University of New South Wales
University of New South Wales Faculty of Law Research Series

Year 2007 *Paper* 62

Copyright Infringement Notices Scheme: A Submission to the Attorney-General's Department

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Copyright Infringement Notices Scheme: A Submission to the Attorney-General's Department

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Abstract

At the end of 2006, the Australian Federal Government passed the Copyright Amendment Act 2006 (Cth), containing a number of new, lower-level criminal provisions aimed at creating greater enforcement of criminal copyright activities. This paper is a response to draft Guidelines issued by the Attorney-General's Department aimed at assisting law enforcement officers in the implementation of the infringement notices and forfeiture of infringing copies and devices scheme. The paper cites areas of the guidelines where more detail is required and suggests methods for improvement. It also explores other considerations the Attorney-General's Department should to take into account for the infringement notice scheme to operate fairly and effectively.

Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions

Submission to the Attorney Generals Department

Re: Draft Guidelines: Copyright Amendment Regulations 2006 – Infringement Notices and Forfeiture of Infringing Copies and Devices Scheme

Researchers at the Cyberspace Law and Policy Centre, based at the University of New South Wales, are involved in intellectual property research through the Australian Research Council Linkage project 'Unlocking IP'[1].

This paper is a response to draft Guidelines issued by the Attorney-General's Department assisting law enforcement officers in their implementation of the infringement notices and forfeiture of infringing copies and devices scheme.

We thank the Attorney-General's Department for providing an opportunity to respond to these Guidelines. A number of issues raised during the passage of the *Copyright Amendment Act 2006* (Cth) were not properly addressed at that time, including the application of the new infringement notice scheme. We appreciate both the difficulty in developing these guidelines and the opportunity to submit comments on these proposals.

We understand that no changes can be made to the current Australian copyright law and feedback must take into account the existing legal framework. Our submission takes account of this limitation and makes suggestions on the basis of the existing framework of the current law.

The paper responds to the different sections of guidelines provided in the draft. In section 12 the paper considers other considerations the Attorney-General's Department should to take into account for the infringement notice scheme to operate fairly and effectively.

1. Purpose and Scope of the Guidelines

"The Guidelines should be read in conjunction with the *Copyright Act 1968* and the *Copyright Regulations 1969* as amended. The definitions set out in the *Copyright Act* and the *Copyright Regulations* apply to terms used in these Guidelines." However, as with our submission in relation to Attachment A (point 11) of the Guidelines below, it is important to provide more effective educational assistance for law enforcement officers and other interested parties on the detailed scope and definitions of terms. The legal and 'street' definitions of copyright terms differ; if

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[1] See the Project's pages at <http://www.cyberlawcentre.org/unlocking-ip/>

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officers are to enforce these new additions to copyright law fairly, it is important for this assistance to be provided effectively.

Note that while they are framed as providing assistance for *only* enforcement officers in relation to the scheme, they are in effect Guidelines which every citizen potentially affected by the provisions in the Scheme should take into account in seeking to understand how the Copyright Act will be enforced in practice. Given the breadth of the Act and its history of prohibitions on many practices routinely carried out by very large proportions of the population, the new Scheme will potentially affect a lot of people, so the Guidelines should be read in the context of their general usefulness, not just their usefulness for enforcement officers. This is all the more so because the Scheme is dealing with strict liability offences, and in a process where they may not be subject to expert prior review by eg independent prosecutors. (We have elsewhere raised concerns about the use of strict liability offences in such a complex, inconsistent and poorly understood area of the law.)

Other commentators have questioned whether the Guidelines are too vague to be of practical assistance, given the inadequacy of the definitions themselves to provide a basis for assessing the application of the legislation in the context of the complex range of actual behaviours, technologies and practices in the real world, and the inconsistency between *de facto* past application and potential strict application under the new Guidelines. These concersn deserve serious consideration, as aspects of copyright law in Australia have in the past been characterised by non-existent, arbitrary or inconsistent enforcement, often in the face of impractical, unenforceable or confusing provisions. Past experience seems to indicate that the bare statute and regulation definitions may not be adequate or realistic guides to interpretation.

