

**Response by Australian Copyright Council to CLRC report
“Simplification of the Copyright Act 1968: Exceptions to
the Exclusive Rights of Copyright Owners”.**

Table of contents

General comments	1
Previous submissions	1
Three-step test	1
Simplification and substantive change	1
Implementation of proposals.....	2
Alternative proposals	2
Fair dealing	2
Recommendation 6.29: simplification of the fair dealing provisions	2
Recommendation 6.31: provisions to appear in Act not Regulations.....	3
Recommendation 6.35: open-ended “fair dealing” exception	3
Recommendation 6.44: non-exclusive factors to apply to all fair dealing.....	6
Recommendation 6.66: Committee’s analysis of quantitative tests be taken into account in Digital Agenda policy	6
Recommendation 6.68: “prescribed portion” exception	7
Recommendation 6.69: prohibition of serial copying of 10% portions	7
Recommendations 6.71 and 6.72: prescribed portion exception limited to printed, published literary, dramatic and musical works.....	7
Recommendation 6.77: prescribed portion exception to apply to any use of work for research or study, not just copying.....	8
Recommendation 6.87: Fair dealing to apply to all rights, including new rights of communication and making available	8
Recommendation 6.92: “electrocopying” not excluded from fair dealing	8
Recommendation 6.103: fair dealing on behalf of another person not excluded.....	8
Recommendation 6.111: external students.....	9
Recommendation 6.117: re-insertion of “private” before “study or research”	9
Recommendations 6.120, 6.122 and 6.126: “sufficient acknowledgment”	10
Recommendations 6.132 and 6.134: expansion of s42(2) to include literary, dramatic and artistic works and films, and to include reporting the news by means of photography.....	10
Recommendation 6.138: fair dealing to cover all uses of copyright material for professional advice	10
Recommendations 6.139 and 6.140: changes to wording regarding professional advice	10
Copying by libraries and archives	11
Recommendation 7.12: retention of special provisions for libraries, in simplified form	11
Recommendation 7.21: copying of works and copying of other subject matter to be treated consistently, except in relation to “prescribed portion”	11
Recommendation 7.28 and 7.30: all provisions allowing royalty-free copying by libraries to be available to all libraries, whether or not conducted for profit.....	11
Recommendation 7.33: no definition of “library”	11
Recommendation 7.36: removal of references to specific archival institutions in para (a) of the definition of “archives” in s10(1)	12
Recommendation 7.38: all royalty-free provisions applicable to archives to apply to all archives, whether or not conducted for profit.....	12
Recommendation 7.41: removal of definition of “archives” in ss10(1) and 10(4)	12
Recommendation 7.49: removal of requirement for declarations.....	12
Recommendation 7.51: repeal of ss203A and 203H(1) to 203H(5)	12

Recommendations 7.59 and 7.60: repeal of s49 and reliance on fair dealing and prescribed portion exception to copy for library users.....	13
Recommendation 7.64: where library makes a copy for a user, the user's purpose is the relevant purpose	13
Recommendation 7.71: library may copy a prescribed portion in response to a verifiable request	14
Recommendation 7.79: no specific requirement for fair dealing that no charge be made for copy, or investigation of availability of copy for purchase	14
Recommendation 7.82: charging for copy under prescribed portion exception limited to cost recovery	14
Recommendation 7.93: no special provision for remote users in relation to unspecified works; such requests to be covered by fair dealing	14
Recommendation 7.97: s50 be repealed, and copying previously done under s50 be covered by fair dealing provision and prescribed portion provision	15
Recommendation 7.99: charge for supply of copy under prescribed portion exception must not exceed cost recovery	15
Recommendations 7.108 and 113: repeal ss51A and 51AA	15
Recommendation 7.116: unpublished material may be copied for the purposes of display	15
Recommendation 7.120: no special provision to allow libraries to copy broadcasts	16
Recommendation 7.122: repeal s110B	16
Recommendation 7.130: repeal s53	16
Recommendation 7.133: retain ss51 and 52 in simplified form	16
Recommendation 7.136: copying for purpose of preservation be added to s51	17
Recommendation 7.144: remove requirement that unpublished work not be copied for 75 years.....	17
Recommendation 7.146: no charge for supply of copy of unpublished work (minority recommendation)	17
Recommendation 7.151: no change to s52 to allow publication of unpublished photographs or engravings.....	17
Recommendation 7.155: unpublished audiovisual material may be copied for preservation	17
Recommendation 7.159: no change to period after which unpublished audiovisual material may be copied	18
Recommendation 7.161: provision allowing publication of unpublished audiovisual material	18
Recommendation 7.168: retention and amalgamation of ss48A and 104A (copying by Parliamentary libraries).....	18
Recommendation 7.183: no special provision allowing libraries to digitise material in collection for access by library users	18
Recommendations 7.192 and 7.194: extend s39A to copyright material accessible via a computer network.....	18

Miscellaneous exceptions 18

Recommendation 8.06: re-organisation of the exceptions.....	19
Recommendation 8.18: retention and combination of ss43(1) and 104(a) (judicial proceedings).....	19
Recommendation 8.23: changes to s43A	19
Recommendation 8.27: retention and combination of ss44B and 112B.....	19
Recommendation 8.32: retention and combination of ss47, 70 and 107 ("ephemeral copying")	19
Recommendation 8.43: repeal of ss65, 66, 67, 68 and 69.....	19
Recommendation 8.48: retention of s72 (reproduction of part of work in later work).....	19

