



AUSTRALIAN
COPYRIGHT
COUNCIL



***Response to government's Digital Agenda
Review proposals***

May 2006

Australian Copyright Council

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 Digital Agenda Review proposals. In addition, the Copyright Council and some of its affiliated organisations made submissions and representations to the consultants engaged to do the initial part of the Digital Agenda Review, and submissions responding to the consultants' recommendations.

Government announcement: 'Major copyright reforms strike balance'

3. The government's Digital Agenda Review proposals were referred to in its media release dated 14 May 2006 titled "Major copyright reforms strike balance". We have responded separately to the proposals in that media release. As noted in that response, we are not clear how the government's Digital Agenda Review proposals fit with the "new flexible dealing provision" proposed in the media release.

Definition of library

Digital Agenda Review recommendation 4:

That the definition of 'library' in sections 49(9) and 50(9) be repealed and the definition of library in section 18 remains unchanged.

That before any decision is made to amend the Act to exclude libraries within 'for profit' organisations from being able to rely on the inter-library loan scheme to provide works or parts of works to other libraries within 'for profit' organisations, those interested in the issue need to have an opportunity to address the matter specifically.

However, unless the survey data collected (see Recommendation Two in section 8) demonstrates a compelling need for libraries within 'for profit' organisations to be able to access collections within libraries in other 'for profit' organisations in order to ensure that the inter-library loan scheme works efficiently and effectively, that section 50 be amended to exclude libraries within 'for profit' organisations from being able to rely on the inter-library loan scheme to provide works or parts of works to other libraries within 'for profit' organisations.

Government proposal

The recommendations are not supported.

The Government acknowledges that Australia has a distributed national collection of library material and the current application of sections 49 and 50 of the Copyright Act is integral to the effective operation of the Australian library network. The Copyright Act already contains limitations on the use of these exceptions. The Government has not been presented with evidence that leads to the conclusion that the current application of the exceptions in sections 49 and 50 is unreasonably prejudicing the legitimate interests of copyright owners or adversely impacting on copyright owners' markets to an extent that warrants further limiting the application of those exceptions. However, the Government proposes to amend these provisions so that the exceptions only apply to libraries whose collections are directly accessible to the public or accessible to other library users through the library's participation in an inter-library loan system.

4. The prejudice to copyright owners from the availability of the library use provisions to libraries owned by profit-making entities is obvious: the entities do not pay the copyright licence fees they would otherwise be obliged to pay. Licences for such copying are available from Copyright Agency Limited.
5. The UK Copyright Designs and Patents Act was amended in 2003 with the effect that libraries in profit-making entities could no longer rely on the free library use provisions in the UK legislation. The change resulted in a rapid expansion of licensing for corporations by Copyright Licensing Agency.
6. It appears that the government's only concern is to provide access to material in collections of profit-making entities to members of the general public. Its proposal, however, is not confined to that issue. This proposal would appear to still allow, without payment:
 - supply by the library of material to employees of the profit-making entity for 'research or study' (which, in practice, is often interpreted very widely); and
 - acquisition by the library of material from other libraries.
7. The government's main concern could be addressed by narrowing the application of the current provisions so that they allow a library owned by a non-profit entity to acquire, for its client's research or study, material held in a library owned by a for-profit entity, but do not otherwise apply to collections owned by profit-making entities.
8. In any event, we are not clear how this proposed amendment fits with the government's proposals for a 'new flexible fair dealing exception'.

Preservation copies

Digital Agenda Review recommendation 5

That owners' interests, libraries and cultural institutions be given a reasonable opportunity to negotiate, agree and implement a code of practice that clarifies issues of concern in relation to copying of works under Part III, Division 5 of the Act.

Failing implementation of such a voluntary code of practice within a reasonable period of time, the Act be amended so as to make it clear that:

- 1 *a copy under section 49 or 50 can be made from a preservation copy of a fragile work*
- 2 *there is a distinction between different editions of works in determining whether a preservation copy can be made.*

Subject to these amendments, no change to the requirement for destruction of copies made under sections 49 or 50 is recommended.

