

Australian Copyright Council

3/245 Chalmers Street Redfern NSW 2016 Australia
ACN 001 228 780 Tel: +61 2 9318 1788 Fax: +61 2 9698 3536

<http://www.copyright.org.au>
email: info@copyright.org.au

**Submission
to the
House of Representatives
Standing Committee
on
Legal and Constitutional Affairs**

***Copyright Amendment
(Digital Agenda) Bill 1999***

6 October 1999

Table of contents

TABLE OF CONTENTS	2
AUSTRALIAN COPYRIGHT COUNCIL	3
INTRODUCTORY COMMENTS	3
Summary of submission	3
Exceptions must comply with the “three-step test”	4
“Extending” existing exceptions	5
“REASONABLE PORTION”	6
ARTICLES IN PERIODICAL PUBLICATIONS	8
LIBRARIES	8
Definition of “library”: section 10(1)	9
Copying by a library for its clients: section 49	10
Material acquired in electronic form: making available online on library premises	10
Copying by a library for another library: section 50	11
Declaration concerning commercial availability	12
Unpublished works: s51	12
Preservation and other purposes: s51A	13
EDUCATIONAL INSTITUTIONS	13
Item 134: Multiple reproduction of insubstantial parts of works that are in hardcopy form	13
Item 140: Multiple reproduction of printed periodical articles by educational institutions	14
Item 144: Multiple reproduction of works published in printed anthologies	15
Item 145: Multiple reproduction of works that are in hard copy form by educational institutions	15
Item 149: Application of Division to certain illustrations that are in hard copy form	15
Section 135ZMB Multiple reproduction and communication of insubstantial portions of works that are in electronic form	15
Section 135ZMC Multiple reproduction and communication of periodical articles that are in electronic form	16
Section 135ZMD Multiple reproduction and communication of works that are in electronic form	16
Section 135ZME Application of Division to certain illustrations in electronic form	16
Item 153: Copying published editions by institutions assisting persons with a print disability	16
Subsection 135ZP(3): Sound recordings	17
Items 160, 161: Prescribed messages on interim copies	17
Item 172	17
Items 175, 176: Prescribed messages on interim copies	17
Item 183	17
Item 189: Electronic use notices: notice requirements etc.	18
SUBSEQUENT USE OF REPRODUCTIONS MADE UNDER EXCEPTIONS	18
TECHNOLOGICAL MEASURES AND CIRCUMVENTION DEVICES	19
Permitted purposes	19
Sanctions against circumvention of technological protection measures	19
Subsequent use of circumvention device	20
Communication or reproduction of work obtained by circumvention device	20
BROADCAST DECODING DEVICES	20
RIGHTS MANAGEMENT INFORMATION	21
RETRANSMISSION	21
COMPUTER SOFTWARE	22
BROADCASTS	22
Current provisions	22
Amendments in Bill: broadcasts in which copyright subsists	23
Amendments in Bill: exceptions which refer to “broadcast” or “broadcasting”	24
TRANSITIONAL PROVISIONS: SCHEDULE 2	24
ANNEXURE	

Australian Copyright Council

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

Introductory comments

3. In general, we support most of the provisions in the Bill, and in particular the provisions granting the new right to communicate to the public, and the provisions relating to retransmission of free-to-air broadcasts. In addition, we support most of the changes made by the Government to the draft version of the Bill circulated for comment in February 1999.
4. We note that the need to introduce a broad right to communicate to the public was first recommended to the Government by the Copyright Convergence Group in 1994. Given the relatively long period which has elapsed since the Government received and accepted this recommendation, and the important economic consequences of the new communication right and the retransmission provisions, we urge early consideration of the Bill by the Senate.
5. As the Committee is aware, the provisions in the Bill dealing with the communication right, technological protection measures and electronic rights management information are intended to comply with the international standards regarding these issues set out in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.¹ We ask the Committee to recommend that the Government introduce a new Bill to amend the Copyright Act (the Act) to meet the other international standards in the treaties not currently met in the Act, and that Australia accede to these treaties.²

Summary of submission

6. Digitisation and online technology allow new ways of publishing copyright material, including easier access to users of copyright material in other jurisdictions, new means of delivery, new forms of licensing, and new relationships between creators, producers and consumers. It cannot be assumed that provisions in the Copyright Act which apply to non-digitised material are

¹ The Bill address the international standards relating to phonogram producers, but not performers, in the WIPO Performances and Phonograms Treaty.

² The main ones are: extended rights for performers, a distribution right, and a longer period of protection for photographs.

appropriate in the digital environment.³ In particular, the consequences for copyright owners of allowing unlicensed uses of digitised copyright material are much more serious than for non-digital material. Our main concerns relate to proposed provisions which allow or affect the use of copyright material without the copyright owner's licence.

7. Our main submissions are:

- that there should be no "extension" of the provisions which allow copyright uses by libraries without payment;
- that the proposed amendment to the definition of "reasonable portion" (which affects use of copying by libraries and educational institutions) should be omitted from the Bill;
- that the provisions relating to fair dealing, libraries and educational institutions should be amended so that they no longer allow the copying of an article from a periodical publication, or a part of a work, which is available within a reasonable time at ordinary commercial price;⁴
- that if a reproduction or copy made under an exception or statutory licence (including the fair dealing provisions and the library provisions) is used for a purpose other than the purpose for which it was made, it should be deemed to be an infringing copy or reproduction from the time it was made;⁵
- that the provision which allows the unremunerated copying of "small portions" by educational institutions without payment should not be "extended" to allow the making and communication of digitised material – on the contrary, it should be repealed;
- that there should be a definition of "broadcast" and "broadcasting" for the purposes of exceptions and statutory licences which allow broadcasting without the copyright owner's licence;
- that there should be no "permitted purposes" for which a circumvention device may be used;
- that the circumvention of a technological protection measure, or the decoding of an encoded broadcast, without the licence of the copyright owner, should be subject to sanctions;
- that the reproduction or other use of copyright material to which access has been gained by the use of a circumvention device or a broadcast decoding device should be an infringement of copyright; and
- that the transitional provisions be amended so as to have a more equitable operation.

