



AUSTRALIAN DIGITAL ALLIANCE

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

### **Response from the Australian Digital Alliance (ADA)**

#### **1. Introduction**

- 1.1. The Australian Digital Alliance thanks the Government for providing the opportunity to comment on the Exposure Draft Copyright Amendment (Digital Agenda) Bill 1999.
- 1.2. The ADA applauds the Government's genuine commitment to carrying forward the copyright balance into the digital environment. This commitment is clearly evidenced both in the wording of the objects clauses in the Bill and the statements of policy intent made throughout the accompanying commentary document. In particular, the ADA commends the Government's policy determination that strong copyright protection in the digital environment must be accompanied by provisions allowing reasonable access to copyright material if Australia is to prosper as an innovative and educated information economy.
- 1.3. The ADA notes the Government's request for comment on the technical efficacy of the legislative proposals, and not on the policy underlying the bill which has been decided and will not be revisited. It is the ADA's view that on the whole the Bill has been well crafted to ensure the appropriate copyright balance is maintained and carried forward into the digital environment, as is expressly permitted in the WIPO Copyright Treaty (Article 10), and Performances and Phonograms Treaty (Article 16).
- 1.4. The ADA response will therefore focus on the aspects of the proposed wording which may not, in practice, meet the policy intentions clearly expressed by the Government. In this, much of what is required is simply clarification on the intended operation of certain proposals. The ADA notes that this clarification may in some cases be more appropriately expressed in the interpretative material accompanying the final Copyright Amendment Act, rather than the Act itself.

#### **2. New Copyright Enforcement Measures - Devices Ban**

- 2.1. In order to comply with Article 11 of the WIPO Copyright Treaty and Article 16

of the Performances and Phonograms Treaty, the Government has decided to introduce civil and criminal remedies against certain proscribed acts including the importation, manufacture and distribution of 'circumvention devices' (as defined in the amended s. 10(1)).

- 2.2. In the ADA's view, the decision to ban circumvention devices rather than prohibiting the act of unauthorised circumvention of effective technological protection measures is not only compliant with Australia's international obligations, but goes well beyond what is required.
- 2.3. The wording of the WIPO provisions was very carefully crafted at the time of the adoption of the treaties in order to ensure that access to digital copyright material for non-infringing uses would not be severely compromised by the new enforcement measures. As such, the treaties only require effective legal remedies against the act of unauthorised circumvention, and only where the technological measures utilised are designed to prevent infringement of copyright.
- 2.4. ADA members hold serious concerns that the widespread use by copyright owners of technological protection measures to control access to and use of digital material will potentially render all exceptions to and limitations on copyright owners' rights ineffective and worthless. In situations where access and use permitted by the Copyright Act is prevented by a copy protection system, a ban on circumvention devices will provide copyright owners with a powerful tool to reconfigure the balance set out in the Copyright Act by simply preventing access altogether or by dictating restrictive terms of use through a contractual agreement.
- 2.5. The ADA does recognise, however, that the Government has clearly attempted to address these concerns in the Digital Agenda Exposure Draft Bill through the introduction of a mental element to the proposed offences. In this regard the ADA particularly notes the Government's policy statement at page 26 of the Commentary that "this element has been included to ensure that the enforcement measure provisions do not limit the operation of the exceptions to the exclusive rights of copyright owners".
- 2.6. The ADA therefore supports in principle the approach that the Government has taken in adding a mental element to the new offences relating to the importation, manufacture and commercial dealing in devices able to be used to circumvent copy protection systems.
- 2.7. However, the ADA is concerned that the language used to implement this policy decision does not provide sufficient guidance or certainty as to how a manufacturer, dealer or maker of these devices may avoid being reckless as to whether the device will be used for circumvention and infringement. In this regard, the ADA proposes that a further provision be inserted in order to provide some certainty to those wishing to manufacture and supply these devices to legitimate users such as libraries and schools.

