

**OVERVIEW OF CONSULTATION ON VARIOUS PARTS OF
THE COPYRIGHT AMENDMENT BILL 2006**

General Criminal Law Amendments (Schedule 1)

- The amendments in Schedule 1 are being introduced primarily so that the offences comply with Commonwealth criminal law policy and are harmonised with the *Criminal Code Act 1995*.
- A technical review of the criminal law provisions was undertaken in close consultation with the Criminal Law Branch and the Commonwealth Director of Public Prosecutions (CDPP).
- Other government stakeholders were kept up-to-date about the technical review through the IP enforcement IDC.
Industry stakeholders were given regular progress reports on this review through the Intellectual Property Enforcement Consultative Group.
- Consultations on the draft amendments were undertaken with key industry stakeholders on an in-confidence basis and other government agencies in August 2006.
- An exposure draft of these aspects of the Bill, together with explanatory material was placed on the Department's website on 22 September 2006 for the general public, and a Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.¹

Evidential presumptions (Schedule 2)

- The Schedule 2 amendments relating to evidential presumptions address a number of concerns raised by copyright industry stakeholders and by the CDPP.
- Film industry stakeholders first raised these issues in December 2004 in meetings with Departmental representatives.
During the course of 2005, there were written submissions from sections of industry and further meetings on this issue.
- The presumptions relating to computer programs address long-standing concerns of the computer software industry about difficulties of proof of originality.
These were first raised with the Department in 2003 and again during development of amendments (late 2004) that implemented the copyright enforcement obligations of the AUSFTA.
- The Criminal Law Branch, Civil Justice Division, the Federal Court and the CDPP were consulted in the development of draft evidential presumption amendments.
- Consultation on the draft amendments was undertaken on an in-confidence basis with key industry stakeholders in August 2006.

¹ See AGD e-news on Copyright, Issue 41 available online at
http://www.ag.gov.au/agd/WWW/enewscopyrighthome.nsf/Page/eNews_Issue_41_-_September_2006

- The amendments were also included in the exposure draft to the general public placed on the Department's website on 22 September 2006 and a Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.²

Technologically Neutral Definitions (Schedule 3)

- The amendments in Schedule 3 of the Bill are designed to address industry concerns about doubts raised in recent court cases that there is no protection in civil proceedings under the Copyright Act for digital files or their download over the Internet.
- Film industry stakeholders first raised these issues in December 2004 in meetings with Departmental representatives. During the course of 2005, there were written submissions and further meetings on this issue.
- These were raised by these stakeholders during the consideration of the *Kazaa* and *Cooper*³ cases. The Department deferred consideration of possible amendments to the Act until after decisions in the cases were handed down. The decision in the *Cooper* case confirmed that there were difficulties for plaintiffs in civil proceedings that involved digital files or their download over the Internet.
- The Civil Justice Division of the Attorney-General's Department was consulted in the development of the amendments that addressed the 'article' issue.
- Consultations on most of these amendments were undertaken with key industry stakeholders in August 2006.
- The revised amendments were included in the exposure draft that was placed on the Department's website on 22 September 2006 and a Departmental 'e-News on Copyright' publicising these materials was sent to self subscribers to the e-news on the same date.⁴

Civil remedies and commercial-scale infringement online (Schedule 4)

- The amendments in Schedule 4 stem from concerns raised by industry stakeholders that, in large scale Internet infringement cases, it is not possible for a plaintiff to prove every act of infringement committed by the defendant.
- Film industry stakeholders first raised these issues in December 2004 in meetings with Departmental representatives.
- During the course of 2005, there were written submissions and further meetings on this issue.
- The Civil Justice Division of the Attorney-General's Department and the Federal Court were consulted in the development of draft amendments on this issue.
- Consultations on most of these amendments were undertaken with key industry stakeholders on an in-confidence basis in August 2006.

² See AGD e-news on Copyright, Issue 41 available online at

http://www.ag.gov.au/agd/WWW/enewscopyrighthome.nsf/Page/eNews_Issue_41_-_September_2006

³ *Universal Music Australia Pty Ltd v Cooper* [2004] FCA 78 (13 February 2004); *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 1878 (22 December 2005); *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (14 July 2005); *Universal Music Australia Pty Ltd v Sharman Networks Ltd* [2006] FCAFC 41 (23 March 2006).

