1 November 2006

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Response to *Copyright Amendment Bill 2006*

Response from the Copyright Office, Swinburne University of Technology ("Swinburne")

Swinburne University of Technology is a member of the Australian Digital Alliance and supports the comments made by the ADA in its submission on this Bill. In addition Swinburne has particular concerns it wishes to raise in relation to the following sections of the Bill:

Schedule 1 – Criminal laws

Part 1 – Main amendments

Swinburne is concerned that the creation of new offences and penalties in relation to the operation of library and archive provisions (ss. 203A – 203H) may unnecessarily increase the administrative impost on organisations that are already highly compliant, however Swinburne has not been able to undertake a detailed analysis of the likely impact due to the short period of time available for commenting on the legislation.

Schedule 6 – Exceptions to infringement of copyright

Part 1 – Recording broadcasts for replaying at more convenient time

This is a welcome and appropriate reflection of the consumer pattern of broadcast consumption and will assist with attempts to educate copyright users about the benefits of complying with the terms of copyright exceptions. We feel however that it would be appropriate for free-to-air broadcast material delivered over the

Internet to also be included as material which can be recorded for replaying at a more convenient time for private and domestic use, as has been done in relation to copying under the Part VA statutory licence (in proposed s. 135C). It is increasingly difficult for copyright users to comprehend why the same content delivered over different platforms should be subject to different usage rules.

Part 2 – Reproducing copyright material in different format for private use

The inclusion of format –shifting is an appropriate reflection of the ways in which contemporary consumers of information and cultural material use new technologies to interact with media products. However if multiple copies are required to enable the proper operation of legitimate technological services or devices, such as certain MP3 management and playing systems, it should be made clear that none of those copies would be considered an infringing copy. This is a technical anomaly that should be resolved to ensure that innovative and commonly used technology does not remain inherently infringing even after the introduction of this new legislation.

It is unfortunate that the proposed new sections in Schedule 6, Part 2 have not adopted more technologically neutral terminology, as the reference to specific types of media is increasingly irrelevant in a world where all media is delivered in digital format. The proposed wording will make this provision less relevant and flexible as new carrier formats for privately used media are developed and media content increasingly shifts across different digital platforms. We are also concerned that as new media forms proliferate it is likely that users will be increasingly unclear about the meaning of terms such as ‘in a form different from’ and not ‘in a form substantially identical to…’. For example in some cases it may be appropriate to

transfer an item into a higher or lower resolution digital format in order to facilitate a private and domestic use.

Part 3 – Use of copyright material for certain purposes

The inclusion of the proposed provision enabling the use of material for certain purposes (ss. 200AB(1) – (4)) is welcome; however Swinburne is concerned about the inclusion of the three-step test in the proposed clause. It may be difficult for staff at an educational institution to determine how the test should be applied, particularly as some uncertainty exists about its legal interpretation in Australia. In particular it is unclear how users will be able to determine when the circumstances of a use will amount to a 'special case'. We consider it would be more appropriate to include a test of fairness such as that already contained in s. 40(2).

In relation to the use by a body administering an educational institution, we consider that the use of the term 'educational instruction' in s. 200AB(3)(b) is not appropriate and that the subsection should be amended to read: '(b) is made for educational purposes'. This would conform to the use of the term in Part VA and VB which is already well understood and appropriately implemented by the sector. Swinburne structures its activities around the concept of 'learner-centred' education, where rather than students simply receiving instructions from a professor, staff and students work together in an interactive learning environment to achieve educational outcomes. The wording 'for educational purposes' is therefore much more appropriate. The term 'educational instruction' could potentially be interpreted narrowly making the provision significantly less workable in the context of a modern educational institution. The use of the term 'educational purposes' would avoid any operational confusion and increased administrative costs arising from the introduction of a new definition.

Part 4 – Fair dealing for research or study

Swinburne is extremely concerned that the proposed changes to s. 40 Fair Dealing for research or study may limit the effectiveness of the section and disable an extremely flexible and workable provision. The exception provided for research and study is extremely important to the education sector as it forms the basis for all work conducted by students enrolled at educational institutions. The current drafting of s.40(3) allows for a flexible response to the wide variety of material which must be used by students and the changing environment in which students operate. We are concerned that if it is the intention of the legislation to place an absolute 10% limit on the amount of a published work which can be considered as 'fair' to reproduce under this section, this is extremely inflexible will have a detrimental effect on the education sector.

Such a change would be an unwarranted restriction on the existing rights of Australian citizens and would limit the ability of citizens to access and engage with all forms of intellectual and cultural material, which is a key element of any democracy. The proposed change would decrease the flexibility of the provision making it unworkable for certain types of media or situations including for example, orphan or anonymous works and out-of-print material. It is not appropriate for a strict limit be applied within the complex and ever-changing information environment of the 21st century. The legitimate activities of copyright users are already under threat from the use of technological protection measures by copyright owners and the lack of exceptions allowing users to circumvent these for legitimate fair dealing purposes. In such an environment it is highly inappropriate to further reduce the operation of this existing right.

Schedule 8 – Responses to Digital Agenda review

Part 1 – Communication in the course of educational instruction

The insertion of a new s. 28A is welcome; however we note again that the use of the term 'educational instruction' is not an appropriate reflection of the modern education environment.

Part 2 – Educational copying of communications of free-to-air broadcasts

Swinburne warmly welcomes the extension of Part VA to facilitate the use by educational institutions of free-to-air broadcast material from online sources when it is made available by broadcasters, such as by podcasting. This removes an anomalous situation in the digital environment where delivery platforms are no longer limited to the broadcasting spectrum, and will allow for a more flexible system in which free-to-air material made available online can be used for educational purposes in the same way as content captured off broadcast.

Schedule 10 – Copyright Tribunal: amendments commencing first

Part 1 – Remuneration required by Parts VA and VB

Swinburne is concerned that these complex changes are being proposed without significant debate about any likely consequences involving the education sector.

Schedule 11 – Copyright Tribunal: amendments commencing second

Part 4 – Records notices

Swinburne is concerned that these complex changes are being proposed without significant debate about any likely consequences involving the education sector.

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