COPYRIGHT AGENCY LIMITED

30 October 2006

Senator Marise Payne
Chair
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

via email: legcon.sen@aph.gov.au

Dear Senator Payne,

PROVISIONS OF THE COPYRIGHT AMENDMENT BILL 2006

We are pleased to provide the attached submission on behalf of Copyright Agency Limited.

The Copyright Agency Limited (CAL) is a copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members.

CAL is a not for profit company limited by guarantee.

CAL currently represents the reproduction rights of over 24,000 Australian authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.

CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the *Copyright Act* 1968 (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.

Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.

In addition, CAL offers voluntary licences to the public and corporations for the right to copy and communicate published works. As a single resource, CAL can provide

copyright clearances for hundreds of thousands of books, articles and artistic works through its licences to copy.

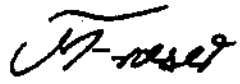
CAL strongly supports legislative provisions in relation to copyright, which will benefit all copyright owners and the community in Australia and internationally.
Our submission outlines our views in detail with particular focus on the following themes:

- The economic significance of the current Australian publishing industry and the opportunity to develop Australia's online publishing industry;
- A need to affirm strong copyright laws to enable creators to earn a living from their work. Copyright legislation protecting Australian authors, publishers and booksellers is in the public interest; and
- The benefit of adhering to the Berne three step test as a means of ensuring equity and access to creative works.

Please note that because of the short time frame for submissions, we have not been able to consult with our membership about the impact of specific proposed changes contained in the Bill.

We look forward to hearing of the progress of the review and will be pleased to substantiate our submission further should we be invited to appear at the Senate Committee Inquiry next week.

Yours sincerely



Michael Fraser
Chief Executive
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Submission by Copyright Agency Limited (CAL) to the Legal and Constitutional Affairs Committee Review of the *Copyright Amendment Bill 2006*

1. INTRODUCTION

1.1. Thank you for the opportunity to make a submission to this review. CAL has been a keen participant in the recent copyright reviews conducted by the Federal Government. CAL welcomes the review by the Senate as this major review of copyright will reshape our online environment and if the balance of reforms is right, will ensure the future of a vibrant Australian publishing industry creating uniquely Australian works.

1.2. CAL is a copyright management organisation, representing creators and publishers of text and artistic works, initially in a hard copy form, but increasingly in a digital form. We represent 9,129 primary creators including 5,996 book authors, journalists, visual artists & illustrators and 3,133 publishers of their works including multinational and Australian publishers and many other copyright owners of published materials.

1.3. The educational publishing industry has a variety of participants including Australian subsidiary companies of multinational publishers, Australian owned businesses and of course, authors and illustrators. A key sector of our membership is the educational publishers and authors. They create educational content for the Australian market in the schools, university, TAFE, government and library sectors.

1.4. Australian publishing is a key contributor to Australia's economy – the most recent figures show Australian publishing and associated industries contributing $1.35 billion to Australia's economy. Australian originated and published educational/ textbooks represent 64% of educational books sold in Australia (compared with 10% in the 1970s).Copyright industries comprise 4.8% of GDP, while providing employment to 5.8% of Australia's workforce.

1.5. This publishing industry provides Australians with Australian content – Australian texts, reference and scientific, technical and medical works for Australian students and readers as well as an international market. It is therefore a rich component of Australia's cultural wealth – important to today's readers, and also important to creating a heritage which will benefit future generations.

1.6. As an industry based on knowledge and learning, it is also a field in which, if the correct conditions are created, Australia can compete and export our Australian information and education services - especially online.

1.7. However, if copyright laws are adopted which do not set an appropriate balance and which act as a disincentive to authors and publishers investing their time and resources into creating copyright works, and digital services, then Australian writing, publishing and online access services will decline and Australia will become a secondary market for the copyright works of our major copyright trading partners – the US and the UK – where significantly stronger copyright laws exist which provide secure environments for investment and trade in copyright works.

1.8. Digital technology is changing the markets for copyright owners – but in sharp distinction to overseas markets as yet we are to see much digital "publishing" in Australia. The digital environment is different from the hard copy environment and creators and publishers in Australia lack sufficient copyright protection to provide online access and continue to be assured that their rights will be protected.

1.9. One of the reasons the digital environment is different from the hard copy environment is that it disrupts the existing value chains for the delivery of copyright material. The new value chains that will operate in the digital environment are still being explored and developed.

1.10. New secure copyright online supply chains for content are required to create a market for online access to the works of professional authors, artists and publishers. In order to manage their new supply chains copyright owners need a copyright framework that supports their endeavours.

1.11. An example of how different markets are emerging for copyright owners in the digital environment is newspaper articles. In the hardcopy environment publishers considered photocopying of articles to be a low value activity. They were not particularly concerned about the activities of press clipping agencies, provided they were licensed by collecting societies.

1.12. In stark contrast, in the digital environment those publishers are now establishing digital archives and websites to provide digital access to their publications. Digital supply of newspaper articles to a company is the first step in a supply claim of online access to articles by staff, customers and related companies – quite different from the hard copy world.

1.13. Another example of new, emerging markets for copyright works is the market for digital downloads of books. The development of this market was discussed in an article in the Sydney Morning Herald Spectrum section on the 28th October 2006. The development of such markets is threatened by proposals in the Bill, such as the proposal to allow format shifting of books.

1.14. CAL notes that the Explanatory Memorandum to the Bill refers to the requirement by users that copyright law keep pace with the development of new technologies, and their concern that in its current form copyright law is inhibiting the use of new technologies by cultural institutions.

1.15. CAL stresses that copyright owners are equally concerned with flexibility and also that copyright law keeps pace with developments in their markets. They are also concerned that the scope of exceptions to their rights in their copyright works reflect market changes and developments.

1.16. CAL asks the Committee to accept that as new markets build new supply chains and as technology develops some existing exceptions have and will become obsolete. In many cases the uses of copyright material permitted by existing exceptions are now more effectively served by licensing arrangements.

1.17. CAL notes that as well as the recommendations arising from the outcomes of the *fair use* review, the changes also contain the government's final response to the Digital Agenda reforms. The Digital Agenda reforms were considered by the House of Representatives Legal and Constitutional Affairs Committee (LACA Committee) in 1999, chaired by Kevin Andrews.

1.18. There were several key recommendations of that Committee. Critical was the recommendation that copyright owners have control of the *first digitisation* of their works. This protection would act as a *firewall*[1] against unauthorised reuse of their works in the digital environment – a key concern of copyright owners.

1.19. The LACA Committee clearly recognised the difference between the print and digital environments[2]. This recognition led to their recommendation regarding first digitization of copyright works, and several of their other recommendations.

1.20. In CAL's view, many of the concerns expressed by copyright owners about the current Bill are due to the government's failure to recognize the differences between the analogue and digital environments in respect of the use of copyright works.

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[1] Paragraph 2.18 of the Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999, Parliament of the Commonwealth of Australia, November1999.

[2] Paragraph 1.22 – 1.35 of the Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999, Parliament of the Commonwealth of Australia, November 1999.

2. THE COPYRIGHT BALANCE

2.1. It is accepted that copyright law seeks to balance the interests of society in protecting and encouraging copyright owners to create works, and also society's interests in having access to those works, to encourage the creation of new works for education and entertainment.

