



Australian Vice-Chancellors' Committee
the council of Australia's university presidents

**Entering the Digital Age:
Fair use and other copyright
exceptions**

***An examination of fair use, fair dealing
and other exceptions –
An AVCC Submission to the Attorney-
General's Department***

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1. Overview

The balance between the interests of copyright owners and users has, in recent years, moved in favour of owners as a result of the current regime's failure to keep up with technological change. The shift has been reinforced by the Australia-United States Free Trade Agreement, which extended the term of copyright by 20 years and tightened the arrangements applying to technological protection measures by imposing a stricter anti-circumvention regime, and by the increasing use of Digital Rights Management systems and contracts by copyright owners.

The Australian Vice-Chancellors' Committee (AVCC) therefore welcomes the Government's review of fair dealing exceptions set out in the *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age Issues Paper*.

However, the AVCC believes the Issues Paper focus on the needs of consumers is too narrow and ignores the needs of educational and other institutional users of copyright materials.

The Government needs to restore the balance of interests between copyright owners and users by introducing a dynamic fair dealing system which is capable of keeping pace with technological change, and which reflects community expectations and practices. To do this, Australia needs a fair use provision, an extended range of fair dealing exceptions, and a resolution of anomalies in the existing provisions.

The need to restore an appropriate balance was recognised in the final reports of the Joint Standing Committee on Treaties (JSCOT) and the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America.

JSCOT made the following three recommendations:

- *The Committee recommends that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes (R16);*
- *The Committee recommends that the changes being made in respect of the Copyright Act 1968 replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair-use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting that is currently absent (R17); and*
- *The Committee recommends that the Attorney General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition (R19).*

2. Summary of recommendations

1. The AVCC recommends that the current Australian fair dealing approach be retained with an expanded list of specific exceptions as detailed in this submission in combination with a general fair use provision based on s 40(2) in the *Copyright Act 1968*.
2. The AVCC recommends that the Government retain the existing fair dealing exceptions in the *Copyright Act 1968*.
3. The AVCC recommends that the Government legislate to prevent copyright owners using contracts to override the existing exceptions in the *Copyright Act 1968*.
4. The AVCC recommends that the Government legislate to prevent the use of technological protection measures to override the existing exceptions in the *Copyright Act 1968*.
5. The AVCC recommends the Government ensure that Part VA (broadcast material) and Part VB (print and graphic material) statutory licences in the *Copyright Act 1968* remain in place.
6. The AVCC recommends that the Government specifically include a time-shifting fair dealing exception in respect of broadcasts.
7. The AVCC recommends that the Government implement a format-shifting fair dealing exception in respect of broadcasts for private and institutional users.
8. The AVCC recommends that the Government implement a back-up copy fair dealing exception for private and institutional users.
9. The AVCC recommends that the Government not implement a statutory licence for private copying.
10. The AVCC recommends that the Government implement additional specific fair dealing exceptions for:
 - Caching;
 - Orphaned, Unpublished & Abandoned works; and
 - Education exception in respect of material which the copyright owner has made freely available on the Internet.

3. Options for consideration

The Attorney-General's Department's Issue Paper proposed five options for consideration in submissions by respondents. The AVCC's position on each option is summarised below.

Option 1 – consolidate the fair dealing exceptions in a single open-ended provision

The adoption of an open-ended fair use regime is strongly supported, because of the added flexibility it provides in allowing the fair dealing exceptions to keep abreast of technological change. However, it should not entail the jettisoning of the existing specific fair dealing exceptions, which have worked well in the interests of owners and users by providing a relatively high level of legal certainty. The list of specific exceptions should be expanded with additional new specific exceptions where specific needs have been identified, as spelled out under Option 5.

Option 1 is the AVCC's third preference.

Option 2 – retain the current fair dealing provisions and add an open-ended fair use exception

This option is preferred to Option 1 because it retains the existing fair dealing exceptions, as well as introducing an open-ended fair use exception. However, it is deficient as it does not allow for additional new specific fair dealing exceptions, as spelled out under Option 5.

Option 2 is the AVCC's second preference.

Option 3 – retain current fair dealing exceptions and add further specific exceptions

Retention of the existing fair dealing exceptions and the addition of new specific exceptions is not a preferred option for the AVCC. This option does not introduce the flexibility of an open-ended fair use exception, which is a necessary safeguard in the digital age to enable the courts to strike an appropriate balance between the interests of copyright owners and users and overcome the problems associated with the static nature of the existing regime.

The AVCC strongly supports the inclusion of an open-ended fair use provision as the best way to address future changes in the way copyright materials can be accessed and distributed. A system reliant on specific exceptions only is not sufficient.