Exceptions must comply with the "three-step test"

8. As a result of Australia's international treaty obligations, any exceptions or limitations to a copyright owner's exclusive rights must comply with the "three-step test". That is, they must:

³ This is recognised in the Agreed Statement regarding Article 10 of the WIPO Copyright Treaty.

⁴ We also make this submission in relation to works contained in anthologies, which may be copied by educational institutions under s135ZK.

⁵ Such a provision applies to copies made for educational purposes under Part VA and Part VB, and reproductions made in reliance on the exceptions relating to computer programs introduced by the Copyright Amendment (Computer Programs) Act 1999.

- only apply in certain special cases;
- not conflict with a normal exploitation of a work; and
- not unreasonably prejudice the legitimate interests of the rights owner.⁶

“Extending” existing exceptions

9. In our view, some of the existing exceptions in the Copyright Act do not comply with the three-step test, although they may have complied when first introduced. These include aspects of the provisions allowing fair dealing for research or study, and aspects of the library copying provisions. These provisions are based on an assumption that copying an article from a periodical publication, or 10% of the pages or a chapter from an edition, is not a “normal use” of a work, and does not unreasonably prejudice the legitimate interests of the rights owner. However, the “normal uses” of copyright material have changed since these provisions were introduced, as a result of technological developments (in particular, digitisation) and developments in collective licensing.
10. The Government has said that its intention is to “extend” the application of these provisions into the digital environment. However, it appears that the Government has not considered whether the existing exceptions comply with the three-step test, let alone whether their operation in the digital environment would comply. In particular, there appears to have been no regard to the different implications of allowing unlicensed uses in the digital environment to allowing unlicensed uses in the print environment. These include:
- allowing unlicensed digitisation, or unlicensed use of digitised material, prejudices the copyright owner’s opportunity to protect his or her work by technological measures, as there is no requirement that libraries and educational institutions use technological protection measures to prevent infringing uses of digitised material they create or communicate;
 - the communication of a work may make the work available outside the jurisdiction and may provide an opportunity for infringement by millions of people;
 - a digitised version of a work may be much more easily duplicated and distributed than a photocopy; and
 - digitised material has greater potential for collection into new products, such as electronic databases.
11. For these reasons, we oppose the amendments in the Bill which would allow the making and communication of digitised material by libraries without payment to copyright owners. If there are to be provisions allowing libraries to make and communicate digitised material, we submit that the provisions should:
- a) require the payment of equitable remuneration, as is required from educational institutions;
 - b) not allow the making or communication of a digitised version of a work (including an article from a periodical publication), or a part of a work, if the work or the part (as the case may be) is available within a reasonable

⁶ Article 13, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); Article 9(2) Berne Convention. A similar test is also included in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (although Australia has not yet acceded to either of these treaties).

- time at ordinary commercial price (including by sale of copies or online access);
- c) require the application of effective technological protection measures to prevent subsequent unlicensed uses;
 - d) require the attachment to, or embodiment in, the reproduction, or communication, of electronic rights management information; and
 - e) prohibit the subsequent use of the electronic reproduction for a purpose other than the purpose for which it was made.
12. We submit that requirements (b) to (d) in the previous paragraph should also apply to use of digitised material by educational institutions, and (b) to (e) should apply to use of digitised material by governments.

“Reasonable portion”

13. The term “reasonable portion”, defined in section 10(2) of the Copyright Act, is currently used in three contexts:
- fair dealing for research or study;
 - copying of works by libraries for clients and for other libraries; and
 - copying of works by educational institutions for educational purposes.
14. Under each of these sets of provisions, a person may copy:
- an entire work if it is:
 - § an article in a periodical publication,⁷ or
 - § it is not available within a reasonable time at ordinary commercial price; or
 - a “reasonable portion” of a literary, dramatic or musical work.⁸
15. Section 10(2) applies to a “reasonable portion” of a literary, dramatic or musical work contained in a published edition of 10 pages or more. It does not apply to an artistic work, an unpublished work, or a work contained in an edition of fewer than 10 pages. In addition, the proposed amendment in Item 19 of the Bill would mean it no longer applied to computer programs.
16. The current provisions – introduced 20 years ago – are based on an assumption that copying an article from a periodical publication, or 10% of the pages or a chapter of an edition, is consistent with the “three-step test” – that is, it is not a

⁷ Sections 40(3), 135ZL

⁸ Sections 40(2), 135ZJ(2). Under Part VB, an entire work may also be copied if it is:

- not separately published (s135ZJ(2));
- a work comprising not more than 15 pages in an anthology (s135ZK); or
- an artistic work explaining or illustrating a literary, dramatic or musical work may be copied under ss135ZJ, 135ZK or 135ZL (s135ZM).

The concept of “reasonable portion” was introduced by amendments to the Act in 1980, which followed recommendations in the 1976 report of the Franki Committee.