Recommendation 8.51: repeal of s73 (reconstruction of buildings).....	20
Recommendation 8.58: retention of s111 (copying broadcasts for private use)	20
Recommendation 8.61: retention of s112 (reproduction of published edition copyright for various purposes)	20
Recommendation 8.68: retention and extension of s182A (reproduction of statutory instruments and judgments).....	20
Recommendation 8.74: retention of s45 (reading or recitation in public or for broadcast) .	20
Recommendation 8.81: retention of ss46 and 106 (performances at premises where people reside or sleep)	20
Recommendation 8.86: retention of ss199(2) and 199(3)	20
Recommendation 8.91: retention of s105	20
Recommendation 8.94: retention of s110(1).....	20
Recommendation 8.97: retention of s110(2).....	21
Recommendation 8.100: retention of 199(4)	21
Recommendation 8.106: ss44A and 112A be retained and combined	21
Recommendation 8.108: no change to Division 6 of Part 3 (recording of musical works) ...	21
Recommendation 8.111: retention of s110(3) (use of record embodying film soundtracks) 21	
Recommendation 8.115: retention of s183, subject to recommendation about computer software	21
Copying for educational purposes	21
Recommendation 9.09: group together provisions relating to educational copying and reduce duplication; transfer provisions relating to regulation of collecting societies to the regulations.....	21
Recommendation 9.15: omit definition of “educational institution” and repeal s10A	22
Recommendation 9.19: no change to s28 (performance in class)	22
Recommendation 9.23: repeal s44 (inclusion of short extracts in collections)	22
Recommendation 9.31: no change to s200	22
Recommendation 9.35: no recommendation for any exceptions from the operation of Part VA	22
Recommendation 9.37: repeal Division 4 of Part VA (Interim copying)	22
Recommendation 9.43: educational institutions should be permitted to “use” all copyright material in digital form pursuant to a statutory licence requiring payment of a royalty... 22	
Recommendation 9.57: no change to s135ZM.....	23
Recommendation 9.60: no change to s135ZH (reproduction of published editions)	23
Copying for people with disabilities	23
Recommendation 10.09: extension of s47A (print handicapped radio)	23
Recommendation 10.15: retain special provisions for copying for people with disabilities 23	
Recommendation 10.18: combination of current provisions into one provision	23
Recommendations 10.26, 10.29 and 10.31: extension of definition of person with a disability entitled to rely on special provisions	23
Recommendation 10.33: extension of copying provisions to allow reproduction in “any appropriate format”	23
Recommendation 10.36: removal of requirement that copies only be used for research, study or self-instruction	24
Recommendation 10.38: removal of requirement that master copies be destroyed.....	24
Recommendation 10.40: charging for cost-recovery allowed	24
Recommendation 10.42: retention of requirement that copy “in desirable format” cannot be purchased	24
Recommendation 10.45: no inclusion of production standards	24

Recommendation 10.48: present framework in Australian Act, rather NZ Act, be starting point for new provisions	24
Recommendation 10.50: provision for people with hearing disabilities (eg captioning)	24
Recommendation 10.52: provision to replace s200AA be included in new provision.....	24
Alternative proposals	25
New fair dealing provision	25
Statutory licence for adding to the collection	26
Definition of “library”	27

**Response to report of Copyright Law Review Committee:
“Simplification of the Copyright Act: Exceptions to the
Exclusive Rights of Copyright Owners”**

General comments

Previous submissions

We made four submissions to the Committee on issues covered in the Committee’s report:

- a) submission dated 7 April 1997 on fair dealing;
- b) submission dated 5 June 1997 on exceptions relating to libraries and archives, educational institutions, legal deposit, and people with a disability;
- c) submission dated 2 December 1997 providing information about reliance on exceptions in the Copyright Act;
- d) submission dated 6 July 1998 on outstanding issues from the Copyright Convergence Group report and the CLRC Computer Software report

Three-step test

Each of the exceptions which the Committee has recommended be retained, amended or introduced must comply with the three-step test set out in Art 13 of the TRIPS Agreement. Exceptions must:

- a) be confined to certain special cases;
- b) not conflict with a normal exploitation of the work; and
- c) not unreasonably prejudice the legitimate interests of the rights holder.¹

In our view, some of the Committee’s recommendations are not consistent with this test. We have referred to these below.

Simplification and substantive change

Most of the Committee’s recommendations will result in substantive changes to the law. In particular, the Committee’s recommendations regarding fair dealing and library copying would result in a vast expansion of the exceptions to copyright owners’ rights. We are therefore unable to understand the Committee’s statement at

¹ See Sam Ricketson, “International Conventions and Treaties”, paper delivered to ALAI Study Days, Cambridge, September 1998.

the beginning of Chapter 8, which deals with “Miscellaneous exceptions”, that making recommendations for substantive changes to the law is outside its terms of reference.

Implementation of proposals

The text dealing with implementation of proposals relating to fair dealing at para 6.143ff is at best unhelpful, and at worst misleading, as it does not indicate how a number of important recommendations would be implemented, including:

- a) how the new provision would apply to a person making a fair dealing on behalf of another person (recommendation 6.103);
- b) how the new provision would apply to libraries (for example, whether the purposes the Committee says would be fair dealing – such as making a preservation copy – would be listed);
- c) how the prohibition on “serial copying” of prescribed portions would be implemented (recommendation 6.69).

Apart from the Committee’s recommendation to introduce a fair dealing exception which allows uses of copyright material for any purpose, the most far-reaching recommendations relate to repealing a number of the library copying provisions, and incorporating the activities they currently allow into the new fair dealing provision. There is no indication of how the Committee envisages these recommendations would be implemented.

Alternative proposals

At the end of this submission, we have put forward an alternative model for a new fair dealing exception, and for a statutory licence for certain copying by libraries.

Fair dealing

Recommendation 6.29: simplification of the fair dealing provisions

The only part of this recommendation which solely deals with simplification of the law is the consolidation of the current fair dealing provisions into one section. We do not object to this. The other changes which form part of this recommendation are substantive changes to the law, some of which we support and some of which we oppose.

In summary, we support:

- including in the new fair dealing provision acts done for the purposes of professional advice in relation to subject matter other than works; and

- removing the effect of ss40(1A) and 40(1B) from the new fair dealing provision.

We oppose:

- removing the provisions that require sufficient acknowledgment; and
- the proposed “prescribed portion” exception.

We set out our reasons below.

Recommendation 6.31: provisions to appear in Act not Regulations

We support this recommendation. The fair dealing provisions are important substantive provisions which should only be subject to amendment by Parliament.