Option 3 is the AVCC's fourth preference.

Option 4 – retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material

This option is rejected. In essence it is based on a proposal to introduce a levy on copying media, such as CDs and possibly all IT based systems, as compensation for the private recording of copyright material. Such a levy would be extremely difficult to administer and would lead to major inequities for users.

Option 5 – other combinations or alternatives

The AVCC recommends that the Government retain its current fair dealing approach and add an open-ended fair use provision based on s 40(2) together with additional specific fair dealing exceptions for:

- Caching;
- orphaned, unpublished and abandoned works; and
- Educational exceptions in respect of copyright material which owners have made freely available on the Internet.

This is essentially Option 2 expanded to include additional specific exceptions. The critical element is the open-ended fair use provision which will allow the Copyright Act to move in closer harmony with technological developments and practices in the real world.

Recommendation 1: The AVCC recommends that the Government retain the current Australian fair dealing approach with an expanded list of specific exceptions as detailed in this submission in combination with a general fair use provision based on s 40(2) in the *Copyright Act 1968*.

4. Issues for consideration

The Issues Paper asked respondents to address the following ten questions:

1. The Government seeks your view on the operation of the exceptions in the Copyright Act (particularly the fair dealing exceptions in ss 40-43(2) and ss 103A-103C) in providing a balance between the interests of copyright owners and copyright users.

The fair dealing exceptions in the *Copyright Act* are an integral part of copyright law in Australia. The exceptions allow essentially non-commercial uses of copyright material for a limited number of approved purposes in the wider public interest of informed discussion and scholarly endeavour.

The Australian Digital Alliance (ADA) held a Forum on 26 May 2005 at which break-out groups examined all of the exceptions and statutory licences clauses listed in Attachment A of the Attorney General's paper *Fair use and Other Copyright Exceptions* (the Forum was a gathering of mostly institutional users, including educators, archivists and librarians). Examples were given of how every one of the exceptions listed in the Attachment was relied upon by those present to carry out their respective roles. There is no doubt that the existing provisions are being drawn on extensively by institutional users and will continue to be for the foreseeable future. A number of additional exceptions and clarifications of existing measures were identified at the Forum, which will be addressed in detail later in this submission.

The Forum demonstrated that every existing exception is useful and should be retained.

The review has sought specific comment on the following fair dealings now permitted by the *Copyright Act*:

- research or study (ss 40 and 103C);
- criticism or review (ss 41 and 103A);
- reporting of news (ss 42 and 103B); and
- professional advice given by a legal practitioner, patent attorney or trade marks attorney (s 43(2)).

Universities' role in providing teaching, learning and undertaking research rests squarely on the ability of students, staff and researchers to access third party copyright material under the s 40, s 103C, s 41 and s 103A.

The education sector – schools, VET and higher education - would not be able to function properly and efficiently if these fair dealing exceptions were removed from the *Copyright Act*. Indeed, Australia's economic growth and development would be harmed if they were. There would not be a student, academic staff member or researcher in Australia who has not, or will not at some stage, rely on these provisions in undertaking their academic pursuits or research. These exceptions, in combination with the educational statutory licences, provide the very foundations on which our teaching and learning operates, in a practical and commonsense way.

The principle of fair dealing, which allows access by users to limited parts of copyright material without prior permission of owners or payment of royalties, is enshrined in copyright law of all our trading partners (refer clauses 7, 8 and 9 of the Issues Paper) and is specifically embodied in the so called “Three-Step Test” as spelled out in relevant international agreements (refer clause 4 of the Issues Paper).

These provisions have, until recent times, provided a balance between the interests of copyright owners and copyright users, and under them, the universities have, by and large, been able to carry out their teaching, learning and research functions in a reasonably secure environment.

Recommendation 2: The AVCC recommends that the Government retain the existing fair dealing exceptions in the *Copyright Act 1968*.

The balance, however, in recent times has moved significantly in favour of owners, and is rapidly reaching the point where the fair dealing exceptions, and statutory licenses, are at risk of becoming redundant as a result of:

- developments in digital technology;
- increasing use of contract law by owners; and
- tightening of the legal regime for technology protection measures, including conditions relating to the use of circumvention devices.

Digital technology empowers copyright owners to directly control access to, and use of, their works through Digital Rights Management (DRM) systems. These systems effectively allow owners to control who access what, when, where, for how long, under what conditions and at what price. The owners rely on a contract, which takes many different forms, from detailed agreements to shrink wrap and click-through arrangements (refer Issues Paper clause 10.10-10.12). This practice is steadily increasing. It moves copyright to a market driven system where owners, secured with the Copyright monopoly, can dictate terms and prices. Users will be increasingly forced to pay for all access, including browsing. To use an analogy of a book on a library shelf, under digital technology owners are able to control access to both the book and the contents within the book, which is akin to selling the book and then charging to look at it or read it.