“normal use” of a work, and does not unreasonably prejudice the legitimate interests of the rights owner.⁹

17. The Bill would amend these three sets of provisions in two ways:
- by replacing the references to “copy” in the library provisions and the educational provisions with “reproduction”, with the intention that the provisions be extended to allow the making of digitised versions of non-digitised works and vice-versa;¹⁰ and
 - by amending the definition of “reasonable portion”, so that it includes a new “quantitative test” for literary and dramatic works in “electronic form”.
18. The new quantitative test would not apply to:
- a computer program, an electronic compilation such as a database, a musical work, or an artistic work; or
 - an unpublished work.
19. Under the current provisions (section 29(1)), a work is “published” if reproductions of the work have been supplied, by sale or otherwise, to the public.¹¹ Item 16 of the Bill would amend s10(1) to provide that “to the public” means to the public within or outside Australia. Thus, the definition of “reasonable portion” would apply to a work unpublished in Australia but published overseas.¹²
20. According to the Copyright Law Review Committee (CLRC), there is a “generally held view” that a work that has only been “electronically distributed” is not “published” for the purposes of section 29(1), but “there is some uncertainty about whether section 29(1) applies in the digital environment”. A majority of the CLRC recommended that “section 29(1) be amended to clearly apply to the publication of copyright materials in the digital environment”.¹³ As the Committee is aware, the Government has not yet responded to the CLRC’s report.
21. We submit that the proposed new s10(2A) and (2B) should be omitted from the Bill for the following reasons:
- digitisation facilitates the licensing of uses of parts of works, so it cannot be assumed that reproduction of a “reasonable portion” of a work in electronic form is consistent with the three-step test;
 - there is no requirement in the proposed new s10(2A) and (2B) that the work be published in electronic form – it may be that an electronic version of the work exists, to which the new provision applies and to which a

⁹ Item 19 of the Bill would amend s10(2) to exclude its application to a computer program, because, according to the Explanatory Memorandum, “10% of a computer program could include a substantial amount of code” (para 26).

¹⁰ There is no equivalent amendment to the reference to “copying” in section 40(3), which provides that copying a “reasonable portion” is a fair dealing. Thus, the proposed new s10(2A) has no application for the purposes of fair dealing.

¹¹ Section 29(1)(a).

¹² The making and supplying of copies of a “reasonable portion” of a work unpublished in Australia may infringe the copyright owner’s right to first publish the work in Australia under s31(1).

¹³ CLRC, “Simplification of the Copyright Act 1968 Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues”, Canberra, 1999, paras 7.36 and 7.43.

library or educational institution has access, but the work is not “published” in electronic form within the meaning of s29;

- the CLRC, after extensive analysis, concluded that a “quantitative” definition of “reasonable portion” for works in electronic form was unworkable.¹⁴

22. We support the proposed new section 10(2C), but submit it should also apply to musical works (the reason for the omission is not clear).

Articles in periodical publications

23. We submit that the Act should be amended to recognise that an article in a periodical publication may be separately purchased – for example in electronic form. Thus, the Act should not allow the reproduction of an article in a periodical publication under the research or study provisions, the library provisions or the educational provisions unless the article is not available for purchase.¹⁵
24. We also submit that the copying of a “reasonable portion” should only be presumed, and not deemed, to be fair for the purposes of the fair dealing provision.
25. In our response to Part 1 of the CLRC’s report on Simplification of the Copyright Act, we also submitted that copying by libraries should be subject to the same “fairness” criteria as copying by individuals for their research or study. We have attached an extract from our response as an Annexure to this submission.

Libraries

26. Most of the current provisions allowing copying by libraries fall into one of the following categories:
- copying for library clients (including for clients of other libraries) for their research or study or in connection with Parliamentary duties;
 - copying manuscripts and other original material to preserve the original;
 - copying to include in another library’s collection;
 - copying to replace an item which has been lost, stolen or damaged; and
 - making a microform copy to retain instead of the copied material.
27. Copying for all these purposes may be done without payment to the copyright owner.

¹⁴ “Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners”, Commonwealth of Australia, Canberra, 1998, paras 6.53 to 6.66 and 6.71.

¹⁵ This would require deletion of, or amendment to, s40(3)(a), s49(1)(a), s50(1)135ZJ.

28. In our view, all the current provisions which allow a library to make copies of material for a library collection (except for preservation purposes) should require payment of equitable remuneration to copyright owners under a statutory licence. We have attached, as an Annexure, an extract from our response to Part 1 of the Copyright Law Review Committee's report on simplification of the copyright, which sets out this proposal in the context of other proposed changes.
29. We oppose any extension of the library provisions, because:
- none of the existing or proposed library copying provisions require payment to copyright owners; and
 - the proposed amendments would allow libraries to engage in activities that are similar to publishing, and thus compete with "normal uses" of copyright material.
30. For example, under the proposed amendments, a library could request another library to make electronic reproductions of a large number of articles and/or extracts from works for inclusion in the requesting library's collection. The supplying library could supply these in the form of a searchable database – on CD-ROM, for example. It appears that the library could make this database available online on the library premises.¹⁶ The library could also lend the CD-ROM to its clients, who could view the contents for the purposes of research or study. In addition, the library could subsequently sell the CD-ROM.¹⁷
31. A publisher that wanted to produce such a database would require a licence from the owner of copyright in each item. The proposed amendments would thus operate to the detriment of the copyright owners who would lose the opportunity to negotiate a licence fee or other conditions (such as technological protection measures), and would allow libraries to compete unfairly with other database publishers.

Definition of "library": section 10(1)

32. We support the repeal of s18 (Item 22 of the Bill) and the introduction of a definition of "library".
33. We submit that the new definition should not include a library in an educational institution conducted for profit. In 1998, the Act was amended to allow educational institutions conducted for profit to copy in reliance on the educational copying provisions in Part VA and Part VB. These amendments were supported by some (but not all) copyright owners on the basis that the educational institutions pay for their copying.¹⁸ This is not the case with library copying.
34. We also submit that the proposed definition does not effectively implement the Government's intention, as described in paragraph 18 of the Explanatory

¹⁶ Because it has "acquired" the material in electronic form for the purposes of the proposed new s49(5A)

¹⁷ Provided a reproduction is made for a permitted purpose by a library, the subsequent use of the reproduction is not regulated.