Recommendation 6.35: open-ended “fair dealing” exception

As stated in our submission to the Committee dated 7 April 1997, we strongly oppose this recommendation. Our reasons include:

1. We do not think the proposal is consistent with the “three-step test” required under the international treaties. This test requires exceptions to be limited to “certain special cases”.
2. Irrespective of the international treaty obligations, the three-step test is the correct approach to take to exceptions to copyright rights.
3. The copyright legislation of most countries specifies the purposes for which copyright material may be used without the permission of the copyright owner. The United States is an exception, and it is arguable that the fair use provision in the United States Copyright Act is not consistent with the three-step test.
4. There is no requirement in the Committee’s recommendation that a purpose for which a fair dealing may be made must serve a public interest which justifies the inroad into the copyright owner’s rights. In the United States, the fair use exception has been interpreted by the courts with reference to the section in the United States Constitution which gives Congress the power:

To promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.²

We agree with Professor Ricketson, in relation to the three-step test in Article 9(2) of the Berne Convention, that the word “special” in the phrase “certain

² US Constitution, art 8, § 8, cl 8

special cases” means that “the use is justified by some clear reason of public policy or exceptional circumstance”.³

5. We disagree that the Committee’s recommendation will simplify the legislation. It will create uncertainty about which purposes of copying may be fair dealing, and will make it more difficult to give advice about the operation of the provision. The Committee’s views about which purposes would be fair dealing, and which would not, are evidence of this uncertainty.

The Committee was of the view that use of copyright material for the following purposes could be fair dealing:

- copying on behalf of another person (6.103)
- commercial uses (6.116)
- provision by a library of a contents page or abstract to a remote user to enable the user to request a work (7.92)
- copying for a user of another library (7.97)
- inclusion in the collection of another library (7.97)
- copying by a non-parliamentary library to supply to a parliamentary library for a member of parliament (7.167)
- preservation of manuscripts and other original material in a library’s collection, where the material has been published, including in digital form (7.103 and 7.110)
- replacement of material in a library’s collection (7.103)
- preservation of audiovisual material, where the material has been published (7.122)
- copies made by Australian Archives under s51AA (7.113)
- copying of accompanying artworks (7.130)
- incidental filming of artworks (8.40)
- photographing or drawing a sculpture or work of artistic craftsmanship (8.41)
- photographing or drawing a building (8.41)

³ Sam Ricketson, “International Conventions and Treaties”, paper delivered to ALAI Study Days, Cambridge, September 1998.

- publishing a photograph or drawing of a sculpture, work of artistic craftsmanship or building (8.43)
- reconstruction of a building (8.51)
- public performance of works in an old film (8.96)

On the other hand, the Committee was of the view that the following would not be fair dealing:

- copying of unpublished works for research, publication or preservation (7.132)
- copying by Parliamentary libraries (7.166)⁴
- use of copyright material for the purpose of judicial proceedings (8.18)
- back up copies of computer software (8.23)
- “ephemeral reproduction” of material to be broadcast (8.32)
- reproduction of writing on a label for a chemical product (8.27)
- use of artwork in later work (8.48)
- copying broadcasts for private use (8.58)
- copying statutory instruments and judgments (8.68)
- performance at premises where people reside or sleep (8.81)
- playing a sound recording at a guest house or club (8.81)
- copying for people with disabilities (10.15)
- performance or broadcast of certain sound recordings (8.90)
- performance of old news films (8.93)
- use of record embodying film soundtrack (8.110).

However, should the Government decide to accept the Committee’s recommendation of an open-ended fair dealing exception, we submit that one of the factors to which regard must be had in determining whether a dealing is fair (in addition to the

⁴ But copying by a non-parliamentary library to supply to a parliamentary library for a member of parliament would be fair dealing (7.167)

factors currently listed in section 40(2)) is whether the use can be made in reliance on:

- a statutory licence (such as Part VA, Part VB or section 183);
- any other provision of the Act; or
- a voluntary licence granted by, or on behalf of, the copyright owner.

We also support other conditions for fair dealing as detailed below in our submission on recommendation 6.44.

Recommendation 6.44: non-exclusive factors to apply to all fair dealing

We submit that the factors to determine whether a dealing is fair should ensure that a fair dealing complies with the three-step test. Thus, the application of the factors should not allow a use which conflicts with a normal exploitation of a work, or which prejudices the legitimate interests of the author or the right holder.

We support the recommendation that the factors apply to all fair dealings.

As stated below, we also support other conditions for fair dealing, including:

- a) acknowledgment of the source of the material;
- b) compliance with the moral rights provisions;
- c) that the use cannot be made in reliance on another provision in the Act (such as Part VB or s183);
- d) that a library not charge more than cost recovery for supply of material to another person;
- e) that a library checks that material is not commercially available;
- f) that if a library copies an unpublished work for a client, the author of the work died more than 50 years ago;
- g) that copies made by libraries are marked in the prescribed form.

Recommendation 6.66: Committee's analysis of quantitative tests be taken into account in Digital Agenda policy

We agree that an exception to infringement based on the "quantity" of digitised material used is unworkable.

Recommendation 6.68: “prescribed portion” exception

We oppose this recommendation. We submit that it is inconsistent with the three-step test, as it would allow uses of a copyright work which conflict with a normal exploitation of a work or prejudice the legitimate interests of the rights holder – for example, if an article from a periodical is available for purchase.

As stated in our submission to the Committee of 7 April 1997, such a provision may be acceptable if it provided that copying a prescribed portion is presumed, but not deemed, to be fair. Such presumption must be rebutted if the portion or article is available at an ordinary commercial price (as this would conflict with a normal exploitation of the work) or for equitable remuneration (as this would prejudice the legitimate interests of the rights owner).

There are also difficulties with the current definition of “reasonable portion” which are not addressed in the Committee’s proposal for a definition of “prescribed portion”. In particular, the application of the definition to an edition comprising more than one work is commonly misunderstood.

In addition, it is unclear whether Part VB, which allows copying by educational institutions, would continue to refer to a “reasonable portion” as currently defined, or whether the “reasonable portion” provision would be replaced by the proposed new “prescribed portion” provision.

Recommendation 6.69: prohibition of serial copying of 10% portions

If there is to be a prescribed portion exception, we would support this recommendation, although the Committee’s intentions regarding implementation of it are unclear. In particular, it is unclear how the prohibition would apply where copying is done on behalf of a researcher or student, by a library or by someone else.

