

Our Ref: KG 30/05009



ABC
Australian
Broadcasting
Corporation

30 October 2006

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
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Dear Madam/Sir

Provisions of the *Copyright Amendment Bill 2006*

Please find attached the submission of the ABC to the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the *Copyright Amendment Bill 2006*.

If you require further information, please do not hesitate to contact Kate Gilchrist, Senior Lawyer, on telephone 02 8333 5850.

Yours sincerely

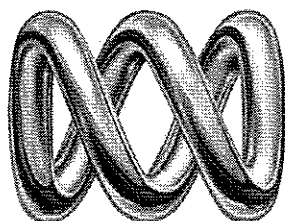
A handwritten signature in black ink, appearing to read 'Stephen Collins', written over a large, stylized circular flourish.

Stephen Collins
ABC General Counsel
Head, ABC Legal Services

**Senate Standing Committee on
Legal and Constitutional Affairs**

**Copyright Amendment Bill 2006: Exceptions
and Other Digital Agenda Review Measures**

**Submission of the
Australian Broadcasting Corporation
October 2006**



ABC
Australian
Broadcasting
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EXECUTIVE SUMMARY

The following sets out the submissions of the ABC in summary:

Schedule 6 – Exceptions to infringement of copyright

Part 3 – Use of copyright material for certain purposes, s200AB:

1. The ABC supports the introduction of new exceptions for parody or satire, and library and archives. However, the Corporation believes that the Three Step Test as a model for new exceptions is inappropriate as it will not achieve government policy in practice, is inconsistent with current Australian and international approaches, and its uncertainty will lead to significant litigation costs.
2. The new exceptions should be drafted within the existing fair dealing model.
3. The new exceptions should also apply to performances.
4. Other exceptions should be included in the Bill concerning fair dealing for the purpose of governmental and political discussion; public interest discussion; dealing with orphaned works; and conducting new technology trials.
5. The ABC supports the submission of Screenrights on the new educational institution exception.

Part 5 – Official copying of library and archive material:

1. Within the amendments to s49, 50 and 51A:
 - (a) the meaning of “accessible to members of the public” needs to be clarified to ensure specialised collections such as that of the ABC can take the benefit of this exception.
 - (b) the words “and in the case of national public broadcasters, their collections” should be added to the definition of ‘library’ and ‘archive’ in s49(9) and s50(10) to ensure specialised collections such as that of the ABC can take the benefit of this exception.
 - (c) equivalent provisions which relate to sound recordings and films should be introduced to protect the ABC’s collection of radio and TV programs adequately and make them available for future generations.
2. Regarding the new provisions for library and archives s51B, 110BA, and 112AA:
 - (a) to avoid doubt, the concept of “key cultural institution” should include the ABC and SBS by adding to s51(B)(1)(a), 110BA(1)(a) and 112AA(1)(a) “or the collection is the collection of a national broadcaster”.
 - (b) the limitation of a single copy should be removed to keep pace with the needs of Australian copyright users and replaced with “copies as required” for library and archive activities.

Schedule 8 – Responses to Digital Agenda Review

Part 1 – Communication in the course of educational instruction

The ABC agrees with the joint position of Screenrights and CAG to be annexed to Screenrights’ submission.

Part 2 – Educational copying of communications of free-to-air broadcasts

The ABC commends and supports the introduction of s135C.

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Part 5 – Active caching for educational purposes – s200AAA

The ABC agrees with the joint position of Screenrights and CAG to be annexed to Screenrights' submission.

Issues Not Included in the Proposed Amendments:

Interaction of copyright and contract: The ABC believes the Bill should include express provisions which prohibit the exclusion or limitation of exceptions to copyright infringement by contract.

General statutory licence to for public broadcasters to facilitate the ABC's activities: The ABC supports the introduction of a general licence for public broadcasters to facilitate their activities.

Schedule 12 – Technological Protection Measures

Drafting of Permission Exception: The exception to TPMs relating to permission should reinstate the words "if a person has, or has reasonable grounds to believe" in ss116AN(2) and 132APC(2), as they were set out in the earlier Exposure Draft of 1 September.

Exception for Acquisition by Broadcasters: S116AN(8)(b) should include an exception for acquisition decisions by broadcasters.

Reinstate Limitation on Broadcasters Damages: Old s116AP in the Exposure Draft of 1 September 2006, giving consideration to broadcasters activities in assessment of damages should be reinstated.

