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Australian Libraries Copyright Committee

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***Copyright Infringement
Notice Scheme Guidelines***

**Joint Submission of the
Australian Digital Alliance and the
Australian Libraries' Copyright Committee**

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1. Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA), and the Australian Libraries' Copyright Committee (ALCC).

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Council of Archives
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

The ADA and ALCC thank the Attorney-General's Department for this opportunity to make comments on the Draft Copyright Infringement Notice Scheme Guidelines (the **Guidelines**).

In submissions to Ms Helen Daniels in November last year the ADA and ALCC outlined concerns relating to the introduction of a strict criminal liability scheme for copyright infringements, and made a number of comments and recommendations in relation to the operation of an infringement notice scheme.

In summary, we were concerned that there was no limit placed on the number of infringement notices that could be issued at one time, and the very large possible range in the number of infringement notices that could be issued in one fact scenario. We were also concerned that this large possible variance, and the fact that police officers with little knowledge of the complicated area of copyright law would be making the decisions, it would be very possible that cases with similar fact circumstances might be treated quite differently by different officers.

Following the release of the Guidelines, a number of our concerns remain. We set out below our comments and recommendations in relation the Guidelines.

2. Issuing Infringement Notices

The Guidelines currently leave the question of whether or not to issue an infringement notice to the discretion of the officer. We note the Guidelines set out some factors the officer should consider, but believe that further guidance is necessary.

In particular, the ADA and ALCC recommends the Guidelines elaborate on the given factors by providing further indications of:

- what might constitute a “significant” breach;
- what value of goods would suggest the officer should issue an infringement notice;
- what quantity of items would suggest a notice should be issued; and
- what might constitute a “practical consideration”.

By way of comparison, the *Customs Infringement Notice Guidelines*¹ devote eight pages to guidance for officers exercising their discretion to issue an infringement notice. The *Customs Infringement Notice Guidelines* even include numbers and dollar amounts in the indicators for officers to consider when deciding whether to serve an infringement notice, such as:

- In the context of section 243T, the amount of duty loss resulting from the false or misleading statement is less than \$1250.
- In the context of section 243U, there are less than 5 false or misleading particulars or omissions in the relevant statement.²

The ADA and ALCC recommend the Guidelines take a similar approach.

In addition, we recommend that further guidance on these factors come in the form of a number of detailed case-study style example. The *Customs Infringement Notice Guidelines* provide numerous short examples to illustrate the scope of legal definitions and to elaborate on the types of factors officers should consider when making decisions under the Infringement Notice Scheme. For example, the *Customs Infringement Notice Guidelines* use an example to illustrate what a “material particular” might be:

The date of arrival or departure of a ship is important for the purposes of Customs examining cargo, because the wrong date could prevent examination.³

We believe the Guidelines should be replete with examples in a similar way. Indeed, the Guidelines would benefit from more detailed examples than those contained in the *Customs Infringement Notice Guidelines*, due to the complexity of copyright law. Customs officers are likely to be familiar with customs rules, hence detailed examples are not so necessary, however in the case of the Copyright Infringement Notice Scheme, police officers will not have a detailed knowledge of copyright law, and even

¹ Commonwealth. *Customs Infringement Notice Guidelines* (2006). Available online: <http://www.customs.gov.au/webdata/resources/files/InfrinNoticeGuidelinesDiv5.pdf>.

² Ibid at 24.

³ Ibid at 8 – 9.

when administering the scheme, will be unlikely to gain a knowledge of the finer points of copyright law.

We recommend the Guidelines include scenarios which illustrate when the value and/or quantity of goods might be considered less significant, and a contrasting example of where the value/quantity of the goods would suggest a significant breach. A number of detailed examples could also provide some guidance on how these factors should be balanced with each other, and even how the different types of offences relate to one another.

For the reasons given above, the ADA and ALCC believe that the current example of the market stall owner given at paragraphs 30 – 32 is insufficient, as there is no indication of how an officer would go about making a decision, nor any actual guidance on what might be a reasonable conclusion in the given example, merely the comment that the officer needs to “use his or her discretion” in deciding whether to issue a notice, and how many notices to issue.

Without further guidance for officers, there is a high likelihood that factually similar cases could be treated very differently by different officers, with one officer deciding a breach is not “significant”, while another seeing the breach as significant enough to warrant issuing multiple infringement notices.

The Guidelines should seek to ensure that like cases are treated alike, and to do this, the ALCC and ADA recommends inclusion of detailed examples.

Multiple offences

A related issue the ALCC and ADA wishes to raise relates to the guidelines specifically dealing with multiple offences. In the market stall owner example the Guidelines note that “technically for each song there would be a separate breach”⁴. In this given set of facts, an officer could potentially issue a vast number of infringement notices. The Guidelines leave this to the discretion of the officer, and suggest the officer refer to the general factors in deciding how many infringement notices to issue.

