

OF COPYRIGHT BUREAUCRACIES AND INCOHERENCE: STEPPING BACK FROM AUSTRALIA'S RECENT COPYRIGHT REFORMS

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[Australian copyright law has recently undergone a period of intense reform. In this article, the author seeks to give both a comprehensive history of the period just past, and a bird's-eye view of the resulting reforms — highlighting the hitherto unremarked way in which they affected the many institutions which manage copyright. In short, recent copyright reforms have a peculiarly 'bureaucratic' bent. In many areas, the government created detailed rules capable of objective application — rules ideally tailored, perhaps, to the many organisations that participated in the development of copyright policy over the period. In addition, the new copyright laws almost across the board reserve significant policymaking discretion to the executive: from the Attorney-General to agencies such as the Australian Competition and Consumer Commission and the Australian Communications and Media Authority. Whether or not this bureaucratic tendency in copyright marks a shift in focus, or simply a continuation of past trends, it certainly warrants closer attention.]

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[T]here will be a time when it will be much better for us to step back and talk about the particular range of often competing interests that we want Australian copyright laws to be able to protect or support — not when we are debating just a particular set of changes.¹

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¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2006, 65 (Nicola Roxon, Shadow Attorney-General).

I INTRODUCTION

There was much sound and fury in Australian copyright policy circles between 2003 and 2006. The transformation of Australian copyright law in this period has been nothing if not rapid. We have had several major events: in particular, the conclusion of the *Australia–United States Free Trade Agreement* ('AUSFTA') in 2004,² the passage, first of some 90 pages of amending legislation in 2004, and then, in 2006, the 215-page *Copyright Amendment Act 2006* (Cth).³ With the worst of the storm at least temporarily in abeyance, it is possible to step back and offer a holistic view of the outcomes for Australian copyright law.

Others have already begun the work of summarising and explaining the particular changes that this period has wrought — copyright term extension, new performers' rights, new exceptions, new anti-circumvention laws and so on. In this article, I want to do something different: take a step back and ascertain the impact of recent changes on the institutional shape of the copyright system in Australia.⁴

Institutions matter. Copyright is not only a legal regime for the creation and recognition of exclusive, proprietary rights in the fruits of human creativity. It also comes with an associated bureaucratic system: a series of institutions and agencies which play various roles in managing copyright rights and the relations between copyright owners and users. Some of these institutions are entirely public in nature: government departments, administrative tribunals, independent statutory authorities, and the police and prosecutorial arms of government. Others, such as collecting societies, occupy ground between the purely public and purely private realms. As I will seek to show, if we step back and look at the recent reforms as a whole with this copyright *system* foremost in our minds, it becomes clear that, in numerous large and small ways, the roles of the various institutions and entities which make up the copyright system have been changed by the recent reforms. To give some examples, the system for enforcement of copyright has potentially been transformed by the inclusion of regulatory

² Opened for signature 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005). For a summary of the contents: see Christopher Arup, 'The *United States–Australia Free Trade Agreement* — The Intellectual Property Chapter' (2004) 15 *Australian Intellectual Property Journal* 205.

³ In fact, this period comes at the end of a significant decade in copyright law (1996–2006), commencing with the negotiation of the *World Intellectual Property Organization Copyright Treaty 1996*, opened for signature 20 December 1996, 36 ILM 65 (entered into force 6 March 2002); the *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, 36 ILM 76 (entered into force 20 May 2002) ('WPPT'); and (perhaps) concluding with the passage of the *Copyright Amendment Act 2006* (Cth).

⁴ In the interests of full disclosure, my own involvement in the process consisted of commenting on developments in an ongoing manner via a web log, Weatherall's Law <<http://weatherall.blogspot.com>>; making submissions to government reviews; appearing in a personal capacity before both the House of Representatives Standing Committee on Legal and Constitutional Affairs (Inquiry into Technological Protection Measures (TPM) Exceptions) ('TPM Inquiry') and the Senate Standing Committee on Legal and Constitutional Affairs (Inquiry into the Provisions of the Copyright Amendment Bill 2006 (Cth)); serving on the Law Council of Australia IP Subcommittee; advising the Australian Digital Alliance as a member of its board (from 2005); and providing views to Linux Australia in relation to reforms to anti-circumvention laws. I was not paid to undertake any of these activities.

techniques;⁵ concerns regarding the effect of the new digital copyright laws on public access to works have been addressed by the creation of an administrative system for ad hoc resolution of complaints by a government department;⁶ and in a quest for certainty, new exceptions have been written and existing exceptions have been restructured in such a way as to make their application practically automatic — a style that might suit the bureaucratically organised institutions such as libraries or educational institutions which dominated the debate on behalf of ‘user’ interests, but may not suit many others.⁷ I also seek to show that these outcomes were not preordained. The government repeatedly selected the reform option which most expanded the role of the bureaucracy in the ongoing management of copyright.

The existence of a bureaucratic system for the management of copyright is not new, but deserves more attention than it generally receives in Australian academic circles.⁸ The relative dearth of such discussion contrasts with a growing literature on Australia’s system for examination and grant of registered rights,⁹ and on copyright systems in other countries.¹⁰ My aim in this article is not only to contribute to a greater understanding of recent Australian copyright reforms, but also to prompt broader debate about both the nature and effectiveness of Australia’s existing copyright system, and how administrative aspects of the copyright system should be constructed.

II A BRIEF HISTORY OF AUSTRALIAN COPYRIGHT LAW 2003–06

Law is shaped by the processes through which it is generated. Before turning to the shape and nature of the recent copyright reforms and their impact on the copyright system, I will therefore outline the ‘storm’ which gave birth to them. In

⁵ See below Part IV(B).

⁶ See below Part IV(C).

⁷ See below Part IV(A).

⁸ The most notable exception is Professor Sam Ricketson: see especially Sam Ricketson, ‘Intellectual Property Administration and Policy in Australia: An Examination of the Australian Situation, Past and Present, and Recommendations for Future Change’ (Paper presented at the National Innovation Summit, Melbourne, 9–11 February 2000); Sam Ricketson, ‘The Future of Australian Intellectual Property Law and Administration’ (1992) 3 *Australian Intellectual Property Journal* 3. Some attention is given to the operation of the collecting societies, although it is intermittent and not academic: see Shane Simpson, *Review of Australian Copyright Collecting Societies: A Report to the Minister for Communications and the Arts and the Minister for Justice* (1995); Justice Kevin Lindgren, ‘The Interface between Intellectual Property and AntiTrust: Some Current Issues in Australia’ (2005) 16 *Australian Intellectual Property Journal* 76. Justice Lindgren of the Federal Court of Australia is currently the President of the Copyright Tribunal.

⁹ See, eg. Robert Burrell, ‘Trademark Bureaucracies’ in Graeme B Dinwoodie and Mark D Janis, *Trademark Law and Theory: A Handbook of Contemporary Research* (2007).

¹⁰ See especially Thomas Streeter, ‘Broadcast Copyright and the Bureaucratization of Property’ (1992) 10 *Cardozo Arts & Entertainment Law Journal* 567; Martin Kretschmer, ‘The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments’ (2002) 24 *European Intellectual Property Review* 126; Joseph P Liu, ‘Regulatory Copyright’ (2004) 83 *North Carolina Law Review* 87. More recently, Pamela Samuelson has proposed that 17 USC §§101–810 (2000 & Supp V, 2006) could be streamlined through *more* delegation of rule-making powers to administrative bodies: see Pamela Samuelson, ‘Preliminary Thoughts on Copyright Reform’ (2007) *Utah Law Review* (forthcoming); see also Mark A Lemley and R Anthony Reese, ‘Reducing Digital Copyright Infringement without Restricting Innovation’ (2004) 56 *Stanford Law Review* 1345 (proposing an administrative system for enforcement of copyright online).

this Part, I will disentangle some of the threads of the reform process, highlight certain striking features, and identify and evaluate the complaints that were voiced during the period by stakeholders unhappy with the course of action adopted by the government. I will return, in Part IV, to the outcomes and the bureaucratic aspects of the changes wrought by the *Copyright Amendment Act 2006* (Cth). The history of the reforms as outlined in this Part is necessary in order to comprehend the driving forces which led to the shape of the resulting laws.

The passage of the *Copyright Amendment Act 2006* (Cth) was the culmination of an intense period of change in Australian copyright law, resulting from the interaction between an existing process of domestic law reform, rapidly changing technology, and foreign and trade policy in the form of the *AUSFTA*. It is well known that the *AUSFTA*, concluded in February 2004, contained both very detailed obligations relating to copyright law and a strict timetable for their implementation,¹¹ creating the impetus which drove rapid, wholesale amendment of Australian copyright law.¹² However, the *AUSFTA* was only part of the picture: there was a pre-existing domestic reform agenda which the *AUSFTA* partly galvanised and partly blocked, and a whole new policy agenda post-*AUSFTA*. To understand what happened in 2006, some knowledge of the copyright agenda prior to the *AUSFTA* is necessary.

A *The Domestic Copyright Agenda circa 2003*

It is well known that the explosion of digital technologies and the rise of the internet caused upheaval in copyright law globally and in Australia from at least the early 1990s.¹³ As digital reproduction and communication of copyright works became more commonplace, there was some legal uncertainty as to whether such acts of communication were covered by the international and domestic copyright law then in force.¹⁴ In response to these technological developments, two international treaties, the *World Intellectual Property Organisation Copyright Treaty*¹⁵ and the *WPPT*¹⁶ were negotiated in 1996. Australian law subsequently underwent an extended process of revision to update the law and give effect to

¹¹ Opened for signature 18 May 2004, [2005] ATS 1, ch 17 (entered into force 1 January 2005).

¹² Under the *AUSFTA*, significant copyright provisions were required to be implemented by the time the agreement came into force, requiring legislation in mid-2004: see below n 40. Article 17.12 of the *AUSFTA*, however, allowed Australia to delay implementation of changes to anti-circumvention law by two years. As the agreement came into force on 1 January 2005, the result was that anti-circumvention law amendments had to be in force by 1 January 2007.

¹³ It could be argued that the upheaval started sooner in the 1980s with the need to accommodate computer programs in copyright law. The internet, however, did not become mainstream until the 1990s, at which time mass copying and distribution became much more pressing issues. It was in 1994 that John Perry Barlow published his famous essay claiming copyright was dead: see John Perry Barlow, 'The Economy of Ideas' (March 1994) 2.03 *Wired* 84.

¹⁴ These uncertainties were discussed in a number of government documents: see especially Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment* (1994); Attorney-General's Department, Australia, 'Copyright Reform and the Digital Agenda: Proposed Transmission Right, Right of Making Available and Enforcement Measures' (Discussion Paper, 1997).

¹⁵ Opened for signature 20 December 1996, 36 ILM 65 (entered into force 6 March 2002).

¹⁶ Opened for signature 20 December 1996, 36 ILM 76 (entered into force 20 May 2002).

the treaties, culminating with the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).¹⁷ Broadly speaking, that Act did three things:

- 1 extended the exclusive rights of the copyright owner so that they clearly covered actions in a digital context;
- 2 extended copyright exceptions and compulsory licences to the digital environment; and
- 3 provided legal enforcement for technological protection measures ('TPMs') used to control use of copyright material in digital form (also referred to as digital rights management ('DRM')).

The passage of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) represented a comma, or maybe a semicolon, rather than a full stop, in copyright policy activity. In fact, as of February 2004, when the *AUSFTA* was signed, there were a number of copyright matters still on the agenda.¹⁸ Recommendations from the four most recent Copyright Law Review Committee ('CLRC') reports were outstanding:¹⁹ two reports on a reference regarding the simplification of the complex *Copyright Act 1968* (Cth),²⁰ and two 2002 reports, one recommending the expansion of the jurisdiction of the Copyright Tribunal,²¹ the other recommending that copyright owners not be allowed to override copyright exceptions through contract.²² It is fair to say that no-one involved in copyright policy expected the recommendations of these reports to be implemented in full, with perhaps the exception of the less controversial Copyright Tribunal report.²³

Nevertheless, various parts of the reports could still be considered live issues in the sense that the government retained a commitment to respond to the

¹⁷ I have traced this history elsewhere: see Kimberlee Weatherall, 'On Technology Locks and the Proper Scope of Digital Copyright Laws — Sony in the High Court' (2004) 26 *Sydney Law Review* 613; see also David Brennan, 'What Can It Mean to "Prevent or Inhibit the Infringement of Copyright"? — A Critique on *Stevens v Sony*' (2006) 17 *Australian Intellectual Property Journal* 81.

¹⁸ In addition to the reports specifically referred to in the text: see Intellectual Property and Competition Review Committee, Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), the copyright parts of which overlapped with the other reports noted here.

¹⁹ The CLRC was a part-time expert committee, appointed by the Attorney-General, to consider and report on copyright issues referred from time to time. The announcement that it would be disbanded for 'budgetary reasons' was made on 20 May 2005: Attorney-General's Department, Australia (June 2005) 36 *E-News on Copyright* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_e-NewsOnCopyright_2005_Issue36-June2005>.

²⁰ CLRC, Parliament of Australia, *Simplification of the Copyright Act 1968 — Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998); CLRC, Parliament of Australia, *Simplification of the Copyright Act 1968 — Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999) ('*Simplification Reports*').

²¹ CLRC, Parliament of Australia, *Jurisdiction and Procedures of the Copyright Tribunal* (2000).

²² CLRC, Parliament of Australia, *Copyright and Contract* (2002) [7.49].

²³ The *Simplification Reports*, above n 20, made very radical suggestions for a restructuring of copyright law, beyond what a government constrained by international treaty and history could be expected to implement. For a discussion: see Sam Ricketson, 'Simplifying Copyright Law: Proposals from Down Under' (1999) 21 *European Intellectual Property Review* 537. In recommending that copyright owners not be allowed to override copyright exceptions via contract, the *Copyright and Contract* report was somewhat less radical, but still required a significant departure from existing practice: see CLRC, *Copyright and Contract*, above n 22. The *AUSFTA* rendered many aspects of all three reports moot.

reports. In addition, over the course of 2003, the operation of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) was the subject of a public review, known as the *Digital Agenda Review*, conducted on behalf of the government by law firm Phillips Fox.²⁴ The Review examined how the 2000 legislation was working, with a particular focus on questions that remained controversial:²⁵ the liability of internet service providers ('ISPs') for infringements occurring over their systems; the status of temporary copies in digital memory and whether they fell within the copyright owner's exclusive right to 'reproduce' a copyright work;²⁶ and the extension of existing 'analogue' exceptions applicable to libraries and educational institutions to the digital environment.²⁷ It also examined Australia's anti-circumvention laws — in lay terms, 'anti-hacking' laws making it illegal to help others to circumvent TPMs used by copyright owners to 'lock' and control digital content. The final report was received by the government in February 2004.²⁸ Happily for the government, it concluded that on the whole the laws were working reasonably well; perhaps less happily for a government in the process of trade negotiations with the US, it made a number of recommendations aimed at improving the position of copyright users.²⁹

Quite apart from all these digital issues, there were a number of other copyright matters in the background more related to the interests of individual creators. In 2002, the *Report of the Contemporary Visual Arts and Crafts Inquiry* ('Myer Report') had made a series of recommendations pertaining to visual arts and crafts.³⁰ The Screen Directors' Association had been lobbying for the creation of economic rights for film directors, to add to the moral rights introduced in 2000.³¹ The Attorney-General's Department had been working on provisions to grant economic and moral rights to performers in sound recordings

²⁴ Phillips Fox, *Digital Agenda Review: Report and Recommendations* (January 2004) ('*Digital Agenda Review*').

²⁵ See the terms of reference: *ibid* 121–2.

²⁶ *Copyright Act 1968* (Cth) s 31. Most digital uses of material involve making temporary copies into the memory of devices. If temporary copies are covered by copyright, then whenever such copies come from unauthorised/pirate copies, the user engages in infringement. In addition, if all temporary copies 'count' for copyright purposes, then exceptions are required to allow 'caching' — the temporary, technical storage of internet content to improve the overall efficiency of systems. The key concept — that of 'material form' — had been amended in the 1980s (*Copyright Amendment Act 1984* (Cth), amending *Copyright Act 1968* (Cth)) but not during the digital agenda reforms in 2000.

²⁷ In 2000, Australia made the (controversial, at least to owners) decision to extend various analogue exceptions allowing digital copying by these institutions.

²⁸ The report was tabled in Parliament and released to the public in April 2004. The report included 20 recommendations at varying levels of detail: see above n 24.

²⁹ For an overview of the *Digital Agenda Review's* 20 recommendations: see *ibid* 1–11. Recommendations 15 and 17 in particular were 'user friendly' in ways which lay directly contrary to the copyright provisions known to be required by the US of its trading partners.

³⁰ Commonwealth of Australia, *Myer Report* (2002). The Inquiry was colloquially known as the 'Myer Inquiry', after the Chair, Rupert Myer. The *Myer Report* considered a number of the matters already mentioned, as well as *droit de suite* and special protections for indigenous moral rights. It recommended a narrowing of exceptions to exceptions applying to visual arts and crafts under the *Copyright Act 1968* (Cth) pt III div 7: at recommendation 3.

³¹ The background is described in: *Bills Digest No 36 2005–06: Copyright Amendment (Film Directors' Rights) Bill 2005* (2005).

in order to pave the way for ratification of the *WPPT*.³² There were also two issues of a more peculiarly Australian colour: first, a draft Bill to introduce indigenous communal moral rights;³³ and secondly, a proposal to introduce a *droit de suite* — that is, a right for visual artists to receive a proportion of the proceeds of resale of their original artworks.³⁴ While this second reform would not advantage indigenous artists exclusively, it was thought that a *droit de suite* would offer particular benefits for indigenous artists owing to the higher resale value of those works compared with the initial sale price.³⁵

In summary then, as of early 2004, various parts of Australia's copyright laws had been the subject of a series of public reviews by external bodies (the CLRC, the Myer Inquiry, Phillips Fox), as a result of which there were many recommendations and proposals sitting on the government's 'to do' list. The mere fact that so many were sitting unaddressed for so long suggests that many were considered at best difficult, at worst unworkable, by the Attorney-General's Department.

B 2004: *The Impact of the AUSFTA*

The *AUSFTA*, which was concluded in February 2004 and included a large intellectual property ('IP') chapter with extensive copyright provisions based on US law,³⁶ threw a spanner in the works. With the March 2004 release of the text, two things became clear: first, that many of the existing proposals were moot because Australia's digital copyright laws would have to be rewritten to fit US models³⁷ and, secondly, that significant changes across the copyright regime would have to be made within six months if the treaty were to come into effect as planned on 1 January 2005.³⁸ Suddenly copyright reform, usually conducted over a period of years, became urgent. It also became political in the sense of

³² Such provisions were required for Australia to ratify the *WPPT*, opened for signature 20 December 1996, 36 ILM 76 (entered into force 20 May 2002). There had been a series of reports on the latter: CLRC, Parliament of Australia, *Report on Performers' Protection* (1987); Brad Sherman and Lionel Bently, *Performers' Rights: Options for Reform* (1995). Performers' rights legislation due in 2003 was deferred pending the *AUSFTA* negotiations.

³³ An exposure draft of the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 was circulated to limited stakeholders in December 2003: see Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27 *University of New South Wales Law Journal* 585, 597.

³⁴ A *droit de suite* was supported by the *Myer Report*: see *Myer Report*, above n 30, 158. A discussion paper on the issue was later issued: Department of Communications, Information Technology and the Arts, Australia, 'Proposed Resale Royalty Arrangement' (Discussion Paper, 2004).

³⁵ See Emily Hudson and Sophie Waller, 'Droit De Suite Down Under: Should Australia Introduce a Resale Royalties Scheme for Visual Artists?' (2005) 10 *Media & Arts Law Review* 1.

³⁶ Opened for signature 18 May 2004, [2005] ATS 1, ch 17 (entered into force 1 January 2005).