Exception for Fair Dealing: The ABC believes the Bill should include express provisions which state that exceptions to copyright infringement are also exceptions to the prohibition on circumvention of TPMs.

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Introduction

The Australian Broadcasting Corporation ('ABC') thanks the Committee for providing the opportunity to make submissions with respect to the *Copyright Amendment Bill 2006*, particularly the *Exceptions and other Digital Agenda Review Measures and Technological Protection Measures*.

Through its distinctive radio, television and new media services, the ABC is one of Australia's largest copyright creators, copyright owners, copyright users and copyright traders. Through its library and archives, the Corporation is also a holder of a substantial and culturally-significant library and archives of sound recordings, audio-visual material and other records such as photographs.

Exceptions to copyright infringement play a key role in the ABC meeting its Charter obligations. In this submission, the ABC argues for the introduction of a number of new exceptions and changes to the *Copyright Act 1968* to enable the ABC to meet its key objectives in a way which balances the interests of copyright owners and users.

Schedule 6 – Exceptions to infringement of copyright

The ABC supports Parts 1 and 2 of Schedule 6 which relate to recording broadcasts for replaying at more convenient time and reproducing copyright material in a different format for private use.

Part 3 – Use of copyright material for certain purposes

New s200AB contains changes which could impact significantly on ABC activities.

1. ABC supports new parody and satire, and library and archives exceptions

The ABC commends the introduction of the new exceptions of parody and satire, and library and archives.

2. ABC concerned about the model for and drafting of new exceptions

However, the ABC is concerned that Government will not achieve the desired policy outcomes in practice, because of the way that the exceptions have been drafted in the legislation. The reasons are set out below.

3. Three Step Test model is inappropriate

The Berne Convention and Trade Related Aspects of Intellectual Property Rights (TRIPS), set out the "Three Step Test". The purpose of this test is to ensure that new exceptions to copyright infringement are justified in domestic legislation.

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(a) Three Step Test appropriate for international copyright law but not domestic copyright law

The Three Step Test, as it is understood in international copyright treaties, is the test which is applied by a country when considering whether an exception to copyright infringement should be admitted into a country's copyright law. It is not the test that should be considered at each application of the exception to a particular set of circumstances.

By incorporating the Three Step Test in s200AB, the Bill misconstrues its role. For example, by recognising specific exceptions should be made for parody or satire or use by library and archives, Australia has acknowledged, like other jurisdictions such as the European Union,¹ that such exceptions meet the Three Step Test. Once the head of exception has been recognised as an exception to copyright infringement as a matter of Australian policy, the particular specific exception should not be open to a further application of this Three Step Test.

(b) Why the Three Step Test is inappropriate

If left as is, the inclusion of the Three Step Test in proposed s200AB will lead to:

Inefficiencies in the law: S200AB is not drafted along the lines of well-established fair dealing exceptions. The novel but inappropriate inclusion of the Three Step Test instantly creates the need for an entire new body of case law to develop separately to the case law already established on fair dealing.

Uncertainty: Each particular application of the exception would be required to meet the Three Step Test, including the identification of whether the application was a '*special case*'. Whether or not the application of the exception to a particular case is successful would not really be known without a court ruling. Where there is uncertainty in law, it leads to two outcomes: litigation costs and a chilling effect.

Litigation costs: Litigation costs time, effort, resources and money. Instead, lawmakers should ensure that law is as clear as possible from the outset, to avoid wasting resources which are otherwise more productively applied to copyright creation.

Chilling effect: When law is uncertain, risk averse bodies tend to act conservatively in the interpretation of the law, and to self-censor rather than expose themselves to legal costs. This undermines the objective of the new exceptions which is to balance of free speech with the monopoly powers of the copyright owner.

Imbalance: The inclusion of the Three Step Test in Australian domestic legislation undoes the balancing goal behind the granting of the exception. The Government has stated its commitment to maintaining an effective and relevant copyright law that achieves an appropriate balance between the rights of copyright owners and reasonable access to copyright material for users.² The inclusion of these exceptions within a Three Step Test

¹ Article 5(3)(k) of European Union Directive 2001/29

² Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age Issues Paper May 2005

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model undermines that balance, it returns the weight in favour of copyright owners, and fails to compensate copyright users for increased rights granted to copyright owners.

