



22 November 2012

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2017

Dear Madam

**Copyright and the Digital Economy (Issues Paper 42) - Private Submission**

I refer to the Inquiry the subject of the above.

The purpose of this letter is to make submissions regarding certain of the current provisions of the *Copyright Act 1968* (Cth) (**the Act**). In doing so, I am not representing any client or group. The firm of which I am a member may well make, or contribute to, submissions to the Commission. If so, those submissions are not connected with these in any way. The opinions expressed in this letter are my own. My *curriculum vitae* is attached.

It is respectfully submitted that a number of the provisions of the Act that are unnecessarily narrow. In some cases, whether this has always been the case or the deficiencies in these provisions have become more obvious or serious with the changes in society brought about by the digital age, one cannot always say. Maybe they made sense once, but they certainly do not make sense now. In other cases, additions to the Act of recent provenance were always pointlessly narrow as a consequence either of the determined lack of technological neutrality preferred by the drafters of the legislation (notwithstanding their protestations to the contrary) or the limitations of the policy-making process.

I therefore make the following submissions with a view only to correcting what appear to me to be obvious deficiencies in existing drafting. If the Commission sees fit to find within the scope of this Inquiry an opportunity to fix these problems, I doubt that any legitimate interests will be adversely affected at all, or at least any more than they already are in practice.

**Cloud, caching etc, transformative uses and data and text mining**

1. Generally speaking, it is respectfully submitted that any concerns regarding ‘the cloud’, caching etc.. transformative uses and data and text mining are red herrings. The provisions of the Act regarding copying in any form are, or should be, oblivious to the question of how, or where, any copy is stored or made. This is assumed in all of the submissions below. If any such storage or making entails an infringement of copyright, or an infringement of copyright in another jurisdiction, that is a matter of private treaty between any service provider involved and its customer. They can work it out and need no help from the legislation to do so.

2. In answer to all the questions raised in the Issues Paper on these matters, internet-related functions have never been, nor will they ever be, impeded by anything in the Act. The digital age, with all that it entails and the use made of its products by ordinary people, is going to march on whatever the Act says.
3. There is nothing restrictive of expression or creativity, or commercially onerous, about any part of the Act. The assumptions that many seem to justify on such grounds that there is a need for more exceptions to copyright or more statutory licences are, in my respectful submission, baseless.

### **Format shifting**

#### 4. *General comments*

There is no apparent policy basis for the extremely narrow operation of these provisions – certainly none was given in the Explanatory Memorandum to the *Copyright Amendment Bill 2006* by which this provision was introduced. The general justification for this and other provisions introduced was that the change “would restore credibility to the Act by better reflecting public opinion and practices.” That is plainly absurd.

The other objection to these provisions, as already noted in the Issues Paper, is their pointless complexity. This seems to be driven by an arbitrary notion of ‘format shifting’, rather than a consideration of what ordinary people do with copyright material. So long as these uses are not commercial and are of a private nature:

- (a) how people create copies, where they get them, where they store them and to whom they communicate them in the ordinary course of social discourse for non-commercial purposes should be of no concern.
- (b) the restriction to a single copy is equally silly. It is becoming increasingly common that a person will store copyright material in more than one computer and on DVD – more than one copy is perfectly reasonable.
- (c) the notion that disposal of the original should render the record of it kept digitally a copyright infringement exposes the Act to ridicule.

If we want to restore credibility to the Act and better reflect public opinion and practices, then we need to change this provision accordingly. Nothing in the Act now or in the future will change human behaviour in this regard.

It is noted that the Canadian Act, as observed in the Issues Paper, now has a broad private use exception in the recently enacted s 29.21 – 29.24. This has much to recommend it, both in its application to all works and subject matter other than works, as well as its simplicity.

The only possible cause of concern with this provision may be its reference to “non-commercial uses”, which is not defined and the use of the expression “dissemination” and its definition, may be too broad – in its place the word “communicate” and “communication” may be preferred.. It may be better to maintain the notion of “private and domestic use”, provided the current definition is extended, because:

- (a) simply put, it seems a pedantic distinction that I can make a copy for my own use, but my son cannot do so for me (or for use generally within the household).
- (b) more importantly, as discussed further below, there is much to be said for a definition of non-commercial use which extends to the making of copies within a business but not for commercialisation or distribution in any manner, including for the purposes of backup.

