

Digital Agenda Review - Government responses to Phillips Fox recommendations and related matters

Recommendation 1

Survey

That the Government commissions a choice modelling survey, in order to make an assessment of owner and user attitudes to the Digital Agenda Act, the effectiveness of the provisions attributed to piracy or other infringing activity and likely responses to stronger legislation. The survey may also seek to determine the extent to which consumers would be likely to change behaviours, if more strict legislation was introduced.

Education

That, having regard to the results of that survey and the other recommendations that are implemented, the Government commissions an education campaign, to raise public awareness of copyright rights and obligations generally, and those in respect of digital works or technologies in particular, with the campaign to be developed with input from owners' and users' interests, to be funded by owners' interests.

Response

This recommendation is not supported at this point in time given the subsequent and ongoing developments affecting copyright law. These developments include significant amendments to the Copyright Act implementing the obligations in the AUSFTA, the amendments still required to implement the AUSFTA obligations concerning technological protection measures and other copyright policy developments including the Fair Use and other Copyright Exceptions review. The Australian Government already supports raising copyright awareness through financial assistance provided by the Australia Council to the Australian Copyright Council.

Recommendation 2

That the Government commissions a longer term, independent survey or data collection of library copying and communication practices within libraries in respect of digital materials and RMI. (It may also make sense to extend that survey or data collection to copying practices in respect of 'hard copy' materials).

That the Government makes the data collected in that survey publicly available.

That the Government undertakes further consultation with interested parties in order to reach agreement on the meaning and effect of that data, and any necessary or desirable amendments to the Copyright Act, as a result.

Response

The recommendations are not supported. However, the Government acknowledges the work being done collaboratively by the University of Melbourne's Centre for Media and Communications Law and the Intellectual Property Research Institute of Australia on copyright and cultural institutions since the release of the Phillips Fox report, including the publication in 2005 of the *Copyright and Cultural Institutions: Guidelines for Digitisation*.

The Government has examined the libraries and archives exceptions as part of the broader review of the Digital Agenda amendments and the Fair Use and other Copyright Exceptions review and further amendments to the Copyright Act are proposed. There will be consultation with stakeholders on the form of any amendments to the Copyright Act in this area. The merits of conducting further survey work or data collection of library copying and communication practices within libraries can be reassessed after those amendments are enacted.

Recommendation 3

That the government commissions a targeted education campaign to raise awareness of copyright rights and obligations in respect of digital works or technologies by educational institutions, under Part VB of the Act (noting that it may also be useful (although outside the terms of reference of the review) to extend that campaign to all aspects of the educational statutory licence provisions), with the campaign to be developed with input from owners' and educational institution interests, to be funded jointly by them.

Response

The recommendation is not supported. The Australian Copyright Council presently provides an educative role in this area.

Recommendation 4

That the definition of 'library' in sections 49(9) and 50(9) be repealed and the definition of library in section 18 remains unchanged.

That before any decision is made to amend the Act to exclude libraries within ‘for profit’ organisations from being able to rely on the inter-library loan scheme to provide works or parts of works to other libraries within ‘for profit’ organisations, those interested in the issue need to have an opportunity to address the matter specifically.

However, unless the survey data collected (see Recommendation Two) demonstrates a compelling need for libraries within ‘for profit’ organisations to be able to access collections within libraries in other ‘for profit’ organisations in order to ensure that the inter-library loan scheme works efficiently and effectively, that section 50 be amended to exclude libraries within ‘for profit’ organisations from being able to rely on the inter-library loan scheme to provide works or parts of works to other libraries within ‘for profit’ organisations.

Response

The recommendations are not supported.

The Government acknowledges that Australia has a distributed national collection of library material and the current application of sections 49 and 50 of the Copyright Act is integral to the effective operation of the Australian library network. The Copyright Act already contains limitations on the use of these exceptions. The Government has not been presented with evidence that leads to the conclusion that the current application of the exceptions in sections 49 and 50 is unreasonably prejudicing the legitimate interests of copyright owners or adversely impacting on copyright owners’ markets to an extent that warrants further limiting the application of those exceptions. However, the Government proposes to amend these provisions so that the exceptions only apply to libraries whose collections are directly accessible to the public or accessible to other library users through the library’s participation in an inter-library loan system.