Ineffective law: Because s200AB requires proof of a 'special case' for each application of the exception, it will be impossible to apply this law to the day-to-day practices of programming making by the ABC. For example, what would be the criteria determining why one parody is more 'special' than another? The Corporation believes that the law should be drafted to give proper effect to the exceptions, to ensure that there is the appropriate balance between free speech and the monopoly powers of a copyright owner.

Inconsistency with international approaches: Incorporating the Three Step Test into legislation is inconsistent with approaches taken elsewhere in the world, for example, the European Union.³ There is no precedent internationally for introducing the Three Step Test into domestic legislation.

Abrogating jurisdiction: The definitions of key terms in s200AB directly reference Article 13 of TRIPS. This has the potential to lead to Australian courts abrogating jurisdiction to international forums such as the World Trade Organisation. Australia should not surrender the determination of exceptions to international forums. Case law should be developed domestically in order to be relevant and effective in Australia.

4. ABC supports a fair dealing model for the new exceptions

The solution to the problems identified above is to draft the exceptions for parody or satire, and library and archives in the same way as other fair dealing provisions well-established in Australian copyright law such as s41 - fair dealing for purpose of criticism or review and s42 - fair dealing for purpose of reporting news.

The concept of "fair" incorporates the essence of the Three Step Test, and allows for the consideration of its core elements. But it also allows the exception to prevail where public interest factors such as free speech outweigh economic impacts on the copyright owner and any market for the copyright. Take for example the particular case of parody. It may be argued that there is a market for licensing copyright works for parody that should not be undermined. However, obtaining a licence from the copyright owner is usually impractical. Either the content of the parody may be objectionable to the copyright owner and the copyright owner in all likelihood will say no. Or if a licence is offered it is likely to contain restrictions on the way in which the work can be used, which is at odds with the free speech objective of undertaking a parody.

Placing the new exceptions within a fair dealing model will be more effective as copyright users, like the ABC, are experienced in making determinations about whether something is a fair dealing. The exceptions will be able to be more easily interpreted in line with existing Australian case law on fair dealing.

A proposed draft is set out in the attached schedule in relation to the parody or satire exception.

³ See note 1 above.

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5. Other comments on drafting of s200AB - exceptions should apply to performances

To give full effect to the exceptions, the provision for new exceptions should be drafted clearly to apply to performances under Part XIA of the Act. This is so that the exceptions cover all forms of copyright covered by the Act. Again, please see attached schedule.

6. Other exceptions not included in the Bill

The ABC has previously made submissions to the Attorney-General that other exceptions should be introduced, namely:

- governmental and political discussion (on which there is an arguable constitutional basis for this exception),
- public interest discussion,
- orphaned works,
- new technology trials.

These exceptions have not been addressed in the Bill, and it is not clear on what basis these exceptions have been excluded.

(a) Fair dealing for the purpose of governmental and political discussion

The Corporation believes that the Act should make express reference to the implied constitutional right of political and governmental discussion⁴ within the defence of fair dealing. There is a free speech imperative in the media being able to access and disseminate information which relates to political and governmental matters in a timely manner and in an appropriate format. Such a principle was supported in obiter by Mason J in *Commonwealth v Fairfax*.⁵

(b) Fair dealing for the purpose of public interest discussion

The ABC advocates the introduction of a specific fair dealing defence for the purpose of discussing matters of public interest, as an adjunct to the fair dealing defence for reporting news. Provision of information in the public interest may not necessarily be covered by the existing fair dealing defences if there is in fact a distinction between “newsworthiness” and the “public interest”.⁶

(c) Fair dealing with orphaned works

The ABC advocates the introduction of a specific defence of fair dealing with orphaned works.

⁴ See for example: *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 1; *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* [2004] HCA 39 (1 September 2004)

⁵ (1980) 147 CLR 39.

⁶ *Ibid.*

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(d) Fair dealing for the purpose of conducting new technology trials

The ABC supports the introduction of a new specific fair dealing provision for public broadcasters for the purpose of conducting new technology trials to assist the advancement of digital media technology.

7. ABC concerned about new educational institution exception

The ABC has concerns about the educational institution exception, and the way that this provision interacts with well-established educational statutory licences. In relation to s200AB(3), the ABC agrees with the position taken by Screenrights in its submission.