¹⁸ The amendments were not supported by music publishers.

Memorandum. The proposed definition would appear to include a library which is owned by a non-profit entity, but which is maintained mainly or solely for the purposes of a business conducted for profit. Such a non-profit entity could be established by a profit-making entity for the purposes of providing library services to the profit-making entity.

35. For the purposes of the definition, the purpose of the library, or to whom it is available, should be the only relevant factor; who owns the library should not be a relevant factor.

36. One possibility is to amend the proposed 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.

37. We also refer to our proposal, made in response to the CLRC's report on Simplification of the Copyright Act Part 1, that a library entitled to rely on the special provisions in the Act should have the following features:

- it is a body administering a collection of materials, where the purpose of the collection is:
 - § the conservation and preservation of the materials comprising the collection; and/or
 - § providing information to members of the public; and
- it is not conducted for profit.

Copying by a library for its clients: section 49

38. We support the proposed amendments in Items 49 and 51 to sections 49(1)(a) and 49(2A)(a), which limit the application of s49 to material held in the library's collection.

39. As noted above, we oppose any extension of s49, and in particular we oppose its extension to allow the making and communication of electronic reproductions. Thus, we oppose the proposed amendments which would replace "copy" with "reproduction", and the proposed amendment to s49(9), which would provide that "supply" includes supply by way of communication.

40. If our view is not accepted, we submit that s49 should not allow a library to make or supply an electronic reproduction of a work to a client, if the client is able to get *access* to an electronic version of the work within a reasonable time at an ordinary commercial price. A copyright owner may provide online access to a work – for example, on a pay-per-view basis – rather than supplying copies. We submit that this form of exploitation would be prejudiced if a library were able to supply free copies of the work.

Material acquired in electronic form: making available online on library premises

41. We oppose the proposed new s49(5A) and 110B(2A). We submit that the making available of material online should require the licence of the copyright owner, because:

- making available online is a normal use of the work, or
 - the unlicensed making available online unreasonably prejudices the legitimate interests of the rights owner (for example, because it prejudices the copyright owner's plans for licensing the making available of the work online in the future).
42. The proposed provisions are not limited to material purchased by the library.
43. For example, it appears that the provisions would apply to material publishers are required to deposit with certain libraries. Section 201 of the Copyright Act requires the deposit of certain printed materials with the National Library. The CLRC has recommended that the provision be extended to electronic and audiovisual materials, and that the National Film and Sound Archive also be a repository.¹⁹ Deposit of materials must also be made to certain State libraries under State Acts, some of which require deposit of material in electronic form.
44. It also appears that the provisions may apply to material "acquired" by the library as a result of the operation of one of the library provisions. For example, it seems that material supplied by a library to another library for inclusion in its collection would be "acquired" by the requesting library. Similarly, the Bill would allow a library to make a digital reproduction of a non-digital work to replace a lost, stolen or damaged reproduction of the work, and it appears that the library could make this replacement reproduction available online.²⁰
45. If the provisions allowing libraries to communicate digitised material to clients are to remain, we support the requirements in proposed new s49(7A) to notify the client, and to destroy the electronic reproduction.

Copying by a library for another library: section 50

46. We support the proposed amendments to s50(1).
47. We submit that the proposed amendment to s49(1)(a) requires the repeal of s50(1)(b). Currently, s49 allows a library to supply its client with a copy of a work held in another library, and s50(1)(b) allows that other library to supply the requested material to the library which has received the request. Following the proposed amendment to s49(1)(a), which means a library may only supply a reproduction of a work held in its collection, s50(1)(b) would have no further practical application. A library could still, however, request a reproduction of the work for inclusion in its collection, and then supply the work to its client.
48. As noted above, we submit that, as a matter of policy, the supply by a library of a copy of a work to another library for inclusion in its collection, under the

¹⁹ CLRC, *Simplification of the Copyright Act 1968 Part 2*, at para 7.125.

²⁰ We note that the proposed new s51A(3) would allow the communication to officers of a library of a reproduction made for "administrative purposes" under the proposed new s51A(2). Thus, it would seem that a reproduction made for administrative purposes would not be regarded as "acquired" for the purposes of proposed new s49(7A). We also note that the proposed new s51A(3A) would allow the making available online, for access within the library premises, a "preservation reproduction" of an original artistic work, and it would seem that a preservation reproduction of an artistic work would not be regarded as "acquired" for the purposes of the proposed new s49(7A).

current provisions in the Copyright Act, should be subject to payment of equitable remuneration.

49. As noted above, we oppose the amendments which replace “copy” with “reproduction” in s50.

Declaration concerning commercial availability

50. We submit that Item 64 should be omitted from the Bill. A consequence of the proposed amendment would appear to be that a library could create, and supply to another library, a digitised version of an entire work which is out-of-print, but which is commercially available in electronic form. This must be contrary to the three-step test.
51. If s50 is to be amended to allow electronic reproductions, we make the following submissions:
- consistently with our submission in relation to s49, the Act should not allow a library to supply an electronic reproduction of a work to another library, if that other library is able to get online access to the work within a reasonable time at an ordinary commercial price.
 - section 50 should be amended by a provision similar to Item 56. Item 56 would amend s49 to require a library to include certain information with a communication, and to destroy an electronic reproduction supplied to a client by a communication.
 - the making or communication of an electronic reproduction should be subject to payment of equitable remuneration to the copyright owner through a collecting society.

Unpublished works: s51
.....