³⁷ Attorney-General's Department, Australia, *Digital Agenda Review — Government Responses to Phillips Fox Recommendations and Related Matters* (2006) 1. Strangely, the law firm which conducted the review was specifically instructed *not* to consider the potential impact of the *AUSFTA*: see Matthew Rimmer, 'Robbery under Arms: Copyright Law and the *Australia-United States Free Trade Agreement*' (2006) 11(3) *First Monday* <http://www.firstmonday.org/issues/issue11_3/rimmer/index.html>.

³⁸ A federal election was due in late 2004; thus laws to implement the *AUSFTA* would have to be passed in August or wait until late November 2004. The 1 January 2005 deadline was a political objective rather than a requirement of the agreement.

actually being a point of debate within, and difference between, the two major political parties: the legislation necessary to implement the urgent changes represented Parliament's only opportunity to review and comment on the *AUSFTA*, which had itself become a source of political difference in the lead-up to the federal election. The government framed support for the legislation as shorthand for support for the Australia–US relationship.³⁹ The legislation,⁴⁰ eventually passed in August 2004 in the dying hours of the Parliament, became a test of the leadership of a relatively new Labor leader, Mark Latham, in the lead-up to the October election. Such circumstances were hardly conducive to consideration of the separate merit of the changes to copyright law.

This is a shame, because significant copyright changes were wrought by the legislation. It extended the copyright term;⁴¹ introduced extensive provisions granting economic and moral rights to performers in sound recordings of their live performances;⁴² expanded coverage of copyright to all temporary copies in digital memory;⁴³ inserted a new formal 'safe harbours' regime limiting the liability of ISPs for copyright infringements in return for their adoption of a 'notice and takedown' system to remove material alleged to be copyright-infringing;⁴⁴ and slightly expanded criminal liability⁴⁵ and other enforcement measures.⁴⁶ The content and rapid passage of this legislation intensified the inevitable controversy that surrounds copyright reform. In terms of content, some of the changes, such as the extension of the copyright term, were contrary to previous assessments of Australian interests.⁴⁷ In terms of process, the time for consultation was limited; some provisions, in particular the performers' rights

³⁹ Tor Krever, 'The US–Australia Free Trade Agreement: The Interface between Partisan Politics and National Objectives' (2006) 41 *Australian Journal of Political Science* 51, 52.

⁴⁰ *US Free Trade Agreement Implementation Act 2004* (Cth) ('*USFTA Act*').

⁴¹ As required by *AUSFTA*, opened for signature 18 May 2004, [2005] ATS 1, art 17.4.4 (entered into force 1 January 2005). The copyright term was 20 years shorter under the *Copyright Act 1968* (Cth) s 33.

⁴² *AUSFTA*, opened for signature 18 May 2004, [2005] ATS 1, arts 17.1.4, 17.6 (entered into force 1 January 2005); *USFTA Act* sch 9 pt 1 (economic rights), sch 9 pt 2 (moral rights).

⁴³ *AUSFTA*, opened for signature 18 May 2004, [2005] ATS 1, art 17.4.1 (entered into force 1 January 2005); *Copyright Act 1968* (Cth) ss 10 (definition of 'material form'), 10(5), (6) (definition of 'copy'). New exceptions were introduced for ordinary uses of legitimately purchased material: *Copyright Act 1968* (Cth) ss 43B, 111B. The importance of temporary copies is noted: see above n 26.

⁴⁴ *AUSFTA*, opened for signature 18 May 2004, [2005] ATS 1, art 17.11.29 (entered into force 1 January 2005); *Copyright Act 1968* (Cth) pt V div 2AA.

⁴⁵ Criminal liability was extended to cover not only activities done 'for the purpose of trade', but also those done 'for commercial advantage' and a new offence for 'causing significant infringements' without any financial motive was introduced: see *Copyright Act 1968* (Cth) s 132AC, amended by *Copyright Amendment Act 2006* (Cth).

⁴⁶ See especially *USFTA Act* sch 9 pt 7 (electronic rights management information), sch 9 pt 9 (unauthorised access to encoded television).

⁴⁷ Extension of copyright duration was contrary to the recommendation of the Intellectual Property and Competition Review Committee, Parliament of Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) 84. The revisions relating to temporary copies and ISP safe harbours were contrary to the recommendations of the *Digital Agenda Review*, above n 24, recommendations 14–15. The adoption of IP standards higher than existing multilateral standards was contrary to research by the Productivity Commission: see John Revesz, 'Trade-Related Aspects of Intellectual Property Rights' (Staff Research Paper, Productivity Commission, 1999).

provisions, were barely understood even as they were passed, and, in the rush, mistakes were made.⁴⁸

While the *AUSFTA* made some already pending copyright changes urgent, such as the adoption of performers' rights provisions, it pushed much of the existing domestic reform agenda to one side. It also changed the copyright policy environment. The copyright amendments brought about by the *AUSFTA* were simple for critics to paint as unbalanced, because most operated to increase or extend copyright protection. Critics also took advantage of this brief moment of public attention to point out to politicians and the media that because exceptions to copyright under Australian law were narrow and specific, a large proportion of Australia's population infringed copyright frequently. Coincidentally, this happened also to be a moment in time when personal copying was particularly salient: sales of iPod digital music players were increasing,⁴⁹ and in late 2003, the Recording Industry Association of America had commenced a high profile campaign bringing lawsuits for copyright infringement against individuals in the US.⁵⁰ Given this environment, an apparent increase in copyright protection met with significant media attention, much of it critical.⁵¹ Members of Parliament became concerned on realising they, too, were infringers:⁵² two parliamentary committees recommended that the government 'balance' copyright by introducing 'fair use', an open-ended exception in US law.⁵³ Those committees also made other, broader recommendations for review, reconsideration and adjustment after implementation.⁵⁴ Both major political parties went to the November

⁴⁸ Certain errors were corrected later in the year: see *Copyright Legislation Amendment Act 2004* (Cth). A further matter was the coverage of the ISP safe harbours. The *Copyright Act 1968* (Cth) pt V div 2AA confines these safe harbours to 'carriage service providers', which, under s 87 of the *Telecommunications Act 1997* (Cth), means network providers only. Other service providers, such as search engines and universities, and online service providers such as search engines, which receive the benefit of the safe harbours in the US under 17 USC §512 (2000 & Supp V, 2006), are thus excluded. The release in 2005 of a discussion paper on whether the safe harbours should be broadened suggests that the initial narrow coverage was, if not a mistake, at least an ill-considered policy decision: see Attorney-General's Department, Australia, *Part V Division 2AA of the Copyright Act 1968 Limitation on Remedies Available against Carriage Service Providers: Does the Scheme Need to Be Expanded?* (Issues Paper, 2005).

⁴⁹ Sales of iPods increased from under 23 000 in the first quarter of 2004, to more than 330 000 in 2005: see Jim Dickins, 'iPod Sales a Sour Note for the Disc', *The Sunday Telegraph* (Sydney), 12 June 2005, 93, 95.

⁵⁰ Lawsuits against individuals commenced in September 2003 in the US: see Matthew Sag, 'Piracy: Twelve-Year Olds, Grandmothers, and Other Good Targets for the Recording Industry' (2006) 4 *Northwestern Journal of Technology and Intellectual Property* 133. No individuals had been sued in Australia at the time.

⁵¹ See, eg, Peter Martin, 'The *FTA* Clause That Stifles Creativity', *The Sydney Morning Herald* (Sydney), 14 April 2004, 13; 'Paying Price of Free Trade', *Canberra Times* (Canberra), 27 July 2004, 12; Bruce McCabe, '*FTA* Leaves Us Second among Equals', *The Australian* (Sydney), 31 August 2004, C02; Ross Gittins, 'Costs Aplenty in "Free" Trade IP Deals with US', *The Sydney Morning Herald* (Sydney), 24 July 2004, 46; Ross Gittins, 'Trade Deal a Free Kick for US Software Racketeers', *The Sydney Morning Herald* (Sydney), 2 August 2004, 34; Ross Gittins, 'Selling off a Slice of Our Country', *The Sydney Morning Herald* (Sydney), 11 August 2004, 17.

⁵² 'You have now given me a huge guilt burden. I am in breach, I am a serial offender': Commonwealth, *Parliamentary Debates*, Senate, 18 May 2004, 87 (Peter Cook).

⁵³ 17 USC §107 (2000 & Supp V, 2006).

⁵⁴ Joint Standing Committee on Treaties, Parliament of Australia, *Report 61: Australia-United States Free Trade Agreement (2004) xx-xxi*. See also the recommendations of the Labor senators (there were no majority recommendations) in Senate Select Committee on the Free Trade

2004 federal election campaign with policies promising a review of this issue.⁵⁵ Copyright reform was enjoying a rare moment on the political agenda, and for once it had both a publicly salient issue (mass infringement by the Australian public) and a deadline for change: the end of 2006, when the next and final round of *AUSFTA*-led amendments was due.⁵⁶

One final impact of the *AUSFTA* on copyright reform should be noted — namely, its effect on the government departments involved in copyright policy. Most important was perhaps the role of the Department of Foreign Affairs and Trade ('DFAT') during negotiation of the *AUSFTA*.⁵⁷ The intertwining of international law, international trade and copyright policy is of course not new: only a few years before, copyright, along with other IP matters, had been included as part of the obligations of membership in the world's largest and most important international trade organisation, the World Trade Organization ('WTO').⁵⁸ However, in that case, the copyright obligations were almost entirely consistent with existing Australian domestic law, and so the Australian trade negotiators did not have to agree to large scale changes to Australian law.⁵⁹ The *AUSFTA* was a very different kettle of fish, and while it would be incorrect to assume that there are clear institutional lines between departments — indeed, during the negotiation of the *AUSFTA* it is clear that staff with expertise in copyright were consulted and in some cases seconded to the negotiating team⁶⁰ — nevertheless, it was the Minister for Trade, Mark Vaile, and DFAT who had primary responsibility for getting the *AUSFTA* signed, sealed and delivered, and to achieve this, last-minute concessions on copyright were made.⁶¹ The impact of DFAT's involvement is open to further investigation, but there must have been

Agreement between Australia and the United States of America, Parliament of Australia, *Final Report* (2004) 230–2 ('*SSCFTA Report*').

⁵⁵ *The Howard Government Election 2004 Policy Strengthening Australian Arts* (4 October 2004) The Liberal Party of Australia <http://www.liberal.org.au/documents/Oct04_Strengthening_Australian_Arts.pdf> 22. The 2004 Labor Party policy on copyright is no longer available on the Labor Party website, but it is reproduced in Collette Ormond, 'Copyright Overboard? The Debate after the *Australia–United States Free Trade Agreement*' (October 2004) 10 *inCite* <<http://www.alia.org.au/publishing/incite/2004/10/copyright.html>>.

⁵⁶ *AUSFTA*, opened for signature 18 May 2004, [2005] ATS 1, art 17.12 (entered into force 1 January 2005).

⁵⁷ Copyright law in Australia has always had an international aspect to it, but at least in recent memory, it has been officers from the Attorney-General's Department copyright law branch who have been most vitally concerned with international IP matters at the World Intellectual Property Organisation ('WIPO').

⁵⁸ Intellectual property obligations are included in the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) (entered into force 1 January 1995) ('*TRIPS*'). All members of the WTO must sign up to *TRIPS*: at arts XI–XII.

⁵⁹ Amendments to Australia's copyright law following the WTO negotiations consisted only of the introduction of a rental right (as required by *TRIPS* art 11), amendment to performers' rights (as required by *TRIPS* art 14), and the regime for customs seizure (as required by *TRIPS* pt III s 4): see *Copyright (World Trade Organization Amendments) Act 1994* (Cth). These are minor changes when compared with what has occurred after the *AUSFTA*.

⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2005, 28 (Helen Daniels) (noting that the Attorney-General's Department 'was part of' the *AUSFTA* negotiations).

⁶¹ See Letter from Mark Vaile (Minister for Trade) to Robert Zoellick (United States Trade Representative), 17 November 2004 <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Implementation/Section_Index.html>.

some: the attitude towards copyright of trade negotiators for whom IP is one of many horses to trade could not possibly be the same as that of those who have spent much of their professional lives dealing with copyright and walking the halls of the WIPO.⁶² Moreover, in the post-*AUSFTA* period of copyright reform, government officers with an international law rather than a copyright background were highly visible.⁶³ From the outside, this appeared to have the effect of increasing the focus on treaty text at the expense of copyright policy goals. At around the same time, following the 2004 election, responsibility for copyright was removed from the purview of the Department of Communications, Information Technology and the Arts ('DCITA') — likely reducing the influence of those government officials most connected, and sympathetic to, the concerns of telecommunications companies, ISPs, galleries and archives.⁶⁴ While it is beyond the scope of this article to trace the full impact of these changes, it is a notable element of the overall changes to the copyright system.

C 2005: The Year of the Never-Ending Copyright Review

With the Howard Coalition government re-elected in October 2004, election promises of review and reform to keep, and with a late 2006 deadline, 2005 posed an interesting problem for the Attorney-General.⁶⁵ On the one hand, copyright reform was needed and public and stakeholder interest was high. On the other hand, the constraints imposed by *AUSFTA* and other treaties were strong, the deadline was tight — and as already noted, past public reviews by independent bodies such as the CLRC had not been notable for generating quick, workable legal reforms. Handing over the issues to an independent, public review body such as the CLRC or a parliamentary committee held significant risks.

The solution adopted by the Howard government was to take the reform process in-house. In early 2005, the government announced that the existing independent body with a remit to consider copyright law reform, the CLRC, would

⁶² We could speculate that international lawyers without a background in copyright focus more specifically on the agreement text, in line with the interpretive principles in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, arts 31–2 (entered into force 27 January 1980).

⁶³ This can be seen in the presence of a senior officer from the Office of International Law, Mark Jennings, in government evidence to the TPM Inquiry. The internal process in the department was described as follows: 'whereas before we would be able to formulate a policy position, now we have to be certain that it complies or is consistent with Australia's obligations under the agreement': Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2005, 31 (Peter Treyde), 22 (Helen Daniels). Perhaps the most curious issue is whether some of the later 2006 amendments were driven by the concerns of international lawyers. In particular, amendments to *Copyright Act 1968* (Cth) s 40 (fair dealing) which did not appear to have been sought by any stakeholder group, but which may have arisen from a concern that the exception was not sufficiently 'certain' to comply with *TRIPS* art 13: see Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 1 November 2006, Submission No 58, 3 (Australian Vice-Chancellors' Committee).

⁶⁴ *Commonwealth of Australia Gazette*, No S 518, 17 December 2004, 10.

⁶⁵ One actual amendment occurred: film directors were given certain extremely limited economic rights in their films: *Copyright Amendment (Film Directors' Rights) Act 2005* (Cth), passed in October 2005: see *Bills Digest*, above n 31, for background.

be disbanded.⁶⁶ From the government's perspective the in-house approach would have had the advantage that the Attorney-General's Department would *have* to generate working legislation. The presence of such an imperative tends to focus the mind on what, exactly, is possible given the constraints of the various copyright treaties and local and international political considerations.

The Attorney-General's Department then released a stream of issues papers on copyright questions: how much radio broadcasters should pay for playing music (February),⁶⁷ whether unauthorised access to pay television should be criminalised (May),⁶⁸ and which entities providing facilities for online communication should be able to use the statutory safe harbours (August).⁶⁹ Drawing the most public attention was an inquiry, announced in May 2005, into whether Australia's copyright exceptions should be extended to allow private copying. This review became known colloquially as the 'iPod Inquiry', because a key question to be addressed was whether copying for private enjoyment should be legalised, although here it will be referred to by the term used by the government — the Fair Use Review.⁷⁰

Some of the reviews were related to the *AUSFTA*, others not at all. The Fair Use Review fell somewhere in between: changes to exceptions were not required by the *AUSFTA*, but the proposal to expand exceptions was a domestic response to the perceived strengthening of copyright occasioned by the *AUSFTA*.⁷¹ This same Review gave the Attorney-General his 'theme' that copyright should be 'fairer for users and tougher on pirates', which, although adopted for this particular Review, was used generally and consistently for the next two years.⁷²

⁶⁶ See above n 19.

⁶⁷ Attorney-General's Department, Australia, 'Review of One per Cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio' (Discussion Paper, February 2005) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Reviewofonepercentcaponlicencefees-February2005>.

⁶⁸ Attorney-General's Department, Australia, 'Policy Review Concerning Unauthorised Access to and Use of Subscription Broadcasts' (Discussion Paper, 2005).

⁶⁹ As noted below, no public announcement of this review was ever made and a discussion paper, while created, was never made publicly available, although it was noted on several web logs: see, eg, Warwick A Rothnie, *Review of Online Service Provider Liabilities* (2005) IPWar's <<http://homepage.mac.com/wrothnie/iblog/archives/2005/8/index.html>>.

⁷⁰ Attorney-General's Department, Australia, 'Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age' (Issues Paper, 2005) ('Fair Use Review').

⁷¹ The word 'perceived' here is used advisedly as the actual 'strengthening' which occurred was arguably relatively minor: see Robert Burrell and Kimberlee Weatherall, 'Exporting Controversy? Reactions to the Copyright Provisions of the *US-Australia Free Trade Agreement*: Lessons for US Trade Policy' (Working Paper No 07-13, T C Beirne School of Law, The University of Queensland, 2007).

⁷² This was to become the theme of the reforms, which the Attorney-General reiterated in a series of speeches and press releases over the next two years: see, eg, Philip Ruddock, Attorney-General of Australia, 'Government Examines Fair Use of Copyright Material' (Press Release, 5 May 2005); Philip Ruddock, Attorney-General of Australia, 'A More Flexible Copyright Regime' (Press Release, 19 October 2006); Philip Ruddock, Attorney-General of Australia, 'Copyright Gift for Consumers' (Press Release, 12 December 2006); Philip Ruddock, Attorney-General of Australia, 'Fair Use and Copyright in Australia' (2007) 25(2) *Communications Law Bulletin* 4. See also the second reading speech to the Copyright Amendment Bill 2006 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 1–2 (Philip Ruddock, Attorney-General).

The choice of taking the reviews ‘in-Department’ — while undoubtedly beneficial for ‘getting things done’ — had a number of implications. The various reviews, while simultaneous, were not conducted as a single process: on the contrary, the number of separate reviews with separate issues papers disaggregated copyright by treating the issues as if they were unrelated.⁷³ More importantly, the decision reduced opportunities for public debate and dialogue: there were no official public hearings in which opposing views could be explored, and submissions were not made available for others to evaluate and respond. It was a process that favoured established copyright stakeholders already identified as such by the Attorney-General’s Department, and accustomed to lobbying the Minister and Department: collecting societies, and the larger user institutions in particular.

In addition, there were other features of the individual reviews that had the effect of limiting the opportunities for public dialogue. For the *Subscription Television Review*,⁷⁴ the period between release of the issues paper and the due date for submissions was a mere three weeks, and the government’s final decision was published one week later. In these circumstances, an observer could be forgiven for thinking that the public review was at best tokenistic.⁷⁵ The review on the scope of the safe harbours was not publicly announced:⁷⁶ certain chosen stakeholders, albeit ones across a range of views, were sent a paper copy of a discussion paper,⁷⁷ which was never made available online. Even more strangely, the issue has since disappeared from the agenda. In the Fair Use Review, despite considerable public interest reflected in media coverage, there were no hearings, and submissions disappeared into the Attorney-General’s Department and were only published six months later after repeated requests.⁷⁸ To some extent, the wider community interested in copyright moved to fill the void: public debates and seminars, which were always attended by government representatives, were held by various groups, although this is hardly a substitute.⁷⁹ In summary, while there was consultation with stakeholders, what was

⁷³ For comments related to the disaggregation: see, eg, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of Technological Protection Measures Exceptions* (2006) 17–18, 128–9 (‘TPM Inquiry Report’).

⁷⁴ See above n 68 and accompanying text.

