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Submission to Digital Agenda Review

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Australian Copyright Council

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 provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to copyright policy issues.

Some of the organisations affiliated with the Australian Copyright Council have made separate submissions to the Consultant to the review.

The contact person in relation to this submission is Libby Baulch, Executive Officer.

We consent to the reproduction and making available of this submission on the websites of the Attorney-General's Department and of Phillips Fox.

Major issues

The major issues in the review for the Copyright Council are:

- that the Digital Agenda Act amendments allow digitisation of non-digital copyright material, including by libraries and educational institutions, contrary to the recommendations of the House of Representatives Legal and Constitutional Affairs (LACA) Committee in its report on the Digital Agenda Bill;
- that the Copyright Act allows free use of copyright material by libraries in for profit entities, and that these provisions were extended by the Digital Agenda Act; and
- that the Digital Agenda amendments do not proscribe the use of circumvention devices and services, and, on the contrary, they allow the manufacture and supply of circumvention devices and services for "permitted purposes".

Our approach to the issues

In accordance with the scope of the review described in paragraph 2.6 of the issues papers, we have addressed the issues having regard to the object of the Digital Agenda Act set out in s3 of that Act. That object must be read in light of Australia's international treaty obligations (including the three-step test).

In addition, we note that some amendments in the Digital Agenda Act were intended to put Australia in a position to accede to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and thus we have taken into account the articles in, and agreed statements for, these treaties where relevant.

Object of Digital Agenda Act

The object of the Digital Agenda Act is as follows:

The object of this Act is to amend the *Copyright Act 1968* so as to:

- (a) ensure the efficient operation of relevant industries in the online environment by:
 - (i) promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors; and
 - (ii) providing a practical enforcement regime for copyright owners; and
 - (iii) promoting access to copyright material online; and
- (b) promote certainty for communication and information technology industries that are investing in and providing online access to copyright material; and
- (c) provide reasonable access and certainty for end users of copyright material online; and
- (d) ensure that cultural and educational institutions can access, and promote access to, copyright material in the online environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors; and
- (e) ensure that the relevant global technical standards which form the basis of new communication and information technologies, such as the Internet, are not jeopardised.

Three-step test

Under the three-step test, exceptions to infringement must:

- apply in certain special cases
- not conflict with a normal exploitation of the work, and
- not unreasonably prejudice the legitimate interests of the rightsholder

References to access in the object of the Digital Agenda Act must be read as access consistent with the three-step test.

Libraries, Archives and Educational Copying

Issue 1

1.1: Does the difference between a library carried on for a profit and libraries operated by a “for profit” organisation adequately maintain an appropriate balance between the interests of owners and those of libraries, users and the community in the digital environment?

In this context, the most relevant elements of the object of the Digital Agenda Act are:

promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors [s3(a)(i)]

provide reasonable access and certainty for end users of copyright material online [s3(c)]

ensuring that cultural and educational institutions can access, and promote access to, copyright material in the online environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors [s3(d)]

The object thus distinguishes “cultural institutions” which provide “public access” from other repositories of material. We submit that libraries operated by for profit entities are not covered by s3(d) as they do not meet those criteria.

Having regard to s3(c), we note that, in general, copyright owners are not obliged to provide access to their work. Subject to special exceptions and statutory licences (which must comply with the three-step test) and to requirements under competition laws, copyright owners have exclusive rights which they may exercise or not. Having said that, copyright owners are, of course, generally interested in their material being widely available on reasonable terms.

We submit that the current application of the library use provisions to libraries in for profit entities does not comply with any, let alone all, of the three requirements of the three-step test:

- it is not a special case
- it conflicts with a normal exploitation of works (that is, licences offered by Copyright Agency Limited (CAL)); and
- it unreasonably prejudices the legitimate interests of the copyright owner.

Licences currently offered by CAL provide access on reasonable terms to libraries in for profit entities to photocopy material, and access to some digital material. We submit that exceptions in the Copyright Act to material outside the CAL licences is not justified by the objects of the Digital Agenda Act, nor by the three-step test.

Finally, in relation to the following term of reference:

- (i) an examination of the effects of these exceptions on copyright owners’ markets and the ability of libraries to discharge their community function as disseminators of information in digital form

the term “community” must refer to a broader community than the staff of a for profit entity.

1.2: Does a distinction between a library carried on for a profit and libraries operated by a “for profit” organisation need to be maintained? If not, would the balance be better addressed by repealing section 18 or section 49(9)?

We submit that s18 should be repealed, and that a definition of “library”, which excludes libraries in for profit entities, should be introduced. The definition should exclude libraries in for profit entities. We propose a definition along the following lines:

Library does not include a library maintained mainly or solely for the purposes of a business or businesses conducted for profit.

