1. Introduction

FLAG welcomes this opportunity to make representations to the Senate Legislative and Constitutional Affairs Committee ("LACA") regarding the Copyright Amendment Bill 2006 ("the Bill").

Before commenting on those aspects of the Bill where FLAG is requesting either that the proposed amendments be rejected or that the Government give consideration to further changes to reflect education sector concerns, FLAG congratulates the Government for giving effect to education sector recommendations including:

- the adoption of a flexible education sector exception;
- the extension of the Part VA educational statutory license to include broadcasts made available online by the broadcaster (including podcasts);
- the extension of the classroom performance exception to include communications;
- the inclusion in Part VB of an electronic anthology provision;
- the clarification which puts beyond doubt that a person who accesses a work etc which is made available online or electronically transmitted is not exercising the right of communication.

Each of these reforms will be of great benefit to Australian students and academics.

In the submission that follows, FLAG comments in particular on the following aspects of the Bill:

- the narrowing of the fair dealing exception contained in s 40 of the Copyright Act 1968 ("the Act");
- the caching exception for the education sector;
- the Copyright Tribunal provisions;
- the enforcement provisions; and
- the failure to address the oversight which resulted in educational institutions not being included in the copyright safe harbour contained Part V Division 2AA of Act.

2. Fair dealing

Schedule 6, clause 11 of the Bill proposes a radical and in FLAG's view unwarranted departure from the existing fair dealing regime. If implemented, the fair dealing rights of students and academics will be dramatically curtailed.

There has been no consultation with the education sector regarding the proposed change.

The Bill proposes an amendment to s 40 of the Act - the section containing the exception for fair dealings for the purpose of research or study – which would impose a statutory maximum number of pages or words which can be copied in reliance on the fair dealing exception.

Currently, the Act contains a statutory maximum only in relation to the *deeming* provision contained in s 40(3). A dealing which is within this statutory maximum is deemed to be fair. However, a dealing with *exceeds* this limit may nevertheless still amount to a fair dealing if a checklist of factors

contained in s 40 (2) (which include the purpose and character of the dealing and the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price) is satisfied. The test contained in s 40(2) is flexible. As was noted by the CLRC in its *Simplification Report Part 1*[1], the test "requires a user and, in the case of a dispute, the court, to weigh up not only the quantity but also the quality of the material copied in determining whether the dealing is fair."

Example:

If a particular work was out of print (ie not available for purchase commercially), it might amount to a fair dealing for a person to make a photocopy of more than 10 per cent of the work for the purpose of research or study.

It might also amount to a fair dealing for a person to copy more than 10 per cent of a work for the purpose of research or study where the copyright owner cannot – despite all reasonable efforts – be located in order than permission can be sought for the copying.

The proposed amendment will have the effect that the fair dealing exception can *never* apply when more than 10 per cent or a work (other than an artistic work or an article from a periodical publication) is copied. Even if a work were out of print (and not otherwise available) or an "orphaned work" (ie a work in respect of which the copyright owner cannot be identified and/or located), it will not be permissible to copy more than 10 per cent for the purpose of research or study.

In light of the recent extension of the term of copyright to life plus 70 years, it is reasonable to expect that the number of copyright works which are either out of print or "orphaned" will increase substantially. There would appear to be no reason in principle to adopt an approach to fair dealing which is so inflexible as to absolutely prevent such works being copied for the purpose of research or study.

There is nothing in the Australia-US Free Trade Agreement which necessitated this amendment. In fact, if the proposed amendment is adopted, Australian students and academics will be in a worse position than their counterparts in the United States in situations such as those outlined above.

FLAG understands that the proposed amendment was prompted by concerns raised by the Department of Attorney General's Office of International Law to the effect that the existing provision was potentially not compliant with Australia's international obligations, in particular the so-called "three-step test"[2]. However, FLAG notes that in an advice prepared for the Centre for Copyright Studies in 2002, eminent copyright academic Professor Sam Ricketson (an internationally renowned Berne Convention scholar) advised that the case-by-case assessment of whether a particular dealing amounts to a "fair dealing - which is inherent in the checklist contained in s 40(2) of the Act – "is in keeping with the clear spirit of [the three-step test]"[3].

