

**COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999
RELEASED 2 SEPTEMBER 1999**

**FIRST SUBMISSION OF THE
AUSTRALIAN LIBRARIES COPYRIGHT COMMITTEE
(‘ALCC’)**

1 OCTOBER 1999

EXECUTIVE SUMMARY

The ALCC supports the broad approach of the Bill, which seeks to carry forward into the digital environment the existing reasonable exceptions applicable to libraries and archives. However, a number of changes are necessary to improve the implementation of the Bill's underlying policy goals, including as follows:

- The Bill should not exclude private sector libraries from the library provisions - this issue should be deferred for consideration in the context of the CLRC Simplification Report
- Sections 43A and 111A should be redrafted to remove the presumption that all temporary electronic 'copies' are reproductions in material form for copyright purposes.
- Subsection 49(5A) should be amended to ensure that, amongst other things, library users browsing electronic material on the premises are able to make reasonable copies under fair dealing using both *hardcopy and digital* technologies.
- Subsection 50(1) should be amended so that interlibrary requests can be made via an intermediary library, rather than directly from one library to another.
- A library should only be required to check the commercial availability of a work in electronic form when the amount requested is more than an article or more than a reasonable portion.
- Sections 51A(1) and (3) should permit digital preservation and administrative purposes copies to be made available to all users within the premises of a library or archives.
- Circumvention devices/services should be available to any person who requires the device/service for any non-infringing purpose, and the scope of 'permitted purposes' should be expanded accordingly.

1. INTRODUCTION

- 1.1 The ALCC welcomes the opportunity to make this written submission to the Legal and Constitutional Affairs Committee of the House of Representatives ('**Committee**'), as part of the Committee's review of the *Copyright Amendment (Digital Agenda) Bill 1999* ('**DA Bill**').
- 1.2 In this submission, the ALCC provides its initial comments on, and suggested changes to, the DA Bill from the perspective of Australia's libraries and information service providers. The ALCC is a national, cross-sectoral committee of Australian libraries and information services which represents their interests on copyright issues. The membership of the ALCC includes representatives of state libraries, university libraries, government and special libraries, research libraries, archives and the profession. See the Terms of Reference (**Attachment A**).
- 1.3 The Committee has indicated that there will be an opportunity to participate in hearings (in addition to those held on 23 October 1999) and 'round-table discussions' shortly after the closing date for making initial written submissions. The ALCC will be pleased to participate in those hearings and discussions. Where necessary, the ALCC may provide further written comments responding to issues arising from any hearings, discussions and the submissions of other interests.

2. ALCC APPROACH TO COPYRIGHT

- 2.1 The ALCC strongly believes that:
- (a) Copyright exists to promote the public interest, not simply the interests of particular copyright owners. This underlying policy objective should always be kept in mind during the review of the DA Bill.
 - (b) The public interest is best served by striking an appropriate balance between the interests of copyright owners and the interests of copyright users. Striking the right balance is often difficult. Nonetheless, it is critical that the balance is struck in a way that best serves the Australian public.
 - (c) As part of the balancing process, the Copyright Act grants to copyright owners, for a limited time, a specific and limited bundle of exclusive rights to deal with the copyright material they create. At the same time, the Act creates specific exceptions to those exclusive rights where the public interest in research, education and other important policy goals requires that access to information is not subject to unnecessary copyright restrictions. Exceptions for fair dealing, libraries and archives are good examples of this.
 - (d) As the exclusive rights protected by copyright are made stronger and wider in scope, it is critical that Australia also maintains and carries forward into the digital environment its existing range of fair dealing, library and other exceptions. Australia's future role in the information economy is likely to suffer greater harm from shifting the balance away from reasonable user access than by maintaining the existing balance.
- 2.2 Relevant to this submission is the Australian Council of Libraries and Information Services' submission to the CLRC's *Simplification Review* of the Copyright Act (to

follow by post). That document sets out in more detail the ALCC's view of the underlying goals of the Copyright Act and the general approach taken by Australian libraries during the copyright review process. The ALCC encourages the Committee to consider comments made in this submission against the policy background set out in the ACLIS submission.

