



AUSTRALIAN DIGITAL ALLIANCE

**House of Representatives Standing Committee on Legal and
Constitutional Affairs Inquiry into Enforcement of Copyright**

Submission from the Australian Digital Alliance

Introduction

1. The following submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs is made on behalf of the Australian Digital Alliance (ADA).
2. The ADA is a broad based coalition of private and public sector interests formed to promote balanced copyright law and inject a public interest perspective into the copyright debate. ADA members include schools, universities, interoperable software producers, major cultural institutions, consumer interests, scientific and agricultural research organisations, Internet industry representatives, libraries and individuals. The ADA's Patrons are Sir Anthony Mason, former Chief Justice of the High Court of Australia, and Mr Neville Roach, Chairman and Chief Executive Officer of Fujitsu Australia.

Executive Summary

3. The Committee has been asked to inquire into and report on issues relevant to the effective enforcement of copyright in Australia.
4. In the ADA's submission:
 - a. Whilst the ADA is unable to comment on whether copyright infringement is a problem in Australia, it is questionable whether the evidence submitted by the copyright industries accurately reflects either the true scale of infringement in Australia, or the resulting cost of infringement to copyright owners;
 - b. Clarification of the term 'piracy' is of limited significance to this Inquiry as the term is simply a rhetorical label with no legal significance in determining whether or not an infringement has occurred;

- c. Whilst proposed enforcement provisions outlined in the Digital Agenda copyright reforms will provide effective new enforcement options for copyright owners to protect their material against infringement in the digital environment, there is a danger that these measures may also offer copyright owners a means of protecting against non-infringing uses of their material, thus overriding the limits on copyright protection set by Parliament and affecting the *scope* of copyright protection;
- d. Issues relating to the scope of copyright protection and the balance of rights set out in the Copyright Act must not be confused with issues relating to the effective enforcement of those rights, as increasing the scope of protection of copyright will not enhance enforcement of copyright;
- e. Recommendations for the further criminalisation of copyright infringement must be accompanied by unequivocal evidence that criminal penalties are both necessary and appropriate in each case within the overall context of the criminal justice system and Commonwealth criminal law policy.

The scale of copyright infringement in Australia

- 5. It is the ADA's understanding that a central function of this Inquiry is to determine whether copyright infringement is a problem in Australia as a result of an ineffective enforcement regime.
- 6. It is stated in the Background Paper (available at: www.aph.gov.au/house/committee/laca/copyrightenforcement/inqinf.htm) that the inquiry is in fact a direct response to claims by Australian industries including book publishing, film, music and software, that copyright owners are being cheated of valuable revenue by copyright pirates.
- 7. The ADA cannot comment on the scale of any copyright infringement problem in Australia, if in fact there is one. However, it is submitted that evidence put forward by copyright industries to substantiate claims on current and future levels of copyright infringement in Australia (and consequential losses to copyright industries), must be subjected to a high level of critical scrutiny.
- 8. As this type of 'piracy data' is invariably generated by the copyright industries themselves, the ADA submits that there is a danger that the figures presented are overstated and reflect a self-serving bias.
- 9. There are numerous examples of cases where figures presented by copyright industries do not stand up to critical scrutiny and do not accurately reflect either the true scale of illegal copying activity, or the consequential losses to copyright industries.

10. Figures presented are often based on estimates both of the amount of illegal copying done, and the losses to copyright owners brought about by this copying. Estimates are made because there are obvious difficulties in measuring levels of illegal or illicit activity. The figures are also often based on questionable assumptions. For example, figures on economic losses resulting from infringement are often based on the assumption that every infringing copy made can be calculated as a lost sale.
11. Furthermore, infringement figures invariably include estimates on illegal 'home copying'. The ADA asks the Committee to be mindful of the fact that in addition to the inherent difficulty in accurately quantifying copying levels, the infringing status of home copying is a grey area, and is currently the subject of a public policy debate. This is particularly so in light of the recommendations contained in Part 1 of the Copyright Law Review Committee Report on Simplification of the Copyright Act (released in September 1998) that a broader and more flexible fair dealing provision be adopted in Australia.
12. The Committee is to inquire into and report on likely future trends in the scale and nature of copyright infringement. Subject to the comment made above concerning the accuracy of data provided by copyright owners on levels of infringing activity, the ADA accepts that the relative ease of digital reproduction is a cause of legitimate concern for copyright owners.
13. In response to these concerns, however, the Government has announced proposed new enforcement measures for copyright owners in the digital environment. The draft Copyright Amendment (Digital Agenda) Bill 1999, released for public comment on 26 February 1999, sets out effective new options for copyright owners to prevent unauthorised use of their digital works.
14. The ADA submits that the operation of these new enforcement measures must be taken into account when looking at likely future trends in the scale and nature of copyright infringement. The proposed new enforcement measures are discussed in further detail below.

