SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT IN RESPONSE TO THE FAIR USE AND OTHER COPYRIGHT EXCEPTIONS ISSUES PAPER DATED MAY 2005

PRESENTED BY BUSINESS SOFTWARE ASSOCIATION OF AUSTRALIA (BSAA)

JULY 2005

The Business Software Association of Australia (BSAA), very much appreciates the opportunity to respond to the Attorney-General's Issues Paper dated May 2005. Our submission will focus on the options for reform presented in the Issues Paper.

The BSAA represents leading business software companies in Australia, including Adobe, Autodesk, Microsoft and Symantec.[1]

1 Summary

1.1 The BSAA believes that, as a matter of principle, exceptions to the rights of copyright owners to control their property should only be legislated when it can be demonstrated that such exceptions will provide an overwhelming public benefit. In addition, such exceptions should, to the greatest extent practicable, result in the least material detriment possible to the economic circumstances of rights holders. The BSAA believes that the current exceptions regime (particularly in relation to time and format shifting) has not caused such a level of public detriment in practice as would warrant legislating for a further copyright exception.

1.2 The BSAA supports the proposition that community practice should not alone determine the extent of exceptions to the principle of copyright. If it can be demonstrated that an exception to the general principle of copyright would provide substantial community benefit without material detriment to copyright owners, then the BSAA submits that any change to the law should be addressed by way of specific, limited exceptions tailored to address the community need, and drafted in consultation with major stakeholders.

1.3 The BSAA is strongly opposed to statutory licensing. The BSAA submits that statutory licensing is an outdated mode of intellectual property protection, and poses a significant threat to the interests of copyright owners and users, by raising costs for all, distorting trade and creating the misimpression that piracy is sanctioned.

2 Option 1 - consolidate the fair dealing exceptions into a single open-ended provision

2.1 The BSAA believes that the introduction of an open-ended fair use exception is both undesirable and unnecessary.

2.2 The BSAA believes that the introduction of an open-ended fair use exception would lead to significant uncertainty for both copyright owners and users of copyright material. This uncertainty will increase the costs of compliance and enforcement. Determining whether use of copyright material falls within the fair use defence is likely to be a burdensome and expensive process.

2.3 In the United States, a complex body of case law has developed in order to interpret the scope of the fair use exception. The outcome of disputes involving the fair use defence

1 The BSAA is affiliated with the Business Software Alliance (www.bsa.org) which is dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programmes foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. Whilst Apple is a member of the BSAA, Apple will be making its own submission.

are difficult to predict. Fair use has been described as "notoriously fuzzy in application"[2], "indeterminate"[3] and abstracted "to the point of incoherence".[4]

2.4 Further, US jurisprudence is not directly applicable in Australia, as there are differences between the Australian and US legal environments and constitutional contexts. Therefore, it is difficult to predict the shape an open-ended fair use defence will take in Australia. These differences include section 8 of article 1 of the US Constitution, which sets out the purpose of laws relating to intellectual property as "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". There is no equivalent statement in the Australian Constitution. There is also no equivalent in Australia to the US right to free speech, enshrined in the First Amendment to the US Constitution, which provides an important backdrop to the fair use doctrine in the US.

2.5 In addition, US courts have traditionally played a more active role in providing solutions to major technological innovations. In contrast, the Australian courts have been more restrained, with judges concerned largely with the interpretation of statutory provisions.

2.6 There is no guarantee that an open-ended fair use provision will address areas of perceived inconsistency between the expectations of copyright users and use permitted under the Copyright Act, such as time shifting and format shifting. In ***Sony Corp of America v Universal City Studios, Inc***.,[5] the US Supreme Court held that video taping of television programmes via a Betamax for private use constitutes fair use. This case forms the basis of assumptions that introduction of a fair use defence in Australia would cover time shifting. However, the case was a narrow 5-4 decision, which turned on the Court's specific factual findings. As Nimmer points out, central to the Court's finding of fair use was the district court's determination that most members of the public tended to record a television programme to watch it once at a later time, and not to create a "library" of television programmes.[6] Further, the Court concluded that the plaintiffs "failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works."[7] Therefore, Australian judges could distinguish the decision on the basis that certain technology (either in the context of time shifting or format shifting) is typically used for "librarying", and *does* harm the potential market for and value of copyrighted work. Alternatively, Australian judges may simply interpret a fair use exception differently in Australia.

