

Response to the Discussion Paper by the Copyright Agency Limited

Copyright Agency Limited

The Copyright Agency Limited ("CAL") is a not for profit company limited by guarantee. CAL is owned by authors and publishers of print materials and collectively administers their copyrights where individual administration of those rights is impractical.

CAL has approximately 1400 author members and 1500 publisher members, including academic authors, research institutes and university publishers. CAL represents thousands more rightsholders through those agreements, through reciprocal agreements with overseas collecting societies and through membership of the Media Entertainment and Arts Alliance. CAL has been operational since 1986 and, in 1997, CAL's licence revenue was approximately \$18 million.

CAL's primary activity is the administration of the statutory licence contained in Part VB of the *Copyright Act 1968* ("the Act"). Part VB of the Act acknowledges that the copying of published works by educational institutions has a significant effect on the market for those works. Accordingly, unlike other copying exceptions in the Act, such copying by educational institutions is subject to the payment of equitable remuneration.

The Act provides that the statutory licence in Part VB of the Act is to be administered by a collecting society declared by the Federal Attorney-General to be the collecting society for the relevant class of rightsholders.

CAL has been declared by the Attorney-General as the collecting society representing owners of copyright in works, other than works included in sound recordings or cinematograph films, whose works are copied under the Part VB statutory licence. CAL requests that the Review Committee amend paragraph 2.1.2 in Appendix 16 to reflect the fact that CAL administers Part VB of the Act, not VA, the latter of which is administered by Screenrights.

In addition, CAL has copying agreements with the Federal, State and Territory governments to facilitate the copying of CAL's members' works by those governments under the statutory licence in section 183 of the Act.

CAL also administers other licences on behalf of its members. These voluntary licences include licences with for-profit educational institutions, corporations, religious organisations, not-for-profit associations and media monitoring organisations.

CAL has recently introduced two additional voluntary licence schemes which allow licences to be offered for digital copying of certain members' works. One of these licence schemes, Copyright Xpress, also allows CAL to give individual permission for the one-off instances of copying of works represented by CAL.

CAL is presently involved in an application to the Copyright Tribunal in which the interaction between provisions of the Copyright Act which permit certain copying as a fair dealing and the copying permitted under Part VB will be considered.

General Comments

CAL has reviewed the West Review in its entirety, but in this submission, intends to comment only on Appendix 16 on Intellectual Property.

Generally, CAL is of the view that the Review and, in particular, Appendix 16 highlights current issues and concerns in higher education regarding copyright both comprehensively and accurately. With few exceptions, CAL supports the Review's recommendations. In particular, we urge the government to give copyright law reform a higher priority.

However, we are of the view that the Review Committee makes several erroneous assumptions.

First, the Review Committee appears to suggest that increasing levels of copyright protection will hinder multimedia and on-line development. CAL is of the view that an important distinction needs to be made between the need to afford users access to *existing* material protected by copyright on fair terms in order to allow the creation of multimedia works and the need to provide an adequate incentive to rightsholders to create, publish and disseminate *new* materials protected by copyright including multimedia works. In assessing an appropriate level of copyright protection, both needs must be considered and balanced.

The creation of new works may be discouraged if copyright law permitted existing works to be readily included in multimedia works without reference to the rightsholder. If new works were subject to the same application of exceptions to copyright as existing works, the rightsholder in the new work will not be adequately protected nor able to control the exploitation of that work.

Secondly, the Review Committee appears to be concerned with the *level* of copyright protection in Australia, in particular, an assertion that the level of protection may be too high.

CAL's experience is that the concern of users and rightsholders is not the level of copyright protection but with various uncertainties within the copyright law, including the uncertain application of the current copyright framework in a digital environment. It is CAL's view that it is not the level of protection but *uncertainty* which is inhibiting the development of an active and diverse market for materials protected by copyright in Australia.

Consequently, CAL does not support the Review Committee's recommendation that that "further copyright obligations should not be undertaken by Australia at the international level until the possible competitive disadvantages for on-line industries resulting from any increased level of copyright protection have been fully considered". CAL notes that the Australian government is, through the Digital Agenda Discussion Papers, already conducting a vigorous consultation on these issues.

Our further comments in response to the Executive Summary of Appendix 16 are as follows.

