Response to Review of Digital Agenda Act

October 2004

PO Box 1986, Strawberry Hills NSW 2012
ABN: 63 001 228 780

info@copyright.org.au
www.copyright.org.au

T +61 2 9699 3247
F +61 2 9698 3536

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 copyright policy issues.

Some of the organisations affiliated with the Australian Copyright Council have made separate responses to the Review of the Digital Agenda Act (the Review) carried out by Phillips Fox Solicitors (the Consultant) for the Commonwealth Government.

Review process

We generally support reviews of copyright law and policy, but submit that they should be conducted by a body such as the Copyright Law Review Committee (CLRC) or by the Government. We have no difficulty with Government commissioning research from appropriate experts outside government, but recommendations about changes to copyright law and policy should come from a body such as the CLRC.

In addition, it is unfortunate that the review proceeded without reference to the negotiations on the Australia/US Free Trade Agreement (AUSFTA). There were many issues considered as part of the review which were also part of the AUSFTA negotiations. The successful conclusion of the AUSFTA has rendered many of the recommendations in the Review irrelevant.

Issues not adequately addressed by the recommendations

The terms of reference for the Review included matters which are not adequately dealt with in the report or recommendations. These include undertaking "research and analysis (including economic analysis where appropriate" and reporting on the impact of the amendments made by the Digital Agenda Act in relation to:

- whether the definition of library in s18 of the Copyright Act 1968 should exclude 'corporate libraries' having regard to factors including the extent of the provision of copyright material from corporate libraries to public libraries

and

- the operation of the "right of first digitisation" and its effects on the market place and users of copyright material.

Application of library use provisions to "corporate" libraries

Under paragraph (a) of its terms of reference, the Consultant was required to undertake research and analysis, and report on, whether s18 of the Copyright Act should exclude "corporate libraries".

Unfortunately, the Consultant appears not to have done any research on this issue, and its recommendation indicates it misunderstood the issue. We deal further with this issue in our response to Recommendation Four below.

First digitisation

The Consultant was required to undertake research and analysis in relation to "first digitisation", under paragraph (f) of its terms of reference. Copyright owners are concerned about digitisation of undigitised material because material in digital form is more easily subject to unauthorised copying and dissemination than material in hardcopy form. The Copyright Act allows first digitisation without the copyright owner's licence in certain circumstances, without any requirement to attach rights management information or apply technological protection measures to inhibit subsequent unauthorised use.

The Consultant unfortunately appears to have misunderstood copyright owners' concerns about first digitisation, despite submissions from the Copyright Council and others explaining those concerns, and further explanation at the public forums. The Consultant appears to have been under the misapprehension that copyright owners' major concern related to first digitisation of *unpublished* material (see paras 9.15 and 9.16). The final report indicates that the Consultant apparently did not understand that copyright owners' major concern relates to first digitisation of *undigitised* material. Such material may or may not have been published in hardcopy form.

As noted in our submission to the review, Division 5 of the Copyright Act allows digitisation of *published* works in a library's collection under s49 for supply to clients and s50 for supply to other libraries. These provisions are of the greatest concern. Other sections also allow digitisation (including first digitisation): s51 (reproduction and communication of unpublished works for research or study or with a view to publication); s51AA (reproduction and communication of works in Australian Archives); s51A (reproduction and communication for preservation, replacement and administrative purposes), and s53 (accompanying illustrations).

Part VB also allows the first digitisation of undigitised material (both published and unpublished) by educational institutions.[1]

Survey and education

Recommendation One: survey and education

> *That the Government commissions a choice modelling survey, of the type referred to in section 7 below, in order to make an assessment of owner and user attitudes to the Digital Agenda Act, the effectiveness of the provisions attributed to piracy or other infringing activity and likely responses to stronger legislation. The survey may also seek to determine the extent to which consumers would be likely to change behaviours, if more strict legislation was introduced.*

We are surprised at the recommendation that the Government conduct a survey, as this would appear to have been part of the Consultant's terms of reference.

---

1 As does s183, which allows use of copyright material for the services of a government, but this was not a result of the Digital Agenda amendments.

In any event, a review of the Digital Agenda amendments in isolation would make little sense given the amendments in the US Free Trade Agreement Act. The desirability of the type of survey referred to in this recommendation, in relation to particular issues, should be assessed after the FTA amendments come into effect.