It is submitted that the following definition may be more helpful than the current definition:

*private and domestic use means the copying or communication of a work or other subject matter within a household comprised of members of the same family by any member of that family for his or her own private use or for the private use of any other member of the same family on or off domestic premises.*

5. *ss. 43C – Reproducing literary works for private use*

There are two major concerns with this provision:

- (a) its limitation to works in books, newspapers or periodical publications. In the ordinary, contemporary use of the Internet and computers today, people store all sorts of literary works on their computers, such as comic strips, recipes, plans, emails, business correspondence, specifications and other records – but, really, there is no need to exclude any literary work, given the non-commercial nature of the use contemplated by this provision; and
- (b) it has no application to literary works accessed by means of the Internet (and copied from websites accessed by that means or from emails). The provision permits a copy to be kept from a newspaper in hard copy but not, it appears, from a newspaper website!

6. *s. 47J - Reproducing artistic works for private use*

The same concerns apply to this provision:

- (a) in the ordinary, contemporary use of the Internet and computers today, people store all sorts of artistic works on their computers, such as maps, cartoons, plans and drawings – but, really, there is no need to exclude any artistic work, including images (whether photographs or not) of sculptures, buildings and models of buildings, paintings, engravings and so on; and
- (b) it has no application to artistic works accessed by means of the Internet (and copied from websites accessed by that means or from emails).

7. *s. 109A – Copying sound recordings for private use*

This was the least offensive of the 2006 amendments as the legislators were persuaded to listen to some reason. The criticism of complexity remains.

8. *s. 110AA – Copying films for private use*

This is a very silly provision which invites public ridicule of the Act:

- (a) the limitation to videotape – and even if one took into account the Internet and other means by which film is received, it should be remembered that a lot more than commercial release movies are received (legitimately) by normal people; and
- (b) the complex provision does not allow for the normal use of films of all kinds, including the making of multiple copies for normal private use, such as:
  - (i) the use of more than one TiVo, iQ or personal computer, networked or not, in a household (I decide to watch the movie in my room or another room because my son is watching *Two and a Half Men*, resulting in more than one copy being made;

- (ii) as was accepted in respect of s. 109A but, for some reason, not in respect of this provision, normal use of film files may involve first download on a computer and then transfer to a portable device for viewing at a later time (this has nothing to do with the “time-shifting” provision, considered further below).

### **Permitted uses of artistic works**

#### 9. *ss. 65, 66 and 67 – Sculptures and certain other works in public places*

There are two major concerns with these provisions:

- (a) their arbitrary limitation to specific types of artistic works; and
- (b) their specific limitations in respect of different forms of utilisation.

These days, there appear in public places, and premises open to the public, not merely sculptures (and works of artistic craftsmanship) and building (and models of buildings) but all kinds of artistic works and, indeed literary, musical and dramatic works as well. Most obviously, in the streets around us are displayed murals, advertising signs and other artistic works. It seems absurd that taking a photograph with a digital camera or an iPhone of a mural, painting, sign, advertisement, photograph or tapestry on permanent display, if:

- (a) the presence of the literary, dramatic, musical or artistic work is only incidental to the principal subject of the photograph; and/or
- (b) the photograph is taken for non-commercial purposes.

Furthermore, the exclusion of works on temporary display is equally mystifying in this day and age. It should be that displays of sculptures (or any other artistic works, or literary or musical works) that are temporary, like *Sculpture by the Sea*, or other artistic works, or textual material, musical scores that are projected onto various surfaces that may well be displayed in public in festivals such as *Vivid Sydney*, may be photographed by members of the public without committing a copyright infringement.

It might also be said that it should be that performances in public of music, literary works (songs and poetry) film and dramatic works may be filmed using one’s digital camera or iPhone, for non-commercial use, without there being an infringement of copyright.