Part 5 – Official copying of library and archive material

1. Amendments to existing provisions - s49, 50 and 51A

(a) the words “and in the case of national public broadcasters, their collections” should be added to the definition of ‘library’ and ‘archive’ in s49(9) and 50(10)

The ABC has a substantial library and archive including vast document, audio and audio-visual collections, as well as sound and reference collections, which are of great public interest and national value.

The words “and in the case of national public broadcasters, their collections” should be added to the definition of ‘library’ and ‘archive’ in s49(9) and 50(10) to ensure specialised collections such as that of the ABC can take the benefit of this exception.

The ABC also has concerns about the proposal to limit s49, 50 and 51A to libraries and archives which are “directly accessible to the public” for three reasons.

(b) Clarify meaning of “accessible to members of the public” to avoid litigation

Firstly, to avoid expensive litigation, it is imperative that what the expression “accessible to members of the public” means is made clear.

(c) Ensure that meaning of “accessible to members of the public” takes into account usual rules of access to specialised collections

Second, whereas the ABC is of the view its library and archives currently fall within the definition of library and archives, it may now be excluded, as a member of the public cannot simply walk in off the street into the ABC’s library and archives because the ABC is not funded to provide a public library. However, access is granted to its specialised collection of nationally significant programs in accordance with the usual rules of access, namely:

1. Providing a member of the public with a reasonable opportunity to access the library or archive, through request.

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2. The request should contain reasonable grounds to access the collection. Due to the ABC's resources being focused on program making, the ABC grants access to members of the public to the collection as an adjunct to this.

3. Access may be refused where it would:

- (a) interfere unreasonably with the operations of the ABC's library and archives;
- (b) not, having regard to the physical nature of the record, be appropriate;
- (c) be detrimental to the preservation of the record.

(c) Introduce equivalent provisions which relate to other subject matter.

Thirdly, there are no equivalent provisions of s49, 50 and 51A in the Bill which provide the same exceptions to copyright infringement for audio and audio-visual material. This approach is inadequate for 2006 as it does not reflect the collections of contemporary libraries and archives, particularly the ABC's collection and may impede the availability of the ABC's nationally significant specialised collection of programs.

2. New provisions for library and archives – s51B, 110BA, and 112AA

New s51B, 110BA and 112AA, in Part 5 of the Bill contain significant changes which could impact significantly and positively on the ABC's activities. The ABC has two key concerns.

(a) Key cultural institution should include ABC by adding to s51(B)(1)(a), 110BA(1)(a) and 112AA(1)(a) "or the collection is the collection of a national broadcaster"

The ABC is considered by Australians to be a key cultural institution. The ABC's collection holds some of the most valuable audio and audio-visual cultural Australian history; just as the National Gallery holds some of Australia's most historic art. It would undermine the policy objectives underlying this section if the ABC's collection were to be excluded.

As drafted, the concept of a "key cultural institution" potentially excludes the ABC. These provisions are drafted only to apply to a library or archives if:

under a law of the Commonwealth or a State or Territory, the body administering the library or archives has *the function* of developing and maintaining the collection.

Depending on one's interpretation of this qualification, it may exclude the ABC as the ABC does not have the explicit function of developing and maintaining a collection within its Charter under the *Australian Broadcasting Corporation Act 1983*. However, it is incidental and absolutely necessary that the ABC maintains libraries and archives in order to meet its Charter activities.

Furthermore, as a government authority the ABC is, unlike commercial entities, legally obliged under legislation, particularly the *Archives Act 1983*, to retain and maintain copies of records.⁷

⁷ For example, Archives Act 1983, Privacy Act 1988, and Freedom of Information Act 1983.

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The ABC urges the Committee to recommend that the national broadcasters be specifically included in the concept of “key cultural institution” to remove any doubt about the legislation applying to the ABC by adding to s51(B)(1)(a), 110BA(1)(a) and 112AA(1)(a) the words “or the collection is the collection of a national broadcaster”.

(b)The limitation of single copy should be removed

Secondly, the limitation to a ‘single copy’ does not reflect contemporary practices, particularly in a digital environment, where a number of digital copies are made as a matter of course.

One copy is insufficient in the digital environment in which the ABC is operating. When material is digitised, a master copy and back up copy are made along with copies held on servers for browsing with a number cached to assist access. Currently, the ABC is engaging in a digitisation project of its archives and wishes to adhere to the guidelines issued by the National Archives.⁸ The limitation to a single copy is too restrictive in practice. The legislation should reference “copies as required”.

