

Australian Copyright Council

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Response to Advisory Report of the House of Representatives Legal and Constitutional Affairs Committee on the Digital Agenda Bill 1999

Introduction

This response to the Advisory Report of the House of Representatives Legal and Constitutional Affairs Committee ("the Committee") on the Digital Agenda Bill 1999 follows:

- our submission to the Committee on the Bill dated 6 October 1999;
- our evidence to the Committee; and
- our joint submission with Australian Publishers Association, Australian Society of Authors, Copyright Agency Limited and Screenrights, dated 14 October 1999, which included a proposed model for library copying.

We respond here to the Committee's recommendations in Chapters 1 to 5 of its report which are of greatest concern to us. We may make a separate response in relation to the Committee's recommendations regarding the transitional provisions.

First digitisation

We are pleased about the Committee's recognition of the important differences between the print domain and the digital domain. We support the Committee's recommendations regarding first digitisation, as they address many of our concerns about the Bill.

We note that there has been some confusion about the application of the Committee's recommendations regarding first digitisation. We submit that the Committee intended:

- that its recommendations apply to educational copying and government use, as well as to fair dealing for research or study and to library copying (see para 1.25); and
- that exceptions allowing digital copying would allow a person to reproduce a digital version of a work, but not to create a digital version from a non-digital version of that same work.

We submit that the Committee's reasoning applies equally to non-digitised material other than print material (eg audiovisual material in analogue form) and that the "first digitisation" principle should thus apply to all non-digitised material.

In keeping with our submissions in relation to “permitted purposes”, we also submit that exceptions allowing digital copying should only allow the copying of a digital version made with the authority of the copyright owner.

Permitted purposes

We strongly oppose the continued inclusion of “permitted purposes” for which libraries, educational institutions and government departments may circumvent technological protection devices. Our reasons include:

No recognition of consequences for issues such as privacy

- the Bill would allow the circumvention of technological protection measures for material which is not commercially available¹ as well as material which is commercially available;
- there are many reasons for technological protection measures, including that a file may contain material which is confidential, private, or intended for a limited class of people;
- technological protection measures are also used to ensure the integrity of the material;
- the analogy of the “permitted purposes” provision for unpublished material in the print domain would be to force copyright owners to provide access to such material so that educational institutions and government departments could copy from them;

Insufficient regard to market forces

- for material which is commercially available, libraries, educational institutions and government departments have enormous collective bargaining power – which they are already exercising – to negotiate payment and other conditions of access;
- the analogy of the “permitted purposes” provision for commercially available material in the print domain would be to force copyright owners to donate material such as textbooks to libraries and educational institutions so that the libraries and educational institutions could copy from them;
- the Committee itself said that it expected that “copyright owners would be willing to provide digital versions of their works, and that market forces would ensure that they do so on reasonable terms”;²

¹ Examples include board papers, minutes of meetings, or draft documents circulated to members or staff for comment. Access by libraries would be more restricted if the requirements that the material be published and in the library collection remain.

² See para 1.29. This comment was made in relation to the publication of digital versions of non-digitised material, but we submit that it also applies to the supply of already digitised material.

Insufficient regard to enforcement issues

- educational institutions and libraries would be entitled to circumvent technological protection measures in order to distribute to their students and clients, and would be entitled to distribute the material in an unprotected form;³
- allowing circumvention would thus be inconsistent with the Committee's recognition (at para 1.28) of "the enormous potential for unauthorised use of digital material";

Explanation of policy illogical

- the explanation (referred to by the Committee at para 4.51) is that the policy is "to counterbalance another change made to the Exposure Draft, namely the enlarging of the mental requirement in respect of the civil liability of recklessness to constructive knowledge";
- the implication is that the lower standard of proof would result in contravention by libraries, educational institutions and government departments, and therefore these bodies should not be covered by the prohibition at all;
- in addition, the small benefit to copyright owners of constructive knowledge rather than recklessness bears no relationship to the enormous detriment of allowing circumvention for permitted purposes – that is, there is no "counterbalance";

Example given by Committee not relevant

- the Committee refers (at para 4.54) to "library collection preservation" as being a "legitimate purpose" for which circumvention should be allowed, but the Bill would not allow circumvention for such a purpose – although such a purpose is of less concern than the purposes for which the Bill would allow circumvention by libraries (that is, to supply to library clients and to other libraries);

Too early to assess whether access is a legitimate concern

- given that digital publishing is still quite new, it is too early to assess whether the concerns raised by libraries and educational institutions will be borne out;
- on the other hand, as recognised by the Committee, there are already considerable risks and uncertainties for copyright owners in the digital environment, which will only be increased if the permitted purposes provision remains;
- libraries, educational institutions and government departments will have an opportunity, when the legislation is reviewed in three years time, to present evidence of any difficulties they say would justify their circumvention of technological protection devices.

³ Similarly, government departments would be entitled to distribute unprotected material.

Definition of “library”

In our submission to the Committee, we supported the policy behind the new definition of “library”, and suggested amendments to give better effect to the policy behind the proposed definition.

We also refer to our joint submission with ASA, APA, CAL and Screenrights, in which we put forward a model for library copying which would allow the supply by a library (as defined in the Bill) to a student or researcher of material held in another collection, whether or not that collection is maintained for business purposes.

We disagree that there was inadequate consultation regarding the definition of “library” in the Bill. The issue was raised at the meeting of the working party on exceptions in the Bill, convened by the Government in March 1999, and in submissions on the Bill, and it was discussed at length before the Committee.

We doubt that further consultations would raise any issues in addition to those already raised in submissions and in evidence to the Committee, and we urge the Government to adhere to the policy in the Bill. At the very least, we submit that the proposed definition of “library” must apply to the use of digital material, and that any further consultations be confined to the extension of the proposed definition to print material.

Educational copying

Insubstantial portions of works

We support the Committee’s recommendation that section 135ZMB be omitted from the Bill. We agree with the reason advanced by the Committee that reproducing and communicating even insubstantial parts of a work is a use of copyright material which should be remunerated.⁴ We also agree that copyright owners, through collecting societies, are in a much better position to administer licences and collect remuneration for the use of their works.⁵

We support the Committee’s suggestion that section 135ZG be repealed. Our reasons are set out in our submission to the Committee of 6 October 1999.

Illustrative artistic works

We agree with the Committee’s view that artistic works should be treated as being a separate and valuable class of works.⁶

We note that following the tabling of the Committee’s report, the Full Federal Court handed down its decision in *Copyright Agency Ltd v University of Adelaide* in which it decided that section 135ZM required the Copyright Tribunal to disregard the presence of illustrative artistic works on a copied page in the course of setting a rate for the page. We submit that this decision confirms the inequity of the

⁴ para 3.40

⁵ para 3.39

⁶ para 3.54

provision and submit that it should be repealed. On the same reasoning, we submit that section 135ZME should be omitted from the Bill.

Film directors

The Copyright Council supports amendments to the Copyright Act recognising directors as authors of films in relation to economic rights as well as moral rights. The Council notes that this position is not supported by the Screen Producers Association of Australia, and is neither supported nor opposed by Screenrights. Both organisations are affiliated with the Council.

Libby Baulch, Executive Officer and Virginia Morrison, Senior Legal Officer
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