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Copyright Amendment Bill 2006

SUBMISSION OF THE AUSTRALIAN DIGITAL ALLIANCE

October 2006

EXECUTIVE SUMMARY

The ADA makes this submission further to its submission to the *Fair Use and Other Copyright Exceptions Review* ("the fair use review") and recognising the critical need for amendment of the *Copyright Act 1968* to reflect consumer and organisational practices, and importantly, the current technological landscape.

The ADA notes and strongly supports the various policy aims of the Government as stated in the general outline of the explanatory memorandum to the *Copyright Amendment Bill 2006* ("the Bill"), particularly:

- The need for copyright to keep pace with developments in technology and rapidly changing consumer behaviour;
- The need to recognise reasonable consumer use of technology to enjoy copyright material; Australian consumers should not be in a significantly worse position than consumers in similar countries';
- The need for copyright laws should not be brought into disrepute with technical and out of date provisions;

Unfortunately however, this Bill as it stands simply does not fulfil these policy aims. Consumers will remain worse off than their US counterparts under this Bill. Researchers will be worse off than they are currently. This Bill will not allow for new and innovative uses by consumers other than parody and satire. The Bill does not allow for new unforseen uses to be considered 'fair'. Consumer uses of current technologies are only partly legalised – the Bill unnecessarily differentiates between different versions and uses of technologies, so that consumers will need to interpret complex legislation to determine to what extent their activities are legal. Essential uses by educational and cultural institutions are not adequately accounted for. In summary, the complexity and limited flexibility of the Bill means that it will date quickly. Some parts already do not reflect current reasonable and common consumer practices and thus, prior to implementation, again risk bringing copyright laws into disrepute.

Additionally, this mismatch between law and reality was accentuated by the Government's accession to the Australia-US Free Trade Agreement ("AUSFTA"), which provided a combination of changes to the copyright landscape effecting increased protection of copyright material, including by an extended copyright term of 70 years, by increased protection of technological protection measures ("TPMs"), and by tougher enforcement measures.

The ADA emphasised in the fair use review, that "Australia's limited and prescriptive fair dealing provisions do not effectively fulfil their purpose. They do not provide an effective legislative mechanism by which the interests of users are 'balanced' with those of owners of copyright materials. They are technical, complex, inflexible and not well suited to the rapidly changing technological environment in which we all live and work". While the ADA recognises the Government's intention to remedy the current unsatisfactory situation, it has serious concerns about the contents of the *Copyright Amendment Bill 2006*, particularly it seeks to highlight in this submission:

- The consumer provisions in their current state are unworkable;

- The limitations in the preservation provisions including the new 'key cultural institutions' provisions make them unworkable;
- The narrowing of fair dealing is strongly opposed and will increase the administrative burden on educational and cultural institutions;
- Whilst the ADA supports flexibility and sees merit in this provisions, there are issues with the 'certain purposes' provision which minimise its flexibility and obfuscate the meaning of the provision that must be addressed;
- The enforcement provisions are a serious concern for the ADA. In their current state they will deter innovation and legitimate uses within educational and cultural institutions, and subject consumers to new 'strict liability' offences and disproportionate penalties, in circumstances where knowledge of infringement is not required.

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In summary, the ADA recommends:

1. **That the amendments relating to:**
    a. **the copyright exceptions (other than the digital agenda review measures);**
    b. **the enforcement provisions; and**
    c. **the copyright tribunal amendments;**

    Not be passed by the Parliament until the various problems highlighted herein are addressed;
2. **That the most effective way to address the various problems addressed herein is by implementing a flexible provision limited by principles of fairness, as outlined in detail in the ADA's submission to the Fair Use inquiry, appropriate for Australia, to better reflect its stated policy aims of ensuring flexibility and allowing for technological advancements;**

Whilst Australia has an obligation under the Australia-US Free Trade Agreement to implement technological protection measures provisions in accordance with that agreement, there is no such requirement in relation to any other part of the Bill. Although the ADA strongly believes there is an urgent need to reform the copyright exceptions, the problems with this Bill as outlined below are not minor and are therefore not able to be easily 'fixed' within the time-frame provided.

Given the serious issues raised by the parts of the Bill relating to matters other than TPMs, the ADA urges the Parliament not to allow passage of those parts until such time as proper consideration has been given to the contents.

1. Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA), a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material. As per the ADA's Statement of Principles, all members:

- Support balanced copyright and related laws that advance the interests of society as a whole;
- Believe copyright laws must balance effective protection of the interests of rights holders against the wider public interest in the advancement of learning, innovation, research and knowledge;
- Believe that fair dealing and other exceptions and limitations must be preserved and carried forward into the digital environment;
- Support appropriate and flexible compulsory licences that ensure guaranteed access for fair payment;
- Support the fundamental principle that copyright protection extends to expressions and not to facts, ideas, procedures, methods of operation or mathematical concepts as such;
- Support clear limitations of liability for copyright infringement in circumstances where compliance cannot practically or reasonably be enforced;
- Oppose laws that would give rights holders power to use technological or contractual measures to distort the balance of rights set out in the Copyright Act.

The ADA thanks the Senate Legal and Constitutional Affairs Committee for this opportunity to comment on the *Copyright Amendment Bill 2006*. The ADA is concerned that contrary to the Government's intentions, this Bill replaces one set of out of date copyright laws with another, and that there may be aspects of the Bill as they are currently drafted that simply are not workable. This submission will therefore address:

1. The limitations which make the consumer provisions unworkable;
2. The limitations in the preservation provisions including the new 'key cultural institutions' provisions which make them unworkable;
3. The serious implications involved in narrowing the fair dealing provisions;
4. The issues with the 'certain purposes' provision which minimise its flexibility and obfuscate the meaning of the provision;
5. The importance of clarifying that caching is not a breach of copyright;
6. The concerns of the ADA regarding the enforcement provisions and the potential implications for ADA members;
7. Why issues with the structure of the Bill necessitate an alternative approach and what such an approach might look like.

2. Consumer Provisions: Format & Time-Shifting

The ADA supports the important policy objectives behind the provisions relating to time-shifting and format-shifting. Technological advancements enable users to access material in new dynamic ways and therefore copyright law should evolve to reflect these important and constantly evolving societal changes.

The ADA however does not believe that the Bill is equipped to adequately adapt or respond to current technologies, let alone future technological advancements.

Time-shifting

Currently, the ADA envisages the following problems with the time-shifting provision at s 111:

- The provision does not allow time-shifting of new and emerging digital forms of technology, such as podcasts and webcats. Rather, the provision is limited to broadcasts only, and therefore is technologically specific rather than neutral. This will be confusing for consumers and as technologies develop and use of podcasts and webcasts become more common this will lead to disregard for copyright law;

- Recordings under this provision can only be made for private and domestic use. This limitation is unnecessary given that by definition; time-shifting is limited to 'watching or listening to material at a more convenient time'. Thus, given this type of use is limited and does not detrimentally affect the interests of rights-holders, this provision should apply more broadly to all consumers. Time shifting enables institutions and consumers to access and disseminate information for research, and educational and cultural purposes, in dynamic and responsive ways. Indeed, the increased exposure of works as a result of time-shifting can enhance rights-holders' profiles thereby *facilitating* their ability to further exploit their works. However this is not allowed under these provisions;

- The provision is geographically limited to 'domestic use'. This limits use of new technologies such as the ipod. For example, a consumer under these laws may be able to copy a broadcast onto an ipod as long as they listen to it inside their house. However, if they chose to listen to the broadcast on the way to work this may not be covered by the provision. The ipod, as a transportable device, should be able to be transported.

- The ADA is unclear of what the addition of the word 'solely' adds and recommends against its use.

Format-shifting

The ADA is concerned that the format-shifting provisions at sections 43C, 47J, 109A, and 110AA are unnecessarily limited and potentially unworkable, for the following reasons:

Technology specific

- The provisions are highly technologically specific, for example, s 109A legitimises only certain uses of the ipod (not all versions) and does not take into account newer devices such as 'Zune'[1] developed by competitor companies;

- *'temporary copies'*
  In relation to format shifting of films and sound recordings, (proposed sections 109A and 110AA), both provisions require that 'temporary copies' made incidentally to the making of the 'main copy' should be destroyed at the 'first practicable time during or after the making of the 'main copy'. The ADA understands that the term 'temporary copy' does not refer to the definition of 'temporary copy' as it is defined in the copyright Act by sections 43A and 43B, but rather, that in this context 'temporary copy' refers to an 'intermediary copy' which is not temporary but rather an essential permanent copy made during the process of format-shifting in certain circumstances.

  This is unworkable in the ipod context, for example, a consumer who wishes to format-shift a copy of a work from CD or mobile phone to Ipod via the accompanying itunes library software, must retain a copy of the work in their itunes library on their computer, as the itunes software is programmed such that works deleted from the itunes library are automatically also deleted from the ipod as soon as the two are connected. This is thus an essential step in the process of format-shifting material onto an ipod and the requirement to delete temporary copies is not workable.