Further guidance on when to issue multiple offences is important since there is such a high possible variance in the number of infringement notices that could potentially be issued, and, as mentioned in the section above, this could lead to highly disparate penalties being imposed by different officers in factually similar cases. In the given example of the stall owner, the possible number of infringement notices that could be issued ranges between zero up to forty or perhaps even a hundred notices. Thus, the guidelines would themselves seem to countenance everything from a fine of \$1320, right up to a fine - in the case of a hundred infringements - of \$132,000.

⁴ We agree with Kimberly Weatherall’s submission, that this reading of the law may not be accurate, and that “article” should be read as being the separate item in the transaction, so that a physical CD would be one article, and an individual file made available online would be one article.

The ALCC and ADA recommend that the Guidelines include specific guidance on issuing multiple offences, and specific case-study style examples by way of illustration.

Another point we wish touch upon is that the funds obtained from these offences do not go to the copyright owners in the form of restitution, but go directly to the Crown; that is, the purpose of the fine is to deter copyright infringement, and not compensate copyright owners. The ADA and ALCC believe that only a minimal number of infringement notices would be necessary to discourage individuals from infringing behaviour, due to the relatively high penalty of \$1320 per single infringement notice.

Indeed, if one set of facts were to give rise to multiple infringements, this could lead to the recipient being liable for a significantly higher fine than would be imposed were the matter taken to court. This offends the Commonwealth's policy principle that infringement notices should not be used to impose higher fines than the courts would issue.⁵

In order to ensure that the Copyright Infringement Notice Scheme is consistent with this policy, the ADA and ALCC recommends that the Attorney-General's Department ascertain, and publish, information on the fines which have been imposed as a matter of criminal law for copyright infringement, and the numbers of copies involved. This would provide far more concrete guidance for both officers, in deciding whether to issue multiple infringement notices, and recipients of infringement notice(s), than the vague "discretion" currently seen in the Guidelines.

Prosecution vs. Infringement Notice

A related issue is the lack of practical guidance on the appropriateness of issuing an infringement notice as opposed to a prosecution notice. We recommend case-study style examples be used to illustrate when an offence may be "too significant", too organised, or too high a volume for an infringement notice.

Circumstances for infringement notices

We note comments made during debate over the *Copyright Amendment Act 2006* and on the Attorney-General's Department Criminal Offence Fact Sheet, that the intended targets of the infringement notice scheme are not legitimate businesses or consumers, but that these provisions are "aimed at tackling copyright piracy online and at our markets and borders".⁶

The Guidelines do not currently suggest there will be any limit to the factual circumstances in which the notices may be issued. This is an issue of particular concern to our institutional and business members.

⁵ Commonwealth, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004), 47. Available at: [http://www.ministerjusticeandcustoms.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~ConsolidatedGuideFebruary2004.pdf/\\$file/ConsolidatedGuideFebruary2004.pdf](http://www.ministerjusticeandcustoms.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~ConsolidatedGuideFebruary2004.pdf/$file/ConsolidatedGuideFebruary2004.pdf).

⁶ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, 113 (Chris Ellison, Minister for Justice and Customs).

The magnitude of collections of copyright works within a number of institutions, as well as the problem of materials whose copyright owner is difficult or impossible to trace (orphan works) means that it is likely that some uses within the collections might be infringing copyright. The ADA and ALCC believes it would be unduly punitive to apply the Infringement Notice Scheme to institutions undertaking socially beneficial activities for the public good.

As noted, it was stated that the Scheme was *not* directed at the actions of legitimate businesses. As Minister Chris Ellison stated during the parliamentary debates, “they are not aimed at ordinary people but at copyright pirates who profit at the expense of creators”⁷ and “the government’s commitment to copyright law reform has been clear and consistent to make the law fairer for consumers and tougher on the real pirates.”⁸

The ADA and ALCC agrees and argues that legitimate businesses making use of copyright works, including through use of licensed electronic material are in no way “the real pirates” and the guidelines should make this clear.

The ALCC and ADA therefore recommends that the Guidelines state the intended purpose and targets for the scheme, in order to avoid criminalising the activities of legitimate businesses, and institutions which are undertaking socially beneficial activities for the public good.

Information for recipients of infringement notices

The Guidelines currently set out the required form of notice in Schedule 11C and suggest that an infringement notice may include the dollar amount of the fine, the place where the fine may be paid and reasons for issuing the notice.

In the opinion of the ALCC and ADA, the current level of optional and required information for the notices is unsatisfactory. This is a new scheme, and so recipients of infringement notices will likely know little about the consequences of receiving a notice, and little about their options.

The ALCC and ADA believe it is particularly important to include:

- The dollar amount of the fine, and the maximum dollar amount that a court could impose for the alleged offence. This is preferable to stating the maximum number of penalty units as most individuals will not know how much a penalty unit is.
- A clear statement that the individual is not obliged to pay the fine, but that the matter may go to court if the individual does not pay the fine.
- An accompanying information sheet, providing general information to the recipient of the notice.

⁷ Ibid.

⁸ Ibid at 112.

We draw your attention once more to the *Customs Infringement Notice Guidelines* and the suggested infringement notices set out at Appendix C. The notices are written in plain English and are easily understandable. Each infringement notice also contains a two page information sheet in question and answer format, and includes information about seeking withdrawal of the notice, where payments can be made, a contact number for further information and, usefully, what the consequences of paying or not paying are for the individual.

