

Australian Copyright Council

3/245 Chalmers Street Redfern NSW 2016 Australia
ACN 001 228 780 Tel: (02) 9318 1788 Fax: (02) 9698 3536

<http://www.copyright.org.au>
email: cprright@copyright.org.au

Response to discussion paper Copyright Reform and the Digital Agenda

Thank you for inviting us to respond to the proposals in the Government's discussion paper *Copyright Reform and the Digital Agenda*.

Implications of proposed new definition of "broadcast"

The proposed new definition of "broadcast" would:

- a) change the rights of copyright owners;
- b) expand the application of all defences applying to broadcasting; and
- c) expand the types of transmissions in which copyright subsists.

We submit that the Act should be amended to give copyright owners a new right to **transmit** their work to the public, rather than amending the definition of "broadcast". The term "transmit" was used in the 1996 draft bill, and we submit that this term is preferable.

We submit that the term "broadcast" should be retained only for the purposes of exceptions to infringement, and that the current definition of "broadcast" should be retained for that purpose. There are no justifications put forward in the discussion paper for expanding the application of the numerous defences and exceptions which apply to broadcasting, and we submit that any such expansion should be left for consideration by the CLRC. We have set out in Appendix 1 the exceptions which would be affected by the proposed new definition.

In this submission, we have used the term "broadcast" to mean "broadcast" as currently defined, and the term "transmit" to mean the broader right relating to transmission by both wireless and physical means.

New right of "making available"

We understand that the right of making available would continue to be exercised as long as the work remained available – for example, if a copyright owner licensed the "making available" of a work for a year, the licensee would infringe copyright if the work was not removed after a year. This should be made clear in the drafting.

Definition of “public”

Under the proposals in the discussion paper, the meaning of “public” would affect copyright owners’ rights to:

- a) transmit a work to the public (whether by wire or wireless means); and
- b) make a work available to the public.

The meaning of “public” would also determine the transmissions in which copyright would subsist.

We support the proposal in the discussion paper that “public” not be defined. In 1994 we proposed that a transmission made for a commercial purpose should be deemed to be to the public. At the time, it was not clear whether “public” for the purposes of “transmit to the public” had the same meaning as “public” for the purposes of “perform in public”. Given the High Court’s recent decision in the *Telstra v APRA* case, we do not think that such a deeming provision is now necessary.

We support the paper’s proposal that “the public” include a public outside Australia (see para 4.53).

Defences relating to broadcasting of sound recordings

As noted above, we submit that the current defences relating to broadcasting of copyright material, including the broadcasting of sound recordings, should not be expanded without consideration of the justifications for doing so, and compliance with international treaty obligations.

We submit that owners of copyright in sound recordings should be given an exclusive right of making available (as required by the WPPT), and an exclusive right to transmit.

The discussion proposes that the application of s109 (the statutory licence for the broadcasting of sound recordings) would be expanded apply to the transmission of sound recordings by non-wireless means. The paper also proposes that s109 would not apply to subscription broadcasts, but that the Copyright Tribunal would have jurisdiction in relation to licence schemes for subscription broadcasting (para 4.26).

We submit that s109 should be repealed, and that licence schemes relating to all broadcasting of sound recordings be subject to the Copyright Tribunal’s jurisdiction. If this submission is rejected, we support amendments to remove the “ceiling” on the amount payable in s152 (although we note that this issue is the subject of separate consideration by the Government).

We oppose the proposed reservation for “indirect” communication to the public of sound recordings, and submit that s199(2) should be repealed (paras 4.35 and 4.36).

Subsistence of copyright in broadcasts

We submit that there should be no extension of copyright protection for broadcasts without clear identification of:

- a) the purpose of protection; and
- b) the criteria for subsistence and ownership of the rights.

We understand that broadcasters' main concern is piracy of broadcast signals by competitors. This issue is not discussed in the discussion paper.¹

In relation to (b), we submit that the subsistence of copyright should relate to the work and investment by the broadcaster in preparing and compiling programming. We submit that copyright should not subsist in a broadcast (or other transmission) unless the broadcaster has made a contribution to the content of broadcast which is additional to the pre-existing material; it is not justified to give copyright rights to a person who does no more than transmit other people's material.

