



## **Response to “Cracking Down on Copycats”, report of the House of Representatives Committee on Legal and Constitutional Affairs**

### **Australian Copyright Council**

The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government’s arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policies and legislation.

Some of the organisations affiliated with the Australian Copyright Council have made separate responses to the Committee’s report.

### **Summary of response**

We support the following recommendations: 2 to 17, 20 and 21.

We oppose recommendation 22.

We have also commented below on some of the recommendations.

### ***Recommendation 1: requirement for declaration by importers***

*The Committee recommends that the documentation required to be completed by commercial importers when importing a product into Australia include a declaration to the effect that*

- *had the product been made in Australia, the making of the product would not constitute an infringement of copyright; and*
- *the product meets the applicable Australian safety standard.*

An importer may know that the making of a imported product would infringe copyright if made in Australia, but nevertheless be entitled to import under sections

44A, 44C, 44D, 112A, 112C and/or 112D. Thus, any such declaration would need to address the issues relevant to establishing that the imported article is a non-infringing copy, and any other issues necessary for reliance on those provisions (eg that the work contained in imported books was not published in Australia within 30 days of first publication overseas).

***Recommendation 2: indigenous intellectual property***

*The Committee recommends that the Minister for the Arts and/or the Attorney-General give the Committee a reference to inquire into the mechanisms for the protection of indigenous cultural and intellectual property.*

We note that there have been a number of inquiries into, and reports on, protection of indigenous intellectual property, and that ATSIC is currently considering the recommendations in the report *Our Culture, Our Future*. We submit that any reference to the Committee should build upon, but not duplicate, previous work in the area of indigenous intellectual property. Issues the Committee could consider include industry protocols, educational programs, and specialised legal advice services to indigenous creators and communities.

***Recommendation 3: technological protection devices***

*The Committee recommends that industry be encouraged to develop technological protection devices that are used to protect copyright material.*

*The Committee further recommends that the Copyright Act be amended so as to provide legal sanctions against the removal or alteration of technological protection devices.*

We support both parts of this recommendation.

In addition, we submit that the Copyright Act should be amended so that the use – as well as the manufacture and supply – of technological protection measures be subject to sanctions.

***Recommendation 4: public education***

*The Committee recommends that the government conduct, in conjunction with representative organisations from the copyright industry, a public education campaign aimed at*

- *promoting awareness and understanding of copyright in the general community; and*
- *educating the business sector as to what copyright is (including how it differs from other intellectual property rights) and how it can be protected.*

We note that the training provided by the Australian Copyright Council is much more extensive than the training for members and law enforcement agencies referred to by the Committee.<sup>1</sup> We conduct a more than 70 training sessions a year around Australia, as well as about 30 speaking engagements on copyright issues. We are also in the process of developing a series of online training modules.

In addition, we publish more than 50 information sheets (and other material about copyright) on our website. We are also developing a practical guide to copyright for small businesses as an addition to our series of practical guides for other interest groups.

***Recommendation 10: liability for possession of infringing program***

*The Committee recommends that the Copyright Act 1968 be amended so that a licensee will be guilty of an offence where an employee or agent of that licensee is found in possession of a computer program, of which the licensee had actual notice, and which the licensee knew or ought reasonably to have known, is an infringing copy of the licensed computer program.*

We support the principle behind this recommendation, but submit that it should not be limited to licensees, and should apply to all copyright material (not just computer programs).

***Recommendation 22: Parliamentary library exception***

*The Committee recommends that sections 48A and 104A be amended so that each section concludes:*

*‘...being a library the principal purpose of which is to provide library services for the members of a Parliament’.*

This recommendation is outside the Committee’s terms of reference, and was made without inviting submissions on the issue from copyright owners.

This issue was the subject of a recommendation by the Copyright Law Review Committee (CLRC) in Part 1 its report on the Simplification of the Copyright Act 1968.<sup>2</sup> The recommendations in that report are currently under consideration by the Government.

In our response to the CLRC’s report, we opposed the CLRC’s recommendation, and referred to the proposal in our submission to the CLRC that sections 48A, 50(1)(aa) and 104A should be replaced by a provision similar to section 45 of the Copyright Designs and Patents Act 1988 (UK), which allows copyright material to be used for the purposes of parliamentary proceedings. We also submitted that any other copying by or for a member of Parliament should be treated in a similar way to copying by or on behalf of the Crown under s183. We maintain that view.

