

# Australian Copyright Council

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## Comments on draft Copyright Amendment (Digital Agenda) Bill 1999

Thank you for inviting us to comment on the draft Bill.

We have already forwarded you our submission on the Copyright Law Review Committee's Report, *Simplification of the Copyright Act 1968, Part 1, Exceptions to the Exclusive Rights of Copyright Owners* ("CLRC Report Part 1") and we understand that the Government will be considering the CLRC's recommendations in conjunction with this Bill.

We support the Government's initiatives aimed at putting Australia in a position to ratify the World Intellectual Property Organisation (WIPO) Copyright Treaty and the Performances & Phonograms Treaty, including the introduction of the right of communication to the public and protection for technological protection measures and rights management information. However, we are of the view that the Bill's extension of the exceptions to the rights of copyright owners, and the framing of the protection of technological measures and rights management information, do not comply with the treaties.

We understand that the Government's objectives in making the proposed amendments to the Copyright Act are to promote creative endeavour while at the same time granting reasonable access in accordance with the WIPO treaties. We submit that the amendments proposed will grant a level of access to copyright material which is unreasonably generous to the copyright user with the effect that the incentive for creative endeavour, far from being promoted, will be greatly diminished.

We are disappointed that the Government has allocated such a short time frame to consult with interests on a Bill that is complex and proposes some fundamental changes to copyright law which will have an enormous impact on copyright owners and creators.

### **Right to communicate to the public**

We support the introduction of the new right of communication to the public for works, films, sound recordings and broadcasts to replace and extend the rights of broadcast and cable transmission to subscribers to a diffusion service.

However, we have the following comments on the implementation of this right:

1. We note that the definition of "communicate" in section 10(1) refers to the electronic transmission of "sounds or visual images" and not text or data. We think the definition should be amended to make it clear that the right to

communicate covers all copyright material including literary, dramatic and musical works, consistently with sections 31 and 85-87.

2. We query whether “electronically” is an appropriate adverb. We understand that “electronic” transmission is not the only means by which material may currently, or in the future, be transmitted (that is, other than via a material substance). We suggest that the adverb be removed altogether, or alternatively that “electronic transmission” be given as an example or instance of communication. If “electronically” is omitted from the definition of “communicate”, then it should also be omitted from the definition of “reception equipment”.
3. We also query the use of the word “online” given that this word denotes a cable transmission but it is clearly not the intention of the Government to limit the right of communication to cable transmissions.

We support the inclusion of the definition of the phrase “to the public”.

### **Fair dealing**

As we stated in our submission on the CLRC Report Part 1, we oppose the application of the fair dealing defences to the new right of communication. In particular, we think it inappropriate that a person ought to have the right to electronically transmit a work or make it available on-line for the purpose of research or study.

This type of use of copyright material will have serious consequences for copyright owners; communication to the public may effectively publish a work to millions of recipients, making it impossible to control subsequent uses of the work. A copyright owner may choose to do this, but there should be no special exceptions allowing communication to the public or making available without the copyright owner’s permission given the consequences.

If the Government were to proceed to make the right of communication subject to the fair dealing defences, we submit that there should be no provision deeming the communication of a certain portion of a work to be fair. (See further our comments on section 10(2A)). The existing reasonable portion provision is predicated on the basis that it would always be fair to copy a part of a published work or one article from a periodical. That may have been the case in the 1960s, however it is not true today when publishers are publishing single articles on-line and collecting societies are offering licences to reproduce parts of works and articles. The test should be the same whether the person requires an entire work, or part of a work.

We submit that the Act should include a presumption that a dealing is not fair if the portion of a work a person requires for research or study is available (in any format) within a reasonable time:

1. at an ordinary commercial price; or
2. on payment of, or an undertaking to pay, equitable remuneration under a statutory or voluntary licence.

We also submit that the fair dealing defences should only apply where:

1. the user acknowledges the source of the material; and
2. the user complies with the moral rights provisions.

We are of the view that compliance with the moral rights provisions (when they come into force) will be important in the context of electronic transmission and making works available on line as, once a work is in digital form, it can be very easily edited, added to and otherwise manipulated.

We would also like to see a provision which states that a reproduction of a work made under a fair dealing defence must not be used for any other purpose and must be deleted or destroyed when the use for the fair dealing purpose has been made.