2.7 In addition, the introduction of an open-ended fair use exception would require a complete review and overhaul of existing exceptions under the Copyright Act.

2.8 In these circumstances, the benefits in introducing an open-ended fair use provision are likely to be low. Applied in Australia, an open-ended fair use provision may not address any of the areas of perceived inconsistency between the current set of exceptions and user expectations. On the other hand, the costs of introducing an open-

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[2] Liu, J., "Regulatory Copyright," 83 *N.C.L. Rev.* 87 at p133.
[3] Goldstein, P., "Fair Use in a Changing World," 50 *J. Copyright Soc'y USA* 133.
[4] Madison, M. J., "A Pattern-Oriented Approach to Fair Use," 45 *Wm. & Mary L. Rev.* 1525 at p1587.
[5] 464 US 417 (1984)
[6] Nimmer M. and Nimmer D., *Nimmer on Copyright*, Matthew Bender & Co, Inc, §8B.01D[2] and 13.05[F][5][b].
[7] *Sony Corp of America v Universal City Studios, Inc*. 464 US 417 at 456.

ended fair use exception are likely to be high. These costs are likely to be borne financially by copyright owners and users through increased compliance costs.

3 Option 2 - retain the current fair dealing provisions and add an open-ended fair use exception

3.1 The BSAA is opposed to the implementation of Option 2 for all of the reasons set out above in relation to Option 1. That is, the BSAA believes that the implementation of Option 2 would lead to significant uncertainty for both copyright owners and users of copyright material. Further, for the reasons outlined above, inserting an open-ended copyright exception into the Copyright Act while retaining the current raft of fair dealing exceptions will not necessarily solve specific problem areas in which the Copyright Act has become out of step with user expectations.

3.2 Moreover, the uncertainty associated with determining the scope of a new, open-ended copyright exception would be exacerbated by the preservation of specific, over-lapping fair dealing and other exceptions. Until this is litigated, it would be unclear how the scope of an open-ended fair use exception should apply where other specific fair dealing and other exceptions also cover the field, and what the priority of the different provisions should be. If an open-ended fair use exception were introduced then all of the existing exceptions would need to be reviewed.

3.3 Further, if multiple exceptions apply to any one use this will increase the cost and length of litigation to the detriment of owners and users alike.

3.4 Implementation of Option 2 would tip the balance between the rights of copyright owners and provision of fair access to users too far in favour of users. If Option 2 is implemented, the Australian copyright exceptions would be wider and more unwieldy than in any other country. Only the US, at present, has an open-ended fair use exception. However, in comparison to Australia and other countries such as the United Kingdom, the US has a more limited number of specific fair dealing and other copyright exceptions.

3.5 The BSAA submits that implementation of Option 2 would put Australian copyright owners at a disadvantage to its trading partners. As Goldstein points out:

> "Copyright owners will invest no more in producing copyrighted works than they can expect to profit from them, and if the profit horizon is systematically lowered by fair use, investment will be correspondingly lower."[8]

If Australia's copyright laws are less favourable to and less capable of being enforced by copyright owners, this will lead to investment in new copyright content being shifted to other countries in which copyright laws are more favourable to copyright owners.

4 Option 3 - retain current fair dealing exceptions and add further specific exceptions

4.1 The BSAA does not believe that the case has been made out for additional copyright exceptions. The BSAA notes the points raised in the Issues Paper regarding time shifting and format shifting (for example that some common personal uses of copyright

[8] Goldstein, P., "Fair Use in a Changing World," 50 *J. Copyright Soc'y USA* 133 at p141.

material infringe copyright). However, the BSAA is not aware that the current exceptions regime has caused any problems in practice in relation to time shifting and format shifting. Therefore, the BSAA does not believe that the issues of time shifting and format shifting require legislative attention.