The ALCC and ADA also notes that in this complicated area of copyright law, it is even more important to ensure that recipients are provided with ample information. Further information we suggest including is information about seeking withdrawal of the notice. This should inform the recipient that simply ‘not knowing’ they were infringing copyright is not a sufficient ground for withdrawing the notice. There should also be information on what might constitute an “honest and reasonable mistake of fact”.

We strongly recommend the Guidelines provide for a plain English information sheet to accompany the infringement, and that the infringement notice itself be set out in an easily understandable format, with plenty of information.

3. Forfeiture

Infringing device

Section 133 of the *Copyright Act (Cth) 1968* provides that a court may order the forfeiture (amongst other things) of a “device or equipment used or intended to be used for making infringing copies”.

Section 133B of the *Copyright Act (Cth) 1968* relates to the Infringement Notice Scheme and provides that regulations can be made relating to the forfeiture of a device “that is alleged to have been *made to be used for making an infringing copy...* that is alleged to have been involved in the commission of the offence” (emphasis added). This phrase is used in the Copyright Regulations 1969 to define an “infringing device”.

It is clear that section 133 has a wider scope, encompassing anything used (or intended to be used) for making infringing copies, whereas section 133B only allows regulations to be made in relation to devices that have been specifically made for the purposes of making infringing copies.

The ADA and ALCC sees this narrower scope as logical, given the different processes followed in each case. Section 133 relates to an order made in court following full court processes, while section 133B relates to an ‘on the spot’ decision of a police officer. Were section 133B not narrower in scope, officers would be faced with making decisions as to whether common items such as laptops or DVD burners have been used, or intended to be used by a person for making infringing copies, with limited evidence and information available to them, and less procedural protection, as compared with a court order.

The ADA and ALCC believes that the Guidelines do not currently make this difference in the scope clear , nor do they provide officers with enough guidance as to what an “infringing device” might include.

The Guidelines restate the definition of “infringing device” as found in the copyright regulations (and section 133B). They then state that “this could include a DVD burner in some circumstances”. We do not believe this example is sufficient to assist police officers in deciding whether something is an infringing device.

We recommend that the Guidelines go into further detail with this example, and need to provide further examples of other devices that might come within this definition. In the given example we recommend using the example of a DVD burner specially modified to avoid copy protections. Examples of devices that would not come under this definition might be *general purpose* laptops and CD or DVD burners.

Legal Advice

The Guidelines do not currently state that a person can seek independent legal advice prior to forfeiting items or devices. We recommend that the guidelines set out exactly how the matter of legal advice will be dealt with in a context where instant forfeiture of devices and copies is required, although the notice can later be challenged.

4. Other comments

Copyright information for officers

Because copyright is a very complex area of law, it is unlikely that authorised officers and nominated persons will have a deep understanding of this area. The ALCC and ADA recommends that people involved in the scheme receive copyright training from the Attorney-General’s Department to assist and inform their decision making processes under this scheme.

Record keeping

We note the Guidelines do not include guidance on how records of past notices, payments and other related information will be kept. The ALCC and ADA recommends that thorough records of the scheme be kept, reported and published by the Attorney-General’s Department in order to monitor the use and effect of the infringement notice scheme, particularly at this early stage of the scheme.

Involvement of other parties

The Guidelines do not currently contain any information about the involvement of any other parties in the infringement notice process. The ALCC and ADA believe that Guidelines should outline the operation and procedure for issuing infringement notices as transparently as possible.

Copyright enforcement groups such as the Music Industry Piracy Investigations, the Australian Federation against Copyright Theft and the Business Software Alliance are known to have been involved in criminal enforcement and investigation in the past.

We are concerned that these types of groups may be the only source of copyright information for the officers, as well as the recipient of the infringement notice. In the absence of further guidance on the exercise of the officer's 'discretion' we are concerned that it will be the information from these groups that will provide guidance as to how the officers exercise their discretion.

We recommend that the guidelines clearly set out the appropriate role of such groups, and the appropriate limits of the role of any representatives of these groups. This is as much for the protection of the officers concerned as for the recipient of the infringement notice.

5. Conclusion

The purpose of the Guidelines, as stated at paragraph 2, is to "assist law enforcement officers in their use of the infringement notices and forfeiture of infringing copies and devices scheme". It is the ADA and ALCC's view that the Guidelines, for the most part, currently consist of summaries of the relevant provisions under the *Copyright Act (Cth)1968* and the *Copyright Regulations (Cth)1969*. These summaries will no doubt assist law enforcement officers, however the ADA and ALCC believes that further guidance, particularly in the form of illustrative examples, needs to be included in the Guidelines, in order to achieve this purpose.

The ADA and ALCC thanks the Attorney-General's Department for the opportunity comment on the Draft Copyright Infringement Notice Scheme Guidelines.

Please contact us should you have any further queries or like us to provide further information.

Yours sincerely,

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