We are not clear about what is proposed in relation to subsistence and ownership in the discussion paper. Para 5.40 says:

It is proposed that the Act should be amended to extend copyright protection to wireless and cable transmissions made by any broadcaster licensed under the Broadcasting Services Act.

However, para 4.51 says:

It is proposed that copyright be expressed to subsist in television or sound broadcasts lawfully made from a place in Australia, thus eliminating the need to refer to specific broadcasting laws or particular broadcasters.

And para 4.53 says:

The owner of copyright in the broadcast would be the maker of the broadcast and the maker of the broadcast would be the person responsible for determining the content of the broadcast.

Protection of foreign broadcasts

In relation to foreign broadcasts, we maintain our view that the current provisions relating to subsistence and ownership are not sufficient to comply with the requirements of the Rome Convention. We have raised this issue previously with the Attorney-General's Department.

Different tests for liability for transmitting and ownership of transmission

The current provisions in the Copyright Act (s22), and the 1996 draft Copyright Amendment Bill, use the same test to determine:

- a) who is liable for broadcasting copyright material; and
- b) who is the maker (and thus may be the owner) of a protected broadcast.

This approach also seems to be proposed in the discussion paper.

We submit that different considerations apply to liability for broadcasting someone else's material, than apply to determining who should own copyright in a broadcast in which copyright subsists. This is partly because there are situations in which the copyright owner's licence should be obtained for transmitting a work or making it available, but the transmitting or the making available will not result in a protected transmission.

¹ This issue was discussed at the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, held in Manila in May 1997.

Responsibility for determining content (as proposed in para 4.52) may be an appropriate test for determining who owns copyright in a protected transmission. However, we do not think it is a sufficient test for determining who should be liable for transmitting other people's material.

One possibility is to provide that a person liable for transmitting a work or for making it available **includes** :

- a) a person under whose direction or control the material was transmitted; and
- b) a person who transmitted the work or made it available as part of a service for valuable consideration (that is, a service to the "content provider", rather than a service to the recipient or viewer).

The Act could use language similar to that in Agreed Statements to the WIPO Copyright Treaty to deem that a person who does nothing more than providing physical facilities for enabling or making a transmission is deemed to not make the transmission.

Liability of service providers

We submit that it is fair and appropriate that a service provider should be liable if it transmits or makes available material in circumstances not authorised by the copyright owner. We strongly oppose any special exemption for service providers.

If a service provider arranges for, and gets a commercial benefit from, the work being made available or being transmitted, it should have responsibility for ensuring that copyright is not infringed.

We submit that the question of the service provider's knowledge should be not be relevant to liability, but should be relevant to the remedies a court may order. If a service provider was not aware, and had no reason to suspect, that an act was an infringement of copyright, then it is not liable to pay damages (section 115(3) of the Copyright Act).

For example, if a service provider hosts a web site which has infringing material on it, the copyright owner should be able to take legal action against the service provider to at least have the material removed. This may be particularly important if the proprietor of the web site cannot be found or is offshore. If the service provider failed to remove the material after being notified that it was infringing, the service provider should also be liable for damages.

"Temporary" & "incidental" copies

We do not oppose a special exception for certain "temporary" or "incidental" reproductions made in the normal course of transmitting a work or making it available, although we note that such reproductions will often be impliedly licensed by the copyright owner.

We suggest that such an exception be drafted using the language relating to special exceptions in the treaties; that is, a temporary or incidental reproduction of a work made in the normal course of transmitting a work or making it available would not infringe copyright if:

- a) it does not conflict with a normal exploitation of the work; and

- b) it does not unreasonably prejudice the legitimate interests of the copyright owner.

For example, under this formulation, we think that browsing of a work by the copyright owner's intended viewers would not be an infringement of copyright, but browsing by other viewers (for example where restrictions on access were circumvented), or browsing of a work made available without the copyright owner's authorisation, should be an infringement.

