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Submission to the Senate Legal and Constitutional Affairs Committee

Copyright Amendment Bill 2006 – Fair dealing provisions and 'reasonable portion'

Principle Concern: We wish to make a submission on the proposed changes in the *Copyright Amendment* Bill to the "research and study" fair dealing provision contained in section 40 of the *Copyright Act 1968* (Cth). In their existing form, these amendments may not only have a detrimental impact on all current and future researchers in Australia but the information commons more broadly.[1] We are principally concerned that the proposed section 40 would codify a 10% reproduction rule in the fair dealing exception of "research and study".

Unclear and Ambiguous Drafting: The proposed section 40(5) states that a reproduction 'is a fair dealing with the work or adaptation for the purpose of research or study *if, and only if*, the reproduction is taken under whichever of those subsections is relevant to contain only a reasonable portion of the work or adaptation' (emphasis added). The existing version of s40(5) seems to have the effect of 'if' rather than 'if and only if', thus leaving open other possible ways in which a relevant work could be considered a fair dealing.

It remains unclear to the intellectual property legal community whether the proposed section 40 changes, taken together with the existing section 10(2) and section 10(2A), would in fact codify a 10% reproduction rule. Such confusion among experts is likely to be amplified tenfold amongst those non-legally trained persons who perform research and study. Given the confusion emanating from the current drafting of the fair dealing amendments, it may be that our reading of the affected provisions is incorrect and our fears are unfounded. However, given the significant impact that the changes to these provisions will have on research and study in Australia, the Senate Legal and Constitutional Affairs Committee must seriously consider the proposed amendments and investigate the underlying rationale. It may be that the issues identified in this submission are unfounded or the result of problematic drafting.

"Reasonable Portion": The *Copyright Amendment Bill 2006* would repeal sections 40(3)-(4) and insert new sections 40(3) – 40(5). We are most concerned about section 40(5) and its usage of the term "reasonable portion." "Reasonable portion" is non-exhaustively defined in section 10(2) and 10(2A): **"**Without limiting the meaning of the expression reasonable portion…". However, within the same section, the provision goes on to imply that reasonable portion is "10% of the number of pages…". The potential for confusion is obvious. However, this was not of such importance while section 40(5) allowed for 'fair dealing' to be achieved by means other than a 'reasonable portion' test.

We wish to ensure that whether a use constitutes "fair dealing" is performed on a case by case basis, rather than based on a statutorily-defined quantitative figure. It seems to us that this could be achieved in either (or preferably both) of two ways: (i) reversion to 'if' rather than 'if and only if' in section 40(5), maintaining the status quo; (ii) clarifying that the existing definition of 'reasonable portion' in sections 10(2) and 10(2A) does not require a 10% test.

[1] One of the major projects based at the Cyberspace Law and Policy Centre, the "Unlocking IP" project is concerned with Australia's copyright commons and ways to both find and expand commons content.

It is understood that the Government has based its amendments on a commissioned report for the Centre for Copyright Studies by notable Berne scholar Professor Sam Ricketson. Ricketson asserts that the 10% reproduction rule is compliant with the Berne 3-step test and article 13 of TRIPS.[2] This does not, however, mean that the absence of a quantitative figure would violate the Berne 3-step test. In fact, Ricketson highlights that the wording of section 40(2) which **is <u>not a quantitative test</u>**, fully satisfies the Berne Convention

> "…in the case of subsection 40(2), compliance with the three-step test is established without any great difficulty. The factors listed in that subsection are directed specifically at the kinds of issues raised by the three-step test and allow, moreover, for a case-by-case determination of whether there will be a fair dealing for the purposes of research or study."[3]

If these non-quantitative factors in section 40(2) would satisfy the Berne three-step test, then there is no need for Australia to go any further in mandating a quantitative test.

<u>Eminent Berne and TRIPS Experts</u>: Numerous other eminent Berne Convention, TRIPS and WIPO scholars have stated that there is no reason to specifically restrict the applicability of any fair dealing provisions and these should be dealt with on a case-by-case basis:

- **Daniel Gervais** (Chair Professor University of Ottawa, former head of WIPO Copyright Projects, Assistant Secretary General of International Confederation of Societies of Authors and Composers, former Vice-President of the United States Copyright Clearance Center, panelist of WIPO Arbitration and Mediation Centre, consultant OECD, and author of 2 authoritative books on TRIPS),
- **Jane Ginsburg** (Professor Columbia Law School and Université de Paris II, Director Kernochan Center for Law, Media and the Arts, Goodhart Visiting Chair of Legal Science at University of Cambridge, editorial board member of many American and international intellectual property journals, and author of more than 5 authoritative books on intellectual property),
- **Mihaly Ficsor** (former Director WIPO, Director for Center for Information Technology and Intellectual Property, author of 3 authoritative books on WIPO and TRIPS),
- **André Lucas** (Professor Université de Nantes, expert advisor on Intellectual Property for the European Union, Advisor to the National Scientific Research Centre, and author of several books on intellectual property in the European Union), and
- **Martin Senfteben** (Associate Officer in Sector of Trademarks in WIPO, author of recent book, "Copyright, Limitations and the three-step test").

<u>Australia Only Jurisdiction to Codify 10% Rule</u>: No other State party to the Berne Convention that has implemented a "research and study" exception codifies a quantitative test. Reasons for the exclusion of a quantitative test include:

- May go against public interest in certain situations.
- May remove flexibility of the courts to balance rights on a case-by-case basis.
- May conflict with current research practices.
- Difficult to implement on a practical basis.
- May produce conflicting obligations with other fair dealing and other general exceptions to the *Copyright Act.*
- May impact on the public domain and the broader information commons.

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[2] Ricketson S., "The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions," Advice prepared for the Centre for Copyright Studies Ltd. Report at www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf

[3] *Ibid.*

- May impede innovation.
- May impose unreasonable financial and legal obligations for libraries and research institutions.

The Senate Legal and Constitutional Affairs Committee must strongly consider the meaning and effect of the proposed amendments. While this section may not appear to be one of the major amendments of the *Copyright Amendment Bill 2006*, it is arguable that it may have a significant impact, beyond the intention of the Parliament.

Submission:
Either or both of the following amendments should be made to the Bill:
(i) the proposed section 40(5) should be changed by reverting to 'if' rather than 'if and only if';
(ii) clauses should be added to clarify that the definition of 'reasonable portion' in the existing sections 10(2) and 10(2A) in the Act do not require a 10% test.

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