



AUSTRALIAN
COPYRIGHT
COUNCIL



*Submission on Exposure Draft: Copyright
Amendment Bill 2006: Exceptions and other
Digital Agenda review measures*

October 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 submissions on the Exposure Draft of the *Copyright Amendment Bill 2006: Exceptions and other Digital Agenda review measures*.

Scope of this submission

In this submission, we focus on what we believe are discrepancies between the drafting in the Exposure Draft and the stated intention behind the relevant provisions, as set out in the associated Explanatory Materials.

In some cases, where the intended meaning or effect of a provision is unclear, we seek additional information and an opportunity to respond further.

As the Department would be aware from our previous submissions, we are also concerned about the policy behind some of the provisions in the Exposure Draft. We do not, however, comment on policy issues in this submission. Rather, we will make submissions on policy issues to the Senate Committee at the relevant time.

Schedule 7, Part 1: Time-shifting

The Explanatory Material which accompanies the Exposure Draft states that the proposed replacement section 111 is not intended to allow individuals to keep recordings "to use over and over as a substitute to buying a commercial copy" and that the condition that a recording be made to watch or listen to a broadcast "at a more convenient time" is intended "to indicate that the maker cannot keep a recording indefinitely".

We submit that the current wording is unclear and that, to create certainty, a sunset period of, say, 14 days, from the making of the film or recording should apply, so that a time-shifted copy which is not deleted or destroyed within that period is deemed to be an infringing copy.

Schedule 7, Part 2: Format-shifting

Differences in terminology

Proposed new section 43C relates to reproduction of relevant material “in a **form** different from the form in which the work is embodied”; proposed new section 47J relates to changes from **hardcopy** to **electronic** form, and vice versa; proposed new section 109A allows changes in **format**.

We are unclear why there are differences in terminology.

The implication would appear to be that the type of format-shifting in relation to books, newspapers and magazines (proposed section 43C) is broader than permitted in relation to photographs (proposed section 47J). We are unclear as to the reason for the distinction, and seek additional information so that we may have the opportunity to comment further on the drafting of the provisions.

Further, proposed new subsections 43C((1)(e), 47J(1)(d), 109A(1)(e) and 110AA(1)(e) allow more than one reproduction or copy to be made from an owned original, provided that each copy is in a different “form” or “format”. Given that the stated intention of the conditions that are to apply to format-shifting is to prevent individuals “making multiple copies”, we submit that “form” or “format” needs to be defined in such a way that mere differences in file types do not give rise to an opportunity effectively to make multiple copies.

Prevention of serial copying from the main copy

We understand that proposed new subsections 43C(5), 43J(5) and 109A(5) are intended to prevent serial copying from a “main copy”.

In our view, however, the current drafting is obscure. In particular, proposed subsection (2) of each proposed new section – to which each of the proposed new subsections (5) refers – relates to copies which result from copying from the owned original, not from copying of the “main copy”.

We submit that proposed new subsections 43C(5), 43J(5) and 109A(5) instead state to the effect that “nothing in this section permits any reproduction/copy to be made from the main copy”.

We further note that proposed new section 110AA does not currently contain any similar provision, and submit that it should.

Schedule 7, Part 3: Use of copyright material for certain purposes

We are unclear as to the effect of the proviso in proposed new section 200AB that the relevant use not be “partly for the purpose of obtaining a commercial advantage”, and we seek additional information on this wording, so that we may have the opportunity to comment further on the drafting of the provision.

Schedule 7, Part 4: Fair dealing

We are unclear as to the intended effect of proposed new subsection 40(5) insofar as it refers back to sections 10(2) and 10(2A). In particular, it is not in our view clear that the amended wording would result in any substantive change to the operation of the provision, given that the definitions of “reasonable portion” in those sections are inclusive, not exclusive.

We therefore seek information as to the intention behind proposed new subsection 40(5) so that we may have the opportunity to comment further on the drafting of the provision.

Schedule 7, Part 5: Official copying of library and archive material

“Reasonable portion”

We are unclear as to the intended effect of proposed new subsection 49(5AA) insofar as it refers back to sections 10(2) and 10(2A). In particular, as noted above, we are not aware that the amended wording would result in any substantive change to the operation of the provision, given that the definitions of “reasonable portion” in those sections is inclusive, not exclusive.

We therefore seek information as to the intention behind proposed new subsection 49(5AA) so that we may have the opportunity to comment further on the drafting of the provision.

Copying from different editions

Proposed new subsections 51A(4) and 51B(4) permit the copying and communication of certain editions of relevant published works whether or not the work is commercially available in other editions. In each case, discretion is given to the relevant authorized officer of the library or archives to determine whether or not he or she will make the reproduction. That discretion is not tied to any particular criteria. We are unclear as to why this is so.

We do understand that collecting institutions have concerns over their current inability to copy rare or significant editions without permission from relevant copyright owners. However, proposed new section 112AA deals with those concerns, permitting the copying of editions and works within editions where the edition itself is of significance.

We therefore submit that the making of a reproduction under either proposed new subsection 51A(4) or 51B(4) be permitted only in the event that the work is not commercially available, as in proposed new subsections 51B(3) and 51B(5).

Alternatively, we seek information as to the intention behind proposed new subsections 51A(4) and 51B(4) so that we may have the opportunity to comment further.

Relationship between proposed new sections 51B, 110BA and existing provisions

We note that proposed new section 51B and section 110BA would allow the making of various single reproductions and copies, without the authorized officer of the library or archive having to have a particular purpose in mind.

We are not clear that, in practice and to the extent they apply to manuscripts, original artworks, first records or first copies, these provisions add anything to the existing provisions. We therefore seek information as to the intention behind these provisions as they apply to these types of material, so that we may have the opportunity to comment further.

Schedule 8 – Maker of communication

We are unclear as to what is intended by the words “what is made available online by someone else in the communication”, and seek information so that we may have the opportunity to comment further on this phrase.

We note that the intention of the provision is to clarify that a “person who merely accesses or browses material online” is not responsible for a communication of that material to him or her self. In our view, however, it is not clear that the proposed wording is so limited, and we are concerned that it may have wider application.

We therefore submit that the section should be redrafted in a way that makes its application clear and certain in light of the stated intention.

Schedule 9, Part 1: Communication in the course of educational instruction

We understand that proposed new section 28A is intended to address the issue of “reticulation” of commercially produced copies of films and sound recordings within the premises of educational institutions to classrooms.

The effect of the current drafting of the proposed new section is, however, much broader than this as it covers all communications of all films and recordings.

Part VA already allows for the communication of material copied from radio and television to classrooms, and we therefore submit that the proposed new section include within it wording similar to the proposed new subsection 200AB(6).

Schedule 9, Part 5: Active caching for educational purposes

The Explanatory Materials state that “the Act is being amended to allow the active caching of websites” by educational institutions.

Proposed new section 200AAA, however, has far wider application, and should be amended to apply only to the active caching of **websites** in their entirety.

We note also that, as currently drafted, the provision goes beyond the intention stated in the Explanatory Materials in another regard: it appears to allow not only active caching, but also archiving of websites.

We therefore submit that a body administering an educational institution wishing to rely on proposed new section 200AAA should be obliged periodically to update the cache. We note the obligation on Carriage Service Providers under current section 116AH to update cached material in accordance with any relevant industry code. In the context of educational institutions, there should be a general obligation periodically to update a cached copy of a website by reference to a specific time-frame – say, 14 days.

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