COPYRIGHT AMENDMENT BILL 2006

FURTHER SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Attorney-General, the Honourable Philip Ruddock MP)
AMENDMENTS TO THE COPYRIGHT AMENDMENT BILL 2006

(Government)

OUTLINE

The purpose of these amendments to the Copyright Amendment Bill 2006 (‘the Bill’) is to further ensure that the Bill properly reflects intended Government policy, to rectify or clarify the drafting of certain provisions and to respond to the report of the Senate Standing Committee on Legal and Constitutional Affairs (‘Senate Committee’).

In summary, these amendments to the Bill will:

- remove further strict liability offences that may have the unintended effect of applying unfairly to people undertaking everyday activities without criminal intent. These include offences relating to:
  - distributing or communicating infringing copies, recordings of performances or unauthorised sound recordings of performances
  - causing sound recordings to be heard or seen in public at a place of public entertainment, and
  - playing an unauthorised recording of a performance publicly during the 20 year protection period.
- provide that the regulations may make provision enabling a person who is alleged to have committed an offence of strict liability under Part V, Division 5 of the Copyright Act 1968 to pay a penalty and forfeit infringing copies made, or other devices for making infringing copies, as part of the alleged commission of the offence, to the Commonwealth as an alternative to prosecution,
- remove the requirement that recording a broadcast for private and domestic use must take place on domestic premises,
- provide for a review of the operation of new ss 47J and 110AA, and
- ensure that communications of broadcasts and copies of broadcasts merely to facilitate viewing of them in a classroom is not a communication to the public.

FINANCIAL IMPACT STATEMENT

The proposed amendments will not have a financial impact.
AMENDMENTS TO COPYRIGHT AMENDMENT BILL 2006

NOTES ON AMENDMENTS

Amendment (1)  Strict liability offences

1. This item replaces the word ‘offences’ with ‘offence’ in the heading before sub-s 132AI(7) of the Bill to reflect the omission of the strict liability offence in sub-s 132AI(8).

Amendment (2)  Strict liability offences

2. This item removes the strict liability offence contained in sub-s 132AI(8) of the Bill. That offence relates to the distribution of an infringing copy of a work or other subject-matter in which copyright subsists where the extent of the distribution affects prejudicially the owner of the copyright. The removal of this strict liability offence is intended to allay concerns that it may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. It is consistent with other amendments made to the strict liability distribution offences in the Bill.

3. Removal of this strict liability offence does not affect the fault-based indictable or summary offences in new s 132AI which will apply to the same activity committed by people who have acted with criminal intent.

Amendment (3)  Strict liability offences

4. This item amends new sub-s 132AI(9) of the Bill to remove reference to the strict liability offence contained in sub-s 132AI(8). This is necessary because sub-s 132AI(8) is being omitted by Amendment (2). The effect of the amendment is that the offence in sub-s 132AI(7) relating to the distribution of an infringing copy of a work or other subject-matter in which copyright subsists in preparation for, or in the course of
trading or obtaining a commercial advantage or profit, will be the only strict liability offence contained in s 132AI.

**Amendment (4) Strict liability offences**

5. This item amends the strict liability offence contained in new sub-para 132AO(5)(a)(i) of the Bill so that it no longer applies to the situation where a person is causing a sound recording to be heard in public at a place of public entertainment where such activity would infringe copyright. The amendment is intended to allay concerns that the provision may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses.

6. Removal of this element of strict liability offence does not affect the fault-based indictable or summary offences in s 132AO which will apply to the same activity committed by people who have acted with criminal intent. It will also narrow the scope of the strict liability offence so that it applies only to the causing of images from a cinematograph film to be seen or sounds from a cinematograph film to be heard in public at a place of public entertainment where such activity would infringe copyright.

**Amendment (5) Infringement notices**

7. This item amends s 133B to provide that a recipient of an infringement notice is required to do two things as an alternative to prosecution for an alleged strict liability offence. First, they are required to pay the infringement notice penalty. Second, they are required to forfeit infringing copies made, or other devices that have been made to be used for making infringing copies, as part of the alleged commission of the offence. This ensures consistency with articles that can be destroyed or delivered up under new s 133 (except circumvention devices since there are no strict liability offences relating to these devices).

8. This amendment will encourage an infringement notice recipient to divest themselves of material that they could use for further criminal activity.
Amendment (6)  Strict liability offences

9. This amendment removes the strict liability offence in relation to making an unauthorised communication to the public of a performance in sub-s 248PC(5). The amendment is intended to allay concerns that the provision may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. It also removes sub-s 248PC(6) as a consequence of the removal of sub-s 248PC(5).

10. Removal of the strict liability offence does not affect the fault-based indictable or summary offences in s 248PC which will apply to the same activity committed by people who have acted with criminal intent.

Amendment (7)  Strict liability offences

11. This item amends new sub-s 248PC(7) of the Bill to remove reference to the strict liability offence contained in sub-s 248PC(5). This is necessary because sub-s 248PC(5) is being omitted by Amendment (6).

Amendment (8)  Strict liability offences

12. This amendment removes the strict liability offence in relation to playing an unauthorised recording of a performance in public in sub-s 248PD(5). It also removes sub-s 248PD(6) as a consequence of the removal of sub-s 248PD(5).