- *'A form substantially identical'*

The ADA is concerned that limiting 'format-shifting' to the same format significantly limits the provision and potentially makes it unworkable. For example, the ADA envisages various circumstances where it would be appropriate for consumers to copy from one hard copy format to another or from one digital format to another. For example;

  - A consumer may want to format shift a sound recording from their computer to their ipod, or from their mobile phone to their ipod;
  - A consumer may wish to photocopy an article from a newspaper so that it is easier to read, to facilitate ease of use;

- *'private and domestic use'*

As discussed above, the 'domestic use' limitation is unworkable and fails to implement the Government's policy intention of allowing consumers to enjoy legitimately acquired materials in different formats[2]. The ipod for example, is a transportable device, however, this provision does not allow consumers to transport it outside the confines of 'domestic use'. Thus a consumer may be

[1] For example, see Weatherall, K. "On the Copyright Amendment Bill and Ipods" blogpost dated 25 October 2006, at http://weatherall.blogspot.com/

[2] For example, see Explanatory Memorandum to the Copyright Amendment Bill 2006 at 6.

breaching copyright law if they format shift for the purpose of enjoying legitimately acquired material in their car.

In summary, the ADA seeks to highlight the following problems with the consumer provisions:

- The provisions are specific to particular technologies and devices;
- The requirement to destroy 'temporary copies' is unworkable;
- The term 'domestic premises' is unworkable;
- It is unclear what is meant by format shifting to a substantially identical format, however the provisions will be largely unworkable if consumers cannot copy from one digital format to another, or from one hard copy form to another.

3. Key Cultural Institutions Provisions (sections 51 B and 110 BA)

The ADA supports the Government's policy of ensuring that institutions holding significant Australian heritage should not be impeded from preserving and providing access to their collections in accordance with their founding statutes. However, the ADA does not believe that these provisions effectively implement this policy, nor do they reflect institutional practices. These provisions may be unworkable for the following reasons:

- They are not technologically neutral. The restriction of preservation copies to one copy only is a concept long out-dated. Organisations which retain information in digital form presumably make sufficient back-up and preservation copies to ensure that legitimately acquired material stored on their networks is not lost or destroyed. There are many best practice standards for organisations to refer to in relation to backing up of digital information. Most of these practice standards recommend 'multiple copies' be made and stored in different locations. For example, the UNESCO *Guidelines for the preservation of digital heritage*[3] recommend 'multiple copies'. Cultural institutions particularly have very valuable material stored on their networks and therefore pursuant to their founding statutes are obliged to ensure that material is not shoddily looked after.

- The provision is limited to copying of material which cannot be obtained 'within an ordinary time at an ordinary commercial price'. This makes the provision unworkable for institutions. It is crucial that institutions be able to back-up and preserve material whether or not that material is still commercially available. Indeed, if an institution has to wait until an item is no longer commercially available in order to preserve it – they will have lost the item and therefore also any ability to preserve it. Preservation by definition is a practice that needs to be undertaken in advance of any loss or deterioration of an item.

[3] UNESCO 2003, *Guidelines for the preservation of digital heritage*, UNESCO, Paris. Pages 114-115: emphasises fundamental need for back-up, multiple copies and storage at different sites. See http://unesdoc.unesco.org/images/0013/001300/130071e.pdf

- These provisions only apply to 'key cultural institutions' which under a law of the Commonwealth or State or Territory have the function of developing and maintaining their collections. It appears that this would not include university and other educational and research libraries, or public or private libraries. However, many institutions other than National, State and Territory libraries, hold material of cultural significance to Australia. To provide some examples:
    - Monash University holds the Australian Jewish Music Archive which 'is the only archive in the world concerned exclusively with collecting sound, visual and bibliographic materials on the musical cultures of the Jewish peoples of Australia and South, east and Southeast Asia'[4].
    - Many public and special libraries hold works of local historic and cultural interest such as local histories and histories of local businesses;
    - The National Meteorological Library maintains a pre-eminent collection of key meteorological books and journals and archives and provides access to these materials for the benefit of the public;
    - Libraries of Professional Associations also often have valuable collections.

  It is equally crucial for these libraries to be able to adequately preserve and back-up this significant material for access by future generations or the material that is preserved will not be an accurate reflection of Australia's heritage.

4. The Narrowing of Fair Dealing

The ADA **strongly opposes** the amendment to fair dealing to narrow the scope of copyright exceptions for research and study. The proposed change will ensure that an entirely workable provision in the copyright Act which facilitates use of material for research and study purposes becomes unworkable. It will mean that researchers are worse off under the new amendments.