2.2. The LACA Committee, when examining the 1999 Bill, summarised the key task of a Committee reviewing changes to copyright law – do the changes *preserve the balance between access for certain legitimate purposes and the adequate protection of the copyright owner?*[3]

2.3. The international treaties to which Australia is party set out a simple test to identify where an exception or limitation to copyright protection can be provided in domestic legislation of signatory countries. This test is known as the three step test and is contained in Article 9(2) of the *Berne Convention for the Protection of Copyright*. It requires that any exception to copyright owners rights:

- Applies only in certain special cases;
- Does not conflict with a normal exploitation of a work; and
- Must not unreasonably prejudice the legitimate interests of the copyright owner.

2.4. Schedule 6 of the Bill includes a new approach to creating exceptions in Australian copyright law – of importing the three step test directly into Australian legislation.

2.5. CAL's position is that this approach, of restoring fairness and flexibility in exceptions is a welcome one. We support the explicit inclusion of the three step test in exceptions, rather than a series of detailed *fixed in stone* exceptions which cannot properly address a fast developing online market for content.

2.6. CAL is concerned that over the last 20 years in seeking *certainty* in legislation government has created specific exceptions that have become ossified – either they are not relied on at all – for example s44 – or the uses of copyright works which are made under them would no longer be justified if the three step test were to be explicitly applied to them.

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[3] Paragraph 2.23 of the Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999, Parliament of the Commonwealth of Australia, November 1999

2.7. It is for this reason that CAL welcomes the inherent flexibility of the new extended dealings provision and believes that its insertion into the Act will alleviate any need for a number of other existing provisions, and for some of the proposed changes in this Bill, particularly those in Schedule 8. The review history of those changes predates the proposals in Schedule 6.

2.8. We suggest that the three step test be made explicit in each of the exceptions to copyright owners' rights included in the Copyright Act – in particular the fair dealing and library copying provisions, and in the new exceptions to be included in the Copyright Act, and set out in Schedule 8 of the Bill.

3. MARKET BASED SOLUTIONS

3.1. CAL acknowledges that important public interests are relevant in determining copyright policy. The public has an interest in obtaining access to original creative works. It is CAL's view that these public interests are best served by seeking market based solutions.

3.2. In CAL's view, copyright policy is a tool to encourage creativity and investment in the trade and distribution of copyright works and to encourage market development. Only if market failure or serious inequities in the operation of the market emerge that cannot be resolved through market based responses should copyright exceptions be legislated.

3.3. The proposed amendments in the Bill forestall and prevent market developments for Australian copyright owners. This prevents the development of online markets for books and journals and that is against the public interest.

3.4. In particular, CAL notes paragraph 2.8 in the *Issues Paper of the Digital Agenda Review*[4] which refers to copyright owners' initial alarmist response to reprography, followed, over time, by the development of markets. CAL contends that digital markets are no different and must be allowed to develop – as was the case with reprography.

3.5. It is premature to include exceptions to copyright owners' works in the Copyright Act, such as changes to the scope of the communication right and active caching, before the copyright industry has had time to resolve how copyright goods are to be traded digitally, and how to best serve their customers in the digital environment.

[4] "Fair Use and Other Copyright Exceptions: an Examination of fair use, fair dealing and other exceptions in the Digital Age – Issue Paper", May 2005, Attorney – General's Department

3.6. Means of promoting and encouraging markets to develop include existing mechanisms such as the Copyright Tribunal and the rigorous application of the three step test to exceptions and limitations. The use of such mechanisms ensures that the interests of all parties can be considered and taken into account in determining whether a use of copyright material is to be remunerated or not, and the rate of payment that should apply.

3.7. Following are CAL's key concerns with the proposed amendments in the Bill.

4. SCHEDULE 6: EXCEPTIONS TO INFRINGEMENTS OF COPYRIGHT

Part 2 - Private Copying and Format Shifting

4.1. Schedule 6 of the Bill contains provisions which will create private copying schemes for the purposes of permitting domestic, private consumers to time and format shift copyright works. CAL notes that the justification for introducing these *free* exceptions to copyright owners' rights is that it reflects widespread practice.

4.2. Popular practice may conflict with the law – this does not necessarily mean the law is wrong or needs amendment. Any shift in public policy, including changes to copyright law, should take a considered and objective approach which complies with Australia's treaty obligations, and takes into account the interests of all parties it will affect.

4.3. In relation to copyright, CAL stresses that the digital environment is young, and that markets must be allowed to develop for trade in digital copyright works – copyright owners must be given the opportunity to provide commercially viable digital products and services.

4.4. In any event, CAL does not believe that a fair dealing exception to permit time shifting such as the schemes in operation in the UK and New Zealand would suit consumer needs and expectations and still comply with the three step test and other treaty obligations. For example, many consumers expect to be able to maintain a library of copied works.

4.5. Format shifting is a relatively new phenomenon for text works – and the ability to format shift rapidly and with near perfect fidelity of copies through digital technology is new to all types of copyright works.

4.6. Considering the infancy of the technology and the rights being discussed, CAL believes that our members should be given time to develop markets and services for trading copyright works in the digital environment.

4.7. CAL also notes that Article 5(2)(b) of EU Directive 2001/29/EC requires that any private copying provisions contained in the domestic legislation of EU member countries require compensation to be paid to copyright owners for this use of their works. This is to ensure compliance with the three step test. If the private copying provisions as contained in the Bill are implemented, Australia will be out of step with the EU and obligations contained in international copyright treaties.

4.8. CAL does not support an exception to permit the making of back-up copies to ensure that consumers could use the back-up copies if the original were destroyed.

4.9. If a good is faulty, there are remedies available to consumers under fair trading and trade practices law. If a good has been damaged through the owner's own misuse of it, accidental loss or normal wear and tear, CAL can see no compelling reason why, because it can be reproduced easily and to a high standard, it should be treated differently from any other consumer good. If a consumer destroys any tangible good, and wants the benefit of that good, they may buy a replacement.

Part 3 - Use of copyright material for certain purposes (Section 200AB)

4.10. As noted above, CAL generally welcomes the inherent flexibility of the approach to exceptions to copyright adopted in section 200AB. CAL is also of the view that if this provision is included in the Act several existing provisions, which do not have the flexibility of incorporating the three step test, and therefore of responding to market changes and developments could to be removed from the Act. A thorough review along these lines might lead to the significant simplification of the Act.

4.11. Some examples of provisions that could be removed are sections 40 (1A); 44; 135ZG; 135 ZMB and 200(1). Each of these provisions permits copying for free by educational institutions. In respect of several of these provisions there is a dispute between educational interests and copyright owners as to whether they actually do comply with the three step test.

4.12. Further, as a result of the inclusion of section 200 AB into the Act provisions in the Bill, such as section 22(6A) and 200AAA are not required. If the activities permitted by those provisions are compliant with the three step test they would be permitted under section 200AB.

4.13. In response to this proposal, educational interests will say that they require certainty as to what activities can take place. CAL suggests that that certainty be provided by the use of industry guidelines, which provide both certainty and flexibility.

