

RECEIVED
21 OCT 2005

Submission No. 40

Date Received

COPYRIGHT ADVISORY GROUP
SCHOOLS RESOURCING TASKFORCE

BY: LACA

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

21 October 2005

Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

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

Dear Sir

**House of Representatives Standing Committee on Legal and Constitutional Affairs
'Inquiry into technological protection measures (TPM) exceptions'**

Please find attached our submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs regarding the Inquiry into technological protection measures (TPM) exceptions.

This submission is made on behalf of the Copyright Advisory Group to the Schools Resourcing Taskforce (SRT) of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) on Copyright.

We welcome the opportunity to provide oral evidence to the Standing Committee. Please note that our submission is made on a confidential basis at this time. Protocol dictates that the submission must be formally endorsed by SRT, AESOC and MCEETYA prior to it being made a public document. This is currently being organised.

If you have any questions, please contact me on telephone (02) 9561 8876 email delia.browne@det.nsw.edu

Yours sincerely

Delia Browne
National Copyright Director
Ministerial Council on Employment, Education, Training and Youth Affairs
Level 5, 35 Bridge Street
Sydney NSW 2000

Tel: 02 9561 8876
Fax: 02 9561 1499
Mob: 0425 243 661
Email: delia.browne@det.nsw.edu

Confidential submission - subject to endorsement by AESOC and Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs

**THE COPYRIGHT ADVISORY GROUP TO THE SCHOOLS
RESOURCING TASKFORCE**

OF THE

**MINISTERIAL COUNCIL ON EDUCATION EMPLOYMENT TRAINING
AND YOUTH AFFAIRS**

**Submission to the House of Representatives Standing Committee
on Legal and Constitutional Affairs**

'Inquiry into technological protection measures (TPM) exceptions'

October 2005

EXECUTIVE SUMMARY

CAG plays a central role in the administration of copyright for Australian educational institutions, and hopes that the experiences gained in this role can provide important insights into the current review.

CAG believes that the terms of the Free Trade Agreement with the United States have fundamentally shifted the balance in the Copyright Act between the interests of copyright owners and the public, to the detriment of public access to information and the operation of educational institutions.

Specifically, the FTA agreement has removed the ability of educational institutions to use copyright works protected by a technological protection measure to make copies for student use in a classroom. This is a fundamentally important public access right that should not be removed.

CAG asks the Committee to ensure that educational institutions can continue to access copyright works for educational purposes, including:

- making copies of works for educational uses by students;
- copying off-air broadcasts to display in a classroom or for other educational uses by students;
- teaching students in classrooms;
- using educational resources when the technological format for the work has become obsolete; and
- accessing public domain materials.

CAG submits that all of these important educational non-infringing uses will be adversely affected by the TPM provisions in the FTA. CAG asks the Committee to protect these public interest access rights by recommending that they be covered by exceptions to the TPM provisions permitted by the Free Trade Agreement to protect important non-infringing uses.

1. INTRODUCTION

An introduction to the Copyright Advisory Group

This submission is made on behalf of the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs Taskforce on Copyright (**CAG**). CAG is responsible for copyright policy and administration for the Australian school and TAFE sector (including the management of obligations under educational statutory licences), and represents almost all primary and secondary school educational authorities and TAFE's in Australia. CAG members include State and Territory Departments of Education, all Catholic Education Offices, the Independent Schools Council of Australia and the majority of TAFE colleges.

CAG and its members have a significant interest in copyright law and policy. Last year, CAG members paid in excess of \$42 million dollars in voluntary and statutory licences for the educational use of copyright material in Government and Catholic schools alone. This figure does not include an amount for the Independent schools sector. It also does not include any payment for copying and communication of literary, musical, dramatic and artistic works in electronic form under the Part VB statutory licence, as this licence is still under negotiation with the Copyright Agency Limited (**CAL**). However it is anticipated that this amount will represent further significant expenditure for the sector, as CAG has already made an interim payment to CAL of \$6 million to cover copying and communication from electronic works for years 2001-2004.

CAG members place a great deal of importance on the appropriate administration of copyright in Australian schools, and ensuring system and school-level compliance with educational exceptions and statutory licences. CAG works with administrators and teachers to ensure that the rights of copyright creators are respected, and that teachers and support staff have practical guidelines to facilitate the greatest possible compliance with the copyright licences granted to schools.