Owners are actively supporting and implementing DRM systems, including the issue of Digital Object Identifiers (DOI). These are unique meta-data tags that identify works and constitute an integral part of the DRM system toolbox.

Owners can granulise works so that chapters, pages and paragraphs in a book can each be issued with a DOI tag and arguably become a work in their own right. This stands to erode the effectiveness of the fair dealing exceptions and the educational statutory licences, the latter which otherwise allows for 10% of a work to be copied in return for equitable remuneration. Importantly equitable remuneration is determined separately from use of third party copyright material, and supply cannot be unilaterally withheld by owners. The pricing for use under these arrangements is not clear – for an effective market to operate, users need the support of effective exceptions to allow copying and to ensure that pricing is reasonable to provide users with a real choice of accessing the material either in full at a sensible price, or in more restricted way as a fair use or dealing.

University libraries also acquire vast numbers of specialised publications (books, journals and other resources) annually, which are increasingly being accompanied by software packaged with the purchase. Indeed, software in publications is the fastest growing, most current and easily accessible component of many library acquisitions, and now about half of such specialised publications include software. These purchases are typically covered by a software licence which limit and prohibit the normal use and distribution of the library book. The value of the publication to the user, that is a library patron, is therefore diminished as the software will not usually be available to the user.

The software can be in the form of removable storage media, such as CD, DVD or floppy disk. The software can also be made available by way of password to access resources on a website. The software is sometimes an electronic duplicate of the hard-copy text, but more often it is in the form of updated or further resources relating to the subject of the text. It can also comprise of teaching resources based on the text. The software sometimes requires installation to a fixed drive in a PC, and sometimes runs directly from the removable media.

Academic libraries typically acquire publications in response to the needs of the academic community. Therefore, it is not always known to the purchasing institution whether the publication will contain software, or whether the academic will direct students to make use of the software.

The licence is typically shrink-wrap or click-wrap (opening the packaging, or logging into the website is taken as the user's acceptance of the licence conditions). Publications are usually received into the library and unpackaged by staff who are not well placed to determine whether or not to accept the licence terms on behalf of an institution. The licence is typically an end-user licence that allows an individual to make use of the software-based resources. The licence usually anticipates that this individual is the owner of the book.

There is no scope, therefore, for these additional resources to be made available to the intended user (ie a library patron) without breaching the licence. The owner of the publication (the Library) has no way of knowing if the software has been removed from the PC of the first user before loaning it to a second user. Neither can a library make the software available locally, as this would not constitute use by an individual owner.

The publication vendor, usually a bookseller, is not typically the copyright holder of the software, and therefore cannot grant permission for its use outside of the definitions of the licence. Although frequently represented by domestic publishers and agents, the software licences are typically drafted in foreign jurisdictions.

The concerns with contract law were raised by the Copyright Law Review Committee (CLRC) in its report *Copyright and Contract* and acknowledged in the AGs Issues Paper (refer section 10). They were also raised in the 2000 report of the Intellectual Property and Competition Review Committee (*Ergas Report* page 13).

The Issues Paper examines market place issues (clauses 12.7- 12.10) and states in clause 12.8 that "there are encouraging signs that maturing licensing agreements and technological protection measures are allowing for flexibility and ease of use while impeding unrestricted copying." Unfortunately the clauses relate only to consumer users and totally ignore institutional users. Institutional users, and in particular educational institutions, stand to lose the benefits of the fair dealing exceptions and educational statutory licence rights under such a market driven

regime in which copyright material is typically made available pursuant to contract. Contrary to the inference in clause 12.10, technological protection measures are not in the interests of education institutions. Technology protection measures, as embodied in DRM systems and software products discussed above, effectively prevent users from exercising their copyright rights by limiting access to content. These limitations can also be effected in a number of other ways, including regional coding, specified numbers of accesses, formatting, and access locks and passwords. Furthermore, there is no provision within the *Copyright Act* for the passage of material, which is protected by TPMs, into the public domain when it comes out of copyright. This is a major anomaly in the current provisions of the Act and favours owners.