⁷⁵ The observer might also infer the purpose of the review was to comply with undertakings given by the Trade Minister, Mark Vaile, in November 2004: see Vaile, above n 61.

⁷⁶ See above n 69.

⁷⁷ It is not suggested that the group selected for consultation was biased towards over-representation of any viewpoint or group. Users such as universities, owners, ISP representative groups and search engines were consulted, as well as more independent experts including barrister and copyright author, Warwick Rothnie, and me. It is, however, unusual to create a discussion paper which is not made generally available.

⁷⁸ Once the government had reached a broad policy approach, it consulted confidentially with a selected group of stakeholders, including representatives of both owners and users in December 2005: see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Provisions of the Copyright Amendment Bill 2006* (2006) 68 (‘SSCLCA Final Report’). A list of who was consulted is not publicly available.

⁷⁹ Events were held, inter alia, by the Copyright Society, IPRIA and the Centre for Media and Communications Law: see IPRIA, *Past Events* (26 July 2007) IPRIA <<http://www.ipria.org/events/#events05>>. A number of speakers also presented papers on the issue at the Copyright Society’s 12th Biennial Conference, 17–18 November 2005: see Australian Copyright Council, *Copyright Symposium 2005: Speakers and Papers* (23 February 2006) Australian Copyright

missing was the public dialogue and public exchange of opposing views in any forum designed to feed into the policy process. Also missing were final reports discussing the issues or explaining the reasons for the approaches rejected, or adopted, in the final legislation. Given the degree of controversy surrounding these issues, and the varied views, the abstract and high-level comments in Explanatory Memoranda are scarcely a sufficient substitute.

There was one exception to this general approach. Later in 2005, the government announced that the House of Representatives Standing Committee on Legal and Constitutional Affairs would conduct an investigation into what exceptions were necessary to the anti-hacking provisions which Australia would have to introduce as a result of the *AUSFTA*,⁸⁰ the TPM Inquiry. Here at least there was an independent body tasked with undertaking the review, as well as public hearings and the publication of opposing submissions. Perhaps this more public process was conducted in recognition of the fact that this, of all the areas of copyright under review, was potentially the most controversial: on the one hand, there was a need to comply with the highly prescriptive provisions of the *AUSFTA* modelled on US law; on the other, there was a desire to take into account Australian interests and to avoid wholesale adoption of the US model, which was known to be controversial even in the US.⁸¹ Nevertheless, this process, too, had distinct oddities that devalued the public dialogue presumably intended when the inquiry was established. A committee of members of Parliament, not expert in either technology or copyright law, was invited to examine the most complicated area of interaction between the two. The Committee was asked to propose exceptions to a prohibition that had not yet been drafted.⁸² When, in the event, the Committee took a broad approach to its mandate,⁸³ considering the broader public interests involved, the ministerial and departmental response was to assert that the Committee had gone beyond its terms of reference, that in certain respects the approach of the Committee and its interpre-

Council <<http://www.copyright.org.au/training/conferences/past-conferences/symposium2005/symposium.htm>>.

⁸⁰ Opened for signature 18 May 2004, [2005] ATS 1, art 17.4.7 (entered into force 1 January 2005).

⁸¹ The government distanced itself from US models: see Evidence to Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, Canberra, 3 June 2004, 67 (Stephen Deady, DFAT); see also Evidence to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 5 December 2005, 29 (Helen Daniels). In addition, *AUSFTA* itself calls for a 'legislative or administrative review or proceeding', which may suggest something more formal than a 'discussion paper' circulated from within a government department: see *ibid* art 17.4.7(e)(viii).

⁸² The Attorney-General's justification for this approach was that '[t]his was a complex area in which I felt it was desirable that the parliament addressed its mind to these questions before we saw a complex bill': Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 47 (Philip Ruddock, Attorney-General). A legal expert was also seconded from the Attorney-General's Department to assist the Committee. In the event, the wisdom of the approach is at least questionable and the problems are discussed in the final report: see House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73, 3–5.

⁸³ An approach which can hardly have been surprising, given a committee made up of legislators whose primary task, most of the time, is making decisions on matters of public policy: see Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 39 (Duncan Kerr).

tation of the *AUSFTA* was incorrect,⁸⁴ and that, as a result, whole sections of the report should be rejected.

One final review deserves mention: in the course of 2005–06, the Attorney-General's Department undertook what was described as a technical review of the *Copyright Act 1968* (Cth) to ensure that the criminal law provisions were consistent with federal criminal law policy and drafting.⁸⁵ This review, too, was not required by anything in the *AUSFTA*. It led to the decisions discussed below to change the system of copyright enforcement. This review was conducted in a way that can only be described as secretive: its existence was not widely publicised; its scope was described as largely 'technical' until mid-2006, when it appears the decisions had already been made, and even then the limited detail provided publicly meant its scope was downplayed;⁸⁶ and no issues paper was ever released. Most importantly, the small group of stakeholders consulted along the way was not representative,⁸⁷ but consisted of the government-only IP Enforcement Interdepartmental Committee⁸⁸ and the IP Enforcement Consultative Group, a committee made up of representatives from four interest groups: law enforcement, government, prosecution agencies, and industry (that is, copyright owners).⁸⁹ A notable exclusion from those consulted was any representative of users, whether institutional or individual; nor were other interested industries such as the telecommunications industry included. It is perhaps not surprising that it was this area which became the most controversial of the reforms in 2006.

⁸⁴ See above n 77 and accompanying text.

⁸⁵ Fiona Phillips, *Intellectual Property Enforcement in Australia — An Evolving Approach*, [28], WIPO Doc WIPO/ACE/3/10 (2006).

⁸⁶ Philip Ruddock, Attorney-General of Australia, 'Major Copyright Reforms Strike Balance' (Press Release, 14 May 2006). The Attorney-General mentioned in a speech in late 2005 that there was an ongoing review regarding the criminal offences, however, its scope was not explained at that time: see Philip Ruddock, Attorney-General of Australia, 'Opening Address — Copyright Law and Practice Symposium' (Speech delivered at the Copyright Law and Practice Symposium, Australian National Maritime Museum, Sydney, 17 November 2005). The May 2006 press release did reveal that there would be on-the-spot fines — but not that they would apply effectively across the board in copyright law as the October 2006 draft revealed. These discrepancies meant that in fact it cannot be said that the changes to criminal law were truly revealed before October 2006 to anyone but a limited, biased set of stakeholders.

⁸⁷ Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 65. There were submissions to the inquiry arguing that there had been inadequate public consultation in relation to parts of the Bill: at 12–13.

⁸⁸ The IP Enforcement Interdepartmental Committee consists of representatives of the Attorney-General's Department (chair), the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions, IP Australia, the Australian Customs Service, DFAT and the Australian Crime Commission.

⁸⁹ Membership from industry varies, but generally includes the Australian Federation against Copyright Theft, Music Industry Piracy Investigations, Business Software Association of Australia, Australian Subscription Television and Radio Association, Interactive Entertainment Association of Australia, Trade Mark Investigations Service, Australian Toy Association, Australian Sporting Goods Association, Anti-Counterfeiting Action Group and Aristocrat Technologies Australia Proprietary Limited: email from Sam Ahlin (Senior Legal Officer, Attorney-General's Department) to Kimberlee Weatherall, 9 July 2007.

D 2006: End Game

The first half of 2006 was deceptively quiet in public — no new reviews or policy decisions were announced — although no doubt the Attorney-General's Department was busy. Then in May 2006, the Attorney-General announced the outcomes of the Fair Use Review in the form of a press release with limited detail,⁹⁰ and published his Department's more detailed response⁹¹ to the 2004 *Digital Agenda Review*.⁹²

The real action started on 8 September 2006 when the government released an exposure draft of the new anti-hacking laws, generating another flurry of submissions.⁹³ On 22 September 2006, two more exposure drafts were released, one proposing a series of new exceptions to copyright infringement (that is, comprising the outcomes of the Fair Use Review),⁹⁴ the other a rewrite of the criminal provisions in copyright law.⁹⁵ The first amended several of the existing exceptions, but more importantly, introduced a series of new ones for private copying (of music, television broadcasts and literary works), parody and satire, and the making of preservation copies of 'significant works', as well as a new open-ended exception for certain activities by public institutions. The second exposure draft represented a radical rewriting of criminal laws in copyright.⁹⁶ By releasing these two drafts, the government was able to re-emphasise its favoured themes: copyright should be fairer for consumers, who benefited from the sudden legalisation of many ordinary activities like taping television and using iPods, and harsher for copyright pirates.⁹⁷ There was, however, a great deal more to the legislation. In the event, on 19 October 2006, the full 215-page Copyright

⁹⁰ Ruddock, 'Major Copyright Reforms Strike Balance', above n 86.

⁹¹ Attorney-General's Department, Australia, *Digital Agenda Review — Government Responses to Phillips Fox*, above n 37.

⁹² Phillips Fox, *Digital Agenda Review*, above n 24.

⁹³ Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth); Exposure Draft: Copyright Amendment Regulations 2006 (Cth). The submissions are attached to the Attorney-General's Department Supplementary Submission: see Supplementary Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 8 November 2006, Submission No 69B (Attorney-General's Department).

⁹⁴ The exposure drafts relating to exceptions, digital agenda review measures, and enforcement are no longer available online. However, it may be noted that in these areas, the exposure draft provisions were left unchanged prior to their introduction as part of the Copyright Amendment Bill 2006 (Cth), unlike the technological protection measure provisions referred to in above n 93, which changed considerably. The Exposure Draft: Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth) remains available on the website of the Attorney-General's Department as at the time of writing: Attorney-General's Department, Australian Government, *Copyright Amendment (Technological Protection Measures) Bill 2006 and Related Regulations — Exposure Drafts* (2006) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CopyrightAmendment\(TechnologicalProtectionMeasures\)Bill2006andrelatedRegulations-ExposureDrafts](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CopyrightAmendment(TechnologicalProtectionMeasures)Bill2006andrelatedRegulations-ExposureDrafts)>.

⁹⁵ This was not the last: another exposure draft dealing with the jurisdiction of the Copyright Tribunal was released on 11 October 2006.

⁹⁶ This is discussed further: see below Part IV(B).

⁹⁷ One difficulty is that the rationale is an incomplete explanation of the legislation, which drew unexplained distinctions between different kinds of works. Moreover, as the government quickly discovered, its attempt to make the laws 'tougher for pirates' also, incidentally, extended criminal liability to ordinary consumer behaviour. To keep its message consistent, the government was forced to amend sch 1 extensively.

Amendment Bill 2006 (Cth) was tabled in Parliament. The final Bill consisted of 12 schedules, including the drafts already released, plus reforms to the statutory licences for libraries and educational institutions, evidential presumptions and the jurisdiction of the Copyright Tribunal: responses, in other words, to some of the various reviews which had been on the agenda as at the beginning of 2004, in particular the *Digital Agenda Review* (by now effectively three years old) and the CLRC Report on the Copyright Tribunal.

It is not clear at what point the decision was made by the government to pass so many changes to copyright law at once, although passing a single, omnibus copyright-amending Act may have seemed a 'now or never' proposition. Some reforms to copyright were required by the *AUSFTA*, providing a tangible deadline;⁹⁸ and 2007 would be an election year, making it difficult to get copyright back on the already crowded legislative agenda. Passage was all but guaranteed without negotiation owing to government control of both Houses of Parliament.⁹⁹ The decision to pass the legislation in this way is thus understandable, but again had important implications for public dialogue and media coverage. A great deal of complicated draft legislation was published all at once. The time for review, discussion, and amendment was drastically truncated. The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs, which was given 16 working days to issue a final report. The Committee called for submissions by 30 October, and hastily organised a hearing on 7 November — not only Melbourne Cup Day but also the same day that the Senate was debating sensitive legislation relating to stem cell research.¹⁰⁰ As the Committee noted, many complaints were made about the truncated period for reviewing the complex statutory language,¹⁰¹ charges echoed strongly by the Labor opposition and members of the minor parties in the parliamentary debate.¹⁰²

The effect of the truncated timetable was made worse by the fact that, before long, errors and unintended effects were discovered in the complex statutory language.¹⁰³ First drafts are seldom perfect, and the Copyright Amendment Bill

⁹⁸ See above n 12.

⁹⁹ It is interesting to speculate whether the process would have been different were it not for this power to pass without reference to other parties. Notably, both minor parties and the Labor party proposed amendments during debate: see below n 108. However, we must be careful not to assume that amendments would have occurred. More extensive proposals for amendment can safely be made by minor parties when the government has the numbers to pass legislation regardless.

¹⁰⁰ Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006 (Cth).

¹⁰¹ Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 13–14.

¹⁰² See, eg. Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 30 (Nicola Roxon, Shadow Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 36 (Joseph Ludwig) ('botched process'), 38 (Labor motion), 39–40 (Andrew Bartlett) ('derisory', 'little short of a disgrace', 'seriously flawed'), 107, 111 (Patricia Crossin); Commonwealth, *Parliamentary Debates*, Senate, 30 November 2006, 152 (Joseph Ludwig), noting that '[m]ost of the submitters complained [about the] truncated process'.

¹⁰³ Cf Jessica Litman, 'War and Peace' (2006) 53 *Journal of the Copyright Society of the USA* 1, 7: 'In recent years, it has seemed as if negotiations over copyright amendments have lasted long enough to generate language that is long, complicated, counterintuitive and difficult to understand, but not long enough to produce a well-written second draft.'

2006 (Cth) was no exception: for example, it was discovered that the legislation, intended to allow consumers to copy music onto digital music players, would, owing to limitations in its drafting, fail to legitimise ordinary use of the dominant player, the iPod.¹⁰⁴ But it was the criminal laws in particular which generated the most concern from the general public because they introduced strict liability offences which created potential liability in the absence of any intent or even knowledge of infringement, and appeared to cast the net of criminality very broadly. It did not take critics long to identify a range of apparently harmless situations where the legislation would make acts ‘criminal’. Media attention followed, with front page stories claiming that kids using mobile phones to record moments from U2 concerts would face fines in excess of \$1000.¹⁰⁵

The prospect of criminalising ‘ordinary’ behaviour caused concern to members of Parliament.¹⁰⁶ These concerns did not go unheard. Following the Committee’s report on 13 November 2006, the government circulated two sets of amendments on 28 and 30 November 2006, aimed at removing some of the criminal offences and fixing obvious drafting problems.¹⁰⁷ The final set of amendments were produced on 30 November 2006 — the night before the Act was passed without further debate by the Senate on 1 December 2006. In the end, the Labor opposition, with some reservations, supported passage of the Bill — although not before they had unsuccessfully proposed a number of amendments.¹⁰⁸ The amended Bill passed the House of Representatives on 5 December 2006 and received Royal Assent on 11 December 2006. With its passage, a stormy chapter in Australian copyright reform drew to a close. However, it is worth noting, once again, that a considerable part of the 2003 agenda, including Australian matters such as indigenous communal moral rights, were (and remain) sidelined.¹⁰⁹

¹⁰⁴ Another example was the proposed amendment to *Copyright Act 1968* (Cth) s 40, which would have imposed an unintended quantitative cap of 10 per cent on copying for research or study: see Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [63]–[69]; Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 10 November 2006, Submission No 52, 1–2 (Flexible Learning Advisory Group). See also Copyright Amendment Bill 2006 (Cth) sch 6 cl 11.

¹⁰⁵ At the time, U2 were touring the country and images were published of hundreds of concertgoers holding up mobile phones: see Lisa Murray, ‘Hold Those Phones, Rockers, Soon Your Recordings Will Be a Crime’, *The Sydney Morning Herald* (Sydney), 14 November 2006, 1; see also Simon Hayes, ‘Poddies Still Crooks under Copyright Law’, *The Australian* (Sydney), 21 November 2006, 27.

¹⁰⁶ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 36–7 (Joseph Ludwig); 102–3 (Kate Lundy); Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2006, 65 (Nicola Roxon, Shadow Attorney-General).

¹⁰⁷ Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth); Further Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).

¹⁰⁸ The Labor opposition proposed amendments to the anti-circumvention provisions, and urged that some provisions be removed pending further consultation: Commonwealth, *Parliamentary Debates*, Senate, 30 November 2006, 153–4, 167 (Joseph Ludwig); 175, 178 (Kate Lundy). The Greens and Democrats opposed the passage of the legislation.

¹⁰⁹ These sidelined issues include: reforms to the scope of the ISP safe harbours; indigenous communal moral rights; the removal of the one per cent cap on remuneration for broadcast of sound recordings; digital legal deposit issues; and the recommendations of the CLRC: Commonwealth Parliament, *Crown Copyright* (2005). In May 2006, proposals for a *droit de suite* were quietly shelved: Attorney-General and Minister for the Arts and Sport, ‘New Support for Australia’s Visual Artists’ (Press Release, 9 May 2006). Some interest groups continue to press

III UNDERSTANDING THE HISTORY AND ITS IMPLICATIONS

As the previous Part has sought to demonstrate, the period 2003–06 was controversial and intense in Australian copyright policy circles. Significant changes occurred over a short period of time. It is only by laying out the detail of the many intersecting threads that a true sense of the process which led to the *Copyright Amendment Act 2006* (Cth) can be achieved. It was not straightforward and, importantly, was not a simple case of implementing the *AUSFTA* or following a single path of domestic reform. Rather, changes required by the *AUSFTA* interacted with a series of formally unrelated domestic reviews. The 2003–06 period also marked a shift in the mechanisms used to achieve copyright reform. The process of review and consultation, previously undertaken by independent bodies like the CLRC or ad hoc committees, was taken within the bowels of the Attorney-General's Department and Minister's office, and conducted 'distantly', through a series of discussion papers and submissions, rather than via public hearing. The shift in approach had a number of implications.

One is that the 'behind closed doors' nature of the process favoured established stakeholders already accustomed to lobbying the Minister and Attorney-General's Department, such as collecting societies, the (owner-oriented) Australian Copyright Council, and on the 'user' side, the larger institutional users such as the schools, universities and libraries. The importance of negotiations between stakeholders appeared to be increased; that of public participation and of legislators as representatives of the public downgraded.

A further result of this confused, truncated and piecemeal process is that no coherent theory or theories can be found to inform the recent changes; on the contrary, parts of the Act seem to be at war with each other.¹¹⁰ It can thus fairly be said that the *Copyright Amendment Act 2006* (Cth), and the 2004 amendments, did not give the appearance, let alone the reality, of being the outcome of a holistic appraisal of the best law for Australian cultural and economic interests. Existing initiatives focusing on local concerns, such as indigenous artistic interests, were sidelined, and many of the reforms made were contrary to past assessments of Australia's national interest, or, as in the case of digital copyright, involved the abandonment of hard-fought native compromises. While some departure from local Australian concerns was inevitable given the need to implement detailed copyright provisions in the *AUSFTA*, one might at least have hoped that there would be an attempt to ensure general coherence between the parts of the Act dictated by *AUSFTA* and the other reforms.

That is not, however, the case. The Explanatory Memorandum to the *Copyright Amendment Act 2006* (Cth) identifies a series of 'principles' said to have guided the reforms, which echo the theme of the reforms stated repeatedly by the Attorney-General ('fairer for consumers and tougher for pirates').¹¹¹ But there

the idea: Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art: Securing the Future* (2007) 159–76.

¹¹⁰ On the difficulty of interpreting the highly complex provisions of the *Copyright Act 1968* (Cth): see *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 207–8 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 230–2 (McHugh J).

¹¹¹ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 1. The objectives of the *Copyright Amendment Act 2006* (Cth) refer to 'supporting the copyright industry', the develop-

are whole swathes of the *Copyright Amendment Act 2006* (Cth) which bear no arguable relation to either the principles in the Memorandum or that theme.¹¹² Indeed, at times the government even adopted diametrically opposed approaches without explanation. Consider, for example, the goal of technology-neutral laws — that is, laws which apply equally across different forms of technology and which do not require amendment when new technologies are introduced. The new personal copying amendments in sch 6, as discussed below, are the opposite of technology-neutral: they are specifically written to apply to particular personal technologies. At the same time, technological neutrality is used as a justification for other new provisions in the Act.¹¹³ This is one example of tension in the drafting approaches, but by no means the only one.¹¹⁴ Is it any wonder that stakeholders and the media were confused?