2.8. As has been suggested by the Supporters of Interoperable Systems in Australia (SISA), in their response to the exposure Draft Bill, the ADA proposes the following clause be added to the provision:

*For the purposes of this section, a person will be considered not to have been reckless as to whether the device would be used for the purpose of infringing copyright if the person takes reasonable steps to prevent the use of the device for the purpose of infringing copyright.*

2.9. The ADA considers that if the Government's policy objective of allowing these devices to be available to users for non-infringing uses is to be implemented, the retention of the mental element is essential, and the addition of such a clarifying provision highly desirable. This additional provision would create a necessary safeharbour from liability for manufacturers and distributors of circumvention devices, thus enabling them to make and supply these products to lawful users such as schools and libraries.

2.10. Claims from copyright owner interests that libraries, universities, interoperable software producers and other legitimate users will have no need for these devices as protection measures will not be used to restrict terms and conditions of access and use are easily rebutted. In recent years, contractual agreements governing the use of material purchased in electronic form have been widely employed by rightsholders to override fair dealing and other exceptions set out in copyright legislation. Some examples of the restrictive terms enforced through these agreements are set out below.

*"Publication of a review of the [software] program is not permitted without prior consent from the copyright owner.*

*"The online form of Publications may not be used, directly or indirectly, by Licensee or its Authorized Users for the purpose of making interlibrary loans".*

*"Licensee may not, unless permission is granted in writing by Licensor, deliver output in any machine-readable form"*

Further examples of restrictive terms can easily be supplied on request.

2.11. The ADA considers that despite the inclusion of the mental element, the proposed new enforcement measures provide copyright owners with strong and effective new remedies against those who market and distribute circumvention devices for illegitimate purposes. If consideration were given to going beyond the provisions currently set out in the Bill, the Government must be mindful of the immediate and potentially disastrous impact on innovation, research, education and learning in Australia that overprotection in this regard would bring about.

### **3. Status of Certain Temporary Copies**

- 3.1. The ADA supports the Government's decision to clarify the status of certain temporary and economically insignificant copies made in the course of communication and browsing.
- 3.2. The ADA wishes to note, however, that in implementing this policy decision, there is some inconsistency between statements made in the Commentary, and the proposed legislative wording of s. 43C. At paragraph 72, the Commentary states that: "the Government has decided to *exclude from the scope of the existing reproduction right* temporary reproductions made in the course of the technical process of both electronic communication and browsing (or simply viewing)" (emphasis added). However, the wording of proposed ss.43C and 111A frames these copies as *exceptions* to the reproduction right.
- 3.3. The implication to be drawn from the formulation of the legislative wording used in these sections is that all temporary copies other than those covered by the exception are reproductions for the purposes of the reproduction right.
- 3.4. As the Government has expressed its intention to exclude temporary copies from the scope of the reproduction right, the ADA suggests that the proposed s. 43C be amended to state that temporary copies are not 'reproductions in material form' and therefore do not come within the scope of the reproduction right.
- 3.5. The ADA would also note that the reference to 'looking at' material on 'a computer screen' may not be technology-neutral. The use of the word 'looking' seems to clearly exclude copies made in the course of listening to material. The ADA also questions whether the use of the term 'computer screen' is technology neutral. Will a television screen through which the Internet can be accessed, for example, be regarded as a computer screen for the purposes of this section?
- 3.6. As such, in order to avoid the problems highlighted above, the ADA suggests that proposed s. 43C (and s. 111A) could be amended to read the following:

*A temporary reproduction of a work, or an adaptation of a work, made as part of the technical process of making a communication, or in the course of browsing, viewing, or listening to a work or an adaptation of a work, is not a reproduction in material form of that work or adaptation.*

### **4. Exceptions - Fair Dealing**

- 4.1. The ADA welcomes the Government's decision to apply the existing fair dealing exceptions to the proposed new right of communication to the public.
- 4.2. The ADA notes that in attempting to replicate in the digital environment the balance struck between the rights of owners and the rights of users that has

applied in the print environment, the Government is carrying forward rather than extending existing exceptions (as per the language of the Agreed Statement in relation to Article 10 of the WIPO Copyright Treaty).

