

Some simple amendments that could reduce concerns with Schedule 1 of the *Copyright Amendment Bill 2006* (Cth)

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This short supplementary submission elaborates on a claim I made in the hearing of the Senate Standing Committee on Legal and Constitutional Affairs yesterday. It makes two recommendations:

1. The Committee should recommend that amendments be considered by the Department along the lines outlined below, to narrow the strict liability offences to a more targeted, and more acceptable scope. In the alternative, the Committee should recommend that the criminal laws Schedule (Schedule 1) be deferred to give time to consider the amendments suggested below.
2. The Committee should further recommend that in the drafting of guidelines on the enforcement of the strict liability scheme and infringement notice scheme, groups representing those who are affected by the laws be consulted. Some groups are suggested below.

Introduction

Yesterday, I argued that the provisions of Schedule 1 of the *Copyright Amendment Bill* (the criminal laws) were overbroad, and could be narrowed in a way that would:

- significantly reduce the risk of their application to ordinary Australians and legitimate businesses;
- bring the provisions into better compliance with stated government policy which requires that strict liability should only be introduced where there are legitimate grounds for penalising persons lacking fault;¹ and
- bring the provisions into better compliance with principles stated by the Senate Standing Committee for the Scrutiny of Bills, which noted that it is undesirable if a strict liability regime includes a large number of offences creating a substantial pool of contravening behaviour, resulting in selective and possibly inconsistent enforcement.²

The following amendments are put forward to show that it *is* possible to negotiate changes to make the laws less broad and more clearly targeted at the behaviour copyright owners are most concerned about. As I am not a parliamentary draftsperson, these do not purport to be finalised drafting suggestions.

Suggested Amendments

The apparent intention of the strict liability provisions is to make it easier to enforce copyright law against ‘pirates’ – people who are infringing copyright on a commercial scale, for commercial purposes (for example, selling pirate material in markets; importing pirate material on a commercial scale). Copyright owners have a legitimate interest in making these laws more enforceable.

¹ Minister for Justice and Customs, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004)

² Senate Standing Committee for the Scrutiny of Bills, *6th Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (26 June 2002).

The most significant problems with the criminal provisions arise where they apply:

- to acts not done for a commercial purpose or in a commercial context;
- to conduct that is a necessary part of conducting ordinary, legitimate business;
- to acts that might be done by ordinary Australians innocently.

To achieve the government's purpose, it is not necessary to capture these latter activities. The law should be drafted so as to *exclude* these activities from criminal liability.

I would therefore propose that if (contrary to my basic submission) strict liability *is* to be included, the following amendments be made:

1. The strict liability provisions in sections 132AD, 132AF, 132AG, 132AH, 132AI, and 132AJ should be amended to remove the phrase 'obtaining a commercial advantage or profit'. That is, a person should be strictly liable for making, selling or hiring out a copyright work, but not for making a copyright infringement 'with the intention of obtaining a commercial advantage'.

In the alternative, a defence could be introduced, providing that a person who could show that the copyright infringement was 'Subsection (x) does not apply where the defendant shows that the copyright work was not the intended object of sale'.

The first proposed amendment would ensure that companies do not become liable for wholly internal activities that they (or their employees) are not aware infringe copyright. This would significantly reduce the impact of the Copyright Amendment Bill on small to medium sized businesses who do not sell copyright content. The internal activities of a business are not the legitimate target of police enforcement. They are appropriate for civil enforcement (copyright owners could sue for damages).

Strict liability and infringement notices could still be enforced against a person who is making and selling pirate DVDs (or renting them out).

The proposed defence would ensure that there would be no liability where the infringement is ancillary to the activity – not the main purpose. This amendment would ensure that the company which mistakenly puts a copyright photograph on their book or research report – while they can be sued for copyright infringement (and be required to pay damages) cannot be fined as a criminal.

*Note that a person who **intended** to obtain commercial advantage from copyright infringement would still be liable for the more serious offences.*

2. The strict liability provisions in sections 132AI, 132AJ, 248PJ and 248QE should be amended to remove strict liability where a person distributes an article to an extent that affects prejudicially a copyright owner.