In this respect, a comparison with the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) is instructive. The objectives of that Act made reference to the policy aims of copyright traditionally conceived: improving protection for copyright owners ‘in order to reward creative endeavour and encourage further creative endeavours’, while ensuring that users have ‘reasonable access’ to copyright material, as well as providing certainty for ISPs, and writing laws in a technology-neutral way ‘so that amendments to the Act are not needed each time there is a development in technology’.¹¹⁵ These objectives were broadly applicable to the whole of the amending Act. While it could be argued that the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) amendments were more likely to be coherent, because they were the result of a single review (rather than many), that only begs the question: why was the review process that gave birth to the *Copyright Amendment Act 2006* (Cth) so disjointed? If the United Kingdom can appoint one committee — the Gowers Committee — to examine all of its IP law in a year, Australia could surely have done the same for copyright.

ment of digital markets and protecting consumers’ ‘reasonable use’. There is no reference to more traditional copyright policy objectives, such as encouraging creativity, rewarding creators, or ensuring access to copyright works.

¹¹² See especially *Copyright Amendment Act 2006* (Cth) schs 6–8, 10–11. It would be tempting to see these other areas as the outcome of interest group bargaining between collecting societies and institutional users. However, parts of the Bill appear to have been a surprise to stakeholders. Cf Jessica Litman argues that US legislators ‘delegated’ the writing of copyright legislation to industry interest groups: Jessica Litman, ‘Copyright Legislation and Technological Change’ (1989) 68 *Oregon Law Review* 275, 278; Jessica D Litman, ‘Copyright, Compromise, and Legislative History’ (1987) 72 *Cornell Law Review* 857, 869; Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (2001). See also William Patry, ‘The Failure of the American Copyright System: Protecting the Idle Rich’ (1997) 72 *Notre Dame Law Review* 907, 909.

¹¹³ In particular, the introduction of *Copyright Act 1968* (Cth) s 135ZMDA and the amendments to *Copyright Act 1968* (Cth) s 135ZMB: see *Copyright Amendment Act 2006* (Cth) sch 8 cl 7, 9.

¹¹⁴ Consider, for example, the accommodation between ‘certainty’ and ‘flexibility’ in the drafting of copyright exceptions. According to the Attorney-General, *Copyright Act 1968* (Cth) s 200AB provided ‘flexibility’ to public institutions, and consumers were granted inflexible, but ‘certain’, personal copying exceptions: see Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 8 November 2006, Submission No 69A, 2 (Attorney-General’s Department). If this indicates trust in public institutions, it is inconsistently applied. Other parts of the *Copyright Amendment Act 2006* (Cth) specifically removed ‘flexibility’ for public institutions: see amendments to *Copyright Act 1968* (Cth) s 51A; Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 122.

¹¹⁵ Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth) 7.

In any event, the claim being made here is not that a single, coherent theory ought to inform the whole of copyright law: that would be impossible. Rather, the claim is that the outcome of the confused, disaggregated process described above was a series of piecemeal amendments, not informed by any common theories, or public policy objectives, and which are at times inconsistent in their approach — if not contradictory. The failure to state guiding principles which sensibly relate to the whole *Copyright Act 1968* (Cth) is indicative of a deeper failure to think through the policy goals — particularly in those areas beyond the immediate political focus of the Attorney-General. Leaving to one side the domestic copyright agenda, in those areas of the *Copyright Act 1968* (Cth) where Australian law was amended to comply with the *AUSFTA*, it might have been expected that the aim would be to harmonise Australian and US copyright law.¹¹⁶ Certainly Australian copyright law became more like US law. However, at the same time as features of US law were adopted, there was an observable, deliberate process of distancing Australian from US approaches, with government emphasising repeatedly that it was not required to, would not, and did not adopt US models.¹¹⁷ Not for the first time, the approach seems to have been one of striving to do the absolute minimum necessary to implement the treaty obligations; not for the first time, confusion results.¹¹⁸ Minimum implementation is one legitimate goal of lawmaking in this area, but not one which should necessarily be bought at the price of unreadable, unworkable law.

A second observation which may be made about this history is that the *process* of reform was the subject of sustained and, in my view, legitimate criticism. It is not clear, in other words, that the shift from external, independent reviews to a very controlled, in-Department approach could be hailed a complete success.

As a preliminary point, it must be recognised that some criticism was inevitable, no matter how the law was drafted, and however the process was managed. The natural response of those unhappy with a substantive legislative outcome is to complain that they have not been heard. In copyright, someone will always be unhappy: there are many competing interests, and no-one can get everything they want,¹¹⁹ a fact acknowledged during the parliamentary debates on the *Copyright Amendment Act 2006* (Cth).¹²⁰ It must also be recognised that there were many

¹¹⁶ According to DFAT, Australia–United States Free Trade Agreement: *Intellectual Property* (2007) Australian Government <http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.htm>, the *AUSFTA* “[h]armonises our intellectual property laws more closely with the largest intellectual property market in the world”.

¹¹⁷ See above n 81 and accompanying text; see also House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73, 19–20.

¹¹⁸ Cf the government’s approach to implementing international obligations on performers’ rights: Kimberlee Weatherall, “‘Pretendy-Rights’: On the Insanely Complicated New Regime for Performers’ Rights in Australia, and How Australian Performers Lost Out” in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law* (2006) vol 3, 171, 172.

¹¹⁹ The increased ‘polarisation’ of all IP debates, including those over copyright, has often been noted: see, eg, Litman, ‘War and Peace’, above n 103, 4–5 (on the ‘copyright wars’); Robert P Merges, ‘One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000’ (2000) 88 *California Law Review* 2187. For a brief discussion of the diverse interest group pressures operating in the copyright field: see Ricketson, ‘The Future of Australian Intellectual Property Law and Administration’, above n 8, 22.

¹²⁰ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 41 (Andrew Bartlett); 112, 114 (Christopher Ellison, Minister for Justice and Customs); Commonwealth, *Parliamentary*

opportunities given for input into the process, and that after six or more reviews, at least five issues papers, days of parliamentary and parliamentary committee time, well over 300 submissions,¹²¹ and who knows how much departmental and ministerial staff time in meetings, a line had to be drawn somewhere.¹²² There are benefits, too, in having specialised, or focused, consultation and interest group participation in highly technical areas like copyright law;¹²³ indeed, it is worth remembering that the Spicer Committee, whose recommendations led to the *Copyright Act 1968* (Cth), explicitly commented that their decision not to hold public hearings had the advantage of ‘a freer and franker discussion of the issues’.¹²⁴ Nor would it be reasonable to expect that the entire process will be conducted in public: there *is* such a thing as ‘too much’ transparency.¹²⁵ In this particular case, the *AUSFTA* had turned copyright into a foreign policy issue and thus raised the stakes for reform. The US takes a very keen interest in how its bilateral trade agreements are translated, and this inevitably affected the degree of freedom Australia had to determine copyright policy, and importantly, the government’s ability to be transparent.

It is also important to see the copyright reform process in its broader law-making context. I have already made reference to the fact that control of both Houses of Parliament enabled a truncated process: the government did not have to negotiate in order to have its laws passed. In addition, it has been noted elsewhere that Ministers in the Howard government took more direct control over policymaking, planning and implementation,¹²⁶ and that there was a greater

Debates, House of Representatives, 5 December 2006, 64 (Philip Ruddock, Attorney-General), 65 (Nicola Roxon, Shadow Attorney-General).

¹²¹ The TPM Inquiry received 64 submissions (see House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73, 2); the Senate Standing Committee on Legal and Constitutional Affairs received 74 submissions (see Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 55–8); and the Attorney-General’s Department received 161 submissions in the Fair Use Review: see Attorney-General’s Department, *Copyright — Review of Fair Use Exception — May 2005* (26 June 2006) Australian Government <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005>. There were therefore at least 299 submissions. I say over 300 because this total does not count submissions made to Phillips Fox, *Digital Agenda Review*, above n 24, and an unknown number of private submissions made to the Attorney-General’s Department, referred to in the chronology of consultations in Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 65.

¹²² Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 111 (Christopher Ellison, Minister for Justice and Customs). See also at 112 (Christopher Ellison, Minister for Justice and Customs), stating that ‘[m]ore consultations will not change [stakeholders’] views. There is no compromise that will make all stakeholders happy.’

¹²³ Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001) 12. In copyright law, it might be argued that the ‘general public’ have little to add to the debate about the law. As should be clear, I do not subscribe to this argument. Copyright law can gain legitimacy only through informed public discussion: see below n 131 and accompanying text. If it is too complicated for the public to understand, it may be time to pare down copyright law to its core: see Samuelson, above n 10.

¹²⁴ CLRC, Parliament of Australia, *Report to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth* (1959) (‘Spicer Committee Report’) 7.

¹²⁵ See, eg, Jim Rossi, ‘Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking’ (1997) 92 *Northwestern University Law Review* 173.

¹²⁶ Paul Kelly, ‘How Howard Governs’ in Nick Cater (ed), *The Howard Factor: A Decade That Changed the Nation* (2006) 3, 7–8.

focus on private consultations with stakeholders,¹²⁷ although commentators have pointed out that the trend in this direction was observable in earlier governments.¹²⁸ In the 2003–06 copyright reform process, there was at least a relatively long lead-in time to the legislative amendments; in many cases, the government's general policy decisions, if not the details of the legislation, were released well in advance. This was not a situation in which legislation was passed and *then* sent for review;¹²⁹ nor was it a situation where amendments were put so urgently that Parliament had to be recalled to pass them.¹³⁰

Even taking all these factors into account, however, there are legitimate grounds for criticising what happened. The process for law-making matters. As legal philosopher Jeremy Waldron has pointed out:

procedures in politics are not just ceremonies or red tape or mindless bureaucratic hoops to jump through. They relate specifically to issues of legitimacy, particularly in circumstances where there is deep-seated disagreement as to what substantive principles should be observed.¹³¹

In any highly contested area of policy, it is important that stakeholders receive equal treatment and have equal rights of participation in the law-making process. Copyright is an area rife with substantive disagreement,¹³² and yet one which depends on public legitimacy to be effective, because the effectiveness of copyright law depends to a large extent on voluntary observance by members of the public.¹³³ This becomes harder to achieve when the media coverage of copyright law portrays it as a set of rules which makes iPod use infringement and criminalises kids. The government referred to the ensuing media attention as 'sensationalism', but the negative coverage was at least exacerbated by the government's own approach.¹³⁴ The decision to depart from past, open public

¹²⁷ Paul Kelly, 'Re-Thinking Australian Governance — The Howard Legacy' (Paper presented at the Cunningham Lecture, The Academy of Social Sciences, Canberra, 2005). The Administrative Review Council ('ARC'), too, in its review of administrative rule-making, has noted that while agencies do consult extensively, such consultations tend to be done informally, and are restricted to known sectional interests. The ARC has warned of the danger of 'captured consultation', where certain groups develop expectations about being consulted, while other viewpoints are excluded: see ARC, *Rule-Making by Commonwealth Agencies*, Report No 35 (1992) 31.

¹²⁸ See Kelly, 'How Howard Governs', above n 126.

¹²⁹ Cf the passage in 2005 of amendments to the law of sedition, followed by referral to the Australian Law Reform Commission, culminating in: Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

¹³⁰ Cf Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747.

¹³¹ Jeremy Waldron, 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) 15, 18. Waldron goes on to point out that, for the citizen who disagrees with the substantive principles enacted in legislation, 'one has to appeal to something about the way the law was enacted ... so that he can see its enactment as fair even if he does not see its substance as just.' For a similar point in a very different context: see *ibid.* In relation to copyright specifically: see Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (2005) 280–2.

¹³² See above n 119.

¹³³ Jane C Ginsburg, 'How Copyright Got a Bad Name for Itself' (2002) 26 *Columbia Journal of Law & the Arts* 61; Jon M Garon, 'Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics' (2003) 88 *Cornell Law Review* 1278, 1282.

¹³⁴ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 114 (Christopher Ellison, Minister for Justice and Customs), commenting that 'the government has noted some of the media and other commentary on the Bill, much of which, disappointingly, referred to ex-

review processes to an almost completely 'in-Department' process, and to conduct selective, secretive consultations in relation to the criminal offences in particular, created an adversarial atmosphere and the impression that a form of 'consultation capture' might be behind the less consumer-friendly aspects of the law.¹³⁵ It also considerably reduced the 'buy in' of excluded groups in the outcomes.¹³⁶ The late release of large slabs of complex statutory language meant that there were errors and unintended consequences, causing unnecessary panic, and providing easy targets for critics, who pointed to the ridiculous and draconian applications of copyright law which could result. It is ironic that the impulse informing some of the reforms was to make the laws more 'consumer-friendly' by allowing personal copying, and to remove technical and out-of-date parts of the law which bring copyright laws into disrepute.¹³⁷ Query whether the law is more, or less in disrepute now.

One final observation may be made. The decision to use a series of differently-constituted parliamentary committees wasted time, led to the rehashing of debates, and negatively affected the rigour of the scrutiny applied to the laws. I can assert from personal experience that the various members of Parliament who sat on committees on copyright reform worked hard to understand the issues before them, but between the Joint Standing Committee on Treaties ('JSCOT'), Senate Select Committee on the Free Trade Agreement between Australia and the United States of America ('SSCFTA'), the House of Representatives Standing Committee on Legal and Constitutional Affairs and its Senate counterpart, 40 individual members of Parliament were required, in each case on truncated timetables, to become acquainted with highly technical matters of copyright law.¹³⁸ It is enough to make one look back wistfully at Professor Sam Ricketson's suggestion of a permanent Intellectual Property Law Reform Commission,¹³⁹ or the recommendation of the Labor members of the SSCFTA for the formation of a Standing Committee on Intellectual Property.

IV BUREAUCRATISING COPYRIGHT

The process described in the preceding two Parts generated outcomes that display certain common features. As I noted in Part I above, it is not my intention to engage with all the substantive policy choices embodied in the various

treble and inaccurate scenarios rather than assessing the practical effect of these reforms ... this undermines public confidence in copyright.' A better way to put it, perhaps, is that the panic and the news stories tended to lead to copyright law 'los[ing] the moral high ground': see Litman, 'War and Peace', above n 103, 9. It should be noted, however, that the reactions were not confined to the 'sensationalist': see, eg, Allan Fels and Fred Brenchley, 'Out of Tune with Reality', *The Australian Financial Review* (Melbourne), 28 November 2006.

¹³⁵ On 'consultation capture': see ARC, above n 127.

¹³⁶ Burrell and Coleman, above n 131, 281.

¹³⁷ See above n 72 and accompanying text.

¹³⁸ Only three people sat on more than one of these committees: Senators George Brandis (SSCFTA, Senate Standing Committee on Legal and Constitutional Affairs), Andrew Bartlett (JSCOT, Senate Standing Committee on Legal and Constitutional Affairs) and Linda Kirk (JSCOT, Senate Standing Committee on Legal and Constitutional Affairs).

¹³⁹ Ricketson, 'The Future of Australian Intellectual Property Law and Administration', above n 8, 27-9; SSCFTA, *SSCFTA Report*, above n 54, 230 recommendation 6.

reforms: this is not an article about whether or not we should have a parody and satire defence, nor whether the laws result in ‘digital lock-up’ of copyright material.¹⁴⁰ Instead, I want to focus on the impact of reform on the copyright ‘system’: the network of institutions and agencies — public and quasi-public — which manage copyright rights and the relations between copyright owners and users. My contention, fleshed out in detail in this Part, is that the recent reforms affected the operation of, and relations between, these institutions and agencies: more specifically, where it had a choice, the government in the period 2004–06 more often adopted rules with features which could be described as bureaucratic. Two such features in particular are:¹⁴¹

- 1 the adoption of legislative features and tools more often seen in regulatory regimes, including highly specified rules or guidelines, either in legislation or encouraged by it, which can be applied in effect automatically,¹⁴² and
- 2 the allocation of decision-making power to expert officials, in the form of new or extended roles for various parts of the executive branch of government.

Both the development of rigid and highly specified, objective rules, and the growth in the importance (and size) of the administrative apparatus tasked with the ongoing management of regulation,¹⁴³ are characteristics of the phenomena known as ‘bureaucratisation’.

One example from the recent reforms may serve to illustrate this process as it applies to copyright law. A new ISP safe harbour regime was introduced in 2004 as a result of the *AUSFTA* to provide a means for carriage service providers (‘CSPs’) to insulate themselves against potential liability for copyright infringe-

¹⁴⁰ Others have already begun this task: see Sally McCausland, ‘Protecting “A Fine Tradition of Satire”’: The New Fair Dealing Exception for Parody or Satire in the Australian *Copyright Act* (2007) 29 *European Intellectual Property Review* 287; Dale Clapperton and Stephen Corones, ‘Locking in Customers, Locking out Competitors: Anti-Circumvention Laws in Australia and Their Potential Effect on Competition in High Technology Markets’ (2006) 30 *Melbourne University Law Review* 657; Maree Sainsbury, ‘Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights’ (2007) 18 *Australian Intellectual Property Journal* 149.

¹⁴¹ Similar trends have been observed in the US in relation to what Liu describes as ‘regulatory’ copyright: see Liu, above n 10, 102–5. There are differences, however. In the US there is no equivalent to the Attorney-General’s Department. The closest equivalent, the Copyright Office, headed by the Register of Copyrights, is not part of a government department, but operates within the Library of Congress, which is actually part of the *legislative* branch of government, and hence somewhat independent from the executive. The Copyright Office provides advice to Congress on the development of copyright policy, and advises relevant government departments including the US Department of Commerce, the Department of State, and the Office of the US Trade Representative. It also operates the US Copyright Register, and administers Copyright Arbitration Royalty Panels.

¹⁴² Max Weber, *Economy and Society* (1968) 958; Owen M Fiss, ‘The Bureaucratization of the Judiciary’ (1983) 92 *Yale Law Journal* 1442, 1450.

¹⁴³ One classic definition of a ‘bureaucracy’ is a complex organisation with three features: (1) a multitude of actors; (2) a division of functions or responsibilities among them; and (3) a reliance upon a hierarchy as the central coordination device: see Fiss, above n 142, 1444. Max Weber, in his early sociological work on bureaucracy, emphasises the growth of a set of specialised, qualified persons assigned full-time to duties delimited by rules and managed through hierarchical relationships: see Weber, above n 142, 956–8. In the copyright context: see Streeter, above n 10, 570–2.

ment occurring over their networks.¹⁴⁴ This regime supplemented the existing law of authorisation, with all its uncertainty and case-by-case assessment,¹⁴⁵ adding a set of well-defined, certain rules accommodated in a system requiring no real thought once established.¹⁴⁶ In addition, the division involves a not insignificant amount of delegation to the executive branch: a considerable number of matters may be prescribed by regulation, including the procedure for removing allegedly infringing material, any system for counternotices, and causes of action and remedies which may be brought for misuse of the safe harbour system.¹⁴⁷ Responsibility for maintenance of the system thus shifts to the Attorney-General's Department.

The bureaucratic tendency in copyright is not, I hasten to add, a new phenomenon: as with other legal regimes for recognising proprietary interests in intangibles, copyright has long been accompanied by the establishment of various public and quasi-public institutions for managing rights. The earliest copyright regimes involved the executive directly in the grant of rights by requiring registration,¹⁴⁸ and although the compulsory register was abolished internationally by the Berlin revision of the *Berne Convention on the Protection of Literary and Artistic Works* in 1908,¹⁴⁹ the abolition of compulsory formalities has shifted, not reduced copyright administration. Since 1926, Australian copyright owners have been establishing their own societies for the collective management of rights.¹⁵⁰ Further, while there was some early reticence on the part of the Australian government to engage in oversight of the management of copyright, it has long since become accepted as appropriate: the Australian Copyright Tribunal was established in 1968 to deal with disputes over compul-

¹⁴⁴ *Copyright Act 1968* (Cth) pt V div 2AA.

