

# Australian Copyright Council

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## **Copyright Law Review Committee Simplification Reference Outstanding issues from CCG report and CLRC Software report**

### **Introductory comments**

The CCG report is now four years old, and many of its recommendations were the subject of discussion and proposals in the Government's 1997 discussion paper *Copyright Reform and the Digital Agenda*. The CLRC software report is now three years old, and the Government announced on 30 April that it had adopted many of the recommendations in the report. There have also been a number of other developments which affect the current relevance of the CCG's recommendations and the CLRC's recommendations in its software report. These include the *Review of Copyright Collecting Societies* (1995), the High Court decision in *PPCA v FACTS* in May 1998, and the Federal Court decision in *Galaxy v Sega* ((1997) 37 IPR 462 and (1996) 35 IPR 161). Particularly given the Committee's obligation to take into account "any recommendations or reports made to Government by other relevant expert or advisory bodies in intellectual property", it would have been helpful if the Committee had referred to these developments in its invitation for submissions.

In addition, we are not clear why the Committee has sought submissions in relation to these issues now, when some of them would seem to be more appropriately considered under the Committee's other terms of reference, such as the categorisation of subject matter and the categorisation of rights.

### **CCG issues**

#### **1. Definition of "cinematograph film"**

It would seem more appropriate for the Committee to consider this issue as part of its review of the categorisation of copyright subject matter required by paragraph 1(c) of the Committee's terms of reference.

In our view, a better approach to the protection of multimedia is to amend the definition of "compilation". It seems that this definition requires amendment in any event, as the current definition does not appear to comply with international treaty obligations. We raised this issue with the Attorney-General's Department in 1995 (a copy of our letter is enclosed).

#### **2. Definitions of "record" and "cinematograph film"**

The uncertainty referred to by the CCG would seem to have been resolved by the decision in *Galaxy v Sega*. In any event, it seems more appropriate to consider this

issue as part of the Committee's review of the categorisation of copyright subject matter required by paragraph 1(c) of the Committee's terms of reference.

### 3. Definition of reproduction

The CLRC recommended a definition of "reproduction" in its report on computer software protection (1995) at paragraph 6.55 as follows:

... the Committee recommends that a clarifying definition of reproduction with respect to works stored electronically should be added to the Act. ... Such an amendment should be drafted so as to deem the mere act of conversion of a work or an adaptation of a work from its hard copy human readable form to an electronic form of storage, such as digital, which is machine readable and which, when printed out is unintelligible by reason of consisting of machine readable symbols to be a reproduction of the work or the adaptation. ... Similarly the instance of converting a work or an adaptation from an electronic form to a hard copy, such as making a print out of a work stored electronically should, in the Committee's opinion, be encompassed in the deeming definition.

In its press release of 30 April 1998, the Government announced that it had adopted many of the CLRC's recommendations in its software report. We understand that one of the adopted recommendations is the recommendation set out above in relation to reproduction.

We ask the Committee to clarify what it means by its invitation to respond to the issue raised by the CCG, given the Government's recent announcement. In any event, it would seem more appropriate for the Committee to consider this issue as part of its review of the categorisation of rights required by paragraph 1(b) of its terms of reference.

### 4. Definition of "copy"

It would seem more appropriate for the Committee to consider this issue as part of its review of the categorisation of rights required by paragraph 1(b) of its terms of reference.

Given the greater possibilities now for duplicating a film into or onto a storage medium which may include other material (such as the hard disk of a computer), or a storage medium which may not be "an article or thing" (such as the RAM of a computer), we think the definition of "copy" should be reviewed. One possibility is to replace the right of an owner of copyright in a film to make a copy with a right to reproduce the film in material form (that is, an equivalent right to owners of copyright in works). Such an amendment could also be made in relation to the right of an owner of copyright in a sound recording to make a copy, and the right of a broadcaster to make a copy of a film or recording of a broadcast.

Consideration may need to be given to the effect of such amendments on decisions such as *Telmak v Teleproducts v Bond International* (1986) 6 IPR 97 (a new film which imitates another film is not a "copy" – cf *Zeccola v Universal Studios* (1982) AIPC ¶90-019), and *CBS Records Australia Ltd v Telmak Teleproducts (Aust) Pt Ltd* (1987) 8 IPR 473 (a "sound-alike" recording is not a "copy" of the original recording it imitates).