3. THE DA BILL STRIKES A REASONABLE BALANCE

- 3.1 Before commenting on particular issues, the ALCC makes the following general comments on the DA Bill. These general comments are, of course, subject to particular problems identified later in this submission.
- 3.2 The DA Bill does no more than maintain a balance which has always existed under Australian copyright law. It does not extend the scope of the fair dealing and library copying exceptions, it merely preserves their existing scope. In some instances, the scope of existing exceptions will be narrower as a result of the Bill.
- 3.3 The range of activities that libraries and archives are able to undertake will not be expanded by the DA Bill. The Bill will simply allow libraries to use new technologies to provide the same limited services they have provided to date, and for the same user groups they have served to date (ie those engaged in research or study).
- 3.4 Some copyright owner interests are critical of the DA Bill not because it fails to maintain the current balance, but because it fails to narrow the scope of user rights in the digital (and non-digital) environment. This Bill has been treated by some as an opportunity to change the owner-user balance in favour of owners (which helps to explain the strength of their criticisms).
- 3.5 Claims by some copyright owners that the DA Bill threatens Australia's future in the information economy are not supported by hard evidence. However, if the DA Bill is used to shift the current balance in favour of copyright owners (eg by cutting back fair dealing and library exceptions), the negative consequences will include:
- (a) demonstrable increases in the cost of education, public and private sector research and the operation of Government, or a decline in the quality of those activities;
 - (b) exacerbation of Australia's substantial trade deficit in relation to copyright payments (Australia is a large net importer of copyright material and pays far more to foreign rightsholders than local rightsholders receive for the use of copyright material); and
 - (c) a growing perception that copyright unfairly restricts the use of information, resulting in declining public respect for copyright law as a whole.
- 3.6 The ALCC welcomes the efforts of the Government, supported by relevant Departments, to prepare a DA Bill which seeks to carry forward into the digital environment the existing balance of rights and interests. The Attorney General's Department and the Department of Communications, Information Technology and the Arts have consulted widely on most aspects of the DA Bill over a number of years. Apart from the proposed change to the definition of 'library', there are very few issues which have not already been the subject of detailed consideration and debate. For this

reason, the ALCC urges the Committee to support the general thrust of the DA Bill, subject to 'fine tuning' amendments where necessary to improve the implementation of the stated policy goals.

4. SUMMARY OF ISSUES THAT CONCERN THE ALCC

4.1 The issues of most relevance to the ALCC are:

- (a) 'library' definition;
- (b) extension of 39A warning notices to computers in libraries;
- (c) temporary copies;
- (d) library to user copying - section 49;
- (e) library to library copying - section 50;
- (f) copying unpublished works in libraries - section 51;
- (g) copying works in Australian Archives - section 51AA;
- (h) copying works for preservation and other purposes - section 51A; and
- (i) circumvention devices.

4.2 Comments on these aspects of the DA Bill are set out below.

5. LIBRARY DEFINITION

Exclusions of 'corporate' libraries

5.1 The DA Bill includes a number of changes which have the effect of excluding all libraries located in 'for profit' businesses from relying on the library exceptions. It does this by:

- (a) adding a new definition of 'library' in subsection 10(1) which states that 'library' does not include *'a library owned by any person or body carrying on business for profit if the person maintains the library mainly or solely for the purposes of that business'* (libraries in 'for profit' educational institutions are, however, still included within the definition of library as a special case);
- (b) repealing the current section 18 which states that libraries in 'for profit' businesses are still 'libraries' (provided that the library itself is not conducted for profit); and
- (c) removing the current subsections of the library provisions (sections 49 and 50) which prevent libraries from relying on these exceptions where the library itself is conducted for profit (which, by virtue of the new definition, is redundant).

5.2 The ALCC strongly opposes this change for a number of reasons:

- (a) First, the exclusion of what might be called 'corporate' libraries has never been included as an issue in any 'Digital Agenda' discussions to date. In fact, this proposal is one which affects all library activities, digital, print or otherwise. The issues to be considered are part of the broader debate about the simplification of fair dealing and library provisions generally. It is impossible to do justice to these issues in the narrower context of the DA Bill.
- (b) Second, although most issues addressed in the DA Bill have been the subject of extensive consultation, there have not been any consultations on this particular issue. There are significant negative consequences which would flow from excluding corporate libraries from the library provisions of the Act. This change should not be made without a proper opportunity for the library community to consider and advise policy makers of the consequences, particularly the negative consequences for private sector and cross-sectoral research.
- (c) Third, the definition of 'library' is an issue which remains to be considered in the context of the Copyright Law Review Committee's ('CLRC') Report on the Simplification of the Copyright Act (Part 1 - Exceptions). It is part of a wider debate about the extent to which the private sector can rely upon fair dealing and library exceptions, and the extent to which it should rely upon licensing options (and the practicality of those options).
- (d) Fourth, the CLRC, having considered this issue, specifically recommends in its Simplification Report that corporate libraries *should* be able to rely on the library exceptions. Indeed, the CLRC goes further and suggests that even libraries conducted for profit should be treated as 'libraries' for the purposes of the Copyright Act. Given these expert committee recommendations, it is only fair that the issues are more fully debated before making a change in the opposite direction.
- (e) Fifth, and most significantly, the exclusion of corporate libraries will give rise to many administrative and cost problems for the library sector, the negative consequences of which will far outweigh any possible benefits. Some of those problems are described in more detail below.