1.3: Is any restriction on copying by for profit libraries to make a copy available to another library, similar to that in section 49(9), required under section 50?

Section 50(9) already limits the application of section 50 to libraries not conducted for profit.

We have commented below on other aspects of ss49 and 50 which are problematic.

Supply from private to public libraries

The application of the library use provisions to libraries in for profit entities allow them to do the following without payment to copyright owners:

- supply material in hardcopy and digital form to their clients (ie the staff of the for profit entity);
- acquire material for their collection from other libraries;
- supply material from their collections to other libraries; and
- reproduce material for various “internal” purposes, such as preservation and replacement.

The first three activities are limited to libraries that are not conducted for profit (sections 49(9) and 50(9)); such libraries may, however, be owned by a person carrying on business for profit (section 18). The “internal purposes” activities may be conducted by any library, including a library conducted for profit (but not an archives operated for profit, because of the definition of “archives” in section 10(4)).

Our greatest concerns are with the first two activities, and thus our position is not accurately stated in 6.1.10 of the Issues Paper (which refers only to the third activity).

We note that submissions from libraries have largely addressed the third activity (the supply of material from private to public libraries). There has been little, if any, attempted justification of the other activities.

We submit that the supply of material from private to public libraries could be addressed by amendments to section 50. These amendments would include a new term to describe the supplying library, defined to include libraries in for profit entities. This would allow public libraries to acquire material from private libraries for their clients, but not vice versa. We note that the reproduction by the supplying library is deemed, under section 50(3), to have been made and supplied by the acquiring library.

Commercial availability

Many of the library use provisions require an enquiry as to whether material is available “within a reasonable time at an ordinary commercial price”. This

requirement is intended to ensure compliance with the three-step test (in particular, the requirement that an exception not conflict with a normal use of a work). There are, however, some provisions relating to commercial availability which are problematic, as we outline below.

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

The Digital Agenda Act amended section 49(4) to replace “copy” with “reproduction”, so that “commercial availability” now depends on whether a *reproduction* of the work is available within a reasonable time at ordinary commercial price. Similar amendments were not made to ss 50 or 51A. Section 50(7A)(e)(ii) and 51A(4) still refer to a “copy” rather than reproduction. This appears to have been an oversight, as the Government has provided no rationale for the use of a different term in ss50 and 51A to that used in section 49.

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

Section 49 now allows 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 may 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. To our knowledge, the Government has not justified the different approach in section 49, and we submit that it is not consistent with the three-step test or the objects of the Digital Agenda Act.

Sections 49 and 50 allow production of a digital reproduction, even though a digital reproduction is commercially available

Section 49 allows a library to digitise periodical articles, and parts of works, even though digital reproductions of those articles and parts are commercially available in digital form. Section 50(7A) has a similar effect. Again, we submit that the effect of these provisions is not consistent with the three-step test or the objects of the Digital Agenda Act. Our view, as stated elsewhere in this submission, is that ss49 and 50 should not allow any digitisation of works in hardcopy form.

1.4: Has the legislature’s intention to exclude private commercial galleries and similar repositories from the definition of “archives” been achieved?

This is not really an issue affected by the Digital Agenda amendments, as there were no amendments to the definition of “archive”; the Act merely introduced an “example”, inserted after s10(4), intended to confirm that the definition may cover collections of galleries and museums.

In our view, it is difficult to see how the definition of “archives” in s10(4) could apply to a private commercial collection.

Issue 2

2.1: What impact (if any) has section 49(5A) had on copyright owners’ markets?

The Explanatory Memorandum to the Digital Agenda Act gives the following justification for section 49(5A):

102. By way of comparison, the mere display of hard copy books in a library is not an infringement of copyright. This provision is

intended to create a similar exception for material in electronic format that complies with the requirements of new s.49(5A).

The analogy is, however, inapt. Only one person may look at a printed book at any one time. There is no requirement in s49(5A), however, that there be only one terminal per reproduction of a work in the library's collection; a library may communicate the work to any number of terminals on its premises. In addition, it is not clear whether "a library", for the purposes of Division 5, must be confined to one building or location. Arguably, there may be one "collection" which is housed in a number of places. If this is correct, an electronic version of a work may be communicated to terminals in several of a library's premises.

2.2: What impact (if any) has the different treatment in section 51A(3A) had on libraries' or users' interests?

This question appears to be misconceived.

Section 49(5A) applies to all published works (including artistic works) acquired in electronic form as part of the library's collection. It allows the library to make such works available on the library's premises, provided users may not make an electronic reproduction or communicate the works. It appears that users may, however, print the material for their research or study.

