of the original. For example, while it is fairly clear that under the new provisions user wishing to make a compilation of music for their car from compact discs they owned will be permitted to copy the material onto a tape or MP3 player, it is unclear whether they will be able to copy the material

- from a CD in audio CD file format to a CD in MP3 format; or
- from a CD in MP3 format to a DVD in MP3 format.

Furthermore, this decision to carve out only very narrowly defined and inflexible exceptions leaves no room for adaptation of the provisions to new technologies. This means that the provisions will quickly become outdated, leaving Australians unable to make use of new devices in ordinary ways without infringing copyright. Indeed, the exceptions fail to take account of reasonable uses that are already occurring as a result of the latest technologies, such as:

- the streaming of music stored on a computer over a home network, so that the music can be listened to via better speakers or in different rooms of the house;
- using a wireless transmitter to play a song stored on an MP3 player (eg an iPod) or a portable CD player (eg a CD Walkman) over a car's speaker systems via a car radio; and
- the temporary "sharing" of songs with others using Microsoft's new Zune MP3 player device, which allows material to be sent via a wireless signal from one Zune player to another, but deletes the song on the new player once it has been listened to three times.

This narrow drafting approach conflicts with the Government's stated aim when introducing the Digital Agenda Amendments in 2000 of ensuring that Australia's Copyright Act remained technologically neutral and capable of adapting to ongoing technological developments. It also places Australians at a disadvantage to their counterparts in the US, whose broad fair use provision is capable of adapting to take account of such new technologies. By comparison, even Australia's narrow fair dealing provisions, which leave courts the discretion to determine, based on all the evidence, whether a use of a new technology is "fair", provide a far preferable legislative model.

We therefore submit that the extremely narrow and complex format and time shifting provisions be replaced with simplified provisions that: are in line with Australia's existing fair dealing exceptions; are technology neutral; and are flexible enough to encompass ordinary use of existing and future technologies.