The position of owners is being further strengthened by international treaties and bilateral trade agreements (refer clause 10.8 of the Issues Paper). In particular, anti-circumvention provisions are soon to be strengthened as part of the Government's commitment under the Australia-United States Free Trade Agreement (AUSFTA) strengthening the technological protection measures. As a result educational institutions will no longer have the right to use a circumvention device or service to access, in reliance on the educational statutory licences. This is one key feature of the AUSFTA which will have a major adverse impact on universities, as the Issues Paper acknowledges in clauses 10.7-10.9.

Recommendation 3: The AVCC recommends that the Government legislate to prevent copyright owners using contracts to override the existing exceptions in the *Copyright Act 1968*.

Recommendation 4: The AVCC recommends that the Government legislate to prevent the use of technological protection measures to override the existing exceptions in the *Copyright Act 1968*.

With no exceptions, the Part VA and VB educational statutory licences play an important role in ensuring that universities have access arrangements to third party copyright material. Each of these licences is relied upon extensively to provide information to students for their educational purposes. The universities pay substantial sums of money to the collecting societies each year in exercising the educational statutory licences. The revenue generated by CAL and Screenrights each year predominantly comes from the education sector - CAL: \$62.1 million out of total revenues of \$66.6 million in 2003-04¹; Screenrights \$17.29 million out of total revenues of \$19.6 million in 2003-04². As is clear from these figures, educational institutional users, unlike the commercial sector, pay very large sums of money for use of third party copyright material as permitted by the Act. In reviewing the fair dealing exceptions, the Government should be wary of any claim by copyright owner interests that they currently receive less than an equitable return on educational sector use of copyright material.

There is nothing in USA copyright law which equates with the educational Part VA or VB statutory licences, and as part of this review there is the risk that some players will seek to remove these licences from the *Copyright Act*. The AVCC would strongly oppose any such move as the licences serve the specific purpose of allowing multiple copies to be made by universities for their educational purposes. The provision of course packs (books of readings made available to students) by

¹ source: CAL Annual Report 2003-4

² source: Screenrights Annual report 2003-4

universities, which is a major part of their operational arrangements, is done in reliance on the Part VB licence.

Recommendation 5: The AVCC recommends that the Government ensure that the Part VA (broadcast material) and Part VB (print and graphic material) statutory licences in the *Copyright Act 1968* remain in place.

2. The Government seeks your view on whether the *Copyright Act* should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

The AVCC supports the thrust of the CLRC recommendation 2.03 to introduce an open-ended model, as spelled out in its report *Simplification of the Copyright Act; Part 1* for the reasons put forward in the report and restated in clause 6.5 of the Issues Paper.

“The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes- such as research or study (s 40 and s 103C), criticism or review (ss41 and 104A), reporting news (s42 and s 103B) and professional advice (s43(2)) – but is not confined to those purposes.”

and its recommendation 2.04

“The Committee recommends that the non-exclusive set of factors that are currently considered in relation to ‘a dealing by way of copying’ with a work for the purpose of research or study (s 40(2)) be applied generally to all fair dealings.”

However, the AVCC also supports the retention of the existing fair dealing exceptions, and the addition of new specific exceptions rather than the introduction of a general fair use regime closely modelled on the USA system. The AVCC does not have a strong view either way on whether the specific fair dealing exceptions should be consolidated into one area of the *Copyright Act*.

The CLRC also considered that its proposal complied with the three-step test, as is outlined in section 6.5 of the Issues Paper.

The AVCC recommends that the Government retain the existing fair dealing exceptions and amend the Act to incorporate new education specific exceptions as well as an open-ended fair use exception (refer Recommendation 1).

3. The Government seeks your view on whether the *Copyright Act* should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.

Amendments are needed to the *Copyright Act* to introduce a fair use concept into Australia’s fair dealing regime, however, this does not require the total adoption of the USA fair use regime.

This will allow for a more dynamic copyright law regime better placed to respond to technological developments, and application thereof to copyright material.

At the moment the current fair dealing exceptions are not broad or flexible enough to effectively keep up with technological progress, as is evidenced in the already widespread practice of time shifting and format shifting, on which this review has a specific interest and has sought specific comment.

Caching is another example of where copyright has not kept up with technology and normal commercial and home practice (see section below).

The AVCC recommends that Australia retain the current fair dealing approach with an expanded list of specific exceptions as detailed in this submission, in combination with a general fair use provision based on s 40(2) in the *Copyright Act 1968* (refer Recommendation1).

4. The Government seeks your view on whether the *Copyright Act* should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances - and if so, under what conditions.

The AVCC supports the inclusion of specific exceptions for time-shifting of television and radio broadcasts, and all the underlying works, films, sound recordings and live performance. However, the exception should relate to all broadcasts, not just radio and television so that other forms, such as cable and satellite, are included.