Recommendations 6.71 and 6.72: prescribed portion exception limited to printed, published literary, dramatic and musical works

Difficulties with the Committee’s recommendation include:

- a) the Committee’s intention appears to be that the provision would apply to periodicals and editions which are the first or primary form of publication for a work. However, the Committee’s proposed implementation (at 6.144) would appear to allow, for example, the application of the exception to a print-out of an online periodical made by a subscriber.
- b) the application of the proposed provision to published editions containing more than one work is unclear (there is also confusion about the application of the current definition of “reasonable portion” to such editions). The provision would apply to a work “contained in” an edition of 10 or more pages. Such an edition could be an anthology or collection. The proposed provision would allow the copying of 10 percent of the number of pages in the edition, and thus would

appear to allow the copying of entire works which constitute less than 10% of the number of pages in the entire edition.

Recommendation 6.77: prescribed portion exception to apply to any use of work for research or study, not just copying

As stated in our submission to the Committee dated 7 April, our view is that if there is to be a “prescribed portion” provision, it should only be a presumption (not an automatic defence), and it should only apply to the making of reprographic reproductions.

The “reasonable portion” provision, on which the proposed “prescribed portion” provision is based, rests on an assumption that copying 10% of the number of pages of an edition, or one chapter, will not prejudice the sale of the complete edition. A similar assumption underlies the provision which allows the copying of one article from a periodical. In recommending that the prescribed portion exception should allow the digitisation of printed material, or the duplication of a digitised version of material also available in printed form, the Committee has failed to take into account the effect of the proposed exception on the current, or a future, market for digitised versions of the material. For example, a library could create a digitised version of an article in a printed periodical, even though the publisher of the periodical provides access to digitised versions of articles in its periodicals to subscribers. We submit that this is clearly in breach of the three-step test.

Recommendation 6.87: Fair dealing to apply to all rights, including new rights of communication and making available

We oppose this recommendation.

These uses of copyright material have serious consequences for copyright owners; communication to the public may effectively publish a work to millions of recipients, making it impossible to control subsequent uses of the work. A copyright owner may choose to do this, but there should be no special exceptions allowing communication to the public or making available without the copyright owner’s permission given the consequences. A copyright owner should have an opportunity to protect a copyright work – for example by technological means – before making it available or communicating it online.

Recommendation 6.92: “electrocopying” not excluded from fair dealing

We are unclear about the point of this recommendation, given the recommendation in 6.87.

Recommendation 6.103: fair dealing on behalf of another person not excluded

We strongly oppose this recommendation. It appears to be based on the Committee’s view that the purposes covered by an “open-ended” fair dealing provision would

include the purpose of copying for another person (irrespective of the purpose for which the other person requires the material).

We do not follow the Committee's reasoning in paragraph 6.99, and disagree that it is consistent with the *De Garis* case. In the *De Garis* case, the court held that to determine whether a fair dealing defence applied, one had to consider:

- a) the purpose of the person making the copy (the purpose of the defendant's client, for whom it was making the copy, was not relevant); and
- b) whether making the copy was fair.

Given the Committee's recommendation that the purposes of fair dealing be opened, the effect of the principle in (a) is largely irrelevant, except that one must look at the purpose of the person making the use (not the purpose of the person for whom the use is made). In relation to (b), the fairness of the use is assessed according to the effect of the actions of the person making the use (eg the copying service), not the actions of the ultimate recipient.

We do not understand the Committee's assertion that under its recommended new provision, as set out in para 6.143, a court could take into account the purpose of someone other than the person making the use, and assess the fairness of the use according to the actions of someone other than the person making the use.

As set out below, we oppose even more strongly the Committee's recommendation regarding "fair dealing" by libraries.

We are also concerned about the relationship between the proposed fair dealing provision, and other provisions which allow copying provided payment is made, such as Part VB and s183.

Recommendation 6.111: external students

We support this recommendation for the reasons set out in our submission to the Committee dated 7 April 1997.

Recommendation 6.117: re-insertion of "private" before "study or research"

As stated in our submission to the Committee dated 7 April 1997, our view is that fair dealing for research or study should only be available to a person making use of copyright material for his or her own research or study, and that it should not be available to a person making use of copyright material for another person or entity (such as a corporation).

We proposed that research conducted in the course of employment, or in return for valuable consideration, be deemed not to be fair dealing. We proposed that this should be in addition to (not instead of) a general limitation of fair dealing to individual research or study, as there are other situations in which research may be conducted for the benefit of another person or entity (for example, by a volunteer).

Recommendations 6.120, 6.122 and 6.126: “sufficient acknowledgment”

We have some difficulty with the Committee’s reasoning in relation to these recommendations.

Article 10(3) of the Berne Convention imposes an obligation to mention the source and author, where a quotation is made from a work pursuant to Article 10(1), or the work is used for teaching purposes pursuant to Article 10(2). Under Article 10(1), a quotation may be made for any purpose, provided the work has been made public, and the use is compatible with fair practice. We disagree with the Committee’s statement, in para 6.119, that the Copyright Act complies with this obligation, given that sufficient acknowledgment is only required where material is used for criticism or review, or for reporting news in text form.

We submit that it should be a condition of the fair dealing defence that the source of the material used is acknowledged, and the obligations regarding moral rights are complied with, irrespective of the purpose. For example, we think this condition should apply to the use of a work for the purpose of research or study. We submit that compliance with the moral rights provisions must be a condition of the defence, so that if the moral rights provisions are breached, there is an infringement of copyright (as well as a breach of moral rights). We submit that this is required by Article 10(3).

Recommendations 6.132 and 6.134: expansion of s42(2) to include literary, dramatic and artistic works and films, and to include reporting the news by means of photography

The Committee appears to have approached the obligations under Article 10bis(2) by attempting to meet the minimum requirement, thus creating distinctions between types of material and types of news delivery which we submit are unnecessary and complicated.

We submit that the new fair dealing provision should allow the use of copyright material for the purpose of reporting the news, by whatever means, only where the material forms part of the news being reported.

Recommendation 6.138: fair dealing to cover all uses of copyright material for professional advice

We do not oppose this recommendation.

Recommendations 6.139 and 6.140: changes to wording regarding professional advice

We do not oppose this recommendation.

Copying by libraries and archives

Recommendation 7.12: retention of special provisions for libraries, in simplified form

The Committee's recommendations would vastly expand the activities which libraries would be able to carry out without infringing copyright; it is misleading to suggest that the Committee's recommendations merely "simplify" existing exceptions.