Throughout the Fair use Review, the ADA on behalf of its members clearly sought:

a) Additional circumstances which should be considered 'fair';
b) Increased flexibility via a fair use style provision, and in accordance with the recommendations of the Copyright Law Review Committee ("CLRC") in its report "Simplification of the Copyright Act 1968" ("Simplification Report")[5]

The Government has not implemented either of these options for users, but has instead narrowed fair dealing, removing the flexibility provided by s 40(2) and thus removed a long-standing mechanism enshrined in copyright law to ensure that the law recognises a balance of interests and encourages creativity and innovation.

The amendment will result in the illogical situation where anything copied by a user for research or study purposes in excess of 10 pages will automatically be considered 'unfair' and thus a breach of copyright, no matter whether the work is not

[4] Further information available on the Monash University website at: http://www.arts.monash.edu.au/jewish-civilisation/resources/music.html
[5] Copyright Law Review Committee, Simplification of the Copyright Act 1968 Part 1, Exceptions to the Exclusive Rights of Copyright Owners, Commonwealth of Australia, 1998 at 90.

commercially viable, out of print, or rare, or what other significant circumstances may exist. Furthermore, this will increase the administrative burden for libraries and archives who will receive an increased number of requests under section 49 for rare and out of print materials as a result of s 40 (2) being rendered useless in these circumstances as a result of this legislation.

Not Flagged or Consulted with Stakeholders Affected

In initiating this review, the Attorney-General noted the importance not only of ensuring that the copyright exceptions were up to date and reflective of public attitudes, but also of maintaining a 'balance' between the interests of copyright owners and users[6]. The review paper proposed various models which could potentially achieve these goals. These models generally incorporated the expansion of fair dealing, either via specific exceptions or via a 'flexible fair use style exception'[7]. The Attorney-General in announcing the review noted:

"In particular, I seek views on whether the Copyright Act should include more specific exceptions or a fair use exception which would facilitate the public's access to copyright material"[8].

The review did not however suggest any narrowing or removal of the essential components of fair dealing.

Background of Fair Dealing: An integral part of copyright law

Fair dealing is a long-standing balancing provision which is not a defence to infringement, but rather defines the boundaries of copyright owners' rights. It was introduced as a result of a recommendation by the CLRC inquiry into reprographic reproductions, ("the Franki Committee"[9]) which recognised the development of fair dealing at common law and emphasised the importance of fair dealing to education and research.

In recommending the introduction of s 40 (2), the Franki Committee commented that "we are satisfied that for the purposes of section 40 it would be most unwise to attempt any exclusive definition of the words 'fair dealing'"[10]… The Committee noted the words of Lord Denning in *Hubbard v. Vesper*[11] that "it is impossible to define what is "fair dealing". It must be a question of degree…" The Committee in making its recommendation went on to say "We see section 40 as being a section mainly directed to the acts of an individual, and there are so many factors which may have to be considered in deciding whether a particular instance of copying is 'fair dealing', that we think it is quite impracticable to attempt to remove entirely from the Court the duty of deciding the question whether or not a particular instance constitutes 'fair dealing'[12].

[6] Issues Paper: Fair Use and Other Copyright Exceptions, Attorney-General's Department, Commonwealth of Australia, May 2005.
[7] Ibid.
[8] Ibid., The Hon. Philip Ruddock M.P., at 2
[9] The Copyright Law Review Committee inquiry into Reprographic Reproductions; the report is available of the CLRC website at www.clrc.gov.au
[10] Ibid at 2.54 – 2.58
[11] [1972] 2 W.L.R. 389
[12] Op. Cit., at 2.54 – 2.58

In its more recent Copyright and Contract Report[13], the CLRC noted "Australia's 'very considerable public interest in ensuring a free flow of information in education and research' and the need to balance the interests of individual copyright owners against this element of the public interest is similar to the policy concern outlined in the preamble to the WCT"[14].