CAG congratulates the Attorney-General on taking the opportunity to refer to the House of Representatives Standing Committee on Legal and Constitutional Affairs (**Committee**) the proposed exceptions to the new laws relating to technological protection measures (**TPMs**) arising out of Australia's obligations under its Free Trade Agreement with the United States. The inquiry provides an important opportunity for copyright stakeholders to participate in this debate about the role and future shape of exceptions to the laws relating to TPMs in the *Copyright Act 1968* (**Copyright Act**), and whether new exceptions are required in order to ensure appropriate public interest access to copyright material.

CAG hopes that its central role in Australian educational copyright administration makes it well-placed to provide a level of experience and insight which can make an important contribution to the current review, particularly in ensuring that Australian students can continue to enjoy appropriate access to copyright material for educational, research and study purposes.

CAG endorses the submissions to the Committee's review by the Australian Vice-Chancellors' Committee, the Flexible Learning Advisory Group and the Commonwealth Department of Education, Science and Training.

2. SCHOOLS AND THE COPYRIGHT BALANCE

CAG's Role

CAG recognises the importance of providing sufficient incentives to copyright owners, and the importance of protecting the exclusive rights granted to copyright owners. However, CAG also supports the need for an appropriate balance in the Copyright Act, and recognises the strong public benefits in public access to information, particularly for educational and cultural purposes.

The need for balance in copyright legislation has also been expressly recognised at the international level. The Preamble to the 1996 World Intellectual Property Organisation Copyright Treaty states that copyright laws should recognise:

"the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention".

CAG members see the role of educational institutions - and the exceptions and statutory licences that provide access to educational material - as a fundamental part of the framework for balanced copyright protection and access in Australia.

CAG's primary concern is to advance the interests of educational institutions in Australia with a view to providing access to copyright works to teachers and students which will promote the overall goals of Australia's educational sector.

These goals are consistent with the government's own policy objectives as indicated by the recommendations of the Joint Standing Committee on Treaties (JSCOT) in its report on the Free Trade Agreement between Australia and the United States:

"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."¹

Digital Agenda reforms

The Digital Agenda Act introduced criminal and civil prohibitions on dealings in relation to circumvention devices and services after an extensive period of consultation and policy deliberation. The use of circumvention devices and services was not prohibited as this was considered to be an unnecessarily heavy-handed intrusion into the private sphere, although CAG notes that this position will be changed on implementation of the AUSFTA.

The Digital Agenda Act also recognised the importance of balancing the rights of copyright owners to protect their works and the rights of copyright users, including educational institutions. As a result, Parliament considered that it was essential that certain public interest non-infringing uses be preserved, so that public interest access to material could be obtained, even in the event of material being 'locked' by the copyright owner by using a TPM.

¹ Joint Standing Committee on Treaties Report 61: The Australia – United States Free Trade Agreement, Recommendation 16 at p.240.

Subsections 116A(3), (4) and (4A) of the Copyright Act contain the current 'permitted purpose' provisions, which allow the manufacture, importation and supply of a circumvention device or service for a 'permitted purpose'. Part VB of the Copyright Act (the educational statutory licence allowing schools and TAFE's to copy and communicate copyright works for educational use) is specifically listed as a 'permitted purpose'. This is a recognition of the public importance of ensuring that non-infringing uses such as supplying limited amounts of copyright material to students is not prevented by technological 'lock up'.

CAG notes that the Report of the Three Year Review of the Digital Agenda Act recommended that these permitted purpose exceptions be broadened to preserve the operation of all Copyright Act exceptions, including fair dealing and access to a legitimately acquired non-pirated product. The Report noted that due to the increasing use of TPMs by copyright owners, this would be the best way to preserve the balance in the Copyright Act between copyright owners and users².

The shifting balance

The proposed changes to the law relating to TPMs required by the AUSFTA will significantly alter the existing balance between owners and the interests of users such as educational institutions in the following ways:

- the introduction of civil and criminal liability for personal or institutional use of a circumvention device or service without any exceptions for circumstances where the device is used to access or use copyright works in accordance with educational or library exceptions, such as Part VB, Part VA, and other educational exceptions such as s.28;
- the removal of existing exceptions for supply, manufacture and importation circumvention devices or services in circumstances where they are used to access or use copyright works in accordance with Part VB, section 49 and section 50 (currently listed as permitted purposes); and
- limiting the rights of educational institutions to use circumvention devices or services to accessing material to make acquisition decisions.

This represents a fundamental and negative shift in the copyright balance away from the interests of educational institutions and Australian students. In effect, schools and TAFEs will no longer be able to perform their primary role as educational institutions (ie, teaching Australian students) in circumstances where copyright owners choose to protect their works with TPMs. This represents a significant threat to Australian education, and the public interest access that the Digital Agenda Act so carefully preserved.

