

Via email: legcon.sen@aph.gov.au

Ms Jackie Morris
Acting Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600


Dear Ms Morris,

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

I have pleasure in enclosing a submission which has been prepared by the
Copyright Sub-Committee, Intellectual Property Committee of the Business Law
Section of the Law Council of Australia.

This submission has been endorsed by the Business Law Section. Owing to
time constraints, it has not been considered by the Council of the Law Council of
Australia.

Yours sincerely,



Peter Webb
Secretary-General

30 October 2006

Enc.

Intellectual Property Committee - Copyright Subcommittee

Business Law Section of the Law Council of Australia

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

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

This submission has been prepared by the Copyright Sub-Committee of the Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**Committee**) in response to the draft of the above Bill which was released on 8 September 2006. The Committee has attempted to keep its response short and directed to specific issues. Please note that this response has been endorsed by the Business Law Section. Owing to time constraints, this response has not been considered by the Council of the Law Council of Australia.

The Committee wishes to express its regret that these very significant changes to the *Copyright Act 1968* (the Act) are being introduced with only minimal time to consider their implications. The process is likely to lead to undesirable and unintended outcomes.

1. Introduction

The Committee addresses seven subjects in this submission:

1. Section 43C – Reproducing works in books, newspapers and periodical publications in different form for private use
2. Section 43J – Reproducing photograph for private use
3. Section 109A – Copying sound recording in different format for private use
4. Section 110AA – Copying cinematograph film in different format for private use
5. Section 200AB – Use of works and other subject-matter for certain purposes
6. Sections 40(3) and 40(5) – Fair dealing for research or study
7. Section 200AAA – Caching

2. Section 43C – Reproducing works in books, newspapers and periodical publications in different form for private use

The Committee notes (in subsection (1)) the circumstances in which this provision is intended to apply. It will permit the making, in a different form, of a reproduction of a work contained in a book, newspaper or periodical publication ('main copy') for the private and domestic use of the person making the reproduction, provided:

- the book, newspaper or periodical publication is not itself an infringing copy of the work or published edition (subsection (1)(d)); and
- at the time the main copy is made, the person making it 'has not made, and is not making' another copy in 'substantially identical' form (subsection (1)(e)).

The effect of subsection (2) – the operative provision – is that except in the case of certain dealings with the main copy (set out in subsection (3)) the making of the main copy is not an infringement of the copyright in the work or published edition.

As section 43C(1)(e) indicates, however, the provision is not intended to permit the making of multiple copies of works; at least not more than a single reproduction in the same or substantially identical form, and this issue is dealt with further in section 43C(5).

The Committee makes the following comments on section 43C:

- (a) The need for it is far from clear and seems some distance removed from the Government's originally stated intention to deal with the issue of format-shifting in the case of musical works, sound recordings and films; further, the Committee is unaware that there has been any kind of public pressure for such an exception to the Act.
- (b) Subsection (5) states that 'subsection (2) does not prevent the main copy from being an infringing copy' in cases where multiple copying takes place. However it is unclear whether section 43C excludes the making of more than one reproduction, or the making of reproductions of the 'main copy'.
- (c) Apart from hard copy photocopies, it is to be envisaged that one of the primary forms in which 'main copies' will be made under this provision will be electronic, which gives rise to real issues of control over the further dissemination of those copies. The Committee regrets that individuals will be permitted to effect the first digitisation of copyright material, precluding the copyright owner from protecting its copyright in the material, for example with appropriate technological protection measures.
- (d) The Committee also believes the drafting of the provision is somewhat obscure, in particular the provision dealing with the destruction of temporary reproductions, subsection (7). Two particular problems arise here:
 - (i) First, there is the practical problem that the 'destruction' requirement will be impossible to police. The resulting amending provision thus repeats a defect contained in the present law; a defect which, as the Committee understands the Government's policy, these amendments are intended to remove – namely, that a law that is unenforceable in practice is not sound.
 - (ii) Second, there is the fact that in certain circumstances the making of a temporary reproduction might lead to the making of other infringing copies. For example, a temporary reproduction held in the hard drive of a personal computer, made available – whether intentionally or otherwise – online, could lead to a proliferation of reproductions of the work. The Committee notes that these amending provisions are silent as to the status of such reproductions and, more importantly, the liability of a person who makes temporary reproductions then used for the making of further infringing copies.

