AL©C

Australian Libraries' Copyright Committee

P.O. Box E202 Kingston A.C.T. 2604 Tel: 6262 1273 Fax: 6273 2545

Ms Jackie Morris
A/g Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

30 October 2006

Dear Ms Morris,

Re: Copyright Amendment Bill 2006

The Australian Libraries' Copyright Committee (ALCC) thanks the Committee for this opportunity to comment on the Copyright Amendment Bill 2006 ("the Bill"). Whilst Australian libraries have in some ways been well served by the library and archive provisions contained in Division 5 of the *Copyright Act 1968* (the Act), the ALCC has some serious concerns in relation to the proposed amendments contained in this Bill which we outline below. The ALCC believes that the Bill requires significant amendments before passage by the Parliament.

2. The following comments reflect the ALCC's perspective as the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with representatives from the following organisations:

- Australian Library and Information Association
- National and State Libraries Australasia
- The National Archives of Australia
- The Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia

The Narrowing of Fair Dealing is strongly opposed

3. The ALCC strongly opposes the amendment to fair dealing to narrow the scope of copyright exceptions for research and study. This is a long-standing mechanism enshrined in copyright law to assist users accessing materials for research and study purposes where a particular use does not unreasonably conflict with a rights-holders interest. The provision is essential to ensuring that the law recognises a balance of interests and encourages creativity and innovation It is particularly well-equipped to deal with a range of circumstances and uses, including copying of out-of-print and rare materials. In such cases, users may weigh up the fairness principles to copy a whole of an out-of-print work or non-commercially viable work.

4. The proposed amendment will result in the illogical situation where anything copied by a user for research or study purposes in excess of 10 pages will automatically be considered 'unfair' and thus a breach of copyright, no matter whether the work is not commercially viable, or what other circumstances may exist. If this amendment goes ahead it will effectively override not only long-standing case law (as discussed in the submission by the Australian Digital Alliance to this Committee), but also various policy recommendations by the Copyright Law Review Committee, in circumstances where, copyright stakeholders were not seeking such an amendment.

5. The implications of this amendment will have the potential to extend beyond fair dealing for research and study. The removal of the fairness tests may impact upon the interpretation of fair dealing more broadly, particularly fair dealing for criticism and review, and crucially, also upon a fundamental concept enshrined in Australia's body of copyright law. This is particularly significant given that this review does not extend fair dealing in anyway – rather, it provides very narrow and specific exceptions for consumers which are minor exceptions, not fair dealing exceptions.

6. In initiating the fair use review, the Attorney-General noted the importance not only of ensuring that the copyright exceptions were up to date and reflective of public attitudes, but also of maintaining a 'balance' between the interests of copyright owners and users. The review paper proposed various models which could potentially achieve these goals. The review did not however suggest any narrowing or removal of the essential components of fair dealing. Researchers and non-institutional users will be worse off as a result of this review, as a result of fair dealing being significantly narrowed.

7. By narrowing the scope of what is protected by fair dealing, the Government is ostensibly attempting to change the concept of copyright by legislatively overriding the 'essential attributes of copyright law'. The recent High Court decision of Stevens v. Sony made clear that the Government would need to provide for "the proper protection of fair dealing in works or other subject matter entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. They

are integrated in the protection which that law offers to the copyright owner's interest in its intellectual property"[1] .

8. From a practical perspective, this change will impact detrimentally on user access to many important works within educational and cultural institutions by users. One university library for example, gave an estimate that 5/6ths of their collection was non-commercially viable (out-of-print) material. This change will therefore substantially impact upon the accessibility of that particular libraries collection. Furthermore, the amendment will also result in users being required to request the item under section 49 of the Copyright Act, if they are not able to copy it themselves, therefore substantially increasing the administrative burden on libraries to supply out-of-print materials.

Amendment to Inter-Library Loan Provisions

9. The ALCC is concerned in relation to the amendment to s 50 (8) which appears to have the practical effect that libraries will no longer be able to acquire two or more articles or published works in accordance with this section simply for the purpose of expanding their collections. This is detrimental to library clients because they will not necessarily know what is available on a particular topic; it is the responsibility of the librarian to scope the most relevant materials for their collections and facilitate access to these materials. Therefore, and particularly because the commercial availability test at 7B limits the use of this provision so that it will be out of print and non-commercially viable material that will be affected by the change, the ALCC strongly opposes this amendment. The amendment will impose a significant change to a major library practice which is to take responsibility for building up relevant collections for the benefit of the community. The provision has the potential to affect remote communities more than others given that they are often isolated and therefore must rely on the interlibrary loan provisions to acquire a broad range of material of relevance to the community. This is unnecessary given that the provision applies to non-commercially available material so that there is no detriment to potential rights-holders' interests.