Throughout this submission, CAG asks the Committee to ensure that as a minimum, the balance between the rights of copyright owners and the educational sector does not shift further in favour of copyright owners without sufficient cause and consideration of the actual and likely adverse impact on non-infringing uses of copyright works by educational institutions. CAG submits that the only way to preserve the existing balance is to recommend the 'introduction' of the existing permitted purpose exceptions as 'new' exceptions permitted by Article 17.4.7(e)(viii) of the AUSFTA.

² Digital Agenda Review Report and Recommendations, Phillips Fox, January 2004, pp106-107.

Further, CAG asks the Committee to recommend any additional exceptions which it believes are necessary to avoid continuing and further adverse effects on the non-infringing uses relied on by educational institutions to perform their important educational functions, in light of changing technologies and requirements of school curricula.

Other practical consequences of the AUSFTA

The AUSFTA will lead to additional practical problems for users. The new exceptions being considered by this Committee will apply only to the *use* of circumvention devices and services, not to any *dealings* in devices or services. This leads to the illogical situation where someone who is entitled to use a circumvention device or service will not be able to lawfully obtain a device. In other words, schools will be able to use a device (at least for the purposes of acquisition decisions), but no-one will be permitted to supply one to them! Further, based on existing law and the AUSFTA provisions, it is likely that even if a device could somehow be manufactured, a person wanting to use a device or service would not be able to authorise anyone to use the device on their behalf. The result is that the exceptions being considered by the Committee will have a very limited effect in practice.

To summarise the effect of the AUSFTA:

1. The use of circumvention devices or services to circumvent copy controls is permitted;
2. However, dealing with circumvention devices or services that circumvent copy controls (ie manufacture or sale) is not permitted, (ie you might be able to use a copy circumvention device or service, but you will not be able to purchase one, making the permission effectively redundant);
3. The use of circumvention devices or services to circumvent access controls is permitted, but only to make acquisition decisions;
4. However, dealing with circumvention devices or services that circumvent access controls is prohibited except in very limited circumstances, making the exception outlined in 3 above of limited practical use for schools and TAFEs, who would not have the technical capacity to manufacture a circumvention device or service;
5. The Committee is only empowered to recommend exceptions in relation to access controls, not TPMs that 'protect any copyright';
6. The Committee does not have the power to enable an exception to permit the dealing with circumvention devices or services to circumvent access controls, again leading to a risk that any recommended new exceptions may not be able to be effectively used in practice.

CAG submits that to prevent the exceptions enacted by the Committee being ineffective in practice, the exceptions must extend at least to allow an agent of the designated user to perform the non-infringing circumvention on the user's behalf. For example, a school should be allowed to authorise a lawful dealer in a circumvention device or service to use that device or service on its behalf to effect one of the AUSFTA exceptions, or any new exception recommended by this Committee.

CAG notes that it was not the intention of the Government in implementing the FTA that the rights of educational institutions and other public interest access rights be undermined. CAG notes the evidence of the Department of Foreign Affairs and Trade (DFAT) to the Senate Select Committee that examined the terms of the proposed FTA. DFAT officials assured the Committee that the provisions were not designed to stop people doing legitimate things with legitimate copyright material, and:

*"The important thing to emphasise is that there will be a public review and we will allow the community to come forward with the kinds of exceptions that they think are appropriate to Australia"*³

CAG submits that the promises made by DFAT to the Senate Committee will not be fulfilled unless significant and meaningful additional exceptions are recommended by the Committee as part of this review to ensure that legitimate uses protected by the Copyright Act (such as educational exceptions and statutory licences) are included in exceptions to the FTA TPM provisions.

³ Committee Hansard, 18 May 2004 at pp 93-95

3. UNDERSTANDING THE TERMS OF REFERENCE

Understanding the Terms of Reference

The Committee is primarily directed to examine whether any additional exceptions to those already listed in Article 17.4.7(e) should be introduced into Australian copyright law.

Article 17.4.7(e)(viii) allows the Committee to recommend the following types of uses to be made as exceptions:

"non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding." (emphasis added)

In considering whether to introduce any new exceptions, the Terms of Reference permit the Committee to examine:

- the activities of libraries, archives and other cultural institutions
- the activities of educational and research institutions
- the use of databases by researchers (in particular those contemplated by recommendation 28.3 of the Australian Law Reform Commission Report on Gene Patenting)
- activities conducted by, or on behalf of, people with disabilities
- the activities of open source software developers, and
- activities conducted in relation to regional coding of digital technologies.