It is often commented that the factors referred to under s.40(2) are also relevant in determining the fairness of a dealing for purposes other than research or study, given the history of these principles in case law. Indeed, the CLRC recommended that the Copyright Act be amended to incorporate the fairness factors to all fair dealings, consistent with existing case law[15] and in its Copyright and Contract Report noted:

> "The underlying question in determining whether use for criticism or review amounts to fair dealing with a portion of a work will always be whether the use was fair for the relevant purpose. Thus, what amounts to a fair dealing is a matter to be determined by the facts of each case. Conti J noted that the substantiality of the material used, and the motives for use, will influence the determination of 'fairness'. Mason J in Commonwealth of Australia v. John Fairfax & sons also indicated that the absence of either express or implied consent so as to justify a use of a work for criticism or review is an important factor in deciding whether there has been a fair dealing under s.41. As indicated previously, the factors listed under s. 40(2) which assist in determining the fairness of dealings for research and study purposes also assist in determining 'fairness' for criticism or review."[16]

The result of the amendment to section 40(2) will be to override not only long-standing case law, but also various policy recommendations, in circumstances where as far as the ADA is aware, copyright stakeholders were not seeking such an amendment, and furthermore, legal commentators have noted the provisions compliance with international law[17].

The implications of this amendment will extend beyond fair dealing for research and study. The removal of the fairness tests may impact upon the interpretation of fair dealing more broadly, particularly fair dealing for criticism and review, and crucially, also upon the fundamental concept of 'fairness' as it is enshrined in Australia's body of copyright law.

Legal Implications of the Proposed Amendment

By narrowing the scope of what is protected by fair dealing, the Government is changing the concept of copyright by legislatively overriding the 'essential attributes of copyright law'. The recent High Court decision of Stevens v. Sony[18] made clear that the Government would need to provide for "the proper protection of fair dealing

[13] The CLRC, Copyright and Contract Report, The Commonwealth of Australia, 2002
[14] Ibid at 25 - 28
[15] Simplification Report at 90
[16] Op., Cit., at 25-28
[17] Ricketson S., The three-step test, deemed quantities, libraries and closed exceptions" at 4.3.2
[18] Stevens v Kabushiki Kaisha Sony Computer Entertainment Ors [2005] HCATrans 30 (8 February 2005)

in works or other subject matter entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. They are integrated in the protection which that law offers to the copyright owner's interest in its intellectual property"[19].

Finally, the ADA understands that Professor Sam Ricketson has written extensively in relation to Australia's international obligations and particularly was commissioned by the Copyright Agency Limited to undertake research into Australia's international law obligations as they relate to copyright exceptions. The resultant publication *"The three step test, deemed quantities, libraries and closed exceptions"* concludes that section 40(2) is in fact compliant with the Berne Convention and TRIPS agreement[20]:

> "Unlike subsections 40(1) and 40(3), this question [of compliance] can be answered much more readily: there seems little doubt that subsection 40 (2) does satisfy each of the three steps."
>
> "Above all, the virtue of subsection 40(2) is that it allows for a case-by-case assessment of each kind of reproduction, and is in keeping with the clear spirit of article 9(2) [of the Berne Convention]."[21]

Practical Implications of the Proposed Amendment

From a practical perspective, the proposed change will impact detrimentally on user access to many important works within educational and cultural institutions by users. Particularly, accessing out of print, rare or non-commercially viable material will be more restricted, despite access to such materials not being detrimental to copyright owner interests. In such circumstances currently, a weighing-up of the fairness principles may lead to a situation where the whole work could be copied if you cannot obtain it commercially. Under the proposed changes however, such rare works will not able to be either purchased OR copied by the user. It is noteworthy that some institutions hold almost entirely or predominantly rare or out of print materials. This proposed amendment will have a profound detrimental impact upon the accessibility of their collections to the public.

In summary, given the important practical and legal implications of removal of the 40(2) tests discussed above, the ADA reiterates its strong opposition to this incursion upon the important concept of fair dealing. Such a rigid interpretation of 'fair dealing' will only lead to the law being held in disrepute.

5. 200AB Flexible Dealing Provision

The ADA is supportive of the Government's policy of introducing increased flexibility into the *Copyright Act 1968*. The ADA in the course of the fair use review

[19] Ibid, per Kirby J at para 224
[20] Ricketson S., The three-step test, deemed quantities, libraries and closed exceptions" at 4.3.2
[21] Ibid

supported an extension of the 40 (2) principles to a broader range of purposes or uses, such as exists in the US 'Fair Use' provision[22], and such as was recommended by the CLRC in the Simplification report[23].

The proposed draft however instead provides:

a) Limited flexibility via a more restrictive and convoluted version of the 3 step test than exists at international law; and
b) For only for a limited range of stakeholders and purposes.

Particularly, the ADA is concerned about the following problems with this provision as it stands:

- There is no 'certain purposes' provision for consumers. Therefore, this legislation will not allow for consumers to develop new and innovative uses of technology for the benefit of society. Lack of such a flexible provision will put Australian innovators at a competitive disadvantage to US counterparts, because the US does have such a flexible provision commonly referred to as 'fair use'. 'Fair use' has already lead to various uses which would not be allowed under this legislation to be legalised in the US[24].