Recommendation 5

That owners’ interests, libraries and cultural institutions be given a reasonable opportunity to negotiate, agree and implement a code of practice that clarifies issues of concern in relation to copying of works under Part III, Division 5 of the Act.

Failing implementation of such a voluntary code of practice within a reasonable period of time, the Act be amended so as to make it clear that:

- 1 a copy under section 49 or 50 can be made from a preservation copy of a fragile work*
- 2 there is a distinction between different editions of works in determining whether a preservation copy can be made.*

Subject to these amendments, no change to the requirement for destruction of copies made under sections 49 or 50 is recommended.

That section 51A be amended so as to allow libraries and archives to make available to volunteers copies of works in the collection, for the purpose of educating or training those volunteers.

That section 51A be amended to allow non-preservation copies of artistic works to be made available on a dumb terminal on the premises of the library or archive (without any ability to make a hard copy from that dumb terminal).

Response

The Government proposes to amend the Copyright Act to

- (1) permit that a reproduction under section 49 or 50 can be made from a preservation reproduction of a fragile work
- (2) acknowledge a distinction between different editions of works in determining whether a preservation copy can be made
- (3) ensure that section 51A permits reproduction of works in the collection for the purpose of educating or training volunteers of the library or archive.

The recommendation concerning non-preservation copies of artistic works has been considered as part of the Fair Use and other Copyright Exceptions review.

Recommendation 6

That, following implementation of the education campaign recommended in Recommendation One and the survey recommended in Recommendation Two, the issue of first digitisation of unpublished works by libraries and archives (and whether rights management information is included), the effects of digital copying by libraries and archives, and the extent to which those copies are further copied or communicated, is re-assessed and, if necessary, amendments considered.

Response

The Government has examined the current exceptions for libraries and archives in the Copyright Act as part of the Fair Use and other Copyright Exceptions review. Further amendments to the specific exceptions for libraries and archives are proposed as part of that review.

Recommendation 7

That provided that the provision can be drafted in a technologically neutral way, and that no owners demonstrate, within the course of public consultation on the amendments, that their interests are likely to be adversely affected, sections 49 and 50 should be amended so as to allow low resolution reproductions of the whole of an artistic work to be copied and communicated, without infringing copyright.

Response

The Government has examined the current exceptions for libraries and archives in the Copyright Act as part of the Fair Use and other Copyright Exceptions review. Further amendments to the specific exceptions for libraries and archives are proposed as part of that review.

Recommendation 8

That all interested parties, including the [Attorney-General's] department and other government departments such as DEST, State Government education departments, private school bodies, the technical and further education sector, AVCC and owners agree on and adopt a code of practice using the existing MCEETYA guidelines as a model.

That failing agreement within a reasonable period of time, and if concerns with the practical application of the regime are still evident, Part VB be amended so as to give legislative force to the MCEETYA guidelines.

That the code (or failing agreement any necessary amendment) includes guidance on the meaning and operation of literary works accompanied by artistic works that explain or illustrate the literary work.

Response

This recommendation is not supported. To the extent that there is any uncertainty in the operation of the guidelines giving legislative backing to them will not address that uncertainty. Parties in dispute will still seek to enforce their rights in the courts. The Government also understands that the Copyright Agency Limited (CAL), while not endorsing the guidelines, does not appear to have challenged their application to date. Giving the guidelines legislative backing would also remove some of the flexibility that educational institutions benefit from by having informal guidelines.

Recommendation 9

This recommendation is in three parts:

(i) Audio-visual material on the Internet

That the Act be amended so as to clearly cover the use of audio-visual versions of copyright material from free to air broadcasts that is available subsequently on the Internet in the same way that Part VB [VA] covers audio visual material taken directly from a free to air broadcast.

Response

This recommendation is supported. It will facilitate the use of copyright material by educational institutions and ensure that copyright owners are compensated for that use.

(ii) Notice requirements

That if the form of different notices under Parts VA and VB can be amended so as to allow for a single notice without adversely impacting on the information that an owner requires under the statutory licence, those amendments should be made.

