



DPP

Commonwealth Director of Public Prosecutions

31 October 2006

Ms Jackie Morris
A/g Committee Secretary
Standing Committee
Legal and Constitutional Affairs
Inquiry into the Copyright Amendment Bill 2006
The Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Inquiry into the Copyright Amendment Bill 2006

I refer to your letter of 19 October 2006 to the Commonwealth Director of Public Prosecutions inviting a submission to the Committee's inquiry into the Copyright Amendment Bill 2006.

Please find enclosed the submission of the Commonwealth Director of Public Prosecutions regarding the inquiry. I am the author of the submission and my contact details are:

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Thank you for inviting the Commonwealth DPP to make a submission.

Yours sincerely

James Carter
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Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE COPYRIGHT AMENDMENT BILL 2006

Introduction

The Office of the Commonwealth Director of Public Prosecutions ("CDPP") is responsible for the prosecution of criminal offences against the laws of the Commonwealth. The primary role of the CDPP is to prosecute offences against Commonwealth law and to recover the proceeds of Commonwealth crime. The CDPP is not an investigative agency and it has no investigative powers or functions. The Office prosecutes cases investigated by the Australian Federal Police or other investigative agencies. The CDPP regularly provides advice to these agencies during the investigative stage in large and complex matters.

Prosecution decisions are made in accordance with the guidelines set out in the Prosecution Policy of the Commonwealth. In general terms there is a two stage test that must be satisfied. There must be sufficient admissible evidence to prosecute the case, which requires not just that there be a prima facie case, but that there also be reasonable prospects of conviction. It must also be clear from the facts of the case and all the surrounding circumstances that prosecution would be in the public interest.

The factors briefly outlined above apply to copyright prosecutions. Given the specialised nature of these matters, the CDPP may provide advice during the investigation phase as a brief of evidence is being prepared. The CDPP assesses briefs on their being referred to determine whether there is sufficient admissible evidence to prosecute. Counsel's advice may be obtained at this stage. Because of the highly technical nature of copyright offences there is potential for defended prosecutions to be complex and difficult matters. Copyright cases conducted by the CDPP cover a range of areas including the movie, music and computer industries.

This submission focuses on the principal new criminal offence provisions and the proposed amendments to the existing evidentiary presumptions in the *Copyright Act 1968*.

Copyright Amendment Bill 2006

The Copyright Amendment Bill 2006 ("the Bill") contains a significant number of proposed amendments to the *Copyright Act 1968* ('the Act'). In particular, Schedule 1 of the Bill repeals the main criminal offence provisions set out in section 32 of the Act and replaces them with a tiered regime of indictable, summary and strict liability offences that carry a range of penalties. In

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addition to the criminal offences, we note that there is to be an administrative infringement notice scheme included in the *Copyright Regulations 1969*. This will provide an alternative to prosecution action.

Schedule 2 contains amendments to the evidential presumption provisions in both civil and criminal proceedings. These provisions allow for presumptions in relation to establishing the subsistence and ownership of copyright. Essentially the Bill strengthens these provisions by providing that statements contained on labels, marks, certificates and so on, are presumed to be correct unless the contrary is established, rather than on the basis that they are admissible as prima facie evidence, as set out in the existing presumptions.

Schedule 9 repeals Part VAA of the existing Act which deals with broadcast decoding devices and replaces it with a new Part VAA in the Bill which contains civil and criminal provisions relating to unauthorised access to encoded broadcasts including both subscription (notably pay TV broadcasts) and encrypted broadcasts delivered by commercial and national broadcasting services. Some of the new offences apply only to unauthorised access to subscription broadcasts.

Schedule 12 contains amendments to the existing offences relating to circumventing technological protection measures ("TPM"), which are 'technical locks' copyright owners use to stop their copyright material being copied or accessed, such as passwords, encryption software and access codes. The Bill contains criminal offences relating to the circumvention of access control TPM, the manufacture of circumvention devices and the provision of TPM circumvention services.

Schedule 1

The principal criminal offences in the Bill are contained in clauses 132AC–132AS. These offences replace the various offences in section 132 of the Act and are discussed in detail below. In our view the offences and their elements are more clearly articulated as separate offences rather than being incorporated within one offence provision and this should be of assistance to practitioners working in this area.