> *That, having regard to the results of that survey and the other recommendations that are implemented, the Government commissions an education campaign, to raise public awareness of copyright rights and obligations generally, and those in respect of digital works or technologies in particular, with the campaign to be developed with input from owners' and users' interests, to be funded by owners' interests.*

The Australian Copyright Council conducts a range of education activities, including an annual training program, and publication of more than 60 information sheets available for free web download. The Copyright Council also has a free legal advice service, principally for creators and arts organisations, but also available to educational institutions and libraries.

Copyright owner organisations, particularly the copyright collecting societies, conduct educational activities for both owners and users.

We note that IP Australia is able to engage in education activities with the registration fees it collects, but that the Departments with responsibility for copyright (Attorney-General's and DCITA) do not have similar resources for education.

We are a little confused by the apparent suggestion in the recommendation that the education campaign be commissioned by the Government, but paid for by owners' interests. Any campaign commissioned by Government should be paid for by Government.

We support the introduction of more systematic coverage of copyright issues in the curricula in schools and in tertiary institutions.

Libraries

Recommendation Two: survey of library practices

> *That the Government commissions a longer term, independent survey or data collection of library copying and communication practices within libraries in respect of digital materials and RMI. (It may also make sense to extend that survey or data collection to copying practices in respect of 'hard copy' materials).*
>
> *That the Government makes the data collected in that survey publicly available.*
>
> *That the Government undertakes further consultation with interested parties in order to reach agreement on the meaning and effect of that data, and any necessary or desirable amendments to the Copyright Act, as a result.*

Again, we are surprised at this recommendation, as this is what we understood the Consultant was engaged to do.

We support the conducting of such a survey in connection with any future review of copyright exceptions.

Recommendation Three: targeted education campaign

> *That the Government commissions a targeted education campaign, to raise awareness of copyright rights and obligations in respect of digital works or technologies by educational institutions, under Part VB of the Act (noting that it may also be useful (although outside the terms of reference of the review) to extend that campaign to all aspects of the educational statutory licence provisions), with the campaign to be developed with input from owners' and educational institution interests, to be funded jointly by them.*

We support education campaigns to raise awareness about copyright. As noted above, the Copyright Council conducts an annual training program, conducted in most capital cities. This includes sessions for educational institutions. In addition, the Copyright Council has produced a range of practical guides for educational institutions, and the Council's free legal advice service is available to educational institutions.

Recommendation Four: not for profit libraries

> *That the definition of 'library' in sections 49(9) and 50(9) be repealed and the definition of library in section 18 remains unchanged.*
>
> *That before any decision is made to amend the Act to exclude libraries within 'for profit' organisations from being able to rely on the inter-library loan scheme to provide works or parts of works to other libraries within 'for profit' organisations, those interested in the issue need to have an opportunity to address the matter specifically.*
>
> *However, unless the survey data collected (see Recommendation Two in section 8 demonstrates a compelling need for libraries within 'for profit' organisations to be able to access collections within libraries in other 'for profit' organisations in order to ensure that the inter-library loan scheme works efficiently and effectively, that section 50 be amended to exclude libraries within 'for profit' organisations from being able to rely on the inter-library loan scheme to provide works or parts of works to other libraries within 'for profit' organisations.*

We are very surprised at this recommendation, given paragraph (a) of the terms of reference.

We are also surprised, given the requirement in the terms of reference to conduct research, at the following comments in the report:

> 1.8 The review has not had any opportunity to consider objective, independent data that demonstrates current practices and economic or other effects of practices affecting copyright within libraries.
>
> 1.9 The issue of whether libraries within 'for profit' organisations should be unable to make 'free' copies of material to be provided to another library within a 'for profit' organisation was not raised expressly in the issues paper.
>
> 1.10 Before any decision is made to amend the Act to exclude libraries within 'for profit' organisations from being able to rely on the inter-library loan scheme to provide works to other libraries within 'for profit' organisations, those interested in the issue need to have an opportunity to address the matter specifically.