⁴ See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

- Amendments were made to the Exposure Draft that was released to the general public on the Department's website on 22 September 2006 as a result of comments made by industry stakeholders during the consultations referred to above.

Customs seizure of imported infringing copies (Schedule 5)

- Schedule 5 contains amendments to the Customs ‘Notice of Objection’ provisions in the Act to reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices.
- They were prompted after discussions with the Australian Customs Service who had requested similar amendments to the Notice of Objection provisions in the *Trade Marks Act 1995*.
- The amendments to the Trade Marks Act were made when Parliament passed the *Trade Marks Amendment Act 2006* in the Spring sittings. The Schedule 5 amendments will ensure the provisions of the Copyright Act remain consistent with the Trade Marks Act amendments.
- The Schedule 5 amendments were not included in the Bill for the initial industry stakeholder consultations.
- However, they were included in the exposure draft that was placed on the Department’s website on 22 September 2006. A Departmental ‘e-News on Copyright’ publicising these materials was sent to self subscribers to the e-news on the same date.⁵

Exceptions to infringement of Copyright (Schedule 6)

- The Election policy 'Strengthening Australian Arts' of 4 October 2004 undertook to review exceptions in the Copyright Act.
- The Department published an Issues Paper to begin public consultations on 5 May 2005.⁶
- More than 160 submissions were received from a wide range of stakeholders, including from members of the public, industry stakeholders, educational and cultural institutions, copyright collecting societies, peak bodies representing people with disability, publishers, broadcasters, distributors, cartoonists, government departments and academics.
- The public consultation period ended in mid July 2005.
- On 17 November 2005, the Attorney-General outlined proposed reforms in this area in his speech at the 12th Biennial Copyright Law and Practice Symposium held in Sydney, by the Australian Copyright Council.⁷
- Meetings were held with key stakeholders on an outline of proposals in December 2005.
- On 14 May 2006, the Attorney-General issued a media release announcing the Government’s decision on the review.⁸
- Exposure drafts of the Bill and Explanatory Material relating to the new exceptions was released on 22 September 2006 for comment, and made available from the Department’s website. A Departmental ‘e-News on Copyright’ publicising these materials was sent to self subscribers to the e-news on the same date.⁹
- No amendments to the exposure draft were made before introduction of the Bill.

⁵ See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

⁶ <http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>

⁷ http://www.ag.gov.au/agd/www/MinisterRuddockhome.nsf/Page/Speeches_2005_Speeches_17_November_2005_-_Speech_-_Opening_address_Copyright_Law_and_Practice_Symposium

⁸ http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006

⁹ See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

- Other provisions arose from the Digital Agenda Review. (See comments for Schedule 8).

Maker of a communication (Schedule7)

- An interpretation issue was raised with the Attorney-General by the Minister for Education, Science and Training (and his Queensland counterpart) in April 2006, and also with the Department by educational interests.
- Amendments were approved by the Government in May 2006 for inclusion in the Bill.
- The amendment clarifies that Internet browsing does not fall within the communication right.
- There was no consultation with stakeholders before the Exposure Draft bill and Explanatory Material was released on 22 September 2006, and publicised in the Departmental 'e-News on Copyright' sent to self subscribers to the e-news on the same date.¹⁰

Digital Agenda Review (Schedule 8)

- The *Copyright Amendment (Digital Agenda) Act 2000* commenced on 4 March 2001.
- The Government announced that it would review the amendments within three years of their commencement.
- Law firm Phillips Fox was selected following a public tender to conduct the Review. As part of that review, it carried out wide public consultation, and public forums were held in Melbourne and Sydney. The final report was completed in February 2004 and released on 28 April 2004.
- A response to the review was not completed in 2004 as the Government gave priority to implementation of the copyright obligations of the Australia-US Free Trade Agreement (AUSFTA) so that those amendments would be in place for the AUSFTA to come into force on 1 January 2005.
- The AUSFTA supersedes some of the Phillips Fox recommendations in areas such as TPM's, and ISP liability for copyright infringements carried out by others on their systems and networks.
- Other issues considered by Phillips Fox were also incorporated into the Fair Use and Other Copyright Exceptions Review.
- The Department considered the outstanding recommendations of the review in 2005 and 2006. On 14 May 2006 the Attorney-General announced that the Government had completed its review of the Digital Agenda reforms.
- The Government's response includes those proposals in the Bill to amend the exceptions applicable to libraries and archives to enable them to conduct their functions more efficiently but without unreasonably prejudicing the legitimate interests of copyright owners.
- Amendments to the educational statutory licences in the Bill are intended to better reflect the needs of educational institutions and copyright owners when dealing with online material. For example, the status of temporarily cached copies of materials used by educational institutions and the use of distributed technologies for classroom teaching will be clarified.