The AVCC does not support any move to change the Part VA educational statutory licence.

Recommendation 6: The AVCC recommends that the Government specifically include a time-shifting fair dealing exception in respect of broadcasts.

5. The Government seeks your view on whether the *Copyright Act* should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.

The AVCC strongly supports the inclusion of specific exceptions for format-shifting as discussed in the Issues Paper. This is based on the simple proposition that where a user purchases copyright material he/she should be able to access that material without being constrained by the format in which it was supplied. It should cover all works, film, sound recordings, live performances and broadcasts and any underlying works therein.

For universities a key area is slides. University libraries and academic departments have huge collections of transparencies that are becoming obsolete simply because slide projectors are no longer being made, and projector service and parts are no longer obtainable. These slides number in the hundreds of thousands and life sciences, medical sciences and fine arts are particularly affected. The universities have built these collections over many years and they are critical in the education of health professionals and artists. Digitisation is the current preferred solution.

However, these are not necessarily 'orphaned works'. It is possible that copyright owners could be traced and permission requested but the transaction costs of this strategy rule it out. If slide collections cannot be digitised, they will become useless. Educational institutions will have to build new collections of digital originals at great cost, perhaps only to have them become obsolete as well in a few years' time.

Another major example is obsolete video formats.

While the Part VA and Part VB already provide educational institutions with some scope to format-shift print and graphic material (Part VB) it is extremely limited in quantity (typically 10%). Format-shifting of broadcast material (Part VA) is much less restrained. However copying and communicating under the two statutory licences is remunerable, which is inequitable in these circumstances.

Recommendation 7: The AVCC recommends that the Government include a format-shifting fair dealing exception for private and institutional users.

6. The Government seeks your view on whether the *Copyright Act* should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.

The AVCC supports the proposal for a new exception for back-up copies of copyright materials which have been legally acquired. Such a back-up regime would secure the position of users against damage, loss or failure of original works and subject matter other than those works. A particular problem exists with digitally based material where the owners are not traceable or no longer service and support the material in question. Without back-up copies users stand to lose investments, which can be substantial, as a result of malfunction.

The need for libraries and archives to make back-up copies of copyright material at risk is especially important. Although back-up copies are covered by the existing library fair dealing exceptions, the libraries and archives are experiencing difficulties in being able to exercise them. For example, a copy of a work can only be made under the library fair dealing exceptions when the work has deteriorated or has been stolen (s 51A). It is unreasonable that a library is required to wait until a work has either deteriorated or been stolen before it is permitted to make a back-up copy.

Such an exception would not adversely affect the market for the works. Furthermore, it would be in the nature of rent-seeking to require users to purchase additional copies (as back-ups) in anticipation of accidental damage, loss or theft or to purchase a new copy when technological changes render the format in which the work was purchased obsolete.

Recommendation 8: The AVCC recommends that the Government include a back-up copy fair dealing exception for private and institutional users.

7. The Government seeks your view on whether the *Copyright Act* should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances.

The AVCC strongly rejects the proposal for a statutory private licence regime. Indeed, an extension of the fair dealing exceptions to cover time shifting, format shifting and back-up copies would obviate the need for such an arrangement.

The AVCC does not support the introduction of a levy system as proposed by some owner interests. A levy system on blank media is inequitable because it assumes all media will be used for private copying purposes. However, there will be a large number of uses where the copyright material is owned by the user, where there is a free licence to copy and/or where payment has already been made, for example under statutory and commercial licences.

Second, the presumption is that it is only certain media that it used to capture such copies, for example CDs, DVDs and analogue tapes. However, all IT systems are capable of capturing this material, including iPods, mobile phones, cameras and any amount of other gear currently under development but not yet released on the market. It would be illogical for the Government to apply a levy on all such equipment simply because it is IT based and therefore capable of recording copyright material. Also, a great deal of material is now made available as direct access over the internet, for which users pay access rights. It would be inequitable to charge an additional statutory levy in these instances.

Recommendation 9: The AVCC recommends that the Government not implement a statutory licence for private copying.

8. The Government seeks your view on whether the *Copyright Act* should be amended to include other specific exceptions or statutory licences, and if so, under what conditions.

The AVCC strongly supports inclusion of the following additional specific exceptions:

8.1 Caching

Caching mostly involves the storing of material from third party internet sites as a means of enhancing access to those sites by users. Rather than having to access each time the originating site, the user accesses the cache. Caching is thus an element of the effective provision of access to internet materials.