3. Section 43J – Reproducing photograph for private use

The Committee makes the following comments on section 43J:

- (a) The Committee repeats its comments at 2(a).

- (b) The Committee repeats its comments at 2(b).
- (c) As stated at 2(c), where 'main copies' are made under this provision electronic form, real issues of control over the further dissemination of those copies arise.
- (d) The Committee repeats its comments at 2(d).

4. Section 109A – Copying sound recording in different format for private use

The Committee makes the following comments on section 109A:

- (a) Section 109A(1)(d) states that section 109A applies where 'the format in which sounds are embodied in the main copy differs from the format in which sounds are embodied in the record'. The use of the word 'format' is different from the terminology used in both section 43C ('a form different from') and section 43J ('hardcopy form' and 'electronic form').

While the reason for the different terminology in section 43J is clear from the explanatory material (namely, to restrict permitted format changes), the reason for the different terminology in section 109A is not clear. The explanatory material states that all format changes will be permitted under section 109A 'except podcasts of radio and similar programs'. If the reason for the use of the term 'format' in section 109A, instead of 'a form different from', is to capture the intended exception it is not clear to the Committee that this is achieved.

The term 'format' would appear to refer to the form in which the reproduction is held, rather than the content of what is reproduced. If that is so, and the difference in terminology is unintended, the Committee's view is that it would be preferable for the sections to be consistent, and for the same terminology to be used in sections 43C and 109A.

- (b) The Committee repeats its comments at 2(b).
- (c) As stated at 2(c), the primary form in which 'main copies' will be made under this provision will be electronic, which gives rise to real issues of control over the further dissemination of those copies.
- (d) The Committee repeats its comments at 2(d).

5. Section 110AA – Copying cinematograph film in different format for private use

The Committee makes the following comments on section 110AA:

- (a) As stated at 2(c), as 'main copies' made under this provision will be electronic, real issues of control over the further dissemination of those copies arise.
- (b) Proposed section 110AA does not contain a provision equivalent to section 43C(5). In the Committee's view, such a provision should be included in section 110AA, given that a main copy made of a videotape embodying a cinematograph film is just as susceptible to copying as, for example, an original photograph in electronic form (made under section 43J) or an MP3 format of a sound recording (made under section 43C).

- (c) The Committee makes the comments at 2(d) in relation to s110AA(6) (as opposed to subsection (7)).

6. Section 200AB – Use of works and other subject-matter for certain purposes

6.1 *Direct incorporation of the three step test for exceptions from TRIPS into the section*

The Committee regrets this approach to the formulation of exceptions to copyright in domestic legislation. It is of the view that it is for the legislature to specifically define the relevant special cases and to determine in advance whether they conflict with a normal exploitation of copyright matter or unreasonably prejudice the legitimate interests of the copyright owner or licensee.

The delegation of the task of determining compliance with the three step test to the courts generates uncertainty which, in turn, is likely to deter users from taking advantage of the exceptions because of their inferior capacity to litigate disputes. In addition, the legislature, rather than courts, is better equipped to make the relevant decisions which often involve micro-economic analysis of the economic impact of the exception.

6.2 *‘not made partly for the purpose of the body obtaining a commercial advantage’ in (2)(c), (3)(c) and (4)(c)*

The Committee regards this requirement as both unnecessary and uncertain. It is unnecessary because the bill already imports the three step test via sub-section one of the section. Exceptions to copyright need not be non-commercial in nature to comply with the three step test. Consequently, the exception imposes a fourth requirement that is not required by international law.¹

This fourth requirement also suffers from being uncertain. For example, one of the purposes of much educational instruction in Australia is to obtain a commercial advantage by requiring the payment of fees in return for the instruction. Arguably, any educational institution would fall foul of this provision, particularly with its reference to ‘partly for the purpose’. Similar arguments may apply with the other sub-sections. For example, paid carers for people with disabilities may make the relevant reproduction or copy referred to in sub-section (4). Are they then not partly motivated by commercial considerations?