Subdivision B – Substantial infringement on a commercial scale

Subdivision B provides that it is an offence to engage in conduct that results in one or more infringements of the copyright in a work or other subject-matter in circumstances where the infringement has a substantial prejudicial impact on the owner of the copyright and where the infringements occur on a commercial scale (clause 132AC).

This offence addresses conduct that has a substantial prejudicial impact on a copyright holder notwithstanding there may be no profit motive involved in the conduct that has allegedly been engaged in by the defendant. In determining whether the infringement has occurred on a commercial scale the volume and value of any articles that are infringing copies that constitute the infringement or infringements and any other relevant matters are to be taken into account (clause 132AC(5)).

Clause 132AC(1) provides for an indictable offence with a penalty of 5 years imprisonment, a fine of not more than 550 penalty units (\$60,500), or both. Clause 132AC(3) creates a summary offence with a penalty of 120 penalty units (\$13,200) or imprisonment for 2 years, or both. Many of the offences in the Bill are structured in this manner and this is discussed in more detail below.

Subdivision C – Infringing copies

Subdivision C contains a large number of criminal offences relating to copyright infringement that address different situations relating to infringing copies.

Clause 132AD provides that it is an offence to make an article to sell, let for hire or to obtain a commercial advantage or profit, in circumstances where the article is an infringing copy of a work or other subject-matter and when copyright subsists in the work or other subject-matter when the article is made. It is also an offence to sell or let for hire an article that is an infringing copy of a work or other subject-matter where copyright subsists in the work or other subject-matter when the article is made (clause 132AE).

Clause 132AF prohibits offering an infringing copy for sale or hire, whilst clause 132AG prohibits exhibiting an infringing copy in public commercially. Clause 132AH provides that it is an offence to import an infringing copy with the intention of selling it or distributing or exhibiting it in public to obtain a commercial advantage etc. Clause 132AI provides that it is an offence to distribute an infringing copy, and clause 132AJ, that it is an offence to possess an infringing copy for various commercial activities as set out, in circumstances where copyright subsists in the work or other subject-matter.

It is also an offence to make or possess a device for making an infringing copy (clause 132AL) and for advertising for the supply in Australia of an infringing copy (clause 132AM).

Importantly, Subdivision C also provides that the indictable offences in Subdivision C (except sections 132AL and 132AM) are aggravated offences if the infringing copy was made by converting a work or other subject-matter from a hard copy of analog form into a digital or other electronic machine-readable form. Aggravated offences carry a penalty of 5 years imprisonment, a fine of not more than 850 penalty units (\$93,500), or both (clause 132AK).

To prove an aggravated offence, the prosecution must prove that the defendant was reckless with respect to the circumstance that the infringing copy was made by converting a work or other subject-matter from a hard copy or analog form into a digital or other electronic machine-readable form. If the prosecution intends to prove an aggravated offence, the charge must allege that the infringing copy was made by converting a work or other subject-matter from a hard copy or analog form into a digital or other electronic machine-readable form (clause 132AK).

Subdivision D – Airing of works, sound recordings and films

Subdivision D contains offences in relation to the airing of works, sound recordings and films. It is an offence to cause a literary, dramatic or musical work to be performed publicly in circumstances where the performance infringes copyright in the work (clause 132AN). It is also an offence to cause a sound recording to be heard or images or sound from a cinematograph film to be seen or heard in circumstances where the hearing or seeing occurs in public at a place of public entertainment and the hearing or seeing infringes copyright in the work (clause 132AO).

Subdivision F – Electronic rights management information

Subdivision F contains offences relating to electronic rights management information. Offences include the removal or alteration of electronic rights management information from or relating to a work or other subject-matter without the permission of the owner or exclusive licensee of the copyright in circumstances where the removal or alteration will induce, enable, facilitate or conceal an infringement of the copyright (clause 132AQ).

There are also offences of distributing, importing or communicating copies after the removal or alteration of electronic rights management information (clause 132AR) and of distributing or importing electronic rights management information with the intention of trading or obtaining a commercial advantage or profit without the permission of the owner or exclusive licensee of the copyright (clause 132AS).

