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Chair
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Department of the Senate
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Australia

Australian Publishers Association

Submission on

THE COPYRIGHT AMENDMENT BILL 2006

October 2006

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About the Australian Publishers Association

The Australian Publishers Association (APA) is the peak industry body for Australian book, journal and electronic publishers. Established in 1948, the association is an advocate for all Australian publishers: large or small; commercial or non-profit; academic or popular; locally or overseas owned. Over the years the APA has grown from modest beginnings and a membership of twenty, to over 160 members and represents 91% of the industry, based on turnover.

The sector has seen exports greatly increase, particularly in the education/textbook arena. 64% of all books sold in Australia are originated and published in Australia (compared with 10% in the mid 1970s). By comparison, Australian films generated 1.3% of box office receipts (2004) and Australian music recordings accounted for 16% of sales (2002).

Exports have increased 261% over the past seven years. Exports as a percentage of total sales rose from 8.5% to 15% over the same period. The success of the Australian book industry depends on effective copyright law.

The copyright industries in Australia value add 4.8% to Australia's economy and employ 5.8% of the workforce. (Mining GDP is 8.5%) – The Allen Consulting Group March 2006. As a percentage of GDP Australia's copyright industries are the world's third largest contributors, after the US and the UK (Figures from AFACT).

Executive Summary

The APA acknowledges the assistance of the Federal Attorney-General, his advisers and the Attorney-General's Department in the endeavours to work through the technological protection measure (TPM) provisions of the Copyright Amendment Bill 2006 ("the Bill"). The provisions introduced into the Parliament better reflect the relevant provisions of the Australia United States Free Trade Agreement (AUSFTA) and the operation of such devices.

However, the APA is not quite so enthusiastic about the apparent policy objectives of the Government in respect to provisions in Schedules 6, 7 and 8 of the Bill.

The APA is keen to ensure that a balance is maintained between the owners and the users of literary works. The APA acknowledges the need for 'fair dealing' or 'fair use' exceptions to assist the movement of ideas through research and study and to increase the volume of Australian works.

Provisions of this Bill, in their eagerness to foster 'consumerism' through various fair use provisions, will have the effect of seriously curtailing the growth of Australian-produced literary and educational material and an industry worth more than $1.3 billion a year (ABS Book Industry Statistics, 2004).

Among other things the APA proposes a collaborative approach which would see the users, i.e. libraries, and copyright owners working together to ensure the availability of material to users and their clients with remuneration for the copyright owners.

The submission offers a policy solution which rests within the framework of the current *Copyright Act* to grow Australian publishing both in a traditional sense and in an online environment.

General Comments
Government Policy

The rationale and conclusions for the Government's policy are set out in the Explanatory Memorandum ("EM") to the Bill.

The Government states that the criteria satisfied in the Bill are:

- Reasonable certainty to owners and users;
- A better take-up of technology by public institutions; and
- Flexibility achieved by giving the Courts a greater freedom to determine what are exceptions to copyright.

Specifically the EM states:

> EM 7[1]
> **An extended use exception**
> A second issue identified in the Fair Use review is the need to expand on the present system of exceptions and statutory licences that apply to specific uses of copyright material. This approach has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright.
>
> It is argued that the fixed scope of existing exceptions inhibits, rather than encourages, public institutions to take-up new technology for socially useful purposes.

Certainty in the context of Drafting Style

The EM acknowledges two differing styles of drafting. The style that prevailed in the Australian legislation from 1968 until the Copyright (Digital Agenda

[1] References to the EM are made by page reference off the PDF provided on the Parliament House website; http://www.awm.gov.au

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Reform Amendment) Bill 2000 was the United Kingdom 'semi-open' style (EM 7). The style adopted in the 2006 Bill is the United States approach that is largely dependent on its meaning being secured through litigation. The EM states:

> EM 7
> United States where a general 'fair use' exception allows the courts considerable freedom to determine whether acts qualify as an exception to copyright.

The EM discusses legislative models and opts for Option C which is a composite model of Option A and Option B.

Strangely enough the Option A style of drafting (the United Kingdom style) is used for the new 'format shifting' and 'time shifting' exceptions in this Bill.

In respect to the Option B part of Option C the EM noted:

> EM 10:
> On the other hand, this approach [Option B] may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.