The Ergas report states on page 108 "...caching can provide significant benefits to internet users, including improved network capacity, reduced connectivity times, and increases speed of access to sites." It also states on page 111 "Caching is economically efficient: it reduces waste time and bandwidth requirements, allowing greater efficiency in using finite network resources, and reducing costs. It provides important benefits to Internet users and to the development of e-commerce in Australia."

In a university, caching occurs at the level of the individual desktop or notebook computer, at university level, and at the ISP level. At the university level, proxy servers cache all downloads and retain material in the cache for a period of time

which is determined by software rules. Caches operate according to rules, and in conjunction with other software rules. In this sense, caching is always purposeful, whether it involves the direct intervention of a person, or not. It follows from this that the distinction between active and passive caching, as discussed in the Digital Agenda review (DAR) report, is problematic and lends itself to never-ending litigation.

Copyright Agencies Limited (CAL) suggested that the efficiencies and cost savings achieved as a result of caching, other than caching covered by s 43A, ought to be shared between copyright owners and users (DAR 17.23). However, caching does not interfere with the normal exploitation of a work, nor unreasonably prejudice the interests of the copyright owner; any claim to be remunerated is in the nature of rent-seeking. Caching makes access to material posted on the Internet easier, and this supports the underlying intent of posting the material in the first place – namely, to provide access to a very wide audience.

In the current climate Australia is at risk of supporting a copyright regime, as it applies to caching, which is out of step with the approach adopted by our trading partners. In fact, the AVCC is not aware of any other country in the world having a "caching licence". The AVCC's position is unequivocal - that unless caching is subject to an exception, educational institutions are at risk of being sued for an activity that would almost certainly be held to be a fair use under US copyright law. This is a serious deficiency in the AUSFTA outcomes and one which puts Australia at a major disadvantage vis-à-vis institutional users in the USA.

The fact that there is considerable uncertainty regarding the legal status of caching, and widespread conviction that it is both a practice that is here to stay and one which is, at the very most, incidental to the exploitation of copyright works, means that the law is out of step with community attitude and practice. As with the Australian Senators who were surprised to learn that in making a video of their favourite television program they were infringing copyright, those in business, educational institutions and government who rely on caching to provide fast and cost-efficient access to online material should not be placed in a position where they are, on one view of the law, serial infringers of copyright.

The DAR considered whether *"any proposal to allow the copying or storing of works or audio-visual files at a point closer to the point of access is or is likely to:*

- *create greater efficiencies or a more efficient allocation of available resources;*
- *significantly adversely impact on owners' legitimate interests or markets;*
- *significantly reduce or remove the incentive to create works or other subject matter that is protected;*
- *lead to creating or reducing opportunities for rent seeking or otherwise create or offset additional social costs;*
- *promote widespread use of material and increase markets."*

This, of course, was prompted by the widespread uncertainty which prevailed with respect to the extent to which the temporary copying exception contained in s 43A of the Act applied to caching.

The DAR states that "passive caching" is covered by s 43A (17.17), but that "active caching of works, involving positive human intention", is not (17.22). This argument is not based on any authoritative interpretation of s 43A, but rather reflects what appears to be a widespread view regarding the likely interpretation a court would give

to this section of the Act. The report also declined to recommend that s 43A be amended to make it clear that all forms of caching, whether passive or active, were covered by the exemption.

The argument is based on flawed assumptions:

- it assumes that a caching exception would apply to material which the copyright owner had "made available for a commercial charge" (17.24). In order to levy a commercial fee for access to internet-based material, the copyright owner would be required to employ a technological protection measure (such as a password). It has not been suggested by those supporting a caching exception (including the educational sector and ISPs) that any such exception would apply to material which was the subject of a technological protection measure. It is AVCC's understanding that in such a case the publicly and freely accessible front or home page of a website might be cached, but that material which was the subject of a technological protection measure (ie the material which the copyright owner intended to make available for payment only) would be blocked and thus not be cached. If there is any legitimate uncertainty regarding whether this would happen automatically, any amendment to s 43A could make clear that it did not apply to material which was the subject of a technological protection measure; and
- it assumes that any efficiencies delivered by caching would be "at the expense of copyright owners' interests". This implies that each and every reproduction or communication is a use which the copyright owner is entitled to control. However, as the CLRC in its *Simplification Report* (Part 1) stated "copyright owners have never been entitled to an unlimited scope of rent for their creations" (6.26). This comment was made by the CLRC in the context of rejecting an argument by CAL and other copyright owner groups to the effect that if technology had delivered the means to monitor (and thus licence) uses in ways that previously were not possible, then the fair dealing exceptions should be replaced with voluntary or statutory licences. The argument that copyright owners should share in any efficiencies delivered by caching is deserving of the same response since it assumes that the use in question – a technical (or otherwise incidental) reproduction which does not amount to a separate exploitation of the information transmitted – is one which copyright owners should be entitled to control.