### **Reasonable portion: section 10(2A)**

We submit that section 10(2A) should be removed from the Bill. It should be a matter for the courts to determine what is fair in any particular case. As stated by the CLRC:<sup>1</sup>

The Committee notes that the fact that a dealing results in the use of a work in a digital form could be raised as a consideration weighing against regarding the dealing as fair. It recognises the greater potential access to, and therefore greater value of, copyright material in a digital form, especially if such material is accessible via an electronic network.

As we stated in our submission on the CLRC Report Part 1, we agree with the Committee's conclusion that an exception to infringement based on the "quantity" of digitised material used is unworkable. We think that the reasonable portion test in clause 10(2A) is flawed and does not achieve the Government's policy objective of replicating the balance struck between the rights of owners and the rights of users that has applied in the print environment. In particular:

1. the test uses the number of words in a digital version of a work as the basis for calculating a reasonable portion, which is clearly an inappropriate basis in the case of musical works;
2. in many, if not most, cases it would be difficult or impossible to determine what constitutes 10% of the words of a digital version of a work; and
3. the test provides that a person can reproduce 10% of an electronic version of a work which is not "conveniently available" in hard copy form. The term "conveniently available" is vague and could conceivably mean that a digital version could be used to print a work or save it to disk if it is inconvenient for a person to go and buy the hard copy version. This provides no protection for hard copy sales.

### **Temporary reproductions: sections 43C and 111A**

As we stated in our response to the discussion paper *Copyright Reform and the Digital Agenda*, we do not oppose a special exception for temporary reproductions made in the normal course of communicating a work, although we note that such reproductions will often be impliedly licensed by the copyright owner.

However, we are concerned that the drafting of sections 43C and 111A does not limit this exception to certain special cases that do not:

1. conflict with a normal exploitation of the work; nor

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<sup>1</sup> Part 1 paragraph 6.4ff

2. unreasonably prejudice the legitimate interests of the copyright owner, as required by article 9(2) of the Berne Convention, article 13 of the TRIPs Agreement and article 10 of the WIPO Copyright Treaty.

We are also concerned about the exception in relation to temporary reproductions in the course of looking at material on screen. It has the potential to conflict with a normal exploitation of a work and unreasonably prejudice the legitimate interests of the copyright owner as it may be possible to consume a work simply by looking at it on screen.

Given that the immediate online access to or supply of material is likely to become a primary market for the delivery of copyright material, this provision, coupled with the current draft provisions dealing with the over-riding of technological protection measures, will, we submit, effectively destroy that market.

Under the proposed amendments, a person may, for example, log into a web site and read a work on screen (making only a “temporary” reproduction) whenever it is convenient without having to ever purchase the work or pay for a licence to view the material. If the owner decides to encrypt the material with the intention that people will have to pay for on-screen access, the amendments proposed by the Bill would allow a user to bypass the owner’s encryption with a circumvention device (at a library, for example) and read the work on screen without payment. We are of the view that this sort of “browsing” is not the same thing as browsing in a bookshop or library which does not replace the need to buy the book, but is more akin to buying a book, taking it home and reading it at leisure.

We suggest that both the temporary reproduction exception for communication and looking at a work on screen be drafted using the language relating to special exceptions in the treaties; that is, a temporary or incidental reproduction of a work made in the normal course of communicating a work or looking at material on screen would not infringe copyright provided:

1. it does not conflict with a normal exploitation of the work; and
2. it does not unreasonably prejudice the legitimate interests of the copyright owner.

## **Libraries & archives**

As we stated in our submission on the CLRC’s issues papers in relation to the simplification reference and in our submission on the CLRC Report Part 1, we oppose the extension of the library copying provisions to allow libraries to digitise and communicate copyright material.

However, in view of the fact that the Government’s policy is to extend the provisions we make the following comments.

### **General comments**

In the Government’s media release dated 26 February 1999, it is stated that “as far as possible, the proposed exceptions [including for libraries] will replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment”. We submit that the Bill does not achieve this policy objective. The balance that now exists will not be preserved by the translation of the library exceptions into the digital arena. The paradigm upon

which the existing library provisions are based is the print paradigm and the superimposition of digital provisions shifts the balance in favour of users of copyright material, as we illustrate below.

### *Definition of library*

One concern of copyright owners, which is heightened by the proposal to extend the libraries exceptions to the digital arena, is the absence of a definition of library. Our view is that an organisation ought to meet some sort of public benefit requirement before relying on the privileges afforded by the Act. We think, for example, that a library that exists solely for employees of a commercial organisation should not be entitled to rely on the provisions.<sup>2</sup> Currently, any organisation or any person that falls within the dictionary definition of a library may rely on the privileges. This includes libraries within for-profit companies.