Recommendation 7.21: copying of works and copying of other subject matter to be treated consistently, except in relation to "prescribed portion"

We have no difficulty with combining existing provisions relating to works with equivalent existing provisions relating to other subject matter, such as the provisions relating to preservation.

As stated in our submission to the Committee dated 5 June 1997, we oppose the extension of provisions which allow libraries to copy works for users to also apply to other material.

Our reference to audiovisual material at para 32 of that submission was intended to apply to a person making a copy of audiovisual material for their own research or study. We proposed that a "reasonable portion" test apply to audiovisual material, but did not propose that the term be defined (as is the case for works which are not articles in periodicals, and are not contained in a published edition of more than 10 pages).

Recommendation 7.28 and 7.30: all provisions allowing royalty-free copying by libraries to be available to all libraries, whether or not conducted for profit

We oppose this recommendation; we do not think that copyright owners should subsidise the activities of profit-making enterprises. In addition, the Committee's recommendation that there be no definition of "library" means there is wide scope for profit-making entities to claim they are a "library" according to some dictionary definition.

Recommendation 7.33: no definition of "library"

As set out in our submission of 5 June 1997, we think there should be a definition of "library", which incorporates archives. We proposed a definition based on the purposes of the collection. Given that wide-ranging privileges are given to libraries under the Copyright Act, we think a body should meet a public benefit requirement in order to rely upon them. For example, we think that a library that exists solely

for employees of a commercial organisation should not be entitled to rely on the provisions.⁵

Recommendation 7.36: removal of references to specific archival institutions in para (a) of the definition of “archives” in s10(1)

We do not understand this recommendation, given the Committee’s subsequent recommendation at 7.41 to remove the definitions of “archives” from the Act.

In addition, as stated above, we think there should be a definition of library (or whatever term is used), which covers archives.

Recommendation 7.38: all royalty-free provisions applicable to archives to apply to all archives, whether or not conducted for profit

We oppose this recommendation, for the same reasons we oppose the similar recommendation in relation to libraries.

Recommendation 7.41: removal of definition of “archives” in ss10(1) and 10(4)

As stated above, we think there should be a definition of library (or whatever term is used), which covers archives.

Recommendation 7.49: removal of requirement for declarations

The Committee’s recommendation regarding the declaration requirements may be acceptable, provided it is a condition of the fair dealing defence and the prescribed portion defence that the person making the copy has been informed by the client that:

1. the client requires the copy for his or her research or study;
2. the client will ensure that the copy is not used for any other purpose; and
3. the client has not previously been supplied with the whole or part of the same work.

Recommendation 7.51: repeal of ss203A and 203H(1) to 203H(5)

We strongly oppose the Committee’s recommendation to remove the requirement to make a prescribed notation on copies made in reliance on the library copying provisions. This recommendation is not a corollary of its recommendation regarding declarations (as suggested in para 7.50), and the Committee offered no justification for it. The notation on copies is important for tracing the origin and purpose of the

⁵ A requirement of this kind appears in s108 of the US Copyright Act.

copy, and for controlling subsequent use of the copy. In our view, any copy made under the library copying provisions should state:

- a) the date it was made;
- b) by whom it was made;
- c) for whom it was made;
- d) the purpose for which it was made; and
- e) a statement that use of the copy for any other purpose may infringe copyright.

Recommendations 7.59 and 7.60: repeal of s49 and reliance on fair dealing and prescribed portion exception to copy for library users

As stated in our submission to the Committee dated 5 June 1997, we think that copying by libraries should be subject to the fair dealing criteria, which in turn should reflect the three-step test. We disagree that the effect on a copyright owner of a library making copies for clients is the same as if the clients had made the copies themselves (as suggested in para 7.52); this view fails to take into account the convenience factor which means that libraries do much greater copying for clients than the clients would do for themselves.

We oppose the Committee's recommendation in relation to "fair dealing" by libraries, particularly in relation to the following aspects:

1. that a library could make a use of copyright material for a client for any purpose; and
2. that the library could make any use of copyright material, rather than being restricted to making a copy.

In addition, it is not clear from the Committee's recommendations whether the actions of the library would be assessed according to the fair dealing criteria. We submit that they must be so assessed.

Recommendation 7.64: where library makes a copy for a user, the user's purpose is the relevant purpose

We are unable to reconcile the justification for the "necessity" of this recommendation in para 7.63 with the Committee's recommendation in para 6.103 relating to copying on behalf of another person.

In any event, we oppose both recommendations, and submit that a library should be able to copy for a client only where the client's purpose is research or study, and the client's use is fair.

It is unclear from the Committee's recommendation whether the fair dealing criteria would be applied to the library's actions or to the client's use. We submit that they should be applied to both; that is, the fair dealing provision should only apply where the client's use is fair and where the library's copying is fair. It may be, for example, that a client's use is fair, but the library's copying for the client is not fair because the library can obtain a licensed copy from a collecting society.

Recommendation 7.71: library may copy a prescribed portion in response to a verifiable request

As stated above, we oppose the recommendation for a "prescribed portion" exception, but accept that such a provision may be acceptable if the prescribed portion is only presumed to be fair. If such a provision is to remain, we support the recommendations of the dissenting member of the Committee in para 7.72, and in addition submit that the library should also be informed by the client that the client will not use the copy for any other purpose. We also refer to our submission above that any copies made must bear the prescribed notation.

Recommendation 7.79: no specific requirement for fair dealing that no charge be made for copy, or investigation of availability of copy for purchase

We oppose the recommendation of the majority, and support the recommendation of the minority. We submit that it is unjustifiable to allow a person to benefit commercially from a free use of copyright material, and that libraries should be specifically prohibited from charging for supply of copies. We submit that the same rule should apply to supply of copies under the fair dealing provision as applies to supply of copies under the prescribed portion provision.

We also submit that there should be a specific obligation to check whether the material is available for purchase, including under a licence scheme.

Recommendation 7.82: charging for copy under prescribed portion exception limited to cost recovery

Subject to our reservations about the proposed prescribed portion provision, we support this recommendation.