The issue of reliance on the library use provisions by libraries in for-profit entities ("corporate libraries") was raised by Issues 1.1 and 1.2 of the Consultant's issues

paper. The issues paper invited submissions on all aspects of the library use provisions, including supply by corporate libraries to libraries in not for profit entities. There was ample opportunity to address this issue in submissions to the Consultant and in public forums. We are disappointed that the Consultant did not collect the data it refers to para 1.8 of its final report, given its terms of reference.

Meaning of "library"

The term "library" is not "defined" in sections 49(9) and 50(9) of the Act (or anywhere else in the Act). Sections 49(9) and 50(9) exclude the application of sections 49 (supply to users) and 50 (supply to other users) to libraries conducted for profit. Section 18 provides that a library "shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for a profit". Other library use provisions apply to all libraries, whether or not conducted for profit.[2]

We strongly oppose the recommendation to repeal the limitations on the meaning of "library" in sections 49(9) and 50(9), as the effect would be to extend the application of these provisions to libraries conducted for profit. Given the potentially wide meaning of "library" for these provisions (given that it is not defined in the Act), such an extension could allow extensive free copying by profit-making entities.[3]

The recommendation to retain section 18 is puzzling; it has no application if the references to library in sections 49(9) and 50(9) are repealed.

In our view, the limitations on the application of sections 49 and 50 must be increased, not decreased. We submit that s18 should be repealed, and that a definition of "library", which excludes libraries in for profit entities, should be introduced. The definition should exclude libraries in for profit entities. We propose a definition along the following lines:

> *Library* does not include a library maintained mainly or solely for the purposes of a business or businesses conducted for profit.

Reasons for our position are set out in our submission to the Digital Agenda Review of September 2003 (available from our website).

Recommendation Five: libraries

> *That owners' interests, libraries and cultural institutions be given a reasonable opportunity to negotiate, agree and implement a code of practice that clarifies issues of concern in relation to copying of works under Part III, Division 5 of the Act.*
>
> *Failing implementation of such a voluntary code of practice within a reasonable period of time, the Act be amended so as to make it clear that:*
>
> 1. *a copy under section 49 or 50 can be made from a preservation copy of a fragile work*
> 2. *there is a distinction between different editions of works in determining whether a preservation copy can be made.*

---

2 Activities covered by these provisions include supply of certain unpublished works to people for research or study, preservation of manuscripts, replacement of damaged lost or stolen works, and "administrative purposes".

3 Section 49(3) and 50(6) require that any charge made for supply of a reproduction does not exceed the cost of making and supplying the reproduction. While it is true that charging for supply of copies is one way a library could be conducted for profit, it could also generate profit in other ways, such as the payment of membership fees.

> *Subject to these amendments, no change to the requirement for destruction of copies made under sections 49 or 50 is recommended.*
>
> *That section 51A be amended so as to allow libraries and archives to make available to volunteers copies of works in the collection, for the purpose of educating or training those volunteers.*
>
> *That section 51A be amended to allow non-preservation copies of artistic works to be made available on a dumb terminal on the premises of the library or archive (without any ability to make a hard copy from that dumb terminal).*

Most elements of this recommendation indicate apparent misunderstandings by the Consultant about the current operation of the library use provisions in the Copyright Act. We discuss these further below.

Code of practice

There have already been some discussions between libraries and copyright owners aimed at identifying issues of real concern, and possible solutions to those issues. There is scope for the development of guidelines endorsed by libraries, cultural institutions and copyright owners, which set out an agreed application of the current provisions to a range of situations.[4]

Guidelines of this kind have been developed by Copyright Agency Limited (CAL) and the Ministers Council on Education, Employment and Youth Affairs (MCEETYA) in relation to the application of Part VB.[5]

Copy under sections 49 and 50 of preservation copy of fragile work

We are not sure what this recommendation is intended to address, given the current provisions in the Act.

Section 51A allows a library or archives to make a preservation copy of work held in manuscript form. It also allows a library or archives to make a copy of a work held in manuscript form "for the purpose of research that is being, or is to be, carried out in the library or archives in which the work is held or at another library or archives". A research copy could be made from a preservation copy (it need not be made from the original manuscript).[6]

Sections 49 and 50 only apply to published works held in the collection of a library or archives. It seems reasonably clear that the sections only apply to copying of the *published form* of the work. It is unlikely, in our view, that they apply to copying and supply of the manuscript version of a published work.