Yet in spite of these words the EM concludes:

> EM 13:
> **Implementation and Review**
> Option (C) is recommended as it achieves the objectives without causing major disruption to copyright markets.
> The Government will monitor the effects of legalising time-shifting and format-shifting and the development of case law with respect to an open-ended exception

The APA notes that under the Treaty obligations noted in the EM any exceptions to copyright are subject to the 'Three step test'[2].

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[2] The foundation of the test is found in the following:
The Three Step Test
Article 9 of the Berne Convention for the Protection of Literary and Artistic Works 1967 states:
(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.
Article 13 of TRIPs Agreement states:
Members shall confine limitations and exceptions to exclusive rights to certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.
The Rule is also picked up in the AUSTFA which, states in respect to Intellectual Property Rights:
Chapter Seventeen - Intellectual Property Rights
Article 17.1 : General Provisions
Each Party shall, at a minimum, give effect to this Chapter. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the additional protection and enforcement is not inconsistent with this Agreement.

The EM states the terms of the test as:

Under this test, exceptions and limitations to the rights of copyright owners must be confined:

- to certain special cases
- which do not conflict with a normal exploitation of the work, and
- do not unreasonably prejudice the legitimate interests of the right holder.

The 'flexible' litigation based United States style of drafting can be seen in the proposed Section 200AB[3]. The principles of the three step test can be seen in the wording and have been emphasised for the reader.

200AB Use of works and other subject-matter for certain purposes

(1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:
(a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a **special case**;
(b) the use is covered by subsection (2), (3), (4) or (5);
(c) the use does **not conflict with a normal exploitation of the work** or other subject-matter;
(d) the use **does not unreasonably prejudice the legitimate interests of the owner of the copyright** or a person licensed by the owner of the copyright.

Definitions
(7) In this section:
conflict with a normal exploitation has the same meaning as in Article 13 of the TRIPS Agreement.
special case has the same meaning as in Article 13 of the TRIPS Agreement.
unreasonably prejudice the legitimate interests has the same meaning as in Article 13 of the TRIPS Agreement.
use includes any act that would infringe copyright apart from this section.

Several general drafting issues arise from this extract of the proposed section 200AB.

International Agreements
2. Each Party affirms that it has ratified or acceded to the following agreements, as revised and amended:
…..
(h) the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (the Berne Convention).
3. Further to Article 1.1.2 (General), the Parties affirm their rights and obligations with respect to each other under the TRIPS Agreement.

[3] This can be found in Schedule 6 Part 3, cl 10 of the Bill and EM commentary in Schedule 6 Item 10.

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It is submitted that this section is a codification of the three-step test. If so, the absence of an explicit provision that the three-step test applies to the current exceptions in the Copyright Act 1968 might give rise to a source of confusion. This simply creates unnecessary uncertainty. Such a position can be fixed by inserting a Statutory Note into the Act stating that the three-step test applies to all exceptions in the Act – pre and post this Bill.

The definition provisions on 'special case' and 'unreasonably prejudice the legitimate interests' are based in TRIPS. This brings into play decisions of International Tribunals which, for those who can afford the costs of a copyright lawyer, is probably a welcome move. But for managers of public libraries, users and consumers of literary works this just adds to uncertainty. On the Government's performance criteria these measures fail as they add uncertainty and expense in a possibly litigious and adversarial environment.

Drafting in the UK style means the Parliament spells out what it means. For example, works which clearly fall within the category of 'special cases' are 'out-of-print' works and 'orphan' works. These allow easy recognition of clearly identifiable exceptions. Australia has had a preference in its drafting in the Copyright Act 1968 to not be so specific. An example is the 'commercial availability test'[4]. While this test creates a problem in some contexts of the Act, it probably has more certainty than what is proposed.

The Government's policy on such special cases effectively remains unstated and unclear. This is the same as saying any act or action can be an exception provided it does not contravene the three-step test. A copyright owner will need to take a user to court to enforce what they believe is not an exception. There is no merit in such an approach.

It is odd that the Government while seeking to assist copyright users and pubic institutions in taking up information technology is moving to a lawyer-based copyright regime – a litigious model – instead of staying with a regime based on clearer legislative exceptions.

It is strange that the Government in its EM would use technological change as a reason to put forward broad and undefined legislation, when an analysis of special cases in the context of the three step test, and what is happening in the EU[5], would show that narrow and well-defined special cases is a better way forward in terms of certainty for all parties.

Submission
The APA submits that the Government would do better to build a greater collaborative model in seeking to secure its performance criteria.