- 4.3. The Government has decided that the 'reasonable portion' quantitative test will be carried forward into the digital environment subject to certain constraints. Whilst the ADA supports the introduction of proposed section 10(2A) in principle, no guidance is provided as to what will amount to a reasonable portion of a work where no hardcopy published edition is available.
- 4.4. The narrow application of the reasonable portion in the digital environment will cause particular problems for libraries, universities and schools attempting to rely on any one of a number of exceptions in the Act where an interpretation of a reasonable portion of an electronic work will be required (where no printed version of that work has been published). Clearly further clarification is required.
- 4.5. The ADA also foresees problems with the application of the reasonable portion as it is framed in the Bill. Much of the material potentially coming within the test will not be expressed in the form of 'words'. How then, for example, is the proposed s. 10(2A) intended to apply to musical works which are not made up of 'words'?
- 4.6. The ADA submits therefore, that as copying is only permitted where a hardcopy published equivalent of the work is in existence, there seems to be no reason why the same reasonable portion test (1 chapter or 10 per cent) cannot continue to apply. It seems anomalous that the amendment may bring about a situation where different amounts of what is effectively the same work are able to be copied, depending on whether the work is in hardcopy or electronic form.

## **5. Exceptions - Libraries and Archives**

- 5.1. The ADA is strongly supportive of the Government's decision to allow libraries and archives (and museums and galleries) to use new technologies to provide access to copyright material in the digital environment as they have in the print environment.
- 5.2. The Government has recognised the importance of allowing libraries to make material acquired as part of a library's collection in digital form available to the public (albeit in a limited sense) through the proposed s. 49(5A).
- 5.3. The ADA welcomes this important exception to the new communication right, but notes that restricting access to the premises of the library may seriously disadvantage those Australians not within easy access of a library, museum or gallery, such as those living in remote and rural areas. In this, the ADA notes the important role that ss. 49 and 50 will play in providing access to digital material to Australians who are not able to conveniently visit the premises of a library or archives.

- 5.4. Under the proposed exception to the new communication to the public right libraries could only provide access to the specified digital material on 'dumb' terminals which are incapable of making or communicating a copy of the work. The exception will thus prevent library users from being able to rely on the fair dealing provisions to make or communicate a copy of any part of a work acquired by the library in digital form. Whilst users will be able to obtain works or parts of works through ss. 49 and 50, this service will only be available to users whose purposes are research or study. In effect, therefore, users will not be able to make or communicate a copy for fair dealing purposes other than research or study. Much of the material in question such as electronic journals available only on subscription, will not be practically available to users other than through a library. As such, the ADA queries whether the Government's policy objective in applying the fair dealing exceptions to the proposed new right of communication to the public, as stated in paragraph 36 of the Commentary, is effectively implemented.
- 5.5. The Bill clarifies that under ss. 49 and 50, libraries and archives can make and communicate reproductions of works or parts of works in response to specific requests and only in limited circumstances to users who require that material for research or study purposes. As noted above, these provisions will become crucial in providing equitable access to information in light of proposed limitations on a library's ability to make digital works available, particularly to those not able to attend the premises of the library.
- 5.6. In relation to proposed amendments to sections 49 and 50, the ADA notes that the Government's decision does not in any way amount to an extension of the scope of the provisions. Paragraphs 44 and 45 of the Commentary make it clear that the copying and supply of this material by libraries and archives will be subject to the same conditions and limitations in the digital environment that currently apply in relation to the supply of print works. All elements of the current procedure are to remain the same with the only change being to the distribution mechanism. As such, there is no evidence to suggest that the amendments contained in the Bill will increase the volume of library copying for users and other libraries or unreasonably prejudice the legitimate interests of copyright owners.
- 5.7. As outlined in the submission from the Australian Libraries Copyright Committee, some clarification may be required as to what constitutes 'on the premises' for the purposes of sections 49(5A), and other relevant library copying exceptions.
- 5.8. The ADA welcomes the amendments contained in Bill concerning the reproduction and communication of unpublished works in libraries, and the reproduction and communication of works for preservation and other purposes (paragraphs 50-59 of the Commentary).