Preservation Provisions:

10. The ALCC notes with regret that the replacement copying provisions have not been amended. Remarkably, the proposed amendments have not addressed a long-standing concern of libraries that section 51A(1)(c) is not comprehensible:

"..the copyright in a work...is not infringed...by the making…of a reproduction of the work:

(c) If the work has been held in the collection in a published form but has been lost or stolen – for the purpose of replacing the work.

It is unclear how a library or archives should copy an item once it has been lost or stolen. In relation to materials which are not unique or rare, a library might be able to

[1] Stevens v Kabushiki Kaisha Sony Computer Entertainment Ors [2005] HCATrans 30 (8 February 2005) Per Kirby J at para 224

obtain a copy via sections 49 or 50 – however, particularly given that the preservation provisions only applies to works where (subsection 4) "an officer of the library has, after reasonable investigation made a declaration stating that he or she is satisfied that a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price", if the rare or out of print work is not also held within another library, then section 51A(1)(c) is completely useless. Thus, this provision is particularly detrimental to the public interest in relation to rare or out of print works that may be in reasonable condition but cannot be replaced in the event that the item is lost, stolen or damaged. The current provisions therefore provide a disincentive to loaning or making such materials available for public access.

11. The current situation where works can only be preserved if they are 'original artistic works or works held in manuscript form, fails to take into account the variety of works which different institutions hold, and draws an artificial distinction between different kinds of works for preservation purposes which is not warranted. Similarly, distinctions between first copies and other copies of films and sound-recordings and published and unpublished material are unhelpful. Institutions need to be able to preserve all material they collect.

12. The ALCC notes the comments of the Australian Digital Alliance to the Fair Use inquiry[2] in relation to the important practical need for preservation of all collection material prior to deterioration or degradation:

> "The following are problems not addressed by the current preservations provisions.
>
> - Materials such as cellulose (paper) and cellulose nitrate (negatives and film), are subject to deterioration to varying degrees depending on factors such as storage conditions, frequency of handling and particular composition. Under the current preservation provisions, institutions may have knowledge to the effect that certain material will deteriorate within a certain time-frame, however such knowledge is useless because the Act does not allow preservation until deterioration has begun.
> - Audio and video materials require regular migration due to (a) deterioration and (b) technologies becoming obsolete. For example, pneumatic video tape is no longer being produced. Pneumatic tape is known to deteriorate rapidly and thus preservation arrangements for material embodied in pneumatic tape must be made as a matter of urgency even if currently the tape is in its early stages of deterioration.
> - In relation to works contained within newer technologies, a risk exists that certain media will degrade or become obsolete thus making access to the work contained therein problematic or impossible. In order to retain works contained within new media, institutions need to be able to transfer them to other sustainable formats in order to preserve them. *Several transfers* may be required, depending on the rate at which particular technologies become obsolete…"

[2] The ADA Submission to the Fair Use and Other Copyright Exceptions Review at 7; Available at www.digital.org.au

> "Placing restrictions on copying for preservation purposes undermines a primary function of public institutions."

13. The ALCC recommends that the preservation provisions be amended to allow preservation copying of materials before they are lost or stolen or have deteriorated.

14. The ALCC notes the amendment of s 51A(4) which requires that in relation to declarations made for the purposes of preservation and replacement copying, these amendments will require authorised officers making declarations, not only to justify that the work is not able to be obtained 'within a reasonable time at an ordinary commercial price' (as is the position currently), but also, if another edition of the work can be obtained within a reasonable time at an ordinary commercial price, why the reproduction should be made form the copy of the work held in the collection. The ALCC opposes this amendment which serves only to increase the administrative burden and associated costs of copyright compliance on libraries. The justification would always be the same i.e. 'preservation'. Different editions would need to be preserved precisely because they are different, and not the same.

15. The ALCC note an amendment to the commercial availability test in the library provisions that require that, in applying the test, libraries must take into account whether the particular copy can be obtained in electronic form within a reasonable time at an ordinary commercial price. However, this is unreasonable given that the work of libraries and cultural institutions often focuses on maintaining and preserving works in their original formats. There is curatorial value in different editions and formats of collection items. Availability of an electronic format does not equate to preservation of the original format or item. For example, viewing a DVD is quite a different experience to watching a 35 mm film.