A better take up of technology by public institutions

[4] An example can be seen in Copyright Act 1968, sections 135ZMD, 49 and 50.
[5] EUROPEAN DIGITAL LIBRARY INITIATIVE, High Level Expert Group (HLG) – Copyright Subgroup, Interim Report, (adopted by the Copyright Subgroup 16 October, 2006)

Items 11 to 26 inclusive of the Bill make amendments to the fair dealing provisions in the Act[6] and the provisions covering libraries[7].

The *Copyright Act* divides the market of copyright material in its 'reasonable portion' provisions[8] into:

- Hardcopy,
- Periodical publication, or
- A work in electronic form.

As Items 11 - 26 of the Bill have to do with the Government's Response to the Digital Agenda Review conducted in the last two years, most of the following comments will be focused on the online environment.

Any policy proposal to generate the take-up of technology by public institutions, and in this case the library sector, would naturally be expected to reflect gaps and issues in the market place. This has not occurred.

Books/Periodicals vs. Electronic Form

Even with the advent of works in electronic form books have flourished. It still appears that people find it hard to read a book online. The NSW State Library had Willoughby Public Library on the Lower North Shore of Sydney trial 'e-books' but the result was not positive. In the fiction and non-fiction area the consumer choice seems to be 'paper'-based.

However in the area of periodicals the electronic form is overtaking the hardcopy. Academic publishers have invested heavily in bigger and better technology that has increased prices for such material. Some business models also changed with some entities listing and adding different pressures for growth and return on investments. The only way out for profit in a static market is price increases.

Generally libraries obtain periodicals in electronic form on a subscription basis. One librarian interviewed has reported that most periodicals now have to be sourced internationally and mostly it is technical and scientific journals that are online. With what has occurred in the periodical publication and academic journal publishing market in the last decade, there appears little

[6] Copyright Act 1968, section 40 - Item 11
[7] Copyright Act 1968, section 49, Item 12 - 16; section 50, Item 17 - 22 section 51A, Item 23 - 26.
[8] Copyright Act 1968, sub sections 10(2) (2A)

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capacity to grow the domestic market. Already within the Australian market, research-based monographs have declined

There is growing concern amongst publishers that what has occurred in the periodical market may happen in the Australian book publishing sector.

In the 1960's Australia was a net consumer of overseas books. Authors had to be published overseas to be sold within Australia. The 1970's saw the Australian publishing sector flourish and Australia now has the capacity to deliver its own product The Australian market still wants Australian material. The question that has to be considered is how best the Australian publishing industry might be served to grow Australian product.

A criterion the Australian Government has set in this Bill is in part to foster a better take-up of technology by public institutions. It is difficult to see how this fosters Australian content.

If the overarching objective is to grow a multiplicity of opinion through diverse works and for those works to be available in a fair dealing context to further grow opinion, then this Digital Agenda Review and its legislative response falls short of its own performance criteria.

Emerging Trends in Hardcopy Publishing

The Australian publishing industry is made up of two broad components: international publishers and Australian publishers. The significance of this for the Australian publishing industry is that, as with so many sectors of the Australian economy, the practices of international companies with offices in Australia ensure the transfer of overseas-developed technological practices and advances to the Australian publishing industry.

In Australia, in one lifetime, we have seen the move from the hot press to the layout of published works through the use of computer software. The rise of the self-publishing industry is a further example of change in industry structure and operation.

Producing copyright material for commercial distribution is already undergoing a further radical change.

When contemplating copyright material, in the form of literary expression, most people visualise a book. It comes out in hard cover and if you wait you might get a cheaper version in paperback. The work is in a complete, unitary form. However this is set to change radically and this change is already underway.

A book may have many differing forms of copyright within it. It may have a photograph, it may have printed words on a page or it may have a drawing or graphic works. Imagine disaggregating this book into each of these items —

including discrete parts of pages — and one can start to imagine the copyright forms that actually make up this unitary form known as a book.

What might be contained in an electronic book is all of these and more copyright material — such as a video clip with sound or one without the other.

When considering electronic processes and how some web pages are built, one sees a 'convergence of technologies' and ideas. There is nothing new in any of this, just where the application of this convergence is likely to take the respective industries dependent on sound copyright protection.

A web page can now be built from 'cascading pages'. This simply means pages behind a home page instead of hyperlinked pages within the web page structure. Within 'cascading pages' can be vast databases. The prime issue here is not how the technology works but rather what it can achieve.