52. Section 51 currently allows the copying of unpublished works by a library, or a library client, for two purposes:
- research or study by the client (old works or theses); and
 - with a view to publication by the client (old works).
53. We oppose the amendment of this section to allow the making and communication of electronic reproductions. In particular, the making and communication of theses may prejudice the opportunities for the authors of theses to later publish their work.
54. If s51 is to be amended to allow the making and communication of electronic reproductions, we make the following submissions:
- the proposed new s51(1)(c) could allow a person to make an electronic reproduction of an unpublished work for research or study, but it is difficult to envisage when communication of the work would be justifiable;
 - section 51 should be amended by a provision similar to Item 56. Item 56 would amend s49 to require, amongst other things, a library to include

certain information with a communication, and to destroy an electronic reproduction supplied to a client by a communication.

55. As for the publication of unpublished works, we proposed in our submission of 5 June 1997 to the CLRC, in connection with its inquiry into the simplification of copyright, that the Committee consider a mechanism such as exists in Canada for dealing with use of copyright material by a person who has tried unsuccessfully to identify or locate the copyright owner.²¹

Preservation and other purposes: s51A

56. The current s51A(2) and (3) allows a library to make a single microform copy of a work, provided the work from which the copy is made is then destroyed (that is, the library is entitled to create a more convenient version of the work to be used instead of, rather than in addition to, the version it purchased). We understand that the provision was intended to facilitate storage of ephemeral material such as newspapers.
57. The proposed new s51A(2) and (3), which would allow a library to make reproductions for “administrative purposes”, and to make such reproductions available online to officers of the library, thus bear little relationship to the provisions they are replacing.
58. We oppose the proposed new s51A(2) and (3). The Explanatory Memorandum contains no justification for the proposed new provisions, and no explanation or examples of what the Government considers to be “administrative purposes”. Given s51AA, 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.
59. If section 51A is to be amended as proposed, it should include a provision similar to the proposed new s49(7A).

Educational institutions

Item 134: Multiple reproduction of insubstantial parts of works that are in hardcopy form

60. We submit that section 135ZG should be repealed and we oppose its extension to allow educational institutions to digitise “insubstantial” portions of literary and dramatic works.

²¹ Paras 128 to 130 of our submission. The proposal was not accepted by the Committee.

61. Our reasons are as follows:
- The provision does not comply with the three step test. It gives an educational institution the automatic right to copy two pages of a literary or dramatic work regardless of whether that work is available for purchase and regardless of the length of the work. So it would allow, for example, an educational institution to copy a third of a work of six pages which is available for purchase. That is not an “insubstantial portion” of the work and such copying has the potential to interfere with the copyright owner’s market for the work.
 - Even though two pages is not a substantial amount in a work of 150 pages, those two pages could represent a particularly significant or valuable part of the work.
62. A further problem we have with the provision is that section 135ZG(4) imposes a time limit of 14 days between instances of copying from the same work, however the limits apply to a “person”. It is not clear whether this means an individual or an institution. If the limits on copying apply to an individual within an institution then the safeguard is watered down considerably.
63. The unlicensed and unremunerated making and communication of electronic reproductions is even more prejudicial to copyright owners than the making of photocopies. Thus inequity of the existing provision will be exacerbated if institutions are able to digitise “insubstantial” portions.

Item 140: Multiple reproduction of printed periodical articles by educational institutions
.....

64. We object to educational institutions having the right to reproduce periodical articles even where those articles may be purchased separately. We submit that this contravenes the three-step test.
65. This provision is based on the assumption that articles are not sold separately and therefore the copying of an entire article will not harm any market, as the relevant market is the market for the periodical publication. This assumption may have been valid when Part VB was introduced in 1980, but it is no longer valid. Advances in technology and the resulting changed economics of publishing have led to a situation where a person can purchase an article in a periodical publication without subscribing to the publication or buying an entire issue.²² Allowing the reproduction of articles regardless of whether they are available for purchase will damage the fledgling market for articles. It is logical and fair that articles should be treated in the same way as other separately published works, such as books, that can only be reproduced if they are not commercially available.

²² See for example <http://www.smh.com.au/news/static/html/search/index.html> for articles from the *Sydney Morning Herald* and <http://www.hbsp.harvard.edu/home.html> for articles from the *Harvard Business Review*.

Item 144: Multiple reproduction of works published in printed anthologies
.....

66. For reasons similar to those outlined above in relation to articles, we object educational institutions having the right to reproduce works in anthologies even where those works are available for purchase. We submit that this right should be subject to a commercial availability test.

Item 145: Multiple reproduction of works that are in hard copy form by educational institutions
.....

67. For reasons similar to those outlined above in relation to articles, we object to educational institutions having the right to reproduce portions of works (ie. 10% or one chapter) where those portions are available for separate purchase. We submit that this right should be subject to a commercial availability test.
68. We also submit that if a work, or a portion of the work, is available online, for example on a pay per view basis, it should be considered to be commercially available and therefore not able to be copied under 135ZL.
69. We note the wording in section 135ZS(2)(c) which provides that if a work is “available electronically” within a reasonable time at an ordinary commercial price neither a copy nor a communication can be made, and submit that this wording would be appropriate for this provision.

Item 149: Application of Division to certain illustrations that are in hard copy form
.....

70. We submit that section 135ZM should be repealed and we oppose its extension to allow educational institutions to digitise artistic works that accompany literary, dramatic and musical works.
71. We submit that the copying of artistic works should be done under section 135ZL which contains a commercial availability test.

Section 135ZMB Multiple reproduction and communication of insubstantial portions of works that are in electronic form
.....

72. We object to educational institutions having the right to reproduce and communicate “insubstantial” portions of works without payment to the copyright owner for the reasons stated above in relation to section 135ZG.
73. We submit that the right of educational institutions to make portions of works available on-line for access by staff and students has the potential to undermine copyright owners’ right to be paid for use of their works under Part VB and copyright owners’ markets for their works.