5.3 Although it is not possible to list all of the problems likely to result from excluding corporate libraries from the scope of the library exceptions, the following list illustrates by example the nature of those problems.

- (a) The system of inter-library resource sharing (which is critical to ensuring access to the ever-growing volume of specialised research literature in this country) will be split in half. A single unified system will become a two-tier, discriminatory system, with increased copyright fees and administrative costs.
- (b) Not for profit libraries will no longer be able to request documents from corporate libraries under section 50 (eg if a university law library requires an article held only in a law firm library, or if a Parliamentary library needs a copy of an article held only in a corporate library), and vice versa.
- (c) Scientists and researchers in private sector companies will no longer be able to make copying requests of their own internal libraries under section 49, even

though they may have a right to make copies themselves under fair dealing (nb no Australian court has ever held that, as a general proposition, private sector companies cannot rely on the fair dealing defence). This will be a particular problem for employees carrying out research in remote areas, eg a geologist carrying out field research for a mining company, or a scientist engaged in pharmaceutical or drug research in a private hospital or biotechnology company.

- (d) All other library exceptions (eg copying for preservation purposes) will no longer apply to corporate libraries. This will threaten the long term integrity of valuable specialist collections held within corporate libraries.
- (e) No corporate library will be able to rely on section 39A warning notices above photocopiers (or computer terminals) to reduce its risk of liability for authorising infringement.
- (f) There is no adequate alternative means for corporate libraries to clear rights if this change is made. A voluntary collective licence from CAL (the only practical alternative) does not provide blanket coverage for all rights holders and CAL does not generally indemnify licensees for copying of works not included in its repertoire. The scope of CAL's authority to license digital copying is also quite unclear. Thus, even if some rights could be cleared under a licence, a substantial amount of material simply could not be copied by the private sector without infringing copyright.
- (g) The provision of information services to cooperative private/public sector research projects will become far more complicated to administer and may, in practical terms, become unworkable. For example, researchers working in a Cooperative Research Centre (CRC) rely heavily on the information services provided by each of the CRC member libraries. If libraries in the private sector CRC member companies are excluded from the library copying provisions, the resources of those libraries will no longer be available to any of the CRC researchers through document supply.

5.4 For the reasons set out above, the ALCC strongly submits that:

- (a) the DA Bill should not exclude libraries from the library provisions simply because those libraries happen to be located within private sector businesses;
- (b) the issue of 'corporate' or private sector libraries should be deferred for consideration as part of the Government's response to the CLRC's Simplification Report (which deals with this issue in more detail); and
- (c) pending further consideration of the issue, the DA Bill can confirm that any library which itself is conducted for profit, or which provides document supply services for profit, cannot do so under the library exceptions.

Definition of 'archives'

5.5 The DA Bill also amends the definition of 'archives' by adding a note stating that museums and galleries are examples of bodies that could have collections covered by the definition of 'archives'. It appears that the intention of this amendment is to confirm

that many museums and galleries will fall within the current definition of 'archives' (see subsection 10 (4)).

5.6 The ALCC supports this proposal.

6. EXTENSION OF 39A WARNING NOTICES TO COMPUTERS IN LIBRARIES

6.1 The DA Bill extends the operation of the section 39A warning notices to cover computers in libraries as well as photocopiers. Section 39A currently provides that libraries and archives (including the body that administers them and the officers in charge) will not be liable for authorising an infringement of copyright simply because somebody uses a photocopier on its premises to make an infringing copy. The DA Bill amends this section to give it broader and more technologically neutral application to 'machines' in libraries by replacing '*a machine for the making, by reprographic reproduction of copies of documents*' with '*a machine (including a computer)*'.

6.2 A new section 104B is also added to extend this provision to the copying of audio-visual items on library machines/computers (ie not just 'works' in a narrow sense).