¹⁴⁵ *Copyright Act 1968* (Cth) ss 36(1A), 101(1A). The fact-specific nature of the assessment is demonstrated in the recent Full Court of the Federal Court decision in *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380. CSPs may choose whether to rely on the law of authorisation, or the safe harbours in *Copyright Act 1968* (Cth) pt V div 2AA.

¹⁴⁶ I acknowledge of course that under the safe harbours, CSPs may choose not to remove material they do not consider infringing. The regime however encourages them to act reflexively and automatically: any risk arising from non-removal lies on the CSP.

¹⁴⁷ *Copyright Act 1968* (Cth) s 116AJ; *Copyright Regulations 1969* (Cth) pt 3A.

¹⁴⁸ Under the *Statute of Anne 1710*, 8 Anne, c 19, rights extended only to books entered into 'the Register-Book of the Company of Stationers'.

¹⁴⁹ Since the revision of the *International Convention on the Protection of Literary and Artistic Works* in 1908 in Berlin, copyright protection may not be made conditional on the existence of formalities: see *International Convention for the Protection of Literary and Artistic Works*, opened for signature 13 November 1908, [1912] ATS 9, art 4 (entered into force 9 September 1910); see also *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 24 July 1971, 1161 UNTS 3, art 5(2) (entered into force 1 March 1978) ('*Berne Convention*'). Australia maintained a register until 1968. This was despite its abolition in the UK which provided the model for most of the original *Copyright Act 1912* (Cth): see Robert Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27 *Journal of Legal History* 239, 257. Under s 26 of the *Copyright Act 1912* (Cth), registration was optional, but certain 'special remedies' were available only to registered owners. The Australian register was abolished with the proclamation of the *Copyright Act 1968* (Cth).

¹⁵⁰ The first collecting society in Australia was the Australasian Performing Right Association ('APRA'), incorporated in 1926. For more historical background: see Simpson, above n 8, ch 3. Collecting societies are 'bureaucratic' in a very classical sense as described in the sources cited in above n 143: they are complex, rule-bound organisations, which collect money almost like a tax on users and distribute it according to predetermined rules: see Streeter, above n 10, 576; Kretschmer, above n 10, 133–5.

sory and collective licences.¹⁵¹ Moreover, from very early on, the Australian government has intervened in the market for copyright material by legislating for compulsory licences that limit copyright owners, in some cases, to receiving only collectively administered remuneration;¹⁵² such systems inevitably involve both detailed rules which simulate, rather than create, a market, and the delegation of regulatory power to administrative agencies. Indeed, if we were awarding the prize for ‘most bureaucratic aspects of copyright law’, the leading candidate would be the educational statutory licences, which were introduced in the 1980s:¹⁵³ they represent a bureaucratic simulation of a market,¹⁵⁴ complete with detailed specifications regarding what educational institutions may copy, which operate mechanically within user institutions, require systems for monitoring use, establish ministerial power to decide who negotiates on behalf of copyright owners,¹⁵⁵ and institute a public authority — the Copyright Tribunal — to set the price for these activities.¹⁵⁶

Nor is the adoption of highly bureaucratic features unique to copyright law. As numerous commentators have pointed out, ‘the history of the twentieth century is largely the history of increasing bureaucratization’.¹⁵⁷ In recent times in Australia, we have seen similar phenomena to those described here lamented at length in industrial relations; in corporate law too, commentators have been asking ‘where did the law go?’ as powers to make increasingly elaborate rules have been delegated to the executive branch of government.¹⁵⁸

Finally, it must be acknowledged that this feature of the recent reforms is not solely the initiative of the Australian government. I am sure that neither the Attorney-General nor his Department sat down and thought to themselves: how can we take over more control of copyright? There are no doubt many driving

¹⁵¹ After APRA was established in Australia in 1926, it did not take long before there were calls to control this ‘monopolistic’ body: see Commonwealth, Royal Commission on Performing Rights, *Final Report* (1933) (‘Owen Commission’). The Owen Commission concluded that a tribunal should be established to counterbalance APRA’s monopolistic power. In 1943, the Parliamentary Standing Committee on Broadcasting similarly recommended compulsory arbitration for disputes between APRA, the Australian Broadcasting Commission, and the Federation of Commercial Broadcasting Stations: CLRC, *Spicer Committee Report*, above n 124, 66.

¹⁵² As early as 1911, there was a compulsory licence for reproduction of published works for sale 25 years from the death of the author, without consent but with a fixed royalty: *Copyright Act 1911*, 1 & 2 Geo 5, c 46, ss 3–4, incorporated into Australian law by *Copyright Act 1912* (Cth) s 8. There was also a compulsory licence for the making of records of musical works previously recorded: *Copyright Act 1912* (Cth) s 19(2).

¹⁵³ Part VA (an educational statutory licence for the recording of off-air broadcasts) and pt VB (an educational statutory licence for reproducing and communicating works) of the *Copyright Act 1968* (Cth) were inserted into the Act in 1989: see *Copyright Amendment Act 1989* (Cth) ss 14–15. Educational institutions had long insisted that much of their copying fell under the free licence for research and study. This argument was rejected in *Haines v Copyright Agency Ltd* (1982) 64 FLR 182.

¹⁵⁴ Streeter, above n 10, 588–90 (discussing the ‘bureaucratic simulation’ of the market inherent in parts of US copyright law).

¹⁵⁵ *Copyright Act 1968* (Cth) ss 135P, 135ZZB.

¹⁵⁶ *Copyright Act 1968* (Cth) ss 135H, 135J, 135JA, 135ZU, 135ZV, 135ZW.

¹⁵⁷ Fiss, above n 142, 1442.

¹⁵⁸ Stephen Bottomley, ‘Where Did the Law Go? The Delegation of Australian Corporate Regulation’ (2003) 15 *Australian Journal of Corporate Law* 1. More generally, the tendency towards more complex bureaucracies has been noted by commentators going back to Max Weber himself: see Weber, above n 142, 971.

forces behind the adoption of these features in copyright reform. Some aspects of the new regime were dictated by the *AUSFTA*: unfortunately, we inherited from the US some additional copyright bureaucracy — the safe harbours being one such part.¹⁵⁹ Still other parts are an attempt by the government to draw a line somewhere in between the competing claims of stakeholders, or a response to the demands of (institutional) stakeholders for certainty,¹⁶⁰ or assistance in ongoing disputes.¹⁶¹ In the last Part, I noted that the reform process favoured established copyright stakeholders, most of which are themselves bureaucratically organised entities. Detailed, certain rules may well suit, and thus be sought by, copyright collecting societies and the large institutional copyright users such as educational institutions, libraries, galleries and archives. In addition, regulatory details, once in the *Copyright Act 1968* (Cth), are very difficult to remove.¹⁶² It is possible, too, that some decisions to delegate power to the Attorney-General's Department or other parts of the executive arose from sheer pragmatism: the drafters recognised that it might be important to build ongoing powers of adjustment into the legislation. Since copyright is both relatively arcane and technical it is hard to get copyright on the legislative agenda; and because it has contentious interest groups, it is hard to get through Parliament. Proposals for copyright reform can wait for years to be enacted.¹⁶³ It is thus safer to ensure that adjustments can be made without having to resort to legislation.

Thus in identifying this bureaucratic tendency I am arguing neither conspiracy, nor a new or unique phenomenon. Nevertheless, whatever the driving forces, we need to be aware of this tendency, and we need to think about its consequences. As I will argue below, these features of the reforms should also prompt an assessment of how well our copyright system, in all its intricacies, is performing.

But first I must justify my assertion, by identifying and describing these features, leaving space for a future assessment in historical context. I have given one example already — the ISP safe harbours — but it is the least interesting case, precisely because, in being adopted wholesale from the US, it is the area where the Australian government had the least choice about the degree of

¹⁵⁹ In addition, as noted above, several of the changes to the exceptions were justified by the government as necessary to ensure the compliance of Australian law with the three-step test contained in art 9(2) of the *Berne Convention*, opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 1 March 1978); *TRIPS*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1C, art 13 (entered into force 1 January 1995). The claim is at least questionable: see further below Part IV(A).

¹⁶⁰ The Attorney-General has pointed this out a number of times: see above n 72.

¹⁶¹ *Copyright Amendment Act 2006* (Cth) sch 7.

¹⁶² Consider, for example, the detailed provisions on record keeping under the statutory licences: *Copyright Act 1968* (Cth) ss 135K, 135L, 135ZQ(3)–(4), 135ZX, 135ZY. The CLRC, in its draft report on the Copyright Tribunal, recommended removal of these provisions subject to a power in the Tribunal to make determinations. It received protests from both collecting societies and the Australian Vice-Chancellors' Committee: above n 63, 5. The original version of the Copyright Amendment Bill followed the CLRC recommendation: see, eg, Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 188. Again, protests, and again, backdown: Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 29.

¹⁶³ While the immediate period just passed experienced many copyright reforms, such a degree of parliamentary attention to the subject is very unusual. As I noted above, in recent times we had the interesting conjunction of political awareness, a deadline for reform, and a theme: see above Part II(B).

bureaucratisation to introduce. I want to focus instead on less obvious areas: the exceptions, the enforcement, and the anti-circumvention laws. It is the adoption of bureaucratic approaches in *these* contexts which is more striking — in the first two because they were areas of home-grown reform in which a considerable range of choice was available; in the last, because it represented the third, controversial area of reform and one where the Australian government differentiated its approach from that of the US despite a detailed *AUSFTA*. In each of these three key areas, I will seek to identify the policy issue sought to be addressed, the option chosen to address it, the effect of the option chosen on the copyright system, and any alternatives, before turning, in the final Part of this article, to the implications of the phenomenon described here.

A *The New Copyright Exceptions*

My first example relates to copyright exceptions, chosen in part because this part of the copyright reforms attracted the most attention in 2006. Here the government sought to resolve the glaring inconsistency between what consumers were doing in the real world (taping television and using iPods), and what copyright law said they should be doing (neither of the above),¹⁶⁴ by introducing a series of private copying exceptions designed to legalise common consumer activities involving copying of legitimately purchased material.¹⁶⁵ Following the passage of the reforms, a person can make:

- one copy ‘in a different form’ of a work contained in a book, newspaper, or periodical publication;¹⁶⁶
- one copy of a photograph (from paper to electronic, or vice versa, but not from paper to paper, or electronic to electronic);¹⁶⁷
- any number of copies of a sound recording in any format;¹⁶⁸
- one copy in electronic form of a film on video tape;¹⁶⁹ and
- ‘time-shift’ copies of broadcast for perusal at a more convenient time.¹⁷⁰

¹⁶⁴ There was no exception for private copying in Australian law. On the issue of private copying in the review: see Kimberlee Weatherall, ‘A Comment on the Copyright Exceptions Review and Private Copying’ (Working Paper No 14, IPRIA, The University of Melbourne, 2005).

¹⁶⁵ Ruddock, ‘Fair Use and Copyright in Australia’, above n 72, 6.

¹⁶⁶ *Copyright Act 1968* (Cth) s 43C. It is not clear what ‘a different form’ means; there is no explanation in Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth). For one example: see Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 2006, 36 (Paul Neville).

¹⁶⁷ *Copyright Act 1968* (Cth) s 47J.

¹⁶⁸ *Copyright Act 1968* (Cth) s 109A. The exposure draft was narrower, allowing only a single copy of a sound recording in any given format. This, however, was inconsistent with the actual operation of devices which require copies on both a computer and the device. The exception was therefore amended: see Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 8.

¹⁶⁹ *Copyright Act 1968* (Cth) s 110AA.

¹⁷⁰ *Copyright Act 1968* (Cth) s 111. This exception was specifically limited to radio and television content delivered via traditional broadcasting methods, not new methods such as the internet: see Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 6–7; *Copyright Act 1968* (Cth) ss 111(1), 10(1); *Broadcasting Services Act 1992* (Cth) s 6(1).

This brief summary overstates consumer freedoms: there are other limitations, including, *inter alia*, a requirement that the consumer not sell or pass on their originals to another person.¹⁷¹ The exceptions are particularly noteworthy for their specificity: for example, the differential treatment of sound recordings, where any number of copies can be made in any format,¹⁷² and films and literary works, where only *one* copy is allowed, for all time — woe betide you if your e-book reader uses iPod-like software which requires the keeping of two copies! In the case of films, only one particular kind of transformation is allowed; presumably, following any shift from DVDs to another format, we will need to revisit whether a new exception is required for shifting collections.¹⁷³ The drafters looked at existing technology and current practice, and narrowly wrote the exceptions to fit. The private copying exceptions were not alone in displaying this tendency: other exceptions are similarly tied to the operation of technology and the day-to-day practice of their beneficiaries. For example, three new provisions allow key cultural institutions to make preservation copies of works of ‘historical and cultural significance to Australia’ in their collections¹⁷⁴ but, like the private copying exceptions, the preservation copying provisions provide for differential treatment of different subject matters,¹⁷⁵ and are highly specific: three preservation copies are allowed, but make four copies, in accordance with the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’) recommended standards, and you may no longer have protection.¹⁷⁶

Readers familiar with the 2006 reforms may by this point be thinking to themselves: ‘Ah, *some* of the new exceptions may be specific, but in other areas the legislation introduced flexibility into the *Copyright Act 1968* (Cth)’. Two of the

¹⁷¹ *Copyright Act 1968* (Cth) ss 43C(3), (6), 47J(3), (6), 109A(3). In the case of sound recordings, the source of the recording is also determinative: *Copyright Act 1968* (Cth) s 109A(1)(c).

¹⁷² Subject to some additional requirements, in particular, the person must own both the sound recording they copy and the device onto which it is copied: *Copyright Act 1968* (Cth) ss 109A(1)(a), (b). On the Attorney-General’s Department’s view of the need to limit the exception: see *SCLCA Final Report*, above n 78, 23.

¹⁷³ The government undertook to consider in two years’ time whether the format-shifting exception for audio-visual works should be extended beyond the ancient videotape: Attorney-General’s Department, ‘Fair Use Review’, above n 70, 6.

¹⁷⁴ *Copyright Act 1968* (Cth) ss 51B, 110BA (sound recordings and films), 112AA (published editions). Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [6.104]–[6.105].

¹⁷⁵ The provisions distinguish between works held in manuscript, unpublished, or first record form (preservation copies allowed) or published form (preservation copies allowed where not available ‘within a reasonable time at an ordinary commercial price’). For original artistic works, the provision allows ‘up to three comprehensive photographic reproductions’.

¹⁷⁶ Three copies is said to be the number required by ‘international best practice guidelines for preservation’: Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [76]. The original draft allowed one copy. See also Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 37 (Joseph Ludwig), noting that the UNESCO standard is four copies, and that ‘splitting the difference ... does not make sense’. The government response was that additional copies might be allowed under s 200AB: Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 115 (Christopher Ellison, Minister for Justice and Customs). This seems inconsistent with ordinary canons of statutory interpretation. The government is also dictatorial regarding what uses may be made of the copies. They may only be made for ‘the purpose of preserving the work against loss or deterioration’, meaning that they may not be ‘made available to patrons, nor may they be used for copying to fulfil requests from other libraries or archives’: Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [75].

new exceptions might be seen in this light: the parody and satire exception, which is written as a fair dealing exception,¹⁷⁷ and s 200AB, which allows parts of the non-commercial sector (that is, libraries and archives, educational institutions, and institutions or volunteers that assist people with a disability)¹⁷⁸ to make certain non-commercial uses. It is true that the parody and satire defence ‘bucks the trend’: it is drafted in a relatively flexible, open-textured way.¹⁷⁹ At first glance, s 200AB also seems to provide flexibility. Under s 200AB, libraries and archives may make copies ‘for the purpose of maintaining or operating the library or archives’ or ‘to provide services of a kind usually provided by a library or archive’, and educational institutions may use copyright material ‘for the purpose of giving educational instruction’. According to the legislative history, the exception was introduced to provide ‘flexibility’ for public institutions to perform ‘socially useful’ acts.¹⁸⁰ As such it would appear counter to the proliferation of rigid, objective rules which I have described.

But is s 200AB truly flexible? The exception is limited by the entity involved (only certain public sector institutions are included) and the purpose of the use (only certain conduct for certain purposes by those bodies is permitted).¹⁸¹ Furthermore, it applies only where a statutory licence does not apply,¹⁸² and is subject to the *Berne Convention*¹⁸³ three-step test — that is, the use must constitute a special case, must not conflict with a normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the owner of copyright.¹⁸⁴ Given all these limitations, one educational industry adviser at the Australian Centre for Intellectual Property in Agriculture’s Copyright Conference in February 2007 referred to the exception as the *nine*-step test.¹⁸⁵ Remem-

¹⁷⁷ *Copyright Act 1968* (Cth) ss 41A, 103AA.

¹⁷⁸ While s 200AB of the *Copyright Act 1968* (Cth) does not specify ‘institutions or volunteers’, the banning of a commercial purpose or profit has essentially that effect.

¹⁷⁹ It is thus particularly interesting to note that the parody and satire defence was originally included in the arguably much less flexible *Copyright Act 1968* (Cth) s 200AB, and only after protest from users was it redrafted as a fair dealing defence. The Exposure Draft was discussed in Patricia Loughlan, ‘Parody, Copyright and the New Four-Step Test’ (2006) 67 *Intellectual Property Forum* 46. See also McCausland, above n 140, 290.

¹⁸⁰ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 12; Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 2 (Philip Ruddock, Attorney-General). The Supplementary Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth) even uses the heading ‘Fair Use’ in relation to s 200AB: Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [46]–[62].

¹⁸¹ Albeit the categories used are drawn broadly. More specifically, libraries and archives may use the exception for copying ‘made for the purpose of maintaining or operating the library or archives’ or ‘to provide services of a kind usually provided by a library or archives’: *Copyright Act 1968* (Cth) s 200AB(2)(b). Educational institutions may copy ‘for the purpose of giving educational instruction’: at s 200AB(3)(b). However, whether this is different from copies made for ‘educational purposes’ (the terminology of the statutory licences) is not entirely clear; and not-for-profit copying may be made by or for ‘a person with a disability that causes difficulty in reading, viewing, or hearing the work ... in a particular form’ for the purpose of ‘obtaining a ... copy ... in another form, or with a feature, that reduces the difficulty’: at s 200AB(4)(b).

¹⁸² *Copyright Act 1968* (Cth) s 200AB(6).

¹⁸³ Opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 1 March 1978).

¹⁸⁴ *Copyright Act 1968* (Cth) s 200AB(1)(a), (c), (d), (7). For treaty sources of the three-step test: see above n 159.

¹⁸⁵ Carolyn Dalton, ‘Educating the Educators: Implementing the 2006 Copyright Amendments’ (Speech delivered at the Australian Centre for Intellectual Property in Agriculture 12th Annual Copyright Conference, Brisbane, 16 February 2007).

ber, too, the nature of the entities to whom this ‘flexibility’ was granted: for the most part, highly bureaucratic, and risk averse, institutional entities.¹⁸⁶ It can scarcely be expected that individual teachers and librarians are going to be sitting down and working out whether s 200AB applies to their particular situation. In my view, the entities allowed to use the exceptions have two likely choices: they may treat the provision as a dead letter or defence of last resort to be called on in a legal challenge, or alternatively as something to be ‘tamed’ through more certain, objective rules, perhaps in the form of industry guidelines. If guidelines are chosen, it might be expected that there would be some negotiation with the relevant collecting society, the Copyright Agency Limited (‘CAL’), as the entity most affected by the guidelines and most likely to bring a challenge in court to any guidelines issued.¹⁸⁷ In summary, then, s 200AB scarcely detracts from the overall tendency of the reforms to ‘bureaucratise’ copyright exceptions.