If these issues of primary concern regarding individuals making reproductions for non-commercial purposes are dealt with by an amendment to (or replacement of) s 43C and 47J to make those provisions all-encompassing, as proposed above, the remaining question will be the extent to which commercial photography and filming may be permitted – as clearly ss 65, 66 and 67 do – and the extent to which the fair dealing defences relating to criticism or review, parody and satire, and reporting the news are not sufficient.

It is respectfully submitted that the following provision would meet all the present objections:

#### ***65 Works displayed in public places***

*The copyright in a work that is situated or being performed in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast.*

There would be consequential amendments of deletion of ss 66 and 67, and removal of references to ss 66 and 67 in s 68.

Such suggestions for amendment would have no effect on the rights of performers (including after amendment of the Treaty on Audiovisual Performances adopted at Beijing on 24 June 2012 by the Diplomatic Conference on the Protection of Audiovisual Performances of the World Intellectual Property Organization) or on moral rights.

If, however, this is considered too ambitious, particularly in its reference to performances, the word “work” in the above could be replaced with “artistic work”.

Either way, one enormous benefit of this approach is that it removes the uncertainty as to:

- (a) what a “sculpture” is, should the poor decision of the United Kingdom Supreme Court in *Lucasfilm Ltd v Ainsworth* [2010] Ch 503; [2010] 3 WLR 333; [2010] 3 All ER 329; [2009] EWCA Civ 1328 (Court of Appeal); [2012] 1 AC 208; [2011] 3 WLR 487; [2011] 4 All ER 817; [2011] UKSC 39; (2011) 92 IPR 647 be followed in Australia;
- (b) what a “work of artistic craftsmanship” is, especially after the confusion created by the decision of the High Court in *Burge v Swarbrick* (2007) 232 CLR 336; 81 ALJR 950; 234 ALR 204; 72 IPR 235; [2007] AIPC 92-240; [2007] HCA 17; and
- (c) the uncertainty as to what a “building” is, having regard to the definition which “includes a structure of any kind”.

## **Backups**

### 10. *ss 47C (computer programs) extending to all copyright material*

As mentioned in the Issues Paper, it is strange that there is a provision for the making of backup copies of computer programs in s 47C but there is no equivalent provision in respect of other literary, dramatic, musical and artistic works. It is obvious that private individuals as well as businesses make backups of all forms of works, as well as subject matter other than works, the copyright in which belongs to others, not just computer programs.

So far as concerns private, non-commercial use, this issue would be substantially disposed by the suggested amendment or replacement of the “format-shifting” provisions referred to above but something is needed for copyright material other than computer programs properly in the possession of businesses that require backing up. An advantage of such a specific correction would be that s 47C could be deleted and, following the current scheme of the Act, a new provision inserted in Part III Division 3 for works and, with suitable amendments to refer to subject matter other than works, in Part IV Division 6, as follows:

### ***xx Back-up copy of works***

- (1) *Subject to subsection (3), the copyright in a literary, dramatic, musical or artistic work [any subject matter other than a work] is not infringed by the making of a reproduction [copy] of the work [such subject matter] if:*
  - (a) *the reproduction [copy] is made by, or on behalf of, the owner or licensee of the copy (the **original copy**) from which the reproduction [copy] is made; and*
  - (b) *the reproduction [copy] is made for use only by, or on behalf of, the owner or licensee of the original copy; and*
  - (c) *the reproduction [copy] is made for any of the following purposes:*
    - (i) *to enable the owner or licensee of the original copy to use the reproduction [copy] in lieu of the original copy;*

- (ii) *to enable the owner or licensee of the original copy to use the original copy in lieu of the reproduction [copy];*
  - (iii) *to enable the owner or licensee of the original copy to use the reproduction [copy] in lieu of the original copy, or of another reproduction [copy] made under this subsection.*
- (2) *Subsection (1) applies in relation to a reproduction [copy] of a work [any subject matter other than a work] made for a purpose referred to in subparagraph (1)(c)(iii) whether or not other reproductions [copies] of the work [such subject matter] have previously been made for the same purpose from the same copy.*
- (3) *Subsection (1) does not apply to the making of a reproduction [copy] of a work [any subject matter other than a work]:*
  - (a) *from an infringing copy of the work; or*
  - (b) *if the work [such subject matter] or the form in which it is supplied has been so designed that copies of it cannot be made without modifying the work [such subject matter] or the form in which it is supplied; or*
  - (c) *if any agreement relating to the supply or use of the work [such subject matter] expressly prohibits the making of a reproduction [copy]; or*
  - (d) *if a licence to use the original copy has expired or been terminated without a further licence being granted.*
- (4) *For the purposes of this section, a reference to a copy of a work [any subject matter other than a work] is a reference to any article in which the work is reproduced in a material form [copied].*