Sections 49 and 50 allow the copying and supply of a work in "fragile" published form held in the library. Section 49 allows copying and supply to a library client for research or study, and s50 allows copying and supply to another library for inclusion in its collection or supply to its client for research or study. If the work is no longer commercially available, the entire work may be copied. If it is commercially available, only a reasonable portion may be copied and supplied.

---

4 The Copyright Council provides practical guidance in its publications for libraries and cultural institutions, and in its training program.

5 Referred to in the Digital Agenda Review report at para 10.2

6 Section 51A also applies to original artistic works. Section 110B applies similarly to first copies of films and sound recordings.

Preservation copy of different editions

Section 51A allows the making of a preservation copy of a manuscript or original artwork. It does not apply to a published version of a work, even if that version is rare or fragile. A published version of a work held in a library may, however, be copied and supplied by the library to its clients for their research or study (under s49), and to another library for inclusion in its collection or to supply to its client (under s50).

The term "edition" can be used to mean different versions of a work (eg subsequent editions of technical works usually contain revised versions of the work), but can also be used to mean differently bound versions (eg "first edition", paperback edition, hardback edition). Used in the first sense, it is likely that each edition is a separate work, and whether or not a particular edition can be copied in its entirety under ss49 or 50 depends on whether that edition is commercially available.

The current provisions effectively allow a preservation copy of an out-of-print edition to be held by another library. A copy can be made and supplied under s50 for inclusion in that other library's collection. If the edition is lost, damaged or stolen, the library which held it may make a replacement copy from a copy held in another library, or a library which holds a copy may make and supply a replacement copy under s50.

Destruction of copies under section 49 and 50

Sections 49(7A)(d) and 50(7C) require the destruction of an electronic reproduction made for the purpose of communication to a user (under s49) or another library (under s50). The library is required to destroy the "intermediate" reproduction because its communication (for example by email) will result in a further reproduction. In the absence of these provisions, a library may amass a collection of "intermediate" electronic reproductions.

It is difficult to see how these provisions are relevant to the making of preservation copies under s51A, as is suggested by the Consultant's recommendations.

Amendment of section 51A to allow copies for volunteers for education and training

We oppose this recommendation. There are already numerous provisions in the Copyright Act allowing copying for research or study, and for educational purposes.

A library may supply copies of works to people for research or study under s49 (published works), s51 (unpublished works) and s51A (manuscripts and original artworks).

Part VB allows educational institutions to copy works for educational purposes.

Section 51A(2) allows a library to make a reproduction of a work for "administrative purposes". The meaning of "administrative purposes" is not clear, but in our view is unlikely to include making copies for volunteers for training purposes, given the existence of ss49, 51, 51A and Part VB.

Amendment of s51A to allow non-preservation copies of artistic works to be made available on a dumb terminal

It is not clear whether "non-preservation copies" is intended to mean only copies made for administrative purposes under s51A(2), or to also include other copies made under s51A (copies of manuscripts made for research or study, and replacement copies) or to include copies made under other sections. In any event, we oppose it. Communication of such copies should, in our view, be licensed.

We note that s49(5A) allows library to make available online published works acquired by the library in electronic form, including artistic works.

Recommendation Six: libraries

> *That, following implementation of the education campaign recommended in Recommendation One and the survey recommended in Recommendation Two in section 8, this issue, and the effects of digital copying by libraries and archives, and the extent to which those copies are further copied or communicated, is re-assessed and, if necessary, amendments considered.*

We have no difficulty with this recommendation.

Recommendation Seven: low resolution copies in libraries

> *That provided that the provision can be drafted in a technologically neutral way, and that no owners demonstrate, within the course of public consultation on the amendments, that their interests are likely to be adversely affected, sections 49 and 50 should be amended so as to allow low resolution reproductions of the whole of an artistic work to be copied and communicated, without infringing copyright.*

Again, it is difficult to discern the purpose of, or rationale for, this recommendation given the current provisions in the Act.

Section 49 allows a library to reproduce and communicate to a person, for research or study, an entire artistic work (in any resolution) if a copy of the work is not available within a reasonable time at an ordinary commercial price.

Section 50 allows a library to reproduce and communicate to another library, for that library's collection and/or for it to supply to a user for research or study, an entire artistic work (in any resolution) if a copy of the work is not available within a reasonable time at an ordinary commercial price.