4.2 If the Government is convinced that a case has been made out for additional copyright exceptions, then the BSAA submits that these issues should be addressed by way of specific limited exceptions which are tailored to address the identified need. For example, if a case were made out for an exception for format shifting then any exception should be limited to making a copy from a legitimate copy of a second recording (and the music it contains) for personal use. It should not extend to any other copyright works. It is also important to ensure that any copy made pursuant to the exception cannot be distributed by the person who made the copy.

4.3 The BSAA is concerned about unintended loopholes being created in the Copyright Act for illegitimate copying.

4.4 The BSAA is also particularly concerned about the wrong message being sent to consumers. As the Government is aware, copyright piracy is a significant and costly burden to many Australian industries. This is a particular problem in the software industry. A report prepared by The Allen Consulting Group in November 2003 estimated that lost sales from counterfeiting in 2002 cost the business software industry approximately $446 million in gross sales.[9]

5 <u>Option 4 - retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material</u>

5.1 The BSAA is strongly opposed to the introduction of a statutory licence that permits private copying of copyright material.

5.2 The levies system emerged in Europe in the 1960s as a way to remunerate authors and copyright owners for private copying. This occurred in the days of analogue works, when there was no effective way for copyright owners to control how and when private copies of their copyrighted works were made. Although levies have never been able to accurately reflect the actual value and use of any particular work, they were deemed to be the only practical method to compensate copyright owners for private copy exceptions. In short, levies reflected a compromise solution in a world where the technology did not exist to manage particular uses of works.

5.3 In today's digital world, the fundamental premise that underlies levy regimes—the copyright owner's inability to control private uses of his or her work—has been eroded dramatically. Technology now enables copyright owners to exercise far greater control over the use of their works and to be compensated accurately for such uses. "Digital rights management" systems (DRMs) make it easier for content owners to identify authors and articulate terms of usage, to establish prices and collect payment, and to determine, among other things, how content is delivered, accessed and copied. In recent years, industry has made tremendous progress in expanding the variety and improving

[9] The Allen Consulting Group, "Counterfeiting of Toys, Business Software and Computer and Video Games," November 2003.

the quality of DRM technologies. As these technologies evolve, content providers are discovering new ways to use them, and developing exciting new business models that allow them to better satisfy a broad spectrum of user requirements.

5.4 Levies on the other hand, are inefficient, inflexible and distort trade, merely shifting inefficiencies to other markets.[10] Typically, levies function as a tax on digital products. As a result, they raise the cost of technology for consumers. In Europe, levies have been applied on digital media such as CD-Rs and RWs, digital audiotapes and minidiscs, and on equipment such as scanners and even PCs. The increased price brought about by levies necessarily results in a lower demand for such products. The result is that fewer people possess the newest technological products, slowing the uptake of new technologies. This tax also reduces investment in, and the development of, DRM-enabled businesses.

5.5 Levies can also impose unfair burdens on consumers. Where levies coexist with technological protection measures, consumers may be forced to pay twice for the right to make a copy of a work—by paying the levy, and by paying the copyright owner for the right to copy the work. Alternatively, consumers may have to pay the levy for a work that cannot be copied. Or, consumers may have to pay the levy for blank media or multi-purpose equipment even where they do not intend to use the items to make copies of copyrighted content.[11]

5.6 The costs of levies for industry are significant. A study undertaken by Rightscom and commissioned by the BSA in September 2003, examined the economic impact of private copying levies on digital equipment and media in France, Germany, Italy, the Netherlands and Spain.[12] The study predicted that the total amounts of levies collected in these five countries would increase by threefold—from €309 million in 2002 to €861 million in 2006 (excluding levies claimed but disputed). A further study was conducted by Nathan Associates in 2003[13], which sought to assess lost sales of PCs, portable music players and printers as a result of increased prices brought about by private copy levies. The study concluded that the cost of levies to the technology industry could range from US$808 million to US$8.8 billion per year.