It is noted that the requirement to store the original copy or the reproduction made has been removed, as there is no problem with the two copies existing in a working environment so long as only one is used and the reproduction is not used as well in a manner that exceeds the contractual limitations on use. The expression “in lieu of” provides adequate protection to the copyright owner (or distributor).

It should also be noted that a consequential amendment to the deletion of s 47C would be an amendment to s 47H to remove reference there to s 47C. This should be accepted because it does not seem reasonable to give a person a right to make a backup when this is prohibited by an express term of a contract between a licensor and licensee. In most cases, if not all, when a work (including in the case of a computer program) or other subject matter is provided, in the normal course of use a copy is made on a computer and the original copy supplied is not executed, or having a right to make a copy when this is technically impossible (without ‘cracking’ skills or tools which do not necessarily change the work at all, as s 47C(4)(b) assumes – this, of course, is the same issue that caused the deficiencies in the original drafting of the technological protections measures provisions) simply makes a nonsense of the statutory right.

The removal of references to the copyright owner arises from the fact that the licence (or other agreement relating to the supply or use of the work) is not always given by the owner of the copyright or a person acting on the owner’s behalf (this is the same issue that caused the deficiencies in the original drafting of the book importation provisions, such as in the 112A(2)(c)).

There is no need for an equivalent provision to s 47C(2) because the proposed provisions already extend to all works and other subject matter the copyright in which belongs to another person.

The loss in this version of s 47C(6), which excludes from the definition of “reproduction” for the purposes of this section a reproduction of a program of the kind referred to in paragraph 21(5)(b) of the Act, is of no significance as s 47C(6) serves no useful purpose in practice

(and, in fact, may be unduly limiting as certain types of programs may be stored in a form of source code and, in the case of those which cannot, the licensee has no real means of turning them into source code or incentive to do so).

### **“Time-shifting”**

#### 11. *s 111 Recoding broadcasts for replaying at more convenient time*

The only justification for limiting this provision to broadcasts would be if the recording of point-to-point communications for ‘replaying’ will be covered by the amendments already proposed in the ‘format shifting’ provisions.

The deficiencies in the drafting of this provision were made evident in the proceedings culminating in the decision of the Full Court of the Federal Court in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147; (2012) 289 ALR 27; (2012) 95 IPR 321; [2012] FCAFC 59. The courts of first instance and on appeal differed as to the intention of Parliament, the drafting being too obtuse to understand in its own terms. What if more than one copy is made; what does “a time more convenient” mean; who can make the copy or copies; where can it or they be made and who can view it or them?

#### ***111 Recording broadcasts for replaying at more convenient time***

- (1) *This section applies if a person makes or causes to be made one or more copies of a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time or in a place more convenient than the time when, or the place where, the broadcast is made or received.*
- (2) *The making of the film or recording does not infringe copyright in the broadcast or in any work or other subject-matter included in the broadcast.*
- (3) *Subsection (2) is taken never to have applied if an article or thing embodying the film or recording is:*
  - (a) *sold; or*
  - (b) *let for hire; or*
  - (c) *by way of trade offered or exposed for sale or hire; or*
  - (d) *distributed for the purpose of trade or otherwise; or*
  - (e) *used for causing the film or recording to be seen or heard in public; or*
  - (f) *used for broadcasting the film or recording.*
- (4) *To avoid doubt, paragraph (3)(d) does not apply to a loan of the article or thing by the lender to a member of the lender’s family or household for the member’s private and domestic use.*
- (5) *To avoid doubt, the making of one or more copies of a cinematograph film or sound recording of a broadcast at the request of or upon the instruction of another person (whether or not as part of a business) solely for that person’s private and domestic use in accordance with this section does not infringe copyright in the broadcast or in any work or other subject-matter included in the broadcast.*