4.14. Industry guidelines will provide needed certainty about what use is agreed to be *fair* from time to time. Such guidelines offer the benefit of being flexible and able to change with needs and circumstances, and develop to meet market needs.

4.15. CAL makes a commitment to developing such guidelines in consultation with authors, publishers and with representatives of libraries and educational institutions.

4.16. Despite our general support for the general approach of section 200AB, CAL notes that there is inherent confusion in the approach of combining explicit recognition of the three step test in one exception with other exceptions in the Act. This is why we urge a thorough review of the relationship with existing exceptions and the removal of several provisions from the Act.

4.17. In addition CAL suggests that the operation of exceptions which allow unremunerated use of copyright material by libraries and educational institutions be made subject to the application of section 200AB, rather than the reverse, which is the effect of section 200AB(6)(a). This would put beyond doubt that those provisions operated in compliance with Australia's international treaty obligations.

4.18. CAL also notes that the for-profit nature of an educational institution or library would be one of the factors to be considered in assessing whether a use of copyright material made under section 200AB is fair. For example, a use that might be considered fair by a non profit school may not be considered fair by a for profit private training college.

4.19. CAL also is concerned about the use of the phrase *partly for the purpose of obtaining a commercial advantage*. CAL is of the view that a use of a copyright work for a commercial purpose, even if only a part purpose, could not be justified under the Three Step Test. Consequently CAL submits that the provision be recast to provide that no commercial advantage, either direct or indirect, can be obtained by reliance on the section.

4.20. CAL is aware that some other submissions to the review suggest that rather than using the words of the three step test in legislation it is preferable to use the existing formulation of fairness as it is currently in section 40(2) of the Act. CAL does not have a firm view on this proposal.

Part 3 - Parody and Satire

4.21. CAL notes that section 200AB(5) permits use for parody and satire under the new extended fair dealing exception. CAL supports the inclusion of an exception for parody so long as it does not conflict with the ability of copyright owners to license such uses. For example, CAL is aware that there are markets of significant value to copyright owners in popular songs for the use of those works for parody. These markets must not be undermined by the inclusion of this provision.

4.22. CAL does not support the extension of this exception to cover satire. The distinction between parody and satire being that parody uses the original work to comment on the original work, where satire uses the elements of the original work to make other social and political comment. In this sense, an exception granted for satire would mean that satirists could free-ride of the distinctive and successful form of a work for no reason other than that form being successful. Parodists on the other hand use the original work precisely because they are commenting on it.

4.23. An exception for satire would be out of step with international practice, and cannot be justified when considered against the terms of the three step test.

4.24. CAL has viewed a draft of the Australian Copyright Council's submission to government in relation to the Bill. In particular CAL supports the comments of the Copyright Council in relation to the new extended fair dealing exceptions.

Part 4 - Fair Dealing for Research and Study

4.25. CAL notes that the Bill includes some proposed changes to section 40(3) of the Act. However CAL is experiencing difficulty understanding the objective of the proposed amendment, and seeks clarification before we comment on the specific proposal.

4.26. The Committee may be aware that CAL has significant ongoing concerns with the operation of section 40(3) and the reasonable portion test. These concerns were raised with the LACA Committee in 1999 and discussed in their Report.[5]

4.27. CAL's concerns regarding the quantitative test and the definition of reasonable portion have intensified since the LACA Committee report in 1999. CAL notes that particularly with respect to journal articles the reasonable portion test permits much copying that would not otherwise be considered fair.

[5] Paragraph 2.35 – 2.38 of the Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999, Parliament of the Commonwealth of Australia, November 1999

4.28. This is because articles are now the item traded online. For example newspapers are making articles available on a pay per view basis. This market is developing especially for archived articles - for example the Sydney Morning Herald.

4.29. In addition, CAL is aware that publishers of professional journals, such as for the legal and medical sector, are increasingly offering online transactional licensing as well as full subscription based licences to their clients. Copyright owners are also providing their works through content aggregators such as EBSCO and Factiva which provide works to users on a transactional basis. To permit unremunerated copying of these works undermines the development of these products which are reliant on the revenue streams paid by users.

4.30. In CAL's view there is an urgent requirement that the application of the reasonable portion test be limited in the digital environment.

Part 5 - Libraries

4.31. CAL recognises the important role played by libraries in providing access to the distributed national collection of copyright materials they hold.

4.32. CAL also recognises that much valuable and fragile material is held in corporate archives and supports the ability of those organisations to preserve that material.

4.33. However, CAL's key concern is that access to copyright materials, particularly by commercial organisations, should not be at the cost of the publishing industry. This point has been made to previous reviews, for example by Susan Bridge, representing the Australian Publishers Association in to the Digital Agenda Review – a copy of that submission is attached.

4.34. This is a view that CAL also firmly holds. In CAL's view, the current library provisions in the Copyright Act do not meet the three step test, and are in breach of Australia's treaty obligations.

4.35. We draw to the Committee's attention the report, *The three-step test, deemed quantities, libraries and closed exceptions*[6], authored by Sam Ricketson, a recognised expert in copyright law and treaty obligations. He concludes that these provisions do not comply with Australia's obligations under the three step test of the Berne Convention.

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[6] Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions Centre for Copyright Studies Ltd*, 2002.

4.36. To illustrate CAL's concerns, and that the approach to library copying is out of step with our major trading partners, consider the situation in each of the UK and the USA regarding library copying.

4.37. In the UK, in October 2003 the UK amended its copyright law to narrow the scope of library copying exceptions. The narrowing of the exception explicitly excluded corporate libraries from being allowed to rely on unremunerated fair dealing copying exceptions.

4.38. In the USA, libraries may only rely on the library copying provision if they are "open to the public"; or available (possibly by interlibrary loan) to specialised researchers. The provision is restricted, so that there can be no direct or indirect commercial advantage. Again, their provisions are more limited than the proposed, or even the existing Australian provisions.

4.39. CAL's perspective is that the introduction of the extending dealings provision for libraries, which is explicitly subject to the three step test is an opportunity for Australia to bring the remainder of our library provisions in line with our international treaty obligations. CAL's proposal for how this can be achieved is set out below, however, we would first like to set out why we are not in favour of the provisions in the Bill.

4.40. CAL's view is that the proposal to change the definition of library to include only those libraries open to the public, and to include in the definition of open to the public, participation in the Inter Library Loan (ILL) system does not respond to copyright owners' concerns.

4.41. CAL's concern is that it 'bribes" libraries into participating in the interloan network as the enticement is that the whole of the library provisions are only available to organisations that elect to participate in the ILL system.

4.42. CAL suggests that the approach be revised to restrict the library copyright free provisions to libraries that are actually open to the "public" – those collections we all consider to be libraries –in schools and universities, state and public libraries.

4.43. To ensure that the current level of access to works continues CAL is developing a series of licences which we propose to enable:

- corporations to take a licence for their internal use of copyright material in hardcopy and digital form and to supply copies into the ILL network for free, if those works are not otherwise available in the ILL network;

- a licence for libraries that permits preservation copies to be made for free;

- An annual licence for libraries that undertakes a small amount of document supply;

- A document supply licence for the supply of copies outside the ILL network.

Those licences will be available by end of the year.

