

Australian Copyright Council

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Submission on Digital Agenda Bill as amended 28 June 2000

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Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council's functions include giving information and free legal advice about copyright, research, and advocating changes to copyright law and practice which will benefit creators and other copyright owners. Further information about the Council is contained on the Council's web site – www.copyright.org.au.
2. A number of organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee.

Introduction

3. We are disappointed that the Government, in its amendments to the Digital Agenda Bill passed on 28 June 2000, did not implement the central, unanimous, recommendation of the House of Representatives Standing Committee of Legal and Constitutional Affairs (LACA Committee) relating to first digitisation. That recommendation – based on the Committee's recognition of the far-reaching consequences of first digitisation (particularly for enforcement) – was that, in general, exceptions to infringement should not allow the first digitisation of a work.
4. We are also disappointed that the Government has amended the Bill so that libraries in profit-making organisations would be able to acquire material for their collections, and make material available to the organisation's staff and clients, without any payment to the copyright owners.
5. The end result is that the "balance" between protection and access, referred to by the Government as an objective of the Bill, has been tipped even further against the interests of copyright owners.
6. We have set out below a number of issues where we submit that the Bill does not give effect to the Government's policy.
7. The main issues are:
 - first digitisation
 - the "balance" between protection and access
 - library copying and communication
 - educational copying and communication of "insubstantial portions"
 - rights management information
 - circumvention of technological protection measures

8. We urge the Government to give high priority to addressing these issues, and to the early passage of the Bill in the Senate.

First digitisation

9. We are very surprised by the Government's statement that its amendments to the Bill partially implement the recommendations of the LACA Committee on first digitisation.¹ We cannot see how they do so.
10. Copyright owners already have the right to first digitise under the current law, as part of their right to reproduce or copy; the Digital Agenda Bill would merely confirm that this is the case. The LACA Committee's concern was that exceptions to copyright infringement should not allow first digitisation without the copyright owner's consent.²
11. The Committee's recommendations were based on its recognition of the important differences between the non-digital and the digital environments – including the “enormous potential of unauthorised use of digital material” – and that copyright owners should thus be able to determine when their material is first digitised.³
12. The Government's amendments do not implement the Committee's recommendations. On the contrary, the Bill would allow first digitisation in a vast range of cases – without the copyright owner's consent, without payment, without technological protection measures, and without rights management information.

“Balance” between protection and “access”

13. The Government has sought to justify the exceptions to copyright infringement in the Bill by referring to the “balance” between the exclusive rights of copyright owners and access to copyright material by users.⁴ The Government appears to have taken the approach that introducing new exceptions is justified because copyright owners have been granted a new right of communication.
14. The “new right of communication” largely comprises the existing rights of broadcasting and transmission, and is thus a relatively small “extension” of

¹ See AGD e-news on copyright issue 14.

² See LACA Committee report para 1.27

³ See LACA Committee report at paras 1.28ff

⁴ For example, the Attorney-General said in Parliament on 27 June 2000 (Hansard P 16934):

The extraordinary pace of development threatens the delicate balance which has existed between the rights of copyright owners and the rights of copyright users. The central aim of the bill, therefore, is to ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment.

exclusive rights (that is, by adding the “right of making available”, and a cable right for sound recordings and broadcasts).

15. On the other hand, the new exceptions apply not only to the new right of communication but also to the existing right of reproduction. The new exceptions thus go much further than “balancing” the new right of “making available”, and make a major inroad into the *existing* right of reproduction.

Libraries

Access to material in libraries *not* “free”

16. The Government appears to be of the view that the operation of the library exceptions means that library users get “free access” to copyright material. They do not. Libraries are (and would continue to be) entitled to charge their clients for supply of material. The charge must “not exceed the cost of making and supplying the copy”, but we understand that libraries take a range of direct and indirect costs into account when determining charges for supplying copied material. In 1997, the Australian Council of Library and Information Services (ACLIS) recommended that the minimum fee for copying and supply of an article of up to 30 pages by one library for another was \$12.⁵
17. No proportion of these charges is paid to the copyright owner.