Copyright in a Digital Environment

In CAL's view, copyright is not only "likely to be relevant in the on-line economy", but strong copyright law and administration will be essential if an active and diverse market, serving both rightsholders and users, is to thrive. Copyright has proven to be an

appropriate and effective mechanism for the trading of intellectual property for over four hundred years, despite immense technological and practical change over that time.

Copyright is the only market based mechanism by which rightsholders can trade their works, whilst providing them with an incentive to create, publish and disseminate their works to the public and serving the public interest of increasing the range of works available to the public. Alternative incentive mechanisms, including patronage, grants and employment, are not universal, nor free of editorial influence, in the same way as copyright.

However, CAL agrees that Australia's current copyright framework requires significant modification if it is to adapt to the challenges of a digital environment. CAL is of the view that the *fundamental principles* of copyright, as set out in international treaties to which Australia is a party, should be retained. However, the current application of the copyright framework, based on a print environment, cannot, in CAL's view, be applied successfully to a digital environment.

For example, the current *fair dealing* exceptions, which allow limited secondary uses of material in a print environment, if applied to a digital environment, allow free uses of portions of works. The effect of this is to limit the rightsholder's ability to market portions of those works on demand in digital form. This is likely to be an important use of copyright in future.

Further, users often assert that *browsing* on-line should not be controlled by copyright, on the basis that the browsing of a book is not controlled by the copyright owner. This assertion confuses two quite separate activities. The browsing referred to is similar to a "test drive", providing an opportunity to consider and review the work to determine if access to the complete work is desirable. Copyright owners do not seek to control this activity. However, rightsholders do seek to control *reading* on-line (as distinct from browsing), which is an important exploitation of the copyright in the work.

Until such issues are satisfactorily resolved and clarified, rightsholders will be reluctant to make their works available in digital form. To this end, CAL supports Australia's ratification of certain international treaties, which adapt print based obligations to the digital environment.

CAL has, during the past year, made detailed submissions on these issues in response to the Australian Government's reform agenda, in particular, the Copyright Law Review Committee. We would be pleased to provide the Review with copies of these submissions, if necessary.

Expanded Activities

In CAL's experience, the scope of post secondary institutions to expand and develop their activities through the use of digital technologies is significant. Digital technology offers post secondary institutions the opportunity to realise greater storage and resource related efficiencies, offer new services and reach vast new local and international markets.

Many rightsholders perceive the more intensive use of their works which flows from these opportunities as a threat to their interests. This is due to the uncertainty within copyright law of the extent to which their works can be used for free in the furtherance of these activities by universities, consequently rightsholders are reluctant to make their work available in digital format.

Consequently, post secondary institutions are unable to proceed with certain projects or, if they do, may be taking significant legal and commercial risks. Australian students therefore are unable to access valuable educational materials protected by copyright. Post secondary institutions are prevented from offering certain modes of course material delivery, thereby restricting their ability to effectively compete in significant distance education markets overseas.

In CAL's view, the inability for universities to act does not result from the level of copyright protection afforded to such works, but rather, from the uncertainty in applying the current copyright framework to digital use.

On behalf of its rightsholder members, CAL is working with post secondary institutions at a number of levels, in an attempt to clarify the relevant issues as soon as possible. In addition to lobbying both in Australia and internationally, through our international body, CAL is discussing pilot projects (including participation in a consortium for funding of the Australian Universities Online project) with certain institutions.

CAL has also commenced proceedings in the Copyright Tribunal seeking clarification concerning the way in which the current law applies to certain new uses of material protected by copyright in universities, as a test case.

Whilst these activities are proceeding, they are doing so slowly, thereby placing both Australian rightsholders and post secondary institutions at a competitive disadvantage internationally. For this reason, we strongly support the acceleration of the government's copyright reform agenda.

On-line Opportunities

CAL agrees with the Review Committee's comment that "the ability of the education sector to take advantage of the opportunity afforded by the on-line economy may be hindered by the failure of the copyright framework which governs the buying and selling of information to adapt to the digital and network environment". However, as noted above, the failure lies in the uncertainty in applying copyright principles in a digital environment, rather than in the principles themselves.

In CAL's view, Australian rightsholders and other copyright based industries are already losing ground in the international marketplace as a consequence of the lack of confidence in Australia's copyright law framework. It is essential that this be addressed before that competitive advantage becomes irrecoverable.