4.44. CAL also notes that Schedule 6 of the Bill contains a number of proposed changes to the library copying provisions in sections 49 – 51A of the Act. Some of those changes relate to the definition of reasonable portion, as discussed above. CAL reserves our comments on those changes until the clarification sought above in respect of reasonable portion is provided.

4.45. CAL's concern is that the supply of copies of works to users and other libraries under sections 49 and 50, threatens and in some cases competes with emerging markets for copyright owners.

4.46. It is this concern that has led us to welcome the inherent flexibility of the extended dealings provision. Our view is that the current library provisions permit copying of copyright material that does not comply with the three step test.

4.47. An example is the Libraries Australia website. In other countries copyright owners authorize the document supply of their works in exchange for a fee. However, in Australia a service that competes with these document supply systems can be established without any payment being made to copyright owners. CAL's members are very concerned about the impact of this service on their markets.

4.48. In particular CAL submits that the commercial availability test should apply to all supply of articles under section 49 and 50 or that a statutory licence be introduced to provide remuneration for copyright owners from this supply.

Part 5 - Copying Significant Works in Key Cultural Institutions' Collections

4.49. CAL has had the benefit of reading a draft version of Viscopy's submission in relation to the proposed amendments to allow copying of works in key cultural institutions' collections contained in s.51B of the Bill. We share Viscopy's concerns about the purpose and scope of this exception as it relates to original artistic works and artistic works held in published form. Additionally, CAL has specific concerns about the ability of cultural institutions to rely on these provisions in relation to manuscripts (s. 51(2)) and published editions (new s. 51B(4).

4.50. CAL is not aware of what deficiency in the current preservation and administration exceptions these provisions are seeking to address.

4.51. However, if this provision is still found to be necessary, it should be subject to a commercial availability test – and where licences are available at an ordinary price within a reasonable time, these should be relied upon.

5. SCHEDULE 7: DEFINITION OF COMMUNICATION

5.1. Schedule 7 of the Bill will narrow the definition of Communication under section 22 of the Act. This amendment would be unique in the world – and would put Australia in a position out of alignment with comparable jurisdictions, through a radical weakening of copyright law in Australia.

5.2. Clicking on content is now the dominant way of using a work online. There may be no need to download a copy. If this is deemed not to be a communication, as proposed, it undermines the growing pay per view market for content.

5.3. The impact of the proposed amendment is that using hyperlinks to access copyright material would not be considered part of exercising the communication right which is an exclusive right of the copyright owner. As this is the most common way for users of the internet to access works, the proposed provision has an extreme effect of reducing what is considered a copyright usage of a work. The provision will have a significant impact on emerging business models in the digital environment.

5.4. Of particular concern to CAL is the context in which the end user of content, such as a student, is instructed (say by an educational institution) to use particular hyperlinks to gain access to content. CAL considers that in many circumstances this directed access would amount to authorisation as understood in the landmark 1975 *Moorhouse* case.

5.5. CAL understands that the trigger for this proposed change to the Copyright Act is what is referred to as the 'tell students to view' component of CAL's current litigation with Schools.

5.6. CAL is disappointed that this amendment was drafted while litigation about this question is currently before the Federal Court. CAL has obtained advice from counsel that such uses are arguably part of the communication right. If the Federal Court finds that, the Copyright Tribunal would have jurisdiction to determine the remuneration for such use of works – it is then open to the Tribunal and to set a low or no payment for this use if they considered it to be appropriate.

5.7. In particular CAL is concerned that although the objective of this amendment is to ensure that clicking onto content in a classroom context is not remunerable the provision is drafted more widely. Therefore, CAL would like to ensure that the effect of any such amendment, if it is to be passed, is confined to the situation it is intended to address and does not have unintended consequences.

5.8. If government is still minded to narrow the definition of communication, the application should only be in relation to an educational context – and specifically not be extended to other contexts for use of copyright material and online markets. CAL understands that submissions from other copyright owner groups identify and explain the impact that this change will have on their markets.

5.9. Nonetheless, CAL opposes the inclusion of this provision into the Act. There is no reason why a special case should be made for copyright free education, and by the special case, unfairly undermine the legitimate interests of educational authors and publishers.

5.10. CAL suggests that the Committee recommend that in light of the current early stages of internet ecommerce we have reached, and Australia's international obligations, and in order to encourage legitimate markets for access to Australian content to develop online, that the proposal to narrow the scope of the communication right not be adopted into the Australian Copyright Act.

6. SCHEDULE 8 - RESPONSES TO DIGITAL AGENDA REVIEW

6.1. CAL recognises the importance of access to copyright materials by educational institutions and stresses the key role played by the educational publishing industry in developing those resources, and in combining them in ways that not only meet curriculum requirements, but stimulates and interests students.

6.2. CAL believes that copyright law should encourage and reward the further development of digital materials, for use in schools. Many Australian publishers and authors are investing energy, talent and finance in developing copyright materials both hard copy and electronic, for this market. They are concerned that the current copyright framework and the proposed changes do not support these endeavours, and will prevent them from obtaining a return from their new offerings.

6.3. Many of the proposed changes discussed below impact heavily on current markets, and the returns copyright owners can expect from their investment. This then impacts on their perception of their ability to make a return from their investment, leading to a decline in investment, and a decline in the amount of Australian materials available to our schools, universities and TAFE.

"Insubstantial" Copying

6.4. Section 135ZG and its digital equivalent s135ZMB allows an educational institution to photocopy one or two pages or digitally copy 1% of the words of a work for free provided certain requirements are met. In CAL's view the restrictions on use in these provisions do not adequately protect copyright owners' interests – particularly copyright owners in artistic works.

6.5. These sections of the Act were based on a recommendation made by the Copyright Law Committee on Reprographic Reproduction (Franki Committee) in its 1976 report. It is important to note that this recommendation relied on two key assumptions:

6.5.1. that the amount of copying of this nature would be *very limited*; and

6.5.2. that it would be difficult for copyright owners to collect remuneration for the copying.

6.6. These assumptions are understandable given the context at the time. Critically, there was no data available to the Franki Committee in relation to the volume and type of educational copying, there was no means of administering copyright for these types of uses, there was no educational statutory licence, and the photocopier was still a new technology.

6.7. However, developments since 1974 mean that these assumptions do not apply today. Some of the features that have changed since 1974 include:

- the introduction of the educational statutory licence;
- the fact that extensive information about the volume and character of copying in educational institutions is now available, showing that this copying is significant in volume; and
- CAL has been monitoring copying in the educational sector since 1988.

6.8. The success of CAL shows that it is not difficult for copyright owners to collect equitable remuneration for this type of copying. In CAL's view this is a clear example of a situation in which the application of the three step test used would not justify the imposition of a free exception to copyright owners' rights.

6.9. In 1999 the Legal and Constitutional Affairs Committee, in its review of the Digital Agenda amendments, considered the above changes and recommended that section 135ZG not be extended into the digital environment. In fact, although it was outside the scope of their reference they recommended that it would also be practical to repeal s135ZG[7].

6.10. Unfortunately the government did not adopt the recommendation of the Committee and the "insubstantial" copying provision was extended into the digital environment.