The DAR also recommends that the educational statutory licence provisions in the Act be "clarified" to allow educational institutions to make active caches of material under the terms of the licence. The report noted CAL's position that "in certain circumstances, including where the material was otherwise made available for free, the equitable remuneration under the statutory licence should equal zero".

The AVCC rejects this recommendation for the following reasons:

- caching is not an activity which naturally fits with either of the educational statutory licences. Reproduction and communication of print and graphic works under the Part VB licence is generally limited to a "reasonable portion" of a work. Caching will almost always involve the entire work. Further, while it is arguable that broadcasts which have been made available online by the broadcaster (eg ABC programs which are available to be accessed on the ABC website) are covered by the Part VA licence, non-broadcast material is clearly not covered, with the result that most multi-media material available on the internet is not covered by either of the educational statutory licences;

- CAL's position that material which is made available for free by the copyright owner should be "zero-rated" suggests that licensing caching activity in educational institutions would appear to be an exercise in futility. As noted above, AVCC's proposal for a caching exception is confined to material which has been made available for free (eg not subject to a technological protection measure). Under CAL's proposal, educational institutions would be required to engage in costly and burdensome monitoring of caching in circumstances where CAL has conceded that all material cached would be subject to a zero rating; and
- as a matter of principle, caching is an activity which should be subject to a free exception. At paragraph 5.2 of its submission to the Digital Agenda Review, the Australian Broadcasting Corporation supported the mirroring of its websites in order to facilitate equal and efficient access to its users. The ABC argued that it was "unlikely that extensions to copyright law that permit caching will have an adverse effect on the market provided that the copyright owner can control and authorise the act of communication to the public in the territory."

Given the extensive and diverse use of caching in the community the AVCC strongly recommends that caching be a new exception for all users, both private and institutional.

If the Government does not wish to provide a blanket exception for caching, then there is a strong case to be made for treating educational institutions as a special case for the following reasons:

- educational institutions undertake caching not for reasons of a commercial nature, but rather to ensure an efficient and effective delivery of educational services;
- an exception for caching will make educational institutions less susceptible to rent seeking by owners; and
- any continued restriction on the capacity of universities to engage in forward caching would impose an unreasonable cost burden on Australian universities and hamper their attempts to compete globally in the delivery of online teaching and learning.

8.2 *Orphaned, unpublished and abandoned works*

Debate about access to orphaned works, unpublished works and abandoned works (refer Kimberlee Weatherall Occasional Paper No3/05 20 May 2005) is not new. The problem concerns the inability of potential users of copyright material to obtain permission of owners when those owners cannot be found. A similar problem arises with respect to software which is no longer being supported by the copyright owner.

Simply, the current copyright regime effectively "locks up" such material for no good reason and represents a clear failure in providing a balance between the interests of owners and users of copyright material.

The AVCC strongly supports a specific exception for orphaned, unpublished and abandoned works, where a potential user should go through a process of reasonable enquiry to locate the owners (with a view to obtaining permission to use the work) in order to rely upon the defence.

8.3 *Education exception in respect of Internet materials*

It is inappropriate for an educational institution to be required to pay for making multiple copies of material for students which the copyright owner has made freely available on the internet without any restriction, such as password-only access or other such technology protection measures.

Copyright owners do not expect to be remunerated for copies made of material which they have made freely available online. If they want to be compensated they have the option of making it available in such a way that access is able to be restricted. By way of example, publisher John Fairfax Holdings Ltd makes the *Sydney Morning Herald* newspaper available online without any restrictions on access. The same publisher makes the *Australian Financial Review* available online, but in most cases only by means of password access, which can be obtained only after payment.

Material which is made freely available online by the owner of copyright is different in nature to material which is made available for payment either in hardcopy form or electronic form. In the latter case, the copyright owner is only prepared to make his or her work available for payment and (subject to fair dealing uses) expects to be compensated for any reproduction. To allow educational institutions to make multiple copies, without payment, of material of this kind would be tantamount to a forced acquisition, without compensation, of property. The same cannot be said of an exception which allowed educational institutions to make multiple copies, for educational purposes, of material which the copyright owner has made freely available without restriction on the internet.

Material which has been made freely available on the internet by the owner of copyright is downloaded day in and day out in offices and homes around the country. This is also true for educational institutions. The only real difference is that educational institutions are being asked by the copyright collecting societies to pay for something that business and private users are doing for free. This is both discriminatory and inequitable.