Section 49(5A) allows a library to make available, on a computer in the library, an artistic work it has acquired in electronic form.

In the rare circumstances that a work is commercially available, the library may reproduce and communicate only a reasonable portion. We do not think the library should be entitled to supply an entire copy, in low resolution, of a commercially available work. We do not think that the supply in low resolution protects the copyright owner; such a supply may well conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights owner.

Recommendations relating to educational institutions

Recommendation Eight: code of practice; accompanying artistic works

> *That all interested parties, including the Department and other government departments such as DEST, State government education departments, private school bodies, the technical and further education sector, AVCC and owners agree on and adopt a code of practice, using the existing MCEETYA guidelines as a model.*

> *That failing agreement within a reasonable period of time, and if concerns with the practical application of the regime are still evident, Part VB be amended so as to give legislative force to the existing MCEETYA guidelines.*
>
> *That the code (or failing agreement any necessary amendment) includes guidance on the meaning and operation of literary works accompanied by artistic works that explain or illustrate the literary work.*

We support the adoption of guidelines about the application of the educational use provisions. We note that the Copyright Council's practical guides for educational institutions were written in consultation with representatives of educational institutions.

We do not think further amendments to the Copyright Act are warranted at this stage.

We do, however, think that the provisions in the Copyright Act dealing with "accompanying" artistic works should be repealed. This would not have an adverse effect on access (as such artistic works can nearly always be copied under other provisions), and would remove an unnecessary complication to provisions which are already very complicated (see our response to Recommendation Ten below).

Recommendation Nine (a): Audio-visual material on the Internet

> *That the Act be amended so as to clearly cover the use of audio-visual versions of copyright material from free to air broadcasts that is available subsequently on the Internet in the same way that Part VB covers audio-visual material taken directly from a free to air broadcast.*

It appears that Part VA may already apply to programs which are webcast as well as broadcast using the radio frequency spectrum.

Part VA allows an educational institution to copy a "broadcast" (and "underlying" material) for educational purposes. A "broadcast" means "a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992".[7] Under s6 of the Broadcasting Services Act:

> ***broadcasting service*** means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:
>
> (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
>
> (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
>
> (c) a service, or a class of services, that the Minister determines, by notice in the *Gazette*, not to fall within this definition.

On 12 September 2000, the Minister determined that the term "broadcasting service" does not include:

> A service that makes available television programs or radio programs using the Internet, other than a service that delivers

---

7 Copyright Act s10(1).

> television programs or radio programs using the broadcasting services bands.[8]

"Broadcasting services bands" is defined in the Broadcasting Services Act to mean certain parts of the radio-frequency spectrum.[9]

The effect of the Minister's determination on the Copyright Act is not clear. One interpretation is that the exclusion does not apply to services that are also delivered using the broadcasting services bands. If this interpretation is correct, then Part VA would appear to apply to programs, such as those broadcast by ABC, which are also webcast. Part VA would appear not to apply, however, to programs available for download at a time of the user's choosing.[10]

We note that it appears that the implications of the Minister's determination for the Copyright Act were not considered. The appropriateness of defining terms in the Copyright Act by reference to another Act, where the policy considerations underlying the terms in each Act may be quite different, may need to be reviewed.

Recommendation Nine (b): Notice requirements

> *That if the form of different notices under Parts VA and VB can be amended so as to allow for use of a single notice without adversely impacting on the information that an owner requires under the statutory licence, those amendments should be made.*

A single notice may be possible, provided it does not impose an additional administrative burden on collecting societies (for example, if it does not require the educational institution to clearly differentiate which material is subject to Part VA and which subject to Part VB).

Recommendation Nine (c): Digital anthologies

> *That Part VB, Division 2A is amended to provide a digital anthology equivalent to section 135ZK, where the anthology is paginated or where otherwise a suitable percentage of the total number of words of the anthology, as a percentage of the work to be copied, can be determined.*

We oppose this recommendation. The rationale for s135ZK was that an educational institution could presume that a work of fewer than 15 pages in an anthology had not been separately published and/or was not (separately) commercially available, and that it could therefore copy the entire work. That presumption cannot be made for works in digital form.