Appropriate Reform

CAL agrees that amendments to the Act to facilitate the production of multimedia and other digital works and delivery of on-line material must be considered. However, CAL is strongly of the view that, in these considerations, it is important to balance the rights and interests of rightsholders and the interests of users in having access to such works efficiently and on reasonable terms.

In this context, it is important to bear in mind that multimedia producers are also rightsholders themselves, as well as users of existing material protected by copyright. For this reason, CAL is of the view that, in considering an appropriate level of copyright protection, the balance must be between the need to have reasonable access to *existing* works and encouraging the creation, publication and dissemination of *new* works.

Further, CAL is of the view that, whilst legislative reform is essential in setting out the framework for new technological uses of material, administrative and practical reform are equally as important. To this end, CAL has developed voluntary licences for certain uses of participating CAL members' works, including new media and transactional use. We are also cooperating with other copyright collecting societies with a view to providing multimedia developers and other users with a "one stop shop" through which they can clear copyright rights to a range of materials protected by copyright. Discussions about developing an association of collecting societies are progressing.

Additionally, CAL is of the view that the provision of information and education to both rightsholder and users concerning their rights and obligations, respectively, is essential in the new media environment. Many users still believe that material available on the Internet is not protected by copyright. Consequently, many rightsholders are reluctant to make their works available on-line. An active and diverse on-line environment depends upon rightsholders having confidence that their rights can and will be respected on-line.

As discussed in the West Review, the development and application of rights management information systems is an important means of instilling this confidence. On behalf of rightsholders in Australia, CAL has been active in participating in the development of such systems through its international body, the International Federation of Reproduction Rights Organisations (IFRRO).

International Obligations

CAL does not support the Review Committee's finding that "further copyright obligations should not be undertaken by Australia at the international level until the possible competitive disadvantages for on-line industries resulting from any increased level of copyright protection have been fully considered".

In CAL's view, it is shortsighted to focus only on the short term *economic* consequences of the fact that Australia is a net importer of material protected by copyright and the *financial* cost of copyright to post secondary institutions. Appropriate levels of copyright

protection foster local creation, which, in the long term, represents a potentially valuable export commodity for Australia. Cultural factors also warrant consideration: copyright assists in protecting and fostering our unique culture.

Without strong copyright protection, there may be insufficient incentive for Australian rightsholders to create and disseminate works which reflect our culture and meet local demand, including student needs. Australian users may then be forced to rely on imported works which do not contribute to the Australian economy nor adequately meet Australian requirements, particularly in an educational context.

The Australian Government played an active role at the World Intellectual Property Organisation (WIPO) Diplomatic Conference in Geneva (December 1996), following widespread consultation with copyright interests in Australia. The resultant WIPO Copyright Treaty provides new rights and obligations, adapted to a digital environment. However, these obligations are subject to appropriate limitations and exceptions, which are determined at a domestic level.

For this reason, CAL does not agree that Australia's ratification of the WIPO Copyright Treaty would necessarily require *increased* levels of protection, but rather, would

require *equivalent* and appropriate levels of protection for copyright based material as applied in a digital environment, as well as certainty in its application.

Additionally, CAL would support Australia's continued active involvement in any international discussions on such issues. This is essential if the views of smaller net importers are to be heard against the interests of larger net exporters such as the United States and European Union.

Further, CAL is of the view that strong copyright protection is essential if on-line industries are to be internationally competitive. The demand for on-line delivery systems is contingent upon having access to a diverse range of quality content. Unless there is a market based incentive for content owners to disseminate their materials, such materials will simply not be made available on-line.

Already, certain multinational corporations are purchasing copyright rights to content, in particular, scientific, medical and technical material, and only making that available to those that can afford to pay significant sums for access. This growing practice effectively denies the wider community of access to valuable material. CAL is of the view that, if a strong and effective copyright framework were established, much information would be democratised, rather than only being corporatised. A diversity of sources, both corporate and individual, would result.

CAL notes that Australia is giving further consideration to ratifying certain international treaties. In principle, we support the proposed WIPO Databases Treaty, however, we are of the view that further consultation with relevant interests and discussion at an international level is necessary. CAL has made a submission to the Federal Attorney-General's Department to this effect.