Recommendation 7.93: no special provision for remote users in relation to unspecified works; such requests to be covered by fair dealing

We agree that there should be no special provision relating to supply of material by a library to a client who has made a request for material on a general subject.

Recommendation 7.97: s50 be repealed, and copying previously done under s50 be covered by fair dealing provision and prescribed portion provision

As stated above, we strongly oppose an open-ended fair dealing provision. We submit that the purposes for which a fair dealing may be made must be exhaustively listed.

We support the application of the fair dealing criteria to copying by libraries, but submit that the purposes for which they may copy must be listed exhaustively. If the prescribed portion exception is also to apply, the uses must also be listed exhaustively in that provision.

We support the recommendations of the two members of the Committee in 7.98 that a library should be prohibited from relying on the fair dealing provision if it charges more than cost recovery for supply of a copy, or if it fails to make a declaration that a work is not available for purchase. We submit that these requirements should also apply to articles in periodicals and to portions of works.

As stated in our submission dated 5 June 1997 (paras 108 to 116), copies made for inclusion in a library's collection should be made under a statutory licence which requires the payment of equitable remuneration. We also submitted (at paras 117 to 119) that a library be able to make a backup copy or a replacement copy, subject to certain conditions, including payment of equitable remuneration.

Recommendation 7.99: charge for supply of copy under prescribed portion exception must not exceed cost recovery

Subject to our reservations in relation to the prescribed portion exception, we support this recommendation and submit that it would also apply to copying by libraries under the fair dealing provision.

Recommendations 7.108 and 113: repeal ss51A and 51AA

We support the view that copying by libraries for the purpose of preservation should be allowed only if the fair dealing criteria are met. As stated above, we submit that purposes for which a library can make a fair dealing should be listed exhaustively.

We support the recommendation of the two members of the Committee in para 7.104 that the effect of s51(4) be maintained.

As stated in our submission of 5 June 1997, we submit that copying for replacement should require the payment of equitable remuneration.

Recommendation 7.116: unpublished material may be copied for the purposes of display

As stated in our submission to the Committee dated 7 June, the necessity for such a provision is unclear, given that a library could display a preservation copy.

Recommendation 7.120: preservation copies of broadcasts

We oppose this recommendation.

We do not follow the Committee's reasoning in relation to this issue. Section 110B allows a library to make a preservation copy of a film or sound recording if:

- a) the film or sound recording is in the library's collection; and
- b) the film or sound recording in the collection is a "first copy".

A recording of a broadcast in a library's collection is not a "first copy" of the film or sound recording which was broadcast.

Recommendation 7.122: repeal s110B

We support the view that copying by libraries for the purpose of preservation should be allowed only if the fair dealing criteria are met. As stated above, we submit that purposes for which a library can make a fair dealing should be listed exhaustively.

We support the recommendation of the two members of the Committee in para 7.124 that the effect of s110B(3) be maintained.

As stated in our submission of 5 June 1997, we submit that copying for replacement should require the payment of equitable remuneration.

Recommendation 7.130: repeal s53

We support the repeal of s53. We disagree with the Committee's comment in para 7.127 that the fact the artwork accompanies text which may be copied should be taken into account when assessing whether the use is fair. We submit that the copying of the artwork should only be allowed if it is for a specified purpose (such as research or study) and the copying is fair having regard to the fair dealing criteria. We see no justification for allowing the copying if it does not meet these two tests.

Recommendation 7.133: retain ss51 and 52 in simplified form

We partly disagree with the Committee's reasoning in para 7.132. The cases referred to were concerned with reliance on fair dealing to publish a previously unpublished work. It seems clear that, under the current law, a person may copy an unpublished work under s40, provided the copying complies with the fair dealing criteria in s40(2), including consideration of the effect of the dealing on the potential market or value of the work.

We agree that a use which makes public a previously unpublished work is unlikely to be fair dealing.

We think that copying of unpublished material, whose author died more than 50 years ago, for a client's research or study may be fair dealing, provided the fair

dealing criteria are met in relation to the library's actions – for example, if the library makes many copies, this may not be fair as it may affect the potential market or value of the work.

In relation to making a copy of an unpublished work with a view to publication under s51, and publishing the work under s52, we oppose the Committee's recommendation and refer to our submission of 5 June 1997. We proposed (at paras 128 to 130) that the Committee consider a mechanism such as exists in Canada for dealing with use of copyright material by a person who has tried unsuccessfully to identify or locate the copyright owner.

Recommendation 7.136: copying for purpose of preservation be added to s51

We oppose this recommendation. For the reasons stated above, we think that copying of a manuscript or other "original" material in a library's collection for preservation purposes, whether the material is published or unpublished, may be done in reliance on the fair dealing provision, provided the fair dealing criteria are met. We take a similar view in relation to audiovisual material (see our response to the recommendation in para 7.155)

Recommendation 7.144: remove requirement that unpublished work not be copied for 75 years

As stated above, we think the copying of an old unpublished work by a library for a client could be included in the fair dealing provision. The removal of the 75 year requirement could be acceptable if the fair dealing criteria are applied.

Recommendation 7.146: no charge for supply of copy of unpublished work (minority recommendation)

We support this recommendation. In our view, a library should not be permitted to charge beyond cost recovery for any copy it makes.

Recommendation 7.151: no change to s52 to allow publication of unpublished photographs or engravings

As stated in our submission dated 5 June 1997, we think that the provisions dealing with publication of unpublished material in ss51, 52 and 110A should be repealed, and a more general scheme for dealing with untraceable copyright owners introduced.

Recommendation 7.155: unpublished audiovisual material may be copied for preservation

As for the recommendation in para 7.136, we oppose this recommendation. For the reasons stated above, we think that copying of a "first copy" of a film or sound recording in a library's collection for preservation purposes, whether the material is

published or unpublished, may be done in reliance on the fair dealing provision, provided the fair dealing criteria are met.

Recommendation 7.159: no change to period after which unpublished audiovisual material may be copied

We support this recommendation.

In addition, as stated above in relation to old unpublished works, we think the copying of old audiovisual material could be included in the fair dealing provision

Recommendation 7.161: provision allowing publication of unpublished audiovisual material

As stated in our submission dated 5 June 1997, we think that the provisions relating to publication of unpublished material in ss51, 52 and 110A should be repealed, and a more general scheme for dealing with untraceable copyright owners introduced.