6.11. Despite its title *Multiple reproduction and communication of **insubstantial** parts of works that are in electronic form,* the copying permitted by these sections is in fact not insubstantial. As noted above, the section permits extensive free copying of copyright works which are often valuable two page lesson plans or summaries in which the publisher and author have expended considerable efforts to distil and summarise other learnings.

6.12. CAL would be happy to provide the Committee with examples of these types of works.

6.13. If the government's intention is that educational institutions can have the right to make an extensive number of copies from copyright works for free, then in CAL's view it should "call a spade a spade" and retitle the section more appropriately.

Further developments

6.14. Contrary to the hope of the Franki Committee that section 135ZG copying would be very limited and would not affect copyright owners (as, they felt that the amounts payable would be too small for the copyright owner to collect under the full records system which applied at the time), copying by educational institutions (in particular schools and TAFEs) under these sections is significant and is having a major impact on copyright owners.

[7] Paragraph 3.41 and 3.42 of the Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999, Parliament of the Commonwealth of Australia, November 1999

6.15. Educational practices have changed and educational publishing has also changed and developed to meet these changes. Publishers are designing works adapted to take advantage of new technologies, such as interactive/ magic whiteboards. When previously an educator copying in reliance on the statutory licence may have copied a chapter of a book – possibly 10 to 15 pages in length, they are more likely now to use a summary or learning outcomes page from a longer work.

6.16. As CAL receives data about digital copying in educational institutions, CAL's concerns about these provisions has increased. One of CAL's concerns has been the ability of educational institutions to use the provisions to "cherry-pick" the most valuable parts from a work for free, in reliance on a copyright exception.

6.17. CAL therefore welcomes the changes proposed by the government as a first step in limiting the application of the provision. However the proposal in itself is not adequate in the circumstances to respond to concerns about s135ZG and s135ZMB.

The inter-relationship between section 135ZM/ZME artistic works and section 135ZG/ZMB

6.18. A further cause of concern, which is not addressed in the legislation, is the interaction of these provisions with sections 135ZM and 135ZME of the Act. This interaction means that whole artistic works are copied for free when they appear with text. The reuse of whole artistic works for free could never be called an insubstantial use.

6.19. CAL is greatly concerned about the effect of these exceptions on the markets for artistic works, as very many artistic works are used in publishing to accompany text. Consider the example of a work which includes a series of reproductions of artistic works, together with a commentary on those works. Provided that the artistic works were captioned, s135ZMB would permit the copying for free not only of the captions but also each of the artistic works explaining or illustrating those captions, clearly not an "insubstantial use".

Recommendation

6.20. CAL believes the Committee should confirm the earlier recommendation of the Legal and Constitutional Affairs Committee, in its 1999 review of the Digital Agenda amendments, that section 135ZG should not be extended into the digital environment. CAL is of the view that both sections 135ZG and 135ZMB should be repealed.

6.21. This action would not restrict the ability of educational institutions to access the works needed for education. The works could be copied under any of the remaining provisions of Part VB – and if the educational interests felt a case for lower, or zero payment was made out, they could ask the Copyright Tribunal to take this into account in rate setting under Part VB.

6.22. It would also be open to educational interests to contend that the scope of use would be permitted under the new section 200AB. The three step test could then be applied to the use and if it was found to comply, then permitted for free. If not, users could rely on other sections of Part VB.

6.23. If the Committee is of the view that our broader recommendation is outside the scope of the review, then CAL urges that it recommends that section 135ZMD be amended as proposed and that section 135ZG and 135ZMD be further amended to exclude the copying of artistic works under section 135ZM and 135ZME in any copying undertaken under section 135ZG and 135ZMB.

Active Caching

6.24. CAL opposes the introduction into the Copyright Act of the new s200AAA, permitting active caching for educational purposes for free. In order to explain our objections it will be useful to look at the history of the current provisions of the Act regarding caching.

6.25. Caching is used to facilitate access to digital material, speeding up access by reducing traffic on the internet and thereby reducing the bandwidth required by each user's computer system.

6.26. Under section 43A of the Act, a temporary copy of a work is not an infringement provided it is *part of the technical process of making or receiving a communication.*

6.27. This provision was inserted into the Act as part of Australia's compliance with the provisions of the WIPO Copyright Treaty. Any proposal to extend the provision should be considered alongside the provisions of that treaty, a more restrictive interpretation of which led to the European Union *Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.*

6.28. Consequently, it should be remembered that what is being sought in this context is a balance between the interests of users with the legitimate interests of copyright owners, not only in respect of lost sales, but also other income the copyright owner might obtain from traffic flows, licensing fees and advertising revenue.

6.29. In response to the proposal to permit active caching by educational institutions CAL notes that any licence payment by educational institutions for their caching and archiving of copyright works would be referable to the Copyright Tribunal. CAL submits that this would be the appropriate jurisdiction to determine the value (if any) of particular uses of caching.

6.30. CAL submits that because of its impact on emerging markets for use of copyright material in education this provision not be included in the Act.

6.31. If this proposal is not accepted, CAL supports the comments of the Australian Copyright Council that the section should be redrafted to apply only to websites, and websites that are freely available to the public, as in its current form it applies to all copyright works. CAL also supports the proposal that the section be clarified to exclude archiving.

Electronic Anthologies (section 135ZMDZ)

6.32. A digital equivalent to the s135ZK anthology provision for hardcopy works was not omitted from the amendments contained in the *Digital Agenda Act* accidentally. Rather it was a recognition that the physical constraints of the hard copy environment do not apply to copying and communication in the electronic environment.

6.33. CAL strongly opposes the proposal to extend s135ZK as it will have a more detrimental effect on rights owners of the works than it does in the analogue environment particularly as works of less than 15 pages are more likely to be separately available in the digital environment.

6.34. This is an example of a situation in which the hard copy and digital publishing practice and markets are substantially different. While superficially appearing to be a simple translation of an existing provision to create technological neutrality, the real impact of the use it permits is very different and much greater, and CAL argues that it is not appropriate.

6.35. CAL proposes that the Committee recommend that s135ZMDZ not be added to the Copyright Act

7. SCHEDULES 10 AND 11 - JURISDICTION OF THE COPYRIGHT TRIBUNAL

7.1. CAL understands that the government proposes to extend the jurisdiction of the Copyright Tribunal to extend to all collective licences administered by collecting societies in Australia. This is consistent with recommendations of the Copyright Law Review Committee's 2000 report, *Jurisdiction and Procedures of the Copyright Tribunal*. In this report the majority recommended that the

jurisdiction be extended to cover all blanket and transactional voluntary licences administered by collecting societies.

7.2. CAL generally welcomes this proposal – with respect to blanket licence schemes, and looks forward to working with government to develop a system in which the Tribunal considers the terms of collectively managed schemes.

7.3. However, since the CLRC report in 2000 there have been a number of advances in copyright licensing – to the benefit of copyright owners and users – which might be impeded by the implementation of the proposed amendments. An example is the emergence of hybrid systems which combine elements of collective and direct licensing. These systems are often called transactional licences.