13. The concept of ‘in public’ is broader than ‘place of public entertainment’ under the offences in new s 132AO. This amendment is therefore made to allay concerns that that the provision may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses.

14. Removal of the strict liability offence does not affect the fault-based indictable or summary offences in s 248PD which will apply to the same activity committed by people who have acted with criminal intent.

Amendment (9)  Strict liability offences
15. This item replaces the word ‘offences’ with ‘offence’ in the heading before sub-s 248PJ(7) of the Bill to reflect the omission of the strict liability offence in sub-s 248PJ(8).

Amendment (10)  Strict liability offences

16. This amendment removes the strict liability offence in relation to distributing an unauthorised recording of a performance where it affects prejudicially the financial interest of the performer in the recording in sub-s 248PJ(8).

17. This amendment limits the strict liability offence in s 248PJ to where the distribution is for or in the course of trade. This amendment is made to allay concerns that the scope of the offence may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. It is consistent with other amendments made to the strict liability distribution offences in the Bill.

Amendment (11)  Strict liability offences

18. This item amends new sub-s 248PJ(9) of the Bill to remove reference to the strict liability offence contained in sub-s 248PJ(8). This is necessary because sub-s 248PJ(8) is being omitted by Amendment (10). The effect of the amendment is that the offence in sub-s 248PJ(7) relating to the distribution of an unauthorised recording of a performance for or in the course of trade will be the only strict liability offence contained in s 248PJ.

Amendment (12)  Strict liability offences

19. This amendment removes the reference to conduct that ‘will affect prejudicially the financial interest of the performer in the performance’ from sub-para 248PK(5)(a)(iv).

20. The effect of this amendment is to limit the strict liability offence for distribution of an unauthorised recording of a performance to where it is distributed for trade. This amendment is made to allay concerns that the scope of the offence may extend criminal
liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. It is consistent with other amendments made to the strict liability distribution offences in the Bill.

Amendment (13)  Strict liability offences

21. This item replaces the word ‘offences’ with ‘offence’ in the heading before sub-s 248QE(7) of the Bill to reflect the omission of the strict liability offence in sub-s 248QE(8).

Amendment (14)  Strict liability offences

22. This amendment removes the strict liability offence in sub-s 248QE(8) in relation to the distribution of an unauthorised sound recording of a performance.

23. The effect of this amendment is to limit the strict liability offence for distribution of an unauthorised sound recording of a performance to where it is distributed for or in the course of trade. This amendment is made to allay concerns that the scope of the offence may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. It is consistent with other amendments made to the strict liability distribution offences in the Bill.

Amendment (15)  Strict liability offences

24. This item amends new sub-s 248QE(9) of the Bill to remove reference to the strict liability offence contained in sub-s 248QE(8). This is necessary because sub-s 248QE(8)) is being omitted by Amendment (14). The effect of the amendment is that the offence in sub-s 248QE(7) relating to the distribution of an unauthorised sound recording of a performance for or in the course of trade will be the only strict liability offence contained in s 248QE.

Amendment (16)  Strict liability offences
25. This amendment removes the reference to conduct that ‘will affect prejudicially the financial interests of the performer in the performance’ from sub-para 248QF(5)(a)(iv).

26. The effect of this amendment is to limit the strict liability offence for distribution of an unauthorised recording of a performance to where it is distributed for or in the course of trade. This amendment is made to allay concerns that the scope of the offence may extend criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. It is consistent with other amendments made to the strict liability distribution offences in the Bill.

**Amendment (17) Recording broadcasts for replaying at more convenient time**

27. This amendment substitutes a new sub-s 111(1).

28. The effect of this amendment is to remove the requirement that a recording of a broadcast under s 111 must be made in domestic premises.

29. This amendment provides greater flexibility in the conditions that apply to ‘time-shift’ recording. The development of digital technologies is likely to result in increasing use of personal consumer devices and other means which enable individuals to record television and radio broadcasts on or off domestic premises. The revised wording of s 111 enables an individual to record broadcasts, as well as view and listen to the recording, outside their homes as well as inside for private and domestic use.

**Amendment (18) Review of new sections 47J and 110AA**

30. This amendment adds item 9AA.

31. The effect of this amendment is to require that a review of the operation of s 47J and s 110AA be carried out by the end of 31 March 2008 and the report of the review must be subsequently tabled in each House of the Parliament.

32. This review will enable consideration to be given to whether these new copyright exceptions should be expanded with respect to digital audio-visual materials in a way which complies with our international treaty obligations. The review will consider how to achieve
an appropriate balance between the legitimate interests of rights holders and users of copyright material.

**Amendment (19) Communication for educational instruction**

33. This amendment adds artistic works, radio and television broadcasts to the exception to the communication right for the strictly limited purposes of s 28.

34. The effect of this amendment is to extend the operation of s 28 to the communication of artistic works, live broadcasts, or recordings of broadcasts by educational institutions so that they may be screened or played in the classroom.

35. This amendment brings the communication of artistic works in line with the treatment of other works under s.28 and implements the Government’s intention that schools should not be paying broadcasters when they distribute/communicate either, live broadcast programs, or recordings of broadcast programs for use in the classroom.