The wide discretion to create one or multiple notices for multiple items, offences and copies also creates significant uncertainty that Guidelines should expressly seek to address.

Vagueness or lack of effective detail is manifest in a number of places through the Guidelines, and we offer comments below on many of these.

There are several means which might remedy this problem. One is to conduct rounds of independent ‘user testing’ and refinement, where the Guidelines’ effectiveness in assisting a range of actual readers is assessed objectively. Test readers would include law enforcement officers, but also other typical users such as young people dealing with digital media, small business people engaged in potentially infringing activities, non-specialist advisors, and others who should be assisted by the Guidelines to appreciate the practical application of the Scheme.

A second remedy would be to increase the specificity of the document generally, and the range and detail of examples and scenarios used to show worked operation of the Guidelines.

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2. Overview of the infringement notices and forfeiture of infringing copies and devices scheme

In conjunction with enforcement officer assistance on this issue, and as implied above, other sections of the public similarly need to be effectively educated on this scheme and its ramifications (for example, 'pay[ing] a penalty as an alternative to prosecution').

3. Meaning of Certain Words

We have little comment regarding these definitions, given each term emanates from the *Copyright Amendment Regulations 2006,* other than the general comments above.

The use of more detailed examples, as suggested above, would be particularly helpful in this area, both in terms of offering more examples scenarios, and also in exploring the limits or boundaries of the case. For instance, a DVD burner *in some instances* could be an 'infringing device', so it would be useful to explain some of the instances where this would be true, and others where it would not.

See also our comment about the meaning of 'infringing device' and other terms, below at 11.

4. Service of an infringement Notice

The guidelines require an authorised officer to have reasonable grounds to believe that all the elements of the infringement notice offence are present. This is based on regulation 23P of the *Copyright Regulations* 1969. It is arguable that the translation of this test into practice will develop over time.

Note particularly the questions below about whether many common devices can be 'infringing devices', and hence whether they need to be forfeit to enable a notice to be struck.

4.1. Discretion of authorised officer

In their current form, the draft guidelines do not provide sufficient assistance as to how the wide available discretions should be applied by the 'authorised officer'. While flexibility and provision of a large array of determining factors is useful, there is still a danger that infringement notices will be applied in an arbitrary or inconsistent manner, leading to uncertainty for both enforcing officers and the wider community. This is in principle an issue with some other infringement notice schemes; however, the distinctive nature of copyright, this Scheme and the type of behaviour that it criminalises makes this issue more urgent.

Examples of the volume of goods that would normally require an infringement notice would be useful. Numerical benchmarks would provide a helpful reference point which can then strengthen or weaken the case for exercise of discretion depending on other factors.

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4.1.1. Authorised officer's judgment as to appropriateness of a notice being issued.

Some aspects may be difficult for an authorised officer to determine. For example the guidelines ask that the authorised officer establish 'whether the breach has been in an *organised manner'*. The Guidelines should offer more information about indicators that the breach has occurred in 'an organised manner'.

We appreciate that the introduction of fixed indicators may be problematic given that offenders or potential offenders may shift practice to avoid the appearance of organised activity as described in these guidelines. However, these would only be 'indicators', and whether to issue an infringement notice would ultimately depend upon the discretion of the authorised officer.

Furthermore if activities are of an organised nature then it will not be useful to target the sellers and others on the periphery with infringement notices. Investigation and location of those orchestrating the activities would be far more effective than targeting those that may have been unwittingly forced to peddle infringing articles. Ultimately, it is those that are most vulnerable that are likely to be placed in the position of scapegoat on the street, and subsequently, those that are most vulnerable under this Scheme. This should be taken into account when authorised officers' are exercising their discretion and should form part of the education program suggested under point 12.2 below.

'Practical considerations' is also vague.

4.1.2. Significance of the breach

Greater guidance is required regarding the importance of the 'nature of the goods' as it relates to the significance of the breach. One question that requires consideration is what type of goods aggravates the significance of the breach and *vice versa*.

Similar comments could be made about 'organised nature' and 'relatively minor nature'. At present these are in effect potentially arbitrary categorisations.

