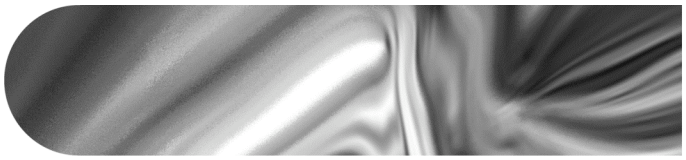

AUSTRALIAN COPYRIGHT COUNCIL

Submission to Senate Legal and Constitutional Affairs Committee on Copyright Amendment Bill 2006

October 2006

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Australian Copyright Council

1. The Australian Copyright Council is a non profit organisation. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.

2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions on the Copyright Amendment Bill 2006.

Major areas of concern

- The private copying exceptions – for time-shifting and for format-shifting – do not comply with international treaty obligations because they undermine current and future markets for copyright material and unreasonably prejudice the interests of copyright owners.
- The application of the proposed section 200AB to activities in libraries, educational institutions and cultural institutions is uncertain. The government has not made known the issues which this amendment is intended to address, which has made it difficult to put forward more workable solutions.
- Section 200AB would allow profit-making educational institutions, and libraries in profit-making entities, to make free use of copyright material.
- There are international precedents for a defence of parody but not, as far as we are aware, for a defence of satire.
- The provision intended to allow communication for the purposes of facilitating a screening in class has a wider application than unintended.
- The provision intended to allow certain sorts of caching by educational institutions has an unintended wider application.
- The new definition of "record" to include "file" has the unintended consequence of extending the statutory "mechanical" licence in Part III Division 6 to digital downloads.
- The exemptions to circumvention liability under the Draft Copyright Amendment Regulations 2006 (Technological Protection Measures) do not meet the requirements of the Australia–US Free Trade Agreement.

Lack of information about reason for and/or intended application of certain provision

3. One of the difficulties in responding to some of the provisions in the bill is that the government has provided little or no explanation of the reasons for them. Issues about which we seek more information in order to properly respond to provisions in the bill include:

- the reasons for the "format-shift" provisions relating to books, newspapers and other periodicals (s43C), and for photographs (s43D);
- the intended meaning of "different form" in s43C; and
- the activities of libraries, educational institutions and cultural institutions intended to be covered by s200AB.

Schedule 3 – technological neutral definitions

4. Schedule 3 includes a new definition of "record". The definition now includes "electronic file". It appears that the definition has been amended in connection with the new provision allowing format-shifting of music.

5. The amendment of the definition would have an unintended effect of extending the operation of the statutory licence for recording of musical works under Part III Division 6 of the Copyright Act to digital downloads.

6. The new definition should therefore not apply to Part III Division 6, and the old definition should be reinstated for the purposes of that Division.

Schedule 6 – Exceptions to copyright infringement

Part 1: Time-shifting

7. The proposed new exception for time-shifting interferes with current and future markets for time-shift copies. The following are examples:

   - On 25 October, each commercial break during the screening of the first episode of the series "Tripping Over" included an advertisement stating that the program would be available for download from BigPond from midnight that night. The program is available for download for $2.95.[1]
   - Past episodes of the series 'McLeod's Daughters' can be downloaded for $1.95 each from the CatchUpTV service on the Ninemsn website.[2]

8. In some cases, television and radio programs are made available for free. Some ABC television programs are available as video podcasts,[3] and many ABC radio programs are available as audio podcasts.[4] The copyright owner's interests can be prejudiced if the program is acquired from another source. For example, the copyright owner loses the opportunity to gauge the number of people watching or listening to a time-shift copy of the program.

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1 http://downloads.bigpondmovies.com/displayItem.do?id=si1001328

2 http://video.ninemsn.com.au/catchuptv

3 http://www.abc.net.au/services/podcasting/video.htm

4 http://www.abc.net.au/services/podcasting

9. The new exception would allow the recording of a television or radio program even if a legitimate time-shift copy is available.

10. In addition, the recording may be kept indefinitely; there is no obligation to destroy it at any time. It may also be watched any number of times. The provision requires that a person make the recording to watch broadcast content at a more convenient time. That time could be any time in the future. If, after watching the recorded program the person decides to retain the program to watch again, the exception still applies. This outcome is inconsistent with the government's stated intention.

11. In our view, if the exception is to remain, it should not apply unless:

    - it is destroyed within 14 days, and
    - a copy of the program is not available within 14 days.