Recommendation 7.168: retention and amalgamation of ss48A and 104A (copying by Parliamentary libraries)

In our submission to the Committee dated 5 June 1997, we proposed 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.

Recommendation 7.183: no special provision allowing libraries to digitise material in collection for access by library users

Our view is that libraries should not be entitled to digitise material in reliance on the fair dealing exception, or the prescribed portion exception. In our view, reliance on these provisions by libraries should be limited to reprographic reproduction.

Recommendations 7.192 and 7.194: extend s39A to copyright material accessible via a computer network

We do not think it is necessary to include such a provision in the Copyright Act, as it sufficient to apply the general principles relating to authorisation of infringement.

Miscellaneous exceptions

We do not understand the Committee's view, stated in the Abstract, that making recommendations about substantive changes to exceptions is outside its terms of

reference to “simplify” the Act, given the far-reaching substantive changes it has recommended in relation to fair dealing and library copying.

At the very least, each of these exceptions needs be assessed for compliance with the three-step test.

We also note that the Committee sought from us information about the extent to which the “miscellaneous” exceptions were relied upon in practice. In our response, we asked to be notified if the Committee was seeking submissions about changes to the provisions. This did not occur.

Recommendation 8.06: re-organisation of the exceptions

We support this approach.

Recommendation 8.18: retention and combination of ss43(1) and 104(a) (judicial proceedings)

The Committee does not discuss why copying for this purpose could not be included in the fair dealing provision. We submit that it should be one of the purposes in the exhaustive list of purposes.

Recommendation 8.23: changes to s43A

We do not object to this recommendation.

Recommendation 8.27: retention and combination of ss44B and 112B

We do not object to this recommendation.

Recommendation 8.32: retention and combination of ss47, 70 and 107 (“ephemeral copying”)

As stated in our submission to the Committee dated 6 July 1998, we support the repeal of ss47, 70 and 107, and oppose the proposal to extend their operation.

Recommendation 8.43: repeal of ss65, 66, 67, 68 and 69

We support the repeal of these provisions, but think there is no necessity to make exceptions for the activities they allow as part of the new fair dealing exception.

Recommendation 8.48: retention of s72 (reproduction of part of work in later work)

We do not object to this recommendation.

Recommendation 8.51: repeal of s73 (reconstruction of buildings)

We support the repeal of this provision, but doubt the need to retain an exception for this activity as part of the fair dealing exception.

Recommendation 8.58: retention of s111 (copying broadcasts for private use)

We submit that this provision should be repealed. It has little practical application, and can be misunderstood as allowing the recording of the copyright material contained in the broadcast.

Recommendation 8.61: retention of s112 (reproduction of published edition copyright for various purposes)

We do not object to this recommendation.

Recommendation 8.68: retention and extension of s182A (reproduction of statutory instruments and judgments)

We do not object to this recommendation.

Recommendation 8.74: retention of s45 (reading or recitation in public or for broadcast)

We think this activity should be subject to the fair dealing criteria.

Recommendation 8.81: retention of ss46 and 106 (performances at premises where people reside or sleep)

We support the repeal of these provisions.

Recommendation 8.86: retention of ss199(2) and 199(3)

In our submission to the Committee dated 6 July 1998, we supported the repeal of ss199(1), 199(2) and 199(3).

Recommendation 8.91: retention of s105

We support the repeal of this provision.

Recommendation 8.94: retention of s110(1)

In our experience, this provision has little application in practice and should be repealed.

Recommendation 8.97: retention of s110(2)

We support the repeal of this provision, but do not think that this activity should be covered by the fair dealing exception.

Recommendation 8.100: retention of 199(4)

We support the repeal of s199(4) and the introduction of a statutory licence scheme to compensate copyright owners for the retransmission of their material.

Recommendation 8.106: ss44A and 112A be retained and combined

We support the repeal of these provisions.

Recommendation 8.108: no change to Division 6 of Part 3 (recording of musical works)

We do not object to this recommendation.

Recommendation 8.111: retention of s110(3) (use of record embodying film soundtracks)

We do not object to this recommendation.⁶

Recommendation 8.115: retention of s183, subject to recommendation about computer software

We submit that, to comply with the three-step test, s183 should not apply to any material which is available for purchase.

Copying for educational purposes

Recommendation 9.09: group together provisions relating to educational copying and reduce duplication; transfer provisions relating to regulation of collecting societies to the regulations

We do not object to this recommendation.

⁶ We note that meaning of this section was considered by the High Court in *Phonographic Performance Company of Australia v Federation of Commercial Television Stations* (1998) 40 IPR 225 at 232 and 238

Recommendation 9.15: omit definition of “educational institution” and repeal s10A

We oppose the recommendation to have no definition of “educational institution”, as it would create an unacceptable level of uncertainty about which bodies are entitled to rely on the provisions.

In our submission to the Committee of 5 June 1997, we proposed an approach to defining the institutions or undertakings entitled to rely on the educational copying provisions, based on certain features of the institution or undertaking, rather than a list of types of institutions and undertakings. We suggested that such features may include, for example, the provision of structured education, instruction or training. There could also be criteria relating to the people delivering and/or supervising such education, instruction or training – for example, that they have qualifications or experience relating to delivery or supervision of education, instruction or training.

Recommendation 9.19: no change to s28 (performance in class)

We do not object to this recommendation.

Recommendation 9.23: repeal s44 (inclusion of short extracts in collections)

We support this recommendation.

Recommendation 9.31: no change to s200

We oppose this recommendation. In our submission to the Committee dated 5 June 1997, we submitted that s200 be repealed.

Recommendation 9.35: no recommendation for any exceptions from the operation of Part VA

We submit that Part VA should not allow the copying of material which is available for purchase, as stated in our submission to the Committee dated 5 June 1997 at para 21. We submit that this is necessary for compliance with the three-step test.

Recommendation 9.37: repeal Division 4 of Part VA (interim copying)

We do not object to this recommendation.