In removing the flexibility inherent in the existing fair dealing regime, the proposed amendment would not only shift the balance firmly against the interests of education, research and access to information, it would place Australian students and researchers in a less favourable position than their counterparts in the US.

It is recommended that the Government reject the proposed amendment to s 40(3) of the Act.

[1] CLRC Simplification Report Part 1 1998
[2] See article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement and article 10 of the WIPO Copyright Treaty
[3] Sam Ricketson, *The Three Step Test, Deemed Quantities, Libraries and Closed Exceptions*, Centre for Copyright Studies, 2002

3. Caching by educational institutions

Caching (ie the *reproduction of a work or other subject matter which results from an activity, performed by machine or human being*) is central to the efficient and cost-effective delivery of internet services by Australian educational institutions. The reproduction which is made does not amount to a separate exploitation of the information transmitted.

Educational institutions engage in caching for purposes which include the following:

- to reduce communication and data processing costs;
- to improve response times;
- to increase transmission reliability; and
- to adapt to limited bandwidth.

Some copyright owner groups, such as Copyright Agency Limited, have argued that caching for these purposes does not come within the temporary copy exception contained in s 43A of the Act. Notwithstanding that no court appears to have determined that this is so, uncertainty regarding the legal status of such caching is a matter of great concern to educational institutions due to the risk of being sued for copyright infringement in respect of caching and having to engage in the expense of defending such a claim.

Schedule 8, clause 10 of the Bill contains a proposed exception for "active caching by educational institutions". However, the proposed exception does not address the concerns noted above regarding proxy caching for purposes of efficiency, reliability etc. Rather, it addresses the kind of caching typically undertaken by primary schools whereby a particular website is cached on the school's server (for a period of days, weeks or months) in order that young students can be granted access to that material in a controlled and safe environment.

FLAG understands that it was in fact the Government's intention that forward or proxy caching which is undertaken for the purpose of enhancing the reliability and efficiency of an institution's internet service come within the exception contained in s 43A. If so, some words to this effect in the Explanatory Memorandum would put beyond doubt that caching of this kind does not infringe copyright. If the Government is not minded to make such a statement, FLAG urges the Government to broaden the proposed education sector caching exception to ensure that it can be relied on by education institutions in respect of forward or proxy caching.

It is recommended that a statement be included in the Explanatory Memorandum to the effect that the temporary copy exception contained in s 43A of the Act is intended to apply to caching which is undertaken for the purpose of enhancing the efficiency and/or reliability of an internet service. Alternatively, it is recommended that the proposed education sector caching exception be broadened to include forward or proxy caching by educational institutions.

4. Copyright Tribunal provisions

The Bill contains proposed amendments to the Copyright Tribunal provisions in the Act which have the potential to impose an enormous cost burden on educational institutions and in respect of which FLAG was not consulted.

The issue of most concern relates to "records notices" and is dealt with at Schedule 11, clauses 40 and 48 of the Bill.

By way of background, for more than 15 years the educational statutory licences in Parts VA and VB of the Act have provided alternative regimes for the assessment of the amount of licensed copying

(and, more recently, licensed communications) for the purpose of calculating (and distributing) equitable remuneration payable by an educational institution under the relevant statutory licence. One alternative provides for use of copyright material to be assessed by a *sampling* type system (in some cases referred to as an electronic use system) which has to be agreed by the institution and the collecting society or, failing agreement, determined by the Tribunal.

Because a sampling system focuses on only a sample of the use that has been made of the relevant licence it is obviously important that the sample is carefully chosen so that the results are sufficiently accurate to enable the proper calculation and/or distribution of licence fees.

The other alternative is a *record keeping* system. A record keeping system requires a record to be made of **all** licensed copies or communications made by the institution in question. The exact records that must be kept and the detail required is specified in the Act/Regulations (Sections 135K, 135ZWA). There is no need for the parties (ie the institution and the collecting society) to agree what records must be kept and therefore no potential for dispute or need to involve the Tribunal in resolving disputes regarding the system. Educational institutions have often opted for the record keeping option.

