

# **AUSTRALIAN DIGITAL ALLIANCE**

## **SECOND SUBMISSION TO INTELLECTUAL PROPERTY & COMPETITION REVIEW COMMITTEE**

### **COMMENTS ON APRIL 2000 INTERIM REPORT**

**8 MAY 2000**

#### **INTRODUCTION**

The Australian Digital Alliance (ADA) welcomes the opportunity to comment on the IPCR Interim Report.

Broadly, the ADA supports the interim findings and recommendations set out in the Report. The Committee has summarised the issues arising in a clear and objective manner, and has made interim recommendations that should improve the manner in which the tension between intellectual property policy and competition policy is resolved.

This submission includes comments on a number of specific issues set out in the Interim Report.

#### **ABOUT THE ADA**

The ADA is a coalition of public and private sector interests formed to promote balanced copyright law and to give an effective voice to a public interest perspective in copyright debate and reform. Interests represented include industry, educational institutions, cultural institutions, libraries in all sectors, research and consumer organisations.

ADA members are united by the common theme that copyright legislation must strike a balance between protecting the legitimate interests of creators and owners, whilst ensuring reasonable and equitable access to information, ideas and knowledge. Though copyright is about an economic return to rightsholders, it is also about the flow of information and the wider public interest.

#### **PART A**

##### **PARALLEL IMPORTATION**

The ADA supports the Committee's stance in relation to parallel importation under the Copyright Act. As the Committee states at page 12, parallel importation 'restrictions should only be retained if they advance the goals of copyright, and the intellectual property system more generally, in ways that can only be cost-effectively secured by these restrictions.' Otherwise, the negative

consequences of creating import monopolies are likely to outweigh the benefits, and the wider Australian public interest will suffer.

The ADA agrees with the Committee's comment at page 22 that 'policy goals, such as those of promoting Australian cultural production are best pursued by means that are direct, transparent, and publicly accountable, rather than by relying on restrictions on competition.'

There is a clear benefit in Australian copyright users having access to lawfully made copyright material on the global market at the most competitive price. The Committee's recommendation that the parallel importation provisions in the Copyright Act be repealed will help to give users that access. Accordingly, the ADA supports that recommendation.

The ADA also supports any changes to the Trade Marks Act that are necessary to ensure the effectiveness of the recommended parallel importation reforms.

## **PART B**

### **FAIR DEALING AND THE DIGITAL AGENDA BILL**

The Committee makes a number of comments on the debate over fair dealing in the digital environment. Importantly, the Committee recognises:

- the desirability of promoting access to and the wide dissemination of information
- the importance of ready access to information if new ideas and innovations are to proliferate
- the fact that copyright exceptions such as fair dealing help to facilitate the flow of information and ideas with very positive effects on further innovation

Fair dealing and copyright exceptions are a key part of the copyright balance, and have long played an important role in promoting access to information and ideas, particularly for purposes such as research and study. New technology does not change the importance of that balance, nor is it a reason for winding back the scope of fair dealing. The ADA strongly supports the Committee's comment at page 58 that there are **no** demonstrable reasons for altering the Government's policy of extending the current balance into the digital environment.

### **THE LIBRARY AND ARCHIVES PROVISIONS**

The ADA welcomes the comments made in relation to the libraries and archives provisions in the Digital Agenda Bill.

Some copyright owner interests have repeatedly claimed that, unless the library provisions are substantially wound back, libraries will compete unfairly with publishers in the digital marketplace. These claims are almost entirely without foundation, and raise questions about the true objective underlying their position. As the Committee notes, the provisions permitting libraries to make and supply copies to their users are subject to a number of significant restrictions that make it questionable that they will compete with publishers. Indeed, in the ADA's submission, it is almost impossible to see how libraries can compete. The restrictions faced by libraries are worth repeating:

- libraries can only copy for users who sign a declaration that they will use the copy for research or study
- libraries can only supply an article from a periodical publication

libraries can only supply a reasonable portion of other works  
libraries must destroy any intermediate copies made in the course of supplying to a user  
libraries can only charge a cost recovery fee for their service  
libraries must be not-for-profit entities to rely on the exceptions  
penalties apply to breaches of these restrictions

The claim that libraries are a threat to emerging markets for works look even more hollow when the facts of the current market are taken into account. Notwithstanding the existence of document supply services within libraries in recent years (which operate under sections 49 and 50), a number of commercial document supply services have sprung up and thrived. The reality is that new commercial services have emerged, and others will continue to emerge, without any 'threat' from the limited offerings of libraries.

This begs the question, what is the true objective of bodies like the Copyright Agency Limited (CAL) in their aggressive lobbying against the library provisions? If one accepts that libraries cannot seriously be regarded as a competitive threat, what other reason might there be for seeking the removal of these provisions? This, ultimately, is a question for those directing the CAL lobbying effort. However, it is clear that CAL would enjoy a larger licensing monopoly if libraries could no longer rely on copyright exceptions to provide their services to researchers and students.

The ADA strongly supports the Committee in its view that the provisions of the Digital Agenda Bill will **not** have the effect of destroying an emerging online market for articles and portions of works. The ADA also strongly supports the recommendation that the Government should proceed with conditions no more restrictive than are currently imposed on libraries.

## **FIRST DIGITISATION**

In its recent report on the Digital Agenda Bill, the Andrews Committee recommended that copyright owners be given a new right to control 'first digitisation' of works, ie print to digital copying. Although some exceptions were proposed, there was no exception recommended for the research or study category of fair dealing.

The ADA welcomes the IPCR Committee's observation that this is a **fundamental alteration** of the concept of fair dealing that has the effect of **narrowing** the fair dealing exceptions in the Copyright Act. Not only is this contrary to the Government's stated policy position of maintaining the current balance, but it would, as the Committee notes, 'ultimately erode Australia's ability to make productive use of copyright material.'