6.3 The ALCC supports this proposal.

7. TEMPORARY COPIES

7.1 The DA Bill proposes to insert a new section 43A into the Act which creates an exception to infringement for temporary reproductions made in the course of communication. The new provision provides that copyright in a work (or adaptation) is not infringed by making a temporary reproduction of the work (or adaptation) 'as part of the technical process of making or receiving a communication'. This is qualified by a new subsection stating that the exception does not apply where the making of the communication is itself an infringement.

7.2 Unlike the exposure draft, this provision makes no reference to 'looking at material on a computer screen'. The Explanatory Memorandum does, however, state the Government's intention that the exception is intended to cover 'browsing' copyright material, 'including copyright material that involves the production of sound'.

7.3 The Explanatory Memorandum also states that, under the exception, 'reproductions made in the course of certain caching would not be caught by the existing reproduction right'. It does, however, define 'caching' simply as 'the process whereby digital works are copied as part of the process of electronically transmitting those works to an end user'.

7.4 Unfortunately, the Explanatory Memorandum reflects a confusion about the difference between excluding temporary copies from the scope of the reproduction right and creating an exception to infringement for temporary copies. In different places, the Explanatory Memorandum claims that section 43A does both of these things (which is impossible). In fact, the new section is still drafted as an exception, which gives rise to an implication that temporary copies do fall within the scope of the reproduction right and would (but for this new exception) expose the maker of any such copies to the risk of liability for infringement.

- 7.5 The consequence of drafting section 43A as an exception is that all other temporary copies not addressed by a specific exception will now be much more likely to infringe the reproduction right (unless licensed). For example, temporary copies of works stored in computers and other electronic devices during normal use or playback (some CD and MiniDisc players have an anti-skip electronic memory buffer of up to 40 seconds) may now infringe copyright. For libraries, this could mean that digital copies made and 'stored' temporarily inside digital photocopiers will be regarded as reproductions in material form. Similarly, placing a multimedia CD ROM into the CD ROM drive of a library computer and 'browsing' it may give rise to a copyright infringement because a temporary electronic 'copy' of the material is made during browsing. As these temporary 'copies' are not made in the course of a communication, they will not be covered by the section 43A exception.
- 7.6 The provisions of section 43A are repeated in section 111A for audio-visual items (eg films and sound recordings). Accordingly, the same problems arise.
- 7.7 The question whether temporary electronic 'copies' are reproductions in material form for copyright purposes remains unresolved. An attempt to 'confirm' that temporary 'copies' do fall within the scope of the reproduction right was rejected by the international community at the 1996 WIPO Copyright Treaty negotiations in Geneva. In ALCC's submission, most, if not all, temporary 'copies' should not be regarded as reproductions. Accordingly, the ALCC submits that the DA Bill should be drafted in a way that does not create a presumption that temporary 'copies' are reproductions.
- 7.8 This problem can be addressed by redrafting sections 43A and 111A to state that temporary copies made as part of the technical process of making or receiving a communication '*are not reproductions in material form*' (rather than stating that such copies 'do not infringe'). This approach leaves open the question whether other temporary copies are reproductions in material form.

8. LIBRARY TO USER COPYING - SECTION 49

- 8.1 The DA Bill includes a number of amendments to section 49 (which deals with library-user exceptions), including:
- (a) Changing 'copy' to 'reproduction' in various places to **confirm that digital copying is covered** (nb 'reproduction' will be defined in section 21 to cover digital copying, including hardcopy-to-digital and digital-to-hardcopy).
 - (b) Confirming that, under this section, libraries can **only copy articles and other works from publications held in the collection of a library or archives**. It is hard to see when this would not be the case (although the exclusion of libraries in 'for profit' organisations will have an impact in this context), but the change has been added to remove any risk that a library might copy works which no library had 'acquired' for its collection (which was a concern expressed by CAL and others). This should not present any significant problems for libraries (nb the words '*a library or archives*' are critical to this interpretation).
 - (c) Creating a new exception allowing libraries and archives to **make articles/other works acquired in electronic form available online to users within the premises** of the library or archives, provided that the library equipment through which users access that material does not allow the users to

communicate or make electronic reproductions of the work (see new subsection 49(5A)). This provision only applies to material acquired in electronic form, not material converted to electronic form by a library. It does, however, allow users to print out a hardcopy of the material they access, where that hardcopy would be covered by fair dealing. This is an improvement on the exposure draft, which would not even have allowed hardcopy printing facilities to be provided by the library.