Section 51A(3A) applies to an electronic preservation reproduction of an artistic work (which may be made by the library under s51A(1)(a)). It allows the library to make such reproductions available online on the library's premises if the original has become lost or unstable or has deteriorated. As for section 49(5A), the computer terminal must not allow electronic reproduction or communication; unlike section 49(5A), it must not allow hardcopy reproductions.

2.3: Is there any unjustified inconsistency in treatment between the availability electronically of literary and artistic works?

As noted above, s49(5A) applies to all published works acquired in electronic form by a library.

Section 51A(3A) applies only to electronic preservation reproductions of artistic works. It applies even if the artistic work has been published (because s51A(4) only precludes the application of s51A(1) to a "work held in published form").

Section 51A(3A) and (3B) appear to be intended to replicate, in the online environment, a library's ability to display a hardcopy preservation copy. As for section 49(5A), the provisions in fact have a much broader effect because there is no limit on the number of terminals on which a work may be viewed.

Issue 3

In relation to copyright owners markets, the Review seeks your views (together with any supporting data and having regard to the matters dealt with in paragraph 4.16 in particular) about whether the provisions of Division 5 are or are likely to:

- ***significantly reduce or remove the incentive to create works or other subject matter that is protected;***
- ***lead to creating or reducing opportunities for rent seeking or otherwise create or offset additional social costs;***
- ***promote widespread use of the material and increase markets;***
- ***impede or encourage material eventually becoming available as part of the public domain.***

We query whether all aspects of the issues listed are consistent with the terms of reference and the object of the Digital Agenda Act. In particular, we fail to see how the issue in the final bullet point is relevant to this review: both the terms of reference and the object of the Digital Agenda Act refer to “reasonable access”.

As noted above, we contend that the application of Division 5 to corporate libraries is consistent with neither the object of the Digital Agenda Act nor the three-step test.

In addition, where the Division allows the making of a reproduction of a work or part of a work, and such a reproduction is available within a reasonable time at an ordinary commercial price, then its application is inconsistent with the three-step test and the objects of the Digital Agenda Act. Under the three-step test, exceptions must not conflict with a normal exploitation of a work. Allowing free reproduction and communication of a commercially available work must necessarily conflict with a normal exploitation.

Finally, we contend that the provisions which allow libraries to produce their own digital versions of works is inconsistent with the three-step test and the objects of the Digital Agenda Act, because of the likely harm to copyright owners. Copyright owners should be entitled the opportunity to ensure that a work released in digital form contains appropriate rights management information, and to use technological protection measures to inhibit unauthorised use.

We submit that international comparisons can be useful in this context, and we have referred the Consultant previously to the comparative study published by the Centre for Copyright Studies, *A Comparative Study of Library Provisions: From Photocopying to Digital Communication*. That study shows that the library use provisions in the Australian Copyright Act are far more generous to users than their counterparts in the US, the UK or Canada.

Issue 4

4.1: Do any of the provisions in sections 49 or 50 create any additional costs or create any artificial barriers to the provision or circulation of works or information, without adequately protecting the rights of owners?

We make the following points in response to issues raised in the commentary:

6.4.2: We note that an article (including an article in electronic form) may be supplied to a client even though it is available within a reasonable time at an ordinary commercial price.

6.4.3: If there were no requirement to destroy electronic reproductions made for clients and other libraries, the supplying library would end up with a copy for its collection in addition to the copy received by the client or acquiring library. It is difficult to imagine a justification for this outcome consistent with the object of the Digital Agenda Act and the three-step test.

6.4.4 The term “reasonable time” has been the subject of agreement in relation to educational copying, with different periods of time for different types of works. Such guidelines would seem to be best way forward on this issue. We note that an important difference between hardcopy and digital versions of works is that digital versions are more likely to be available from the copyright owner on a “supply on demand” basis, and that sources of enquiry in relation to the availability of hardcopy versions may not be appropriate for the digital versions.

6.4.8: A library may make preservation reproductions of manuscripts and other original versions of works under s51A(1)(a). It may also, under s51A(1)(a), make a reproduction of an original version of a work for the purposes of research or study. In our view, a library may make a research reproduction from a preservation reproduction. There is nothing in s51A(1)(a) which requires the research reproduction to be made directly from the original version.

6.4.10: Section 51A(4) only applies to a work held in published form; it thus does not apply to the original versions of works (such as manuscripts), to which s51A(1)(a) applies.

4.2: Does any aspect of Division 5 of the Act require clarification or amendment, to remove any uncertainties or to better express or meet the objectives of the Digital Agenda Act?