That section 51A be amended so as to allow libraries and archives to make available to volunteers copies of works in the collection, for the purpose of educating or training those volunteers.

That section 51A be amended to allow non-preservation copies of artistic works to be made available on a dumb terminal on the premises of the library or archive (without any ability to make a hard copy from that dumb terminal).

Government proposal

The Government proposes to amend the Copyright Act to

(1) permit that a reproduction under section 49 or 50 can be made from a preservation reproduction of a fragile work

(2) acknowledge a distinction between different editions of works in determining whether a preservation copy can be made

(3) ensure that section 51A permits reproduction of works in the collection for the purpose of educating or training volunteers of the library or archive.

The recommendation concerning non-preservation copies of artistic works has been considered as part of the Fair Use and other Copyright Exceptions review.

Copies of preservation copies

9. We think the recommendation in the Digital Agenda Review, and the government's response in point (1), are ill-conceived and based on a misunderstanding of the operation of the current law.
10. Section 51A allows a library or archives to make a preservation copy of work held in manuscript form. It also allows a library or archives to make a copy of a work held in manuscript form "for the purpose of research that is being, or is to be, carried out in the library or archives in which the work is held or at another library or archives". There is no requirement that a research copy be made directly from the manuscript; it can be made from the preservation copy.
11. Sections 49 and 50 only apply to published works held in the collection of a library or archives. Given that that s51A(1)(a) expressly allows the copying of a manuscript for research or study, it appears that ss 49 and 50 apply to the *published form* of a work, and would not apply to the manuscript version of a published work.
12. Sections 49 and 50 allow the copying and supply of published works in the library's collection. Section 49 allows copying and supply to a library client for research or study, and s50 allows copying and supply to another library for inclusion in its collection or supply to its client for research or study. If the library's copy of a published work has been damaged or has deteriorated, the library can make a replacement copy under s51A, if a replacement is not available within a reasonable

time at an ordinary commercial price. The library can make a copy for a client (s49) or for another library (s50) from a replacement copy.

Preservation copies of different editions

13. We do not understand the government's proposal in point (2). The 'preservation' provisions in the Copyright Act apply to 'original' versions of works, such as manuscripts. Published editions of works are not 'original' versions and the preservation provisions do not apply to them.
14. A published version of a work held in a library may, however, be copied and supplied by the library to its clients for their research or study (under s49), and to another library for inclusion in its collection or to supply to its client (under s50). If the work is commercially available, only a reasonable portion can be supplied.
15. The term "edition" can be used to mean different versions of a work (eg subsequent editions of technical works usually contain revised versions of the work), but can also be used to mean differently bound versions (eg "first edition", paperback edition, hardback edition). Used in the first sense, it is likely that each edition is a separate work, and whether or not a particular edition can be copied in its entirety under ss49 or 50 depends on whether that edition is commercially available.
16. The current provisions effectively allow a preservation copy of an out-of-print version to be held by another library. A copy can be made and supplied under s50 for inclusion in that other library's collection. If the edition is lost, damaged or stolen, the library which held it may make a replacement copy from a copy held in another library, or a library which holds a copy may make and supply a replacement copy under s50.
17. In addition to the above concerns, we are not clear how these proposals fit with the government's 'extended fair dealing' proposals.

'Educating volunteers'

18. The Digital Agenda Review recommendation regarding volunteers appears to be based upon the following statement in paragraph 14.42 of the Digital Agenda Review report:

[The Cultural Institutions] also submit that the exception allowing a work to be made available to an officer of the library or archive fails to take into account the important role played in many cultural institutions of volunteers, who provide expert guidance and assistance to members of the public and assist in the institution's charter of disseminating information to the community. Material cannot be made available to those volunteers under this exception, to allow those individuals to learn about or better understand the collection. [The footnote refers to the NMA – NGA – NGV submission]
19. The report appears to be referring to s51A(3), which allows the owner of a collection to make reproductions (including digital reproductions) of works in its collection for 'administrative purposes', and to make those reproductions available to officers of the collection via a computer terminal situated on the collection's premises.
20. The government's proposal appears to be based on an assumption that 'administrative purposes' includes training. We query whether that is so.