Response

This recommendation is supported. If it is practical, consolidation of the forms will simplify record keeping and provide cost savings for both copyright owners and educational institutions.

(iii) Digital Anthologies

That Part VB, Division 2A is amended to provide a digital anthology equivalent to s.135ZK, where the anthology is paginated or where otherwise a suitable percentage of the total number of words of the anthology, as a percentage of the work to be copied, can be determined.

Response

This recommendation is supported. Preserving the technological neutrality of the Copyright Act requires a provision equivalent to s 135ZK for digital anthologies.

Recommendation 10

Application of the 1% - “insubstantial portion” test to works in electronic form.

That section 135ZMB is amended to provide that:

- (i) if the digital work is paginated then the same rule that applies in section 135ZG applies;*
- (ii) in determining the percentage calculation the extract that is copied must be continuous.*

Response

This recommendation is supported. The amendment is appropriate to preserve the technological neutrality of the Act.

Recommendation 11

That section 36 be amended to better express the relationship between that section and section 39B to better express the interpretation of the application of section 39B.

Response

In view of the amendments implementing the Australia-United States Free Trade Agreement (AUSFTA) copyright obligations, amendment of section 36 is not supported at the present time. However, the issue of liability of carriage service providers for authorisation of infringement of copyright is being monitored on an ongoing basis. Should problems with relevant provisions of the Copyright Act become apparent, further consideration will be given to appropriate amendments.

Recommendation 12

That section 36 of the Act be amended (or a new section be inserted) to:

- Set the acceptable minimum standards or conduct in relation to notice and take down procedures that will determine the reasonableness or otherwise of conduct, when considering issues of authorisation of infringement and provide that compliance with those procedures means that the conduct is reasonable, having regard to section 36(1A)(c).*

- *Require that until an agreed industry code is implemented, the minimum standards set out in the section is the default position.*
- *Require any voluntary code of conduct that may be agreed to be certified by an appropriate body, to be determined.*

That section 202 of the Act be amended to include unjustified allegations of authorising infringement or requiring compliance with a notice under the amendments proposed above that is unjustified.

Response

The recommendations were taken into account in the implementation of the AUSFTA copyright obligations and have effectively been superseded by those amendments.

Recommendation 13

Draft amendments, amending the Act, the Federal Court Rules and the Federal Magistrates Court Rules, to implement a limited subpoena process to identify alleged infringers of copyright, where there is existing evidence of infringement, be prepared.

That the Federal Privacy Commissioner undertakes public consultation on the proposed draft process in order to refine or improve that process.

That, following that public consultation and finalisation of the amendments, those amendments be introduced into the Parliament.

Following implementation of the process, the Federal Magistrates Court collects and maintains information about the number of applications made under the process, the number of subpoenas granted and any other information relevant to the efficacy or efficiency of the process.

That an applicant for a subpoena is required to also provide information to the Department on any proceeding subsequently instituted, following any application under this subpoena process, or the existing provisions under Order 15A of the Federal Court Rules (or equivalent rules of the State and Territory Supreme Courts).

That, after an appropriate period of time, the Department reviews that information with a view to improving the efficiency of the process or to ensure that the Federal Magistrates Court is adequately and appropriately resourced to cope with that process.

Response

The Government does not consider that the subpoena process recommended is effectively any different to, or better than, the current procedure under Order 15A of the Federal Court Rules. Therefore, the recommendation is not supported. This issue was considered more recently in the context of the implementation of Australia's copyright obligations under the AUSFTA and it was considered that the subpoena procedure under Order 15A met Australia's AUSFTA obligations and was an appropriate judicial procedure for identifying online copyright infringers. However, the Government is sympathetic to the difficulties copyright owners face in identifying those who engage in online file-sharing of unauthorised reproductions of copyright material through peer-to-peer networks. Subsequent to the AUSFTA amendments and in the light of experience of court proceedings in 2005 dealing with these issues, the Government is currently considering the issue of a more streamlined procedure for the identification of online copyright infringers as part of a broader package of initiatives to assist copyright owners to protect and enforce their copyright in the online environment.

