



AUSTRALIAN  
COPYRIGHT  
COUNCIL



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***Response to government proposals for new  
exceptions in media release ‘Major copyright  
reforms strike balance’***

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**May 2006**

## **Australian Copyright Council**

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1. 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 policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate responses to the government's media release 'Major copyright reforms strike balance'. The Australian Record Industry Association has a different position to that of the Copyright Council in relation to private copying.

## **Issues addressed in this submission**

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3. We are responding to the proposals for new exceptions in the government's media release dated 14 May 2006 titled "Major copyright reforms strike balance". We have responded separately to the government proposals in the document titled "Digital Agenda Review – Government responses to Phillips Fox recommendations and related matters" (referred to in the media release). We will respond at a later time to the proposals in the media release dealing with issues other than new exceptions.
4. A major purpose of this submission is to seek clarification of some aspects of the proposals for new exceptions to copyright infringement, particularly in relation to their compliance with Australia's international treaty obligations.

## **Australia's international treaty obligations**

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5. To comply with Australia's international treaty obligations, the government must ensure that any exceptions to copyright infringement:
  - are confined to certain special cases;
  - do not conflict with a normal exploitation of the work; and
  - do not unreasonably prejudice the legitimate interests of the right holder.

## **Intention behind proposed new exceptions**

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6. We understand that the government's intention is to introduce new exceptions that would allow certain uses of copyright material, which are not currently allowed under an exception or statutory licence, without permission and without payment to copyright owners. We further understand that the government intends these new exceptions to comply with Australia's international treaty obligations.

7. The media release lists a series of 'principles' to which the government has had regard in making its proposals. These include:
  - The need for copyright to keep pace with developments in technology and rapidly changing consumer behaviour.
  - Recognising reasonable consumer use of technology to enjoy copyright material – Australian consumers should not be in a significantly worse position than consumers in other countries.
  - Reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners.
  - Copyright industries are important and need to be supported. It is important to get the balance right between copyright owners and users in developing the legislation.

### **'Normal exploitation' and the digital marketplace**

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8. Under Australia's international treaty obligations, an exception must not conflict with a normal exploitation of a work. 'Normal exploitation' refers to both existing and potential future uses of a work.
9. In many of the existing exceptions in the Copyright Act (including the library use provisions, the educational use provisions, and fair dealing for research or study), copyright material may be used for a particular purpose, without permission, if a reproduction of the work (or the work itself, in some cases) is not available within a reasonable time at an ordinary commercial price ('commercial availability test'). If a work is available, a 'reasonable portion' of it may be copied.
10. When the commercial availability test was first introduced, it applied, in practice, to the availability of a reproduction of the work in a physical article such as a book. The copying of journal articles and portions of works was allowed because, at the time, they were not separately available for sale. The test was therefore regarded as consistent with Australia's international treaty obligations.
11. Largely because of digital technology, components of compilations, and portions of works, may now be separately available, and can be supplied on demand, including in digital form. In addition, a work may be available via a licence to copy rather than via supply of a copy. These are important changes to the marketplace for copyright works that must be recognised in the conditions for any exceptions to copyright infringement. The exceptions introduced by the Digital Agenda Act 2000 included some recognition to these developments (in some of the conditions for the new digital use provisions).
12. In our view, the 'commercial availability' test in the Copyright Act can be interpreted as applying to on-demand copies and licensed copies, but we understand that it is not universally interpreted in that way. In our view, Australia's international treaty obligations require the test to apply to on-demand copies and licensed copies, and the Copyright Act should be amended to remove any ambiguity on this issue.
13. Similar considerations must obviously apply to any new exceptions subject to a commercial availability test.

## **Implications of government proposals for the digital marketplace**

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14. One of the principles underlying the proposals is:

Reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners.

15. Unfortunately, many of the government's proposals appear to be inconsistent with this principle.

## **Private copying**

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16. We do not support the Government's proposals in relation to private use. We question the proposal's compliance with international treaty obligations.

## **Position in other countries**

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17. Other developed countries which allow private copying (including the United States) have systems for payment to copyright owners. In those countries, composers, writers and other copyright owners receive copyright payments for private copying.