If a person has a great deal of information, places it in a database software package where the database is relational, then that person has created an extraordinary range of applications. For example, take a series of photographs covering a backpacker holiday around the world for a period of eighteen months. It is unlikely that such a collection of photographs will be published commercially. However, software now allows anyone to load photographs onto a web page or into an html environment. However the data within this type of facility is still extremely difficult to manipulate. It is effectively like the old family album; rows and rows of photographs.

Put these same photographs into a relational database, then provide key words and add a search facility and immediately a very powerful tool has been created, coupled with a vast array of information. The data can be arranged and rearranged simply at the command of the search engine. It can be organised by date, person, place and the limitation is only subject to the software, and the data entered and attached to each item in the database.

Our point in relation to emerging trends in publishing is that the copyright of the data has not changed. Rather, the item that has copyright protection is simply being moved about. To build any relational database the information has to be uniquely identified but there is nothing extraordinary about this. As with any information or item stored in any software, there has to be a unique identifier. In Microsoft Word the phrase ‘pathway’ is used. Some people now refer to this naming or identifying as 'tagging". Once an item has had a tag

attached to it then it is uniquely identifiable and it is forever treated as a separate item and manipulated as such.

Returning to the hot plate press process, the final product in its entirety (whether a book or a newspaper) had just one tag because the items making up that product could not be separated. So in such an environment, it is possible to reason at a policy level, that the entire item had copyright protection and therefore part of this product might be exempted or an exception under certain circumstances. The concept of 'fair dealing' in respect to publishing is such an example. It is acknowledged that the policy goal was, and is, the balancing of the 'competing interests' previously referred to and the reference is not to question 'fair dealing' or the policy goal.

The application of these matters in a changing environment will require flexibility and review to maintain the overall intent as the underlying circumstances alter irrevocably.

Currently, where each item in the final product is tagged and there is the potential to commercialise separately each item or have it as part of an extract or as a different product, then the issue of building legislative structures to accommodate such changeability is an essential requirement for economic growth within the publishing industry.

The key factor in encouraging the rapid digitisation of content in the Australian publishing industry is to examine the current legislation and build the certainty Government policy is seeking.

Watermarking is one technological aid in tagging digital material. An example of this can be found on the Australian War Memorial's website[9] where photographs picked up through the website search engine are watermarked "AWM" in the event that anyone prints the image. This allows free access to the image (both on-screen and in printed form) but makes it difficult to use the image commercially. If a commercial use were required it would cause the bona fide publisher to contact the commercial arm of the Australian War Memorial to negotiate use rights.

Growing Libraries

Observations on the current online statutory scheme of libraries in the Copyright Act

[9] http://www.awm.gov.au

The Government merely sought in the Digital Agenda Reform to duplicate the hardcopy reproduction provisions into a digital regime where works were concerned.

The key changes were very few and included:

- A 'reasonable portion' for a work in electronic form was based on words rather than pages.
- There was a differing treatment for a work in electronic form in a request made pursuant to section 49 and an inter-library loan pursuant to section 50. In the former circumstance the scanned material has to be removed as soon as possible and the latter it does not[10]. This is about collection building and not about growing an online sector of the market.

The APA registers its surprise that the Government in the face of the pressures faced by the Australian library sector, the Australian publishing industry and a fast changing online environment elected to duplicate a hard copy exception regime into a digital age. It is somewhat analogous to placing new wine into old wineskins.

Policy Gaps

The policy contained in the Digital Agenda Reform and subsequent reviews does not deal with where the online market is moving in respect to hardcopy works. The solution is not in building library collections or in legislative models that perpetuate the traditional tension between copyright owners and users operating under exceptions.

In the three step test an exception will fall away where such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights holder (author or publisher). In the emerging trends outlined below a chapter of a book will not get past these two conditions. In a whole hardcopy book it does but not if full digitisation of works occurs.

[10] Copyright Act 1968, section 49(7A)(d)

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The information in this submission on emerging trends is readily available in the market place and it would be expected that some of the issues raised and which require a policy response might have been ventilated. Yet there is no real policy analysis of the reasonable portion provisions in an online market where a work is made of tagged items out of a database and not a hardcopy work.

The solution has been to only build library collections and retain legislative models that perpetuate the traditional tension between copyright owners and users operating under exceptions.