Subdivision G - Evidence

Many of the offences in the Division include an element of an activity to obtain a profit. Clause 132AA provides that “profit” does not include any advantage, benefit, or gain, that:

- (a) is received by a person; and
- (b) results from, or is associated with, the person’s private or domestic use of any copyright material.

Clause 132AU provides that if in a prosecution of an offence against this Division it is relevant whether the Defendant intended to obtain a profit or did something for, in preparation for, or in the course of, obtaining a profit, the burden of proving that any advantage, benefit or gain does not result from or is not associated with, any private or domestic use of the copyright material is on the prosecution. This is similar to the current position in section 132(11) of the Act.

Subdivision I – Procedure and jurisdiction

The Bill does not propose any changes in relation to the courts in which copyright offences may be prosecuted. Copyright offences may be prosecuted in the courts of the States and Territories exercising federal jurisdiction or in the Federal Court. The proposed indictable offences would be heard in the courts of the States and Territories. Clause 133A(3)(b) provides that the Federal Court of Australia has jurisdiction in relation to determining the newly created strict liability offences.

Structure of the offence provisions

The Bill provides for a tiered regime of indictable, summary and strict liability offences that carry a range of penalties. The indictable offences carry a penalty of 5 years imprisonment, a fine of not more than 550 penalty units (\$60,500), or both. The summary offences carry a penalty of 2 years imprisonment, a fine of not more than 120 penalty units (\$13,200), or both. The strict liability offences provide for a penalty of 60 penalty units (\$6,600).

This structure has been employed in many of the offences. Clause 132AD is a central offence in terms of infringing material, as it concerns actually making infringing material with the intention of engaging in various commercial activities.

It affords an opportunity to focus on the varying levels of seriousness of the offences and on the elements of the offence that must be proven beyond reasonable doubt in order to establish a criminal offence.

Clause 132AD Making infringing copy commercially

Indictable offence

(1) A person commits an offence if:

(a) the person makes an article, with the intention of:

- (i) selling it; or
- (ii) letting it for hire; or
- (iii) obtaining a commercial advantage or profit; and

(b) the article is an infringing copy of a work or other subject-matter; and

(c) copyright subsists in the work or other subject-matter when the article is made.

(2) An offence against subsection (1) is punishable on conviction by a fine of not more than 550 penalty units or imprisonment for not more than 5 years, or both.

The prosecution must prove:

- the physical element of conduct that the Defendant made an article. The fault element applicable is that the Defendant made the article with the intention of selling (or letting etc).
- the physical element of a circumstance that the article was an infringing copy of a work or other subject-matter. The fault element applicable is recklessness (s5.6(2) *Criminal Code*) and;
- the further physical element of a circumstance that copyright subsisted in the work or other subject-matter when the article was made. The fault element applicable is recklessness (s5.6(2) *Criminal Code*).

The indictable offence is differentiated from the summary and strict liability offences in the fault elements that attach to the physical elements of the offence. In the indictable offence the Defendant, in order to commit an offence, must make the article with the intention of selling, letting for hire or obtaining a commercial advantage or profit, and must be reckless as to the article being an infringing copy of a work or other subject-matter, and be reckless as to copyright subsisting in the work or other subject-matter when the article is made.

The word reckless is not used in the provision but recklessness is the fault element that applies to the circumstances set out above by virtue of the principles set out in the *Criminal Code*. If an offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element (subclause 5.6(2) of the *Criminal Code*).

Attention must not be given to only the fault elements in these offences. In establishing the physical elements of the subsistence of copyright and it being infringed technical and legal issues may arise.

Summary offence

(3) A person commits an offence if:

(a) the person makes an article, with the intention of:

- (i) selling it; or
- (ii) letting it for hire; or
- (iii) obtaining a commercial advantage or profit; and

(b) the article is an infringing copy of a work or other subject-matter and the person is negligent as to that fact; and

(c) copyright subsists in the work or other subject-matter when the article is made and the person is negligent as to that fact.

Penalty: 120 penalty units or imprisonment for 2 years, or both.

(4) An offence against subsection (3) is a summary offence, despite section 4G of the *Crimes Act 1914*.

The summary offence again provides that the person must make the article with the intention of selling, letting for hire or obtaining a commercial advantage or profit, however it requires that a person must be negligent as to the article being an infringing copy of a work or other subject-matter and negligent as to copyright subsisting in the work or other subject-matter when the article is made.