### **The “safe harbour” provisions**

I appreciate that there is already a review of the safe harbour provisions. It seems likely, however, that all that will come of that will be a replacement of the absurdly narrow limitation to carriage service providers to internet service providers generally. Whilst the provisions of Division 2AA of Part V of the Act, along with ss 39B and 112E, have proved nothing but their superfluity so far, if we *have* to keep them, and they are to be extended to

any other internet service providers, some consideration must be given to clarification of certain of their terms.

12. *The definitions of activities and conditions of application*

The amendment of the provisions to apply to a wider number of service providers will necessitate significant changes elsewhere in these provisions, in either or both of the definitions of the services provided and the conditions attached to the exceptions.

Category A, which concerns “providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections,” will need to be amended to avoid costly and wasteful litigation. Will it apply, for example, to an image (or any other copyright material – games, books, programs, music, and so on) licensing service? It could equally apply to many eBay and Amazon (Kindle) activities. This is because what is offered is typically contained in a thumbnail or other small sample of copyright material, and the copyright material is actually transmitted (from the copyright owner by means of the service provider) once a licence is granted. Of course, the defence should extend to these sorts of providers but, if it does, then the condition of its application in relation to transmission of copyright material being “initiated” by or at the direction of a person other than the carriage service provider makes no sense at all. It is frequently a condition the service provider imposes on its suppliers that the service provider will be entitled to initiate the transmission – for example by being entitled to require the copyright material be uploaded into a transmission area of the service provider’s website.

Category C would appear to apply to the passive storage of copyright material – on one hand this would apply to all cloud service providers but it also would apply to the likes of megaupload.com. Of course, the definition of the service concerned is at present so vague it could apply to anything, including all the service providers referred to above under Category A where the relevant material is stored, otherwise than transiently, for download to a licensee – such as in the case of iTunes and Kindle, as well as to Wikipedia. Again, the first condition of application seems superfluous, that is that relating to financial benefit. Even Wikipedia receives what could be a “financial benefit” from donors that is “directly attributable” to the service it provides – the language is so loose. It should be removed. All that is important is that the service provider responds expeditiously to a take-down notice.

Exactly the same comment may be made in respect of Category D, which relates to “linking users to online locations using information location tools or technology.” It is difficult to understand why a person who provides a reference or recommendation site providing links to third party sites, and who takes a commission or other benefit from sales and who relies upon those third parties for copyright and other clearances cannot have the benefit of a defence in these circumstances.

It is difficult to suggest amendments when the legislative policy is so obscure. As mentioned, total repeal would serve both copyright owners and users engaged in digital commerce significantly better. A slovenly amendment restricted solely to an extension of the unaltered provisions to all internet service providers would be worse than useless. If this occurs, however, it is submitted that the first condition of application of each of Categories A, C and D be deleted, along with s 116AH(3), which is virtually incapable of application in any event.

13. *A policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers*

Thus far, these provisions have not been found meaningful or useful by any court, but in *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215; (2010) 83 IPR 430; [2010] FCA 24, Cowdroy J of the Federal Court observed:

*It is impossible to fail to notice the complete vacuum of legislative guidance in relation to any category A requirements when compared to the highly prescriptive requirements in relation to categories B–D found in s 116AH(1) and the Regulations. Neither the legislation, the regulations nor extrinsic materials provide any guidance to the court as to what the “appropriate circumstances” for termination are, what “repeat infringement” means or what the “accounts of repeat infringers” means. The assumption must be that Parliament left latitude with the [carriage service provider] to determine the policy, and left the meaning of those words to be determined by the courts.*

To add to the confusion, condition 1 of item 1 applies to all categories of activities, even though a “repeat infringer” in relation to category A is likely to be different to a “repeat infringer” in relation to category C (hosting), for example. This is likely to be important, given that the termination must occur only in “appropriate circumstances”. For example, it could be argued that given that the legislation and the regulations in relation to category C (hosting) are highly prescriptive and that that type of activity allows for a [carriage service provider] to actually access and view the material alleged to be infringing, that would have the consequence that it would be reasonable for the repeat infringer policy in relation to that category to provide for quicker termination of internet users alleged to be repeat infringers than in relation to category A, where, due to the transitory nature of the transmission, a [carriage service provider] cannot independently verify the infringing nature of the transmission. Presumably, given that condition 1 of item 1 is said to apply to all categories, implementing an appropriate repeat infringer policy in relation to one category will not necessarily suffice for compliance with another category.