In regard to statutory exceptions for works in electronic form it might have been a more productive model for the Government to take a limited and narrow legislative pathway and allow a voluntary licensing regime to develop between copyright owners and entities dealing with the general public, together with the operation of sections 49 and 50.

Such an approach recognises special categories which remain statutory exceptions and may allow a market based solution, with a minimum standard within the legislation, which would operate in the absence of any agreement.

In this way a legislative model is in place that would comply with the three step test at all levels, allow the Parliament to have a robust model that will operate in a rapidly changing environment and allow for a retention of a body of law based on United Kingdom style drafting in which some certainty and clarity resides and which Australia has been using for some time.

Submission

For works in electronic form the Government consider adopting a legislative model following a consultative process (as outlined in the paragraph above).

<u>The Library Sector</u>

One of the key issues for online growth is providing catalogues with descriptions of what works exist. Finding the information is the first step.

The Government has identified growth in public institutions and for the APA libraries, apart from educational institutions, are the main group within that sector with which its members transact. The educational institution sector is not discussed as it has a Part VB licence coverage which provides a stable foundation for the balancing of the competing interests.

The following discussion has not sought to distinguish between libraries in educational institutions and libraries generally. It has instead, given the purpose of this submission, attempted to draw out issues relevant to the Government's policy objective.

The National Library of Australia has some interesting data from a survey conducted on the CiP.

> Cataloguing in Publication (CiP) is a free service offered to publishers by the National Library of Australia to provide a bibliographic record for a book before it is published. When the book is published the CiP data is printed on the reverse side of the title page. The CiP data is also included in the Australian National Bibliographic Database (ANBD) available on Libraries Australia, Australia's Library Network.[11]

Of the publishers who responded to the survey only 16% had produced items on CD-ROM or disk (they were asked how many computer software programs and/or databases they had produced on CD or floppy disk) and 36.6% indicated they would be publishing software, CDs or other electronic publications in the next 5 years. A question which has not appeared in the response to the Digital Agenda Review is how this intent might be realised?

Respondents to the survey also identified several categories of material not currently included in the CIP program, but for which CIP would be useful including video disks/tapes (89.6%), kits (85.6%), audio disks/tapes (80.2%), and interactive multimedia packages (76.6%). Again, how might the Digital Agenda Review assist such a move?

Under the Legal Deposit requirements the National Library of Australia secures a copy of every work published in Australia. A work can be a book, a periodical such as a newsletter or annual report, a newspaper, a piece of sheet music, map, plan, chart, table, program, catalogue, brochure or pamphlet. In some States where a similar scheme operates a work also includes material published in electronic format such as CD's and computer disks.

Couple this with the online catalogue capacity and it is not hard to imagine how to grow a public institution's capacity to become an information powerhouse. This is particularly so if buying consortia were added to this industry structure. (Australia does not have the library consortia that operate out of the USA like OCLC[12].)

[11] http://www.nla.gov.au/services/CIP.html
[12] http://www.oclc.org/

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Not surprisingly, the organisational arrangement of Australian libraries is based on a federal model. Tasmania, the ACT and the Northern Territory have a centralised organisational model flowing out of their State Library. NSW, Vic and Qld have a decentralised model based on Local Government.

Generally in Australia there is no regional library structure. However in NSW, for example, there are associations between larger country centres and smaller libraries in the area. This arrangement operates because the smaller libraries do not have the financial resources to operate alone. Wagga Wagga is an example where services are provided for cost to surrounding smaller libraries.

In NSW, Local Government Bodies run individual libraries in bigger towns and cities. Generally they have no co-operative purchasing body. Each individual library does its own purchasing. On the Lower North Shore of Sydney is the 'Shore Link" group of libraries. This body has as its constituents the Councils of North Sydney, Manly, Mosman, Lane Cove and Willoughby. However each library in this group does its own acquisitions. It is not as if a buying co-operative has not been suggested. This has not eventuated due to the nature and function of the libraries in this group.

Like many public libraries they are what are termed 'browsing libraries'. They are libraries of popular works that are required for their members. If an exotic item is needed then only one of the group may buy the book and it is available through inter-library loan. Otherwise each library buys the books they need.

This discussion has not sought to distinguish between libraries in educational institutions and libraries generally.

Speculation on future events is fraught with the risk of simply being wrong. But the type of issues which have been outlined and the manner in which they may interact does suggest tension between stakeholders – if not now then at some point in time. The legislative model outlined above may bring a commerciality and robustness to this environment that could never be created through the legislative process[13].