18. One of the principles underlying the government's proposals is that 'Australian consumers should not be in a significantly worse position than consumers in similar countries'. Another principle, however, is that 'it is important to get the balance right': it would seem to follow that if Australian consumers should not be in a significantly worse position than consumers in similar countries, then neither should Australian copyright owners.

## **Effect on digital download markets**

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19. A major concern is the potential for these proposals to interfere with the emerging and rapidly growing market for legitimate digital downloads of music and television programs. The Government is proposing to introduce these amendments at the very time that technological developments have enabled consumer desire for 'format-shift' and 'time-shift' copies to be met by the marketplace.

20. The gap in the market which the proposed amendments are apparently intended to address – the absence of a market for a 'time-shift' copy or a 'format shift' copy – is rapidly being filled by download services such as ninemsn and BigPond. For example, ninemsn is currently offering recent episodes of *McLeod's Daughters* for \$1.95, and television programs are available for download from BigPond from \$1.95. Technology is already available which allows people to view digital downloads on a television screen. Allowing these copies to be made without payment will interfere with existing and future download markets.

21. On the other hand, it is reasonable, in our view, to ask consumers to pay an appropriate amount for a second copy of a song they have purchased on CD, or to acquire a copy of a television program or a film to watch at a time convenient to them. In the past, the only way to legitimately acquire an additional copy of a song was to buy another CD. The only way to legitimately acquire a copy of something that

had been broadcast, to view at a more convenient time, was to rent or buy it on video or DVD (if it was available in one of those formats). The copyright marketplace is rapidly changing due to technological developments such as digital television, broadband access, and digital rights management. Further changes will occur with the convergence of home computers and television set-top boxes.

22. In relation to music, AMCOS (which licenses the rights of composers and music publishers) already licenses DJs and radio stations to 'format shift' music from vinyl records to CD. It is in a position to license format shifting for personal use. We understand that such a licence would be subject to the jurisdiction of the Copyright Tribunal under the government's proposed changes. In addition, the owners of copyright in sound recordings (record companies) have said that they have 'no issue with people making a copy of a sound recording for their own personal use from a CD they have already purchased'.
23. If the amendments are to proceed, they must at least be conditional upon an availability test to ensure compliance with the international treaties. The exception should not apply to a work which is available at an appropriate price, including as a legitimate digital download or via a private copying licence.
24. In addition, we seek a commitment that the Government will engage an independent consultant to undertake a survey, one year after the amendments come into effect, of private copying done in purported reliance on the new exception to ascertain the proportion of works copied which are available as digital downloads or via a private copying licence.

#### **Rationale for 'format-shifting'**

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25. The thinking behind the proposed exception for 'format-shifting' seems to be that the purchase of a legitimate copy of a copyright work in one 'format' should be deemed to include a licence to make copies of that work in other 'formats'. The proposal appears to be based on an assumption that, in practice, a licence to format-shift (or a licensed copy in an additional format) is difficult or impossible to obtain. In fact, as noted above, AMCOS is in a position to offer such a licence for private copying.
26. The proposal seems to be partly driven by concerns about obsolete, or potentially obsolete, storage media (such as video cassettes and audio cassettes). It also appears to be partly driven by the availability of 'secondary' playing /viewing devices – such as computers which can play audio CDs and audiovisual DVDs, and portable music players – and a view that if the copy suitable for the primary device cannot be played in the secondary device, a consumer should not be required to purchase a copy suitable for the secondary device.
27. The application of the proposal to books, magazines, newspapers and photographs is a surprise. The possibility of a new exception to 'format-shift' these was not raised in the government's Issues Paper *Fair Use and Other Exceptions*. We seek an explanation from the government for the application of the 'format-shifting' proposal to this material, and whether the government intends the proposal to apply to material which is separately available in a suitable form for purchase.
28. In our view, if the proposal is to proceed, the legislation must prescribe the purposes for which a 'format-shift' copy can be made, if it is to comply with the 'special case' requirement of the international treaties. In addition, the exception must not apply if a licence to copy, or a licensed copy, is available at an appropriate price.

### Meaning of 'format'

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29. We do not understand what the Government means by 'format'. In the explanation under the heading 'Changes to the Copyright Act – what do they mean for me?', the definition of 'format-shifting' suggests that 'format' refers to a physical form of storage (video cassette, DVD, CD, book), and that 'different format' means a different form of storage (eg videotape to DVD). The response to the question 'Can I make a compilation CD by copying tracks from CDs that I own to a blank CD?' suggests that format (also) means the file format of a digital file.