We refer to our submission (dated 5 June 1997) on the CLRC discussion paper on the library exceptions (at pages 8-10) and our response to the CLRC Report Part 1 (page 27) in relation to the definition of a library.

### *Research or study*

Libraries can copy material for clients who require it for their “research or study”. As we submitted in our response to the CLRC Report Part 1, our view is that fair dealing for research or study should only be available to a person making use of copyright material for his or her own research or study, and that it should not be available to a person making use of copyright material for another person or entity (such as a corporation). Similarly, we submit that the library provisions should be clarified to provide that libraries can only supply to clients using material for their own research or study and not on behalf of someone else.

## **Section 49**

### *Digitising and communicating compared with photocopying*

The proposed amendments to section 49 will allow a library to digitise (for example, by scanning) copyright material in its collection and communicate (for example, by email) that material to a library client in response to a request.

One of the important differences between digital reproduction and photocopying (and one of the reasons that it is not possible to simply translate the current exceptions to the digital arena without changing the balance of interests) is that photocopying does not add to the library’s collection but digitising has the potential to. Now, when a person requests a copy of a work (or part of a work) from a library, the library photocopies that work and sends it to the client. The library does not (or should not) keep a copy. The current provisions are based on the assumption that this is how libraries operate.

However, if a person requests a library to digitise a work and email it to them, the library will have a digital version of that work. The Bill does not clarify what is to become of the library copy. The amendments proposed by the Bill would allow a library to build up a digital database of literary, dramatic, musical and artistic works in its collection as a result of supplying copies to clients under section 49.

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<sup>2</sup> A requirement of this kind appears in s108 of the US Copyright Act.

Such an outcome is contrary to the Government's policy as set out in the Commentary (paragraph 47) and the CLRC's recommendations.

We submit that the Bill should make it clear that where a library digitises material for a client, it must delete that digital version from its own system or, if that is not accepted, only use it for the purpose of supplying to other clients who request it in accordance with section 49.

Another important difference between photocopying and digitising is that a digital version is potentially far more valuable to a library client than a photocopy. Digital versions can be stored, searched and edited much more easily than photocopies and they do not deteriorate like photocopies do. We, therefore, submit that the amendments to section 49 will tip the balance considerably in favour of users of copyright material at the expense of creators and investors.

*Automatic right to reproduce and communicate articles and portions of works*

The Bill, if enacted in its present form, will allow libraries to set up in competition with on-line publishers for the supply of articles and portions of works, as illustrated by the Australian Publishers Association in its submission on the Bill. The provisions will allow library clients to request a library to scan an article from a periodical and email it to them, regardless of whether or not the client can purchase a digital or other version of that work from the publisher or obtain a licence to reproduce it from a collecting society. The same will be the case for portions of works (10% or a chapter from a book, for example) or entire works (such as photographs and other artistic works) which are not published separately but only as part of a larger work.

As we pointed out in relation to the fair dealing defence, the automatic right to copy a certain amount of a work or an article in a periodical or a work not separately published in the existing Act is predicated on the assumption that this will not interfere with the copyright owner's normal exploitation of the work. We submit that this assumption is not applicable to the on-line economy.

See our comments above in relation to the extension of the reasonable portion test to works in digital form.

If the Government is to proceed to give libraries the right to digitise and communicate copyright material to its clients, we submit that they should only be able to do so where:

1. the material is not commercially available within a reasonable time at an ordinary commercial price or under a licence from a copyright owner or copyright collecting society; and
2. the digitisation and communication is otherwise fair having regard to the factors such as those set out in section 40(2).

We also submit that a library's right to access material for the purpose of reproduction and communication to clients should only apply to copyright material that has not been encrypted in any way by the copyright owner. A provision similar to that proposed in relation to computer programs in section 43A(2)(b) could be adopted so that section 49 does not apply if the copyright owner has made copyright material available on the basis that copies of it cannot be made.

We have commented more fully below in relation to the use of circumvention devices.

**Section 49(5A) & (7A): Making digital works available on-line**

We do not object to a provision which allows a library to make material available on line in these circumstances, although we note that such reproductions will often be licensed by the copyright owner, by way of a CD ROM licence, for example.