¹⁰ See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

- In relation to caching, the ICPR Committee (Ergas Committee) Report to Government in September 2000 (rec 5) recommended that “caching appears to be of considerable significance to the efficiency of the Internet; and that the transaction costs to secure licences to cache could be prohibitive for ISPs. As a result, Government policy should help ensure that this efficiency-enhancing activity is not prohibited.”
- The Government response¹¹ to this recommendation (which was publicly released in August 2001) agreed that it is desirable to promote the efficient operation of the Internet and notes that the objects section of the Digital Agenda Act includes ensuring that the relevant standards which form the basis of new communication and information technologies, such as the Internet, are not jeopardised.

Unauthorised access to encoded broadcasts (Schedule 9)

- Protection for encoded broadcasts is currently in Part VAA of the Copyright Act, which was inserted by the *Copyright Amendment (Digital Agenda) Act 2000*.
- In 2005, Part VAA was extended as a result of amendments implementing Australia’s obligations under the Australia-United States Free Trade Agreement (AUSFTA).
- As part of the AUSFTA amendments, Australia criminalised the use of a broadcast decoding device where the encoded broadcast is then used in a commercial context.
- Following the conclusion of the AUSFTA, and separately from its AUSFTA obligations, the Government undertook to review its policy on the issue of personal use of a broadcast decoding device and other unauthorised activities carried out by subscribers to pay TV broadcasts.
- That review was conducted by the Attorney-General’s Department between January and June 2005.
- The Department released a Discussion Paper, *Protecting Subscription Broadcasts*, in May 2005,¹² and invited public comment.
- The Attorney-General announced on 30 June 2005 that dishonestly accessing pay TV services without payment of a subscription fee would be criminalised.¹³
- Pay TV industry stakeholders were consulted on the draft provisions on an in-confidence basis in August 2006.
- An Exposure Draft of the amendments to Part VAA and Explanatory Material were placed on the Department’s website for public comment on 22 September 2006, and publicised in Issue 41 of the AGD e-News on Copyright sent on the same date.¹⁴

¹¹ The Government’s response to the Report of the Digital Agenda review is available online at <http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP216DCFAA58A8C720CA25705F0081E54D>

¹² <http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP46815AB514858C33CA2570600083AA29>

¹³ http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Second_Quarter_27_May_2005_-_Unauthorised_pay_TV_use_under_review_-_1012005

¹⁴ See AGD e-news on Copyright, Issue 41, referred to in footnote 1 above.

Copyright Tribunal (Schedules 10 and 11)

- On 20 April 1999 the then Attorney-General asked the Copyright Law Review Committee (CLRC) to inquire into and report on the need for changes to the jurisdiction and procedures of the Copyright Tribunal under Part VI of the *Copyright Act 1968* and report by 30 April 2000.
- In June 1999 the CLRC published an issues paper, inviting submissions on the matters raised in the terms of reference. It received 20 submissions.
- The CLRC also met with a range of other experts in preparing its report:
 - Justice Burchett and former Justice Sheppard, the then current and past Presidents of the Copyright Tribunal for insight into the practical workings of the Tribunal;
 - Mr Shane Simpson, author of the *Review of Australian Copyright Collecting Societies*;
 - Mr Henry Ergas, the Chairman of the Intellectual Property and Competition Review Committee (IPCRC); and
 - In September 1999 the CLRC held a half-day forum in with interested parties.
- The CLRC released a draft report in February 2000 and received 15 submissions.
- Its Final Report was presented to the then Attorney-General on 21 April 2000. The CLRC indicated in its report that the small number of submissions it received in response to the draft report indicated that its recommendations were largely uncontroversial.
- The CLRC's terms of reference, its Discussion paper and Interim and Final reports are available online.¹⁵
- The Intellectual Property Competition Review Committee (IPCRC), under terms of reference given to it by the Attorney-General and the Treasurer, also reviewed intellectual property legislation under the Competition Principles Agreement, including the Copyright Act. It presented its final report to Ministers on September 2000 (the Ergas Report). Recommendation 9, addressed matters relating to collecting societies, ACCC guidelines and alternative forms of dispute resolution for matters arising between collecting societies and their members.
- The Government's Response to the Ergas Report was tabled in August 2001, and is available online.¹⁶ The Response accepted the IPCRC recommendation in part, and agreed:
 - to review relevant provisions of the Act, regulations and guidelines relating to the requirements for declaration, revocation and compliance by collecting societies operating under the statutory licences as raised by the IPCRC;
 - in relation to the proposed ACCC mechanism, that
 - (i) The ACCC be required by statute to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration and other conditions of licenses that currently can or will be able to be the subject of determination by the Copyright Tribunal under Part VI of the Copyright Act; and
 - (ii) the Copyright Act be amended to ensure that the Copyright Tribunal has the discretion to take account of the ACCC guidelines and admit the ACCC as a party to