5. Multiple Offences

There is a high probability that multiple offences will occur at the same time, since the conduct involved is typically 'copying' and it is almost as easy to make multiple copies of eg, a digital media item as it is a single copy. This includes both multiple incidents of the same offence (as shown in the example) and multiple incidents of many different offences.

For example, a market stall owner has four infringing copies of four copyright protected DVDs. The market stall owner has these four copies displayed on a table. An individual purchases one copy. In this instance the market stall operator could conceivably be served infringement notices for the following:

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- Section 132AE(5) Selling or hiring out infringing copy
- Section 132AF(7) & (8) Offering infringing copy for sale or hire

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- Section 132AG(7) & (8) Exhibiting infringing copy in public commercially
- Section 132AI(7) Distributing infringing copy
- Section 132AJ (8) Possessing infringing copy for commerce

The question that arises in this instance in whether 7 different infringement notices can be issued. Could this then be multiplied by each infringing article? A market stall operator with just four infringing DVDs could then lead to 28 infringement notices, which is equivalent to a fine of $36,960.

While it might be argued it is unlikely that 28 notices would actually be issued to this operator, the example demonstrates the potential scope for infringement notices to be issued in an inconsistent and potentially oppressive manner.

A further quantitative discretion arises where each component item on a single copied medium is a 'copy' itself. Take a CD with say 10 separate copied music tracks. 'Technically, for each song, there would be a separate breach,' say the Guidelines. If this was applied 'technically', the number of potential notices could therefore be multiplied by 10 if each breach was subject to a separate notice, as presumably it could be in law. In the example above, this would suggest a maximum available penalty of nearly $370,000 for 4 CDs.

A Scheme whereby an officer has a potential 'technical' discretion between applying no penalty and one equivalent to the price of a small house needs much more specific guidance as to the effect of these quantitative factors.

It might be appropriate to suggest a maximum amount of fines that can be issued, or a maximum number of infringement notices, for basically the same conduct. If the officer believes that more is required, it is probably a matter that is best pursued by prosecution.

(It also perhaps points to a more fundamental problem with the underlying regime, if a 'technical' interpretation is acknowledged to result in a probably unintended outcome in a typical situation. It is not easy to ascertain how an ordinary citizen is meant to interpret the law if it is assumed in these Guidelines that a technically and legally correct application of the plain words of the statute is not intended to be the basis of the operation of the Scheme, but some arbitrarily more relaxed or 'pragmatic' interpretation at the discretion of each individual officer. Wide arbitrary discretion, particularly as to liability and penalty, is acknowledged as poor law. It is all the more so here where there the offences are strict liability.)

6. Forfeiture requirements

We have a number of comments on aspects of forfeiture under the Scheme:

- **In what circumstances may forfeiture occur?**

  It may be quite difficult to determine if a particular device (section 132AL(8)) is 'to be used to' create infringing copies. This determination does not only involve extensive knowledge of technology (and the vast array of devices that can be used to create infringing copies, for example, a mobile phone) but has the potential to create confusion amongst both law enforcement officers and the

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general community when such devices often have multiple and often legitimate uses.

It also requires a prediction about the future intention of the creator, and the work to be copied, as the infringing copying has not yet been made. While it is not required under 132AL(11) to prove which particular work is to be copied, presumably there must be some indication that there is at least one relevant work which will be copied so as to infringe copyright. Some further guidance is needed here.

See also our comments about the meaning of 'infringing device' in the context of mass market consumer devices, below at 11.

- **What is the procedure for forfeiture?**

The guidelines tell us that "the authorised officer may inform the person that if they agree to forfeit…then the person may avoid prosecution". There is the danger that police can use this to scare potential offenders into forfeiting goods or devices. This is particularly concerning given the potentially arbitrary application of infringement notices, and the narrow wording of the definition of 'infringing device'.

See also our comment about the meaning of 'infringing device', below at 11.

7. Contents of infringement notice

7.1. What must be included?

We support the details that are included in Attachment B, including the fact that a nominated person can contact the 'relevant police force' to apply to have the notice withdrawn (though the effect of this in re-opening exposure to further liability should be flagged), or apply for an extension of time or payment by instalment.