Accordingly, the ADA strongly supports the recommendation that the Digital Agenda Bill should be adopted in its current form **without** the incorporation of the concept of 'first digitisation'.

## **CLRC RECOMMENDATIONS ON OPEN ENDED FAIR DEALING DEFENCE**

In Part I of its Simplification Report, the CLRC recommended that an open-ended fair dealing defence be introduced under Australian copyright law. This approach would allow fair dealing to apply more broadly than the closed set of purposes currently allows.

As the IPCR Committee notes, some interests have opposed this recommendation on the basis that it lacks certainty. The Committee goes on to question whether sufficient offsetting benefits have been identified that justify the costs and uncertainties of an open-ended fair dealing model.

In the ADA's submission, the CLRC's fair dealing recommendation has significant benefits in terms of flexibility, and only limited costs in terms of uncertainty.

The flexibility benefits can be illustrated by considering the Committee's own comments in relation to caching. The Committee makes the specific comment that it would prefer a solution to the caching problem that is not technology-specific. This is exactly where an open-ended fair use style defence plays a role. By applying well-articulated principles of 'fairness' the Courts would be able to treat certain types of caching as non-infringing, without the need for a complicated legislative solution.

The costs of an open-ended defence may also have been overstated. Although it is true that the Australian courts have not yet developed clear rules about the scope of an open-ended fair dealing defence, those rules do exist in the case law of the US Courts. The CLRC proposal would allow users, owners and the Australian courts to 'piggy-back' on most of the US fair use case law, which includes clear guidelines on how to apply the defence.

The ADA strongly supports the CLRC's recommendation on fair dealing, and urges the IPCR Committee to reconsider its position. We are happy to provide further information on this issue if the Committee has any specific concerns or questions.

## **COLLECTING SOCIETIES**

Given the market power of collecting societies, and the role they play in the copyright licensing system, the ADA agrees that effective means need to be in place to ensure that their power is not abused.

Accordingly, the ADA supports the Committee's recommendations that:

- the adequacy of a society's dispute resolution mechanism should form part of its review
- all licensing arrangements of a society should be considered during a review (not just statutory licences)
- collecting societies should be subject to periodic review by the ACCC
- more than one declared society should be permitted for each class of rights holders
- collecting societies be **required** to implement accessible, approved alternative dispute resolution procedures

The ADA also favours greater transparency and accountability in relation to the activities of collecting societies. Where they spend their money (eg what type of rights holders receive what share of licensing revenue) is one example of the information that ought to be more readily available to their members and licensees. This type of transparency ought to be a condition of their status as a declared society.

DOCITA's suggestion that collecting societies develop and adopt a voluntary code of conduct in consultation with creators, users and Government is one possible way of addressing these issues.

## **COPYRIGHT TERM**

For reasons set out in our first submission, the ADA strongly endorses the Committee's stance on the issue of extended the term of copyright protection. There is simply no evidence to suggest that an extension would benefit Australia as a whole. Indeed, there is evidence to suggest that the costs of an extension would far outweigh any claimed benefits.

## **CACHING**

As noted in previous submissions, the ADA supports provisions designed to confirm that caching does not expose ISPs and others (including users browsing the web and hardware manufacturers) to liability for copyright infringement. We agree that caching provides significant benefits to Internet users through improved network capacity, reduced connectivity times, and increase of access to sites (page 80).

However, as the Committee notes, although section 43A will provide some protection, it may not solve the issue of forward or proxy caching.

The ADA notes Telstra's suggested solution to the caching problem at pages 82-83 and agrees that this conditional defence may be an acceptable compromise solution. We also note the Committee's concerns about the technology-specific nature of this and other similar proposals.

As mentioned above, the ADA believes that the CLRC's open-ended fair dealing proposal may provide a more satisfactory technology-neutral solution to this problem. If this defence was included in the Copyright Act, it would be open to the courts to develop an exception for proxy caching which balanced the competing arguments in a flexible and practical way.

## **COMPUTER SOFTWARE**

The ADA has always strongly supported the amendments to the Copyright Act designed to address interoperability and other issues relevant to the scope of computer program protection. Accordingly, we agree that the Government should review the Computer Programs provisions to ensure that all legitimate acts necessary to achieve interoperability are permitted (page 85).

The 1999 amendments now make it possible for Australian developers to create innovative, interoperable products without the risk of unreasonable claims of copyright infringement from existing dominant vendors in the software industry. The ADA rejects IBM's submission that these amendments devalue the level of copyright protection and enforcement in Australia. We also reject the suggestion that the amendments do not properly implement the WIPO Copyright Treaty. This is reinforced by the fact that the USTR has, in the last month, taken Australia off the s301 watch list.

In relation to the Powerflex case, the ADA supports any amendments that help to overcome the negative consequences of the High Court's finding in relation to the compression table. Possible solutions to consider in this context include:

- Amending section 47D(d) to cover program-to-file interoperability (which arose in the Powerflex case), not just program-to-program interoperability.
- Including a provision modelled on 17 USC 112(b) which confirms that, where idea and expression merge in a functional element of a computer program (eg a compression table), that element is treated as unprotectable for copyright purposes.

## **CONCLUSION**

The ADA welcomes the Interim Report and, subject to specific comments above, supports the approach taken by the IPCR Committee.

We are happy to provide further comments and to answer any questions the Committee may have in relation to this submission.

**CONTACT DETAILS**

Before 15 May 2000

Jamie Wodetzki, Consultant  
0402 090920

From 15 May 2000

Executive Officer, ADA  
02 6262 1273