However, we submit that it should be made clear that this exception does not apply if the library, at the time of acquiring the material, is given an express direction to the contrary by or on behalf of the copyright owner (similar to the existing provision in relation to computer software) or the copyright owner has used technological protection measures to prevent this use.

We also submit that the word "purchased" should be substituted for the word "acquired" so as to make it clear that the exception only applies to material the library has purchased. The provision should not apply to material that a library acquires in other circumstances, for example:

- a) by reason of having made a digital version for a client (as discussed above);
- b) by reason of having made a digital version for preservation purposes under section 51A; or
- c) where a client gives back a digital version which the library has made for him or her (which we understand sometimes now happens with print copies).

**Section 50**

The extension of section 50 to digital reproduction and communication will, in our view, unreasonably prejudice the rights of copyright owners and conflict with a normal exploitation of copyright works.

One consequence of this amendment is that a library will be able to scan a copy of an article and then email it to all other libraries in Australia (including all for-profit corporations that have a library) at their request for the purpose of including that article in their collection, even if that article is available for purchase in hard copy or digital form. It is easy to see that it will be much more convenient for libraries to send digital copies than it is to photocopy and post or fax print versions.

If the amendments we are seeking to section 49(5A) are not made, libraries could then put their "acquired" copy on an intranet so its clients (including staff of for-profit corporations) can read that article on screen.

This scenario could be repeated over and over until all libraries have an extensive digital database of copyright material, all without payment to the copyright owner. This database could potentially be used for profit making purposes. The current provisions provide that a library cannot "supply" a copy of copyright material for more than the cost of making and supplying the copy but they do not prohibit a library from providing access to a database (for viewing purposes, for example) for a profit. This is a further example of the problems created when trying to make provisions designed for the use of print material apply to digitisation.

Another problem is that section 50 does not provide that the library must have a work in its collection before it can copy and send it to another library. If the provisions in the Bill are enacted, a library will be able to borrow an issue of a periodical, scan an article and email it to another library who wants it for their collection. A library could also use a circumvention device to access an article made available by the copyright owner on-line and download and email that article to

another library for inclusion in its collection. The client library could then reciprocate so both libraries have a copy.

As we pointed out in relation to section 49, the Bill does not clarify what is to become of the supplying library's digital version of the work and the amendments proposed by the Bill would allow a library to build up a digital database of works in its collection as a result of supplying copies to clients under section 50.

We recommend that the same conditions as we have suggested in relation to section 49 be imposed on the reproduction and supply of copyright works under section 50. We also submit that section 50 should only apply to works which are held in the collection of the library.

### **Section 51(1)**

As stated in our submission on the CLRC Report Part 1, we think that the removal of the 75 year requirement could be acceptable if the fair dealing criteria are applied. Otherwise, we do not see any justification for it.

### **Section 51(1)(b)**

We oppose the extension of the provisions allowing the copying of unpublished works in libraries to digital reproduction and communication. However, if they are to be enacted, we submit that they should be subject to conditions similar to those we have recommended for copying and supply under sections 49 and 50.

### **Section 51(2)**

We are not sure why this provision has been extended from the copying of theses and "other similar works" to any "unpublished" literary works. We oppose this extension as it would appear to defeat the purpose of the restrictions in section 51(1) in relation to unpublished literary works. In addition, it has the potential to undermine the copyright owner's publication right. We also oppose the extension of the exception to a "reproduction".

However, if this amendment is to be enacted, we submit that the provision should be subject to conditions similar to those we have recommended for copying and supply under sections 49 and 50.

## **Archives**

### *Definition of "archives" (section 10(4)).*

As submitted in our response to the CLRC Report Part 1, we think there should be a definition of library which covers archives. However, we do not object to the amendment of section 10(4) to provide galleries and museums as an example of archives.

### *Section 51AA*

We oppose the extension of the exceptions relating to archives to the reproduction and communication of copyright material.

However, if this amendment is to be enacted, we submit that this provision should be subject to conditions similar to those we have recommended for copying and supply under sections 49 and 50.

### **Section 51A(1)**

We oppose the extension of the provisions allowing libraries to copy works for preservation and other purposes to reproduction and communication of those works. We do not see any justification, in particular, for allowing a library to communicate a work for the purposes of preservation and replacement.

If the Government is to proceed to give libraries the right to digitise and communicate copyright material in these circumstances, we submit that it should only be able to do so in accordance with the conditions we have suggested should apply to sections 49 and 50.