Preservation under 'Key cultural institution' provision

16. Whilst 'key cultural institutions' will be able to utilise sections 51B and 110BA for preservation purposes, the ALCC is concerned that the limitations on this provision will minimise its workability in practice, particularly in the digital environment and notes specifically the following problems which require amendment:

17. The provisions are limited to libraries or archives that have the function of developing and maintaining the collection pursuant to a law of the Commonwealth or a State or Territory. This necessarily excludes many libraries, including universities and other educational and research institutions, and public and private libraries, which all hold collections significant to Australia. The ALCC therefore strongly recommends that all libraries and archives should be able to access these provisions. The creation of an artificial distinction between National, State and Territory libraries and other libraries is not recommended. Such an approach will impact particularly upon remote and public libraries, which hold key collections within their communities, reflective of the particular needs of those communities. The ALCC sees no reason why regional and other libraries should not be able to access provisions to ensure preservation of their unique collections for the benefit of their communities.

18. The ALCC notes the submission of the Australian Digital Alliance to this Committee:

> "…many institutions other than National, State and Territory libraries, hold material of cultural significance to Australia. To provide some examples:
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> - Monash University holds the Australian Jewish Music Archive which 'is the only archive in the world concerned exclusively with collecting sound, visual and bibliographic materials on the musical cultures of the Jewish peoples of Australia and South, east and Southeast Asia'.
> - Many public and special libraries hold works of local historic and cultural interest such as local histories and histories of local businesses;
> - The National Meteorological Library maintains a pre-eminent collection of key meteorological books and journals and archives and provides access to these materials for the benefit of the public;
> - Libraries of Professional Associations also often have valuable collections.
>
> It is equally crucial for these libraries to be able to adequately preserve and back-up this significant material for access by future generations or the material that is preserved will not be an accurate reflection of Australia's heritage."

19. The single copy limitation in sections 51B and 110BA should be removed to facilitate use of the provision in the digital environment. Limiting preservation to a 'single copy' is a long-outdated concept and makes these provisions unworkable in the digital environment. Organisations (whether cultural or other) which retain information in digital form presumably make sufficient back-up and preservation copies to ensure that legitimately acquired material stored on their networks is not lost or destroyed. There are many best practice standards for organisations to refer to in relation to backing up of digital information. Such practice standards generally recommend 'multiple copies' made and stored in different locations. For example, the UNESCO *Guidelines for the preservation of digital heritage*[3] recommend 'multiple copies'. Cultural institutions particularly have very valuable material stored on their networks and therefore pursuant to their founding statutes are obliged to ensure that material is not shoddily looked after.

20. The commercial availability tests contained in sections 51B and 110BA should be removed in order to ensure these provisions are workable. The addition of these tests shows a misunderstanding of how preservation of digital material is conducted in the digital environment and the important functions of libraries and archives in preserving and providing access to Australia's cultural heritage. Preservation, particularly of digital materials must occur of all materials in the collection, regardless of whether such materials are commercially available or not for a number of reasons, including:

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[3] UNESCO 2003, *Guidelines for the preservation of digital heritage*, UNESCO, Paris. Pages 114-115: emphasises fundamental need for back-up, multiple copies and storage at different sites. See http://unesdoc.unesco.org/images/0013/001300/130071e.pdf
For a further example see; Standards Australia & Standards New Zealand 2001, *Information technology - codes of practice for information security management, AS/NZS ISO/IEC 17799:2001 (Incorporating Amendment No. 1)*, Standards Australia International Ltd, Sydney & Standards New Zealand, Wellington.

- Once something is no longer commercially available – if you haven't yet made a preservation copy – you have lost the material for good unless it is available at another library (preservation by definition is a practice that need to be undertaken in advance of any loss or deterioration);
- Preservation of digital material is undertaken by ensuring sufficient back-up copies are made to ensure there is no risk of loss of material. Often, back-up systems automatically make several copies of entire organisational databases so that risk of loss is minimal. Therefore, a commercial viability test simply would not be practicable or administratively feasible.

21. The ALCC recommends that to facilitate ease us use of collection items by the public, these provisions be broadened to allow not only reproduction of collection items but also internal communication within libraries and archives and for purposes of access to the public at least on dumb terminals.

Certain Purposes Provision: 200AB

22. The ALCC is supportive of increased flexibility being introduced in the Copyright Act. This is necessary in the current digital environment. However, the ALCC is concerned that the limitations of this provision as currently drafted confuse the scope and purpose of the provision. The ALCC is particularly concerned that:

- Only 'certain special cases' within uses for purposes of library administration may be made; and
- Uses cannot be 'made partly' for 'a commercial advantage'.