We refer to the responses we have made to other questions relating to Division 5.

In addition, we note that the scope of s51A(2) and (3) is unclear. These provisions allow a library to make reproductions for “administrative purposes”, and to make such reproductions available online to officers of the library. The provisions bear little relationship to the provisions they replaced, which allowed the making of “microform copies” of material which was subsequently destroyed (such as newspapers).

The Explanatory Memorandum to the Digital Agenda Bill contained no justification for the new provisions, and no explanation or examples of what the Government considered to be “administrative purposes”. Given s51AA (which allows certain activities of the Australian Archives), a reproduction made for “administrative purposes” would appear not to include a “reference reproduction”, a “replacement reproduction” or a “working reproduction” as defined in that section. In addition, a reproduction made for “administrative purposes” would appear to not include a reproduction made for preservation of original material, or a reproduction made to replace a lost, stolen or damaged item.

We look forward to the Consultant’s findings about the circumstances in which these provisions are currently being used, and an opportunity to comment on appropriate amendments.

4.3: In relation to libraries and archives community function as disseminators of information in digital form, the Review also seeks your views (together with any supporting data and having regard to the matters dealt with in paragraph 4.16 in particular) about whether the provisions of Division 5 are or are likely to:

- **significantly reduce or remove the incentive to create works or other subject matter that is protected;**
- **lead to creating or reducing opportunities for rent seeking or otherwise create or offset additional social costs;**
- **promote widespread use of the material and increase markets;**
- **impede or encourage material to eventually to be available, as part of the public domain.**

We refer to our responses to other questions relating to Division 5 in relation to some of the issues listed in the bullet points. See also our earlier comments on the relevance to this review of all issues raised in these bullet points.

Issue 5

5.1: Is first digitisation of unpublished works by libraries and archives occurring to any (or any significant) extent? If so, is there any systemic or widespread failure to include electronic rights management information?

Division 5 allows digitisation of published works in a library's collection under s49 for supply to clients and s50 for supply to other libraries. These provisions are of the greatest concern. Other sections also allow digitisation: s51 (reproduction and communication of unpublished works for research or study or with a view to publication); s51AA (reproduction and communication of works in Australian Archives); and s51A (reproduction and communication for preservation, replacements and administrative purposes).

We look forward to seeing the Consultant's findings about the extent to which, and manner in which, libraries are digitising works in reliance on these provisions.

5.2: Are there any adverse effects as a result of the lack of any positive obligation to include electronic rights management information on any electronic copy or communication that may be made of a work or other subject matter? If so, what are they?

The provisions in the Copyright Act dealing with rights management information, which are based on the international norms in the 1996 WIPO treaties, recognise the importance of this information to copyright owners, particularly in connection with managing and enforcing their rights in the digital environment. The effect on a copyright owner of releasing a work in digital form without digital rights management information is the same as removing the copyright owner's digital rights management information. It is thus difficult to reconcile the recognition of the importance of rights management information in one part of the Digital Agenda Act with the introduction of exceptions, in another part of that Act, which allow the release of digital versions of works without that information.

Section 49 requires certain notification to a user when a work is communicated, but there are no requirements regarding rights management information or technological

measures to inhibit subsequent infringing use, and there are no consequences for the library if the reproduction is subsequently used for other purposes.

Issue 6

6.1: Does the format neutral approach to media in the Act have an adverse effect on the ability of libraries and archives to discharge their community functions as disseminators of information in digital form?

The issue to which response is invited is not very clear from the commentary or the question. The references to “media” and “formats” appear to be intended to refer to copyright subject matter, rather than the form or media in which that subject matter is embodied. Assuming we have correctly understood the issue, we have commented below on:

- the application of the library use provisions to subject matter other than works; and
- the application of the library use provisions to works other than works comprising text.

Subject matter other than works

According to statements made by the Government, the Digital Agenda Act was intended to “extend” into the digital environment certain exceptions which previously applied to hardcopy material. Given that the library use provisions allowing supply to clients and to other libraries, preceding the Digital Agenda amendments, applied to works but not to other subject matter, it is difficult to see how supply to clients and other libraries of audiovisual material could be covered by the Consultant’s terms of reference.

We confirm, however, as stated in our response to the report of the Copyright Law Review Committee on *Simplification of the Copyright Act*, that we would oppose the introduction of provisions allowing libraries to supply audiovisual material to clients and other libraries. We submit that those who propose such provisions need to make out a case which is consistent with the three-step test.