Furthermore, it should be noted that the government also took the opportunity in 2006 to cast a regulatory eye over the rest of the *Copyright Act 1968* (Cth), amending existing exceptions in ways that reduced their flexibility and the autonomy of their beneficiaries. For example, prior to the recent changes, libraries and archives were entitled to make copies of material held in their collection for ‘administrative purposes’,¹⁸⁸ a term which was then undefined.¹⁸⁹ The *Copyright Amendment Act 2006* (Cth) retained the exception but introduced a new definition of the term in order to ‘ensure that copying is appropriately limited under this section to only genuinely administrative purposes, being those directly related to the effective internal management, care and control of the collection of the library or archives.’¹⁹⁰ Apparently, libraries and archives cannot be trusted to exercise their own judgement as to what constitutes ‘administrative purposes’. Another example is an amendment made to the statutory licence under which educational institutions are entitled to make copies of material for their students. Under the statutory licence, such institutions have always been able to make free copies of up to two pages or one per cent of the number of pages of a work, on the basis that this constituted an ‘insubstantial portion’.¹⁹¹ The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) extended this exception to the digital environment, but the *Copyright Amendment Act 2006* (Cth) has narrowed the digital version of this accommodation by providing, in essence, that the passages copied making up the portion less than two pages or one per cent must

¹⁸⁶ As to the risk averse nature of the institutions involved: see Emily Hudson and Andrew Kenyon, ‘Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives’ (2007) 30 *University of New South Wales Law Journal* 12.

¹⁸⁷ CAL has previously sued over guidelines: *Haines v Copyright Agency Ltd* (1982) 64 FLR 182.

¹⁸⁸ *Copyright Act 1968* (Cth) s 51A(2).

¹⁸⁹ For the use of this provision and its importance to the running of libraries and archives: see Hudson and Kenyon, above n 186.

¹⁹⁰ *Copyright Act 1968* (Cth) s 51A(6); Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [6.102].

¹⁹¹ This explanation of the provision was tendered by the Attorney-General’s Department and DCITA: Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999* (1999) [3.37] (*Andrews Committee Report*). It is consistent with the general position under copyright law that a copyright owner is only entitled to prevent, or demand payment for, the copying of a ‘substantial part’.

be ‘continuous’ — if extracts from different parts of a work are used, the second and subsequent extracts will have to be paid for.¹⁹² This surely falls in the category of an amendment showing there is ‘no issue too small for the government to dictate’.¹⁹³

Thus, subject perhaps to the parody provision, in the area of copyright exceptions, the 2006 reforms display a key bureaucratising tendency: the proliferation of detailed and rigid rules which may be applied objectively and without judgement. They also display the other tendency: the delegation of ongoing powers to parts of the executive arm of government. The various exceptions introduced, or modified, in this period are designed in such a way that they formalise relations between copyright owners and users: the exceptions appear to have been written, in many cases, by the drafters looking at current practice in the market, and embodying that practice in the form of highly specified rules. There is also an expanded role for the executive branch in a series of ways which, while minor taken individually, are striking when tallied up. By introducing such technology-specific rules, the government is practically required to keep matters under ongoing review. If the market or technology changes (if e-book readers requiring the storage of two copies hit the market, for example) there will be reason to go back and reconsider these issues.¹⁹⁴ By being responsive to stakeholder demands for more and more detail in some of the exceptions, for example, in the statutory licences, the government has more or less ensured it will continue to be the object of more rent-seeking.¹⁹⁵ Finally, in the case of preservation copying the government explicitly reserved to itself the power to decide which cultural institutions in Australia have items of such ‘historical and cultural significance to Australia’ that they should be allowed a special preservation copying exception.¹⁹⁶

¹⁹² See *Copyright Amendment Act 2006* (Cth) sch 8 pt 3.

¹⁹³ This change has the potential to be significant as schools receive a 25 per cent discount in copyright fees for insubstantial copying: see Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 30 October 2006, Submission No 25, 7 (Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs). No similar change was made to the non-digital exception: *Copyright Act 1968* (Cth) s 135ZG; cf *Copyright Act 1968* (Cth) s 135ZMB. The reason for the amendment appears to be complaints about ‘cherry-picking’ from organisations like CAL: see Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 30 October 2006, Submission No 29, 17 (CAL); see also *Andrews Committee Report*, above n 191, [3.32]–[3.42]. While the provision does not confer any discretion on the executive, its enactment does suggest to stakeholders that if they complain long enough, they may get the changes they want. This indirectly ensures that the executive will continue to be a focal point for lobbying.

¹⁹⁴ Of course, reconsideration would require legislative change — unilateral power to act has not been conferred on the executive. The role of the executive, however, does extend to the power to initiate the review, and bring forward any proposed new changes.

¹⁹⁵ It would also be fanciful to assume that, if guidelines are drafted in relation to *Copyright Act 1968* (Cth) s 200AB, the government would not be involved in some way, given that the relevant institutions receive significant public funding. One would think, for example, that the Department of Education, Science and Training would be involved in some way, as would, of course, the Ministerial Council on Education, Employment, Training and Youth Affairs.

¹⁹⁶ *Copyright Act 1968* (Cth) s 51B(1). This was a late amendment to the Bill, designed to allow scope ‘to consider the merits of claims of institutions other than those who have a statutory function of preserving a collection, but who nonetheless develop and maintain collections that

This tendency towards the bureaucratic in the exceptions would be unremarkable if it were unavoidable, but it was not: there were other approaches the government could have adopted. Take, for example, the personal copying exceptions. Having made the policy decision to excuse ordinary, legitimate consumer behaviour, there was a spectrum of approaches the government could have taken, ranging from the general to the specific, from an open-ended US-style ‘fair use’ exception¹⁹⁷ through to the other extreme of a series of exceptions specifying the subject matter, number of copies, and technology of copying. There is also a middle ground: for example, exceptions which, while specific as to *purpose*, are more open-textured in the language and conditions they impose. Drafters of copyright law have long been aware of a range of options: existing Australian law exceptions display different degrees of specificity. To generalise somewhat, previously existing exceptions for individual use — for example, the fair dealing exceptions, which allow use for a particular purpose provided it is fair — are more general in their terminology. There are other exceptions which are much more specific, but these are, in general, aimed at institutional users: for example, the libraries and archives exceptions which delimit the purpose, extent, and format of copying.¹⁹⁸ For its new personal copying exceptions, the government chose the extreme specific end of this spectrum. This was a choice: even if it was not in favour of adopting a fully open-ended exception — a view that has some justification¹⁹⁹ — it could, as an alternative, have alighted somewhere in the middle ground. For example, the government could arguably have drafted a single exception for ‘fair copying for the purposes of private and domestic use of legitimately purchased material’. Such an exception would potentially be both narrower and broader than the ones adopted,²⁰⁰ but would also be less technology-bound and more adaptable to changing market conditions. If it were not prepared to go so far, the infinitely

are of historical and cultural significance to Australia’: Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [73]. This is perhaps an example of a provision conferring power on the executive on the pragmatic grounds that further legislation in the area could take years.

¹⁹⁷ 17 USC §107 (2000 & Supp V, 2006). For a discussion: see Weatherall, ‘A Comment on the Copyright Exceptions Review and Private Copying’ above n 164; see also Attorney-General’s Department, ‘Fair Use Review’, above n 70.

¹⁹⁸ *Copyright Act 1968* (Cth) ss 48–53, 104A, 104B, 110A, 110B. There are good reasons for the specificity of the library and archives exceptions: designed for bureaucratic institutions, they provide rules capable of objective application, and require the establishment of systems and the keeping of records. For a discussion of open-textured, as opposed to open-ended exceptions: see Burrell and Coleman, above n 131, 276–310; Robert Burrell, ‘Reining in Copyright Law: Is Fair Use the Answer?’ [2001] *Intellectual Property Quarterly* 361.

¹⁹⁹ There is a respectable, although by no means universally held, opinion that the open-ended fair use exception contravenes the *Berne Convention* three-step test even in the US: see Ruth Okediji, ‘Toward an International Fair Use Doctrine’ (2000) 39 *Columbia Journal of Transnational Law* 75. There is an equally respectable view that the fair use exception in the US may not contravene the three-step test, because the case law provides sufficient ‘certainty’ and specificity, but that the attempt to introduce a similar exception now in another country, without its elaboration in case law, would contravene the three-step test: see Burrell and Coleman, above n 131, 249–74.

²⁰⁰ Given markets for digital downloads, it is possible that some copying of sound recordings is not ‘fair’; but it is also possible that copying beyond the subject matters specified would be allowed under a fair private use exception.

more sensible exception relating to sound recordings could perhaps have been a model for these provisions.

It might be objected that, particularly in the case of private copying, all of these options were not equally available, given existing international law. Any exceptions enacted by Australia must comply with the requirement known as the ‘three-step test’, found in both the *Berne Convention*²⁰¹ and *TRIPS*.²⁰² Under that test, exceptions must be restricted to ‘certain special cases’, must not ‘conflict with a normal exploitation of the work’, nor ‘unreasonably prejudice the legitimate interests of the right holder’.²⁰³ One argument is that in order to comply with this requirement in the case of private and domestic copying — an exception justified by convenience rather than some overwhelming social benefit or public interest — any exception had to be limited so as to apply only in those cases of old technology, and only where it was clear that such use was already tolerated by copyright owners, since only this approach would minimise the interference with the interests and digital markets of copyright owners. To accept this argument is a cop-out.²⁰⁴ First, the three-step test is itself open-textured, and has historically been interpreted by states as giving them considerable flexibility; its developing content is uncertain at best.²⁰⁵ Secondly, there are other ways to address the concern that the exception must be limited; for example, by giving directions as to what kinds of copying should be considered legitimate, either in legislation or in the legislative history, or by listing factors to be considered in assessing what counts as ‘fair’ copying for private and domestic purposes.²⁰⁶ To the extent that specific limitations were considered necessary, they could have been included as conditions or situations of deemed or presumed unfairness.²⁰⁷ In short, it is simply not true to assert that maximum specificity of the kind found in the new private and domestic copying exceptions was necessary as a matter of compliance with international obligations. The degree of specificity to which Australian copyright exceptions now descend has no international equal. If that degree of ‘certainty’ is required by international law, then Australia alone is complying.

²⁰¹ Opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 1 March 1978).

²⁰² Ibid art 9(2); *TRIPS*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1C, art 13 (entered into force 1 January 1995).

²⁰³ Above nn 201–2.

²⁰⁴ It is also, by the by, arguably inconsistent with the approach adopted by the government in *Copyright Act 1968* (Cth) s 200AB.

²⁰⁵ Burrell and Coleman, above n 131, 217; Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2005) vol 1, 763 (noting the ambiguity over the meaning of the test).

²⁰⁶ In a different context, Professor Ricketson has argued that ‘factor-based’ tests are consistent with the *Berne Convention* three-step test for exceptions: Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (2002) 64–7. Note that in the report Ricketson was considering a *research and study* exception; he has not considered specifically whether a *personal copying* exception, delimited by fairness determined according to a list of factors, could ever be consistent with art 9(2) of the *Berne Convention* and art 13 of *TRIPS*. The reasoning in the report does, however, suggest that a fairness test, along with a list of relevant factors, may provide sufficient *certainty*, the need for which appears to be the justification for the narrow drafting of the personal copying exceptions.

²⁰⁷ Additional non-negotiable conditions on fair dealing exceptions are not unheard of: see, eg, the requirements of ‘sufficient acknowledgment’ in the exception for criticism or review under s 41 of the *Copyright Act 1968* (Cth).

It might further be objected that maximum specificity was also a response to stakeholder pressure for ‘certainty’.²⁰⁸ That may well be the case, although it should be noted in passing that not all stakeholders requested or favoured quite so much certainty: I suspect that such demands will have come most strongly from institutions which are structured, and operate, in a highly bureaucratic way themselves, because for them objective rules are the easiest to cope with.²⁰⁹ As noted in Part III(A) above, it is not my contention that the government set out to grab extraordinary power over copyright, nor that it wanted to ‘grow’ the copyright bureaucracy. There may well be multiple drivers for the choices made, and in this case, both concerns about compliance with international law and demands for certainty played a role. The point, for present purposes, is that choices of this kind are being made, and repeatedly.

B *The Criminal Provisions*

My second example of the kinds of bureaucratic choices made in recent times is another high profile area of copyright reform from 2006: the criminal offence provisions. The policy issue which the government wished to solve here was the gap between the letter of the law and its enforcement. In short, copyright infringement is hard to detect and hard to stop. Despite various legal reforms that have occurred over time, for example, to the burden of proof,²¹⁰ such cases still involve technical issues which make them complicated to pursue.²¹¹ The difficulty of ensuring prosecution of sufficient offenders to create deterrence also contributes to make such cases unattractive to the public enforcement agencies.²¹² Thus, the government’s stated aim was to create a system which would

²⁰⁸ See Ruddock, ‘Fair Use and Copyright in Australia’, above n 72, 6, noting that there was little stakeholder support for a fair use exception.

²⁰⁹ Although it is well beyond the scope of this article, one cannot help but wonder whether the particular nature of the copyright policy environment in Australia has a great deal to do with the adoption of bureaucratic rules. In short, most participants in the copyright reform process are highly bureaucratic organisations. The lead participants are the collecting societies and the Australian Record Industry Association on the ‘owner’ side, and the universities and libraries on the ‘user’ side. Missing are creators and even the big owners (although, as Streeter has pointed out, they too are very bureaucratic: Streeter, above n 10, 573), as are the technology and consumer electronics companies (of the electronics companies, it was really only Apple Incorporated which participated at early stages). Google Incorporated joined issue late in the piece, when the Copyright Amendment Bill 2006 (Cth) had already been drafted and the policy decisions had been made. It is battle by proxy to some extent, and the proxies are bureaucratic institutions. It may also be worth noting that the ‘in-Department’ reform process favoured such participants, by giving most advantage to those accustomed to the lobbying process.

²¹⁰ See, eg, the presumptions as to subsistence and ownership (*Copyright Act 1968* (Cth) ss 132A, 132B) introduced for the first time in relation to the copyright criminal offences in 2003 by the *Copyright Amendment (Parallel Importation) Act 2003* (Cth) sch 4.

²¹¹ For a discussion of why copyright enforcement is difficult and not a high priority: see Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Enforcement of Copyright in Australia*, June 1999, Submission No 35 (Australian Federal Police). For complaints regarding the inadequate level of enforcement in this area: see Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Cracking Down on Copycats: Enforcement of Copyright in Australia* (2000) 82–8 (‘Copycats Report’).

²¹² Standing Committee on Legal and Constitutional Affairs, *Copycats Report*, above n 211, 42–3, discussing the low penalties imposed. Where penalties are low, general economic theories of criminal law suggest that the risk of detection and punishment must be high for deterrence to be

allow ‘more cost-effective administration of the existing enforcement provisions’ by providing police and prosecutors with ‘a wider range of penalty options to pursue against suspected offenders, depending on the seriousness of the conduct.’²¹³ Whether or not one agrees with the policy of strengthening and increasing criminal enforcement of copyright,²¹⁴ for present purposes the point is that the way the government chose to do so resulted in the significant consolidation of enforcement power and discretion in the hands of the executive branch and police: a shift from the previous position where the judiciary played a more important role. Before turning to the details of the changes made, and how they fit into the overall thesis presented here, I should note that, in part because they were introduced late and without prior consultation, there have been many misunderstandings about the nature of the changes to criminal copyright provisions in Australia. My purpose here is not to examine every substantive issue raised by the criminal provisions, but to focus on those aspects of the changes to the law that might be called ‘regulatory’ in nature.

Two key changes were made in late 2006. First, the existing offences, most of which in the past had been indictable offences for intentional or reckless conduct carrying a maximum penalty of five years’ jail, were replaced with a tiered regime. Copyright offences now come in three flavours, depending on the fault — that is, the state of mind²¹⁵ — of the defendant:²¹⁶

- 1 An indictable offence carrying a maximum penalty of five years’ imprisonment and/or \$60 500 to \$93 500 (550 to 850 penalty units),²¹⁷ which applies where the defendant intends their acts, and is reckless as to whether they are dealing with an infringing copy;²¹⁸

effective: see Gary Becker, ‘Crime and Punishment: An Economic Approach’ (1986) 76 *Journal of Political Economy* 169. However, it is very difficult to make the risk high where infringing acts are common or widespread. Deterrence is a factor in making the decision to prosecute: see Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2nd ed, 1990) 9 (‘*Prosecution Policy of the Commonwealth*’). It follows that where deterrence is difficult to achieve, prosecution will be a less attractive option for law enforcement agencies.

²¹³ Attorney General’s Department as quoted in Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 18.

²¹⁴ There is significant literature questioning whether, and in what circumstances, criminal enforcement of copyright is appropriate: see, eg, Geraldine Szott Moohr, ‘The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory’ (2003) 83 *Boston University Law Review* 731.

²¹⁵ *Criminal Code* ss 3.1, 5.1 refer to the ‘mental element’ or mens rea as a ‘fault element’.

²¹⁶ The Exposure Draft: Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth) applied these three tiers almost across the board, with the exception of offences under *Copyright Act 1968* (Cth) ss 132AC (infringements on a commercial scale), 132AM (advertising supply of infringing copies), 132APC–132APE (the technological protection measure offences), 132ASA–132ASJ (the encoded broadcast offences). The *SSCLCA Final Report* and media attention (see above n 105) led to the removal of several strict liability offences affecting non-commercial acts: see Further Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [1]–[26]. For a list: see Attorney-General’s Department, Australia, ‘New Australian Copyright Laws: Criminal Offence Provisions’ (Fact Sheet, 2007).

²¹⁷ Corporations may be fined up to five times that amount: *Crimes Act 1914* (Cth) s 4B(3).

²¹⁸ *Criminal Code* s 5.6 specifies the default fault element for various physical elements. Recklessness is defined: at s 5.4.

- 2 A summary offence carrying a maximum penalty of two years' imprisonment and/or \$13 200 (120 penalty units) for natural persons, which applies where the defendant intends their conduct and is negligent as to the fact that they are dealing with an infringing copy;²¹⁹ and
- 3 A strict liability offence which carries a maximum penalty of \$6600 (60 penalty units), which does not require proof of fault, although there is a defence of mistake of fact.²²⁰

The second innovation is the introduction of infringement notices for strict liability offences.²²¹ Federal or state police may now, as an alternative to prosecution,²²² issue on-the-spot fines of \$1320,²²³ and require the immediate forfeit of infringing copies in a person's possession and any device designed to make infringing copies,²²⁴ where they have 'reasonable grounds to believe that a person has committed an offence of strict liability'.²²⁵ A person issued with an infringement notice has two options: pay the fine (and forfeit), or risk prosecution and criminal conviction.²²⁶

The key to understanding the regulatory potential of these provisions lies in appreciating their breadth. Historically, there is no quantitative threshold for criminal liability for copyright infringement: almost all offences under the *Copyright Act 1968* (Cth) apply to the making of, or dealing with, a single infringing article,²²⁷ provided it is made for the purposes of trade or commercial

²¹⁹ Note that this means negligent as to the underlying facts which make the copy infringing, not negligence as to the *legal status* of their act. This makes it very difficult to understand how these mental elements will apply. Once you know, for example, that you are dealing with computer software (which is all within the period of the copyright term) — what takes you from 'negligence' as to your authorisation to deal with the copy, to 'recklessness'? Detailed examination is beyond the scope of this article; suffice it to say it is uncertain.

²²⁰ The defence of mistake of fact applies where a person acts under a 'mistaken but reasonable belief' as to the circumstances: *Criminal Code* ss 6.1, 9.2.

²²¹ *Copyright Act 1968* (Cth) s 133B; *Copyright Regulations 1969* (Cth) pt 6A.

²²² *Copyright Act 1968* (Cth) s 133B(1); *Copyright Regulations 1969* (Cth) reg 23V.

