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Visual Arts
Copyright Collecting
Agency

viscopy

30 October 2006

Jackie Morris
A/g Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Ms Morris,

Provisions of the Copyright Amendment Bill 2006

Introduction

Thank you for the invitation to make a submission on the provisions of this Bill. Viscopy welcomes the opportunity to comment on this important legislation.

Viscopy is a non profit company limited by guarantee, owned by approximately 5300 members. We represent the copyright interest of visual artists, including fine artists, illustrators, cartoonists, photographers, lithographers, textile designers, craft-workers, sculptors, architects, and a number of artists' estates. Over 40% of our members are indigenous artists, many of whom live in remote Australia. Viscopy has approximately 43 overseas affiliates whose works we license in Australia.

Unlike the declared societies Copyright Agency Limited and Screenrights, Viscopy does not administer a statutory right, but engages in direct voluntary licensing on behalf of members. Our licensees include galleries and museums, auction houses, publishers and private individuals.

Comments on the Bill

Schedule 6 – Exceptions to infringement of copyright

Part 1 - Recording broadcasts for playing at a more convenient time

In previous submissions on this issue, including the submission to the Attorney-General's Department in relation to the enquiry into fair use, Viscopy has submitted that it would

support a time-shifting exception for TV broadcasts, provided it was subject to the payment of remuneration to the copyright owners (including artists whose works are included in television broadcasts).

In light of the Government's policy to introduce a non-remunerable exception for time shifting, we have some comments on the provision in the Bill.

We submit that the exception should be subject to a commercial availability test. It appears that there is now an emerging market for the sale of time-shift copies. By way of example, a service called "Catch-Up TV" is offering copies of episodes of the Australian series "McLeod's Daughters" for sale by digital download. For the price of \$1.95, a viewer can download a copy of an episode they may have missed or want to see again and they have access to it for a period of five days. It seems likely that copyright owners will want to continue to explore and expand this market and the proposed exception will interfere with this and conflict with a normal exploitation of the copyright material in contravention of the three-step test in TRIPS.

We also submit that where a person makes a copy of a broadcast under this exception, it should only be retained for a defined period of time. Under the current drafting, a person could keep the copy for an indeterminate period of time, provided they had the intention to watch or listen to it at a "more convenient" time.

We have had the benefit of reading the draft submission of the Australian Copyright Council and Viscopy supports the Council's proposed amendment to the provision.

Part 2 - Reproducing copyright material in different format for private use

As in the case of time-shifting, Viscopy has previously supported the introduction of format-shifting on the proviso that copyright owners are remunerated for this use through a statutory levy scheme.

Viscopy does not support the introduction of the format-shifting provisions in the Bill. The justification for copying books, newspapers, periodicals and photographs, in particular, is not clear.

Section 43C would appear to allow a person to copy an artistic work, including a painting or a photograph, from a book or newspaper for "private and domestic" use. Section 47J would allow a person who owns a photograph to make a copy of it in another format.

Viscopy has a wide mandate from its members to license the use of artworks. We can, for example, license the reproduction of our members' artworks and photographs for private and domestic use. In fact we have granted several licences to allow people to make enlarged copies of artworks to hang on their lounge room walls. We submit therefore that these exceptions would interfere with the current and potential licensing activity of copyright owners and as such would contravene the TRIPS three-step test.

If the Committee is of the view that the format-shifting provisions should remain, we submit that they should be subject to a commercial availability test which provides that the exceptions can only be relied upon if a copy or a licence to make a copy is not available.

Again we support the Australian Copyright Council's proposed amendment to the provisions.

Part 3 – Use of copyright material for certain purposes

Use by libraries and educational institutions

As previously mentioned, Viscopy has a wide mandate from its members to license the use of their works for all manner of purposes, including non-commercial or not-for-profit purposes. We are concerned to ensure that we can continue our licensing activities on behalf of our members as well as expand into new areas of licensing.

While we welcome the Government's intention to make these new exceptions subject to "normal exploitation", as per the TRIPS three-step test, we are concerned about the uncertainties inherent in this approach and the potential for the development by the courts of ad hoc exceptions based on particular facts.