CAG's submission will focus primarily on exceptions that are relevant to educational institutions, particularly schools and TAFE's. However, CAG notes that librarians in educational institutions also rely on the exceptions for libraries and archives contained in the Copyright Act. For example, the inter-library loan provisions are particularly important for small schools, or schools in remote and regional areas.

CAG submits that the requirements that must be met for an exception to be granted in accordance with Article 17.4.7(e)(viii) are relatively flexible, as long as they do not have the effects listed in Article 17.4.7(f) (ie, that they impair the adequacy of legal protection for TPMs). Therefore it is important for the Committee to carefully consider the approach it wants to take to the Terms of Reference to determine which exceptions the Committee believes should be allowed.

CAG submits that it is appropriate for the Committee to base its approach simply on the language of Article 17.4.7(e)(viii) itself in approaching the Terms of Reference. CAG submits that the clear and ordinary usage of the language in the FTA suggests that the Committee should address the following three questions in assessing whether to recommend any new exceptions:

- whether the AUSFTA requirements will have any actual or likely adverse impact on non-infringing uses;
- whether the claimed non-infringing use can be credibly demonstrated; and
- whether an exception can apply to a particular class of works or other subject-matter.

1. Non-infringing use

To qualify for any exception under the FTA, the prohibition on using a circumvention device or service must prevent or impact on an existing or future non-infringing use.

CAG submits that there are three ways in which a use could be considered to be non-infringing under Australian copyright law:

- a use that does not fall within the scope of offending conduct (such as the doing of an activity not within the scope of a right granted to a copyright owner such as the private reading of a book);
- a use that is covered by an exception to any offending conduct (such as classroom use of material permitted by s.28 of the Copyright Act); or
- being a use that is subject to a statutory licence, such as under Part VB.

CAG submits that if the use of a TPM, and any subsequent prohibition on using a circumvention device or service, prevents a user from exercising one of the three categories of use listed above, the TPM and prohibition must be considered to have an adverse impact on non-infringing uses.

2. Credibly demonstrated actual or likely adverse impact

The proponent of an exception is required to show evidence of how not being able to use a circumvention device or service would adversely impact a non-infringing use. For example, in the example of digital material being controlled by a TPM, if a teacher shows that he or she would not be able to make student copies as permitted by Part VB of the Copyright Act, CAG submits that this must be considered to be a credible demonstration of an adverse impact on non-infringing uses permitted by the Copyright Act.

It is also submitted that there will be likely or actual adverse impact on non-infringing uses for the present purposes if not being able to use a circumvention device or service would place an unreasonable burden on the user. This might be because of an unreasonable:

- increase in cost to enable access or use;
- level of difficulty to obtain access or use; or
- effect on the choices available to users;

caused by the inability or difficulty of accessing material in an unprotected format.

CAG submits that the adverse or likely impact on non-infringing use might also be evaluated by reference to the number of people affected. Further, where the impact on each individual person might be minimal but the number of people impacted is significant, then the cumulative adverse impact should be sufficient to justify an exception under Article 17.4.7(e)(viii).

3. Particular class of works

A further requirement is that the exception must be limited to a particular class of works. CAG submits that this could be considered in two ways:

- (a) by describing the subject matter or class of work. This might be by condensing into one statement, the scope of existing exceptions and statutory licences it is considered necessary to preserve. Alternatively it might be by formulating a description of the particular acts needed to be allowed in relation to providing access to particular works for particular reasons.
- (b) by defining the particular class of work by reference to sections of the legislation. In other words, the class of work would be works of a class permitted to be reproduced in accordance with a copyright exception or statutory licence. This is consistent with precedent in Australian copyright legislation.

It is submitted that both approaches are appropriate in the Australian context, as Australian copyright legislation has historically constructed exceptions by reference to sections of the legislation, not just a description of the subject matter of the exception. CAG submits that it would be appropriate for the Committee to identify the non-infringing uses that should be protected in the public interest, and to define those uses either by reference to the copyright exception that permits each use or by a descriptive statement as to the types of users or uses the Committee believes should be protected.