7.2. What else can be included?

A table listing the offences, dollar amount of penalty units, address of location and where payment can be made and method of payment and reasons for issuing the notice as outlined in the draft guidelines are useful elements of an infringement notice. The inclusion of these details would be helpful to both enforcement officers and offenders.

7.3. Time for serving notice

While the regulations stipulate that fines may be issued within 12 months after the day of the alleged offence the guidelines should suggest that this should only occur in the most exceptional circumstances, ones which should require documentation and justification, and that typically they should be issued on the spot or immediately after the detection of the alleged offence.

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Note that the deterrent qualities of an infringement notice diminish over time and would not usually be appropriate to issue over such a lengthy period of time.

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8. Payment

We support this inclusion of provisions and guidelines for both an extension of time for payment and the payment of the fine through instalments.

9. Failure to pay

We have no comments on this issue.

10. Withdrawal of an infringement notice

We support the inclusion of provisions and guidelines for withdrawal of infringement notices where appropriate.

The alleged offender should be notified of the effect of the withdrawal: that they may still be prosecuted.

11. Attachment A: Guide to the elements of the strict liability offences

Greater guidance is required regarding the interpretation of the elements of each of the offences and the distinctions between them.

For example, looking at s 132AF, offering infringing copy for sale or hire, 132AF(7) requires that "the person by way of trade offers or exposes an article for sale or hire," while 132AF(8) requires that "the person offers or exposes an article for sale or hire, in preparation for, or in the course of, obtaining a commercial advantage or profit". The distinction between these two provisions, while presumably of some legal effect, is not obvious, and guidance is required regarding which provisions should be used in particular circumstances.

There are also a number of terms that arguably require clearer interpretation in the application of the guidelines. We discuss the first few of these, and flag others for more attention:

- 'infringing copy' – this requires considerable knowledge of other sections of the *Copyright Act*. Officers in the field should have assistance from the Guidelines in making an assessment of what this key term means, and how to avoid unwittingly issuing notices in relation to items which are not infringing copies.

  For instance, there are a variety of situations where there are rights or entitlements under explicit or statutory licence, contract, the Act itself or for other reasons which mean that a copy may not be an 'infringing copy'. Certain software and literary works are, for example, released under licences which permit commercial exploitation without permission or explicit authorisation.

  It may also be difficult for law enforcement officials to immediately establish if copies are legitimate or not for other reasons. For example, pirated books can appear to look quite close to the real thing. A similar situation applies to some pirated DVDs and CDs. This, coupled with the parallel imports of some

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intellectual property leading to significant price drops, could lead to authorised officers issuing infringement notices for non-infringing copies. Wrongly issued notices can be contested but this incurs extra burden to the system and should not occur in the first place.

- 'infringing device' – the definition in the Regulations[2] would not apply to most mass market consumer electronic devices capable of making copies, since to fall within the Regulations they must have 'been made to be used for making an infringing copy'. Most ordinary consumer copiers, phones, DVD burners, computers, fax machines, digital cameras, iPods and the like will presumably not have been made by their typically foreign commercial manufacturer with the intent that they be used for making 'infringing copies' under Australian law; indeed, many now come with notices explicitly advising or warning against infringing uses and noting that penalties are applicable in many jurisdictions.

  There are of course specialist devices which are specifically made for the purpose of making an infringing copy, properly subject to 132AL(8) but they would typically be in a quite small minority, given the ubiquity of generic copiers.

  If it is claimed that eg., a domestic DVD burner or any other consumer electronic device could fall within the definition of 'infringing device' under the regulations, and hence be forfeit, much more guidance is needed about the interpretation and limits of the meaning of 'made to be used for making an infringing copy'. Failure to do this could result in a spate of false allegations and unwarranted forfeitures to avoid prosecution. This will lead to the required destruction of the devices[3]; there is not an economical means of redress or reparation if the allegation that a device is infringing and hence subject to forfeiture prior to the notice being issued turns out to be wrong, and the device wrongly destroyed. (Although there is provision for refund of a penalty amount if a notice is withdrawn, there is no provision for compensation for the consequences of an incorrect allegation that a device was an 'infringing device'.)