Proposed amendment to the bill:

12. We propose that the bill be amended by adding the following paragraphs to proposed new s111(1):

    (c) the cinematograph film or recording is destroyed within 14 days of being made; and

    (d) the cinematograph film or sound recording is not used for a purpose other than that described in paragraph (b); and

    (e) at the time the broadcast is made the person has ascertained after reasonable inquiry that the material broadcast will not be available to the person within 14 days of the broadcast at an ordinary commercial price.

Part 2: Format-shifting

13. The new exceptions for format-shifting interfere with current and future markets for copyright material. For example:

    - articles from the Sydney Morning Herald are available in digital form from www.smh.gov.au, but the new provision would allow a person to digitise a printed version;
    - many books are available in electronic form – ebooks.com, for example, advertises 69,000 titles;
    - publishers of academic journals offer electronic copies of articles in the journals, usually for a fee; and
    - AMCOS (which licenses music on behalf of composers and music publishers) can offer a format-shift licence for private copying of music;[5]

14. The new exceptions mean that when you buy something that contains copyright content, you may also have one or more additional copies of that content for free, irrespective of the price (if any) paid for the original.

15. Each of the format-shift exceptions in the bill allows a format-shift copy to be made to use *instead of* the original. A plain reading of the bill suggests that the exception does not allow the person to use both the original and the copy. The explanatory memorandum, however, says that "instead of" does not mean the original must be

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5 http://www.amcos.com.au/music-users/making_records/tranferring_music.asp

stored, and that it may be used as well as the copy. If this is the case, we do not know what "instead of" is intended to indicate. In our view, if the format-shift exceptions are to remain, they should only apply to a copy made to use in place of the original.

Books and periodicals (proposed new s43C)

16. We do not know what has prompted the government to introduce a format-shift amendment for books and periodicals (which would include newspapers, magazines and academic journals), or what activities the government wants to regulate with this provision. The reason for the new provision is not explained in the Explanatory Memorandum, nor are there any examples given.

17. The exception would allow the making of a copy which embodies the work in a "different form" to that of the original. The meaning of "form" is unclear. The exception relating to photographs allows the making of an electronic copy from a hardcopy version, and vice-versa. This terminology has not been used for books, newspapers and periodicals, which indicates that "different format" is intended to mean something other than electronic copy from hardcopy and vice-versa. The exception relating to sound recordings refers to "different format", which appears to refer to file format. This terminology is not used in proposed new s43C, which indicates that the exception is not intended to allow the making of a different file-format version (Microsoft Word to PDF, for example).

18. Given the lack of adequate explanation of, or justification for, this exception, we submit it should be omitted from the bill. If it is to remain, it must be conditional upon the non-availability of the material in the form being made by the consumer.

19. The following paragraph should be added to proposed new s43C(1)

    (f) at the time the main copy is made the person has ascertained after reasonable inquiry that a copy in that form is not available within a reasonable time at an ordinary commercial price, and that a licence scheme to make a copy in that form is not available within a reasonable time at an ordinary commercial price.

20. In addition, the meaning of "different" format needs to be clarified. That requires an explanation from the government about what, other than hardcopy to electronic copy and vice-versa, "different format" is intended to cover.

Photographs

21. Like the provision for books and periodicals, we do not what has prompted the government to introduce this amendment. We do not know if the exception is meant to address people's personal collections of photographs – such as holiday snapshots and wedding photographs – and/or whether it is intended to address photographs reproduced in items such as books, magazines and newspapers.

22. In relation to personal collections of photographs, we note:

    - Copyright in personal photographs, such as holiday snapshots, will nearly always be owned by the person who took the photograph.
    - Copyright in photographs commissioned from a photographer for private and domestic purposes (such as wedding photographs) is owned by the commissioning client unless copyright was dealt with in the agreement (which is common), in which case the agreement determines copyright ownership and licensing. The new exception will not affect the contractual arrangements.

23. We think the exception should be omitted from the bill.

24. If the exception is to remain, the following paragraph should be added to proposed new s47J:

    (e) at the time the main copy is made the person has ascertained after reasonable inquiry that a copy in same form as the main copy is not available within a reasonable time at an ordinary commercial price, and that a licence [scheme] to make a copy in that form is not available within a reasonable time at an ordinary commercial price.

25. In addition, we seek an explanation from the government of the intended application of the provision. Depending on the explanation, the provision may need to be amended to better give effect to the government's intention.

