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Submission to the Copyright Law Review Committee on categorisation of subject matter and categorisation of rights

Thank you for giving us an opportunity to put our views about categorisation of subject matter and categorisation of rights at the consultation meeting on 13 July, and to make a written submission on the issue. We made a detailed submission to the Committee about protectible subject matter in September 1995, and we made some comments about subject matter and rights in our recent submission to the Committee (dated 6 July 1998) on the outstanding issues from the Copyright Convergence Group report. We have not repeated all the comments in those two earlier submissions, but we ask the Committee to treat them as part of our response to the issues raised by the Committee in its paper for the consultation meeting on 13 July 1998, and the issues raised at that meeting.

Exclusive rights

1. Right of communication to the public

We support the Government's decision announced in April 1998 to introduce a broad-based right of communication, including a right of "making available", for works and films, and to introduce similar rights for sound recordings. We understand that the Government is currently drafting legislation to give effect to its decision, and that we will be given an opportunity to comment on the legislation in draft form. We have concerns about the exceptions to these rights, particularly as the Government has provided little detail about these.

We also support the introduction of similar rights for performers, as set out in our response to the Government's discussion paper *Performers' Intellectual Property Rights*.

2. Right of distribution

We think the right to distribute is conceptually different to the right to publish.

The right to publish relates to making public a previously unpublished work. In our view, it appears that the right to publish could be infringed by means other than distribution of copies (for example, by exhibiting or broadcasting a previously unpublished work).

The right to distribute, on the other hand, applies to a physical article that contains copyright material (such as a book, a compact disc or a videocassette). Generally, the right to distribute applies if that article has never been sold; it is irrelevant whether or not the works embodied in the article have been made public in Australia. Sections 38 and 103 of the Act give some limited control over

distribution in relation to infringing copies and unauthorised imports, but do not give an exclusive right which can be assigned or licensed.

We support a distribution right (and note that the Act would have to be amended to provide a distribution right if Australia is to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), but we strongly oppose any further diminution of sections 37, 38, 102 and 103.

We would be happy to discuss further with the Committee how a distribution right could be implemented.

3. Alternative approach to rights reform

We support a non-exhaustive list of rights, as opposed to a general “right to exploit” with no guidance about what that right may comprise. We note that legislation in other countries which adopts an “open” approach to defining rights tends to include quite detailed descriptions of the rights included in the “right to exploit”.

We think the most important consideration is to ensure that the rights are formulated so that they cover new means of exploitation – for example, resulting from technological developments.

We understand that the disparities between the right to broadcast and the right to transmit to subscribers to a diffusion service will be addressed by the Government’s “digital agenda” reforms. We also note the Government’s announcement in April 1998 that it will adopt many of the CLRC’s recommendations in its report on computer software. We understand that the recommendations adopted include the recommendations for a “clarifying” definition of “reproduction”, and for amendments to the rights in a published edition.

We confirm our comments in our submission dated 6 July 1998 about the need to review the definition of “copy”.

4. Adaptation right for artistic works

The recommendation by the Australian Law Reform Commission in its report on designs was not for a new right of adaptation for artistic works, but rather to rename the existing right of reproduction as it applies to trans-dimensional versions. This recommendation was part of a proposal for a new approach to the difficult question of the overlap between copyright law and designs law. There were problems with the proposal and we understand that the Government is not intending to adopt it.

The Committee sought views about whether there should be a right of adaptation which is in addition to the rights already granted. We think that if this were to occur, the Act would need to define what “adaptation” means in relation to artistic works, as it does for other works. For other works, adaptation relates to a version of a work in a different medium (such as dramatic version of a non-dramatic work or a cartoon version of a story) or in a different “language” (such as a translation of a literary work, an arrangement of a musical work, or an object code version of a computer program in source code). It is difficult to think of such examples for artistic works, where the expression in visual form is “translated” into a different medium or “language”.

On a minor matter, the Committee could recommend the deletion of “transcription” from the paragraph (d) of the definition of “adaptation”, as we understand that a transcription is a type of arrangement.

Subject matter protectible under the Copyright Act

5. Distinction between Parts III and IV

As stated in our submission of September 1995, we think that the distinction between works and other subject matter is important, as the justifications for the protection of works appear to be different to the justifications for the protection of other subject matter. This does not necessarily mean, however, that the current structure of the Act needs to be maintained. The Act may be easier to read if, for example, all provisions dealing with subsistence were grouped together, followed by all provisions dealing with duration, followed by all provisions dealing with ownership, followed by all provisions dealing with exclusive rights, and then all provisions dealing with exceptions to exclusive rights. This approach would mean, for example, that the exceptions relating to other subject matter in Part IV, many of which repeat corresponding exceptions relating to works in Part III, could be combined with the exceptions in Part III.

6. Conflation of literary, dramatic and musical works

As stated in our submission of September 1995, the distinctions between the types of works are used for a number of purposes other than determining subsistence. These include duration, ownership, the exclusive rights and the exceptions to exclusive rights. There does not seem to be much to be gained from conflating these works into one category for the purposes of subsistence, if the distinctions are to remain for other purposes.

We are, however, in favour of a non-exhaustive description of protectible works, along the lines of the United States Copyright Act (as set out in paragraphs 29 to 34 of our submission of September 1995).

We would be happy to discuss further with the Committee options for implementing this approach.

In addition, some of the definitions of protectible subject matter need to be reviewed as they may not apply to new forms of expression. This is particularly the case with the definitions relating to artistic works. We refer to paragraphs 35 to 48 of our submission of September 1995.

7. New category of audiovisual work

We think a more appropriate category of protection for multimedia and web sites is an amended definition of “compilation”, as set out in paragraphs 36 and 37 of our submission of September 1995.

We would be inclined to leave the definition of “cinematograph film” as it is, given the decision in *Galaxy v Sega* (and the fact that it is referred to in other legislation, as pointed out by Film Finance Corporation at the consultation meeting), but we note that the Australian Film and Video Security Office had some concerns about the effects of the *Galaxy v Sega* decision. We would not oppose a recommendation

that the Act be amended to include a new category of “audiovisual work” along the lines of the United States Copyright Act, but we think it would probably be necessary for the Act to state that “audiovisual work” includes “cinematograph film” as currently defined.

8. Non-original databases

If non-original databases are to be given intellectual property protection, we think this should be in sui generis legislation rather than in the Copyright Act.

9. Computer-generated materials

We refer to our comments on this issue in our submission to the Committee of October 1993 (at paragraphs 92 to 97) in response to its draft report on computer software. In its draft report on computer software, the Committee raised two issues in relation to material created by or with the assistance of computer programs:

- a) where it is difficult to identify the author or authors, and
- b) where there is no human author.

We think that the authorship of works in the first category should be determined, by a court if necessary, on a case by case basis. We think that material in the second category should be treated in a similar way to non-original databases.

Libby Baulch
Executive Officer
17 July 1998