7.4. The recommendation to extend the jurisdiction of thee Copyright Tribunal to transactional voluntary licensing is based on misunderstanding of the operation of transactional licences. In transactional licensing a collecting society merely act as an intermediary for the rights owners in works – linking users and owners. The rights owners, publishers and authors, set the terms on which works are offered, including rates.

7.5. For example, Digital Course Materials (DCM) is a CAL licence scheme where CAL makes cleared content available online to universities and TAFEs. The content is provided to licensees through a portal hosted by CAL. This portal then links to content held on publishers' databases. The lecturer can then review the available content and select the content they want to provide to their students, in the form of a compilation of segments of different copyright works.

7.6. The objective of the project is to provide online access to content from many authors and publishers to educational institutions. The system combines elements of a collective licence scheme (some licence terms are common to all copyright works in the project) with individual licensing as publishers and authors set the price for each item they provide and also decide how much of a particular work they will make available. CAL acts as a portal facilitating access to the content, on the terms set by publishers.

7.7. The Document Delivery Service (DDS) is another CAL licence scheme designed for the corporate sector. Similarly to DCM, DDS is a licence scheme for online access to articles and chapters in which copyright owners set prices for content they include and users select and pay for works on an item by item basis. CAL's role is to facilitate the transaction between the copyright owner and the educational institutions.

7.8. To make these schemes subject to variation by the Copyright Tribunal would be a disincentive to authors and publishers providing content for inclusion in these schemes. These effects would be detrimental for copyright users, who would be deprived of the convenience offered by a centralised portal for access to copyright works for certain uses.

7.9. Publishers and authors may, rather than being subject to the Copyright Tribunal, choose instead to only make their works available from their individual proprietary websites, rather than through a shared portal. This would mean that users will have to access separately a large number of sites instead of the convenience of logging onto CAL as a centralised, interoperable access to many publishers.

7.10. CAL suggests that the Committee recommend that the Copyright Tribunals' extended jurisdiction apply only to traditional collective management and that schemes in which separate rates are set by each copyright owner be excluded from the jurisdiction of the Copyright Tribunal.

Jurisdiction over Distribution Rules

7.11. CAL does not welcome amendments which would allow both prospective and retrospective review of distribution schemes devised by collecting societies.

7.12. Of particular concern, retrospective review would create uncertainty for the operation of licence schemes, and would open CAL and other collecting societies up to the risk of having already allocated and paid money to members only to be ordered later that these distribution payments are to be revised.

7.13. CAL submits that if jurisdiction of the Tribunal is to extend to distribution rules, this should only operate prospectively. This would create greater certainty for CAL and its members.

8. SCHEDULE 12 - TECHNOLOGICAL PROTECTION MEASURES AND CIRCUMVENTION DEVICES

8.1. We understand that Schedule 12 of the Bill is drafted to comply with Australia's obligations under Article 17.4.7 of the Australia – United States Free Trade Agreement (**AUSFTA**). This article contains the parties' obligations in relation to Technological Protection Measures (**TPMs**) which Australia must implement by 1 January 2007.

Review Mechanism for additional Exceptions

8.2. The AUSFTA contemplates a mechanism for additional exceptions to the prohibition on the use of circumvention devices to be adopted by Australia. It requires at least a four yearly review to be conducted.

8.3. In the review mechanism contained in the Bill there is no obligation for the body entrusted to undertake the review to consult with copyright owners whose works will be subject to an exception. CAL believes it is a requirement of procedural fairness that copyright owners be given the opportunity to comment on any proposed exceptions to the general prohibition on the use of circumvention devices that affect their works.

8.4. Additionally, the set of considerations that are to be taken into account by the review does not expressly require consideration of the impact any additional exception might have on the legitimate interests of the copyright owner, or the market for their works. This is clearly not consistent with Berne and WIPO treaty obligations contained in the three step test.

8.5. CAL urges the Government to include the three step test in the legislation. We believe this inclusion, with respect to all exceptions is a minimum requirement to meet our obligations under all international treaties and at the same time satisfies the AUSFTA.

8.6. CAL believes that any additional exceptions to allow circumvention of TPMs should automatically expire at the end of the four year review period for which they were granted. This would be consistent with the approach adopted by the United States under their comparable review mechanism.

8.7. CAL believes that users that want to continue to rely on a free exception should have to make out the case for the exception at each review. In this way, if markets develop, for example with licences or product offerings developed which address the adverse impact which was found at a previous review, the exception, which would now not be needed, is not extended into a new review period.

Jurisdictional limit of Bill

8.8. Terms of the Bill are stated to apply only to acts which are done in Australia. This would potentially mean that acts of circumvention which might be technically found to have occurred outside of Australia, for example because the internet server being used for the act of circumvention is situated in a non-Australian jurisdiction, would not be covered by the proposed law. This would leave both Australian and overseas copyright owners' works at risk of infringement with no action able to be taken, as there is the potential that the user of the work could be using a computer situated in Australia to circumvent

legitimate TPMs.

Remedies for illegal circumvention of TPMs

8.9. CAL is alarmed at a draft provision which would mean that a Court could refuse to award damages or an account of profits for educational, libraries and archives. CAL believes this will only encourage these organisations to take their obligations around TPMs less seriously than they otherwise would, and that they are unnecessary as the previous provision of the Bill grants a Court a broad discretion in relation to the damages it can award.

Scope of exceptions

8.10. CAL is also concerned that the Bill refers to prescribed exceptions which relate to a particular class of acts and a particular person or class of persons being exempt from liability for circumventing TPMs where the AUSFTA only permits a certain class of works being exempted from the prohibition against circumvention of TPMs. CAL is concerned that the approach adopted under the Draft Exposure Bill will therefore have broader application than permitted under the AUSFTA, and will lead to greater exemptions than are fair or necessary, and would have an unduly detrimental impact on copyright owners' interests.

AUSTRALIANPUBLISHERSASSOCIATION

REVIEW OF THE DIGITAL AGENDA ACT

SUBMISSION BY THE AUSTRALIAN PUBLISHERS ASSOCIATION

INTRODUCTION AND KEY POINTS

The Australian Publishers Association is the peak industry body representing the interests of publishers of books, scholarly journals and educational materials in print and electronic form. We currently represent about 90% of the book publishing industry in Australia by turnover, as estimated by the Australian Bureau of Statistics. A list of members is annexed.

The business of publishing is to make works widely available. Publishers wish to maximise their authors' intellectual property by publishing in many markets and in many formats. In particular, electronic publishing promises to increase the speed of delivery of works with lower distribution costs.

Australian publishers submit that the effect of the Digital Agenda Act has been to impede the development of commercial electronic publishing in Australia.

The first objective of the Digital Agenda legislation was "to ensure the efficient operation of copyright industries in the online environment through promoting financial rewards for creators and investors, providing a practical enforcement regime, and providing access to copyright material online". In our view an environment that promoted financial rewards and security from unauthorised use certainly would in turn promote access to copyright material online. That access has been impeded, however, in part because the Digital Agenda Act:

- undermines financial reward by facilitating systematic, unlicensed and unpaid electronic publishing by libraries in competition with commercial publishers;
- undermines security and effective enforcement by allowing unauthorised digitisation of print material and by creating a legitimate market for circumvention devices.