Sound recordings (proposed new s109A)

26. If the exception allowing format-shifting of sound recordings is to remain, it must be redrafted so that it does not undermine the licence scheme AMCOS can offer. We note that such a licence – as a result of other amendments in the bill – would be subject to the jurisdiction of the Copyright Tribunal.

27. The provision would not apply to podcasts. The Explanatory Memorandum says that the purpose of this exclusion is "to avoid including within the scope of 109A merging markets for digital recordings such as 'podcasts'".[6]

28. It is no clear why this is the only emerging market the government has chosen to recognise and protect. The rationale for the exclusion of podcasts applies equally to any other digital download. The exclusion should therefore apply to all digital downloads, not just digital recordings of radio programs (which are currently excluded).

29. In addition, most digital downloads are covered by a contract with the downloader, so in practice the exception would rarely apply, but the non-exclusion of digital downloads will create a false expectation about the application of the exception to digital downloads and confusion about the relationship between the exception and the contractual provisions.

30. We understand that this amendment has been driven by a view that a person who purchases a CD for $30 should be entitled to copy tracks from that CD onto a portable device such as an iPod. We do not agree with this view. If the provision is to remain, however, its operation should be limited to the scenario that gave rise to it.

31. If the provision is to remain, it should be limited to the copying of sound recordings from compact discs purchased by the owner in Australia at an ordinary commercial price. In addition, it should not apply to the copying of material covered by a licence scheme.

Proposed amendments to proposed new s109A

32. The following amendments would give effect to our position:

    - Replace all references to "record" with "compact disc". Alternatively, a paragraph could be added to the effect that "record" in this section means "compact disc".
    - Add a new paragraph to section 109A(1):

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6 Paragraph 6.34.

(aa) the owner purchased the compact disc in Australia for an ordinary commercial price.

- Amend proposed new section 109A(1)(b) by omitting "of a radio broadcast or similar program", so that the exclusion reads:

  (b) the record was not made by downloading over the Internet a digital recording

- add a new paragraph (f) to proposed new section 109A(1):

  (f) if a licence scheme allowing the making of the main copy is available in relation to any copyright embodied in the record, the owner has acquired a licence under that licence scheme to make the main copy.

Videotapes (proposed new s110AA)

33. In our view, it is not unreasonable to ask consumers to purchase DVD versions of films they purchased on videotape, in the same way that consumers have purchased CD versions of music previously purchased on vinyl.

Part 3: Use of copyright material for certain purposes

34. We have been unsuccessful in obtaining from the government information about the issues it intends to address with this provision. This makes it difficult to assess whether or not the proposed exception is the best response to the issues the government is seeking to address.

35. We seek, again, information from the government about which activities it wants to allow by the application of this new exception.

Three-step test

36. Proposed new s200AD includes the "three-step test" from international treaties. This test is intended to apply to exceptions to copyright infringement in national legislation.

37. We think more useful guidance would be given by a test based on the "availability" test in the library use provisions and in the educational use provisions, and on section 40(2) (fair dealing for research or study).

38. Under this proposal, the exception would not apply to:

- the making of a reproduction or copy if the reproduction or copy is available in the form required within a reasonable time at an ordinary commercial price; and
- an activity which is licensed under a licence scheme (licence schemes are subject to the jurisdiction of the Copyright Tribunal).

39. In other cases, the exception could allow the use of a work for a specified purpose provided the use was fair, which would be assessed by having regard to:

(a) the purpose and character of the dealing;

(b) the nature of the work or adaptation;

(c) the possibility of obtaining a licence to make the use within a reasonable time at an ordinary commercial price;

(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and

(e) in a case where only part of the work or adaptation is used – the amount and substantiality of the part used in relation to the whole work or adaptation.

Application of s200AD to profit-making entities

40. Proposed new s200AD allows free use of copyright material. It should not be available to profit-making educational institutions. Nor should it be available to libraries and other collections held by profit-making entities.

Commercial advantage

41. We do not know how the exclusion of a use "for a commercial advantage" is intended to apply, except that, according to the Explanatory Memorandum it "would not necessarily preclude use on a cost recovery basis". "Commercial advantage" suggests that the use is assessed in relation to the activities of the user organisation as a whole. It also suggests that the user organisation is operating for profit. We do not know whether the government intends the exclusion to apply to non-profit as well as profit-making entities.