Copyright Clearance Arrangements

CAL notes the Review Committee's finding that, at present, copyright clearance arrangements for multimedia producers can be prohibitive. However, we are strongly of the view that this is indicative of a developing industry. As the industry matures, copyright clearance arrangements are likely to become centralised and resultant administrative efficiencies can be passed onto multimedia producers. CAL and other rightsholder representative groups are working with both rightsholders and user groups to develop appropriate and practical copyright clearance arrangements.

For example, in 1995, CAL worked with Silver Stream Pty Limited to license the copying of APAIS indexed journal articles for inclusion in a series of CD-Roms as part of *The Definite Article* project. The market for this project was post secondary educational institutions. CAL developed licences for the copying of journal articles onto the CD-Roms and subsequent "on-copying" by users of the product.

More recently, CAL developed a new media licence, under which participating rightsholder members of CAL can set the rates and terms for the use of nominated works in new media products. This licence is being further refined in light of experience.

In addition, CAL has participated in meetings with other copyright collecting societies to develop ways in which users, including new media producers, might approach collecting societies as a "one stop shop" for the clearance of rights contained in a broad range of literary, musical, artistic audio-visual and other works. Also, CAL has

been having further discussions with representatives of the Cooperative Multimedia Centre with a view to cooperating in developing a copyright clearance centre.

Additionally, CAL is working, through IFRRO, to develop rights management information systems, including the Digital Object identifier (US) and the Common Information System (European Union) which can be applied to any digital work that might be incorporated in a new media product.

Finally, CAL is working with the Australian Copyright Council and other not for profit organisations, to assist in disseminating information and education to rightsholders and users regarding the copyright implications of new media products and practical means for obtaining necessary rights clearances.

CAL is of the view that copyright clearances for new media products will become both practical and cost efficient as the industry matures. In the meantime, we would urge government support, but not legislative intervention, for such development. In particular, we would resist any attempt to introduce a statutory licence for new media producers. To do so would, in our view, be premature and prejudicial to the legitimate interests of rightsholders.

Copyright Administration

CAL agrees with the Review Committee's finding that "technology will be essential in finding solutions to rights acquisition, licensing, monitoring of use and protection of intellectual property from unauthorised use in the digital era." In CAL's view, obtaining the confidence of rightsholders is contingent upon the existence of appropriate legal and technological protection.

As noted above, CAL is actively involved in such development. Whilst a number of different systems have been developed and are being trialed, no one system has yet emerged as setting an appropriate international compatible system. Australia should actively participate in the development of international systems and avoid adopting any one system exclusively before it is appropriately trialed and obtained widespread international support.

CAL also agrees with Review Committee's finding that further resources should be committed to the investigation of appropriate systems. We urge the Review Committee to consider recommending that, in addition to the Cooperative Multimedia Centres, other appropriately qualified organisations should also be eligible for funding. For example, as noted in paragraph 5.4 of Appendix 16 of the Review, the copyright collecting societies jointly applied for funding, but our bid was non-complying, therefore unsuccessful. If further funding were available, the major rightsholders organisations in Australia could draw upon their unique expertise and contacts, to fast track these important developments.

National Office of Information Economy

CAL strongly agrees with the Review Committee's recommendation that a high level multidisciplinary taskforce should be established as a matter of urgency within the National Office of Information Economy to drive important copyright initiatives. In CAL's view, there have been many reforms initiated over the last few years, however, few have been implemented. Responsibility for copyright related issues appears to be fragmented between a number of different portfolios and inter-departmental committees, creating duplication and hindering the increasingly urgent need for reform.

Australia must act in the near future if copyright related industries are to realise the significant international markets and the opportunities they offer. Failure to do so may place Australia at a permanent disadvantage in global terms.

In particular, CAL seeks assistance in establishing collecting societies in Australia's major trading partners for educational services, notably, the Asia Pacific region. Centralised copyright management organisations, such as CAL and its IFRRO affiliates, facilitate the cross border distribution of rights and copyright fees. The establishment of an international network of such societies is essential if international trade in digital materials protected by copyright is to flourish. IFRRO is currently addressing many of the complex territoriality and liability issues in such an environment.

Final Comments

CAL would be pleased to provide the Review Committee with further information on any of the issues raised in this submission. We would also be pleased to meet with Committee members at a mutually convenient time to discuss our submission in further detail.

Yours faithfully,

Michael Fraser
Chief Executive

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