



Australian Government



Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Copyright Amendment Bill 2006: Exceptions and other Digital Agenda Review Measures

**Australian Film Commission
October 2006**

1. Introduction

The Australian Film Commission (AFC) is an Australian Government agency, operating as part of the Commonwealth Film Program to ensure the creation, availability and preservation of Australian screen content. The AFC enriches Australia's national identity by fostering an internationally competitive audiovisual production industry, making Australia's audiovisual content and culture available to all, and developing and preserving a national collection of sound and moving image. As the major collector and analyser of data about the industry, the AFC leads opinion, outlook and policy about the audiovisual industries and screen content in Australia.

Following a Federal Government Review of Cultural Agencies in 2002 and 2003, ScreenSound Australia, the National Screen and Sound Archive, was integrated with the AFC and reverted to the title of the National Film and Sound Archive (NFSA) in December 2004. To facilitate the integration and to enshrine the functions of the NFSA in legislation, the *Australian Film Commission Act 1975* was amended to encompass the following functions.

- Develop and maintain a national audiovisual collection;
- Preserve the national collection according to the highest curatorial standards;
- Exhibit and make available the national collection to the widest possible audience.

The AFC's role of fostering an independent internationally competitive audiovisual production industry is now complemented by the role of developing, preserving and providing access to Australia's national collection of sound and moving image .

The NFSA preserves and shares Australia's moving images and sound recordings. The NFSA makes this collection available for all Australians to share through exhibitions, screenings, the NFSA website¹, travelling shows, video and audio products, live presentations, education programs, and television and radio productions.

The AFC fosters a competitive production industry by developing people, projects and the industry. The AFC strives to ensure that filmmakers and audiences throughout Australia have access to a variety of screen activities, and, the AFC is the Australian Government's development agency for screen content.

The AFC's mandate is to both assist the creation of copyright and to utilise copyright material. The AFC supports filmmakers and encourages mechanisms to return to creators valuable income from the exploitation of copyright. Simultaneously, the AFC must seek to provide greater opportunities to access copyright materials, within the framework established by copyright law.

The AFC previously made a submission in July 2005 to the Attorney General's Department on its Issues Paper Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age (available

¹ www.nfsa.afc.gov.au

at <http://www.afc.gov.au/policyandresearch/policy/ip.aspx>). Following the release of the exposure draft of the Copyright Amendment Bill 2006 by the Government, the AFC has reviewed the proposed drafting of the Bill and considered the implications for the film industry and the potential impact on the operation of the National Sound and Film Archive. The AFC provides the following further response.

2. Copyright Amendment Bill 2006

The AFC welcomes the range of measures proposed under the Copyright Amendment Bill 2006 to clarify the exceptions available for libraries and archives.

However, the AFC has identified a number of issues in the current drafting that may pose problems for the implementation of the legislation. In particular, while the legislation provides a degree of certainty in respect of the use by libraries and archives of copyright material, the AFC believes that the current drafting of the legislation does not adequately address some of the particular technical challenges confronting the National Film and Sound Archive in preserving, maintaining and storing its vast collection of audiovisual and sound recording material, spread across a range of formats.

A comprehensive account of the unique technical issues confronting the NFSA is set out in the AFC's July 2005 submission.

The issues that concern the AFC with the proposed drafting are:

- 'first copy/first record'
- 'single copy'
- deeming 'key institutions'; and
- 'cost recovery'.

'First copy' or 'First Record'

The AFC welcomes the introduction of a new exception from copyright infringement under the proposed section 110BA, which permits copying of significant recordings and cinematograph films in key cultural institutions' collections by authorised officers of the library or archive, and section 51B, which provides a similar exception in relation to 'works' (manuscripts, original artistic works and published works). However, the AFC wishes to raise the following concerns with regard to section 110BA.

The AFC understands that section 110BA allows making a copy of:

- a 'first record, or an unpublished record' in respect of sound recordings (s110BA(2)); and
- a 'first copy, or an unpublished copy' in respect of cinematograph film (s110BA(4)).

Copies of material in 'published form' are dealt with in sections 110BA(3) and (5).

The AFC believes that there is a lack of clarity in the terms 'first copy' and 'first record' as they remain undefined. It is unclear whether 'first copy' and 'first record'

are intended to be a reference to the first copy of a film or first recording of a sounding recording ever made, or the first copy or record the AFC has obtained. In any event, both possible interpretations of the term 'first copy' and 'first record', are problematic for the reasons set out below.