- The provision is much more limited than the three step test at international law.

    - Firstly, s 200AB is limited to 'certain special cases' within the certain special cases of educational instruction: Uses by bodies administering libraries and archives, uses by or for a person with a disability, and uses for parody or satire. This is an additional AUSFTA+ restriction of the three step test. It may unnecessarily prevent uses which are TRIPS compliant from even being argued before the Courts. For example, in the US, it has been held that search engines operating to make the internet more accessible, are operating legally in accordance with the US 'fair use' exception and therefore also the TRIPS agreement[25]. Search engines would not be able to mount such an argument here, despite the fact that another jurisdiction has found this use to be TRIPS compliant. This legislation does not allow this use.

    - Secondly, in relation to uses other than parody or satire, there is an additional limitation that the uses should not be made '*partly* for the purpose of the body obtaining a commercial advantage'. This provision is unclear and unnecessary.

      There may be circumstances where the three step test is met even where a commercial advantage is obtained. For example, in the case of uses of out of print or extremely rare materials, there would be strong

[22] See the Submission of the ADA to the Fair Use inquiry at: http://www.digital.org.au/submission/FairDealingReview05.rtf
[23] Simplification of the copyright Act 1968 Part 1 at 29 -43
[24] For example, see *Kelly v. Ariba Soft Corp*. (9th Cir. 2003)
[25] Ibid

arguments for compliance under the three step test. These scenarios however may simply not be made under this provision.

The phrase 'partly for the purpose of the body obtaining a commercial advantage' is unclear. The terms 'partly' and 'commercial advantage' introduce new phrases to the Copyright Act which have not been subject to judicial determination in the context of Australian copyright law. They further confuse the meaning and scope of the provision and importantly place additional unnecessary restrictions over and above the three step test. It is worth noting that public educational and cultural institutions are not for profit institutions which do not function with the purpose of obtaining any kind of commercial advantage in the sense that any monies received are ordinarily received on a cost recovery basis and used for purposes of essential institutional functions.

- Whereas there is some Australian judicial guidance regarding tests of 'fairness' such as exist currently at s 40 (2) (as discussed above), there is no such guidance regarding the TRIPS three step test. There is only one WTO decision regarding the interpretation of this test and in that decision, aspects of the test were challenged by the WTO Panel hearing the case. Thus, the test is far from clear[26].

- Use of the term 'educational instruction' at s 200AB(3)(b) implies that the scope of what is able to be copied under the subsection is narrower than copying for 'educational purposes'. The ADA sees no reason to restrict the operation of s 200AB given that the provision is already limited by the 3 step test. The provision should be applicable to educational purposes more broadly. Introducing new language into the Act also further complicates the Act. Use of the term 'educational purposes' would be clearer and simpler.

6. Caching

The ADA is concerned that the important efficiency function of systems administrators known as caching has not been clarified under this Bill and therefore potentially remains a breach of copyright.

Provision 200AAA has been included to clarify the position of 'active' caching for educational purposes. However, there is no provision in the Bill for the most common form of caching which occurs widely for internet efficiency purposes in a broad range of organisations that provide internet access. This form of caching is know as 'passive' or proxy caching.

As explained in the ADA submission to the Fair use and Other Copyright Exceptions inquiry[27]:

[26] United States-Section 110(5) of the US Copyright Act, Report of the Panel (the Homestyle Case) WT/DS160/R, 15 June 2000
[27] Op. Cit., at 12

> "Caching has been defined as "an activity, performed by machine or human being, with the goal of reducing communication and data processing costs, adapting to limited bandwidth, or providing a safe or otherwise regulated online environment"[28].
>
> 'Passive caching' is conducted mechanically in order to maximise system efficiency. The relevant material is cached on an institution's server, or on a desktop hard drive, merely in response to or as part of the process of satisfying a user request. It may include the use of automatic filters, but does not involve active human selection or intervention[29]… The principal purposes of caching are to (a) provide faster access to online items and (b) reduce the transmission costs of downloading online items. Thus it exists to create efficient access to the online environment within large networks."

There is a common view[30] that passive caching falls within the temporary copying exceptions found in s.43A & 43B of the Act. Whilst the ADA concurs with this view, clarification of this matter is necessary in this Bill so that it is clear that the technical processes involved in both passive and active caching (regardless of whether this is done within educational or other organisations) do not constitute infringements of copyright.