Works other than works comprising text

The Digital Agenda amendments relating to supply to clients and other libraries apply to all works, including artistic works and musical works. An entire work may be supplied if a reproduction or copy of it is not available within a reasonable time at an ordinary commercial price. If a reproduction or copy is available within a reasonable time at an ordinary commercial price, then no more than a reasonable portion may be supplied by the library. If a photograph of a Henry Moore sculpture is available within a reasonable time at an ordinary commercial price, then a library may not supply more than a reasonable portion of it. This is consistent with the three-step test, including the requirement to not interfere with a normal use of the work.

6.2: *Would amending the Act to distinguish between different media have an adverse effect on:*

- ***The technological neutrality of the legislation***
- ***The rights and interests of owners, users or libraries and archives.***

We seek an opportunity to respond once we have a clearer idea of what is being proposed, and the reasons for it.

Issue 7
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7.1: *Is further clarification or guidance needed in the Act, in order to assist educational institutions to determine what is a 'work' in the online or digital context? If so, does that clarification need to be made within the framework of the legislation, or is better left to industry rules or guidance, akin to the rules agreed between CAL and MCEETYA?*

Any clarification is better dealt with in guidelines, such as those being negotiated between CAL and MCEETYA.

7.2: *If any rules are to be industry based, does the Act need to prescribe certain minimum requirements, as the minimum acceptable benchmark or standard?*

No.

Issue 8
.....

8.1 *Is further guidance needed in the Act, in order to clarify the nature and extent of the application of the statutory licence to artistic works? If so, should an artistic work be included in calculating the amount that can be copied? How should 'explaining or illustrating' be defined?*

Our view is that all provisions referring to artistic works which explain or illustrate text should be repealed: s53 (library use), s135ZM (educational use of illustrations in hardcopy form) and s135ZME (educational use of illustrations in electronic form).

Without these provisions, artistic works can usually be reproduced in any event because they are rarely separately published or available within a reasonable time at an ordinary price. For artistic works in electronic form, there is not even a commercial availability limitation: s135ZMD(1) allows reproduction of all works in electronic form; s135ZMD(2) requires an enquiry about commercial availability for literary, dramatic and musical works, but not artistic works. This appears to be an oversight, which should be rectified.

Repeal of the provisions would not have a detrimental effect on access. If an accompanying artistic work is available within a reasonable time at an ordinary commercial price, then ss53, 135ZM and 135ZME are inconsistent with the three-step test.

We oppose the division of remuneration in ss135ZM and 135ZME, as we think that this is a matter for the distribution policies of the collecting society. In many cases,

copyright in accompanying artistic works is owned by the publisher rather than the artist, and the statutory division of royalties has had the effect of diverting 50% of the income to the publisher, thus diminishing what may otherwise have been the writer's share.

For our view in relation to artistic work accompanying "insubstantial portions", see our response to Issue 11 below.

8.2 Do the current provisions lead (or would any change lead) to uncertainty, or an inappropriate shift in the balance between the interests of owners, user and educational institutions?

As apparent from our response to the previous question, we think the current provisions have led to an inappropriate shift in the balance between the interests of owners, users and educational institutions, and that that shift would be remedied by the amendments we have proposed.

Issue 9
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Is further clarification or guidance needed in the Act in order to determine what is meant by "hardcopy" works? If so, are you able to state what might be an appropriate definition?

We are not aware of any confusion or difficulties of interpretation in relation to the meaning of "hardcopy". Given the context in which it appears, it clearly has a wider meaning than that suggested in paragraphs 6.9.7 and 6.9.8 of the issues paper.

Issue 10
.....

10.1: To what extent (if any) are technological developments and the operation of the Act adversely affecting the ability of an educational institution to make the most of the benefits of new communications technologies (including distributed communication systems) for the purposes of instruction or learning?

Under Part VA, educational institutions may communicate material copied from broadcasts, provided they give an undertaking to pay equitable remuneration. The amount of remuneration payable can be determined by agreement or by the Copyright Tribunal. Different rates may apply to different types of communication.

We do not understand the two references to "windfall" in the issues paper, given that the entitlement under the Act is to *equitable* remuneration.

10.2 The extent to which any change in the provisions, in order to increase the consistency of approach in a technologically neutral way, or any decision not to change the provisions are or are likely to:

- **significantly reduce or remove the incentive to create works or other subject matter that is protected;**
- **lead to creating or reducing opportunities for rent seeking or otherwise create or offset additional social costs;**
- **promote widespread use of the material and increase markets;**
- **impede or encourage material to eventually to be available, as part of the public domain.**

We refer to our response to 10.1. See also our earlier comments on the relevance to this review of all issues raised in these bullet points.