Fair dealing

We do not oppose, in principle, the application of the fair dealing defences to the proposed new rights. We have commented on other aspects of fair dealing in our submission to the Copyright Law Review Committee dated 7 April 1997.

Use of copyright material by libraries and educational institutions

We are not convinced that there is a need or justification for new exceptions for libraries and educational institutions in relation to the proposed new rights. To consider this issue further, we think it would be useful to have examples of the types of activities libraries and educational institutions are proposing, and their arguments for special exceptions or statutory licences to allow or facilitate those activities.

We submit that the special provisions which allow photocopying, and which allow the copying of television and radio programs, were introduced at a time when these were not "normal exploitations" of copyright works. However, the transmission and "making available" of works are, or will become, "normal exploitations" of works, and any special exceptions must not undermine or interfere with these normal exploitations by the copyright owner.

Retransmission

We urge the Government to decide soon its policy in relation to retransmission, so that the policy can be implemented at the same time as the changes arising from this discussion paper. The issues are related, and the Government should deal with them in one piece of amending legislation to avoid unnecessary complication.

Our position is that owners of copyright should receive equitable remuneration for retransmission of their work, and that this should be determined by the Copyright Tribunal if the parties are unable to reach an agreement.

Technological measures

We support the introduction of provisions in the Copyright Act to give effect to the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

We think these provisions should enable a copyright owner to take civil action, and give rise to criminal penalties. As with criminal penalties for infringement, the criminal penalties could be limited to acts done for commercial purposes.

The discussion paper seems to propose new provisions in relation to certain specific activities (paras 5.9 to 5.14). We submit that the new provisions should cover these activities, but have more general application.

We note the proposal in the US White Paper *Intellectual Property and the National Information Infrastructure* that the Copyright Act (US) be amended to include a provision which would prohibit the

importation, manufacture or distribution of any device, product, or component incorporated into a device or product, or the provision of any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without authority of the copyright owner or the law, any process, system, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights [of the copyright owner].

We do not think that copyright owners should be compelled to give access to material, where a use of that material is allowed by a special exception or statutory licence (para 2.16). We think that the purpose of these provisions is to regulate the use of a work to which a person has access, not to give access to otherwise unaccessible material.

Rights Management Information

We support the introduction of provisions to protect rights management information. We think these provisions should enable a copyright owner to take civil action, and give rise to criminal penalties. As with criminal penalties for infringement, the criminal penalties could be limited to acts done for commercial purposes.

We are not aware of situations where protection of rights management information would be an unreasonable restriction where an activity was licensed by the copyright owner or allowed by law (for example under a statutory licence) (para 2.18).

Libby Baulch
Executive Officer
19 September 1997

Appendix 1: defences affected by proposals in discussion paper

Defences relating to broadcasting

The defences and exceptions which apply to broadcasting include:

- ss42 & 103B – reporting news by means of broadcasting
- s45 – reading or recitation of extract of work included in a broadcast
- ss47, 70, 107 & 248A(1)(h) – ephemeral copy for purposes of broadcasting
- s47A– sound broadcasts for the print handicapped
- s67 – incidental filming or televising of artistic works
- s105 – no public performance or broadcasting right for certain foreign sound recordings
- s109 – statutory licence for broadcasting sound recordings
- s25 – secondary broadcasts

This is reference to some, but not all, of these exceptions in para 4.68.

Exceptions relating to transmitting to subscribers to a diffusion service

- s69 – artistic works transmitted to subscribers to a diffusion service
- s199(4) – retransmission of a broadcast

Exceptions relating to the copyright in broadcasts

- s111– filming or recording broadcasts
- s200(2A) – making a record of a sound broadcast
- s200AA – use of broadcasts by institutions assisting people with intellectual disabilities

The expansion of the educational copying scheme in Part VA to cover the recording by educational institutions of television and radio programs delivered by cable is being addressed in the Copyright Amendment Bill 1997.