21. In addition, s51A(3) should be subject to an availability test: for example, it should not apply to works covered by a licence offered by Viscopy or Copyright Agency Limited. We understand that those licences will be subject to the jurisdiction of the Copyright Tribunal following the government's proposed amendments, so that the Tribunal can determine the value of reproductions made under the licence. The same obviously applies to any proposed extension of the provision.
22. As for other proposals relating to the Digital Agenda report, it is not clear how this proposal would fit with the government's 'flexible dealing' proposal.

First digitisation

Digital Agenda Review recommendation 6

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

23. The 'issue' referred to was as follows:

The Review seeks your views (together with any supporting data) on the issues raised in this section. In particular:

5.1: Is first digitisation of unpublished works by libraries and archives occurring to any (or any significant) extent? If so, is there any systemic or widespread failure to include electronic rights management information?

5.2: Are there any adverse effects as a result of the lack of any positive obligation to include electronic rights management information on any electronic copy or communication that may be made of a work or other subject matter? If so, what are they?

Government proposal

The Government has examined the current exceptions for libraries and archives in the Copyright Act as part of the Fair Use and other Copyright Exceptions review. Further amendments to the specific exceptions for libraries and archives are proposed as part of that review.

24. The Digital Agenda Review recommendation relates to the effect on copyright owners of libraries making digital versions of non-digital material (contrary to the apparent view of the Digital Agenda consultants, libraries can do this in relation to both published and unpublished material). One of the copyright owners' concerns is that libraries are not obliged to include rights management information with the digitised versions of the material, and are not obliged to use technological protection measures to inhibit subsequent unauthorised use of the material.
25. We do not understand the government's response to this recommendation. The *Fair Use and Other Copyright Exceptions* review did not examine this issue. The government's proposed amendments in its 'new flexible fair dealing' do not address this issue.

Making and communication of low resolution copies

Digital Agenda Review recommendation 7

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

Government proposal

The Government has examined the current exceptions for libraries and archives in the Copyright Act as part of the Fair Use and other Copyright Exceptions review. Further amendments to the specific exceptions for libraries and archives are proposed as part of that review.

26. It is difficult to discern the purpose of, or rationale for, the Digital Agenda Review recommendation, given the current provisions in the Act.
27. Section 49 allows a library to reproduce and communicate to a person, for research or study, an entire artistic work (in any resolution) if a copy of the work is not available within a reasonable time at an ordinary commercial price.
28. Section 50 allows a library to reproduce and communicate to another library, for that library's collection and/or for it to supply to a user for research or study, an entire artistic work (in any resolution) if a copy of the work is not available within a reasonable time at an ordinary commercial price.
29. Section 49(5A) allows a library to make available, on a computer in the library, an artistic work it has acquired in electronic form.
30. In the rare circumstances that an artistic work is separately commercially available, the library may reproduce and communicate only a reasonable portion. We do not think the library should be entitled to supply an entire copy, in low resolution, of a commercially available work. We do not think that the supply in low resolution protects the copyright owner; such a supply may well conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights owner.
31. The government's response refers to the Fair Use and Other Exceptions review, and proposed exceptions resulting from that review. The meaning of that reference is not clear.

Code of practice/MCEETYA guidelines

Digital Agenda Review recommendation 8

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

That failing agreement within a reasonable period of time, and if concerns with the practical application of the regime are still evident, Part VB be amended so as to give legislative force to the existing MCEETYA guidelines.

That the code (or failing agreement any necessary amendment) includes guidance on the meaning and operation of literary works accompanied by artistic works that explain or illustrate the literary work.