Taking film as an example, if the term 'first copy' refers to the first ever copy of a film, the limitation restricts the AFC's ability to adequately fulfil its preservation activities. The nature of audiovisual material means that the copy or version within the AFC's collection may be unique, rare and valuable but may not be the first copy. However the location of the first copy may be unknown, may be inaccessible or may be in a location where there is no guarantee that preservation will occur. It is also difficult to determine the status of items in the AFC's collection. This is because the provenance of a significant proportion of the AFC's collection is unknown or was acquired in an ad hoc manner, for example, by donations from the public with limited information of the origin of the material. A specific example is *The Sentimental Bloke*, which the AFC successfully restored and which has been shown around Australian and several international festivals. The first ever copy of the film has been lost, but the AFC was able to base its restoration on a later copy. A 'first ever' interpretation of 'first copy' would have prevented copying under s110BA.

Further, because of the need for film to be copied (or what is termed the plasticity of film), many and varied copies are produced from one set of negatives. It is not possible to be absolutely sure where the AFC's copy has originated. Even if the AFC holds negatives, they are more likely to be duplicate ('dupe') negatives than final cut negatives. Dupe negatives are usually three or more steps removed from final cut negatives but still are part of the process of the creation of the print. The process of making a film is quite long and the AFC could obtain elements from that chain at any stage or multiple stages. For instance, the AFC might receive 16mm A & B rolls² which the AFC can't duplicate or copy from unless the AFC holds the optical effects reel(s) that tells it what optical effects go where – so the AFC might use a print to copy from instead. The issue of what is 'original' in film is therefore difficult to define in an archive context.

The AFC believes that if the provision is implemented in its current drafting it would prevent the AFC from making copies of material, however rare or fragile, if the copy in its possession did not constitute the first ever copy or if the AFC was unable to determine whether the material was the first ever copy.

If the term 'first copy' refers to the first copy that the AFC has obtained, the drafting continues to be problematic as it would impose impractical limitations on the AFC's ability to preserve and maintain its collections. For example, the 'first copy' of a film obtained by the AFC may not present the best example of copyright material required to be reproduced. The AFC may have in its possession a range of copies of a film that may however all be in need of preservation. Under the current drafting, the AFC may be limited to copying the 'first copy', despite later copies being in superior

² The process of creating a film will usually involve creating a final 'print' from a combination of an 'A' roll and a 'B' roll. The 'A' roll is the primary film roll and will contain the majority of footage, while the "B" roll is reserved for secondary shots or used to overlay specific visual effects. In order to create the final print, both rolls are combined, in conjunction with an optical roll which contains information on the sequencing of the A and B rolls.

condition. For example, the AFC may have two copies of a film in VHS videotape of dramatically different quality. The AFC would be required to reproduce the 'first copy' without regard to whether it was the superior copy and would provide the best outcome for archival purposes.

The AFC believes that the references to 'first copy' and 'first record' adds uncertainty to what may or may not be copied, and also imposes technical restrictions on the archival and preservation activities of the AFC that the legislation is intended to facilitate.

'Single copy' or 'Single record'

The AFC understands that under the proposed s110BA, the AFC's ability to make a copy of a cinematograph film or sound recording is limited to making a 'single copy' or 'single record'.

The AFC considers that this 'single copy' and 'single record' limitation creates problems with the AFC's preservation, access and maintenance functions involved in operating an audiovisual archive, for the following reasons.

Technical requirements: In relation to certain forms of media, making a copy of the material necessitates a number of intermediate copies to be made. For example, making a copy of a DVD may necessitate several cached copies to exist within a computer's memory before being finally assembled into a final copy is created. The proposed amendments have recognised elsewhere that caching does not amount to copyright infringement. These include the use of the Internet by educational institutions not amounting to copyright infringement (section 200AAA) and also disregarding temporary copies in relation to the consumer format shifting provisions (sections 109A and 110AA). In relation to multiple copies that are made during the copying process for archival purposes, the same principle should apply.

Format obsolescence: Although the practice of archiving and preservation often involves reproducing old analogue material to digital formats, it is still often desirable to reproduce material in their original format (i.e., reproducing a film as a film print, rather than digitising the film as a DVD). One reason is that reproducing analogue material to digital format can fundamentally transform the nature of the material (e.g. preserving analogue vinyl records to digital compact disc). However, although it may be necessary to maintain materials in their original format for preservation purposes, making an additional digital copy may also assist in preserving as well as providing greater cost effective access to material. The proposed drafting of the provision would limit the AFC to making a single copy of the material.

Media decomposition: Over time, the media on which copyright material is based may degrade (for example, although digital files may be stable, DVD disks are not). Future preservation of digital files may require material to be refreshed by copying onto new media. This would necessitate more than one copy being made. The current drafting of the provision would restrict the NFSA to making only one copy.

Works: Also relevant to this issue is the equivalent exception from copyright infringement set out under section 51B in relation to copies of 'works' carried out by key cultural organisations. The AFC holds an extensive collection of 'works' that includes scripts, photographs, posters and artworks. The limitation on making 'single

reproductions (ss 51B(2) and (4)) of 'works' is as problematic for the AFC in preserving 'works' as it is in making preservation copies of film and sound. As an example, copies of a script made of a script for preservation face the same technical requirements and format obsolescence issues described above in relation to copies of film and sound recordings.