One of the challenges for the library sector has been decreasing funding across Australia. They are faced with the costly demand of technology and huge resource demands as consumer expectation grows in terms of timeliness and the range of items available.

Submission

The APA requests the Government look again at its policy approach in relation to works in electronic form. Any specific approach the APA might suggest as a business model is not far removed from what is in place today.

[13] The EM makes an admission to this extent when discussing the Options considered for the Bill.

The APA's objective is to build a collaborative approach between copyright owners and the library sector.

One suggestion to achieve the objectives of the growth of the online information economy in the business and public sectors which:

- Would inject funds into the library sector,
- Add certainty to both copyright owners and users, and
- Reward copyright owners,

is, to institute a three-thirds rule. This rule would require a fee to be levied on every online request made pursuant to sections 49 and 50, or where a charge is made by a library for cost recovery for an online request with a user. One third of the payment would go to an acquisition fund for the library; one third would go to the publisher and one third to the author.

Other Commentary on the Bill

Corporate Libraries

The Bill extends the definition of Library to corporate libraries

Proposed Section 50(10)

Item 22
library means:
(a) **a library all or part of whose collection is accessible to members of the public directly or through interlibrary loans**; or
(b) a library whose principal purpose is to provide library services for members of a Parliament; or
(c) an archives all or part of whose collection is accessible to members of the public.

One of the essential features of the library provisions of the current Act is that for a library to avail itself of the exception to infringement of copyright in respect to the fair dealing and reasonable portion provisions in servicing requests was that they are not-for-profit organisations[14].

The provisions also required that no charge exceeding cost be made for the service.

[14] Copyright Act 1968, section 50(9)

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Corporate Australia is certainly not part of the not-for-profit sector. What this amendment will achieve is, with a little organisational restructuring, the library of a corporate library could become a stand-alone not-for-profit structure. At the stroke of a pen the corporation would gain all the copyright exceptions that other libraries have due to their special circumstances.

Again applying the first part of the three- step test one has to ask where is the special case to grant a corporate library access to copyright exceptions for research and study when the environment in which they operate is a commercial one.

If the policy objective is to secure the inter-library loan arrangements with corporate libraries, due to the specialist material they might have in their collections, the full impact of this needs to be examined. What will be the impact on the publishers that produce such specialised journals? Mention has been made of how the Australian suppliers to this market have contracted and many journals have now to be sourced overseas.

Submission
The APA submits that this amendment not be made until the Government's position on the three step test's applicability to this amendment has been clearly stated.

Schedule 6

Time Factor and Work in Electronic Form Test

Item in the Bill	Proposed section
14	49 (5AA) & (5AB)
19	50(7BA) & (7BB)
26	51B
29	112AA

The main provision in these proposed sections reads as follows:

> in determining whether a copy of the work, the work, the portion of the work or the article (as appropriate) cannot be obtained within a reasonable time at an ordinary commercial price, the authorized officer must take into account:
>
> (a) the time by which the person requesting the reproduction under section 49 requires the reproduction; and
>
> (b) the time within which a reproduction (not being a second-hand reproduction) of the work at an ordinary commercial price could be delivered to the person; and
>
> (c) whether the copy, work, portion or article can be obtained in electronic form within a reasonable time at an ordinary commercial price.

This provision is a new exception applying to both hardcopy and works in electronic form. It is to operate where a current exception or licence does not

operate and where a user has a need for the works within the overall terms of section 49. It is a further unremunerated exception.

CAL and other industry groups have labelled this the ‘license it or lose it’ provisions. If the copyright material is not available electronically to be licensed then under this provision the copyright owner will lose their exclusive rights. This is a confronting extension of copyright exceptions. If the special case was restricted to an 'orphan work' or an out of print work' the provision would take on a different hue. However it not drafted in this narrow way.

It is a further example of APA's earlier remark that a more collaborative approach needs to be built between libraries and publishers in the online environment of Australian works in electronic form are to be published and available.

An outcome of this clause is that a publisher will be less inclined to publish works in electronic form. This may not be apparent at first but if no realistic time or other provisions are set as an industry practice then, the authorising officer may very well overlook an 'electronic reproduction of the work'. Without a regularisation of this then this provision is a commercial disincentive to invest in the reproduction of 'works in electronic form'. Without a commercial licence in place then the copyright owner is at risk of having more than a reasonable portion copied and/or an electronic reproduction overlooked.