The fault element of “negligent as to that fact” is stated in the provision and therefore it is that specified fault element that attaches to the physical elements of the circumstances in the offence. As set out in the *Criminal Code*, negligence is a ‘lesser’ fault element than recklessness or intention and it is on this basis that the indictable and summary offences are differentiated with the summary offence having a lesser penalty. See section 5 of the *Criminal Code*.

Strict Liability offence

(5) A person commits an offence if:

(a) the person makes an article in preparation for, or in the course of:

- (i) selling it; or
- (ii) letting it for hire; or
- (iii) obtaining a commercial advantage or profit; and

(b) the article is an infringing copy of a work or other subject-matter; and

(c) copyright subsists in the work or other subject-matter when the article is made.

Penalty: 60 penalty units

Strict liability offences have no fault elements attached to the physical elements of the offence (subsection 6.1 of the *Criminal Code*). A defence of mistake of fact is available (section 9.2 of the *Criminal Code*).

The structure of the offences provides for tiered penalties. Indictable offences carry a penalty of 5 years imprisonment, whilst summary offences carry 2 years imprisonment. It should be noted that generally Commonwealth summary offences carry a penalty not exceeding 12 months imprisonment, as section 4G of the *Crimes Act 1914* provides that offences punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.

In this Bill the summary offences expressly provide that the offences are summary offences with a penalty of 2 years imprisonment despite section 4G of the *Crimes Act 1914* and accordingly a contrary intention is indicated. The Commonwealth's Guide to Framing Offences states that section 4G should apply unless there is a demonstrated reason why that dividing line is inappropriate for a particular offence.

The Explanatory Memorandum notes that the inherent seriousness of the offences, even at summary level, provides cause for the higher than usual maximum penalty for the summary offences. It is also noted that this penalty level is lower than the maximum penalty of 5 years imprisonment for the current offences in section 132 of the Act, which are all summary offences.

In addition, there are some summary offences that carry lesser only monetary penalties and do not carry terms of imprisonment: see clauses 135ASI and clause 132APC. These offences involve fault and are not strict liability offences.

The approach that has been adopted has standardised the fault elements used in copyright offences. The Explanatory Memorandum states that the Bill will ensure that the offences comply with Commonwealth criminal law policy and the *Criminal Code*.

A number of the offences in the Act utilise the 'ought reasonably to know' formulation, for example in section 132(1) a person makes an article for sale ... if the person "knows, or ought reasonably to know, the article to be an infringing copy of the work". Other offences are based on a recklessness formulation, for example in section 132(5C) which relates to electronic rights management information. The same comment can be made about subsistence of copyright.

The Commonwealth has moved away from the 'ought reasonably to know' formulation. The Bill provides for fault elements and the application of strict liability consistent with the *Criminal Code*. We support this approach (See Guide to Framing Offences page 21 and page 11 of the Explanatory Memorandum).

The Explanatory Memorandum notes that the offences have been re-drafted in accordance with the preferred *Criminal Code* style of separating different physical elements into separate paragraphs and this is clearly seen in the example set out above.

The approach of providing for a range of offences with varying penalty levels provides considerable flexibility and enables charges to be selected based on the particular conduct that is being assessed. The Explanatory Memorandum states that this will provide police and prosecutors with a wider range of penalty options to pursue against suspected offenders depending on the seriousness of the conduct.

It is important to note that the choice of charge is a matter that is addressed in the Prosecution Policy of the Commonwealth. If, after assessing the evidence, the CDPP considers that there is sufficient evidence to lay charges, the CDPP will choose the most appropriate charge or charges in accordance with the Prosecution Policy of the Commonwealth. In this regard, paragraph 2.18 states:

“In many cases the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence.”

Subdivision A - General offences

Clauses 248PA – Clause 249PM provide for a range of structured offences relating to sound recordings during the protection period of the performance. They cover conduct such as direct and indirect recording, unauthorised communication, possessing equipment, copying etc.

Subdivision B – Acts relating to sound recordings of performances given before 1 July 1995

Clauses 248QB – Clause 248QH provide for a range of structured offences relating to these performances.