74. As we noted in relation to section 135ZG, it is not clear whether the 14 day limit applies to an educational institution or a person within the institution. If the latter is the case, substantial portions of works could be made available on-line at the same time. We note by way of comparison that section 135ZMD(3) provides that if a person communicates part of a work *by or on behalf of a body administering an educational institution* by making the part available online, that person or any other person acting on behalf of that body cannot communicate any other part of that work while the first part remains online (our emphasis).

**Section 135ZMC Multiple reproduction and communication
of periodical articles that are in electronic form**
.....

75. We object to educational institutions having the right to reproduce and communicate periodical articles even where those articles may be purchased separately for the reasons stated above in relation to section 135ZJ.

**Section 135ZMD Multiple reproduction and communication
of works that are in electronic form**
.....

76. We object to educational institutions having the right to reproduce and communicate portions of works (ie. 10% or one chapter) where those portions are available for separate purchase for the reasons stated above in relation to section 135ZL.
77. We support the provision that limits the making available online to a portion of a work at a time.

**Section 135ZME Application of Division to certain
illustrations in electronic form**
.....

78. We object to educational institutions having the right to reproduce and communicate artistic works that accompany literary, dramatic and musical works for the reasons stated above in relation to section 135ZM.

**Item 153: Copying published editions by institutions
assisting persons with a print disability**
.....

79. The word "the" is missing from the end of the penultimate line of section 135ZN. The word "or" after the comma on the last line of the section should be "of".

Subsection 135ZP(3): Sound recordings

80. We submit that the words “or communication” should be inserted after the word “making” on the second line to make it clear that a digital sound recording may not be communicated if it is commercially available.
81. We also submit that it should be made clear that a sound recording or electronic version which is available in electronic form on a pay per view/pay per listen basis falls within the meaning of an item that “can be obtained” or “is available” “within a reasonable time at an ordinary commercial price”.

Items 160, 161: Prescribed messages on interim copies

82. We submit that all “relevant reproductions”, not just analogue sound recordings and reproductions in hard copy form, should be accompanied by a prescribed message. See for example the requirement of a notice accompanying a reproduction and communication in item 189.

Item 172

83. We refer to our comments on Item 145 in relation to works available online being regarded as commercially available.
84. Section 135ZS(2)(d) refers to a “new copy” which can be “obtained within a reasonable time at an ordinary commercial price”. We submit it should be made clear that an item which is available on a pay per view/pay per listen basis, comes within the meaning of a copy that is commercially available.

Items 175, 176: Prescribed messages on interim copies

85. We submit that all interim copies, not just analogue sound recordings and reproductions in analogue or hard copy form, should be accompanied by a prescribed message. See for example the requirement of a notice accompanying a reproduction and communication in item 189.

Item 183

86. We support CAL’s submission that an educational institution should only be able to retain digital copies for a year. However, we are doubtful that this provision achieves that result.

Item 189: Electronic use notices: notice requirements etc.

87. It should be made clear that section 135ZXA(a) refers to the giving of a notice to the recipient of a reproduction or communication, rather than to anyone else, such as the collecting society.
88. Otherwise, we support the inclusion of this provision.

Subsequent use of reproductions made under exceptions

89. We submit that if a reproduction made as a fair dealing for research or study, or under the library provisions, is subsequently sold, or used for another purpose, it should be deemed to be an infringing reproduction from the time it was made. Provisions of this kind currently apply to copies made for educational purposes under Part VA and Part VB, and to reproductions of computer programs allowed under the new provisions introduced by the Copyright Amendment (Computer Programs) Act 1999.²³ Such a provision would also be appropriate for other exceptions and statutory licences such as the government use provisions.
90. Currently, there is no regulation of the subsequent use of a reproduction made as a fair dealing, or under the library provisions, unless the subsequent use is one of the acts controlled by the copyright owner (such as public performance). This is not a hypothetical issue – from time to time the Copyright Council’s lawyers are asked for advice about whether photocopies made as a fair dealing or by a library for its client may be subsequently used for another purpose (such as inclusion in a library’s collection). It is anomalous that the subsequent use of copies made for educational purposes (for which copyright owners receive payment) is regulated, whereas the subsequent use of copies for which copyright owners receive no payment is not.
91. The potential for subsequent uses of electronic reproductions is much greater, and the lack of such provisions in the Bill may allow unacceptable uses of reproductions made under special exceptions.
92. For example, a library could supply a client with a range of material, requested by the client for his or her research or study in accordance with s49, on an electronic storage device such as a CD-ROM. After using the material for research or study, the client could sell the CD-ROM or give it back to the library for the library to include in its collection.²⁴

²³ Sections 135E(2), 135ZZH, 47GH. The application of section 135ZZH was at issue in *Copyright Agency Limited v Victoria University of Technology*

²⁴ The Government’s intention is that the proposed new “temporary reproduction” provisions would allow the material on the CD-ROM to be viewed without infringing copyright.