Interaction of sections 51B and 110BA with exception under section 200AB

The AFC believes that the exception set out under ss 51B and 110BA have the potential to provide the AFC with an effective means of copying material for preservation purposes, provided it is amended to take into account the concerns detailed above.

Notwithstanding, taking film and sound as an example, the AFC believes that more than one copy of a film or sound recording, where those copies or recordings are not from the first copy or first record, could arguably constitute non-infringing acts of reproduction under the scope of the new exception set out under 200AB where those copies are made for preservation purposes in accordance with the AFC's functions. This is because additional copies made for preservation purposes could potentially satisfy the test under section 200AB as they:

- amount to a special case;
- are made for the purpose of maintaining or operating the library or archives (and are not for a commercial purpose);
- do not conflict with a normal exploitation of the work; and
- do not unreasonably prejudice the legitimate interests of the owner of the copyright.

The table below illustrates the AFC's understanding of how the proposed provisions might operate:

Proposed interaction of ss 51B/110BA with s200BA

Activity	Type of Copy	Examples of activities	Permitted
Archiving/ Preservation	<ul style="list-style-type: none"> • Single copy of 'work' • Single copy / record of first copy / record (Preservation Copy) 	<ul style="list-style-type: none"> • Copy of film script • Copy of VHS tape to VHS • Copy of CD to CD • Copy of film to DVD 	Under proposed s 51B or s110BA
	Additional copies necessary to make 'Preservation Copy'	<ul style="list-style-type: none"> • Multiple component copies of film necessary to create 'final print' • Multiple copies of sound recording (into different formats required for preservation, i.e. mp3, .wav file, CD format) 	Arguably, under proposed s200AB
Internal Administration / Internal Communication	Copies made for internal administration	<ul style="list-style-type: none"> • Copies for inter-library loans • Access copies (copies made available to users, to preserve preservation copy) 	Arguably, under proposed s200AB

The AFC understands that the purpose of s110BA is to grant a narrow exception to copyright infringement for key cultural institutions to allow such institutions to preserve material in their possession. However, as the s110BA exception limits non-infringing copies to a single copy/record from the first copy/ record, uncertainty remains in relation to the making of further copies (necessary to create a preservation copy) that may not be in the scope of s110BA, but are potentially within the scope of s200AB.

The limitation to a single copy is a restriction that materially affects the carrying out of archiving functions for audiovisual material. As an example, the AFC may copy a film for preservation under s110BA, but in order to facilitate greater access to the film and to reduce wear on the 'preservation' copy, the AFC would also make a further digital copy. This further digital reproduction does not fall under the express exclusion under s110BA, but would fall under the new exclusion set out under s200AB, provided it satisfied the relevant tests set out under s200AB.

The AFC believes that copying carried out solely for the purpose of preservation should not be subject to the potential uncertainty associated with the application of the s200AB test. A possible solution could be to replace the proposed limitation on 'first copy/record' and 'single copy/record' with a general requirement for copies made under S110BA to be for the purpose of preservation by key cultural institutions. Other conditions, such as the commercial availability test under s110BA, should also continue to apply.

Deeming 'key institutions'

The AFC understands that under the proposed amendments, certain libraries and archives may qualify for the exceptions set out in section sections 51B, 110BA and 200AB.

It is clear that as the leading archive of audiovisual material in Australia, and the organisation responsible for its administration, the proposed amendments are intended to include within their operation the NFSA and the AFC. However, the definition of 'key cultural organisations' refers to government bodies that have the 'function of developing and maintaining ...[an]... archive (ss51B(1)(a) and 110BA(1)(a)). The AFC has many functions, only one of which is developing and maintaining the NFSA. It is possible for the definition of 'key cultural organisation' to be interpreted narrowly, and be considered to apply only to bodies whose sole or primary function is to develop and maintain archives.

Accordingly, to avoid uncertainty, the AFC recommends that the AFC and the NFSA be expressly deemed as qualifying 'key institutions' to which the sections apply.

'Cost recovery'

The AFC understands that under the exception set out under section 200AB, the legislation requires that the use of the copyright material by a library or archive 'is not made partly for the purpose of the body obtaining a commercial advantage' (s200AB(2)(c)).

The operations of the AFC frequently involve charging fees related to recovering

costs for services involved in accessing, maintaining and storing material. The AFC believes that legitimate cost recovery should be distinguished from charging for commercial advantage. The Attorney General's Department in its Explanatory Material indicates that the condition does 'not necessarily preclude a cost recovery charge'³. Accordingly, the AFC recommends that the provision be amended to include express permission for libraries and archives to engage in 'cost recovery'.

³ *Copyright Amendment Bill 2006: Explanatory Material for Exceptions and other Digital Agenda Review Measures*, September 2006, 6.