The ALCC therefore recommends the provision be amended in one of the following ways:

Option 1

23. That flexibility be introduced into the Copyright Act via fairness principles akin to those contained presently in s 40 (2), rather than introduction of an international legal test contained in TRIPS, into Australian legislation. The concept of fairness has developed as an essential part of copyright law prior to introduction of s 40 (2) in the *Copyright Act* and thus is familiar to the public, copyright stakeholders, and the judiciary. Commentators have opined that the s 40 (2) factors are clearly defined and narrow in scope and therefore compliant with the 3 step test[4]. In contrast, the three step test is an international legal test which is not well understood amongst international lawyers, and which has only been tested in one WTO Panel case, the Homestyle case, in which aspects of the three step test were challenged by the WTO Panel hearing the case[5].

Option 2

24. Alternatively, the following two amendments to s 200AB are recommended:

> (1) The provision should not be unduly limiting or indeed more restrictive than the 3 step test at international law. Therefore, Subsection (1) (a) should be

[4] For example; Ricketson S., The three-step test, deemed quantities, libraries and closed exceptions" at 4.3.2

[5] United States-Section 110(5) of the US Copyright Act, Report of the Panel (the Homestyle Case) WT/DS160/R, 15 June 2000

removed. Section 200AB only applies to certain special cases, namely, uses by bodies administering libraries or archives, uses by bodies administering educational institutions, uses by people with disabilities, and uses for parody or satire. In discussing the meaning of the 3 step test, the Copyright Law Review Committee said:

> "The condition that the use under Art. 9(2) of the Berne Convention is only allowed in 'certain special cases' has been interpreted by Professor Ricketson to mean that the use be for a specific and designated purpose. Similarly the WTO Panel in the Homestyle case interpreted the requirement that limitations and exceptions under Art. 13 of TRIPS be confined to 'certain special cases' to also mean that the use be for a specific and designated purpose, in the sense that the exception should be clearly defined and narrow in its scope and reach. It is also suggested that the use is considered 'special' if it is also justified by some clear reason of public policy or other exceptional circumstance."[6]

Thus s 200AB is already narrowly defined as required by the first step of the test. Subsection (1) (a) therefore adds an additional element which is not required by international law, and which merely makes the provision more difficult to understand and administer by those it applies to.

(2) Furthermore, subsections (2) (c), (3) (c), and (4) (c) should be removed. Theses provisions are over and above anything required by the 3 step test at international law and serve only to obfuscate the meaning of the provisions. The practical effect of these provisions is particularly problematic given that many educational and cultural institutions hold material which is non-commercially viable or material where the copyright holder is not identifiable or locatable. In such circumstances, an institution may wish, for example, to make a reproduction of material for an exhibition or brochure which may lead to the institution obtaining a commercial advantage from the exhibition or brochure. Subsection (c) would prevent this in circumstances where the use has no detrimental impact upon the rights holder, and where the institution then has no other option but to use alternative material. If this subsection is not removed, this provision may fail to assist with some of the major issues institutions have put before Government in the course of this review, including the issue of 'orphan works'.

25. In any event, the ALCC notes that ALCC members operate on a not-for-profit basis and do not conduct activities for commercial gain. Rather, they conduct activities for the benefit of the public and in accordance with their mandates. Libraries may however seek to recover costs. It is unclear how the 'partly for commercial advantage' test would work and the ALCC recommend that the Government clarify that cost recovery activities would not be covered.

Transformative uses

[6] Copyright Law Review Committee, Copyright and Contract, Commonwealth of Australia, 2002, at 18

26. The ALCC supports the submission of the Australian Digital Alliance to this Committee in relation to the need for an exception for transformative uses of copyright material in certain circumstances. Whilst the ALCC understands that certain transformative uses of material may be made by libraries and archives pursuant to the proposed s 200AB, the ALCC is particularly concerned that the limitation that the use 'is not made partly for the purpose of the body obtaining a commercial advantage' in addition to the 3 step test at international law, is more onerous that the 3 step test alone and will deter institutions from making transformative uses of works in circumstances even when they do not conflict with the normal exploitation of the material and do not unreasonably prejudice the legitimate interests of the copyright owner.

Copyright and Contract

27. The ALCC notes with regret that this issue has not been dealt with and reiterates its position that, in accordance with the recommendations of the CLRC's Copyright and Contract Report, the *Copyright Act 1968* must make it clear that contractual provisions purporting to exclude or modify any of the exceptions to infringement provided for in the Act are unenforceable. Unequal bargaining power between 'owners' and 'users' necessitates codification of this recommendation. Failure to clarify this issue by way of legislative reform frustrates the very policy justifications for including exceptions to infringement in the Act. 'Balance' between owners and users cannot be achieved through fair dealing if fair dealing can be easily excluded.

The ALCC thanks the Committee for the opportunity to make this submission and would be pleased to attend a public hearing or provide any further information that would assist the Committee in its inquiry.

Yours sincerely,

Sarah Waladan
Australian Libraries' Copyright Committee