Emerging commercial markets *not* protected

18. The Attorney-General said in Parliament that:

The extension of the library exceptions into the digital environment has been carefully crafted so as to prevent competition with emerging commercial markets.⁶
19. We submit that the Bill does not, in fact, “prevent competition with emerging commercial markets”. On the contrary, the Bill would allow libraries to engage in activities which would interfere with online services being developed by copyright owners.
20. For example a library could establish a collection of digitised journal articles – supplied by other libraries which could digitise the articles from their collections – even though those articles are sold separately in digital form by their publisher.
21. We have attached a scenario which illustrates our concerns.

⁵ The fee was substantially higher if the article was supplied quickly.

⁶ Hansard, 27 June 2000, P 16935

Library provisions not “consistent with international developments”

22. The Attorney-General stated in Parliament on 27 June that “the library exceptions are consistent with international developments”, and made reference to the position in the United States.⁷
23. The library exceptions are not consistent with international developments. The international standard for exceptions to infringement is the “three-step test” – contained in the Berne Convention and the TRIPS Agreement, and now also incorporated into the 1996 WIPO treaties. The library provisions are not consistent with the three-step test.⁸ The attached scenario illustrates that the library provisions would allow activities which conflict with normal exploitations of works, and/or unreasonably prejudice the legitimate interests of rights owners.
24. The library provisions are also inconsistent with Article 5 of the European Union draft Copyright Directive. Even the US provisions are more limited than Australia’s (for example, they are not available to corporate libraries).

Corporate libraries

25. The Government has said that it
- has decided to further consider the impact of the changed definition [of “library”] on the ability of private libraries to participate in the inter-library loan system and to provide material to public libraries.⁹
26. The Government thus appears to have accepted the concern raised by libraries – for example by the Australian Library and Information Association (ALIA) which, in a letter to the Attorney-General of 31 March 2000, expressed concern about the effect of the proposed definition of “library” on “valuable resource sharing arrangements between libraries and community access to highly specialised private sector collections”. This concern was repeated by libraries in the inquiry by the LACA Committee.
27. The Government’s amendments in fact have a much wider effect. They not only allow access to corporate library collections by public libraries and their clients, but also allow corporate libraries, without any payment to copyright owners:
- to add to their collections material supplied by other libraries (corporate and public), and

⁷ Attorney-General, 27 June 2000, Hansard P16935

⁸ Under the three-step test, any exceptions to the exclusive rights of copyright owners must:

- only apply in certain special cases
- not conflict with a normal exploitation of a work, and
- must not unreasonably prejudice the legitimate interests of a rights owner.

⁹ AGD e-news on copyright, issue 14. By “inter-library loan system” we understand the Government to mean, or include, copying and supply of articles and other material by one library for inclusion in another library’s collection under section 50.

- to supply copies of material to the corporation's employees.
28. The Government has made no reference – let alone attempted justification – of these additional implications. We thus submit that Government should further amend the Bill so that it:
- would allow access by clients of public libraries to material in corporations, but
 - would *not* allow corporate libraries to add to their collections or supply copies to staff without fair payment to copyright owners.
29. We note that the Government has indicated it will review the issue in connection with its consideration of the recommendations of the Copyright Law Review Committee (CLRC) in its report on simplification of the Copyright Act. However, it has given no indication of its time-frame for doing so and we understand that it is a relatively low priority.

Supply from other libraries' collections

30. The Government has amended the Bill so that a library could reproduce and supply to another library a work held in any library's collection; the Bill as originally introduced required the work to be part of the supplying library's collection.
31. The Supplementary Explanatory Memorandum (Amendment 17) says that the effect of this amendment "is to limit the application of the exception to works held in the collection of the library network, rather than the particular library to which the request is made" and that this "will allow the continued operation of inter-library supply services such as SUPPLY 1". The amendment thus appears to be intended to implement the recommendation of the LACA Committee at para 2.103, but would in fact have a much wider application than that recommended by the Committee.
32. We submit that the Government should introduce a further amendment to the Bill so that section does not have a wider effect than recommended by the LACA Committee.

Commercial availability test

"Copy" should be "reproduction" in ss50(7A) and 51A(4)

33. Item 53 of the Bill would amend section 49(4) to replace "copy" with "reproduction", so that the "commercial availability" test would be whether a *reproduction* of the work is available within a reasonable time at ordinary commercial price.¹⁰ The commercial availability test in ss 50(7A) and 51A(4), however, refer to "copy" rather than reproduction. As the Government has not referred to any policy justifying a different test in ss 50(7A) and 51A(4), we

¹⁰ We note that a similar amendment would be made by Item 148 of the Bill to s135ZL(2).

assume that the discrepancy is an error, and we ask the Government to move further amendments to the Bill to amend ss 50(7A) and 51A(4) to refer to “reproduction” rather than “copy”. If, on the other hand, the discrepancy has resulted from a policy decision, we submit that the Government must provide the reasons for that policy.