Definition of 'piracy'

15. In the Background Paper prepared by the Committee on the Enforcement Inquiry, comment is requested on the definition of the term 'piracy'.
16. The ADA queries whether for the purposes of this inquiry the term 'piracy' is in fact in need of any further clarification. 'Piracy' is not a legal term and its definition has no legal significance in determining whether a particular act constitutes an infringement of copyright or not. The term does not appear anywhere in Australian copyright legislation, nor does it appear in any dictionary of legal terms in the context of copyright infringement. The term is simply a rhetorical label invoked by copyright industries to raise the emotive stakes of the copyright debate.

17. The ADA therefore seriously questions whether for the purposes of this inquiry, defining the term 'piracy' serves any useful purpose or adds any value to the debate on whether enforcement of copyright in Australia is effective.
18. If a discussion on the definition is to be entered into however, the ADA submits that the term 'piracy' ought to be used in reference to large scale commercial infringement operations only. The use of the term 'piracy' to describe minor private 'home' copying which may or may not technically constitute an infringement of copyright is inaccurate and merely serves to distort the debate on copyright infringement levels in Australia.

Options for copyright owners to protect their copyright against infringement

19. Publishers and creators argue that the ease of reproduction and transmission in the digital environment will bring about a massive increase in copyright infringement as copyright owners lose control of their material in the digital environment.
20. In response to these concerns, new enforcement measures proposed in the draft Copyright Amendment (Digital Agenda) Bill 1999 will provide strong and effective new options for copyright owners to protect their copyright against infringement in the digital environment.
21. In particular, the reforms propose to ban commercial dealings in devices able to be used to circumvent effective technological protection measures employed by copyright owners, where the dealer knows or is reckless as to whether the device will be used both for circumvention and infringement of copyright. The Government has carefully crafted these provisions in order that they do not limit the operation of the limitations or exceptions to copyright. The provisions have been designed to bring about the effective enforcement of the rights protected by copyright, without providing protection beyond those rights.
22. However, copyright owners have called for a stronger ban on circumvention devices based on the argument that the proposals in their current form will prove ineffective in the battle against copyright infringement as they allow access to circumvention devices for legitimate non-infringing purposes. Copyright owners also argue that the Australian proposals do not meet international standards set by the World Intellectual Property Organisation (WIPO) Copyright Treaty and Performances and Phonograms Treaty.
23. The WIPO treaties (Article 11) require adequate legal protection and effective legal remedies against the circumvention of technological measures used by copyright owners *in connection with the exercise of their rights under the WIPO treaties or the Berne Convention*, and used to restrict acts which are not authorised or permitted by law. In other words the treaties do not require protection and remedies against circumvention where that circumvention is done in order to facilitate a use of copyright material that *is* permitted by law, for example in reliance of a copyright exception. The Government's Digital Agenda proposals clearly meet these new international standards, and in fact provide

stronger protection than that required by the Treaties. As such, there can be no credible argument made that the Digital Agenda proposals do not satisfy Australia's international obligations with regard to new enforcement measures.

24. The Digital Agenda reforms will allow the manufacture and distribution of devices that can be used to circumvent technological copyright protection measures, for users who require these devices in order to rely on exceptions set out in the Copyright Act. If these circumvention devices were subject to a complete ban, as advocated by copyright owner interests, there would be nothing to prevent copyright owners from preventing all access and use of digital copyright material, including lawful, non-infringing uses, thus excluding the operation of the exceptions.
25. There is much evidence to suggest that copyright owners will resort to any available means of enforcing restrictions on access to and use of their material, beyond the parameters of the rights granted under copyright protection. In recent years, contractual agreements governing the use of material purchased in electronic form (including 'shrinkwrap' and 'clickwrap' licences) have been widely employed by rightsholders to override fair dealing and other exceptions set out in copyright legislation.
26. The ADA submits that if these new enforcement measures are not drafted in such a way as to ensure that they do no more than enforce rights protected under copyright, they will provide copyright owners with a tool to override the practical operation of the exceptions and limitations on copyright. In this way the delicate copyright balance painstakingly set by Parliament would be undermined, thus affecting the scope of copyright protection.

Distinguishing the scope of copyright protection from effective enforcement of copyright

27. Throughout the continuing law reform debate on copyright in the digital environment, rightsholder interests have sought to confuse issues concerning the scope of protection afforded under the Copyright Act, with the enforcement of rights granted. Evidence of high levels of piracy, or speculation as to dramatic increases in piracy rates is usually invoked as part of an argument calling for an increase in the scope of copyright protection granted to owners as an effective solution to enforcement problems.
28. The ADA submits that the nature and scope of the rights granted to copyright owners must be dealt with separately from issues surrounding the effective enforcement of those rights. In particular, the ADA maintains that increasing the scope of protection granted to copyright owners under the Copyright Act will not enhance the enforcement of copyright protection.

Further criminalisation of copyright infringement

29. The ADA makes no comment on the general adequacy of criminal sanctions against copyright infringement.
30. However, the ADA would comment that the imposition of further criminal sanctions on acts constituting infringement of copyright must not be undertaken without serious consideration of the necessity and appropriateness of extra sanctions. This consideration must occur within the overall context of the criminal justice system and in light of Commonwealth criminal law policy generally.