## **6. Exceptions – Statutory Licence for Educational Copying**

- 6.1. The ADA strongly supports the Government's decision to clarify the operation of the Part VB educational copying licence in allowing educational institutions to make electronic copies of works through the revised definition of 'licensed copy'. The ADA also welcomes the Government's decision to allow educational institutions to exercise the new communication to the public right under similar conditions to those currently applicable in the print environment.
- 6.2. The ADA has some concerns as to the operation of the statutory licence particularly with regard to the equitable remuneration payable for the communication of works under the licence. The question as to whether a separate remuneration notice will be required for communications made under the proposed Division VA is also critical. In this regard, the ADA supports simplified approaches to the administrative requirements of the statutory licence.

## **7. Contracting out of Exceptions**

- 7.1. The ADA notes that in relation to the proposals for back-up copying, the Government has decided that the Act be amended by way of s. 42(2A) to ensure that these exceptions could not be overridden by contractual means.
- 7.2. At point 2.10 above, the widespread use of contractual provisions in licences for use of digital materials (such as CD-ROMS and electronic journals) to override fair dealing rights and other exceptions has already been noted. The use of non-negotiable 'clickwrap' licences in imposing restrictive terms of use of software and other on-line material is already common practice and will only become more widely used with the advent of effective technological copy protection systems. In being confronted with these enforceable agreements, the consumer, whether a library, school or individual, is inevitably in a position of unequal bargaining power such that the agreement becomes one of 'take it or leave it'.
- 7.3. It is the ADA view that in order to ensure that the package of exceptions that the Government has carried forward into the digital environment is not rendered ineffective, it is essential that a provision be introduced similar to the proposed s. 43(2A), which expressly states that exceptions in the Copyright Act are not overridden by contractual agreements to the contrary. The ADA maintains that all copyright exceptions, including any new exceptions such as the recently announced decompilation exception, must be subject to such protection in order that the delicate balance set by Parliament in the Copyright Act is maintained in practice.

## **8. Computer Software Protection**

- 8.1. The ADA welcomes the amendments contained in the Bill which will have the effect of making exceptions for back-up copying, copying for normal use, and the making of ephemeral back-up copies more flexible and more

appropriately suited to common practice in the digital environment.

- 8.2. The ADA notes, however, that there are certain issues requiring clarification in relation to the exception for copying for normal use (s. 43B). The ADA supports the comment made on these issues in the response to the Bill submitted by the Supporters of Interoperable Systems in Australia (SISA).
- 8.3. The ADA notes the importance of the introduction of a specific exception to allow decompilation for certain purposes in light of proposed insertion of s. 21(5) which would clarify the scope of the reproduction right as regards the conversion of computer programs from one type of code to another. In this regard, the ADA would like to take the opportunity to strongly support the Government's decision announced on 23 February 1999, but not included in the current Exposure Draft Bill, to introduce a new exception permitting decompilation in certain circumstances.

## **9. Liability Issues – Carriers and Carriage Service Providers**

- 9.1. The ADA recognises the Government's commitment to the provision of a legislative framework that gives certainty to carriers and carriage service providers about their responsibilities to copyright owners and the steps they need to take to avoid infringing copyright.
- 9.2. The ADA supports the limitations on a carrier's direct liability for infringement for communicating material to the public (subsections 22(5) and (6)) or providing the physical facilities by which the communication was made (s. 39B and 112C). The ADA also supports the clarification of indirect infringement through the codification of authorisation principles both in the context of CSP liability and generally.
- 9.3. The ADA notes, however, that the guidance provided to carriers in the proposed framework is not as comprehensive as that which has been utilised in both the European Union and the United States. As such, some further clarification in the Bill may be desirable.