7. Enforcement Provisions

The ADA has seriously concerns about the enforcement provisions contained in the Bill. The ADA was not consulted in relation to these provisions and is concerned that no consumer or user group organisations were consulted in relation to this legislation.

The ADA is particularly concerned that the Bill introduces strict criminal liability offences into the Copyright Act. As these offences do not require any knowledge element, they will fundamentally change how copyright infringements, particularly, innocent copyright infringements are dealt with in Australia. The penalty for a strict criminal liability offence under these provisions will be 60 penalty units or $6600.00. This is not an insignificant amount, particularly given that this is the penalty *per infringement.*

Implications for consumers

Whilst the ADA has not had sufficient time to analyse these provisions in detail, however it is concerned that the provisions have serious implications beyond commercial conduct, and notes the following potential scenarios which exemplify potential serious implications for consumers of this new regime:

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[28] Whitehead, D. Draft: "Caching: An Issues Paper" 2005. This paper was presented at the Australian Digital Alliance Forum "ADA fair dealing review strategy forum" held at the National Library of Australia on 26 May 2005.
[29] Whitehead, D., Op. Cit.
[30] See for example, *Digital Agenda Review Report and Recommendations*, Attorney-General's Department, January 2004; Submission of the Copyright Advisory Group to the Schools Resourcing Taskforce of MCEETYA to this review.

- It will be an offence pursuant to s 132 AL to make or possess a device which is used for copying a work or other subject matter where the copy will be an infringing copy and copyright subsists in the work or subject-matter at the time of making the device. Therefore potentially, possession of a computer or ipod may lead to liability under this provision if for example, a consumer unknowingly exceeds the limitations of the format-shifting exception above;

- S 132AI makes distribution of infringing articles a strict liability offence where it is done to 'an extent that affects prejudicially the copyright owner'. Thus if a consumer engages in unauthorised file-sharing or where a consumer puts an infringing file on a website not knowing the copy is an infringing copy, they may be caught by this provision[31];

- Sections 248PE and 248PF provide for strict criminal liability offences to either:
    - possess equipment to make or copy unauthorised recordings; or
    - make an unauthorised recording of a performance;

  Thus ordinary consumers attending live entertainment venues or concerts will be subject to hefty strict liability fines regardless of whether they know they are committing an offence and regardless of any commercial intent. So for example, if a consumer, unaware of copyright law, takes an mp3 recorder to the Big Day Out and records 7 songs; they may be subject to a strict liability fine of $46,200.00[32];

- The legislation does not prevent misleading statements, threats or intimidation in relation to the exercise of these penalty provisions to be made;

Thus, the effect of these law will be that copyright 'crimes' will be the subject of substantially higher penalties than other property crimes, in circumstances where the public does not perceive these sorts of activities (uses of mp3 recorders, ipods etc) as crimes. It is noteworthy that the fines are disproportionate to any license fee that could reasonably be expected, and will presumably not be for the benefit of copyright owners. This will lead to disrespect for copyright law.

Implications for organisations

Again, the ADA has not had sufficient time to analyse these provisions in detail, however it is concerned that the provisions have potentially serious implications for institutions, and notes the following issues:

As the ADA understands it, the only defences for public institutions relate to:

- Subdivision B regarding commercial-scale infringement prejudicing the copyright owner; and
- Subdivision F – Electronic rights management information;

[31] Comments of Ms Kim Weatherall, Blogspot dated 25 October 2006
[32] Ibid

However, institutions often engage in activities which are potentially criminalised in other subdivisions of the legislation, including:

- Exhibiting copies of works to the public;
- Importing material for collections;
- Digitising materials for collections (NB conversion to digital form is aggravated offence);
- Distributing materials with or without electronic rights management;

Given the size of the collections of public institutions, it is likely that despite the risk averse nature of institutions, some items in some collections are infringing copyright and that institutions are completely unaware of these infringements. The National Library of Australia, for example, holds nine million collection items[33]. Institutions are seriously concerned about the criminalising of activities which they undertake for the benefit of the public in accordance with statutory duties. It is therefore essential that activities undertaken for the maintenance of collections within both educational and cultural institutions should be deemed "non-commercial". Whilst such institutions are not-for-profit, they may from time to time hold exhibitions or functions requiring a fee upon entry. Any monies made over and above cost recovery however are directed back into the maintenance of the collection.

Furthermore, the defences at subdivisions B and F relate only to 'anything lawfully done'. The ADA is unclear of the implications of this wording. Clearly, institutions will only need to resort to the defences if they are found to be breaching copyright in contravention of the law.