Cowdroy J found that iiNet’s notification to its customers in its customer relationship agreement that copyright infringement may lead to termination of the customer account put the customer’s on notice that the required policy existed, and the understanding of the chief executive officer of iiNet that, if a court ordered a customer account be terminated or if a court found that a customer of iiNet had infringed copyright or a customer admitted infringement, iiNet would terminate that customer’s account, qualified as a policy for the purposes of the provision.

The Full Court of the Federal Court in *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285; (2011) 275 ALR 1; (2011) 89 IPR 1; [2011] FCAFC 23 [265], whilst affirming the decision of the trial judge on authorisation, found that iiNet did not have a ‘repeat infringer policy’. The Court took the view that, for there to be a policy in the required sense, there must be demonstrated some settled statement that has been adopted, which specified what a “repeat infringer” was and what “appropriate circumstances” would mean, and what steps would then be taken, resulting in termination of the customer account when those conditions were met. The Court also disagreed with iiNet’s argument that a “repeat infringer” must mean the person who has infringed copyright must be established, who might not be the account holder. The Court took the view that “repeat infringer” does not refer to a person, but to an account, which has been used to infringe copyright, regardless of who has used it to do so. Emmett J also took the view that the required policy must have been communicated to the customer in a manner making it part of the contract between the carriage service provider and the customer, so as to entitle the carriage service provider to terminate the customer account.

It is unfortunate that millions of dollars in legal fees had to be spent because of such careless legislative drafting.

A definition of “a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers” might be inserted in place of the current s 116AH(3) as follows:

“Subject to any contrary requirements of a relevant industry code, a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers is one which:

(a) is in writing, has been incorporated into the service contract under which the service provider provides its services, is publicly available upon the service provider’s website and has been disclosed in writing to each of its suppliers and customers;

(b) provides that, if:

(i) the service provider gives a notice under this Division to the same supplier or customer using the service of the service provider on not less than three, separate occasions; and

(ii) unless a reasonable explanation and an undertaking to prevent the repetition of any of the conduct giving rise to such notices is given by the supplier or customer, as the case may be; and

the service provider will exercise a right to terminate the provision of the relevant services to the supplier or customer;

(c) notwithstanding such reasonable explanation and undertaking, a further notice is given under this Division, the service provider will exercise a right to terminate the provision of the relevant services to the supplier or customer; and

(d) if a court finds that the supplier or customer using the services of the service provider has used such services to infringe the copyright of any person the service provider will exercise a right to terminate the provision of the relevant services to the supplier or customer.”

#### 14. *The responsibilities of copyright owners and the Regulations*

The current provisions assume that copyright owners will provide accurate and complete information sufficient in notices issues under the Division and the Regulations to justify the required response of the service provider, simply because there may be legal consequences if they fail to do so. They also assume that the copyright owners will co-operate with the service provider with respect to any further information needed to identify the relevant customer and infringement. The *iiNet* proceedings amply illustrate that certain copyright owners will not do so.

This is currently reflected in the regulations which, it is submitted, do not comply with the requirements of the Act. The Act refers to “copyright material”, “infringers”, “infringing activity” and says that a service provider “must act expeditiously to remove or disable access to copyright material residing on its system or network if the carriage service provider: (a) becomes aware that the material is infringing; or (b) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing.”