As we stated in our submission to the CLRC Report Part 1, we submit that copying for replacement should require the payment of equitable remuneration.

### **Section 51A(2)(a)**

We note the comments at paragraph 47 of the Commentary:

Libraries and archives will not be able to systematically digitise the copyright material held in their collections and make it available on-line to the public without the permission of the copyright owner.

We are of the view that under the proposed 51A(2)(a), which allows a library to make a “single reproduction for a purpose other than a purpose referred to in subsection (1)”, a library *could* systematically digitise its collection.

We submit that this provision should be deleted. If the Government decides to retain it, we submit that it should be qualified to apply to purposes relating to internal collection management and contain limitations similar to those we have proposed in relation to sections 49 and 50.

### **Section 51A(2)(b)**

The effect of this clause is that a library could make available on-line on its premises *any work held in its collection* (presumably if it is already in digital form). As submitted above in relation to clause 49(5A), these clauses, if they are to remain, should be limited to material *purchased* by the library in digital form provided the contract of purchase does not specify otherwise and the copyright owner has not used technological protection measures to prevent this use.

Clause 51A(2)(b) in its present form would allow a library to make available on-line those works it had digitised for clients under section 49 and for other libraries under section 50 (as these presumably are “held in the library’s collection”) unless it was made clear (as we have suggested above) that these digital versions be deleted from the library’s system or only used for the purpose of supply under section 49 or 50.

### **Sections 110A & 110B: Copying and communicating unpublished films and sound recordings**

We oppose the extension of the provisions allowing libraries and archives to copy films and sound recordings for preservation and other purposes to cover the communication of films and sound recordings.

We do not see why a library would need to communicate a film or sound recording for the purpose of preservation or replacement.

However, if these provisions are to be enacted, we submit that they should be subject to conditions similar to those we have recommended for copying and supply under sections 49 and 50.

As we stated in our submission to the CLRC Report Part 1, we submit that copying for replacement should require the payment of equitable remuneration.

### **Making infringing reproductions on library machines: Sections 39A and 104B**

As we stated in our response to the CLRC Report Part 1, we do not think it is necessary to amend section 39A or include section 104B in the Act, as it sufficient to apply the general principles relating to authorisation of infringement. However, if section 104B is to be included we think that its wording should be consistent with the existing section 39A.

## **Published editions**

### **Section 88**

The word “or” should be “a”.

## **Broadcasts, exceptions and statutory licences**

### **Definition of broadcast**

As stated in our response to the discussion paper Copyright Reform and the Digital Agenda, we submit that the current definition of “broadcast” should be retained. We are concerned that the definition proposed by the Bill would have the effect of expanding the application of the numerous defences and exceptions which currently apply to broadcasting to services such as cable television and Internet radio, although we understand from the Commentary (paragraph 67) that this is not the Government’s intention.

### **Section 91**

As we stated in our submission on the draft Copyright Amendment Bill 1996 in relation to an identical provision, and in our response to the discussion paper Copyright Reform and the Digital Agenda, we submit that if broadcasts or transmissions are to be protected by copyright, such protection should only apply to broadcasts or transmissions which are the result of skill and labour in selecting

and compiling programming, by or on behalf of the person who makes the broadcast.

### **Section 99**

We do not make any comment in relation to this provision.

### **Sections 65, 66 and 67**

As we stated in our response to the CLRC Report Part 1, we support the repeal of these provisions and urge the Government to do so.

## **Sound recordings**

### **Section 105**

As we stated in our response to the CLRC Report Part 1, we support the repeal of this provision and we oppose its extension to communications.

We note the statement at paragraph 67 of the Commentary that the Government does not intend to extend the existing exceptions that relate to broadcasting to communication.

The repeal of section 105 would require a consequential amendment to section 152(7).

### **Section 136(1)**

We support the position of the Australian Record Industry Association that section 136(1)(b) should not be amended in the way proposed by the Bill to render licences for the subscription broadcast of sound recordings subject to the jurisdiction of the Copyright Tribunal. We submit that it is inconsistent with section 109, as amended in July 1998, to amend section 136(1) in this way.

### **152(8) and (11)**

We understand that the issue of the 1% ceiling on fees payable by broadcasters for the broadcast of sound recordings is currently the subject of separate consideration by the Government. We reiterate our submission made in response to the Digital Agenda discussion paper that the ceiling ought to be removed and urge the Government to include this amendment in this Bill. In this respect we endorse the submission by the Australian Record Industry Association.