Libraries can digitise articles which are commercially available in digital form

34. Proposed new section 50(7B) would allow a library to digitise a periodical article, even if the article is separately available for purchase in digital form. Similarly, it would allow a library to digitise a part of work, even if that part is separately available for purchase in digital form.
35. This appears to be an oversight, as s50(7A) as currently drafted would have anomalous and unfair results. For example, a library would not be able to copy and supply an article held in electronic form if that article were separately published in electronic form, but would be able to digitise and supply the same article held in its collection in print form.
36. If, contrary to our understanding, this is intended effect, we submit the Government must provide justification for such a policy, and in particular how such a policy would be consistent with the three-step test.

Commercial availability test in s50(7B) should apply to s49

37. Proposed new section 49 would allow a library to reproduce a digital version of an article and supply it to a client, even though the article is separately available for purchase in digital form. Similarly, a library would be able to reproduce a part of a work (for example, a chapter) and supply it to a client, even though that part is separately available for purchase. There is thus a different approach to electronic material in section 49 than in section 50. We submit that the Government must justify this different approach, and in particular how this provision is consistent with the three-step test.
38. Proposed new section 49 would allow a library to digitise periodical articles, and parts of works, which are commercially available in digital form. It thus has a similar effect to section 50(7A), and our comments about section 50(7A) apply equally to section 49.

Educational institutions

Insubstantial portions

39. The Government appears to have the following reasons for rejecting the LACA Committee’s recommendation to omit from the Bill the exception which would allow educational institutions to reproduce and communicate “insubstantial portions” of works:

- there would be uncertainty
 - there would be an increase in legal action
 - administrative costs would be increased
 - fair access by students would be impinged.¹¹
40. Each of these concerns indicates a misunderstanding of the educational copying provisions.
41. If the “insubstantial portion” provisions were removed, the material to which they apply could still be copied under other provisions in Part VB. Thus, removing the provisions would not “impinge access”, and would in fact simplify the operation and administration of Part VB.
42. The issue for copyright owners is not whether or not the material is copied, but whether or not the copying is paid for. The term “insubstantial portion” disguises the fact that the provisions allow the copying of qualitatively important parts of works; if a part is not an important part, then copying is not an infringement and there is no need to resort to a special exception.

Educational copying of artistic works

43. Proposed new section 135ZMD would allow the reproduction and communication of an entire artistic work in electronic form, even if that work is commercially available in electronic form.¹² This appears to be an oversight, and we submit that the Government must move an amendment to remedy the error.

Rights management information

44. Item 9 of the Bill (as amended) would introduce the following definition of “electronic rights management information”:
- (a) information attached to, or embodied in, a copy of a work or other subject-matter that:
 - (i) identifies the work or subject-matter, **and** its author or copyright owner; and
 - (ii) identifies or indicates some or all of the terms and conditions on which the work or subject matter may be used, or indicates that the use of the work or subject matter is subject to terms or conditions; or
- any numbers or codes that represent such information in electronic form. [emphasis added]

¹¹ Comments by the Hon Bruce Baird on the Digital Agenda Bill, 27 June 2000, Hansard P 16924.

¹² The Bill would not allow the reproduction of more than a reasonable portion of a literary or dramatic work, or 10% of a musical work, if the work is available in electronic form.

45. The first subparagraph requires identification of the material **and** its author or owner. In the 1996 WIPO treaty provisions, however, “rights management information” means:

information which identifies the work, the author of the work, the owner of any such right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. [emphasis added]

46. It thus appears that the Bill, even as amended, would not give full effect to the treaty provisions. In its report on the Bill, the LACA Committee recommended amendments to the definition to bring it into line with the WIPO treaties.¹³
47. We thus submit that the Government should introduce a further amendment to fully implement the LACA Committee’s recommendation.

Circumvention of technological protection

48. The “permitted purposes” provisions are not limited to allowing access to material published by the copyright owner in electronic form. They also allow educational institutions and government to get access to unpublished material, which may be confidential, private or intended for a limited class of people (such as board minutes, or draft documents). Access to such material does not appear to be part of the Government’s policy, and we thus submit that the Government should move amendments to the Bill to restrict the application of the “permitted purposes” provision to material published by the copyright owner in electronic form.

