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SCHOOLS RESOURCING TASKFORCE

MINISTERIAL COUNCIL ON EMPLOYMENT, EDUCATION, TRAINING AND YOUTH AFFAIRS

NEW SOUTH WALES DEPARTMENT OF EDUCATION AND TRAINING

Early Childhood and Primary Education
Secondary Education
Technical and Further Education
Vocational Education and Training
Higher Education
Adult and Community Education

30 November 2005

Attn: Mr. Nick Horne NH
Inquiry Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

BY EMAIL: laca.reps@aph.gov.au

Dear Mr Horne

Copyright Advisory Group to MCEETYA (CAG)

Supplementary submission to the
House of Representatives Legal and Constitutional Affairs Committee
Inquiry into technological protection measures (TPM) exceptions

This supplementary submission addresses three issues raised in questions to Ms Delia Browne, National Copyright Director, MCEETYA in evidence before the Committee's public hearings in Sydney on 21 November 2005:

- The compliance with the educational statutory licences in the *Copyright Act 1968* (**Act**) with the Australia – United States Free Trade Agreement (**FTA**)
- The impact of a provision in the FTA allowing the exclusion of criminal penalties and procedures for educational institutions; and
- CAGs views as to the appropriate body to review and recommend exceptions to the TPM provisions under Article 17.4.7(e)(viii) of the FTA.

This supplementary submission also has two attachments:

- a copy of a recent MCEETYA strategy document *Contemporary learning: learning in an online world* referred to in my evidence to the Committee; and

- a copy of CAGs submission to the Attorney-General's review of fair use and other exceptions in the Act, which sets out the practical issues faced by schools and TAFEs and

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the importance of the effective copyright exceptions to meet the educational needs of Australian students.

1. Educational statutory licences

The Committee was enquired whether CAG felt that the educational licences in the Act were contrary to the FTA.

CAG does not believe that the statutory licences in the Act in any way contravene the letter or spirit of the FTA. The FTA allows for certain exceptions (ie, free uses) of copyright material under each domestic copyright law. In the United States, the doctrine of fair use permits educational institutions in the United States to access limited amounts of copyright material – but generally for free.

In contrast, the Australian scheme (which was not altered by the FTA, and to CAGs understanding is countenanced by the FTA) allows for greater flexibility of use of copyright materials for Australian educational institutions – with the trade off that the permitted use is remunerable.

In other words – the United States has chosen to allow more limited uses of material for educational purposes – but for free. Australia has chosen to allow more certain and broad uses – but only if the copyright owner is paid. CAG understands that both regimes are consistent with both the FTA and international obligations such as the Berne Convention and TRIPS agreement.

CAG also notes that the Committee asked whether by putting a TPM on a work in respect of which an educational institution has access via the statutory licence, a copyright owner can in effect frustrate Parliament's intention in providing for the statutory licence.

The situation described by the Committee is exactly the scenario that the FTA will permit if the Committee does not recommend that the statutory licences and other educational exceptions in the Act are stated to be exceptions to the TPM provisions required by the FTA. In other words, the FTA – without clear and strong recommendations to the contrary from this Committee – will have the effect that copyright owners can use TPMs to prevent the educational uses that were introduced by the Australian Parliament to ensure that Australian students have fair access to educational resources.

2. An educational exclusion from criminal procedures and penalties

The Committee also asked whether Article 17.4.7(a) of the Act (which allows the Australian Government to exclude educational and other public interest institutions from the criminal offences of the TPM provisions) would enable copyright owners to continue to bring civil claims against teachers or educational institutions.

In CAGs opinion, that is the exact effect of Article 17.4.7(a). If the Committee does not act to recommend that educational exceptions in the Act be exempted from the TPM provisions, a teacher could still face legal proceedings if he or she uses a circumvention device to make copies of a work protected by a TPM for distribution to students in a class.

As the Committee noted, the Australian Government is empowered to ensure that criminal proceedings can not be brought against the teacher. However, on CAGs reading of the FTA, it is not permitted for the Government to exclude teachers or educational institutions from the civil penalties and procedures required by the FTA.

The only way to ensure that educational uses of works protected by TPMs are preserved and protected is for this Committee to recommend that the educational statutory licences and other non-remunerated educational use exceptions in the Act be excluded from the TPM provisions required by the FTA.

3. An appropriate review body

The Committee also asked whether the Copyright Tribunal would be an appropriate body to undertake a review process or make recommendations to the Attorney-General regarding proposed exceptions to the TPM provisions under Article 17.4.7(e)(viii) of the FTA.

CAG does not believe that the Copyright Tribunal would be an appropriate body for this task and would be strongly opposed to any suggestion that this should be the case.

The Copyright Tribunal currently only has jurisdiction over the terms and conditions of statutory licences in the Act (for example, the method or recording information about school copying or the rate an educational institution should pay to a collecting society for this copying). The Copyright Law Review Committee in examining the jurisdiction and procedures of the Tribunal found that the majority of cases heard by the Tribunal were for determining a rate of remuneration, assessing the validity of a refusal to licence copyright material, or confirming or varying details of an existing licence scheme.

The Copyright Tribunal does not have any experience in weighing or balancing competing policy claims from copyright stakeholders (that is, it has experience in applying administrative arrangements that need to be made under the Act, but has no experience in making policy assessments about what laws should or should not be).

In addition, the Copyright Tribunal's processes are very similar to a Court – a party must make an application for a matter to be heard before it, and parties are represented and submit evidence in very similar ways to a matter heard by a Court. As a result, it can be extremely costly for a matter to be heard by the Copyright Tribunal. There can also often be considerable delay experienced by parties in waiting for a decision from the Tribunal. For example, in CAGs last experience before the Tribunal, CAG members had to wait some 16 months for a decision from the Tribunal, which was almost 4 years after negotiations between the parties had first broken down.

CAG submits that a body with experience in undertaking public consultations and making policy deliberations would be much better placed for the process required in assessing whether additional exceptions should be introduced to the FTA TPM provisions. CAG submits that the copyright policy experts in the Attorney-General's Department would be well qualified for this task, as would members of Parliamentary Committees such as this Committee or a Senate Select Committee.

4. Conclusion

CAG hopes that these additional comments adequately address the issues raised by the Committee in the public hearings. CAG would be pleased to provide additional comments or to meet with members of the Committee or its Secretariat if this would provide further assistance to the Committee in undertaking its inquiry.

Yours sincerely

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