²²³ Twelve penalty units, or 20 per cent of the maximum for the strict liability offences: *Copyright Regulations 1969* (Cth) reg 23R. Commonwealth policy provides that the penalty in an infringement notice should be one-fifth of the maximum penalty for the offence, and should not exceed 12 penalty units for a natural person: Australian Government, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) 46–7. The level of fines chosen is the maximum allowed by Commonwealth policy, which is interesting given the additional punitive effect of the forfeiture requirement: see below n 224.

²²⁴ *Copyright Act 1968* (Cth) s 133B(1)(b); *Copyright Regulations 1969* (Cth) reg 23M. The requirement of forfeit may significantly compound the penalty; however, the definition of the relevant devices in s 133B of the *Copyright Regulations 1969* (Cth) and reg 23N of the *Copyright Regulations 1969* (Cth) appears to confine the definition to devices 'made to be used for making an infringing copy of a work' — a narrow definition that would exclude ordinary electronics. Note that if the authorised person issuing the notice requires forfeiture, and the recipient refuses, then an infringement notice cannot be given: *Copyright Regulations 1969* (Cth) reg 23O.

²²⁵ *Copyright Regulations 1969* (Cth) reg 23O(1)(a). See also at reg 23P(1)(a).

²²⁶ *Copyright Regulations 1969* (Cth) reg 23V. Payment of the fine, just like the payment of a traffic fine, is not an admission of guilt, nor does it lead to a criminal record. Prosecution does not follow inevitably from a refusal to pay the fine.

²²⁷ There has been some confusion about how this operates in practice. In law, liability arises in respect of infringing 'articles' (see, eg, *Copyright Act 1968* (Cth) s 132AD), which might suggest physical things, such as CDs. This is how the law was understood by the Minister for Justice and Customs: see Commonwealth, *Parliamentary Debates*, Senate, 30 November 2006, 164

advantage.²²⁸ As a result, behaviour extending all the way from the obviously ‘pirate’ through to quite commonplace commercial acts falls within the scope of the criminal offences. For example, s 132AD of the *Copyright Act 1968* (Cth) creates three offences (one for each tier of knowledge) where a defendant:

- makes an article (which includes an electronic copy);²²⁹
- to sell it or obtain ‘a commercial advantage or profit’; and
- the article is an infringing copy of a work or other subject matter in which copyright subsists.

Clearly, this provision applies to the obvious: the person who makes counterfeit copies of Hollywood DVDs en masse and sets out to sell them at the market. But the provision is also sufficiently broad to apply to a business whose employee makes a single unlicensed electronic copy, say of a computer program, for use in the course of business (this being use ‘to obtain a commercial advantage’).²³⁰ It might also apply where, for example, a business was selling a book which unintentionally included too large a proportion of someone else’s copyright material or which inadvertently used a copyright-infringing photograph on the cover. A further point which contributes to the breadth of the provisions is that they create Commonwealth offences, meaning that the provisions of the *Criminal Code Act 1995* (Cth) sch (‘*Criminal Code*’) relating to corporate criminal liability apply. Under those provisions, corporate criminal liability can arise not only from individual acts of ‘high managerial agents’ (such as executive officers or directors) of a company, but also where the company has a ‘corporate culture’ which encourages, or fails to discourage, the relevant criminal acts.²³¹ In the case of strict liability offences, companies have a defence only if they can

(Christopher Ellison), stating it ‘does not matter how many songs are on there; it is the article for which you are fined. It would not be a case of being fined 13 times, for each different song on the article.’ However, ‘articles’ in fact includes electronic copies of works (*Copyright Act 1968* (Cth) s 132AA), and draft guidelines issued by the Attorney-General’s Department state that ‘[t]echnically, for each song, there would be a separate breach’: Attorney-General’s Department, Australia, *Draft Guidelines: Copyright Amendment Regulations 2006: Infringement Notices and Forfeiture of Infringing Copies and Devices Scheme* (2007). This may, however, not be accurate: see Submission to the Attorney-General’s Department on the Draft Guidelines for Infringement Notices and Forfeiture of Infringing Copies and Devices Scheme, 10 October 2007, Submission No 1992 (Law Council of Australia) <<http://www.lawcouncil.asn.au/sublist.html?year=2007>>.

²²⁸ There are also distribution offences which apply in cases where the distribution is sufficient in scale to ‘affect prejudicially the owner of the copyright’: *Copyright Act 1968* (Cth) ss 132AI. Moreover, there is a further provision for infringements (more generally, not involving distribution necessarily) which are on a commercial scale and have a ‘substantial prejudicial impact’ on the copyright owner: at s 132AC. Offences relating to the recording of live performances have not tended to include a requirement that the recording be for commercial purposes, merely that it be unauthorised: at pt XIA div 3.

²²⁹ *Copyright Act 1968* (Cth) s 132AA.

²³⁰ Regarding the application of Australian law to this kind of ‘end user piracy’: see Attorney-General’s Department, Australia, Interpretive Note on End User Piracy, Appendix to Letter from Mark Vaile (Minister for Trade) to Robert Zoellick (United States Trade Representative), 17 November 2004 <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Section_Index.html>.

²³¹ *Criminal Code* s 12.3(2)(c)–(d). For a discussion of these provisions: see Jennifer Hill, ‘Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique’ [2003] *Journal of Business Law* 1, 16–20.

show 'due diligence'.²³² Would it not be common for a company to have a 'culture' that does not actively discourage copyright infringement? To avoid any risk of criminal liability, companies would need to have copyright compliance systems in place.

Now, no doubt this all sounds terribly alarmist. It is not unusual, after all, for criminal laws to be drafted more broadly than their application in practice, and it might be said that all these provisions, including the strict liability provisions, are intended to be applied only to 'obviously' criminal acts, such as the market sale of counterfeits. As with any overbroad criminal law, overbroad application of the law will inevitably be limited by budget constraints,²³³ and managed through police and prosecutorial discretion. The current ministerial direction to the Australian Federal Police identifies terrorism, transnational and multi-jurisdictional crime, illicit drug trafficking, organised people smuggling, serious fraud against the Commonwealth and money-laundering as priority areas — not copyright.²³⁴ According to the published policy of the Commonwealth Director of Public Prosecutions, prosecutions should proceed where, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued,²³⁵ considering (among a long list) the seriousness of the crime, mitigating or aggravating circumstances, characteristics of the alleged offender, the degree of culpability, the effect on public order and morale, the prevalence of the alleged offence, the need for deterrence, both personal and general, and whether any prosecution would be 'unduly harsh and oppressive'. There is clearly a vast difference in the seriousness of the offence committed by the market counterfeit seller as compared with the careless business infringer, so we would expect the business using infringing software to fall low on the general priority list. And while the Attorney-General's Department refused to specify any particular targets for the criminal provisions,²³⁶ as one Minister put it, 'the bill ... introduces reforms aimed at tackling copyright piracy online and at our markets and borders.'²³⁷

However, prosecutorial discretion is not a complete answer to the argument being put here, because I am not arguing that Australians will suddenly face

²³² *Criminal Code* s 12.5(1)(b). Factors relevant to due diligence include whether the company had 'adequate systems for conveying relevant information to relevant persons in the body corporate': at s 12.5(2)(b).

²³³ Although note, on the point of budget constraints, that the then Attorney-General later announced \$12.4 million in additional funding: Philip Ruddock, 'More Resources to Stop Piracy and Counterfeiting' (Press Release, 8 May 2007).

²³⁴ Australian Federal Police, *Annual Report 2005–06* (2006) 10, quoting the Ministerial Direction dated 31 August 2004 under the *Australian Federal Police Act 1979* (Cth) s 37(2).

²³⁵ Commonwealth Director of Public Prosecutions, above n 212, 9.

²³⁶ See Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 18–19.

²³⁷ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 113 (Christopher Ellison, Minister for Justice and Customs); see also Commonwealth, *Parliamentary Debates*, Senate, 30 November 2006, 164–5 (Christopher Ellison, Minister for Justice and Customs), explaining that: throughout my remarks in support of these amendments I have mentioned that the aim of the legislation is to target those pirates who are the 'genuine pirates', if I can call them that ... from my knowledge of the AFP and the people they have been targeting, it would ... be those people down at the markets who are selling CDs in a very organised fashion. They are the ones who are doing all the damage.

repeated infringement notices when they engage in innocuous acts. Rather, my point is that the provisions confer considerable discretion on the executive branch, in the form of enforcement agencies and prosecution agencies, without parliamentary oversight.²³⁸ By passing the *Copyright Amendment Act 2006* (Cth), Parliament gave the executive branch, including the police, carte blanche to determine all future copyright criminal enforcement matters, and an incredibly flexible and broad set of tools. Prosecution policy, and the drafting and updating of enforcement guidelines, are matters for the executive branch: both can change without parliamentary oversight.²³⁹ Furthermore, while it might well be that the current enforcement priority is targeted at ‘dudes at markets with counterfeits’, it is not hard to imagine an alternative strategy, directing enforcement efforts at the marginal infringer — the person who is generally compliant with legal obligations and will take little encouragement to make compliance a greater priority.²⁴⁰ A targeted blitz or campaign directed at a few members of such a societal group could yield significant benefits in terms of increased compliance from the group more generally. Consider, for example, the benefits to copyright owners and collecting societies alike of greater encouragement to businesses to obtain licences for all their photocopying activities,²⁴¹ or proper software licences.²⁴² Again, I am not saying that such a shift is in prospect now; rather, I am saying that it is not fanciful to imagine a decision to treat copyright more like a regulatory regime, with enforcement directed at ordinary businesses in particular, to encourage compliance. While the government has decided not to direct enforcement priorities for the present, the law is in place to facilitate such a move, and the decision to make such a shift would be a decision purely for the executive arm of government.

Thus, the government and/or prosecutorial agencies (whichever has this discretion allocated to them, depending on how guidelines are written) could choose, if they wished, to treat copyright as a regulatory regime, to be applied to business as well as the criminal fringe, compliance with which is to be encouraged through the use of infringement notices and the strict liability offences. The Attorney-General’s Department itself noted that the application of infringement

²³⁸ Cf *Customs Act 1901* (Cth) s 243 XA, which makes the infringement notice guidelines under that Act a disallowable instrument and thus subject to parliamentary scrutiny.

²³⁹ In theory, the actual discretion to determine enforcement policies here could lie with the Attorney-General’s Department, which drafts the guidelines, or with the actual enforcement agencies — that is, the police. Interestingly, when the government issued a draft version of its guidelines on the issue of infringement notices in August 2007, it did very little to structure the discretion of the police or prosecutorial authorities: Attorney-General’s Department, Australia, *Draft Guidelines: Copyright Amendment Regulations 2006*, above n 227, 8.

²⁴⁰ Sag, above n 50, 146–7.

²⁴¹ Licensing by commercial entities for such activities is listed by CAL as a potential area for growth in licensing revenues in its recent annual reports: see CAL, *Annual Report 2005–06* (2006) 2; Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill (2006)*, 30 October 2006, Submission No 29, 11–12, 20 (CAL). In August 2006, the CAL issued a press release promoting the licence and noting that ‘businesses need to be more aware of their copyright obligations following the recent changes to the *Copyright Act*’: CAL, ‘Businesses Urged to Consider Digital Copyright’ (Press Release, 15 August 2007).

²⁴² In fact, academic literature has advocated an almost ‘traffic-fine-like’ approach towards online infringement: see Lemley and Reese, above n 10, 1418.

notices is common for ‘lower level criminal transgressions of certain *regulatory offences*’.²⁴³ An examination of Commonwealth law reveals that infringement notices are used in areas where the goal of the law is compliance — for example, revenue laws,²⁴⁴ disclosure regimes,²⁴⁵ licensing regimes,²⁴⁶ environmental protection rules,²⁴⁷ and other safety rules²⁴⁸ — not the protection of private property rights.²⁴⁹ It is interesting that while copyright owner representative organisations like the Australian Federation against Copyright Theft (‘AFACT’) and Music Industry Piracy Investigations constantly liken copyright infringement to theft of physical property, there are no infringement notices for car theft or handbag snatching. The thinking behind an infringement notice scheme can usually be paraphrased as follows: ‘we think that you are not bad people generally, but you do need some obvious incentives to ensure you comply with this regulatory scheme.’ Indeed, some copyright owners were explicitly concerned that this might be the attitude of police: that police would use the infringement notices even where the circumstances indicated that charging and prosecution under a more serious offence would be appropriate.²⁵⁰ Whether the new provisions end up treating copyright as a compliance matter or something else will depend on how they are used — something we will only know in time.

It is worth noting, too, that the government did have other choices it could have made in order to achieve its goal of a more effective copyright enforcement regime: once again, it chose the most regulatory option, which suits bureaucratic institutions like collecting societies, and which arrogates to the executive the

²⁴³ Senate Standing Committee on Legal and Constitutional Affairs, *SSCLCA Final Report*, above n 78, 19 (emphasis added).

²⁴⁴ See, eg, *Tradex Scheme Act 1999* (Cth) s 28; *Customs Act 1901* (Cth) ss 243T–243V, 243Y; *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003* (Cth) ss 16, 20; *Excise Act 1901* (Cth) ss 117, 117B.

²⁴⁵ See, eg, *Corporations Act 2001* (Cth) s 1317DAC; *Broadcasting Services Act 1992* (Cth) s 65B; *Financial Sector (Collection of Data) Act 2001* (Cth) s 19; *Education Services for Overseas Students Act 2000* (Cth) ss 104–6; *Quarantine Act 1908* (Cth) s 70A; *Water Efficiency Labelling and Standards Act 2005* (Cth) pt 7.

²⁴⁶ See, eg, *Fisheries Management Regulations 1992* (Cth) pt 10; *Broadcasting Services Act 1992* (Cth) s 65B; *Migration Act 1958* (Cth) s 280; *Civil Aviation Act 1988* (Cth) ss 30DY–30EE.

²⁴⁷ See, eg, *Environment Protection and Biodiversity Regulations 2000* (Cth) sch 10; *Great Barrier Reef Marine Park Regulations 1983* (Cth) pt 14; *Airports (Environment Protection) Regulations 1997* (Cth) pt 8 div 2.

²⁴⁸ See, eg, *Airports Act 1996* (Cth) s 208; *Airport (Building Control) Regulations 1996* (Cth) pt 5 div 2; *Aviation Transport Security Act 2004* (Cth) s 117; *Interstate Road Transport Regulations 1986* (Cth) reg 52(2); *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) s 187; *National Transport Commission (Road Transport Legislation — Heavy Vehicles Registration Act) Regulations 2006* (Cth) sch 1 pt 3; *Road Transport Reform (Dangerous Goods) Act 1995* (Cth) pt 5; *Therapeutic Goods Act 1989* (Cth) s 42YJ.

²⁴⁹ There are some exceptions that do not fit readily into these categories: see, eg, *Spam Act 2003* (Cth) s 30, which authorises the provision of infringement notices for contravention of, for example, ss 16 (sending spam) and 20 (address-harvesting). These notices may be aimed at the legitimate business which makes a mistake, rather than the large-scale spammer. This is potentially similar to the kind of enforcement we could see in copyright law. The *Defence Force Discipline Act 1982* (Cth) also has a series of infringement notice provisions for minor disciplinary offences: at ss 23, 27, 29, 32(1), 35, 60. The *Workplace Relations Regulations 2006* (Cth) have a miscellaneous set of provisions with infringement notices: see pts 19, 19B. None of these areas concerns the protection of private property rights.

²⁵⁰ See, eg, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Provisions of the Copyright Amendment Bill (2006)*, 30 October 2006, Submission No 38, 3 (Australian Recording Industry Association).

maximum degree of power and discretion. If the aim is to increase copyright enforcement, the obvious step would be to make criminal copyright infringement a resources priority, and increase the budget dedicated to such activities,²⁵¹ or take steps to overcome other procedural difficulties that make enforcement unattractive to police.²⁵² Alternatively, assuming that it was necessary to make a broader set of tools available for enforcement against counterfeit manufacturers and sellers, there were various ways to limit the laws so as to make them less overbroad and more targeted at the problem of mass counterfeiting as presented to Parliament by, for example, imposing quantitative thresholds, limiting the application of the provisions to true counterfeits only, or even applying the infringement notice scheme only to cases where copyright material is being sold (rather than used for commercial advantage).²⁵³ Another alternative would have been to add criminal offences specifically targeted at the kinds of behaviour which appear to be of most concern to copyright owners. AFACT, for example, repeatedly cite a concern about camcording of films in cinemas: the government could have introduced a provision to make this act an offence (something even this enforcement-oriented piece of legislation notably failed to do).²⁵⁴ Or the government could have taken quite a different approach and sought to facilitate private criminal enforcement. The right to bring proceedings for private enforcement of criminal law is a longstanding common law right.²⁵⁵ Private parties already have a significant role in the investigation of IP infringement,²⁵⁶ and private prosecution of IP provisions is possible in Australian law.²⁵⁷ Experience shows that in other countries, too, it has been a useful tool.²⁵⁸ There are, how-

²⁵¹ This was done, but later: see Ruddock, 'More Resources to Stop Piracy and Counterfeiting', above n 233.

²⁵² For example, state police have the power to enforce criminal copyright provisions, but because copyright is a Commonwealth law, a different set of procedures applies than for prosecutions under state law; this suggests that measures to overcome these basic procedural problems might be a useful practical step.

²⁵³ See also Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Provisions of the Copyright Amendment Bill 2006*, Undated, Submission No 54A, 2-3 (Kimberlee Weatherall).

²⁵⁴ See Supplementary Submission to SSLCA, *Inquiry into Provisions of the Copyright Amendment Bill 2006*, 9 November 2006, Submission No 57B, 1 (Australian Federation Against Copyright Theft) noting that 'over 90% of the 13 million pirate movies sold or the 11 million downloaded in Australia in 2005 started life with a person copying the film in a cinema with an ordinary camcorder'.

²⁵⁵ Where the alleged criminal breach affects the plaintiff's personal rights or would inflict special damage on them: *Gouriet v Union of Post Office Workers* [1978] AC 435.

²⁵⁶ Standing Committee on Legal and Constitutional Affairs, *Copycats Report*, above n 211, [3.22]-[3.23]; see also Tim Prenzler and Michael King, 'The Role of Private Investigators and Commercial Agents in Law Enforcement' (2002) 234 *Trends and Issues in Crime and Criminal Justice* 1, 3.

²⁵⁷ *Crimes Act 1914* (Cth) s 13; *Director of Public Prosecutions Act 1983* (Cth) s 10(2). The Commonwealth Director of Public Prosecutions has the power to take over a private prosecution: *Director of Public Prosecutions Act 1983* (Cth) s 9(5). According to the *Prosecution Policy of the Commonwealth*, the private prosecutor should be permitted to retain the prosecution unless there is insufficient evidence, there are grounds to suspect that 'the decision to prosecute was actuated by improper personal or other motives', or to proceed would be 'contrary to the public interest': Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, above n 212, 17.

²⁵⁸ See, eg. Law Commission, England and Wales, *Consents to Prosecution: A Consultation Paper*, Law Com No 149 (1997) (recommending private prosecutions in IP be brought to an end);

ever, barriers to the effective use of private prosecution, not least the confusing current system which involves different procedures in different jurisdictions around Australia. Admittedly, it does not lie within the power of the Commonwealth Attorney-General to change the rules on private prosecutions across Australia, but there would be nothing to prevent the Attorney-General's Department from seeking to facilitate changes which encouraged such methods of enforcement against serious 'pirates'. Instead, the approach of having tiers of offences, and in particular, the creation of strict liability offences arguably makes moves towards private prosecution *less* likely. With so many enforcement provisions in the *Copyright Act 1968* (Cth), and so many of them strict liability provisions, it seems unlikely that the government would want to place such a powerful tool in the hands of private parties.²⁵⁹ I am not seeking here to advocate private prosecutions, which carry a series of well-known risks.²⁶⁰ The point is that the government had choices: to provide the budget necessary to increase enforcement via public bodies; to narrow the strict liability offences and infringement notice regime to the identified criminal acts, and thus require recourse to Parliament before any significant departure from that situation in prosecution policy were proposed; or to encourage more private enforcement. Instead, the government chose to broaden the tools of public enforcement, confer on itself significant discretion, and create the legal environment for treating copyright in a similar manner to compliance-oriented regulatory regimes.