## **Liability of internet service providers and telecommunications carriers**

### **Direct liability**

As we have previously stated (in our response to the Digital Agenda discussion paper and in commenting on the 1996 Copyright Amendment Bill), we are of the view that it is fair and appropriate that a service provider should be liable if it transmits or makes available material in circumstances not authorised by the copyright owner. If a service provider arranges for, and gets a commercial benefit from, the work being made available or being transmitted, it should have responsibility for ensuring that copyright is not infringed.

We submit that the question of the services provider's knowledge should be not be relevant to liability, but should be relevant to the remedies a court may order. If a service provider was not aware, and had no reason to suspect, that an act was an infringement of copyright, then it is not liable to pay damages (section 115(3) of the Copyright Act).

For example, if a service provider hosts a web site which has infringing material on it, the copyright owner should be able to take legal action against the service provider to at least have the material removed. This may be particularly important if the proprietor of the web site cannot be found or is offshore. If the service provider failed to remove the material after being notified that it was infringing, the service provider should also be liable for damages.

#### *New subsections 22(5) and (6)*

We submit that section 22 is a provision dealing with subsistence and ownership of copyright in works and other subject matter, but not to liability for communication or otherwise using copyright material in one of the ways reserved to the copyright owner. It appears from the Commentary (paragraph 115) that the new subsections 22(5) and (6) are intended to deal with liability. We submit that liability should be dealt with separately.

### **Indirect liability**

#### *Section 101(1A)*

We understand that the policy behind this proposed section is to provide some guidance to internet service providers and carriers as to when they might be liable for authorisation of infringement. We are of the view that this provision does not achieve this objective. We support the proposal in the Digital Agenda discussion paper that the issue of liability for authorisation of infringement should be left to be determined by the courts.

#### *Sections 39B and 112C*

We note the statement at paragraph 125 of the Commentary that the Government has decided to broadly implement the agreed statement concerning Article 8 of the WIPO Copyright Treaty adopted at the Diplomatic Conference. In our submission, the Government has gone much further than implementing that statement. The statement says that merely providing physical facilities to enable or make a

communication does not in itself amount to a communication, whereas, sections 39B and 112C provide a defence to authorisation of *any* infringement where a person merely provides physical facilities used to do an infringing act.

We would support a provision that reflects the agreed statement and otherwise leaves the issue of liability for authorisation by carriers and carriage service providers for determination by the courts on the basis of common law authorisation principles. We agree with the view expressed in the Digital Agenda discussion paper that the provision of a statutory exception for service providers from liability for authorisation of copyright infringement would be premature as the new communications environment is constantly evolving.

## **Circumvention devices**

As stated in our response to the Digital Agenda discussion paper, we support the introduction of provisions in the Copyright Act to give effect to the obligations in the WIPO Treaties in relation to circumvention devices. However, we have some concerns about the provisions of the draft Bill and we do not think that the Bill provides adequate legal protection and effective legal remedies as required by the WIPO Treaties.

### **Definition of technological protection measure**

We submit that there is a problem of circularity with respect to the definition of technological protection measure. The anti-circumvention provisions only apply to technological protection measures that are “effective”. A measure is not effective unless it allows access to a work *solely* by use of access codes or processes. However, if a measure can be circumvented then, arguably, it is not effective under this definition as access can be gained otherwise than *solely* by a code or process. If the measure is ineffective, the anti-circumvention provisions cannot be used when they are needed, that is, when a measure is circumvented.

The US definition of effective measure does not appear to have this problem:

A technological protection measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

We submit also that the definition of technological protection measure is too limited, referring as it does to “products” and “devices” which suggest some sort of physical object. We would like the Government to consider broadening the definition along the lines of the definition used in the US Digital Millennium Act to “any technology, product, service, device, or component”.

### **Definition of circumvention device and circumvention service**

Under the proposed definition, a device could be capable of circumventing a technological protection measure but as long as it has more than a limited commercially significant purpose other than circumvention, it will not be held to be a circumvention device. The same is true of a circumvention service.

We would like the Government to consider a definition that is more in line with the definition in the US Digital Millennium Act. In that Act a circumvention device or service:

1. is primarily designed or produced for the purpose of circumventing a technological protection measure;
2. has only a limited commercially significant purpose or use other than to circumvent a technological protection measure; or
3. is marketed for use in circumventing a technological protection measure.