### Practical implications of proposals for digital downloads

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30. The response to the question 'Can I copy a music download to a CD or MP3 player?' suggests that the proposed amendments will have a practical effect on what consumers can do with digital downloads. In fact, the use of all legitimate music downloads is governed by a contract, so it is difficult to see what practical effect the amendments could have.

### 'New flexible fair dealing exception': libraries, cultural institutions and educational institutions

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31. We strongly oppose these proposals in the form in which they are made. The proposals are apparently intended to allow certain activities by these institutions, but we do not know which activities the government wants to allow. The media release lists one example for each proposal. This makes it difficult for us to propose alternative solutions to the issues the government wants to address.
32. In addition, we are aware that some activities which libraries and others think require a special exception are, in fact, already covered by an existing exception. Some of these are outlined in our publication *Fair Use: Issues & Perspectives*.

### Orphaned works

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33. The government has indicated that it will conduct a review of 'orphaned works' (works whose copyright owners are in practice, very difficult or impossible to ascertain or locate). On 20 March 2006, we wrote to the Attorney-General, noting that such an inquiry would cover a number of issues raised by libraries, cultural institutions and educational institutions in their submissions to the *Fair Use and Other Exceptions* inquiry. We expressed our understanding that these issues would be considered further in the course of the orphaned works inquiry, and that any government action arising from the fair use inquiry would not relate to orphaned works issues.
34. The government's reply, dated 31 May 2006, indicates that the government's May 2006 proposals 'may alleviate some of the problems associated with orphan works', but that the Attorney-General's Department will be developing 'a strategy for further consultation on the topic of orphan works'.

35. This response is obviously disappointing, as alternative approaches to orphan works to those in the May 2006 proposals – including approaches in other countries – have not yet been fully considered by the government.

### **Existing provisions for libraries, museums & archives**

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36. There are already provisions in the Copyright Act which allow the owners of libraries and other collections, amongst other things, to:
- supply copies of material to people for their research and study, including by email;
  - supply copies of material to other libraries for inclusion in their collections, including as a digital file;
  - make material in their collection accessible via computer terminals in the library;
  - copy original versions of works (such as manuscripts) in their collections to preserve them; and
  - make copies of material in their collection for 'administrative purposes'.
37. None of these provisions requires any payment to copyright owners. Some of the provisions are available only to libraries that are not conducted for profit. Such libraries may, however, be owned by a profit-making entity.

### **Purpose of existing provisions for libraries, museums & archives**

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38. Broadly speaking, the purpose of these provisions appears to be to assist owners of libraries and other collections to:
- make material in their collections available to the public for research or study;
  - maintain the material in their collections; and
  - acquire certain new material, which is commercially unavailable, for their collections.
39. In general, these provisions are related to the special status of custodians of collections of material which contribute to the collective knowledge of society. There are, however, some features of the library use provisions that do not appear to be related to that special status. For example, profit-making corporations can rely on the free library use provisions to provide material to their staff for research or study, provided the activities of the library do not make a profit. In addition, there is no obligation for a library which uses the free library use provisions to make its collection available to the public at large (one of the proposals in the government's response to the Digital Agenda Review addresses this issue in part).

### **Government proposals for libraries and other collections**

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40. The existing library use provisions relate to activities carried out in connection with managing a collection, and providing access to its contents.
41. Only one example is given in the media release of an activity which may be covered by the government's proposal: reproducing 'extracts of historical documents in

materials for visitors'. From this example, it appears that the proposals for libraries would apply to *any activity* of an owner of library or other collection: the activity need not be connected to the management of the collection, or access to the collection by researchers.

42. The rationale for the proposal is thus not clear: why does the government think that an organisation (which may be a profit-making organisation) which owns a collection should not be obliged to get permission for an activity that other organisations do need to get permission for?
43. In addition to the example given in the media release, it is possible (but not clear) that the government intends its proposals to cover the following situations outlined in its response to the Digital Agenda Review:
  - making and communicating low resolution reproductions of an artistic work (government response to Digital Agenda Review recommendation 7); and
  - making available of non-preservation copies of artistic works on a dumb terminal on the premises of a library or archive (without the ability to make a hard copy from that dumb terminal) (government response to Digital Agenda Review recommendation 5).
44. In each case, the government's Digital Agenda response refers to the government response to the Fair Use and Other Exceptions inquiry, but does not say whether the proposals in its response to the Fair Use and Other Exceptions inquiry are intended to cover the situation identified in its Digital Agenda response.
45. We have commented in more detail on the government's response to the Digital Agenda Review in our submission on that response (May 2006).

