



Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

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Submission on Fair Use and Other Copyright Exceptions

Australian Government Libraries Information Network (AGLIN)¹ fully supports and endorses the issues raised and views expressed in the submission to this review made by the Australian Libraries Copyright Committee (ALCC) and the Australian Digital Alliance (ADA).

The broader issues relating to fair dealing and other exceptions in the Copyright Act, and in particular the need to have many of the exceptions such as format and time shifting for non-commercial purposes extended to institutions, as well as preservation copying, back-up copying, non-commercially viable copies such as thumbnail images to facilitate access, treatment of orphaned works, the treatment of unpublished works, and caching as delineated in the ADA and ALCC submissions are issues that impact on Australian Government libraries ability to service fully the information needs of Australian Government and detract from the intent of the Copyright Act.

In addition to the issues raised above, AGLIN members are particularly concerned about the ability of contracts to overwrite the provisions of fair dealing exceptions including statutory licenses in the Copyright Act.

Government departments are permitted to copy materials under Section 183 of the Copyright Act and each year government departments pay royalties to the various collecting societies under terms negotiated by Attorney-General's Department. However, use of materials purchased under license is often restricted by the terms of the license signed at the time of purchase. An example of how these restrictions apply is illustrated in the scenario below.

¹ List of AGLIN membership is attached at the end of this document (Attachment 1)

A government department needs to collect in a small database, for internal use, newspaper reports and journal articles about the department and relating to the department's portfolio. Over time such a database has the potential to provide the department with a research tool providing ready access to public comment about the department and its work including a tool for reviewing the impact of how certain government policies have been reported in the press.

Under Section 183 of the Copyright Act a department has a right to do this provided appropriate remuneration is paid to the copyright owners.

These newspaper reports and journal articles are available in digital format from online subscription databases. However, many of the contracts with vendors of these databases specifically do not permit local storage of any information harvested from the database, thus preventing the government department from exercising its rights under the statutory license.

The department can collect the same information from printed sources under the statutory license.

Increasingly electronic publishing is starting to replace paper publishing with some publications no longer having print equivalents. The restrictions on the use of electronic content contained in licenses have the potential to severely limit government access to essential information.

Further, the current ability of contracts to enable vast tracts of information to be excluded from the exceptions provisions of the Copyright Act with, in some cases, highly restrictive conditions imposed on how digital information is distributed, used and stored for re-use is counter to the intent of the Copyright Act.

In accordance with the recommendations of the CLRC's Copyright and Contract Report², the Copyright Act 1968 must make it clear that contractual provisions purporting to exclude or modify any of the exceptions to infringement provided for in the Act are unenforceable. Failure to clarify this issue by way of legislative reform frustrates the very policy justifications for including exceptions to infringement in the Act. 'Balance' between owners and users cannot be achieved through fair dealing if fair dealing can be easily excluded.

In addition, AGLIN supports the ADA and ALCC hybrid model which does not seek to replace the existing fair dealing provisions with 'fair use' as it exists at s.107 of the *Digital Millennium Copyright Act*³ but supports the addition of flexibility to the current fair dealing provisions.

² Copyright Law Review Committee, *Copyright and Contract*, 2002

³ 17 U.S.C. Section 107 (2005)

AGLIN also supports the ADA and ALCC view that additional specific exceptions need to be introduced to update Australian law in areas where it clearly lags behind other jurisdictions and where there is a clear and immediate need for public institutions and citizens to be able to make a free use copy without first waiting for a court decision.

Charu Sood
Convenor, Copyright Taskforce, AGLIN

Kym Holden
Executive Convenor, AGLIN