### **Knowledge**

The effect of section 116A(1)(c) is that if a defendant can prove that he or she did not know, and was not reckless as to whether, the device would be used to infringe copyright only, the copyright owner will have no rights against that person. We submit that sections 116A(1)(c)(ii) and 132(5C)(f) (incorrectly labelled 132(5C)(b)) should be deleted.

We note that the Commentary says (at paragraph 93) that the Government is of the view that the sale of a circumvention device to a non-profit library to be used to get access to material so it can be used in accordance with the library provisions would not give rise to any liability on the part of the manufacturer or vendor. If this is indeed the case then we fail to see when a copyright owner would ever have rights against someone dealing in circumvention devices. Such people could simply sell their devices on the basis that they must only be used to access material that can be used in accordance with defences under the Copyright Act.

This condition is not a requirement of the WIPO Treaties. Nor is it part of US law.

As we stated in our submission on the Digital Agenda discussion paper, we do not think that copyright owners should be compelled to give access to material, where a use of that material is allowed by a special exception or statutory licence. We think that the purpose of the exceptions is to regulate the use of a work to which a person has access, not to give access to otherwise inaccessible material.

Our comments above apply equally to section 132(5B) in relation to circumvention services. We submit that section 132(5B)(b) should be deleted.

It is not clear why, in section 116A, the criminal standard of recklessness has been adopted rather than civil standard of reasonable knowledge. We submit that reasonable knowledge is the appropriate standard.

### **Use of circumvention devices and services**

We are concerned that the Government has not given the copyright owner rights against a person who uses a circumvention device or service. This will mean that copyright owners will not be able to protect their work adequately and effectively with technological protection measures. We think that the absence of a prohibition on use will lead to the development of a thriving market in circumvention devices and services.

We note that this is not the approach taken by the US which has provided in section 1201(a)(1) of the Digital Millennium Act that a person may not circumvent a technological protection measure controlling access to the work. This is subject to very limited rights of libraries and archives to access a work to make a good faith determination of whether to acquire a copy of the work.

In contrast, a library in Australia will be able to use a circumvention device to get around a technological protection measure on a web site to reproduce material for

the purpose of sending it to another library under section 50 (as there is no requirement under this section that a library have a work in its collection before it copies and supplies it to another library). The other library could in turn send that material back to the original supplying library in response to a request from that library under section 50.

We would like to see the approach that is taken in relation to computer software taken in relation to other copyright material. The proposed section 43A(2)(b) expressly provides that a copyright owner can design a computer program so that copies of it cannot be made.

If our suggested amendments to the exception in relation to temporary reproductions, as outlined above, are not made we are concerned that a person would be able to use a circumvention device to access a work and then read that work on screen. A copyright owner could not prevent this on the basis of the use of the device or that the use was an infringement of copyright as neither of these activities are proscribed by the bill. We consider that this must be an unintended consequence of the drafting.

### **Act of circumvention**

We also submit that a copyright owner should have rights against someone who circumvents a technological protection measure, whether or not they use a “circumvention device” or a “circumvention service”. A person may discover a way to bypass protection measures without using something that comes within the definition of a “circumvention device” or “circumvention service”.

## **Electronic rights management information**

### **Definition of electronic rights management information**

The effect of the definition of “electronic rights management information” is that, in order to be protected, information must identify the copyright material *and* its owner or author *and* terms and conditions of use. In our view, any combination of such information should be protected. So, for example, if the only information that appears is the name of the author or owner (but there is no information about terms and conditions) that information should be protected as “electronic rights management information”. This approach, we submit, would be consistent with the WIPO Treaties which make it clear that any of these items of information should be protected.

### **Knowledge**

Sections 132(5D) and (5E) provide that a person must know or be reckless as to whether an alteration or removal of rights management information will “induce, enable, facilitate or conceal” an infringement of copyright before an offence will be proved.

We submit that it should be an offence to remove or alter rights management information per se and to deal in copyright material knowing that rights management information has been removed from it.

## **Remedies**

We are concerned that the bill does not give the copyright owner the right to take action against those who remove or alter electronic rights management information, but merely makes these acts offences. We understand that this may be an oversight and the Government will give consideration to correcting it.