We support the Australian Copyright Council's proposal for an alternative test that we believe would more clearly protect existing and potential markets for the licensing of copyright material as well as providing more certainty for users of copyright material. We also agree with the Copyright Council's submission that these exceptions should not apply to profit-making organisations and that "commercial advantage" should be more clearly defined.

Use for parody or satire

We are not sure exactly what a defence of parody adds to the legislation given the existence of the fair dealing defence of criticism or review.

It is not clear how the TRIPS three-step test in section 200AB(1) might apply to this defence. Presumably, the defence would not apply if a copyright owner was prepared to offer a licence to parody a work as this would conflict with a normal exploitation of the work.

While not a mainstream area of our licensing activity, Viscopy may be in a position to license parodies of members' works in consultation with the members concerned.

In order to avoid doubt and ensure that the use does not conflict with the licensing activities of the owner, we would like to see an amendment that provides the defence is only available where a licence for the parody cannot be obtained.

We also submit that the defence should not extend to satire generally. We understand, for example, that while parody is allowed for under the fair use defence operating in the USA, satire is not. We support the Australian Copyright Council's submission on this point.

Part 5 – Official copying of library and archive material

Copying under sections 49 and 50

We submit that an additional factor that should be taken into account under subsections 49(5AB) and 50(7BB) is whether a licence to reproduce the material within a reasonable time at an ordinary commercial price is available.

Definition of library

Viscopy shares the concerns of the Australian Copyright Council and the Copyright Agency Limited in relation to the amended definition of library in that it does not go far enough to address the concerns of copyright owners raised in the course of the Digital Agenda Review.

Definition of “administrative purposes”

We submit that it should be made clear in this definition that administrative purposes does not include making copies of copyright material available to patrons of the library or archives.

Copying significant works in key cultural institutions’ collections

We are concerned about the purpose of and scope of this exception as it relates to original artistic works and artistic works held in published form. Currently libraries and archives have the right, under section 51A, to make various uses of artistic works for particular purposes. For example, a preservation copy of an original artistic work can be made under section 51A(1)(a).

It is not clear why this additional exception is needed in light of the existing provisions. What is also not clear is the purpose or purposes for which a library or archives might be able to use a “comprehensive photographic reproduction” or a reproduction of a published work. In contrast, the existing provisions specify the (limited) purposes for which copies can be used.

We submit that this exception should not be included in the legislation. However if it remains, we submit that it should be limited in the following ways:

1. a “comprehensive photographic reproduction” should be defined to exclude a digital or electronic copy;
2. the purposes for which reproductions made under the exception can be used should be limited to internal uses, such as preservation and administration of the collection, and it should be made clear that copies cannot be used for other purposes, such as in material produced in connection with exhibitions or on a website; and
3. the library or archives ought not be permitted to make a copy of an artistic work if a licence to reproduce that work is available from the copyright owner or a collecting society acting on the owner’s behalf.

We have similar concerns in relation to the equivalent provisions for films and published editions to the extent that these items contain artistic works.

Schedule 7 – Maker of communication

Viscopy supports the submissions of the Australian Copyright Council and Copyright Agency Limited in relation to this provision.

Schedule 8 – Responses to Digital Agenda Review

Part 1 - Communication in the course of educational instruction

Viscopy supports 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.

Part 3 – Insubstantial parts

Viscopy shares the concerns of Copyright Agency Limited and the Australian Copyright Council in relation to the copying of artistic works under the insubstantial portions provisions.


Schedule 12 – Technological Protection Measures

In our submission to the Attorney-General's Department on the exposure draft bill containing the technological protection measures provisions, a copy of which should have been provided to the Committee, we raised concerns about the definition of "access control technological protection measure". While the definition in the current Bill is an improvement on the previous definition, there is still a question concerning the meaning of "in connection with the exercise of the copyright". Viscopy is concerned to ensure that an access control that supports a pay-per-view model is covered by the definition.

In our previous submission we also raised concerns about the exceptions allowing circumvention of access controls provided for in the draft Regulations. We reiterate these concerns.

Thank you again for the opportunity to comment on the draft Bill. We would be happy to answer any questions in relation to our submission.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Joanne Brown', is displayed within a light gray rectangular box.

Per: Joanne Brown
Acting CEO