5.7 Levies also do not satisfactorily compensate users. Levies are often set in an arbitrary way, with little meaningful opportunity for stakeholders to participate in the levy-setting process or to object to these levies once established. In determining the amount of revenue or royalties that need to be raised, the primary goal is generally to mimic markets, as markets are thought to provide efficient solutions that maximise economic values.[14] However, it is impossible to determine the market value of a copyright work other than in a freely functioning market. Liebowitz demonstrates this difficulty by using as an example, the fact that there was a 50% increase in real album revenues from

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10 Liebowitz, S., "Alternative Copyright Systems: The Problems with a Compulsory License," 16 (Oct. 31, 2003), at http://www.utdallas.edu/~liebowit/intprop/complpff.pdf.

11 Hugenholtz, B., et al "The Future of Levies in a Digital Environment," Final Report, Institute for Information Law, Amsterdam, March 2003, ppi-ii.

12http://www.bsa.org/customcf/popuphitbox.cfm?ReturnURL=/eupolicy/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=10369

13 Presentation delivered in Maryland, USA "Impact of Content Rights Compensation Levies: Lost Sales Revenue Worldwide." April 28, 2003, Robert Damuth, Vice President Nathan Associates, www.nathaninc.com .

14 Liebowitz, S., "Alternative Copyright Systems: The Problems with a Compulsory License," 16 (Oct. 31, 2003), at http://www.utdallas.edu/~liebowit/intprop/complpff.pdf.

1975 to 1978, followed by a 45% drop from 1978 to 1982. Then from 1983 to the mid-1990's, real revenues in the market more than doubled, outstripping population and income. As Liebowitz points out, it is extremely unlikely that such dramatic changes would have been approved or understood by a body charged with the task of determining the amount of royalties to be raised.[15]

5.8 The result is a system that undermines the balance that copyright law aims to strike between providing incentives for authors to create copyright material and the need to ensure public access to that material.[16]

5.9 The BSAA submits that the law should resist imposing bargains where parties have opportunity to reach agreement, but decide not to do so.[17] Technology is evolving quickly, as is the way in which works are licensed. To take advantage of these developments, right holders and consumers must retain the ability to freely negotiate the relevant terms and conditions of their licence agreements.

5.10 The success of the software industry provides a powerful example of what can be achieved through individual rights management. Software rights holders negotiate with users the terms and conditions governing the use of their works, set rates and collect payment directly. This is done through a wide variety of licence formats, which vary by product and transaction, and is facilitated by DRMs. The ultimate beneficiaries of these developments are consumers, who now enjoy greater and more user-friendly opportunities to use digitally distributed content. Through differing licence types and business models, software rights holders have been able to offer multiple products with different rights and prices, and thus to accommodate the diverse and frequently changing needs of consumers.

5.11 Lastly, the BSAA is against the introduction of a statutory licensing system because of the message it sends to the public. As the Government is aware, copyright owners suffer significant harm as a result of copyright piracy. Users of digital audio and audio-visual works can and do mistake private copy levies—which are intended to compensate right holders for lawful private copying only—for an "open-licence" to copy content freely. Levies quickly become a "licence to pirate". At the same time, the presence of levies in a market can also hamper or undermine investment in DRM-enabled products and services that would seem to offer the best avenue for curtailing rampant illegal file-sharing.

July 2005

[15] *ibid*.
[16] Fessler, K., "Webcasting Royalty Rates", 18 *Berkeley Tech. L.J.* 399 (2003).
[17] Lindsay, D., *The Future of the Fair Dealing Defence to Copyright Infringement*, Centre for Media, Communications and Information Technology Law, The University of Melbourne, Research Paper No 12, November, 2000, p82.