Much material made freely available on the internet by the owner of copyright is there because of a desire by the owner that it be circulated as freely and as widely as possible. This includes advertisements, promotional material, material intended to be of educational value to the public (eg to promote awareness of health or other public issues).

By making material freely available on the internet, the copyright owner has made a conscious decision *not* to seek remuneration from those who browse that work online. While the reasons for such a choice are likely to be myriad, it is a fair assumption that the copyright owner is more concerned to ensure widespread dissemination of his or her work than to be compensated by those who access (whether by browsing or downloading or both) the work.

While it clearly does not follow from this that the copyright owner has impliedly waived any right to control the way in which the work is used, an exception which acknowledges the right of educational institutions to copy this material for distribution to students would not interfere unreasonably with the interests of the copyright owner. In many (if not most) cases such further distribution of the work would be exactly what the copyright owner intended when making the work freely available online.

There are a number of additional reasons why this material should be subject to a free exception for educational institutions:

- a vast amount of such material is likely to be in the nature of an "orphaned work" since any attempt by CAL to locate the copyright owner will, in many cases, prove to be futile. In this case, the administrative burden imposed upon educational institutions in having to monitor and record such copying would be completely unwarranted;
- while the circumstances might fall short of satisfying the requirements for a free licence to copy to be implied at law, there is strong argument for imposing statutorily such an "implied" licence. Such a licence would not interfere unreasonably with the copyright owner's legitimate interests: it could hardly be argued that the copy is a substitute for a sale of the work;
- CAL's conduct in seeking payment for work made freely available on the internet is in the nature of rent-seeking. As discussed above, in most cases any such payment will be completely unexpected by the copyright owner, who has chosen to make the work available for free. Further, if (as will often be the case) the copyright owner cannot be located, the payment will eventually be directed to other copyright owners with no connection to the work for which payment was sought; and
- an exception allowing educational institutions to copy and communicate for educational purposes, without payment, material which the owner of copyright has made freely available online would not cause any diminution in the willingness of copyright owners to continue to make works available online.

Therefore, the Act should be amended to provide educational institutions with a specific fair dealing exception to reproduce and communicate for educational purposes material made available online, without restriction (either by way of a technological protection measure such as pass-word protected access or by contract), by the owner of copyright.

Recommendation 10: The AVCC recommends that the Government implement specific fair dealing exceptions for

- 1. caching;**
- 2. orphaned, unpublished and abandoned works; and**
- 3. education exception in respect of Internet material.**

9. The Government seeks your view on other options for implementing reform, and the costs and benefits of those options.

The AVCC has outlined in Section 4 the key changes it recommends to ensure an effective balance of the needs of copyright owners and users.

10. The Government seeks your view on any other matters arising out of this Issues Paper.

The AVCC raised a number of other important issues in its submission to the Digital Agenda Review which relate to this enquiry. They were:

- section 28 of the Act, which relates to the performance of works and other subject matter in the classroom, should be amended to include performance by means of

distributed communication technology and thus deem there to be no exercise of the right of communication in such circumstances;

- the *Copyright Act* should be amended to delete the reference in s 135ZXA to the Regulations, and by deleting Regulation 23LA. Section 135KA should be amended in a similar fashion. The effect would be to provide universities with flexibility both as to the means of attaching a notice to users in respect of each of Parts VA and VB of the Act and as to the form of such notice;
- section 135ZMD(3) should be amended to allow for more than one upload, provided that the aggregate made available online at any one time, for the purposes of a particular class undertaking a particular course of study, does not exceed the 10 per cent limit;
- the Act should be amended to provide an equivalent of s 135ZK (the anthology provision) in Division 2A of Part VB of the Act;
- the Act should be amended to provide educational institutions with a non-remunerable licence to reproduce and communicate for educational purposes material made available online, without restriction (either by way of a technological protection measure such as pass-word protected access or by contract), by the owner of copyright;
- the Act should be amended to make clear that educational institutions can rely on the Part VA licence to copy and communicate sound recordings and cinematographic films directly from the internet, where those sound recordings and/or films have been made available online by the broadcaster after having been broadcast;
- the Act should be amended to make clear that an educational institution does not lose the benefit of the educational statutory licences merely because it has "contracted out" to a commercial operator the delivery of material to students;
- section 200 (b) should be amended to include the right for educational institutions to make available online to students (without the need to rely on Part VB of the Act) past examination papers which include works which have been reproduced in reliance on the provision; and
- the Act should be amended to make it clear that the use of distributed communication technology to deliver audio-visual material, including broadcasts to students in a classroom, is not an exercise of the right of communication.