

# Australian Digital Alliance

## SUBMISSION TO THE HOUSE OF REPRESENTATIVES LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE (LACA)

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

DATED 1/10/99

#### 1. LACA Review

- 1.1 The Australian Digital Alliance (**ADA**) welcomes the chance to make this submission to the LACA review of the *Copyright Amendment (Digital Agenda) Bill 1999* (the **Bill**), which was released on 2 September 1999.

#### 2. About the ADA

- 2.1 The ADA is a broad alliance of public and private sector organisations and individuals who have recently come together to promote balanced copyright laws, particularly as they apply in the digital and online environments.

- 2.2 ADA members include:

- (a) schools - represented by the MCEETYA Task Force on Copyright Law, which speaks for the vast majority of private and public sector schools in Australia;
- (b) libraries and cultural institutions - represented by a wide range of libraries, archives, museums, galleries and their representative organisations;
- (c) information technology businesses - represented primarily by Supporters of Interoperable Systems in Australia;
- (d) higher education - represented by various universities;
- (e) consumers - represented primarily by the Australian Consumers' Association; and
- (f) science and research organisations - including CSIRO.

#### 3. Balanced Copyright Laws

- 3.1 The ADA membership includes both copyright owners and copyright users. Accordingly, the ADA is a strong supporter of a balanced approach to the ongoing copyright review process. Although the ADA supports effective protection of copyright material, it believes that this must be balanced against the need for fair access to information.
- 3.2 In the ADA's submission, provisions in the Copyright Act which are designed to ensure fair access must be preserved and appropriately extended into the digital environment. This approach is consistent with the international approach reflected in the *WIPO*

*Copyright Treaty 1996* and will help to ensure the best environment for the development of the information economy in Australia.

#### 4. The Bill is a Good Start

- 4.1 The ADA supports the underlying goals and general thrust of the Bill. Although changes are needed to improve certain aspects of the Bill, many of its provision are likely to achieve the Government's stated goal of ensuring a fair balance of owner and user interests in the fast-growing digital and online environments.
- 4.2 This submission sets out the ADA's suggestions for 'fine tuning' the Bill to improve the implementation of the underlying policy goals and to correct what appear to be unintended consequences of certain aspects of the Bill's drafting. Subject to these suggested improvements, the ADA supports the Bill.
- 4.3 The ADA has also had the opportunity to review the submissions of the Australian Libraries Copyright Committee, Supporters of Interoperable Systems in Australia and the MCEETYA Task Force on Copyright Law. The ADA supports those other submissions.

#### 5. ADA Suggestions for Improvement

5.1 In the ADA's submission:

- (a) The Bill should not exclude **private sector libraries** from relying on the library provisions in the Act. This change would seriously harm the cooperative scheme of interlibrary resource sharing which is critical to public and private sector research in this country. The issue of 'corporate' or private sector libraries should be deferred for consideration as part of the Government's response to the Simplification Report of the Copyright Law Review Committee (which recommends the *inclusion* of private sector libraries in the inter-library copying scheme).
- (b) The **temporary copies** exception in sections 43A and 111A should be redrafted as an exclusion from the scope of the reproduction right, rather than as an exception to infringement. Otherwise, the implication is that all temporary electronic copies are reproductions for copyright purposes. This would mean that temporary electronic 'copies' made while using stand alone equipment such as computers and CD players (ie those that are not made 'as part of a communication') would infringe copyright. Further, to ensure that innocent third parties are not liable for making infringing temporary copies simply by browsing a website which contains unauthorised content, subsection 43A(2) should be deleted. At the very least, this subsection should be amended to exclude only the temporary copies made by the person who *initiates or makes* an unauthorised communication.
- (c) **Circumvention devices/services** should be available to any person who requires the device/service for a non-infringing purpose. The scope of 'permitted purposes' should therefore be expanded to cover all non-infringing purposes, rather than a narrow group of exceptions (as drafted). This approach is simpler and more balanced. In particular, permitted purposes should cover fair dealing (ss 40, 41, 42, 43, 103A, 103B, 103C, 104) and the full range of library and archives provisions (ss 48A, 49, 50, 51, 51AA, 51A).

- (d) To improve the technological neutrality of the Bill, **subsection 49(5A)** should be amended so that electronic material made available on library premises for browsing can be copied by users within reasonable, lawful limits using both digital and hardcopy technologies (ie printing and saving to disk), rather than only hardcopy technologies. Now and in the future, students are increasingly likely to gather information and submit projects and assessment materials in electronic form. Provided that fair dealing limits are not exceeded, the Act should allow this to happen.
- (e) The proposed '**commercial availability**' test in subsection 50(7B) has been drafted in a way that will make it almost impossible for libraries to share reasonable amounts of their electronic resources in the same way as they currently share print resources. A library should only be required to check whether a copy of the work is available within a reasonable time at an ordinary commercial price when the amount requested is more than an article from a periodical or more than a 'reasonable portion' of another work. Subsection 50(7B) should be amended to address this problem. At the very least, subsection 50(7B) should confirm that the commercial availability test relates to the availability of the particular *part requested*. Otherwise, libraries will be forced to buy an entire electronic work when all the user needs is a small part of the work. For many libraries, with limited budgets, this simply will not be possible.
- (f) Sections 51A(1) and (3) should be amended to permit **digital preservation and administrative purposes copies** to be made available to all users within the premises of a library or archives, not simply library officers. The reason for making these copies is to ensure that library users will still be able to access the information. Limiting access to library officers completely frustrates the purpose of the provision.
- (g) The educational copying scheme in **Part VB** will more effectively carry forward the existing balance of rights if a number of changes are made. For example, the ADA supports the continuation of a single remuneration notice for all educational copying (hardcopy and digital), rather than a split system with separate notices for sampling and electronic use. The proposed approach is inconsistent with the goal of a technology-neutral Copyright Act and adds further unnecessary complication to the Part VB scheme. Also, section 135ZMB should be amended to allow the communication of small parts of works to remote students (ie those that study off premises) as part of a course of study offered by an educational institution.
- (h) The ADA supports amendments to the educational copying scheme in **Part VA** to allow the online communication of video material to students for educational purposes.
- (i) Finally, the ADA supports a general provision aimed at preventing the use of licence agreements and **contractual restrictions** to frustrate or override the operation of exceptions and statutory licences under the Copyright Act. Licence terms are increasingly used as a way of excluding rights recognised by the Act. This can distort the careful balance established by Parliament and may compromise the underlying objectives which the Act is intended to achieve.

- 5.2 The ADA will be pleased to provide further comments and to participate in hearings or discussions initiated by the Committee, if this would assist the Committee in its work.

## 6. **Contact**

If you have any questions in relation to this submission, please contact

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