Recommendation 9.43: educational institutions should be permitted to “use” all copyright material in digital form pursuant to a statutory licence requiring payment of a royalty

As stated in our submission to the Committee dated 5 June 1997, we do not think it would be justifiable for educational institutions to be entitled to create digital versions of non-digitised material, as this would conflict with a normal exploitation of a work or at least prejudice the legitimate interests of a rights owner. We

similarly oppose the application of the statutory licence to works already in digital form.

Recommendation 9.57: no change to s135ZM

This section was amended in July 1997, before the release of the Committee's report. We support the repeal of the section.

Recommendation 9.60: no change to s135ZH (reproduction of published editions)

We do not object to this recommendation.

Copying for people with disabilities

Recommendation 10.09: extension of s47A (print handicapped radio)

We do not object to this recommendation.

Recommendation 10.15: retain special provisions for copying for people with disabilities

We do not object to this recommendation. We refer to our comments in our submission to the Committee dated 5 June 1997.

Recommendation 10.18: combination of current provisions into one provision

We do not object to this recommendation. We refer to our comments in our submission to the Committee dated 5 June 1997.

Recommendations 10.26, 10.29 and 10.31: extension of definition of person with a disability entitled to rely on special provisions

We do not object to the recommendation in 10.26. We are concerned that the proposal in 10.29 may apply to people learning English as a second language.

Recommendation 10.33: extension of copying provisions to allow reproduction in "any appropriate format"

We do not oppose this recommendation, subject to the conditions raised in our submission to the Committee of 5 June 1997.

Recommendation 10.36: removal of requirement that copies only be used for research, study or self-instruction

This issue would appear to have been addressed by the July 1998 amendments to the Copyright Act.

Recommendation 10.38: removal of requirement that master copies be destroyed

This issue would appear to have been addressed by the July 1998 amendments to the Copyright Act.

Recommendation 10.40: charging for cost-recovery allowed

We do not support this recommendation.

Recommendation 10.42: retention of requirement that copy “in desirable format” cannot be purchased

We support this recommendation.

Recommendation 10.45: no inclusion of production standards

We support this recommendation.

Recommendation 10.48: present framework in Australian Act, rather NZ Act, be starting point for new provisions

We support this recommendation.

Recommendation 10.50: provision for people with hearing disabilities (eg captioning)

We do not object to this recommendation

Recommendation 10.52: provision to replace s200AA be included in new provision

We do not object to this recommendation.

Alternative proposals

New fair dealing provision

1. We submit that the new fair dealing provision should allow use of copyright material for the following purposes:
 - a) by an individual for his or her research or study;
 - b) for criticism or review;
 - c) for the purpose of reporting news, where the material forms part of the news;
 - d) for professional advice by a legal practitioner, patent attorney or trade marks attorney;
 - e) for the purposes of a judicial proceeding or a report of a judicial proceeding;
 - f) the reading or recitation, or broadcast of a reading or recitation, of a reasonable part of a published literary or dramatic work.
2. In addition, a library (as defined) may make a copy (a reprographic reproduction) of a work for the following purposes:
 - a) to supply to a library client (its client or a client of another library), provided the client has made a verifiable declaration that he or she requires the copy for his or her research or study, has not been previously supplied with a copy of the work, and will not use the copy for any other purpose;
 - b) to create a preservation copy of a manuscript or other “first version” of a work, film or sound recording, or of a “rare” version of a work, film or sound recording.
3. In determining whether the use is fair, regard must be had to the factors currently listed in s40(2).
4. Where a library makes a copy for a client, the fair dealing factors must be applied to the client’s use, and to the library’s actions.
5. The fair dealing exception should be subject to the following conditions:
 - acknowledgment of the source of the material;
 - compliance with the moral rights provisions;
 - that the use cannot be made in reliance on another provision in the Act (such as Part VB or s183) or in reliance on a voluntary licence granted by, or on behalf of, the copyright owner;

- that if the copy is subsequently used for another purpose, it is deemed to be an infringing copy from the time it was made.
6. If the fair dealing is made by a library, the exception should be subject to the following additional conditions:
- that the library not charge more than cost recovery for supply of material to another person;
 - that a library checks that material is not commercially available, including under a licence scheme;
 - that if a work copied for a client is unpublished, the author died more than 50 years ago;
 - that the copy is marked in the prescribed manner (which would include the purpose of the copy, that the copy cannot be used for any other purpose, who made the copy, for whom it was made, and when it was made).
7. A dealing is presumed, but not deemed, to be fair in the following circumstances:
- it is a copy (a reprographic reproduction) of a literary, dramatic or musical work first published as part of a published edition (which could include a periodical publication); and
 - the copy is made by an individual for his or her research or study, or by a library for a client's research or study (and the client has provided the verifiable declaration set out above); and
 - the amount copied is:
 - an entire work, provided it comprises less than 10% of the number of pages in the edition (such as an article in a periodical publication, or a work from an anthology); or
 - part of a work which comprises less than 10% of the number of pages in the edition; and
 - that the person making the copy, or for whom the copy is made, has not previously copied, or been supplied with, a copy of material from that edition; and
 - the other requirements outlined above in relation to fair dealing apply.

Statutory licence for adding to the collection

We submit that there should be a new statutory licence which allows a library (as defined) to make a copy of a work, film or recording for the following purposes:

- to add a work to its collection, where the work is not already part of the collection;
- to make a “backup copy” of a work, film or sound recording in its collection;
- to make a replacement copy of a work, film or sound recording in its collection which has been lost, damaged or stolen, and it does not have a backup copy.

The conditions of the licence would include:

- a work, film or sound recording (whole or part) may not be copied if it is available for purchase;
- a copy made in reliance on this provision is marked with the prescribed information (including the purpose of the copy, that the copy may not be used for another purpose, who made the copy, and the date it was made);
- the library undertakes to pay equitable remuneration to the relevant authorised collecting society.

The statutory licence would be subject to the jurisdiction of the Copyright Tribunal.

Definition of “library”

As stated above, and in our submission of 5 June 1997, we submit that there be a definition of a “library” which is entitled to rely on the special exceptions for libraries, that requires it to have the following features:

- it is a body administering a collection of materials, where the purpose of the collection is:
 - the conservation and preservation of the materials comprising the collection; and/or
 - providing information to members of the public; and
- it is not conducted for profit

Libby Baulch
Executive Officer
1 March 1999