***Private copying***

The Committee recommended against the introduction of a blank media royalty scheme for the following reasons:

- In the Committee’s view, many people are not aware that home taping is an infringement of copyright, or regard its effect as trivial. The change in public attitudes intended to result from the Committee’s recommendations relating to public education “should lead to a decrease in the amount of private copying”.<sup>3</sup>

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- In the Committee's view, private copying would in the future predominately take place in the electronic environment, where the use of "traditional media" such as blank video and audio cassettes would be minor in comparison.
- The Committee referred to the submission of the Australian Consumer Association that "the digital economy not be used for increasing pursuit of consumers".
- The Committee referred to the submission of the Australian Digital Alliance that "there is in any case a public policy debate over whether private copying constitutes infringement".<sup>4</sup>

We submit that none of these arguments justifies the Committee's recommendation:

### *Public attitudes*

Even if more people become aware that their home-taping infringes copyright, it is unlikely that they will stop doing it if they believe they will not be penalised, even if they do accept that their copying may harm the copyright owners.

### *Future copying in the digital environment*

Countries with private copying schemes are already adapting their schemes to the digital environment – for example, by imposing levies on CD burners and blank CDs.<sup>5</sup>

### *ACA submission*

It is unclear whether the ACA's comments were intended to apply to proposals for a remuneration scheme for private copying of audio and audiovisual material. In any event, it is not clear how the "smart businesses" with "a relationship to customers strong enough, and a business model of values flexible enough" advocated by the ACA would deal with the private copying problem.

### *ADA submission*

As with the ACA submission, it is unclear whether the ADA's comments were remuneration for private copying.

There have been debates about private copying in the European Union (particularly in the lead up to the adoption of the Information Society Directive), and in the United States (particularly in connection with the Napster litigation). The issue has been settled in the European Union with the adoption of the Information Society Directive, and in the United States with the Supreme Court decision in the Napster case that users of Napster software were not covered by the fair use exception.<sup>6</sup>

In any event, there is less room for debate in Australia, as there is no exception for private copying (as there is in some European countries), and the Australian fair dealing exceptions only apply to certain specific uses (unlike the fair use defence in the US Act). Most private copying of audio and audiovisual recordings does infringe copyright. Whilst copying for research or study does not infringe if the copying is a fair dealing, private copying to time-shift, archive, store in a more convenient

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medium, “place-shift”, or to give to a friend is not copying for research or study.

As part of its determination of the levies payable under the Canadian private copying scheme, the Canadian Copyright Board unequivocally stated that private copying was not fair dealing under Canadian law.<sup>7</sup> Canada’s provisions on fair dealing are similar to Australia’s.

The ADA referred to the recommendation of the Copyright Law Review Committee (CLRC), in Part 1 of its report on Simplification of the Copyright Act, the Copyright Act be amended to introduce an “open-ended” fair dealing provision similar to the fair use defence in the US Copyright Act.<sup>8</sup> The recommendation has been subject to substantial criticism and the Government has not yet indicated its response to it. Even if the recommendation were adopted, it is unlikely that it would allow unremunerated private copying for any non-commercial purpose. Such copying would only be allowed under the Committee’s recommendation if the factors currently listed in section 40(2) of the Copyright Act were met.<sup>9</sup> These factors are similar to the “three-step test” in the international treaties. It is unlikely that a provision that allowed unremunerated private copying for all non-commercial purposes would comply, particularly given the increasing incidence of online distribution direct to consumer.

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### *Endnotes*

- 1 para 3.54
- 2 para 7.168
- 3 para 2.43
- 4 para 2.44
- 5 This has occurred, for example, in Germany, France, Austria and Norway. The US scheme – introduced in 1992 – has only ever applied to digital copying, as does the Japanese scheme.
- 6 *A&M Records v Napster* (2001) 50 IPR 232
- 7 Decision of 17 December 1999, footnote 3
- 8 Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, Commonwealth of Australia, Canberra, 1998 at p51 ff.
- 9 These factors include the possibility of obtaining the work within a reasonable time at an ordinary commercial price, the effect of the dealing upon the potential market for, or value of, the work, and how much of the work is copied.