Issue 11

Are there any significant adverse effects being created or likely to be created in owners' markets or interests as a result of the application of the 1% insubstantial portion exception to copyright infringement to works in electronic form. If so, how can the provisions be drafted so as to remove any adverse effects, but continue to apply to works in electronic form, having regard to the necessary balance to be achieved (including the matters listed in paragraph 4.16 above, and the need to ensure technological neutrality in the Act?

Section 135ZG allows educational use of insubstantial portions of literary and dramatic works in hardcopy form. The provision appears to have originated in a recommendation by some members of the Franki Committee in its 1976 report on reprographic reproduction (para 6.67), on the basis that "it would permit only an amount of copying in respect of which any royalty would be very small and probably uneconomic to collect".

The Digital Agenda amendments introduced s135ZMB, which allows educational use of "insubstantial" portions of literary and dramatic works in electronic form, and extended s135ZG to allow the making and communication of electronic reproductions.

Both sections allow the copying of a further 1% every 14 days; there is no limit on the cumulative amount of a work which may be reproduced. By contrast, s10(2C) provides that a person who reproduces a reasonable portion of a work may not subsequently rely on the deemed meaning of "reasonable portion" in relation to any other part of the same work.

Our view is that ss135ZG and 135ZMB should be repealed. The original justifications for s135ZG no longer apply, and, even if they did, different considerations apply to the digital environment. In addition, section 135ZMB has a much broader effect than s135ZG, and so does more than "carry over" the effect of an existing exception in the hardcopy environment. This is because it allows the reproduction of 1% of the words in a work, and thus allows more scope for reproducing the "best bits" of a work than the limit for s135ZG (1% of pages).

In addition, an accompanying hardcopy artistic work is likely to be on one of the pages reproduced under s135ZG, but it appears that an accompanying electronic artistic work may be reproduced in addition to the words.

We submit that the Consultant may recommend the repeal of s135ZMB and of the amendments to s135ZG, consistently with the objects of the Digital Agenda Act and the terms of reference.

Carriers and Carriage Service Providers

Issue 12

12.1: Do sections 36 and 39B of the Act adequately specify the circumstances in which a carrier or carriage service provider (including an ISP) will not be liable for an infringing act?

Sections 39B and 112E originate from the following agreed statement to the WIPO Copyright Treaty:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.

There is an equivalent agreed statement to the WIPO Performances and Phonograms treaty.

Sections 39B and 112E are unnecessary for compliance with the treaties, given other provisions in the Copyright Act, particularly ss36 and 101 (liability for infringement), 43A and 110A (temporary reproduction in course of communication) and 22(6) (person deemed to make a communication). Sections 39B and 112E should be repealed; not only are they unnecessary, but they arguably have a wider effect than that required by the agreed statements, and there appears to be confusion about their scope.

The liability of carriage service providers under the Digital Agenda Act amendments has not yet been the subject of judicial consideration. More guidance about liability, and procedures for giving and responding to notification of alleged infringements could be dealt with in a code of conduct negotiated between copyright owners and Internet service providers. Such a code should be supported by legislative provisions, which would provide a mechanism for review and authorisation of the code (for example by the Attorney-General), and exempt from certain liabilities an Internet service provider who complies with the requirements of the code.

12.2: Would any other provisions (such as the “safe harbor” provisions of the DMCA) better achieve the aims of the legislation, particularly having regard to possible implications for technological neutrality or increased costs? (Supporting evidence for any claims made in respect of this issue should be given).

See the response to 12.1 above.

12.3: Is there any material difference between the “mere provision” of facilities and the “mere use” of facilities? If so, does that difference have any impact or effect on the objectives of the Digital Agenda Act?

See the response to 12.1 above.

12.4: Is there any overlap between sections 39B (or 112E) and 36 (or 101)? If so, does this lead to a lack of clarity which prejudices owners, users or service providers?

See the response to 12.1 above.

Issue 13

13.1: Does the current flexibility and inclusive approach in section 36(1A) achieve the Digital Agenda's objectives in relation to clarity and certainty? If not, would a more rigid approach better achieve those aims?

See response to 12.1 above regarding a code of conduct.

13.2: Is there any inconsistency between the first limb of the test stated by Gibbs J and paragraph 36(1A)(a) of the Act? If so, does the concept of control in the Act need to be modified or strengthened so as to give greater certainty to the acts or omissions that may constitute authorisation of infringement?

No.

13.3: Are there any circumstances in which the mere provision of a device that can be used to infringe copyright without also providing open access to works or other subject matter protected by copyright amounts to an authorisation of infringement of copyright works?