For example, the current exceptions to circumvention liability in Part V Division 2A are constructed in this way:

s116A (7)

For the purposes of this section, a circumvention device or a circumvention service is taken to be used for a permitted purpose only if:

- (a) the device or service is used for the purpose of doing an act comprised in the copyright in a work or other subject-matter; and*
- (b) the doing of the act is not an infringement of the copyright in the work or other subject-matter under section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.*

Other parts of the Copyright Act also derive their practical meaning by reference to sections of the legislation. For example, section 47H states that agreements that seek to exclude the operation of certain provisions of the Act have no effect. The subject matter of the provision is defined by reference to other sections of the legislation.

The US approach

CAG is aware of the United States Register of Copyrights' interpretation of the "particular class of works" requirement in its Recommendation to the Library of Congress and its rejection of "purpose based" exceptions, such as those defined by a particular use or user group.⁴

In particular, in its consideration of a request from educational institutions for an exception covering "per se education fair use works", the Register commented that "use based or user based classifications are rejected by the Register *because the statutory language and legislative history* did not provide support for classification on this basis". (emphasis added)⁵ We do not think this approach is appropriate for Australia, where we have a very different "statutory language and legislative history".

CAG does not consider that Australia should follow the Register's interpretation of the "particular class of works" requirement, for three key reasons. Firstly, Australia has a very different legislative framework for dealing with educational copyright. In the United States, no specific regime for educational use is provided and there are no statutory licences for educational purposes. This can be distinguished from the situation in Australia where the copyright regime has historically allowed educational use exceptions, such as the statutory licences in Part VA and Part VB and the exception in section 28.

Secondly, Australian jurisprudence allows purpose based exceptions, including for education, and this should be no different for the exceptions at hand. For example, the existing "fair dealing" exemptions in Part III Division 3 of the Copyright Act are purpose based, including for research or study, criticism or review and reporting news.

Thirdly, CAG submits that the Committee should adopt an approach that is appropriate for the Australian legal, cultural and educational environments. CAG refers the Committee to the objects of the Digital Agenda Act,⁶ which set out some policy objectives for Australian copyright law. Copyright reform in Australia should promote a practical enforcement environment for copyright owners, but should also promote technological neutrality and provide reasonable access and certainty for end-users of copyright material.

As such, CAG submits that the US Register of Copyrights' approach to the interpretation of the "particular class of works" requirement in its similar inquiry should not bind the Committee in its present review. CAG submits that following the US approach would not achieve:

- certainty
- technological neutrality; or
- consistency with general copyright and government policy as evidenced in existing legislation.

CAG strongly encourages the Committee to take into account existing Australian legal approaches in deciding how to address the Terms of Reference to the review, and to recommend that the subject matter of the exceptions should be defined by reference to existing sections of the Copyright Act.

⁴ Recommendation of the Register of Copyrights in RM2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.

⁵ Ibid at p.84

⁶ Digital Agenda Act, section 3

4. RELEVANCE OF TPMS FOR SCHOOLS

Information and Communication Technologies (ICT)

Increasingly, educational institutions are incorporating resource material into their curricula which require the use of ICT including, for example, multimedia CDs, web-based resources, DVD and digital television. It is not uncommon now to find that students are requiring access to a range of ICT materials to complete components of their curriculum. At the same time however, copyright owners are able to more than ever before restrict access to their works as a result of the ICT platforms being adopted for their work.

There has been a concerted effort by government at both Federal and State level to embrace ICT based learning into school curricula.⁷ *Australia's Education and Training Action Plan for the Information Economy – 2000* is a publication promoting the need for greater use of ICT in the education sector noting the benefits not only as a mode of efficient delivery of educational outcomes but as a means of preparing Australia's next generation for the information technology age. Importantly, one of the 5 action areas identified relates to 'Online Content, Applications and Services':

'The sector needs to invest in new approaches to education and training content, applications and services which enhance the learning experience in Australia and develop leadership internationally. How content, applications and services are delivered is a key element in the value chain for Australia's education, training and research industries. Australia is a small market and development costs are high. Education and training must cooperate with the private sector to promote an active and productive content and services delivery market.'

Increasing TPM protection for works which are available in the ICT platform, means it is becoming increasingly important to preserve non-infringing uses in the digital environment to ensure legitimate educational objectives are not undermined.