However, the Parts 3A.4 and 3A.6 of the Regulations impose no obligation on the person issuing a notice under the Division to do any more than identify the alleged copyright material, and imposes no obligation to provide such minimum information as is required by law to establish authorship and ownership of that copyright nor to provide any information or assistance. This is unreasonable. I suggest that Regulations 20I(2) and 20(J)(1) be amended as follows:

**20I**      ***Notice of claimed infringement***

- (1)      *The owner, or an agent of the owner, of the copyright in the copyright material must issue a notice of claimed infringement in relation to the copyright material to the service provider's designated representative.*
- (2)      *A notice of claimed infringement must:*
  - (a)      *be in accordance with, or substantially in accordance with, the form set out in Part 3 of Schedule 10; and*
  - (b)      *provide sufficient information to identify the copyright material to the service provider; and*
  - (c)      *include reasonable particulars identifying the circumstances under which copyright subsists in the copyright material and belongs to the owner;*
  - (d)      *in the case of a notice issued by an agent of the owner, provide reasonable particulars establishing the right of the agent to issue the notice on behalf of the owner.*

**20J**      ***Takedown procedure***

- (1)      *If a service provider receives a notice of claimed infringement under regulation 20I, the service provider may request further information from the owner or the owner's agent which the service provider reasonably requires in order to identify the copyright material the subject of the notice, to be satisfied that copyright subsists in it and belongs to the owner and that an agent represents the owner.*
- (2)      *If the service provider receives a notice complying with regulation 20I and has received reasonable responses to its request or requests for further information under subregulation (1), if any, the service provider must expeditiously remove, or disable access to, the copyright material specified in the notice and residing on its system or network.*

Regulation 20J(2) should be renumbered accordingly. An equivalent amendment should be made to Regulations 20T and 20U.

**Other amendments**

15.      *Royalties to collecting societies for use of works on the internet*

*Copyright Act 1968 (Cth), s 135ZM(2) provides that, in respect of works in hardcopy form, the owner(s) of the copyright in illustrations is entitled to receive half of the per-page royalty in respect of copies made under s. 135ZJ, s. 135ZK or s135ZL. However, s 135ZME, the equivalent provision in respect of works in electronic form, only provides that the proportion of the per-page royalty to be paid to the copyright owner will be as agreed between the copyright owner(s) or otherwise as determined by the Copyright Tribunal. The effect of this is that the providers of illustrations receive little or nothing in respect of on-line publications.*

It is respectfully submitted that there is no reason not to provide exactly the same division of royalties to providers of illustrations in respect of on-line works and fairness dictates that this amendment be made.

16. *Omission of reference to s 135ZMDA in the definition of “licensed communication” in s 135ZB*

The omission of a reference to s 135ZMDA in the definitions of “licensed copy” and “licensed communication” in s 135ZB would appear to suggest that this notice may not be given in respect of copies and communications of works included in electronic anthologies. This was presumably an oversight in the legislation introducing s 135ZMDA, the *Copyright Amendment Act 2006* (Cth), as *Copyright Amendment Bill 2006* (Cth), Explanatory Memorandum at [8.19]–[8.22] states that it was intended to treat such works in the same manner.

17. *Definition of computer program*

It is presumably an optimistic submission, but the definition of “computer program” has never been “technologically neutral” and has caused millions of dollars in money wasted in litigation trying to apply it to a wide range of circumstances, some appropriate, some not. It is submitted that the European model, presently embodied in *Council Directive on the Legal Protection of Computer Programs 2009/24/EC* which does not include any definition, is to be preferred. It is submitted that the definition of computer program should be repealed and not replaced.

Yours faithfully

A handwritten signature in black ink, appearing to read 'PKU' with a stylized flourish.

Peter Knight

**Peter Knight**

**Qualifications:** Bachelor of Arts 1975  
Bachelor of Laws 1977  
Master of Laws (University of London) 1981 (majoring in intellectual property and competition law)

**Admitted to practise in:**

- Supreme Court of New South Wales (1978)
- High Court of Australia (1978)
- Federal Court of Australia (1978)
- Supreme Court of the ACT (1990)
- Supreme Court of Victoria (1991)
- Supreme Court of Western Australia (2000)

**Professional background:**

Apple Computer Inc: Regional Counsel 1987 – 1991  
Clayton Utz: Partner 1991 – 2009  
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