#### **Would the government proposals allow supply of audiovisual material?**

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46. It is not clear whether the government's proposals are intended to allow owners of libraries and other collections to supply audiovisual material to clients and other libraries. The current provisions allowing supply to clients and to other libraries do not apply to audiovisual material (sound recordings and audiovisual recordings such as films, videos and DVDs).

#### **Would the government proposals apply to profit-making libraries?**

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47. It is not clear whether the government's proposals would apply to profit-making libraries, or whether they would apply to libraries owned by profit-making entities.

#### **Educational institutions**

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48. The government's proposal for educational institutions, and its relationship to existing provisions for educational institutions, is unclear.
49. Under Parts VA and VB of the Copyright Act, educational institutions are entitled to reproduce and communicate certain material for 'educational purposes', provided (for most uses) they undertake to pay equitable remuneration. We seek further

information about the proposed definition of 'teaching purposes', and how it would differ from the current definition of 'educational purposes'.

50. In addition, the proposal appears to be that the new exception would not require payment. If this is so, we seek an explanation of why reproduction for educational purposes is subject to payment, whereas uses for 'teaching purposes' (whatever it means) would not be subject to payment.
51. The current educational use provisions are available to educational institutions conducted for profit as well as to not-for-profit organisations. The provisions were extended to profit-making institutions in 1998 on the basis that the uses require payment. It is not clear whether the proposed new exception would apply to profit-making entities.
52. We are assuming that the proposed new exception would be subject to an availability test (because it is proposed as a 'fair dealing' defence), and refer to our comments above on the availability test.

### **Meaning of 'non-commercial' use**

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53. We do not know how the government intends to define 'non-commercial'. Does the adjective apply to the use, or the user, or both? If it applies to the use, would a use that benefits a commercial organisation, but does not involve a sale, be covered? Would a user be allowed to charge a 'cost-recovery' fee?
54. Under the current law, the owner of a library may (but is not required to) charge a fee for supply of material, provided the charge does not exceed the cost of making and supplying the reproduction.
55. We ask that the government collate, and make available, the charges that owners of libraries currently make in reliance on this provision. We understand that owners of libraries supply material to other libraries under a credit system, and we ask that the value of these credits also appear in the collated data.
56. The new National Library of Australia *Libraries Australia* web portal offers articles from periodicals for \$13.20 if held by the National Library, or \$27 if held at another library. It appears that not a cent of this fee is paid to copyright owners.

### **Parody and satire**

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57. We seek further information about:
  - whether the government intends to define 'parody' and/or 'satire', and, if so, how those terms will be defined;
  - bearing in mind that, under the current law, a parody may not infringe copyright because it does not reproduce a substantial part or because it is fair dealing for criticism or review, which activities that currently infringe copyright does the government intend to cover with the proposed new exception?; and
  - whether the government intends its proposal to affect the operation of the moral right of integrity, and, if so, how?

**Legislative compliance with the three-step test**

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58. There is a suggestion in the media release that the three-step test may be included in the Copyright Act as part of the new 'flexible dealing' exception
59. The treaties require countries to ensure that their copyright *legislation* complies with the three-step test. To comply, an exception must be confined to certain special cases (that is, clearly defined and narrow in scope), and be subject to conditions that ensure that the exception does not conflict with a normal exploitation of the work (e.g. the exception does not apply if the work is available for purchase), and does not unreasonably prejudice the legitimate interests of the copyright owner. Conditions intended to meet the second and third steps of the test currently form part of section 40 (fair dealing for research or study).
60. The test is not intended for inclusion in national legislation as a test for whether a particular use of copyright material complies with the legislation. Including the test in the legislation, of itself, does not mean that the legislation complies with the treaties. In particular, inclusion of the test in the legislation does address the 'special case' requirement of the three-step test.

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