Institutions will need to acquire additional insurance coverage given that under a strict liability regime the risk of an institution being held liable for infringement is higher than under civil offences. Litigation costs are also likely to be higher given that more copyright owners may seek to sue institutions as it will be easier to make out a case of infringement under a strict liability regime.

The significant issues with the enforcement provisions are amplified by the lack of sufficient exceptions to cover institutional activities. For example, educational and cultural institutions hold orphan works, (works where the copyright owner is either not identifiable or locatable). Such materials may include letters, notes, labels, old Government reports, etc. Whilst these items are held by institutions because they are considered to be culturally significant, they are often non-commercially viable and rare. Under current law however, use of such material is illegal. These strict criminal liability provisions serve as a strong deterrent to institutions using orphan works in everyday activities such as exhibitions and brochures, to the detriment of the public.

Implications for Australian innovators and international competitiveness

The ADA is concerned that the enforcement provisions will further discourage innovation in Australia, particularly combined with the overall package of the Bill, which provides no recourse for innovators creating new products for the benefit of

[33] National Library of Australia General Facts Sheet

society (contrary to the position in the US). The ipod for example, currently in Australia might be seen to be 'a device which has been made with the intention that it be used to make an infringing copy'. The package of laws contained in this Bill will continue to deter Australian innovators from making such devices if the legal risks and potential costs far outweigh the benefits. This in turn will maintain Australian innovators at a competitive disadvantage internationally and particularly compared with their US counterparts[34].

8. Plethora of Issues with the Structure of the Copyright Amendment Bill 2006 Warrant Alternative Approach

As outlined above, there are many significant issues with this Bill which render many of the provisions unworkable in today's technological context. These issues are not easily addressed. A fundamentally different approach is required which recognises the need for copyright to adapt to changing consumer behaviours and technological advancements. Furthermore, for Australia to remain globally competitive in the field of technology, particularly following the AUSFTA, it is necessary that Australian consumers are not in a significantly worse position than consumers in the US. If these issues are not addressed, copyright laws will be brought into disrepute, contrary to the stated intentions of the Government in making these amendments.

Fairness is Essential to Copyright Law

The ADA maintains that the most appropriate remedy is introduction of a flexible provision that will allow owner and user rights to be balanced on a case by case basis via analysis of principles of fairness such as:

(a) The purpose and character of the dealing
(b) The nature of the work or adaptation
(c) The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
(d) In a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied in relation to the whole work or adaptation[35].

Such a flexible provision may effectively legalise many common consumer and institutional uses such as:

- format shifting;
- time shifting;
- back-up copying;
- use of thumbnail images;
- uses of orphan works.

Minimise complexity

Such a provision would avoid complicating the Copyright Act further with highly specific legislative provisions that will date quickly. Furthermore, it would allow for

[34] See further, comments of Kim Weatherall, Op. cit at blogspot 25 October 2006
[35] These 'tests' are derived from The Copyright Act 1968 Section 40(2) however exclude 40(2)(c) on the basis that the ADA is of the view that this test is superfluous in light of the other 40(2) tests.

future uses to be incorporated into copyright jurisprudence without requiring further frequent legislative amendments.

Hybrid Model: You can have Certainty and Flexibility
Such an approach need not replace the certainly that currently exists in the Act. It is not necessary to *replace* the existing fair dealing provisions with 'fair use' as it exists in US law[36]. Rather fair dealing should be retained and extended so that the current set of purposes is not exhaustive. Such an approach was envisaged by the CLRC in the Simplification Report[37].

The ADA supports the addition of specific exceptions to update Australian law in areas where it clearly lags behind other jurisdictions and where there is a clear and immediate need for public institutions and citizens to be able to make a free use copy without first waiting for a court decision. *However*, such exceptions should not be technologically specific or they will only serve to confuse the meaning of the legislation.

9. Summary and Conclusions

Given the extensive issues with the practical workability of the provisions of the *Copyright Amendment Bill 2006*, the ADA recommends:

1. That the amendments relating to:
    a. the copyright exceptions (other than the digital agenda review measures);
    b. the enforcement provisions; and
    c. the copyright tribunal amendments;

    Not be passed by the Parliament until the various problems addressed herein are addressed;

2. That the most effective way to address the various problems addressed herein is to implement a flexible provision limited by principles of fairness, as outlined in detail in the ADA's submission to the Fair Use inquiry, appropriate for Australia, to better reflect the Government's stated policy aims of ensuring flexibility and allowing for technological advancements;

[36] 17 U.S.C. Section 107 (2005)
[37] Op. Cit., at 61