In section 135ZMD(2), where 'reasonable time' and 'ordinary commercial price' are key phrases, there is a statutory licence scheme which operates around the provision. So the Copyright Act picks up the three step test in this part of the Act concerning multiple reproduction and communication or works by educational institutions - by requiring that the use be paid for under a statutory licence.

What is remarkable is that the library sector does not have an equivalent provision applying to it

Submission

In the absence of the EM setting out any direction as to how any commerciality might be injected into this provision the Government must act to do so quickly. In doing so its aim should be to restore some balance to the interests of the copyright owner.

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The APA submits that unless the provision is narrowed down to identifiable 'special cases' this amendment not go forward until the Government's position on the Three-Step Rule in respect to this amendment has been clearly stated.

Schedule 7 - Part 1

Communication

The EM for this provision states:

> an amendment to clarify who made a communication for the purposes of the communication right so that a person who merely browses the Internet is not considered to be determining the content of the copyright material accessed online.

The term 'communicate' was introduced as part of the Digital Agenda Reform amendments:

Section 10(1)

> ***communicate*** means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.

Section 22(6)

> (6) For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.

The amendment reads:

> Copyright Act 1968
>
> 1 After subsection 22(6)
>
> Insert:
>
> (6A) To avoid doubt, for the purposes of subsection (6), a person is not responsible for determining the content of a communication merely because the person takes one or more steps for the purpose of:
>
> (a) gaining access to what is made available online by someone else in the communication; or
>
> (b) receiving the electronic transmission of which the communication consists.
>
> Example: A person is not responsible for determining the content of the communication to the person of a web page merely because the person clicks on a link to gain access to the page.

The communication right which was added to the rights of copyright owners in 2000 includes things such as emailing content, pod casting content and posting works on websites/intranets.

The physical act of a user clicking on a hyperlink is taking a step to gain access or receive something. There had to be some form of intent to

physically click a mouse or strike a keyboard to command a computer to do some act. Browsing on the web is not an involuntary act. Irrespective of the intent there has been a communication as defined.

In narrowing the application of the definition of communicate, what is actually left of the owner's right of communication? On the one hand the right is 'to make available' and yet someone cannot be taken to determine the content of the communication if they take a step to gain access or receive the electronic transmission.

This leaves the meaning of communicate very unclear. If someone gains access to the work does this mean that there is no communication? Or does the amendment introduce an element of intent? If this view is correct, then this amendment makes the definition of 'communicate' almost unworkable so far as a copyright owner is concerned. Such a position will require the Courts to clarify the operation of this Digital Agenda Reform initiative.

The noun ‘communication’ means 'imparting or exchange of information by message or otherwise'. The fact that the amendment says a person will not determine the content of a communication merely by clicking on the link to gain access seems not to detract from the imparting or exchange of information. If A talks to B or sends a letter to B there will be communication. B under neither of these two circumstances has or can determine the content of the communication.

If A loads up a website and B clicks on to the website then B has received a communication.

The EM states:

> **Schedule 7** contains an amendment to clarify who made a communication for the purposes of the communication right so that a person who merely browses the Internet is not considered to be determining the content of the copyright material accessed online.
>
> **Schedule 7—Maker of communication**
> Copyright Act 1968
> **Item 1** After subsection 22(6)
> This item inserts new sub-s 22(6A). The purpose of the amendment is to clarify the intended scope of the communication right by specifying circumstances when a person is not responsible for determining the content of a communication under sub-s 22(6). When the right to communicate works and other subject-matter to the public was inserted into the Act by the Copyright Amendment (Digital Agenda) Act 2000, a definition of ‘communicate’ was inserted into sub-s 10(1) which was stated to mean

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> ‘make available online or electronically transmit … a work or other subject-matter, including a performance or live performance’. Sub-section 22(6) supplements that definition by providing that a communication is taken to have been made by the person responsible for the content of the communication. Although it was never intended that a person doing no more than merely accessing copyright material online could be considered to be exercising the communication right in relation to what was accessed, some have argued that this interpretation is possible.
>
> New sub-s 22(6A) provides that for the purposes of sub-s 22(6) a person does not determine the content of a communication merely because that person takes one or more steps for the purpose of gaining access to what is made available online by someone else in the communication; or by receiving the electronic transmission of which the communication consists. The amendment is intended to make it clear that a person who merely accesses or browses material online is not considered to be responsible for determining the content of the communication and, therefore, is not the maker of the communication for the purposes of the communication right.
> The item also inserts an example in an explanatory note that a person does not determine the content of material by merely doing the technical process necessary to receive a communication, e.g., by clicking on a hyperlink.