We do not think that the case law regarding authorisation liability prior to the Digital Agenda amendments included any requirement that the person authorising had provided access to the material infringed. Such a requirement would vastly, and unfairly, limit authorisation liability, particularly in the digital environment.

Issue 14

14.1: Is a voluntary code of conduct sufficient to protect Service Providers and to help define the liability of service providers for copyright infringement?

See our response to 12.1 above.

14.2: Should such a code of conduct be supported by a statutory indemnity (or any other statutory framework) as proposed by the IIA?

No. Depending on the code and the statutory provisions relating to it, it may be appropriate to provide exemption from liability, to users and third parties in certain cases, for an Internet service provider who complies with the code.

14.3: Are there any instances in which a Service Provider may be liable to a third party with whom it has no contractual relationship? If so, is amendment of the Digital Agenda Act required to better clarify the Service Providers' liability?

We assume that this question relates to issues such as provision of subscriber information and takedown of alleged infringing material. We are not aware of any such circumstances, but if they exist, they could be addressed in the code of conduct we have referred to above.

Issue 15

15.1: Is the existing discovery procedure under the Federal Court Rules a sufficient mechanism for obtaining access to ISP subscriber details?: If not, what would be a viable alternative procedure, particularly having regard to issues of cost, compliance and potential for the exercise of judicial power by an administrative body?

While there are existing procedures of obtaining access to subscriber information, they are regarded as expensive and cumbersome, and a more streamlined process would be desirable.

Technology and rights

Issue 17

18.1: The Review seeks your views (together with any supporting data and having regard to the matters dealt with in paragraph 4.15 in particular) about whether any proposal to allow the copying or storing of works or audio-visual files at a point closer to the point of access is or is likely to:

- **create greater efficiencies or a more efficient allocation of available resources;**
- **significantly adversely impact on owners' legitimate interests or markets;**
- **significantly reduce or remove the incentive to create works or other subject matter that is protected;**
- **lead to creating or reducing opportunities for rent seeking or otherwise create or offset additional social costs;**
- **promote widespread use of the material and increase markets.**

In some cases, caching which is not covered by ss43A and 111A may be impliedly licensed by the copyright owner, where the copyright owner has authorised the

communication of the work. In addition, the desirability of caching to facilitate faster delivery is diminishing as bandwidth increases.

We do not think that a statutory exemption such as that referred to in the issues paper would be justified.

Issue 20

20.1: Do you have any comments on the approaches taken by Sackville and Finkelstein JJ in the Sony case (at first instance and on appeal respectively) and Emmett J in the Warner case?

We think that the judgment of Finkelstein J is a correct description of the law.

20.2: Is there a legitimate basis to distinguish between use of the computer program in circumstances where it can be reproduced and in circumstances where it cannot?

We think that the formulation of the right of reproduction and/or the definition of “material form” needs to be amended so that there is no such distinction. Australia’s international treaty obligations require the granting of an exclusive right of reproduction “in any manner or form”. That obligation may not be met by the right to reproduce under Australian law, given the constraints arising from the “material form” requirement as interpreted by the majority in *Sony v Stevens*.

We also note that the definition of “material form” applies both to determining when a work is “made” (for the purpose of determining subsistence of copyright and other matters), and to the reproduction right.

Issue 21

Do you have a view on the value of the right to make the first digital copy of a work, and whether, as a result, the Act needs to be amended to better recognise that value?

We think that the consequences of releasing a work in digital form are so far reaching that it should never be allowed under an exception or a statutory licence. These consequences were recognised by the LACA Committee in its 1999 report on the Digital Agenda Bill, but the Committee’s recommendations appear to have been misunderstood by the Government.

Copyright owners had the exclusive right to digitise non-digital material before the Digital Agenda amendments: the amendments merely confirmed this. On the other hand, this exclusive right has been undermined by the Digital Agenda amendments, because they allow digitisation without the copyright owner’s licence. These amendments are completely at odds with the amendments relating to technological protection measures and rights management information, which originate from a recognition that exclusive rights alone may be insufficient in the digital environment. The Digital Agenda amendments allow the release of a digitised work by someone other than the copyright owner, without the copyright owner’s rights management information and without any technological measures to inhibit subsequent infringing use.

We submit that the Act should be amended so that material may not be digitised under any free exceptions or statutory licences. The current provisions necessarily prejudice the legitimate interests of copyright owners, and are thus inconsistent with the three-step test. In some cases, the current provisions also conflict with a normal

exploitation of a work as they allow the production of a digital version of a work which is already available in digital form (for example, digitisation of a hardcopy article by a library under ss 49 and 50).