We understand that s135ZK was based on a clause in agreements between Copyright Agency Limited and educational institutions which preceded the introduction of s135ZK. In our view, presumptions about the application of the three-step test to particular situations should be addressed in guidelines to the legislation, such as the

---

8 See *Commonwealth of Australia Gazette* No BN 38, 27 September 2000.

9 Under section 6(1) of the *Broadcasting Services Act 1992*:

> ***broadcasting services bands*** means that part of the radiofrequency spectrum that:
>
> (a) is designated under section31 of the *Radiocommunications Act 1992* as being primarily for broadcasting purposes; and
>
> (b) is referred by the Minister under that section to the ABA for planning.

10 Because this would be a service that makes programs available on demand, covered by the exclusion in para (b) of the definition of "broadcasting service" in the Broadcasting Services Act.

CAL/MCEETYA guidelines, rather than in the Copyright Act itself. We thus refer to the statement to this effect in the Digital Agenda Review report, at para 1.16.

Recommendation Ten: s135ZMB

That section 135ZMB is amended to provide that:

1. *if the digital work is paginated then the same rule that applies in section 135ZG applies;*
2. *in determining the percentage calculation, the extract that is copied must be continuous.*

Our view is that all provisions referring to artistic works which explain or illustrate text should be repealed: s53 (library use), s135ZM (educational use of illustrations in hardcopy form) and s135ZME (educational use of illustrations in electronic form). These provisions can be repealed without unreasonably inhibiting copying of artistic works, because of the other provisions which allow copying of artistic works. Our reasons are set out in our submission to the Digital Agenda Review.

As for s135ZG ("insubstantial portions"), our view is that it and 135ZMB should be repealed. Our reasons are set out in our submission to the Digital Agenda Review.

Carriage service providers

Recommendation Eleven: sections 36 and 39B

That section 36 be amended to better express the relationship between that section and section 39B to better express the interpretation of the application of section 39B set out in paragraph 16.5 below.

As noted in our submission to the Review, we think that sections 39B and 112E should be repealed. Not only are they unnecessary, but they arguably have a wider effect than that required by the Agreed Statements to the WCT and WPPT, and there appears to be confusion about their scope.

Recommendation Twelve: sections 36 and 202

That section 36 of the Act be amended (or a new section be inserted) to:

- *Set the acceptable minimum standards or conduct in relation to notice and take down procedures (set out in paragraph 16.31 and following above) that will determine the reasonableness or otherwise of conduct, when considering issues of authorisation of infringement and provide that compliance with those procedures means that the conduct is reasonable, having regard to section 36(1A)(c).*
- *Require that until an agreed industry code is implemented, the minimum standards set out in the section is the default position.*
- *Require any voluntary code of conduct that may be agreed to be certified by an appropriate body, to be determined.*

The concerns giving rise to this recommendation would appear to have been partly addressed by the amendments in Part 11 of Schedule 9 of the US Free Trade Agreement Implementation Act 2004, although the full effect of those amendments depends on the forthcoming Regulations.

> *That section 202 of the Act be amended to include unjustified allegations of authorising infringement or requiring compliance with a notice under the amendments proposed above that is unjustified.*

Section 202 would appear to already apply to a threat of action for infringement resulting from authorisation.

We also note that new s116AJ(3), introduced by the US Free Trade Agreement Implementation Act 2004, may address the concerns underlying this recommendation.

Recommendation Fifteen: temporary reproductions

> *That sections 43A and 111A of the Act be amended to align the exception with the similar exception in the Information Society Directive, by deleting the words 'of making or receiving a communication' in subsection (1) and substituting 'part of the technical process' with 'as a necessary and incidental part to any technical process'.*
>
> *A consequential amendment to the heading to the section will be needed also.*
>
> *That the sections be further amended by inserting a new subsection to include a definition of 'temporary reproduction' for the purposes of the section, as meaning any transient, non-persistent reproduction that is incidental to the primary purpose or act for which the work is made available and which has no independent economic significance.*

Article 5.1 of the EU Information Society Directive[11] provides:

> Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
>
> (a) a transmission in a network between third parties by an intermediary, or
>
> (b) a lawful use
>
> of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

Section 43A(1) currently provides:

> The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication.

The proposed amended version would read:

> The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation as a necessary and incidental part to any technical process.