Schedule 8 – Maker of Communication

The ABC supports these amendments.

Schedule 9 – Responses to Digital Agenda Review

Part 1 – Communication in the course of educational instruction

The ABC agrees with the joint position of Screenrights and CAG to be annexed to Screenrights’ submission.

Part 2 – Educational copying of communications of free-to-air broadcasts

The ABC commends and supports the introduction of s135C.

Part 5 – Active caching for educational purposes – s200AAA

The ABC agrees with the joint position of Screenrights and CAG to be annexed to Screenrights’ submission.

⁸ “Digital Recordkeeping: Guidelines for Creating, Managing and Preserving Digital Records” Commonwealth of Australia, May 2004 available on the web at <http://www.naa.gov.au/recordkeeping/er/guidelines.html>

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Issues Not Included in the Proposed Amendments

1. Copyright and Contract

The ABC submits the Government should legislate to ensure that parties cannot contract out of exceptions to copyright infringement. This has been recommended by the Copyright Law Review Committee.⁹ There is also already precedent for this in the Act.¹⁰

The ABC's everyday activities are affected by the uncertainty in the relationship between contract restrictions and its right to fair deal under the Act. The ABC may be placed in a worse position for having entered into a contract with the copyright owner or licensee which restricts fair dealing, than other organisations, who have no such contract and can fair deal with that content, particularly when the ABC has paid a fee for access to content.

Please see recommended drafting in the attached Schedule.

2. General Statutory Licence to for Public Broadcasters to Facilitate the ABC's Activities

Public interest functions are fulfilled by cultural and heritage institutions such as the ABC. It is increasingly difficult for such public cultural institutions to achieve their mandates and comply with the technical impositions of copyright law, particularly in preserving and maintaining archival material.

Historically, the position of broadcasters relative to copyright has been catered for by the implementation of specific statutory provisions that recognise and accommodate the policy objectives of both the broadcasters and of copyright law. However, the form and policy underlying current statutory licences are derived from the technological environment of the 1960s and as such the licences are now out of date.

The ABC proposes that a public broadcaster exception should be granted to the ABC.

Statutory licences have the advantages of minimising transactional clearance and administration costs for the ABC, providing certainty to the ABC by ensuring that the ABC does not infringe copyright, and ensuring that public information and cultural material – the ABC's intellectual property assets – are not made redundant through restriction but instead are available to the public through the ABC's broadcasting activities.

⁹ Copyright Law Review Committee, *Copyright and Contract Report*, Paragraph 2.05.

¹⁰ For example, section 47H of the Act – *Agreements Excluding Operation of Certain Provisions*. This is also consistent with other legislation which cannot be contracted out of, for example, *Trade Practices Act 1974*, section 68, *Corporations Act 2001*, section 199C, *Occupational Health and Safety (Commonwealth Employment) Act 1991* section 80, and *Broadcasting Act 1996 (UK)* section 137.

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Schedule 12 – Technological Protection Measures

1. Ss116AN(2) and 132APC(2) – Reasonable grounds to believe permission granted

In relation to the drafting of the exception to circumvent Technological Protection Measures (TPMs) where permission has been granted, the ABC prefers the words “if a person has, or has reasonable grounds to believe” in ss116AN(2) and 132APC(2). These words were contained in the first draft Exposure Draft of the current Bill that was released on 1 September 2006 and have been deleted. They unequivocally include implied permission as well as express permission as a defence, and should be reinstated.

2. S116AN(8)(b) – Exception for Acquisition decisions by Broadcasters

The ABC submits that there should be a provision here that allows a broadcaster such as the ABC to circumvent TPMs for the purpose of making an acquisition decision in relation to the work or other subject-matter, without prejudice to the ABC's capacity to assert that the ABC falls within the definition of library or archives in ss8(b)(i) and (ii).

3. Old s116AP (Exposure Draft 1 September 2006) giving consideration to broadcasters activities in assessment of damages should be reinstated.

The old s116AP - Limitation on remedies under this Subdivision from the Exposure Draft of 1 September 2006, has been removed. This gave comfort to the ABC in limiting the damages and should be reinstated.

4. Exceptions to copyright infringement should be exceptions for TPMs eg. fair dealing

The ABC submits that the Bill should also clarify that exceptions to copyright infringement such as fair dealing, are also exceptions to circumventing TPMs.