In addition, the Australian Law Reform Commission ‘Genes and Ingenuity: Gene Patenting and Human Health’ (Commonwealth of Australia, 2004) has already recommended that:

Recommendation 28-1: The Commonwealth should amend the Copyright Act (1968) to provide that research with a commercial purpose or objective is ‘research’ in the context of fair dealing for the purpose of research or study.

Similar considerations apply to these already very limited exceptions.

¹ *United States — Section 110(5) of US Copyright Act* WTO Doc WT/DS160/R (2000) (Report of the Panel) at [6.182] provides that an exception under the three step test may be commercial in nature.

7. Sub-sections 40(3) and 40(5) – Fair dealing for research or study

The Committee sees no reasons for changing these provisions, as the present provisions adequately cover this subject matter. The Committee's particular concerns with the drafting of the proposed provisions are set out below.

7.1 Drafting of s40(3) and s40(5)

The Committee considers the drafting of proposed s40(3) and the consequential drafting of proposed s40(5) cumbersome.

The current s40(3) refers to a work that 'comprises an article in a periodical publication'. In contrast, the proposed provision refers to literary, dramatic or musical works 'contained in an article in a periodical publication'.

The words 'contained in' may suggest that the 'article' and the 'work' are different. Generally, the work will comprise the article. The proposed drafting will create uncertainty as to the effect of the provision. In the Committee's view, the current provision is to be preferred.

7.2 s40(5) – reasonable portion

At present, s40(3)(b) deems the reproduction of a reasonable portion of a work (as described in ss10(2) and 10(2A)) for the purpose of research or study to be a fair dealing. However, the deeming provision is not conclusive and it is possible that a greater amount of a work may be reproduced and remain a fair dealing if the criteria in section 40(2) are satisfied. This is an important provision as it allows, for example, more than 10% of a work to be reproduced where the work is out of print and cannot be easily obtained.

The proposed s40(5) purports to take away this flexibility so that no reproduction of greater than a reasonable portion will be a fair dealing, regardless of the circumstances. The Committee sees no basis for this change and, so far as it is aware, it has not been sought by any stakeholder.

The current provision, by requiring any reproduction of greater than a reasonable portion to be tested against the criteria in s40(2), ensures that the three step test will be observed. Removing the ability to have regard to the matters set out in s40(2) denies the possibility that a reproduction of more than 10% of a work may constitute a fair dealing.

The Committee submits that, if it is felt that amendment is necessary, proposed s40(5) should be drafted as follows:

'Despite subsection (2), a reproduction, for the purposes of research or study, of not more than a reasonable portion of a literary, dramatic or musical work, or of an adaptation of such a work, that does not comprise an article in a periodical publication, is taken to be a fair dealing with the work or adaptation for the purpose of research or study.'

8. Section 200AAA - Caching

The effect of this provision is unclear in a number of respects:

- (a) The term 'active caching' contained in the heading is not defined. This is also a term which is not defined in many commonly used computing dictionaries. It is not clear whether it is intended to cover all deliberate acts of caching and/or temporary storage (such as creating a safe Internet environment for child protection reasons) or whether it is only intended to cover what is known as 'proxy caching'. However, we would

have thought the legislative intent would have been to restrict it to proxy caching except where temporary storage is for child protection reasons.

(b) If the intention is to capture proxy caching, it is unclear that the provision achieves this result. For example, proposed s22(6A) clarifies that reading from the Internet (the act that triggers storage in a proxy cache) is not an exercise of the communication right. However, the making of a communication is an element of paragraph (b) of proposed s.200AAA.

(c) Subsection (3), which provides that:

'Subsection (2) does not apply, and is taken never to have applied if the reproduction remains on the server after the end of the course'

could have a number of meanings. For example, it could mean when that particular subject matter is completed or when the institution stops providing the relevant course.

The Committee submits that if s200AAA is intended to cover proxy caching and temporary storage for reasons of child protection, the provision does not appear to have achieved this objective, and arguably may allow a far greater amount of temporary storage than intended in likely breach of Australia's international obligations.

The Committee suggests that the provision is amended to expressly permit proxy caching and that a separate provision is introduced permitting deliberate caching for the purposes of child protection.