Non-infringing uses

CAG notes the following practical examples of where educational institutions have been or will be prevented from accessing or using copyright works in non-infringing ways unless exceptions are granted under the proposed TPM laws:

1. Mixed copyright status works – where multiple works are available on single multimedia (such as a CD Rom or DVD), it is possible that some works on the media are out of copyright while others remain in copyright. In these circumstances works which are otherwise copyright free may have access restricted because of other works in which copyright still subsists. Retaining access control measures in

⁷ See report by Peter Kearns, *Towards the Connected Learning Society - An International Overview of Trends in Policy for Information and Communication Technology in Education*, June 2002 prepared for the Federal Department of Education, Science and Training available at: http://www.ictpolicy.edna.edu.au/sibling/go/engineName/filemanager/pid/6/Towards_the_Connected_Learning_Society.pdf. Note specifically policies of the various education stakeholders contained in Appendix I. Also see report by Spring Consulting Services Pty Ltd, *Australia's future using education technology*, 2004 available at: http://www.dest.gov.au/NR/rdonlyres/001526C8-212E-4866-88DC-FD2041477EF5/4598/exec_summary.pdf

these circumstances will deny schools access to works only found on compilation media. Accessing these works thereby becomes either impossible in digital formats.

2. Portions of works – under Part VB, it is a non- infringing use to copy and communicate up to a reasonable portion of a work. However, if a TPM prevents the copying of sections of a work or access to only sections of the work, students are unable to create new works on the basis of past works, review works or use works as a learning aid. For example, where an e-book is access protected so that text cannot be selected, students are unable to extract relevant sections for their use without circumventing TPMs. Often the effect is that an otherwise valuable resource is rendered unusable.
3. 'Master' copies – Videos, CDs and DVDs, while durable in storage for long periods of time, are otherwise quite vulnerable to damage when used frequently and widely as can be expected in the educational community. As a result, educational institutions may find that after several years, it is unable to use a copyright work because of the failure in the medium. Alternatives to this may be having to repurchase a copy of the work (an expense that should not be borne by the user) or even worse, if the work is out of print or distribution, lose access to the work altogether. In these circumstances, educational institutions should be permitted to circumvent TPMs to create archive or master copies of works where there is a real threat to the quality and durability of the original copy of the work. CAG notes that the Committee may be concerned by the creation of a broadly-based exception. CAG submits that to meet the legitimate needs of the education sector, the exception could be limited to circumstances where two criteria are met:
 - (a) where the creation of master copies is for educational purposes only; and
 - (b) where the original copy has been legitimately acquired by the institution or a teacher or staff member for the purposes of the institution.

CAG notes that these criteria conform with its previous submissions.⁸

4. Cultural determination – often educational institutions will deem certain parts of a work inappropriate for viewing or access by students (for example, where resources relating to Indigenous Australians may offend members of this community). In these circumstances, access measures that prevent the editing of a work to remove certain parts may result in an otherwise valuable resource becoming unusable.
5. Accessibility for students with disabilities – It is sometimes necessary to re-format material in digital formats to enable students with disabilities to access the work (eg, to ensure the work complies with standards such as W&C recommended by the Human Rights and Equal Opportunity Commission). To the extent that access codes prevent this ability, CAG submits that an exception should be permitted.
6. Foreign based access codes - Educational institutions will, on a small number of occasions, purchase non-infringing copies of foreign works where local copies have never been released. These copies are generally used for teaching languages or cultural studies. To the extent that access measures prevent the use of the copies for strictly educational purposes, CAG submits that an exception should be permitted.

⁸ The Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education Employment Training and Youth Affairs - Submission to the Attorney-General's Department Issues Paper "Fair Use and Other Copyright Exceptions - An examination of fair use, fair dealing and other exceptions in the Digital Age. July 2005 at p.22

5. EDUCATIONAL EXCEPTIONS REQUIRED

In this section of the submission, CAG outlines the exceptions that CAG believes are essential in order to preserve the ability of schools and TAFEs in Australia to continue to provide Australian students with access to copyright materials as permitted under the Copyright Act. As CAG will show, it is simply not sufficient to limit educational access to copyright works to the ability to make acquisition decisions. It is essential that Australian educational institutions continue to be able to use the statutory licences granted to them by the Copyright Act, and for other public interest exceptions in the Copyright Act to be preserved.

Part VB of the Copyright Act

Part VB of the Copyright Act is an educational statutory licence that allows teachers and staff of educational institutions to make multiple copies of small amounts of works for use by students as part of their learning activities. For example, a school could make an electronic copy of a small extract of an online learning resource for students to use in a classroom project.

Part VB has many in-built safeguards to ensure that the rights of copyright owners are protected:

- copyright owners are paid for the educational use of their works;
- generally, only a 'reasonable portion' of a literary, dramatic, musical or artistic work is able to be copied;
- works made available on intranets or online must be protected by password-style protections so that the work can only be accessed by students and staff; and
- educational institutions lose the protection of Part VB if they use a work for other than educational purposes.