42. In our view, profit-making entities should be excluded altogether from the provision.

43. In our view, the government's intention would be given better effect if the following were added:

> "obtaining a commercial advantage" includes supplying a product or service containing the work and/or other subject matter for a fee which exceeds the cost of the materials and labour used to produce the product or service.

Parody and satire

44. We do not object to an exception for parody, providing it does not interfere with copyright owners' licensing of parodical versions. We understand that the exception for parody has been introduced because it is a use which, in some cases, has been allowed under the fair use defence in the US.

45. We do not know the basis on which an exception for satire has been introduced. Satire (in the absence of parody) is not covered by the fair use defence in the US.[7] Nor is it allowed by the EU Directive on the Information Society. We have concerns about its operation, as satire (unlike parody) does not relate to comment on a particular work, but comment on the characteristics of a person or society. Reproducing a work for the purposes of satire may assist to make a satirical point or observation, but is unlikely to be a comment on the work itself.

46. We therefore submit that satire should be omitted from the provision.

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7 See Nimmer on Copyright at § 13.05[C][2], referring the US Supreme Court decision in *Campbell v Acuff Rose*.

Part 4: Fair dealing for research or study

47. According to the Explanatory Memorandum, this amendment is intended to clarify something, but we do not know what that is. We have sought an explanation from the Attorney-General's Department, but we have been advised that we will receive a reply after 30 October.

48. The drafting of the amendment is not clear. Once we have received an explanation from the government, we will be in a position to respond.

Part 5: Official copying of library and archive material

"Reasonable portion"

49. We are unclear as to the intended effect of proposed new subsection 49(5AA) insofar as it refers to sections 10(2) and 10(2A). In particular, it appears that the amended wording would not result in any substantive change to the operation of the provision, given that the definitions of "reasonable portion" in those sections is inclusive, not exclusive.

50. We have sought information about the intention behind proposed new subsection 49(5AA) so that we may have the opportunity to comment further on the drafting of the provision, but have not yet received any such information.

Meaning of "library"

51. Currently, the library provisions in the Copyright Act, which allow free use of copyright material, apply to libraries owned by profit-making entities. These exceptions include the supply of material to users of the library, and supply of material to other libraries. In our view, the exceptions should be limited to libraries owned by non-profit entities. The only application of the library provisions to profit-making entities should be to allow them to supply material to clients of libraries owned by non-profit entities.

52. Proposed new s49(9) and 50(10) would introduce some limitation on the libraries entitled to rely on ss49 and 50. In our view, however, the limitation should be much larger.

53. We submit that s18 should be repealed, and that a definition of "library", which excludes libraries in for profit entities, should be introduced. We propose a definition along the following lines:

> *Library* does not include a library maintained mainly or solely for the purposes of a business or businesses conducted for profit.

Copying from different editions

54. Proposed new subsections 51A(4) and 51B(4) permit the copying and communication of certain editions of relevant published works whether or not the work is

commercially available in other editions. In each case, discretion is given to the relevant authorised officer of the library or archives to determine whether or not he or she will make the reproduction. That discretion is not tied to any particular criteria. We are unclear about why this is so.

55. We do understand that collecting institutions have concerns about their current inability to copy rare or significant editions without permission from relevant copyright owners. However, proposed new section 112AA deals with those concerns, permitting the copying, by key cultural institutions, of editions and works within editions where the edition itself is of significance.

56. We therefore submit that the making of a reproduction under proposed new subsections 51A(4) and 51B(4) be permitted only in the event that the work is not commercially available, as in proposed new subsections 51B(3) and 51B(5).

57. Alternatively, we seek information about the intention behind proposed new subsections 51A(4) and 51B(4) so that we may have the opportunity to comment further.

Relationship between proposed new sections 51B, 110BA and existing provisions

58. We note that proposed new section 51B and section 110BA would allow the making of various single reproductions and copies, without the authorised officer of the library or archive having to have a particular purpose in mind.

59. We are not clear that, in practice and to the extent they apply to manuscripts, original artworks, first records or first copies, these provisions add anything to the existing provisions. We therefore seek information as to the intention behind these provisions as they apply to these types of material, so that we may have the opportunity to comment further.

Schedule 7 – Maker of communication

60. We are unclear as to what is intended by the words “what is made available online by someone else in the communication”, and have sought information so that we may have the opportunity to comment further on this phrase.