This amendment would take out of the strict liability provisions a person who makes material available online – not for trade, but, for example on a personal website.

*This amendment would therefore ensure that people are not going to risk criminal liability for activities done at home, and not for trade, **where they are not aware** that that what they are doing risks affecting prejudicially the owner of copyright.*

The amendment also ensures compliance with the principle that strict liability, and infringement notices, should only be used where the physical elements of an offence are clear. Once this amendment is made, we will not be expecting police officers to make a judgment as to whether certain actions affect prejudicially a copyright owner.

*Activities done for trade would still be subject to strict liability. Note that in the US, criminal liability for non-commercial activity has a numerical limit: a person may be criminally liable for distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a **total retail value of more than \$1,000**. The Australian provision currently is broader.*

3. Section 132AL should not be subject to strict liability. This provision makes it criminal to make or possess a device which will be used to make infringing copies. In that form, it criminalises possession of a video recorder or personal computer. Some kind of intent should be required. At most, intent should be presumed from, for example, the possession of, for example, simultaneous possession of infringing copies where the retail value of those copies is worth more than \$1,000. This would remove the problem of liability for possessing a video recorder, MP3 player, or average laptop computer.
4. Sections 132AN and 132AO should be amended so that strict liability only applies where (a) the person owns, controls, or is otherwise in charge of, the place of public entertainment, or (b) the person performing or causing the recording to be seen or heard in public is receiving payment for the performance of public viewing/seeing.

This would ensure that playing your music too loud at a restaurant is not a strict liability offence, and would confine strict liability to its intended operation: where a business is making money from infringing performances.

5. Neither section 248PA (recording a performance) nor 248PE (possessing equipment to record a performance) should be a strict liability offence, unless the act is done for the purposes of trade. Thus, the provisions should be

amended so that the strict liability offence has an additional requirement ‘for the purposes of trade’.

In the alternative, a defence should be introduced to each offence, so that the offence does not apply if the recording is made for a person’s private and domestic use. With the increasing ubiquity of portable recording devices, this defence will become more important.

Section 248PA is the provision which makes it criminal to record a concert that you are enjoying. No commercial incentive is required in the law as drafted.

It should be sufficient, for the purposes of copyright owners, to impose strict liability at the point where a person tries to sell unauthorised recordings.

Note that if a person made a recording contrary to signs at the concert banning such recordings, they would be liable under other provisions.

6. The strict liability offences in sections 248PF, 248QC (copying unauthorised recording) and 248PG should be amended to include a defence where the copy is made for private and domestic purposes.

This would ensure that no person would be criminal for an act done in the home.

The Department, and copyright owners, might be concerned that if these amendments are made, the laws will not be broad enough. I would propose that these amendments be made and the laws be ‘tested’ in the real world. If it is found that they are not sufficient to capture the activities intended to be captured, they can be broadened where the need is shown. Given the radical nature of the changes being proposed in the Bill, and the fundamental importance of intent in the criminal law, it is appropriate to tread carefully, and remove the requirement incrementally, as is shown to be necessary.

Participation in drafting of Guidelines

In addition, I note that the Senate Standing Committee for the Scrutiny of Bills has previously proposed that determining the application of strict liability provisions, the adverse effects on those affected should be recognised, and steps should be taken to ameliorate any adverse effect on small and medium enterprise.

The DPP has noted that guidelines will be drafted on the management of these offences and the infringement notice scheme. The Senate Committee should therefore recommend that in the drafting of these guidelines, bodies representing those who are regulated (and not just copyright owners) should be consulted. Suitable bodies include:

- the Business Council of Australia (as a body representative of individuals who may have to introduce compliance regimes as a result of these laws);
- the Law Council of Australia (as experts on the operation of laws such as strict liability laws);
- bodies representative of user interests, such as the AVCC, the Australian Digital Alliance (as groups who will be regulated by these laws).

I would also personally be willing to participate in the process as an expert in copyright law. However, if that is not considered appropriate, at the least, the above representative bodies should be involved in this process. Such groups were not consulted during earlier drafting stages: as I understand, only copyright owner groups were consulted. A recommendation from the Senate Committee may therefore be helpful.

Best regards,

Kim Weatherall