

JOINT SUBMISSION

COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999

**FURTHER SUBMISSION ADDRESSING ISSUES RAISED DURING
THE ROUND TABLE FORUM ON 14 OCTOBER 1999**

This joint submission is made by:

Australian Copyright Council

Australian Publishers Association

Australian Society of Authors

Copyright Agency Limited

Screenrights

This further submission is made jointly on the main issues discussed at the Round Table Forum on 14 October. It deals with:

- library provisions (including the definition of “library”)
- fair dealing and reasonable portion
- educational statutory licence

In the interests of assisting the Committee to find workable and fair solutions to some of the difficulties and inequities in the Digital Agenda Bill, we have made a number of concessions and compromises in developing these proposals. The interests ask the Committee to note that this paper does not replace their individual submissions which deal with a wider range of issues.

LIBRARY COPYING PROVISIONS

We have been asked to respond to the proposal made by Duncan Kerr MP during the Roundtable discussion on 14 October. We understand Mr Kerr's proposal to be:

- that the reproduction and communication of material by libraries would be subject to a statutory licence, and
- that libraries would not be allowed to make any charge (even for cost recovery) for supply of material to clients under the library provisions.

We understand that proposal is intended to have the effect that the library provisions would benefit the non-commercial clients of a library by giving them access to material held in public libraries, but not the commercial clients (as a library would be disinclined to provide material to a commercial client if it could not recover its costs).

We welcome and support this proposal. It is consistent with our view that access to copyright material for research or study is important, but that such access is not a "right" to be exercised at the expense of the creators of the material.

We have developed a model, set out below, which we intend to be consistent with Mr Kerr's proposal although it is more detailed. We could provide draft amendments to give effect to this proposal if necessary.

Proposed model

A "library" (as defined in the Bill) would be permitted to supply a work, or part of a work, in electronic form, to its client for the client's research or study provided:

- a digital version of the work has been acquired by the library, or as part of another collection (including a collection maintained for business purposes), by purchase or donation;
- the library is satisfied that the work or portion requested is not available to the client, as a paper or electronic copy or through online access, within a reasonable time at an ordinary commercial price;
- if the material is unpublished, it is a thesis, or its author died more than 50 years ago, or (in the case of films and sound recordings) it was made more than 50 years ago;
- the library has undertaken, by a notice given to the relevant collecting society, to pay equitable remuneration for its supply of the work or part of the work;
- the amount of equitable remuneration would be determined by the Copyright Tribunal in the absence of agreement between the library and the collecting society;

- the provisions dealing with the payment of equitable remuneration would be similar to those relating to use of copyright material by educational institutions and governments;
- any reproductions made of the work in connection with the supply must be destroyed; and
- the library does not charge a fee for the supply.

Our model would allow the supply by a library to a student or researcher of material held in another collection, whether or not that collection is maintained for business purposes. We regard this as a sensible way in which to address the concern of the library groups that corporate libraries would no longer be able to supply the inter-library network, given the new definition of “library” in the Bill.

For the purposes of the library provisions, the model would also include the amendment of “reasonable portion” included in the Bill, as we are less concerned about the application of the amended definition as part of a statutory licence than as part of a free exception.

On the other hand, our model would not allow the following activities which would be allowed under the Bill:

- digitisation of non-digitised material for any purpose except preservation of a manuscript or similar original version of a work;
- the supply by one library to another library of material in electronic form for inclusion in the other library’s collection;
- the supply to clients, or communication on-site, of material “acquired” otherwise than by purchase or donation.

REASONABLE PORTION AND FAIR DEALING

As indicated during the Roundtable discussions, we would be prepared to accept the proposed amendment to the definition of “reasonable portion” if the copying of a reasonable portion under the fair dealing provision (s40) is only presumed, but not deemed, to be fair.

We would be happy to put forward proposed drafting to give effect to this position.

EDUCATIONAL STATUTORY LICENCE IN PARTS VA AND PART VB

The parties to this joint submission differ in their views on the desirability of the extension of the existing statutory licences in the digital environment. Each has made its own submissions on this issue. If the schemes are to be extended, the interests agree on questions of implementation.

In general, the interests support the model proposed in the Bill that there should be a flexible scheme, with the opportunity for educational institutions to elect whether or not to participate in the extensions to the scope of the licence. This should also apply to the exercise of the communication right in an extended Part VA scheme. Further, we believe that the extended provisions in both schemes should attract equitable remuneration.

We oppose the proposal from the educational interests that the record-keeping/sampling election should be the legislative model for the new rights. The unilateral choice between sampling and record keeping have proven to be a powerful bargaining tool for educational institutions and the negotiating position between owners and users has been skewed in favour of users. Hence, sampling and record keeping should not be extended to the new environment. We believe that there should be a general review of the operation and equity of the existing sampling and record keeping provisions in the Act.

Specifically as to Part VA:

In brief, the copyright interests agree in principle with the educational sector (MCEETYA and the AVCC) that the statutory licence to copy broadcasts for educational purposes in Part VA should be extended to include a statutory licence to communicate copies. The interests believe that the exercise of the right of communication should attract equitable remuneration.

Contrary to the AVCC's approach which applies the means of assessing copying to the means of assessing communications of copies, the copyright interests submit that this does not adequately recognise the fundamental differences between the two uses and the need to create systems of assessment specifically relevant to communication.

The proposed model supported by the copyright interests resolves these problems by creating a new notice and assessment system for communications. This is the approach used by the Government for communications of works under Part VB and the copyright interests support this approach because it offers flexibility and simplicity. Drafting for this model incorporating the concessions Screenrights has made as a result of the AVCC's submission appears in a separate submission by Screenrights.

The interests endorse the Screenrights submission including its drafting proposals.

Specifically as to Part VB:

We are generally pleased with the Government's proposals in relation to Part VB. CAL will make separate submissions to the Committee with respect to the Government, MCEETYA and AVCC proposals.

We agree that as a preferred course the Committee should recommend to the Government that:

- Specifically, it should be possible for administering bodies of educational institutions to issue separate electronic use remuneration notices and to have the ability to choose whether to participate in the statutory licence for reproduction and communication of works in electronic form.
- The principles of flexibility contained in s.135ZWA(2) in the Bill should be retained. MCEETYA's proposal regarding this section is opposed.
- Matters which the Copyright Tribunal should take into account for the purposes of s.135ZWA should be contained in the regulations in the manner suggested by Screenrights.
- Proposed s.135ZMB regarding reproduction and communication of insubstantial parts of works should be removed from the Bill. MCEETYA's proposal regarding this section is opposed.

Thank you for the opportunity to present this further submission. We would be pleased to clarify any points or suggest detailed drafting solutions.