The ability of schools and TAFEs to legitimately use copyright materials to teach Australian students was considered to be so fundamental to the copyright balance that Part VB was listed as a permitted purpose in the Digital Agenda Act reforms. CAG submits that the operation of this statutory licence is critically important, and should be protected.

CAG notes that copyright owners are increasingly using access codes and other TPMs to lock up their copyright products, and limit the uses to which these products may be put. This has the effect of preventing teachers from exercising their statutory rights under the Copyright Act to copy and communicate small amounts of a copyright work for student and classroom use. It is important to recognise that this educational use is paid for via significant payments by the Australian educational sector to the Copyright Agency Ltd to distribute to copyright owners. If the existing TPM exception for Part VB is not retained in the Copyright Act, this important public interest use of copyright material will be curtailed and potentially prevented.

CAG requests the Committee to consider to be the copying and communications of works under Part VB to be a non-infringing use that must be protected by this review. CAG submits that the Committee must recommend that an exception to the TPM provisions be introduced so that educational institutions can continue to use copyright materials for educational purposes – irrespective of any TPM that may attempt to prevent this statutorily protected non-infringing and remunerated use from occurring.

Part VA of the Copyright Act

Part VA of the Copyright Act is a statutory licence that enables educational institutions to make a copy of a broadcast for educational purposes (for example, to videotape the ABC news so that a story can be discussed in class the next day). The copy must be made solely for educational purposes, and if it is used for any other purpose the educational institution would no longer be protected by Part VA.

CAG notes that at the time of introducing the Digital Agenda Act, it was not considered necessary to list Part VA as a 'permitted purpose'. CAG understands that the policy rationale for this was that it was not necessary at the time to access a circumvention device or service to use this licence, as the technology did not exist to place TPM controls on broadcasts. CAG submits that this position needs to be reviewed for 2 reasons:

1. It is now possible to place TPM controls on off-air broadcasts, especially in digital formats; and
2. CAG has submitted to previous copyright reviews (supported in its submissions by the national broadcasters) that Part VA should be extended to allow educational institutions to copy broadcasts that are made available online. If this recommendation is accepted by Government, CAG submits that it will be increasingly important to protect the non-infringing uses permitted by Part VA. As such, CAG asks the Committee to consider listing POA VA as an additional exception permitted by Article 17.4.7(e)(viii).

Additional exceptions required

Classroom performance

CAG notes that s.28 of the Copyright Act currently allows teachers to perform copyright works and audio-visual material in class, in circumstances where this would otherwise be a breach of the copyright owner's public performance right. This exception protects the core role of Australian teachers – to teach Australian students in the classroom. CAG has submitted to previous inquiries held by the Attorney-General's Department that this exception should be expanded to allow schools to provide distance education options for students who are absent, ill or located in remote areas (eg, to video tape a classroom discussion and make the film available on the school intranet for distance students to view)

CAG submits that s.28 should also be included in any new exceptions recommended by the Committee due to the impact on this important non-infringing use if such uses were prevented by access coding technologies.

Obsolete technologies

CAG notes that technologies do, from time to time, become obsolete. For example copyright material may be stored on a media that is not operable on the technology platforms available in the marketplace, in which case the material must be copied to a media that is compatible with available platforms.

CAG submits that an exception allowing circumvention of access measures where relevant technologies are obsolete should be included in any new exceptions recommended by the Committee. Without such an exception, the education sector would be prevented from non-

infringing use of materials stored on obsolete media, media designed to be operated on obsolete platforms, or media controlled by obsolete access measures.

CAG notes that obsolescence was considered an appropriate circumstance in which to make an exception in the United States Register of Copyrights' Recommendation.⁹ The Register recommended that "obsolete" be defined to mean "no longer manufactured or reasonably available in the commercial marketplace".¹⁰

CAG submits that the definition of "obsolete" adopted in the United States should be carefully evaluated in light of Australian practice. In particular, consideration should be had of the Australian education sector's specific charter to increase the use of Information and Communication Technologies,¹¹

CAG submits that the definition of "obsolete" in the context of operating platforms and access measures can be in line similar to that adopted in the United States.

However, in relation to materials stored on obsolete *media*, obsolete should be interpreted as a broader criterion. Given that the education sector is encouraged to use new technologies, it should be able to circumvent access controls where the copyright material is stored on a format that is out of date and not supported by the institution's standard operating platform (ie not any operating platform on the market). For example, rather than showing an audio-visual work on VHS in a classroom, the work may need to be transferred to DVD to enable showing on the School's electronic reticulation system.