C The TPM Provisions

My final example, and the third high profile area where the *Copyright Amendment Act 2006* (Cth) made changes to copyright, is in relation to anti-circumvention law. Anti-circumvention laws give legal protection to technical measures used by copyright owners to control use of their copyright content, particularly in a digital context. They do so by making it illegal to 'crack' (or in legal terms, 'circumvent') those technical measures, and/or to sell devices, programs, or provide services for such circumvention. In other words

Gwilym Harbottle, 'Private Prosecutions in Copyright Cases: Should They Be Stopped?' [1998] *European Intellectual Property Review* 317 (defending the option); Law Commission, England and Wales, *Consents to Prosecution: A Final Report*, Law Com No 255 (1998) (retreating from recommendation to abolish, and supporting their continuation on the basis of feedback received). See also Standing Committee on Legal and Constitutional Affairs, *Copycats Report*, above n 211, [4.59]–[4.60].

²⁵⁹ There is a significant body of commentary expressing the view that private prosecutions are of little or no value in a context where there exists a professional, independent prosecuting service — namely, the Director of Public Prosecutions: see *Jones v Whalley* [2007] 1 AC 63, 71 (Lord Bingham); Law Commission, New Zealand, *Criminal Prosecution*, Report No 66 (2000) [258].

²⁶⁰ For example, cutting across public prosecution policies: concerns about the 'unduly vengeful or vexatious' private prosecutor (Law Commission, New Zealand, above n 259); the oppressiveness of using criminal proceedings when civil proceedings would be just as appropriate (*Thames & Hudson Ltd v Design & Artists Copyright Society Ltd* [1995] FSR 153; Law Commission, England and Wales, *Consents to Prosecution: A Consultation Paper*, above n 258, [6.48]); the potential for use of criminal proceedings by a private prosecutor to bolster their negotiating position in a civil dispute (Law Commission, England and Wales, *Consents to Prosecution: A Final Report*, above n 258, 68); and the risks of excessive litigation by powerful companies: Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 235. Cf Harbottle, above n 258, 318–20.

we are talking about technologies such as Apple's FairPlay technology, which limits the use and copying of music purchased from iTunes, and the Content Scrambling System used to prevent copying of movies released on DVD. Anti-circumvention law has been a highly controversial area of copyright reform, in part because such technical measures, while being used to protect copyright, are also used for 'non-copyright' purposes: preventing copying for criticism or review, for example, or even for such unpopular measures as 'region-coding' (geographical segmentation of markets) or 'platform lock-in' (iTunes-purchased songs, for example, cannot be played on other digital music players).²⁶¹ It was also a particularly controversial area in the process of implementation: the initial release of draft legislation led to a flurry of submissions and significant changes to the legislation prior to the Bill being introduced into Parliament.²⁶² This is not the place to explore the more general issues surrounding the implementation, which will no doubt be explored in other work.

In terms of options, the *AUSFTA* left the Australian government only limited choice in how to enact Australia's new anti-circumvention laws.²⁶³ There are several parts of the new anti-circumvention laws which fit the general pattern described in this Part, such as the strictly limited and detailed list of exceptions, but where this merely reflects the terms of the *AUSFTA*, rather than a deliberate legislative choice, it is of less interest. For present purposes, however, one aspect of the implementation is worthy of note. Under art 17.4.7(e)(viii) of the *AUSFTA*, Australia is entitled to introduce new exceptions to the ban on circumventing access control technical measures 'when an actual or likely adverse impact on ... non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding'. The provision is modelled on a triennial process for creating new exceptions to the equivalent ban under US law,²⁶⁴ in which the US Office of the Register of Copyrights, an administrative agency which is part of the Library of Congress,²⁶⁵ reviews whether users are being unduly disadvantaged every three years. In the US, a public announcement is made of the review, and a process of submissions, reply submissions, and public hearings follows, with the end result being a 'rule-making' by the Librarian of Congress on advice from the Register of Copyrights. While the relevant provision of the *AUSFTA* summarised this US system for managing copyright

²⁶¹ See also Clapperton and Corones, above n 140.

²⁶² The submissions are appended to the Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, Undated, Submission No 69B (Attorney-General's Department). The changes made, and their significance, are discussed in Dale Clapperton, 'The Elusive "Link" to Infringement in the Copyright Amendment Bill 2006: Now You See It, Now You Don't' (2007) 19 *Australian Intellectual Property Law Bulletin* 141-4; Kimberlee Weatherall, 'Response to Dale Clapperton's Article' (2007) 19 *Australian Intellectual Property Law Bulletin* 145.

²⁶³ Opened for signature 18 May 2004, [2005] ATS 1, art 17.4.7 (entered into force 1 January 2005). See generally Rimmer, above n 37; Emma Caine and Kimberlee Weatherall, 'Australia-US Free Trade Agreement: Circumventing the Rationale for Anti-Circumvention?' (2005) 7 *Internet Law Bulletin* 121; House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73.

²⁶⁴ 17 USC §1201(a)(1)(C) (2000 & Supp V, 2006); House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73, 138-9.

²⁶⁵ The role of the Copyright Office is described: see above n 141.

exceptions, the *AUSFTA* did not include all the machinery of that process in its text.²⁶⁶

This left the government some choice as to how the system should be managed and by whom. A number of possibilities spring to mind: proceedings could have been carried out by the CLRC (but of course, it no longer exists),²⁶⁷ the Copyright Tribunal,²⁶⁸ a parliamentary committee (such as the House of Representatives Committee which conducted the TPM Inquiry in 2005), or the Attorney-General's Department.²⁶⁹ There was also a question of how often reviews should occur: whether there should be, in effect, a 'once-every-four-years extravaganza', or, on the other hand, whether there should be opportunity to apply at any point for an exception (ad hoc reviews). The recommendation of the House of Representatives Committee, accepted by the government, was that the Attorney-General's Department should conduct reviews, and that both ad hoc and periodic reviews should be available, and that any resulting exceptions should be promulgated by way of the *Copyright Regulations 1969* (Cth).²⁷⁰ This is now reflected in s 249 of the *Copyright Act 1968* (Cth). The presence of an ability to conduct ad hoc reviews creates an interesting dynamic, the potential of which I will return to in a moment. However, it is worth further noting that the legislation confers considerable discretion on how the process will occur within the executive. Section 249 does not require a public review,²⁷¹ publication of any submission made,²⁷² or any opportunity for reply submissions to be made.²⁷³ The only apparent form of parliamentary scrutiny that would apply would be the tabling of any regulations made.²⁷⁴ This gives the Minister the power to set the process, and vary it, and subject it to the degree of transparency which they think fit — even reject the conclusions of any independent body which conducts any

²⁶⁶ This forms an interesting contrast with the ISP safe harbours, where even the machinery was specified in a side letter: see above nn 144–7 and accompanying text.

²⁶⁷ See above n 19.

²⁶⁸ Many stakeholders rejected the Copyright Tribunal as being an unsuitable body for various reasons: see House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73, 142.

²⁶⁹ *Ibid* 141.

²⁷⁰ *Ibid* 143–7; see also *Copyright Act 1968* (Cth) s 249; *Copyright Regulations 1969* (Cth) reg 20Z, sch 10A.

²⁷¹ There is no general legal requirement that persons affected by the making of subordinate rules should be heard by the rule-maker: G J Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569.

²⁷² As noted above, submissions from Attorney-General's Department, 'Fair Use Review', above n 70, were not initially published; nor were submissions on the Exposure Draft: Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth) until requested by the Senate Standing Committee on Legal and Constitutional Affairs.

²⁷³ There was no process of reply submissions in the TPM Inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs, although there was a process of reply in another, mini-review run by the Attorney-General's Department more recently. Compare the process applied in the US: see above n 264 and accompanying text.

²⁷⁴ Under Australian law, regulations must be notified in the *Commonwealth of Australia Gazette*, and then tabled before each House of Parliament within 15 days of having been made. Within 15 sitting days of tabling, a motion of disallowance may be made, in which case the regulations will be debated. However, they need not be passed or formally approved by the Parliament. Bottomley, above n 158, 11 has also noted, citing Page, above n 123, 8–9, that the level of ministerial involvement in the making of regulations is less than that would be expected during the drafting of legislation. It is unclear whether the same would be true in this context.

review.²⁷⁵ Thus, again, as with the criminal enforcement provisions, maximum discretion and flexibility have been reserved to the executive branch.²⁷⁶ It should be clear from the above that the final shape of the system adopted was a matter of government choice: it looks very little like the US system which was the model for the provision of the *AUSFTA*.

The power to create new exceptions ad hoc is, in my view, a particularly interesting power, which could be used to affect significantly the nature of relations between copyright owners and copyright users. Technological protections for digital copyright works operate in a dynamic market. To over-generalise a complicated process and vast literature, large corporate copyright owners in particular have often exhibited a desire to control all or close to all uses of their copyright material, and to enforce those controls through technology, limited only by the extent of user resistance to the technology (make it too hard to use material and people will not pay). Users, both institutional and individual, tend to want more freedom to use and communicate copyright material. Also relevant are the consumer electronics manufacturers, who may be caught between a rock and a hard place: wanting to produce electronics that will grant users more freedom, but needing the consent of copyright owners before they can manufacture the devices that will read copy-controlled copyright works. Interactions between all of these players will, in the end, determine the controls placed on copyright material and their effectiveness; controls which may be different depending on the particular market in question. Anti-circumvention laws tend to strengthen the hand of the copyright owners. For example, with such laws in place, if copyright owners only sell their works digitally in encrypted form, then the maker of any technology to render or allow consumers to use the files must have the permission of the copyright owner to sell their technology.²⁷⁷

From a public policy perspective, the best possible result is if technology does not block desirable uses, if copyright owners provide the access that people need, while maintaining the level of profitability that will ensure continued creation, and if mutually beneficial deals can be reached between all three relevant groups. As I have argued elsewhere,²⁷⁸ it is possible that policymakers can facilitate this outcome by showing themselves willing to create new exemptions. If policymakers show themselves willing to provide exemptions in the face of unwarranted blockages imposed by copyright owners on socially valuable uses, particularly uses by institutional users more capable of using the procedure for

²⁷⁵ Cf House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73, 143, which proposed that the ‘public nature of any future inquiries be set out in the *Copyright Act 1968*’, and that the process be made ‘as transparent as possible with all material considered by the review available publicly.’ Transparency has not been a feature of the recent reviews by the Attorney-General’s Department.

²⁷⁶ Amusingly, the Exposure Draft: Copyright Amendment (Technological Protection Measures) Bill 2006 (Cth) reserved an even broader discretion to the government — it allowed the Minister to respond to any submission seeking an exception any time within four years of receiving it: at s 116AK(9)–(13).

²⁷⁷ There is a vast literature on how digital rights management works, and how it interacts with anti-circumvention law, but a general level introduction may be found in House of Representatives Standing Committee on Legal and Constitutional Affairs, *TPM Inquiry Report*, above n 73.

²⁷⁸ Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 21 October 2005, Submission No 38 (Kimberlee Weatherall).

creating ad hoc exceptions, copyright owners will have a greater incentive to be receptive to user concerns, or make deals, rather than simply stonewall requests for access. A similar system is in place in Europe to encourage 'fair use by design' under the *Information Society Directive*.²⁷⁹ Under that directive, member countries must 'take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law', in the absence of 'voluntary measures taken by rightholders'.²⁸⁰ The purpose of the European system is to encourage copyright owners to 'create space' for users, but failing that, owners may be compelled to make non-encrypted versions of works available to users.²⁸¹ This approach may be particularly important for a country like Australia, which, given its small economy, cannot hope to influence the general development of technology, but may have some influence in relation to particular concerns expressed by significant stakeholders.

Of course, we ought not to assume that the government will use this power to make exceptions ad hoc so as to affect the relations between copyright owners and users. The power might well end up being a dead letter. However, the potential is clearly there for the Attorney-General's Department to influence the practices of copyright owners in their dealings with users.

V CONCLUSIONS

In earlier Parts of this article, I outlined the kind of process Australia went through in reaching its new copyright law: one where copyright policy went 'in-Department', where all the substantive choices, other than those dictated by treaty, were made within the bounds of the bureaucracy. The laws that resulted from this process arguably bear the hallmarks of their heritage. My three examples serve to illustrate two important points. First, that system *matters*: reforms look different when observed through the lens of their effect on the bureaucratic system which relates to copyright law, and the constitution and relations between institutions that impact copyright and copyright stakeholders. Secondly, that throughout the recent reforms the Australian government showed a marked tendency to make choices displaying two features:

- 1 the adoption of legislative features and tools more often seen in regulatory regimes, including, in particular, highly specified rules or guidelines, either in legislation or encouraged by it, which can be applied in effect automatically; and
- 2 the allocation of decision-making power to expert officials, in the form of new or extended roles for various parts of the executive.

²⁷⁹ European Parliament and Council, *Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 2001/29/EC (2001).

²⁸⁰ *Ibid* art 6.4.

²⁸¹ For a detailed discussion of the merits of the fair use by design approach: see Burrell and Coleman, above n 131, 70–5. For a discussion of the issues of using copyright law to influence copying technologies: see Andrew T Kenyon and Robin Wright, 'Television as Something Special? Content Control Technologies and Free-to-Air TV' (2006) 30 *Melbourne University Law Review* 338.

While I have chosen three high profile areas of copyright reform in which to explore these decisions, I could have picked others: recent reforms also expanded the jurisdiction of the Australian Copyright Tribunal,²⁸² in particular over collective licences;²⁸³ granted various roles to other bodies, including the Australian Competition and Consumer Commission ('ACCC')²⁸⁴ and the Australian Communications and Media Authority ('ACMA'),²⁸⁵ to make decisions which will impact on the scope and nature of copyright owners' rights; and, of course, introduced the ISP safe harbour regime described briefly above.²⁸⁶ All of these reforms obviously increased the role of various parts of the executive. While I have not discussed them in any detail, they too, contribute to the general flavour of the recent reforms.

At the risk of some repetition, I should remind the reader that I am not seeking to describe a conspiracy of self-aggrandisement, nor, necessarily, a new phenomenon: copyright law has long been accompanied by a considerable bureaucracy. It may be that we could look back at other periods of copyright reform and draw similar conclusions about the choices law-makers made. Alternatively, looking back at past reform periods we might find very different approaches being adopted. Without doing a detailed study, it would be foolish to draw conclusions. I have sought to point out the nature of recent choices: a subject of all too little commentary. This discussion raises a number of interesting questions.

From a purely practical perspective, both the history and the analysis presented here suggest that more thought needs to be given to how the copyright system ought to be managed on an ongoing basis. There is no evidence that any serious

²⁸² *Copyright Amendment Act 2006* (Cth) schs 10–11.

²⁸³ The new powers include the power to: declare or revoke the declaration of a collecting society (*Copyright Act 1968* (Cth) ss 135P, 135Q, 135ZZB, 135ZZC, 135ZZT, 135ZZU); make determinations regarding all licences administered by collecting societies (at s 136); entertain applications made by collecting societies, or members of those societies, for review of the arrangements for allocating and distributing remuneration (at ss 135SA, 135ZZEA, 135ZZWA, 183F); and more generally, make determinations on 'any question that is necessary or convenient to help an administering body of an educational or other institution or the collecting society to comply in the future with the requirements of the statutory licences': at ss 135JAA, 135JZWA.

²⁸⁴ The ACCC was given a role in proceedings before the Copyright Tribunal, which may have regard to any relevant guidelines issued by the ACCC when making a determination (*Copyright Act 1968* (Cth) s 157A), and admit the ACCC as a party to Tribunal proceedings (*Copyright Act 1968* (Cth) s 157B): see ACCC, *Copyright Licensing and Collecting Societies: A Guide for Copyright Licensees: Draft for Comment* (2006) 5, 33.

²⁸⁵ The *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) gave the ACMA 'more general powers ... to determine standards' in relation to communication technologies: Revised Explanatory Memorandum, *Broadcasting Legislation Amendment (Digital Television) Bill 2006* (Cth) 81 (discussing sch 2A of the Bill). The ACMA now has the power to set technical standards relating to the transmission of, and receivers for, digital television broadcasting and datacasting services: *Broadcasting Services Act 1992* (Cth) ss 130A–130B. In the US, similar powers granted to the Federal Communications Commission were used in order to require television reception equipment to recognise the 'Broadcast Flag' — that is, copyright protecting technology, although this was later overturned: see generally David Brennan, 'Flag Waving in the Digital Jungle' in Andrew T Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (2007) 214; Kenyon and Wright, above n 281. The *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth) sch 2A also added a new pt 9B to *Broadcasting Services Act 1992* (Cth), giving ACMA the power to register, and hence make enforceable, industry codes, which could deal with such matters as Electronic Program Guides ('EPGs').

²⁸⁶ See above nn 144–7 and accompanying text.

thought has been given by the government to how we can ensure that the various powers described here can be exercised in a coherent or consistent way. As charted in this article, powers and discretions have been allocated to all different kinds of executive bodies: the Attorney-General's Department (copyright and international law divisions) and the Attorney-General, DFAT (as these matters relate to trade agreements), the Copyright Tribunal, the federal and state police and prosecutorial authorities, the ACCC, and the ACMA. All have a role or potential role in matters relevant to determining the scope and exercise of copyright rights. Relations between these different organisations do not appear to be formalised in any way. Unlike many other areas where there is an increasing trend towards regulation, in copyright there is no industry regulator to formulate overall policies and priorities; on the contrary, there are many, who occasionally have reason to look at copyright (no doubt, askance).²⁸⁷ This raises an interesting question: do we need either some concentration of these powers and discretion, as Ricketson has previously argued, for the sake of coherence and efficiency,²⁸⁸ or alternatively, a supervisory body of some kind, as the Labor Senators considering the *AUSFTA* proposed at one point?²⁸⁹ Or alternatively, does the involvement of all of these different regulators, with their different perspectives and priorities, represent a strength, not a weakness, of the Australian system? Without a much more detailed discussion, I am not able to answer those questions; I merely point out at this stage that it is a debate we need to have.

Beyond these very practical questions, the material discussed in this article also raises some interesting broader issues. What is the appropriate level of delegation to the executive of ongoing copyright policymaking? How much parliamentary oversight should there be? As scholars in copyright, how can we evaluate the efficiency and effectiveness of Australia's 'copyright bureaucracy'? And are these recent trends merely reflective of the nature of IP as a form of 'bureaucratic property', or part of a general trend towards greater regulation? In future work I hope to address some of these questions. Suffice it to say, there is much thought to be given to the institutions of intellectual property generally, and copyright in particular.

²⁸⁷ Cf corporate law, where the Australian Securities and Investments Commission maintains primary responsibility, although there are others involved, such as the Australian Stock Exchange: Bottomley, above n 158, 1–4.

²⁸⁸ Ricketson, above n 8.

²⁸⁹ SSCFTA, *SSCFTA Report*, above n 54, 230. The recommendation was for 'a Select Committee on Intellectual Property to comprehensively investigate and make recommendations for an appropriate IP regime for Australia in light of the significant changes required to Australian IP law by the *AUSFTA*.' It was aimed at dealing with the *AUSFTA* changes, so is perhaps less relevant now. However, a standing committee of the type proposed, also recommended by Ricketson, could exercise consistent oversight by Senators who would not have to educate themselves each time about copyright: see above n 8; cf above n 138 and accompanying text. The government's response to this was that no such committee was necessary, given that Australia's IP legislation is 'extensively governed' by commitments in multilateral and bilateral treaties: Australian Government, *Government Response to the Final Report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America*, 4 <http://www.aph.gov.au/senate_freetrade/gov_response/gov_response.pdf>.