The proposed amendment would give the exception a much wider operation than it currently has because it would apply to all "temporary" reproductions, not just those resulting from making or receiving a communication. In addition, it would give it a

---

11 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

wider operation than Article 5.1 of the EU Directive, partly because there is no equivalent reference to "economic significance".

In any event, new exceptions for "incidental" reproductions – ss43B and 110B – have been introduced as part of the US Free Trade Agreement amendments. The justification for those amendments was to limit the effect of the new definition of "material form" introduced by the FTA amendments.

Recommendation Sixteen

> *That the educational statutory licence provisions be amended to allow an educational institution to make active caches of copyright material for the purpose [of] a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner.*

The reasons website proprietors object to caching include the loss of opportunity to measure traffic to the site, and the fact that an outdated cached version of the site may continue to be available. Neither of these consequences may be directly measurable in financial terms; the traffic data may have value not directly related to advertising revenue, and the currency of the site is likely to be related to the level of traffic.

Obviously, the longer the cached material is retained, the greater the adverse effect on the website proprietor.

Educational institutions can already reproduce certain material from websites for educational purposes. The recommendation is effectively that they be entitled to reproduce material they are not currently entitled to reproduce, including computer programs, audiovisual material and works available within a reasonable time at ordinary commercial price.

We think further consideration needs to be given to the justifications and consequences of this recommendation, and what the range of solutions (including seeking permission) may be.

Recommendation Seventeen

> *That the definition of TPM in section 10 of the Act be amended so as to accord with the interpretation favoured by Sackville J in Stevens, at first instance.*
>
> *That the permitted purposes in section 116A (3) be amended so as to clearly allow any supply or use of a circumvention device or service for any use or exception allowed under the Act, including fair dealing and access to a legitimately acquired non-pirated product.*
>
> *That section 116A(1) be amended so as to prohibit the use, including commercial and personal use, of a circumvention device or service to circumvent a TPM, other than for a permitted purpose.*
>
> *That section 135ANA be amended so as to prohibit the personal use of a broadcast decoding device other than for a permitted purpose, being the same permitted purposes listed in section 116A(3).*

These recommendations would appear to have been superseded by the obligations under the AUSFTA. We oppose the first two parts of the recommendation, and support the last two parts, subject to the limited purposes for which devices may be used under the AUSFTA.

Recommendation Eighteen

> *That section 135ANA be amended so as to prohibit the personal use of a broadcast decoding device other than for a permitted purpose, being the same permitted purposes listed in section 116A(3).*

This recommendation is the same as the last part of recommendation Seventeen.

Recommendation Nineteen

> *That the integrity of the permitted purposes in section 116A (3) be retained by preventing a copyright owner from making it a condition of access to or use of a copyright work or other subject matter that a user will not use a circumvention device or service for the purpose of making a fair dealing of the work or other subject matter.*
>
> *That this amendment is made irrespective of whether the recommendation to include fair dealing as a permitted purpose is accepted. However, in those circumstances, a new subsection may need to be introduced in order to give effect to the recommendation.*

We oppose this recommendation, for similar reasons that we opposed the recommendations of the Copyright Law Review Committee in its *Copyright and Contracts* report. We note that the Digital Agenda report, at 18.52, says that the Consultant received no evidence that owners are using contract to prevent use of a circumvention device for fair dealing purposes. It says that "some submissions suggested anecdotally that this is occurring" but refers only to a submission from the ABC.

We note that the AUSFTA requires Australia to introduce sanctions against the circumvention of a technological protection measure (TPM) that controls access to a work. It does not require sanctions, however, against circumvention of a TPM to make a copy of a work to which access has been legitimately gained, provided the copy does not infringe copyright.

Recommendation Twenty

> *That the definition of RMI in Section 10 of the Act be amended so as to expressly exclude any TPM.*

We oppose this recommendation; it is likely to introduce unnecessary and undesirable confusion. Both the existing definition of RMI, and the new definition introduced by the FTA amendments, relate only to information, and the sanctions relate to removing and altering that information. We do not think those sanctions should be inapplicable where the RMI forms part of a TPM; if the circumvention of a TPM results in the alteration or removal of RMI, we think the RMI provisions should still apply.

Libby Baulch
Executive Officer