Schedule 2 - Presumptions

Section 132A of the Act currently provides for an evidentiary presumption to assist in relation to establishing the subsistence and ownership of copyright in order to prosecute. This presumption recognises that copyright is a highly technical area and marshalling the evidence necessary to prosecute matters is a difficult and lengthy process.

Inherent in proving an infringement, is establishing the ownership of copyright in order to prove that the impugned acts were done without the copyright owner’s licence. Proof of the making and identifying the maker of the article is the first step in the process of the proof of ownership. Each subsequent assignment of the copyright has to be proved and, in addition, it has to be proved that the defendant acted without licence from the copyright owner.

Essentially the Bill in subclauses 132A(2), (3), (4), and (5) strengthens section 132 by providing that statements contained on labels, marks certificates or chain of ownership documents are presumed to be correct unless the contrary is established, rather, than on the basis that they are admissible as prima facie evidence so stated, as provided for in the existing provision. The Explanatory Memorandum notes that the current formulation is inconsistent with the stronger formulation used in other presumptions in the Act (see subsection 127(1)).

In addition, specific provision is made in relation to evidential presumptions for criminal proceedings with respect to computer programmes (clause 132AAA), sound recordings, (clause 132B), and film (clause 132C). These provisions are intended to more accurately reflect common labelling practises used in these industries.

Item 15 of Schedule 2 provides that the amendments relating to presumptions do not have retrospective effect and apply only to criminal proceedings commenced after the commencement of the Schedule.

Schedule 9 – Unauthorised access to encoded broadcasts

Division 3 – Offences

Clause 135ASA – Clause 135ASJ provide for offences relating to unauthorised decoders. Definitions are set out in clause 135AL. A decoder means a device (including any computer programme) designed or adapted to decrypt, or facilitate the decryption of, an encoded broadcast. An encoded broadcast is a subscription broadcast or a broadcast that is encrypted and is delivered by a commercial broadcasting service or a national broadcasting service within the meaning of the *Broadcasting Services Act 1992*.

The offences include making an unauthorised decoder (clause 135ASA), selling an unauthorised decoder (clause 135ASB) and distributing an unauthorised decoder (clause 135ASF). Each of these offences are punishable on conviction by imprisonment for not more than 5 years, a fine of not more than 550 penalty units (\$60,500), or both. There are also indictable offences relating to the commercial importation and exhibiting of an unauthorised decoder, the distribution of an unauthorised decoder and making an unauthorised decoder available online, including for a subscription broadcast.

In addition there is a summary offence of gaining unauthorised access to a subscription broadcast that carries a penalty of 60 penalty units (\$6,600).

Schedule 12 – Technological protection measures

Subdivision E contains three criminal offences relating to technological protection measures (“TPM”), as defined in subsection 10(1) of the Bill. An “access control TPM” means a device, product, programme etc as defined, which in the normal course of its operation, controls access to the work or other subject matter. A “TPM” is defined as an access control TPM or a device etc that in the normal course prevents, inhibits or restricts the doing of an act comprised in the copyright.

Clause 132APC provides that it is an offence to circumvent an access control TPM with the intention of obtaining a commercial advantage or profit. This offence has several elements. A defendant must be proven to be reckless to the result that the TPM was circumvented as well as to the circumstance that the TPM was an access control TPM. This offence has a penalty of 60 penalty units.

Clause 132APD provides that it is an offence to manufacture, import, distribute, offer to the public, provide or communicate to another person a circumvention device for a TPM with the intention of obtaining a commercial advantage or profit. A defendant must be proven to be reckless as to the circumstance that the device was a circumvention device for a TPM. This offence has a penalty of 550 penalty units (\$60,500) or imprisonment for 5 years, or both.

Clause 132APE provides that it is an offence to provide a service to another person or offer a service to the public with the intention of obtaining a commercial advantage or profit and the service is a circumvention service for a TPM. A defendant must be proven to be reckless as to the circumstance that the service is a circumvention service for a TPM. This offence has a penalty of 550 penalty units (\$60,500) or imprisonment for 5 years, or both.

These offences have a number of specific defences, including where permission has been given by the copyright owner or exclusive licensee, interoperability, and where encryption research and computer security testing, and work of libraries is involved.

It is important to note that clause 132APB clarifies that the TPM offences do not apply to encoded broadcasts covered by Part VAA.