Technological measures and circumvention devices

Permitted purposes

93. We submit that the current provisions relating to use of copyright material for research or study, libraries and educational institutions are intended to *regulate* the use of material to which people have access. They are not intended to *provide* access. Libraries, educational institutions and others may not have easy access to non-digitised material for a range of reasons. For example, a work may not be available for sale, or may only be available in another country, or only a small number of copies may have been produced.
94. We submit that there should be no provision allowing the use of a circumvention device for any purpose other than law enforcement or national security (as contemplated in proposed s116A(2)). We therefore submit that proposed new s116A(4) and (7), and 132(5G), (5H) and (5J) should be omitted from the Bill.
95. A consequence of the Bill would be that a library, educational institution or government could remove the technological protection measures from a digitised work, and distribute “unprotected” versions of the work. We submit that the resulting prejudice to the copyright owner far outweighs any possible benefits of the proposed provisions.
96. In general, copyright owners have an interest in their material being distributed as widely as possible, as their income is related to the number of consumers. Libraries, educational institutions and governments are important customers for copyright owners. These institutions are able to negotiate the terms on which material they purchase may be used. We understand that this already occurs in relation to digitised material acquired by libraries.
97. We support the submission by Copyright Agency Limited that access to material protected by technological protection measures could be part of the three year review announced by the Attorney-General in his Second Reading Speech on the Bill.

Sanctions against circumvention of technological protection measures

98. We submit that the Act should include sanctions against the circumvention of a technological protection measure, as well as the proposed sanctions in relation to the making, importation and sale circumvention devices.
99. In some cases, a copyright owner may have no recourse against a person making, importing or selling the circumvention device.
100. Under the current provisions, a person may import a circumvention device, provided the importation is not for sale or other distribution. The use of the device may not involve or result in an infringing use of the work, but may well be detrimental to the copyright owner, particularly if the device is used by a large number of people or a significant proportion of the copyright owner’s

potential market. The copyright owner may have no legal recourse against the manufacturer or seller (depending on the law in the jurisdiction), and in any event it is difficult to take legal proceedings in another jurisdiction.

101. The “device” may be a computer program acquired via the Internet from outside the jurisdiction – again, leaving the copyright owner with no recourse.
102. We submit, however, that there should be sanctions against the circumvention of a technological protection measure whether or not the copyright owner also has recourse against the maker, seller or importer.

Subsequent use of circumvention device

103. If, contrary to our submission, the provisions in the Bill allowing the making, sale or importation of a circumvention device for a “permitted purpose” remain, we submit that there must be sanctions against the subsequent use of a circumvention device for a purpose other than a “permitted purpose”. For example, a circumvention device could be sold to a library, but subsequently made available by the library to its clients who may use it for a purpose other than a permitted purpose.

Communication or reproduction of work obtained by circumvention device

104. We submit that there should be sanctions against the communication or reproduction of a work by a person who has got access to it by circumventing a technological protection measure, or by a person who knows (or ought to have known) that access to the work was obtained by circumventing a technological protection measure.
105. The Bill includes a provision of this kind – proposed s116C – for commercial dealings with works whose electronic rights management information has been removed.

Broadcast decoding devices

106. As for circumvention devices, we submit that:
 - decoding an encoded broadcast, (as well as the manufacture, importation and sale of decoding devices) should be subject to sanctions; and
 - that the reproduction or other use of copyright material to which access has been gained by decoding an encoded broadcast should be an infringement of copyright.

Rights Management Information

107. The Bill defines “electronic rights management information” to mean:

- (a) information attached to, or embodied in, a copy of a work or other subject-matter that:
 - (i) identifies the work or subject-matter, *and* its author or copyright owner; *and*
 - (ii) identifies or indicates some or all of the terms and conditions on which the work or subject-matter may be used, or indicates that the use of the work or subject-matter is subject to terms or conditions; *or*
 - (b) any numbers or codes that represent such information in electronic form.
- [emphasis added]

108. The requirements in (a) are cumulative rather than in the alternative. In the WIPO treaties, 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]

109. As the Government’s intention is to meet the requirements under the WIPO treaties, the Bill should be amended so that any of the items of information listed in the proposed definition would be “electronic rights management information”.

Retransmission

110. Item 27 would amend s25(3). Section 25(3) deals with “secondary broadcasts”. According to the Copyright Convergence Group in 1994 report, the section “was intended to enable the use of repeater stations for signal boosting and networking”.²⁵ We submit that the Bill should be amended to repeal s25(3), as its continued operation would be inconsistent with the Government’s policy relating to the payment of equitable remuneration for the retransmission of broadcasts.

111. We submit that the proposed new section 135ZZZE should be omitted from the Bill. Broadcasters should be obliged to notify their licensees that the licensees may also need a licence, or to comply with the retransmission statutory licence, in relation to copyright material contained in the broadcast.

²⁵ Copyright Convergence Group, “Highways to Change: Copyright in the New Communications Environment”, 1994 at p 50.

Computer software

112. We note that the High Court has just handed down its decision in *Data Access v Powerflex*, relating to the current definition of “computer program”.²⁶ This decision may affect the desirability of introducing a new definition of “computer program”.

Broadcasts

113. The term “broadcast” is used in the Copyright Act in three contexts:

- as a verb, to describe one of the exclusive rights of a copyright owner;
- as a verb, to describe an act which may be done without the licence of the copyright owner under certain exceptions to infringement; and
- as a noun, to describe something in which copyright may subsist.²⁷

114. We understand that the Government’s policy is to replace the exclusive rights to “broadcast” and to transmit to subscribers to a diffusion service with the new right to communicate to the public – that is, the term “broadcast” will no longer be used in the first context. It will, however, continue to be used in the second and third contexts.

Current provisions

115. Currently, the copyright in most subject matter includes the exclusive right “to broadcast”, and “broadcast” is defined as “transmit by wireless telegraphy to the public”. The definition also applies to a range of exceptions which allow broadcasting of material for certain purposes without the copyright owner’s licence.