## **Use of works by educational institutions**

### **Communication of insubstantial portions of works**

We oppose the enactment of the proposed section 135ZMA which would allow educational institutions to communicate portions of literary and dramatic works on its premises for the purposes of a course of education provided by it. In our view, this provision goes further than the Government's stated policy of replicating the balance struck between the rights of owners and the rights of users that has applied in the print environment for the following reasons:

1. communicating works digitally (eg. making them available on an intranet for access by students) is a very different proposition from photocopying them;
2. there is no justification for allowing educational to communicate works without payment to the copyright owner;
3. this provision has the potential to undermine the copyright owner's right to payment for communication of works under the proposed section 135ZZA. Although there are strict limits on the amount of works that can be communicated and time frame in which this can be done, those limits apply to a "person", which means that the limits could effectively be circumvented by several persons within the institution communicating different parts of works; and
4. it is not clear how this provision is to operate with the rest of the provisions relating to educational institutions.

### **Reproduction and communication of works**

As stated in our submission on the CLRC Report Part 1, we do not think it is justifiable for educational institutions to be entitled to create digital versions of non-digitised material, as this would conflict with a normal exploitation of a work or at least prejudice the legitimate interests of rights owners. We similarly oppose the application of the statutory licence to works already in digital form.

However, given that the Government's policy in relation to this issue, we offer the following comments on the amendments.

#### *Copying limits*

We do not think that the current copying limits, which are designed to protect the sale of books and journals, will work effectively in relation to the digitisation and supply of copyright material. By way of illustration, the amendments would allow a teacher at a school to digitise one chapter or 10% of a commercially available book and to make that portion of the work available on the school's intranet. Another teacher at the same school could digitise another chapter or portion of 10% and also

put that on the intranet, and so on, until the school has the whole work on the intranet for viewing and other use by students.

As stated above, we do think that the reasonable portion test in section 10(2A) in relation to digital works is unworkable and should be deleted. We submit that educational institutions should only be able to reproduce and communicate works or parts of works where those works or parts are not commercially available.

### **Retransmission of free-to-air broadcasts**

We support the Government's decision to give owners of copyright in material underlying broadcasts a right to equitable remuneration where broadcasts are retransmitted by cable television providers. However, we are concerned that the proposed statutory licence contained in section 199A does not create a workable regime for the collection and distribution of that remuneration.

The scheme does not (contrary to statements in the Commentary at paragraph 168) provide expressly for the appointment of one or more collecting societies to administer the scheme. Instead it relies upon retransmitters giving copyright owners a written undertaking to pay equitable remuneration in accordance with a future determination by the Copyright Tribunal or paying equitable remuneration in accordance with an existing Tribunal order.

We ask the Government to give consideration to enacting a scheme that provides for the collective administration of the statutory licence to retransmit free-to-air broadcasts. We would welcome an opportunity to comment on the drafting of such a scheme.

### **Computer software**

#### **Reproduction of computer program: Section 21(5)**

We do not make any comment on this provision.

#### **Definition of literary work**

We refer to the comments we made in response to the CLRC's draft report on the protection of computer software and do not make any further comment.

#### **New definition**

We refer to the comments we made in response to the CLRC's draft report on the protection of computer software and do not make any further comment.

#### **Duration of copyright: Section 33(3)**

We are not convinced that the proposed amendment to the duration of copyright in computer programs is justified.

## **Exceptions**

### *Section 43A(1)(a) & (b)*

We do not make any comment on these provisions.

### *Section 43A(1)(c): Backup copying*

As we stated in our submission on the CLRC Report Part 1, we do not object to this amendment.

### *Section 43A(1A) & (1B)*

We do not make any comment on these provisions.

### *Section 43A(2A)*

We object in principle to a provision that restricts a copyright owner's freedom to contract with respect to a work.

### *Section 43A(3)*

We do not make any comment on this section.

### *Section 43B: Normal use*

As we stated in our submission on the CLRC's draft report on the protection of computer software, we are not sure of the instances where "normal use" would not be allowed by an express or implied licence granted by the copyright owner. Therefore, we query the need for this exception. We also note that, unlike the provisions in section 43A, there is no requirement that programs to which this exception applies be legitimate.

### *Other amendments announced by the Government*

We note that on 23 February 1999 the Government announced further amendments to the provisions in the Act in regard to computer software. We urge the Government to make those amendments available for public comment before they are tabled.

## **Further information**

We would be happy to provide further information or answer any questions the Government may have in relation to any aspect of this submission.

Virginia Morrison  
Acting Executive Officer  
Australian Copyright Council  
19 March 1998