Government proposal

This recommendation is not supported. To the extent that there is any uncertainty in the operation of the guidelines giving legislative backing to them will not address that uncertainty. Parties in dispute will still seek to enforce their rights in the courts. The Government also understands that the Copyright Agency Limited (CAL), while not endorsing the guidelines, does not appear to have challenged their application to date. Giving the guidelines legislative backing would also remove some of the flexibility that educational institutions benefit from by having informal guidelines.

32. We support the government's response to the Digital Agenda recommendation. We support the adoption of guidelines about the application of the educational use provisions, but do not think further amendments to the Copyright Act are warranted at this stage.
33. We do, however, think that the provisions in the Copyright Act dealing with "accompanying" artistic works should be repealed. This would not have an adverse effect on access (as such artistic works can nearly always be copied under other provisions), and would remove an unnecessary complication to provisions which are already very complicated.

AV material on the internet

Digital Agenda Review recommendation 9(a)

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

34. We assume the recommendation should have referred to Part VA rather than to Part VB.

35. The recommendation appears to be based on the paragraphs 15.23 and 15.24 of the Digital Agenda Review report:

There is consensus among DEST, the ABC and SBS that Part VA should be amended so as to clearly cover use of audio/video versions of copyright material from free to air broadcasts that is available subsequently on the Internet, in the same way that the Part covers audio/video material taken directly from the free to air broadcasts.

No commercial free to air broadcasters made any submission on this point.

Government proposal

This recommendation is supported. It will facilitate the use of copyright material by educational institutions and ensure that copyright owners are compensated for that use.

36. As explained in our response to the Digital Agenda Review, it appears that, as a result of a determination relating to the meaning 'broadcasting services' by the Minister for Communications and the Arts on 12 September 2000, Part VA may already apply to television and radio programs which are webcast using the broadcasting services bands (certain parts of the radio-frequency spectrum).

37. Part VA does not apply, however, to programs which are webcast by other means, or to programs available for download at a time of the user's choosing.

38. We seek further information about the details of the government's proposal and the rationale for it.

Notice requirements

Digital Agenda Review recommendation 9(b)

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

39. The recommendation appears to be based on paragraphs 15.31 to 15.33 of the Digital Agenda Review report:

In order to obtain the benefit of the statutory licence, any copy that is made or communicated must comply with particular notice requirements.

DEST submits that these notice provisions are unwieldy in practice and, in some cases, unworkable. In particular, DEST refers to what it describes as the 'apparent requirement' to apply a notice in relation to each copy or communication and, more significantly, in respect of the different works or subject matter comprised in the copy or communication. Where the copy comprises at least one work and one other audiovisual material, such as a sound broadcast, there is a requirement to attach a Part VA notice and a

Part VB notice. Whilst the forms of notice are similar, they are not identical.

If the form of the different notices can be amended so as to allow for use of a single notice, without adversely impacting on the information that an owner requires under the licence, then those amendments should be made.

Government proposal

This recommendation is supported. If it is practical, consolidation of the forms will simplify record keeping and provide cost savings for both copyright owners and educational institutions.

40. The Digital Agenda Review recommendation related to the “warning” notices that educational institutions must give, under ss 135KA and 135ZXA, to recipients of electronic copies and of communications made under Part VA and Part VB. The form of these notices is prescribed in the Copyright Regulations, and the prescribed form of the 135KA notice is slightly different to that of the 135ZXA. We are not sure how the references to ‘record keeping’ in the government’s proposal relate to the Digital Agenda Review recommendation.
41. In relation to the Digital Agenda Review report and recommendation, we are not sure when a ‘copy’ would contain both part VA and Part VB material, although there may be cases where Part VA and Part VB material are communicated together. We do not object to the Regulations being amended to include a notice suitable for a communication of Part VA and Part VB material together.

Digital anthologies

Digital Agenda Review recommendation 9(c)

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

Government proposal

This recommendation is supported. Preserving the technological neutrality of the Copyright Act requires a provision equivalent to s135ZK for digital anthologies.