The EM material has been provided in full, as there would appear to be a problem. If Parliament is seeking to say a communication in electronic form only takes place if the user can determine the content of the communication then there is a problem with this analysis.

Starting with the ordinary meaning of 'communication' one gets a sense of a sender and a receiver on every occasion where a successful communication occurs. The definition in section 10(1) adds to this ordinary meaning to the extent that it clarifies what is to be communicated.

A receiver of a communication just receives a communication. A notice might be posted which says that if you enter this communication the following will occur. Then the receiver has to elect whether to proceed.

Clicking on a hyperlink is an act of communication if the person doing the clicking receives something. What is probably really being suggested is that if the copyright material is used, acted upon, downloaded then a full communication has occurred. If this is what is intended then this amendment does not achieve this.

Most serious publishing entities will place their copyright material on the Internet in a secure location. There are also people who merely publish using the web for whatever reasons[15]. These people have a copyright interest that should not be ignored. They certainly have not appeared as an explicit policy consideration probably because the material is freely accessed. Herein lies a solution. The copyright protection exists regardless of whether a licence fee is sought or not. When a communication occurs in the ordinary meaning, the legislation needs to establish a regime for how the copyright interest is to be recognised.

The way Parliament might deal with these Internet situations for users in Australia is to place into the legislation an attribution system similar to what is used in academia. All extracts from an unprotected website must be attributed or infringe copyright and a limit set on the amount of material that can be used. From this starting point the 'communication' regime can be built into cases where protected and/or licensed material is on the Internet.

If the issue of the differing categories of people using a web browser within a library or an educational institution or at home are then considered they would appear to slot into this attribution regime.

Submission
APA submits the Government needs to clarify the act of communicating in an electronic form for the purposes of copyright.

Schedule 8 - Part 5

Active caching for educational purposes

The amendment in part states:

> The copyright is not infringed by:
> (a) the making of that reproduction of the work or other subject-matter; or
> (b) a communication, using the server, of the work or other subject-matter to any of those staff or students for the purposes of giving or receiving the educational instruction.

This wording is extremely broad. It essentially permits activities which are infringements of copyright.

Importantly the full wording of the clause ignores the fact that a voluntary licence or a statutory licence may be in operation under which a payment is being made by the educational institution to the copyright owner for the use of the material.

This proposal conflicts with the three step test. It is difficult to see that there is a special case, the activity conflicts with a normal exploitation of the work and would unreasonably prejudice the legitimate interests of the rights holder.

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The practice outlined is also extremely broad. 'Cache' involves vast amounts of information stored in cache memory. What if the material cached during the period of instruction is of or includes material previously subject to an agreement with the copyright owner?

The EM states:

> To achieve a balance between copyright owner and user interests, this item amends the Act to allow the active caching of websites by educational institutions under certain conditions.

If implemented this provision will destroy the balance and allow an educational institution to use copyright material without payment to the copyright owner, effectively destroying existing commercial arrangements.

As part of their service Australian, and overseas, publishers of educational textbooks provide a CD-ROM of the textbooks sold into the educational institution. What of the interests of the copyright owner if an electronic version of a work were to be found on a website and then downloaded? Does this proposed amendment give the educational institution protection if this material is held in a cache? The answer lies in the proposed section – it does give protection. The relevant elements are in subsection (1) and if they are met then copyright is not infringed:

> 1. If:
> (a) copyright subsists in a work or other subject-matter; and
> (b) 'a communication of the work or other subject-matter is made so that here is a reproduction of the work or other subject-matter on a server;
> (i) that is operated by or on behalf of a body administering an educational institution; and
> (ii) that makes the work or other subject-matter available, in connection with a course of educational instruction given by staff of the institution to students, to those staff and students in a way that is intended the availability, using the server, to those staff and students.

Any educational publisher facing this circumstance would have second thoughts about placing any of their material publicly in digital or electronic form. Such a business could not afford to have its information find its way to the Internet.

Submission
The APA submits that the Government either withdraws this proposed section or redrafts it so that if a voluntary license arrangement or a Part VB license is in place copyright infringement will occur.

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