¹⁵http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Jurisdiction_and_Procedures_of_the_Copyright_Tribunal

¹⁶<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP216DCFAA58A8C720CA25705F0081E54D>

Tribunal proceedings. It noted that the nature of ACCC's guidelines would be advisory, not determinative - in the event that negotiations failed and one or other party applied to the Tribunal, recourse to the Tribunal would not be restricted in any way; and

- that ADR mechanisms for copyright owners, collecting societies and users should be encouraged as part of these processes to ensure access to affordable and equitable alternative means of resolving disputes between parties in a licensing or potential licensing agreement. It noted the Government was exploring avenues to provide for ADR, and that ACCC guidelines may be of assistance.
- The Government developed its response to the majority recommendations in the CLRC report during 2004, however other priorities subsequently meant that these reforms were deferred.
- During preparation of the draft legislation, consultations were held with the Copyright Tribunal, with the Civil Justice Division of the Department (relating to courts and tribunals) and with the ACCC.
- Exposure Drafts of the Copyright Tribunal aspects of the Bill and explanatory material were placed on the Department's website for public comment on 11 October 2006, and publicised in Issue 42 of the AGD e-News on Copyright sent on the same date.¹⁷

Technological Protection Measures (Schedule 12)

- Protection for technological protection measures (TPMs) is currently found in s116A and ss132(5A) and (5B) of the *Copyright Act 1968*, which was inserted by the *Copyright Amendment (Digital Agenda) Act 2000*.
- Australia is obliged to implement Article 17.4.7 of the Australia-United States Free Trade Agreement (AUSFTA), which relates to TPM protection, by 1 January 2007.
- The TPM obligations in the AUSFTA were considered by the Joint Standing Committee on Treaties and the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America in 2004.
- The issue of TPM exceptions was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs on 19 July 2005. The Committee accepted submissions and undertook public hearings on the TPM provisions in the AUSFTA.
- Following the tabling of the Committee's Report on 1 March 2006, the Department accepted written views of stakeholders on the Committee's recommendations.
- The Department held in-confidence discussions with key stakeholders on the Government's proposed approach on 27 July 2006.
- The Department also held discussions with US Government officials on the proposed approach and the Exposure Draft.
- An Exposure Draft of the Bill was made available on the Department's website on 8 September 2006 for comment for three weeks, and publicised by the AGD e-news on Copyright on 4 September 2006.¹⁸ Comments on the Exposure Draft were due on 22 September 2006. Approximately 45 submissions were received.

¹⁷ http://www.ag.gov.au/agd/WWW/enewsCopyrightHome.nsf/Page/eNews_Issue_42_-_October_2006

¹⁸ See Issue 40 at http://www.ag.gov.au/agd/WWW/enewscopyrightHome.nsf/Page/eNews_Issue_40-September_2006

- An Exposure Draft of the Regulations was made available from the Department's website for comment on 15 September 2006. Comments were due on 6 October 2006. Three submissions were received. Seventeen submissions on the Exposure Draft of the Bill also commented on the Regulations.
- On 4 September 2006, in Edition 40 of the e-News on Copyright,¹⁹ the Department called for submissions and further evidence in support of granting a limited number of further exceptions to the TPM scheme. Initial submissions were due by 25 September 2006. Eight submissions were received. Reply comments in response to submissions (which have been placed on the Department's website) were due by 24 October 2006. Six submissions were received.

¹⁹ See Issue 40 at http://www.ag.gov.au/agd/WWW/ewnewscopyrighthome.nsf/Page/eNews_Issue_40-September_2006