Circumvention devices, technological protection measures and rights management information

Issue 23

23.1: *In light of recent judicial consideration, does the definition of “technological protection measure” in the Act, achieve its objectives as expressed in the EM?*

We think that the interpretation of the meaning of “technological protection measure” by the Full Court of the Federal Court in *Sony v Stevens* is correct.

23.2: *Is any change or clarification required to the definition of “technological protection measure” in the Act in order for the objectives of the Digital Agenda Act to be met?*

We think that the definition should be amended so that it covers measures intended to control access to copyright material. Such an amendment would be consistent with the object of the Digital Agenda amendments and with the 1996 WIPO treaties.

Issue 24

24.1: *Is the Australian definition of a “circumvention device” sufficient to meet the objectives of the Digital Agenda Act?*

No.

24.2: *Are any aspects of other comparable legislative solutions that, in your view, should be included in the definition of a “circumvention device”?*

We support the wider formulation in the DMCA and the EU Directive.

24.3: *Have any problems with the definitions of “circumvention device” (and “circumvention service”) been cured by the recent amendments to those definitions in the Parallel Importation Act?*

The only problem cured by the recent amendments was a drafting error.

Issue 25

25.2: Are further amendments necessary to better protect copyright owners in relation to the illegal manufacture, dealing and provision of circumvention devices and services or broadcast decoding devices, and the subsequent use of circumvention devices and services or broadcast decoding devices.

We support prohibitions on the use of circumvention devices and services. Given that this is the activity the amendments were intended to impede, the failure to prohibit use is a major inadequacy. We note that a copyright owner has no control over devices supplied from overseas and imported by the users of them.

Contrary to the object of the Digital Agenda Act, the failure to prohibit the use of circumvention devices and services allows access which is not reasonable.

We strongly object to the inclusion of "permitted purposes" for which circumvention devices and services may be supplied.

We look forward to the Consultant's findings about the extent and manner in which these provisions are being relied upon, particularly by governments, libraries and educational institutions.

25.3: Does the prohibition on the commercial marketing and sale of circumvention devices or services or broadcast decoding devices achieve the desired balance between the right of users and owner of copyright works.

No: see our response to 25.2.

Issue 26

Are owners' rights affected (as demonstrated by any supporting data) by the fact that the Digital Agenda Act does not prohibit use of circumvention devices or services or private use of broadcast decoding devices per se? If so, are any amendments to the Digital Agenda Act required and what are they?

See our response to 25.2.

Issue 28

28.1: Do the permitted purposes exceptions effectively provide access to copyright material that is protected by a TPM?

The terms of reference require an inquiry about reasonable access; the permitted purposes exceptions may provide effective access but that access is unreasonable.

As noted above, we look forward to the Consultant's findings about the manner and extent to which circumvention devices and services are being supplied and used.

28.2: Does the operation of the permitted purposes exceptions achieve the objectives of the Digital Agenda Act?

The permitted purposes exceptions are inconsistent with the object of the Digital Agenda Act as they encourage access which is not reasonable.

We look forward to the Consultant's findings about the circumstances in which people have relied, or would seek to rely, on these provisions.

28.3: Has not including fair dealing as a permitted purpose adversely affected the ability of users to exercise their fair dealing rights or might have the effect of doing so in the future?

Not to our knowledge. We would strongly oppose the inclusion of fair dealing as a permitted purpose, and in fact submit that the use of a circumvention device or service should be prohibited and that the current permitted purposes have not been justified. If there are purposes for which use of a circumvention device or service may be justified, then we are in favour of a procedure similar to that in the US, where application is made to the Copyright Office. We note that there have been few successful applications, and that they have been for very limited purposes.

Issue 29

29.1: Is there any evidence that copyright owners are contractually preventing the use of circumvention devices for fair dealing purposes.

We are not aware of any such evidence, but submit that it may not be unreasonable for copyright owners to seek to impose such conditions, particularly given the lack of prohibition on the use of such devices in the Copyright Act.

29.2: If so, (or if there is a risk that this practice will develop) should owners be prohibited from preventing, by means of contract, the use of circumvention devices for any fair dealing?

No; we think use of a circumvention device or service should be prohibited.

Issue 30

30.3: In order to achieve an appropriate copyright balance, should the Government consider other amendments to the RMI provisions? For example, should there be greater protection for copyright owners through RMI? If so, how?

Section 10(1) defines "electronic rights management information" as follows:

- (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; orany numbers or codes that represent such information in electronic form. [emphasis added]

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]

The definition thus does 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. Some amendments were made, but they were not sufficient to fully comply with the international standard. We thus submit that the Consultant should recommend that the Government introduce a further amendment to fully implement the LACA Committee's recommendation.

Libby Baulch
Executive Officer
September 2003