Copyright Tribunal jurisdiction

49. We support the submission by APRA that the Copyright Tribunal should have jurisdiction in relation to collective licences relating to the new right of communication.
50. We support the submission of Screenrights that the Copyright Tribunal should have jurisdiction in relation to the systems used by collecting societies for sampling and record keeping.

¹³ *Advisory Report*, op. cit., Recommendations 10 and 11 at paras 4.9 and 4.10.

Film directors

51. 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
8 August 2000

Annexure: Library copying scenario

Publisher A provides, to subscriber, online access to articles published in its printed journals. The service required considerable investment, including software development, and acquisition of rights (in return for payment) from authors.

Publisher B is developing a similar online service for articles from its journals. The service is to be available from mid 2001. Publisher B is acquiring licences from the authors of the articles, to include their articles in the online service in return for royalty payments. Publisher B has also invested in the development of software, including technological protection measures to inhibit unauthorised subsequent use of the articles, and rights management information.

A large commercial corporation is looking at diversifying its activities. A number of its staff are investigating a variety of possible business opportunities. These staff members ask the corporation's library (Corporate Library A) to acquire a large range of material relating to the business opportunities they are investigating, to be accessible online in the library.¹⁴

Corporate Library A requests digital reproductions of 200 articles from another corporate library (Corporate Library B) which subscribes to the printed journals containing those articles.¹⁵ 100 of the articles are from Publisher A's journals, and the other 100 are from Publisher B's journals.¹⁶ Corporate Library B notifies other libraries that it has received the request from Corporate Library A, and offers to supply the digital versions of the articles to other libraries who request them for their collections. Corporate Library B receives requests from five other libraries for the articles.

Corporate Library B creates digital versions of the 200 articles, and makes them available online for the six requesting libraries to download.¹⁷

Corporate Library B charges the six libraries for the costs (direct and indirect) of digitising and supplying 150 of the articles. In relation to the remaining 50 articles, Corporate Library B does not charge a fee but instead makes a "contra" request for 50 digitised articles from each of the libraries' collections.

Corporate Library A provides online access in the library premises to the collection of articles it has acquired from Corporate Library B. The library provides access not only to the corporation's staff, but also to other people who pay the library an access fee.¹⁸ The library advertises this service.

¹⁴ Under proposed new section 49(5a). There is no requirement that the access be for the purposes of research or study.

¹⁵ Under proposed new section 50(7A), the Corporate Library B can digitise the articles from the printed journals in its collection even if the articles are available in electronic form.

¹⁶ In some cases, there were two or three articles on the subject matter in the same journal, and Corporate Library B has reproduced both or all of them in reliance on proposed new section 50(8)

¹⁷ The supplying library could also supply the articles on CD-ROM. Under proposed new s50(7C), Corporate Library B must destroy the digital copies on its server once the copies have been supplied to the requesting libraries.

¹⁸ There is no prohibition under proposed new s49(5A) against charging a fee for online access, and no requirement that any fee be limited to cost recovery.

Corporate Library A then receives requests from five other libraries to supply them with the 100 articles it has acquired in digital form from Corporate Library B that are published in Publisher B's printed journals.¹⁹

Corporate Library A charges each of the libraries a "cost recovery" fee for the supply of the collection. When calculating the "cost recovery fee", Corporate Library A includes the fee it paid to Corporate Library B.

Each of five libraries which acquires the collection also makes the collection accessible online on its premises.

Publisher A has lost at least six potential new clients – the six libraries supplied by Corporate Library B.

Publisher B has lost at least eleven potential new clients – the six libraries supplied by Corporate Library B and the five libraries supplied by Corporate Library A.

Neither the authors of the articles nor the publishers receive any payment.²⁰ The corporate libraries on the other hand – part of large profit-making corporations – have acquired a collection of valuable copyright works.

¹⁹ Corporate Library A can supply articles it holds in digital form, under proposed new section 50(7B), if the articles are not available in electronic form at the time of supply. It is irrelevant to the operation of the proposed new provision that the publishers of those articles are developing online services including those articles.

²⁰ In addition, there are no technological protection measures to inhibit subsequent unauthorised use, and no rights management information for the articles.