Most Australian publishers are wary of publishing online given the ease with which unauthorised copies can be made and distributed. The decision to publish electronically requires the publisher to trust that unauthorised use will be minimised though copyright protection, technological protection measures and enforceable contracts.

As to copyright protection, this is undermined by the ability of libraries to provide document delivery services both to the public and to each other on a commercial scale but without any commercial obligations such as negotiating a licence with the author or paying royalties.

As to technological protection measures, this is undermined by the broad "permitted purposes" exceptions which allow hacking tools to be purchased in the high street with no effective means of restricting their use, quantifying their use or even detecting their use.

As to contract, we note the recommendations of the Copyright Law Review Committee which further undermines publishers' confidence in online publishing.

For Australian publishers the key concerns about the *Copyright Amendment (Digital Agenda) Act* 2000 (Digital Agenda Act) are:

a) provisions permitting the unauthorised digitisation of works;

b) inadequate controls over the importation and sale of circumvention devices and the absence of a provision restricting their use;

c) unlicensed and unremunerated digital copying by libraries for supply to other libraries under section 49 and section 50 where copies are available for sale or use under licence;

d) the ability of corporations and other organisations other than public non-profit libraries to rely on the "library" provisions

Our submission addresses:

Issue 1 – definition of library and the position of libraries within institutions conducted for profit

Issue 3 – effect of Division 5 on incentive to create and publish

Issue 21 – first digitisation

Issues 23 to 29 – circumvention devices

We would welcome the opportunity to comment on other issues in response to submissions made by other interested parties.

ISSUES PAPER: LIBRARIES, ARCHIVES AND EDUCATIONAL COPYING

Issue 1 – Definition of Library

Australian publishers submit that the Copyright Act should be amended so that businesses conducted for profit should no longer be permitted to rely on the "library" provisions of the Copyright Act. We address below the issue of the mechanism to achieve that objective.

Whatever the fairness of requiring copyright owners to donate their intellectual property to the public library network or the non-profit sector, the same public policy arguments do not apply to commercial businesses. In our view no case has or can be made that the present scope of sections 49 and 50 meets any one of the three cumulative requirements of the "three step test" in the Berne Convention.

The "three step test" as contained in Article 9(2) of the Berne convention (transplanted and extended into the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty) is in Article 9(2):

> Article 9 (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain *special cases*, provided that such reproduction *does not conflict with a normal exploitation of the work* and *does not unreasonably prejudice the legitimate interests of the author.* (3 "steps" in italics)

Corporations have access to works through purchase of digital or printed copies; direct licences from publishers or the blanket licences developed by Copyright Agency Limited. This system of sales and licences constitutes the "normal exploitation of the work". We see no justification for commercial enterprises to feed at the public trough by acquiring works from public libraries through the section 50 network and avoiding any purchase price or licence payment.

Representatives of the public library sector have argued that they would like access under section 50 to works held in corporate libraries and that they would be prejudiced by an amendment to the definition of library to exclude libraries within 'for profit' institutions. If, from a public policy perspective, the Government wished to permit public libraries to use section 50 to acquire copies from libraries within 'for profit' institutions, we suggest that consideration be given to excluding libraries within 'for profit' institutions from the operation of sections 49 and 50 rather than amending the definition of library. We note that copies are deemed to have been made by the requesting library rather than the supplying library and so a library within a for profit organisation could still respond to section 50 requests made by public libraries.

We suggest that a mechanism along these lines can be found which would result in a fairer system in that:

- public libraries could rely on section 50; and
- libraries within 'for profit' institutions could rely on their licences from Copyright Agency Limited (or direct licences from the copyright owner, if they prefer).

Issue 3 – Effect of Division 5 on incentive to create and publish

Although it is difficult for publishers to quantify the extent to which works are copied and communicated under Division 5, it is clearly significant. We note that the National Library gave an estimate at the Sydney Forum that it copied about 15,000 articles in the last six months. It is logical that the general market is being affected by the document supply services professionally run by major libraries under section 49. The library supply market s is affected by the ability of libraries under section 50 to form networks for duplicating the resources of one library for all others. Theoretically, the library market for publishing certain types of works such as reference books and journals potentially reduces to one single copy. All of this copying and dissemination competes with the market for licensed copying (direct or through Copyright Agency Limited) and some of it competes with the market for physical copies (print and digital) where reproduction is not subject to a commercial availability test.

The commercial market for electronic publishing, including electronic publishing to libraries, is at present very small in Australia. Despite the huge potential market, sales of books in electronic form (including audio books) in 2001-02 totalled only $12.1 million of total sales of $1.3 billion[1]

The free publication of copyright material by libraries clearly has an effect on publisher's willingness to undertake or continue electronic publishing. We draw the Review's attention to the survey conducted by AMR Interactive to be included with the submission of Copyright Agency Limited.

Australian publishers submit that all copying under Division 5 should be subject to a commercial availability test. We believe that this is necessary to meet the three step test obligations under the relevant treaties. This would give the copyright owner the first chance to supply the market ("use it or lose it")..

This would entail:

- Section 50(7A)(e)(ii) and 51A(4) should refer to a "reproduction" rather than a "copy". We believe this was a drafting error;
- Section 49 should be amended to prevent a library from reproducing a digital version of an article or chapter for supply to a client, if the article or chapter is separately available for purchase in digital form; and
- Section 49 should be amended to prevent a library from digitising periodical articles and parts of works which are commercially available in digital form.

Further, Australian publishers believe that Division 5 should be amended to prevent the transfer of copyright works from a non-digital to a digital format without the consent of the copyright owner. This is addressed immediately below.

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[1] *Book Publishers 2001-2002*, Australian Bureau of Statistics series 1363.0, September 2003

Issue 21 – First Digitisation

The unauthorised digitisation of works is an issue of great importance to publishers.

We submit that copyright owners should be entitled to prevent unauthorised digitisation. Rights owners should be permitted to determine:

1) Whether a work is to be released in digital form at all (given the vulnerability of digital copies to piracy) and, if so
2) the form of the digital version, including having the opportunity to:

   a) apply rights management information

   b) choose the format and the 'look and feel' for marketing purposes and to discourage unauthorised changes; and

   c) apply technological protection measures.

The first point recognises the right of a copyright owner to elect not to take the risks associated with making works available in digital form. It is the policy of the Australian Society of Authors that authors do not license "digital rights"in publishing contacts. This is in part due to concerns about protection against unauthorised copying.[2] Publishers also recognise that the decision to 'go digital' is a significant decision. Notwithstanding their significant investment in digitising works for release in the future, most publishers in Australia are not yet prepared to take the risk of publishing content in digital format, let alone online. Many have experimented and withdrawn.

The second point applies to "first" and subsequent unauthorised digitisation (that is, whether or not the copyright holder has elected to publish in digital form). In our view copyright owners should control the form in which the digital copy is released. They can then attempt to minimise piracy and unauthorised changes and use rights management systems.

Where digital copies are made from print versions by third parties such as libraries those opportunities are lost. Further, copies legally made by libraries are indistinguishable from pirate copies and enforcement becomes more difficult.

It has been suggested that libraries take on the role of applying rights management information and copy protection etc to copies made under exceptions to infringement in the Copyright Act.