61. We note that the intention of the provision is to clarify that a “person who merely accesses or browses material online” is not responsible for a communication of that material to him or her self. In our view, however, it is not clear that the proposed wording is so limited, and we are concerned that it may have wider application.

62. We therefore submit that the section should be redrafted in a way that makes its application clear and certain in light of the stated intention.

Schedule 8 – Responses to the Digital Agenda Review

Part 1: Communication in the course of educational instruction

63. We support the joint position of Screenrights and the Copyright Advisory Group of the Ministerial Council on Employment Education Training and Youth Affairs, in their letter to the Attorney-General of 25 October 2006, in relation to proposed section 28A. Under that joint position, s28A would allow a communication made merely to facilitate a performance in class under s28.

Part 3: insubstantial parts (s135ZMB(2))

64. Section 135ZMB currently allows (and would continue to allow, following the amendment) the copying, for free, of entire "accompanying" artistic works (ss135ZM and 135ZME). This effectively expands the portion copied, for free, considerably. In our view, that situation should not continue. The copying of "accompanying" artistic works is allowed under sections 135ZL and 135ZMD, provided the educational institution has undertaken to pay equitable remuneration.

Part 4: electronic anthologies

65. We oppose this proposal. It is intended to effectively "extend" the operation of s135K to digital material. Section 135K allows the copying of a work of fewer than 15 pages from a printed anthology. We understand that s135ZK was based on a clause in agreements between Copyright Agency Limited and educational institutions which preceded the introduction of s135ZK. The rationale for s135ZK was that an educational institution could presume that a work of fewer than 15 pages in an anthology had not been separately published and/or was not (separately) commercially available, and that it could therefore copy the entire work. That presumption cannot be made for works in digital form. That is presumably why this amendment was not made as part of the Digital Agenda amendments.

Part 5: Active caching and proxy caching for educational purposes

66. Proposed new s200AAA has a much broader application than was apparently intended by the government. The section is intended to apply to both proxy caching and active caching.

67. In relation to active caching, we support the joint position of Screenrights and the Copyright Advisory Group of the Ministerial Council on Employment Education Training and Youth Affairs (CAG), in their letter to the Attorney-General of 25 October 2006.

68. We note that proxy caching is covered by the "safe harbour" provisions for carriage service providers in s116AH of the Copyright Act. A solution for educational institutions engaged in proxy caching is for them to do the caching through a carriage service provider. It is not clear why they are not doing so.

69. If there is a reasonable explanation of why educational institutions are not doing proxy caching via a carriage service provider, we support the joint position in relation to proxy caching in the letter from Screenrights and CAG to the Attorney-General referred to above.

Schedule 12 – Technological protection measures

Access control technological protection measure

70. In our view, the definition of "access control technological protection measure" should clearly apply to a mechanism used in connection with "pay-per-view" and "pay-per-listen" business models, where the viewing or listening does not involve an act comprised in the copyright. We think that such mechanisms could be covered by the definition of "access control technological protection measure", but some uncertainty is created by the inclusion of the requirement that the mechanism be used "in connection with the exercise of the copyright". The inclusion of this requirement does not seem necessary to address the government's concerns, as those concerns are addressed expressly in paragraphs (c) and (d) of the definition.

Process for a hoc exceptions (s249)

71. Proposed new s249(2) to (9) sets out the process for a person to apply for exemption from circumvention liability in order to circumvent a technological protection measure to make a non-infringing use.

72. An exemption may not be granted unless the Minister receives a submission, and (among other things), "an actual or likely adverse impact on the [non-infringing use] by the person has been credibly demonstrated". We submit that such impact cannot be credibly demonstrated unless the copyright owners affected by the exemption sought have an opportunity to respond to the submission. The Act should therefore require the Minister to seek responses from copyright owners affected by a proposed exemption before determining whether or not the impact on a non-infringing use has been credibly demonstrated.

73. The bill includes – in proposed new s249(8) – a process for revoking an exemption previously granted. The process requires the person seeking the revocation to show that:

    - the adverse impact can no longer be credibly demonstrated, **and**
    - the adequacy of the protection provided by the TPM provisions would be impaired, **and**
    - the effectiveness of the remedies would be impaired.

74. The Australia–US Free Trade Agreement requires that revocation be granted if **any** of these criteria is met. Each "and" should therefore be replaced with "or".

Libby Baulch
Executive Officer
October 2006