  The reasonableness of an allegation that a device was 'made to be used for making an infringing copy' is especially critical, because it may be that the mere allegation, not the truth, that it is so made is what triggers its inclusion in the category of 'infringing device' and thus forfeiture and destruction.

  A worst-case scenario is where officers make routine allegations that devices are infringing without due consideration of the legal reality that most common devices were not made for the required purpose and thus should not be infringing. If a mere allegation is enough, even if erroneous in law, to cause a device to be thus properly liable for forfeiture and destruction, then the Guidelines bear a heavy burden of counteracting any tendency to make

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[2] Copyright Amendment Regulations 2006 (No. 1) (SLI No 328 Of 2006) - Schedule 1; Copyright Regulations 1969, Reg 23N

[3] Reg 23O (4)

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falsely broad assumptions about the proper scope of this definition.

There may also be a need for further consideration of the adequacy of the 'device' entry in the table in para 38, as there may be some devices the possession of which may be an offence under parts of 132AL, but which are not themselves subject to forfeiture, not having 'been made to be used for making an infringing copy'. At the very least this should say 'Infringing Device'. It should probably also refer to the limits on the scope of this definition.

It is also probable that the words '(or possession)' in the offence column here are wrong in law, as the strict liability offence 132AL(8) does not include a possession element, unlike some other offences in 132AL. The Guidelines are misleading on this, inviting a blurring of the limited strict liability offence ss(8) with the rest of that section.

- 'copyright subsists' – While in the majority of cases it may be more or less obvious to an authorised officer whether a work is copyright protected (for example, infringing copies of *The Bourne Ultimatum* or other movies currently in cinemas), there may be occasions where the copies involved are public domain works. Although this may be less common, it is important to highlight this possibility. See also the discussion of 'infringing copy' above.

- 'by way of trade'
- 'commercial advantage or profit'
- 'exposes'
- 'exhibits'
- 'distributes'
- 'indirect recording'
- 'protection period of the performance'

This attachment is a direct transplant of the provisions in the *Copyright Act*. Law enforcement officials should be aware of the elements of each offence; however, given the complexity of copyright law (and history of difficulty of applying provisions in the *Copyright Act* both in the real-world and inside the court room) a plain English guide would also be useful.

12. Other Considerations

12.1. Review of guidelines

Due to both the complex nature of copyright law and the novelty of this scheme we believe that it is essential that the guidelines are reviewed on a regular basis. In the first year of application the guidelines should be reviewed at the end of a six-month period. After the first year guidelines should be reviewed on a yearly basis.

Experts from a range of disciplines and perspectives should be involved in this review, given the contentiousness of the new law, the complexity of technologies, and the scope for improper use of discretion.

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The review should contain the following information:

- Statistics revealing the amount of notices issued.
- Statistics revealing the amount of warnings issued.
- Statistics revealing the amount of cases prosecuted.
- Information and statistics regarding the amount of such activities considered to of an 'organised' nature
- The numbers of notices issued to each alleged offender (in cases where a notice is issued at all), the number of media copies involved, the number of copied items and the number of infringements alleged against each copy.
- Geographic areas where the most notices are issued.
- Survey of law enforcement officials issuing notices and their feedback on the scheme, especially in relation to their understanding of when infringement notices are appropriate.
- Statistics of cases of electronic versus physical infringement.
- Numbers of items forfeited and nature of these items.
- Indicators of the effectiveness of the infringement notice scheme.
- Changes in the amount of notices issued over time.
- Implement necessary improvement to Scheme.

12.2. Resources

Appropriate resources will need to be allocated for training and education of officers that will be issuing infringement notices under this Scheme. The Scheme involves a complex area of law and the use of infringement notices in this area is novel. No notices should be issued unless the issuing officer has been properly trained and educated regarding this scheme and its application. In addition to training and education that is conducted prior to the implementation of the Scheme, such training should also continue if the Scheme is to be effective, fair and responsive to technological change. This education will also be an important factor in ensuring that the Scheme is not open to abuse.

Finally, resources will also need to be allocated to educate the public in relation to the implications of this new scheme and how it may affect them.

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