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[2] Australian Book Contracts Australian Society of Authors 2001page 24.

This suggestion is not workable as the librarian would not be in a position to know the copyright owners' wishes in this regard. This problem will increase as rights management information systems develop to handle complex metadata such as licence terms.

There is some hope for negotiations about third party application of metadata under statutory licence schemes such as Part VB and s183 as the users do have a contractual relationship with the collecting society. There is no prospect of a workable scheme under section 49 and 50 where there is no contractual relationship between the copyright owner and the library.

The Andrews Committee recommended that the exceptions to infringement in sections 49 and 50 should not apply to "first digitisation" given the importance of the controls described above. We believe the arguments are cogent with unauthorised digitisation whether for the "first" time or where the material has previously been digitised by the copyright owner. While we would prefer to see all unauthorised digitisation as being subject to the copyright owner's consent, we would be grateful at least to see the Andrews Committee recommendation regarding "first" digitisation adopted. This, in conjunction with the commercial availability tests (as extended, see Issue 3 above), would in practice limit the circumstances where unauthorised digitisation could legally occur.

ISSUES PAPER: CIRCUMVENTION DEVICES ETC

Issues 23 to 29 – circumvention devices

Australian publishers would welcome amendments to clarify that a "technological protection measure" includes devices to control access to copyright material and amendments to broaden the definition of "circumvention devices" in line with US and EU models.

Access controls such as password protection are common in publishing. For example, support material is made available online to supplement physical textbooks where the textbook purchaser has password access. Another typical example is the publication of teacher support material such as test questions and answers with password protection to prevent unauthorised access, for example by students.

We have no knowledge of the extent of use of circumvention devices whether for permitted purposes or otherwise.

We note that there is no procedure for notification of sale or use of circumvention devices and no mechanism to lodge "permitted purpose" declarations with any relevant authority. In short, we are not in a position to quantify the legal or illegal use of our intellectual property accessed via hacking.

Nonetheless we think it is clear that the current provisions cannot be achieving their intended purpose unless there are proper controls to limit the unauthorised use of these devices (not merely

limit their importation and sale) and while the "permitted purposes" are so wide. It cannot have been intended, for example, that a library should be permitted to make copies of teacher support materials including test answers for supply to students under section 49.

Currently most members of the Australian Publishers Association do not know of the permitted purpose exceptions and when made aware of them they find it, quite literally, hard to believe. In the longer term the efficient operation of the publishing industry in the online environment will be compromised and access to copyright material online will be reduced because the legal use of hacking tools for "permitted purposes" further undermines any confidence in the security of content online.

The Australian Publishers Association believes that circumvention devices should be banned. However, if a proper case is made out that access to copyright material is being denied in unfair circumstances, at that time the Government can consider their use under strict controls. Such controls should include a review of the circumstances by the Copyright Tribunal. We note in this context the US system of review by the Register of Copyrights.

CONCLUSION

The three year review of the Digital Agenda Act was established in recognition that the internet and communications technologies are changing rapidly and we are in "uncharted waters". Australian publishers submit that this remains true. Certainly electronic publishing is still in its infancy. It is our view that the three year time frame has proven to be inadequate to properly assess the impact of the dramatic changes made by the Digital Agenda amendments. As recognised in the Issues Paper, few of the major new provisions have yet been tested in the courts and little empirical evidence is yet available to measure the economic or cultural impact of the amendments.

We ask the Review to recommend to Government that further reviews will be necessary and to acknowledge that we remain in what could be called the "trial period" for the new laws. We ask that the current legislation be monitored closely as the business models for the copyright industries change as these underlying technologies develop.

The Australian Publishers Association is willing to assist the review by providing further information or clarification as required.

Thank you for the opportunity to make these comments.

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APPENDIX

MEMBERS OF THE AUSTRALIAN PUBLISHERS ASSOCIATION

4C Publishing Pty Ltd
ABC Books
Aboriginal Studies Press (AIATSIS)
ACER Press
Allen & Unwin Pty Ltd
ANZAC Day Commemoration Cttee (QLD) Inc.
Art Gallery of South Australia
Australian Academic Press
Australian Geographic
Australian Institute of Company Directors (AICD)
Australian Licensing Corporation
Australian Sports Commission
Benchmark Publications Pty Ltd
Black Inc.
Board of Studies (NSW)
Bobby Graham Publishers
Bolinda Publishing Pty Ltd
Brandl & Schlesinger P/L
Bridger & Henderson
Cambridge University Press
Choice Books
College of Law Pty Ltd
CSIRO Publishing
Currency Press Pty Ltd
Curriculum Corporation
Department of Mineral Resources
Department of Primary Industries QLD
East Street Publications
Eleanor Curtain Publishing
Elsevier (Australia) Pty Limited
Era Publications
Fremantle Arts Centre Press
Gary Allen Pty Ltd
GeoGraphics Group
Greater Glider Productions Australia P/L
Haddington Press
Harcourt Education
Hardie Grant Books
Harlequin Enterprises (Australia) Pty Ltd
HarperCollins Publishers Pty Ltd
Hodder Headline Australia
Horwitz Education
Hudson Publishing
IAD Press
Ibis Publishing Australia
Indra Publishing
Insight Publications
John Wiley & Sons Australia, Ltd
Ken Duncan Panographs Pty Limited
Koala Books
Limelight Press Pty Ltd
Lonely Planet Publications Pty Ltd
Lothian Books
Macmillan Education Australia
Macquarie Library Pty Ltd
Magabala Books
McGraw-Hill Australia Pty Limited

Melbourne Publishing Group
Melbourne University Publishing
Michelle Anderson Publishing Pty Ltd
Mimosa Publications Pty Ltd
Murdoch Books
Narkaling
National Archives of Australia
National Educational Advancement Programs
National Gallery of Australia
National Library of Australia
NCELTR
New Era Publications
New Frontier Publishing
Nielsen BookData
Nielsen BookScan
Nightingale Press P/L
Northern Territory University Press
Of Primary Importance Pty Ltd
Palgrave Macmillan
Pan Macmillan Australia Pty Ltd
Pandanus Books
Papyrus Publishing
Pascal Press
Pearson Australia:
Pearson Education
Penguin Books Australia
Powerhouse Publishing
Primary English Teaching Association
Random House Australia
Reader's Digest (Australia) Pty Ltd
Red Mountain Publishing
Regency Inst. of TAFE (Regency Publishing)
RIC Publications Pty Ltd
Richmond Ventures Pty Limited
RMIT Publishing
Robert Andersen & Associates
Sally Milner Publishing
Scholastic Australia
Scribe Publications Pty Ltd
Simon & Schuster Australia
Software Publications Pty Ltd
Southern Cross University Press
Spinifex Press
St Pauls Publications
Thames & Hudson (Australia) Pty Ltd
The Ink Group
The Text Publishing Company
Therapeutic Guidelines Limited
Thomson Learning Australia
Thorpe-Bowker
Tower Books Pty Ltd
University of New South Wales Press Ltd
University of Queensland Press
University of Western Australia Press
Victoria Law Foundation
Walker Books Australia
Weldon Owen Pty Ltd
Wild & Woolley Pty Ltd
Willow Publishing Pty Ltd
Zaresky Press