CAG acknowledges that some of the format shifting examples listed above may not currently be permitted by the Copyright Act. However, CAG has submitted to the Attorney-General's inquiry into "Fair Use and Other Copyright Exceptions - an examination of fair use, fair dealing and other exceptions in the Digital Age"¹² that these activities should be included in any format shifting exceptions introduced as a result of the review. If CAG's submission is accepted, CAG believes that it should be accompanied by an exception to the TPM provisions. CAG submits that the best way of approaching the TPM exception is by a broad definition of obsolete media.

Non-copyright protected material

CAG notes that many products – particularly multimedia products – contain some content that is protected by copyright, and some content that is old material, where the term of copyright has expired and the material is now in the public domain. CAG notes that the definition of "effective technological protection measure" in Article 17.4.7(b) of the FTA refers to an access code that controls access to a protected work or other subject matter. CAG submits that copyright owners should not be able to expand the scope of their copyright rights by using TPMs to protect material that has entered the public domain. As such, CAG requests the Committee to enable educational institutions to access circumvention devices or services to use to provide educational access to public domain material, even if it is included in a product that also contains protected material.

⁹ Recommendation of the Register of Copyrights in RM2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at pp.38-39 and p.43.

¹⁰ Ibid at p.198

¹¹ See discussion above at p.11 under heading 4 - Relevance of TPMs for Schools

¹² See The Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Education Employment Training and Youth Affairs - Submission to the Attorney-General's Department Issues Paper "Fair Use and Other Copyright Exceptions - An examination of fair use, fair dealing and other exceptions in the Digital Age. July 2005 at p.21

6. CONCLUSION

CAG believes that there are strong public policy reasons for the introduction of exceptions to the proposed TPM measures which:

- preserve the current exceptions to circumvention available to educational institutions seeking to use works under section 49, section 50 and Part VB;
- extend the above exception to use of works under Part VA;
- ensure that other non-infringing educational uses, such as classroom performance under s.28 are not prevented; and
- ensure that educational uses are not prevented where the relevant technology is obsolete.

CAG submits that there are two options for complying with the requirement that any exception introduced under Article 17.4.7(e)(viii) must be limited a particular class of works:

1. a recommendation from the Committee that an exception can meet the requirement of Article 17.4.7(e)(viii) if it is limited to a class in the sense of literary, dramatic, musical or artistic works or other subject matter (or, if the relevant test is met by all of these classes, each of them); or
2. for the Committee to recommend an exception based on a particular class of work by reference to specific sections in the Australian Copyright Act.

Importantly, the second approach would reflect the historical framework of copyright in Australia and remain consistent with the recognised goals of Australian government education policies.

Implementing an alternate system of determining exceptions, such that adopted by the US Register of Copyrights, has the undesirable effect of not meeting the requirement for Australian copyright laws to be certain, technologically neutral and provide appropriate protection for access to works by users.


The introduction of these new exceptions is of critical importance to the educational sector to ensure:

- appropriate public access to material for education;
- consistency with government education policies and ICT action plans; and
- important public interest non-infringing uses are preserved in Australian copyright law.

CAG submits that the Committee should bear in mind the fast pace of technological change in assessing which TPM exceptions should be introduced. CAG notes that as digital delivery of educational and other copyright resources becomes increasingly common, the need to protect public interest and educational uses will become more and more important. CAG is concerned that the next review is not envisaged by Article 17.4.7(e)(viii) for another four years. Given the timeframes required to achieve legislative change to the Copyright Act,

CAG believes that there is a real risk to copyright users if the Committee does not recommend significant exceptions in this current review. This is because it will be a period of some years before the Government can resolve any harm to non-infringing uses that are not addressed in the current review, or that becomes apparent in the period of time between reviews. As a result, CAG submits that the Committee may wish to consider recommending that the Attorney-General be given the power to make regulations to introduce any exceptions to the TPM provisions that may become necessary after the completion of this review. CAG submits that these regulations could be made following an 'administrative review', which would enable a regulation making power to be consistent with the spirit of Article 17.4.7(e)(viii).

CAG would be pleased to provide further information to assist the Committee in its inquiries, or to appear to answer any questions the Committee may have in relation to this submission.



Delia Browne
National Copyright Director
Ministerial Council on Education, Employment, Training and Youth Affairs

21 October 2005