116. Copyright subsists in certain “television broadcasts” and “sound broadcasts”.²⁸ A “television broadcast” is “visual images broadcast by way of television, together with any sounds broadcast for reception along with those images”, and a “sound broadcast” is “sounds broadcast otherwise than as part of a television broadcast”.²⁹

²⁶ Data Access Corporation v Powerflex Services Pty Ltd, 30 September 1999

²⁷ The proposed amendments to Part VA would mean that “broadcast” is also used to describe material which may be copied by educational institutions

²⁸ Section 91

²⁹ Section 10(1)

Amendments in Bill: broadcasts in which copyright subsists

117. The Bill would repeal the current definition, and replace it with a new definition, which defines “broadcast” as a noun (ie something in which copyright subsists), with reference to the definition of a “broadcasting service” in the Broadcasting Services Act. The result is that “broadcast” would effectively mean:

a communication to the public delivered by a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means...

118. We submit that it would be preferable to include all definitions in the Copyright Act, rather than defining a term by reference to another piece of legislation; subsequent amendments to the Broadcasting Services Act may have unintended consequences for the operation of the Copyright Act. If this approach were to be taken, it may also be necessary to include in the Copyright Act definitions of terms used in the definition of “broadcasting service” in the Broadcasting Services Act, such as “television program” and “radio program”.

119. The current definitions in the Copyright Act of “television broadcast” and “sound broadcast” remain unchanged. These terms are used in connection with the subsistence of copyright (in the proposed new section 91), and in provisions which create exceptions to infringement (such as sections 45, 47A and section 111).

120. We submit that these definitions should be amended consistently with the proposed new definition of “broadcast”. “Television broadcast” should be defined in terms of a service that delivers television programs, and “sound broadcast” (or “radio broadcast”) should be defined in terms of a service that delivers radio programs.

121. As a matter of drafting, references to “a sound broadcast or a television broadcast” (for example in section 45 and the proposed new section 91) could be replaced with “a broadcast”. This approach is taken in the amendments to Part VA.³⁰

³⁰ Part VA currently allows the copying of “transmissions” by educational institutions. “Transmission” is currently defined as:

- (a) a sound broadcast or television broadcast including (to avoid doubt) a sound broadcast, or a television broadcast, transmitted for a fee; and
- (b) a television transmission to subscribers to a diffusion service.

The Bill would repeal this definition, and replace all references to “transmission” with “broadcast”.

**Amendments in Bill: exceptions which refer to “broadcast”
or “broadcasting”**

122. The Government’s intention is to “retain most of the existing statutory licences and exceptions in the Act in relation to broadcasting and not extend these licences to apply in relation to communication”.³¹
123. It appears that the Government’s intention is that references to “broadcasting” would have a meaning corresponding to the new definition of “broadcast”, but it is not clear that this intention would be implemented by the Bill.
124. We submit that there should be a definition of “broadcasting” for the purposes of the exceptions and statutory licences which allow broadcasting without the copyright owner’s licence. There is also a reference to broadcasting in the proposed new s87(c), which sets out the rights comprised in the copyright in a broadcast.
125. We suggest an amendment which provides that, for the purposes of sections 47, 87, 105, 107, and 248H, a reference to broadcasting shall be read as a reference to the making of a communication to the public by providing a broadcasting service within the meaning of the Broadcasting Services Act, and a reference to broadcast in 248A(h) and 248P shall have a corresponding meaning, as shall a reference to re-broadcast in 248G and 248P.

Transitional provisions: Schedule 2

126. We submit that the proposed new Item 3 of the Schedule 2 would have unintended and inequitable consequences.
127. Item 3(2) appears to mean that an assignee of the broadcast right or the cable right would have no rights when the amendments in the Bill came into effect. One consequence would appear to be that a person who acquired the broadcasting right or the cable transmission right by way of a licence would be in a better position than a person who acquired the same right by way of assignment. We submit the Government cannot have intended either of these consequences.
128. A major difference between the current broadcasting right and cable transmission right, and the new right to communicate to the public, is liability. For example, under the current provisions, Telstra is liable for music on hold facilities because of the operation of the right to transmit to subscribers to a diffusion service. Once the amendments in the Bill came into effect, however, Telstra would not be liable unless it was responsible for the content of the music on hold. The operation of the transitional provisions would mean that a person who had acquired the right to transmit to subscribers to a diffusion service may have no-one to license once the amendments came into effect.
129. The reference in Item 3(1) to “any contrary intention appearing in it” (“it” being a licence, contract or arrangement) suggests that the licence, contract or

³¹ Explanatory Memorandum, para 7

arrangement must be in writing. It is not clear that this is the Government's intention.

130. We submit that, for the purposes of the transitional provisions, the new right to communicate to the public should be regarded as comprising three rights:

- the right to electronically transmit over paths provided by a material;
- the right to electronically transmit otherwise than over paths provided by a material substance; and
- the right to make available online.

131. We submit that the Government's policy should be that:

- a transaction relating to the broadcasting right – that is, an assignment (including an assignment of future rights) prior to the commencing day or a licence, contract or arrangement in force immediately before the commencing day – should be read as a transaction relating to the right of communication to the public in so far as it relates to the right to electronically transmit otherwise than over paths provided by a material substance, subject to any contrary intention of the parties;
- a transaction relating to the cable transmission right, and in force immediately before the commencing day, should be read as a transaction relating to the right of communication to the public in so far as it relates to the right to electronically transmit over paths provided by a material substance, subject to any contrary intention of the parties; and
- a transaction relating to copyright, and in force immediately before the commencing day, is not to be read as relating to the right to make available online, subject to any contrary intention of the parties.

132. We note that there is judicial authority for the proposition that a grant of rights is presumed not to include new rights subsequently introduced by Parliament.³²

Libby Baulch and Virginia Morrison

6 October 1999

³² For example, *Pathé Pictures Ltd v Bancroft* [1928-35] MacG Cop Cas 247; *Williamson Ltd v Metro-Goldwyn Mayer Theatres Ltd* (1937) 56 CLR 567