42. We oppose this proposal. We understand that s135ZK was based on a clause in agreements between Copyright Agency Limited and educational institutions which preceded the introduction of s135ZK. The rationale for s135ZK was that an educational institution could presume that a work of fewer than 15 pages in an anthology had not been separately published and/or was not (separately) commercially available, and that it could therefore copy the entire work. That presumption cannot be made for works in digital form. That is presumably why this amendment was not made as part of the Digital Agenda amendments.

Insubstantial portions

Digital Agenda Review recommendation 10

That section 135ZMB is amended to provide that:

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

Government proposal

This recommendation is supported. The present treatment of anthologies in electronic form and those in hard copy form under Part VB is inconsistent. The amendment will address this and preserve the technological neutrality of the Copyright Act.

43. We do not understand the relationship between the government's proposal (which appears to relate to Digital Agenda Review recommendation 9(c)), and Digital Agenda Review recommendation 10.
44. In relation to Digital Agenda Review recommendation 10, our view is that ss135ZG and 135ZMB should be repealed. The original justifications for s135ZG no longer apply. Even if they did, different considerations apply to the digital environment. In addition, section 135ZMB has a much broader effect than 135ZG, and so does more than "carry over" the effect of an existing exception in the hardcopy environment. This is because it allows the reproduction of 1% of the words in a work, and thus allows more scope for reproducing the "best bits" of a work than the limit for s135ZG (1% of pages). In addition, an accompanying hardcopy artistic work is likely to be on one of the pages reproduced under s135ZG, but it appears that an accompanying electronic artistic work may be reproduced in addition to the words.
45. If s135ZMB is to remain, then it should at least be limited to a continuous portion of the work, and not include accompanying artistic works.

Caching by educational institutions

Digital Agenda Review recommendation 16

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

Government proposal

The recommendation is not supported. Instead the Copyright Act will be amended to allow the active caching of web sites by educational institutions where cached material is not altered and not retained beyond the minimum period required for the particular course of educational instruction.

46. This proposal must at least be subject to equitable remuneration, which would enable the Copyright Tribunal to determine the value of the caching.

Communication right

Government proposal

The Copyright Act is to be amended, as necessary, to clarify the scope of the communication right. In particular, the amendments will clarify that by the action of clicking on a link to gain access to a webpage a user is not determining the content of the material accessed and is not exercising the communication right.

47. We seek further information about the government's proposals in relation to the communication right. We are particularly concerned that any changes do not apply to a communication which is infringing, or which results in an infringement. Such a change could limit the actions available against internet piracy, particularly where some of the aspects of the piracy occur outside the jurisdiction.

Distributed communication technologies

Government proposal

A new provision is to be added to the Copyright Act to clarify that a "communication to the public" of copyright materials is not a "communication to the public" where that communication is made in the circumstances and for the purposes set out in s 28.

48. Educational institutions are already entitled to communicate material copied from television and radio under Part VA, subject to an undertaking to pay equitable remuneration. Equitable remuneration is determined by the Copyright Tribunal in the absence of agreement between Screenrights and the institution's representative body.
49. Any exception for communication (for the purposes of showing or playing in class) of non-broadcast material should be subject to the availability of a licence for that activity. We do not object to the addition of such communications to the activities covered by Part VA, subject to the availability of a licence: this would enable the Copyright Tribunal to determine the value of the communication. The practical effect of allowing educational institutions to communicate material simultaneously to a number of classes is that they purchase fewer copies of the material.

Liability for inter-library supply of publications

Government proposal

Section 50 the Copyright Act is to be amended to clarify the immunity for liability aspect of the provision.

50. We do not know what this proposal means. Section 50 allows a library (the requesting library) to request another library (the supplying library) to supply copies of certain material from the supplying library's collection. Section 50(3) provides that the reproduction is deemed to be made on behalf of the requesting library, and that the supplying library is not liable.

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