Recommendation 14

That, to the extent that it is necessary in order to clarify the liability of Service Providers acting in accordance with a court order or a Federal Magistrates Court subpoena, appropriate amendments be made to the Telecommunications Act 1997 and the National Privacy Principles.

However, before any such amendments are made, any proposal is the subject of appropriate public consultation through the office of the Federal Privacy Commissioner.

Response

Should the Government decide to introduce an alternative procedure to assist copyright owners to identify alleged online copyright infringers, the Government will ensure that the procedure is consistent with service providers' obligations under privacy and telecommunications law.

Recommendation 15

That sections 43A and 111A of the Act be amended to align the exception with the similar exception in the Information Society Directive, by deleting the words 'of making or receiving a communication' in subsection (1) and substituting 'part of the technical process' with 'as a necessary and incidental part to any technical process'.

A consequential amendment to the heading to the section will be needed also.

That the sections be further amended by inserting a new subsection to include a definition of 'temporary reproduction' for the purposes of the section, as meaning any transient, non-persistent reproduction that is incidental to the primary purpose or act for which the work is made available and which has no independent economic significance.

Response

These recommendations were taken into account in the implementation of the AUSFTA copyright obligations and have effectively been superseded by those amendments.

Recommendation 16

That the educational statutory licence provisions be amended to allow an educational institution to make active caches of copyright material for the purpose of a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner.

Response

The recommendation is not supported. Instead the Copyright Act will be amended to allow the active caching of web sites by educational institutions where cached material is not altered and not retained beyond the minimum period required for the particular course of educational instruction.

Recommendation 17

That the definition of TPM in section 10 of the Act be amended so as to accord with the interpretation favoured by Sackville J in Stevens, at first instance.

That the permitted purposes in section 116A (3) be amended so as to clearly allow any supply or use of a circumvention device or service for any use or exception allowed under the Act, including fair dealing and access to a legitimately acquired non-pirated product.

That section 116A(1) be amended so as to prohibit the use, including commercial and personal use, of a circumvention device or service to circumvent a TPM, other than for a permitted purpose.

That section 135ANA be amended so as to prohibit the personal use of a broadcast decoding device other than for a permitted purpose, being the same permitted purposes listed in section 116A(3).

Response

These recommendations have effectively been superseded by the obligations under the AUSFTA in relation to circumvention of technological protection measures that the Government is obliged to implement by 1 January 2007.

Recommendation 18

That section 135ANA be amended so as to prohibit the personal use of a broadcast decoding device other than for a permitted purpose, being the same permitted purposes listed in section 116A(3).

Response

This recommendation is not supported. The issues concerning use of a broadcast decoding device to access an encoded broadcast are different to that concerning use of a circumvention device to access other copyright material protected by a technological protection measure. These issues were considered as part of the Government's review of unauthorised access to and use of subscription broadcasts in 2005.

Recommendation 19

That the integrity of the permitted purposes in section 116A (3) be retained by preventing a copyright owner from making it a condition of access to or use of a copyright work or other subject matter that a user will not use a circumvention device or service for the purpose of making a fair dealing of the work or other subject matter.

That this amendment is made irrespective of whether the recommendation to include fair dealing as a permitted purpose is accepted. However, in those circumstances, a new subsection may need to be introduced in order to give effect to the recommendation.

Response

This recommendation has effectively been superseded by the obligations under the AUSFTA in relation to circumvention of technological protection measures that the Government is obliged to implement by 1 January 2007.

Recommendation 20

That the definition of RMI in Section 10 of the Act be amended so as to expressly exclude any TPM.

Response

This recommendation has effectively been superseded by the obligations under the AUSFTA.

Additional matters considered as part of the Digital Agenda review

(1) Communication right

The Copyright Act is to be amended, as necessary, to clarify the scope of the communication right. In particular, the amendments will clarify that by the action of clicking on a link to gain access to a webpage a user is not determining the content of the material accessed and is not exercising the communication right.

(2) Distributed communications technologies

A new provision is to be added to the Copyright Act to clarify that a “communication to the public” of copyright materials is not a “communication to the public” where that communication is made in the circumstances and for the purposes set out in s 28.

(3) Liability for inter-library supply of publications

Section 50 the Copyright Act is to be amended to clarify the immunity for liability aspect of the provision.