The Bill contains a repeal of the provisions which give effect to a prescribed record keeping system. This is despite the fact that the Copyright Law Review Committee considered these provisions in its Simplification Report Part 1, and recommended that they be retained. If the proposed repeal is implemented, an institution issuing a records notice would be required to reach agreement with the collecting society regarding the form of record keeping system or, failing that, apply to the Copyright Tribunal for determination.

This has enormous costs consequences for the education sector. Negotiations with monopoly collecting societies have been such that, if having a matter determined by the Copyright Tribunal is an option the collecting society will not reach agreements with the education sector without first instituting and pursuing Tribunal proceedings. Agreement is often not reached until the Tribunal has made a determination. Up until this occurs the collecting societies are only prepared to make extravagant ambit claims. In part this approach leverages the uncertainty and cost of Tribunal outcomes. It also allows the collecting society to avoid any criticism by its members that it did a bad deal – if the outcome is determined by the Tribunal the collecting society is not directly responsible for it.

There would appear to be no reason to impose this burden (of Tribunal proceedings in relation to how record keeping should operate) on the education sector when there is no evidence that the current records option is not working. The current records notice provisions of the Act do not allow educational institutions to pick and choose which records to make and how. All licensed copies and communications must be recorded and the form of the records is prescribed. Failure to comply results in the loss of the licence. The proposed amendment gives further bargaining power to copyright owners and undermines the interests of important educational users in Australia who have not been consulted on this proposal.

It is recommended that the proposed repeal of ss 135K(1)(b),(c) and (d) and 135ZX(1)(b),(c) and (d) be rejected.

5. The enforcement provisions

While the stated legislative intention of the proposed new enforcement provisions is to combat copyright piracy, FLAG is concerned that, as currently drafted, some of the proposed provisions have the potential to impact in unintended ways on educational institutions.

Firstly, the proposed new offence of *commercial scale infringement prejudicing copyright owner* set out at Schedule 1, clause 6 of the Bill, has the potential to be construed as imposing liability on educational institutions. While educational institutions are afforded a defence to this provision, this

defence only applies to "anything done lawfully" by an educational institution in performing its functions. The question arises: if an educational institution were found to have unwittingly authorised a staff member or student to reproduce or communicate copyright works (eg by providing them with access to a device which can be used for this purpose and taking no reasonable steps to prevent this from occurring) then the institution might be found to have engaged in conduct which was not lawful and which resulted in infringement/s falling within at least the terms of the summary version of this offence.

Secondly, there is no educational institution defence in respect of the various strict liability offences which are created, which include *making, or possessing a device, which is to be used for copying, where the resulting copy will be an infringing copy*; *performing a work at a place of public entertainment (where the performance is an infringement)*; and *causing a sound recording to be heard, or a film seen, at a place of public entertainment*.

In considering how this might this impact on educational institutions it is instructive to consider, for example, the offence of *making, or possessing a device, which is to be used for copying, where the resulting copy will be an infringing copy*. While the wording of this offence is quite ambiguous (what is meant by the words "the resulting copy **will be** an infringement"?) there is a risk that it could result in an educational institution being held liable whenever it was found that a third party (eg staff member or student) had made infringing copies using a copying device *possessed by* the institution.

It goes without saying, of course, that Australian educational institutions should not be unintentionally made subject to a radically enhanced enforcement regime which is directed towards combating copyright piracy.

It is recommend that:

(a) all of the proposed new enforcement provisions are subject to an educational institution defence; and

(b) such defence be clarified to ensure that educational institutions will not be exposed to criminal liability merely because they are found to have inadvertently authorised a staff member of student to reproduce or communicate copyright works or other subject matter.

6. Educational institution inclusion in the copyright safe harbour

At present, Australian educational institutions are in a vulnerable position because, unlike for-profit ISP's, they do not get the benefit of the copyright safe harbour contained in Part V Division 2AA of Act if users of their systems infringe copyright. FLAG understands that this was not an intentional exclusion, but rather an oversight by the drafters.

A very simple amendment is all that is required to fix this oversight.

It is recommended that the Act be amended to include educational institutions in the copyright safe harbour contained in Part V Division 2AA of the Act.