## 5. Definition of “publication”

We would support this recommendation.

## 6. Extension of the jurisdiction of the Copyright Tribunal

The following recommendation was made in the Review of Copyright Collecting Societies (1995), at p 254.

That the Tribunal have as wide a jurisdiction as possible in respect of licences and licence tariffs including the variation, approval and interpretation of all licensing schemes whether the relevant rights are administered under a voluntary or statutory licence.

We have supported this recommendation (Response to recommendations to Government in Review of Australian Collecting Societies, 10 September 1996).

The Government has made no announcement about whether it has accepted or rejected this recommendation, and we understand that it is still being considered by an interdepartmental committee.

In addition, the following recommendations were included in *Don't Stop the music!*, the report of the inquiry into copyright, music and small business by the House of Representatives Standing Committee on Legal and Constitutional Affairs, released in May 1998:

- that the Copyright tribunal should have as wide a jurisdiction as possible in respect of licences and licence tariffs including the variation, approval and interpretation of all licensing schemes (recommendation 4); and
- that mediation between parties in dispute over a licensing scheme be available through the Copyright Tribunal (recommendation 5).

## 7. Review of public performance by receiving device

In *Copyright Reform and the Digital Agenda*, the Government said:

It is not proposed to implement the right, also provided for in Art.15(1), to remuneration for indirect communication to the public of sound recordings. An indirect communication of a sound recording to the public would occur, for example, where a sound recording is included in a radio broadcast which is received by a radio set which is played in a public place such as a shop. [para 4.35]

In our response to the discussion paper (19 September 1997), we opposed the proposed reservation for “indirect” communication to the public of sound recordings, and submitted that s199(2) should be repealed.

We would also support the repeal of subsections 199(1) and (3), and at least oppose any expansion of their operation.

## **8. Mechanism for the use of copyright material where the copyright owner is unknown or cannot be traced**

In an earlier submission to the Committee, we supported the introduction of a mechanism, such as that which applies in Canada, which would allow a person to apply to the Copyright Tribunal for a licence to reproduce copyright material, after providing evidence that all reasonable steps had been taken to find the copyright owner (submission dated 5 June 1997, paragraphs 128 to 130). We have since provided the Committee with some further information about the Canadian scheme.

## **9. Review of section 23**

This would seem to be irrelevant given the High Court decision in *PPCA v FACTS* (handed down on 20 May 1998).

## **10. Ephemeral copying provisions**

In *Copyright and the Digital Agenda*, the Government said:

It is proposed to extend the [statutory] licences ... for copying of works, films and sound recordings for the purposes of broadcasting (ephemeral copying) (ss.47, 70 and 107) beyond wireless broadcasts to all broadcasts that will come within the expanded definition of broadcast. [para 4.68]

We oppose that proposal, and support the repeal of ss 47, 70 and 107.

## **11. Extension of statutory licence for the broadcast of sound recordings**

In *Copyright and the Digital Agenda*, the Government said:

... it is proposed that the statutory licence under s.109 should not apply to subscription broadcasts, so that subscription broadcasters would have to obtain a licence to broadcast sound recordings as they now have to from the owners of copyright in the musical works used in the recordings. However, it is proposed that the Copyright Tribunal would have jurisdiction to review the reasonableness of licences offered by record producers, as it now does to review licences offered by music copyright owners. [para 4.26]

In our response to the Discussion Paper (19 September 1997), we submitted that s109 should be repealed, and that licence schemes relating to all broadcasting of sound recordings be subject to the Copyright Tribunal's jurisdiction.

## **12. Point-to-point transmissions**

In *Copyright Reform and the Digital Agenda*, the Government said:

The CCG recommended, and the Exposure Draft proposed, that the expression "to the public" be extended to include the "public outside Australia" so that broadcasts from Australia directed to overseas audiences would be protected in Australia. This paper adopts this approach in order to extend copyright protection to transnational transmissions. [para 4.53 ]

In our response to the discussion paper (19 September 1997), we supported this proposal.

We also support the other proposals in para 3.3 of the CCG report.

## **CLRC software issues**

### **1. Extension of published edition copyright**

We do not support such as extension.

### **2. Presumptions**

We suggest that the Committee look at such presumptions for all subject matter irrespective of its form (that is, whether or not in computer readable format). Of course, the basis of the presumptions would need to vary according to the subject matter, and possibly according to the form.

Libby Baulch  
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