- (d) Adding an extra requirement when libraries make and communicate electronic reproductions under section 49 that, on or before communicating the material, the **user is notified that the material is protected by copyright and has been reproduced under section 49** (see new subsection 49(7A)). This notice may also need to contain other prescribed information (presumably to be set out in the Regulations). According to the Explanatory Memorandum, the notice does not necessarily need to be attached to or embedded in the electronic reproduction that is transmitted to the user. The notice must simply be brought to the user's attention on or before transmission.
- (e) Confirming that libraries and archives **must destroy any electronic reproductions** held by the library/archives 'as soon as practicable' after they are communicated. This is intended to address CAL's claim that libraries would be able to use the new provisions to create huge electronic databases of works.
- (f) Confirming that libraries and archives **can 'supply' works under section 49 by way of online communication** without infringing the communication right.

8.2 These changes confirm that the library-to-user exceptions will continue to apply in the digital environment without unreasonable additional limitations on their scope. On balance, the changes represent a reasonable outcome for libraries. However, the exclusion of libraries in 'for profit' organisations from relying on section 49 (as amended) overshadows many of the positive aspects of these changes.

8.3 Broadly, the ALCC supports the proposed changes to section 49, which confirm that libraries are not denied the benefits of new technology when providing the same limited level of access to users for research or study. ALCC support is, however, subject to the following qualifications:

- (a) Corporate libraries should not be excluded from relying on this provision.
- (b) Where electronic material is made available on library premises for users to browse, those users should be able to make reasonable copies lawfully permitted under fair dealing using both digital and hardcopy technologies. As drafted, the new section 49(5A) only allows libraries to make material available on machines which cannot be used to make electronic reproductions or to communicate works. Given the increasing use of digital technologies by researchers and students in their day to day work, this technological discrimination does not seem appropriate, nor is it consistent with the stated goal of technological neutrality. ALCC submits that paragraph (a) of subsection 49(5A) should be deleted.

- (c) There is a technical problem with subsection 49(5A) which arises from the exclusion of equipment which can be used to make 'an electronic reproduction'. If temporary electronic 'copies' are reproductions, then all computers (which make temporary electronic copies during use) will be caught by the exclusion in paragraph (a) of subsection 49(5A). This problem must be addressed.

9. LIBRARY TO LIBRARY COPYING - SECTION 50

9.1 The DA Bill also makes similar amendments to section 50 (which deals with library-library exceptions). For example:

- (a) Changing 'copy' to 'reproduction' in various places to **confirm that digital copying is covered** (see comments above).
- (b) Confirming that, under this section, supplying libraries can **only copy articles and other works from publications held in their own collection**.
- (c) Confirming that libraries and archives **can 'supply' works under section 50 by way of online communication** without infringing the communication right.

9.2 The most significant changes to section 50, however, are the changes to the 'commercial availability' test in subsection (7A). The DA Bill splits this into two new subsections (7A) and (7B) and applies a different commercial availability test depending on whether the material copied is held by the library in hardcopy or electronic form (nb copies supplied to Parliamentary Libraries appear to be a special case and are not affected by the commercial availability test at all).

9.3 For copies made from **works in hardcopy form**, the old rules continue to apply (eg the library may not copy the whole or more than a reasonable portion of a book unless the library officer makes a declaration that, after reasonable investigation, he or she is satisfied that a (new) copy cannot be obtained within a reasonable time at an ordinary commercial price). The ALCC supports the continuation of this provision.

9.4 For copies made from **works in electronic form**, however, a new and stricter test will apply. Unlike the hardcopy test, the test for works in electronic form applies to all works (including journal articles), and applies no matter how much of the work or article is to be copied. Thus, if a request is made by a library for a copy of a single article from an electronic copy held in another library (or even a single page of some other work), the supplying library cannot reproduce and supply from the electronic source material unless the library officer makes a declaration that, after reasonable investigation, he or she is satisfied that 'the work' cannot be obtained within a reasonable time at an ordinary commercial price.

9.5 This new test gives rise to a number of questions. What is 'the work' to which the commercial availability test applies? If a publisher is prepared to sell a 'bundled' version of a work at great expense (which is nonetheless the 'ordinary' cost of that bundle), does this mean that the 'work' is commercially available and cannot be copied? What happens if a particular 'work' is commercially available, but the rightsholder will not sell a smaller part of the work (eg a chapter) requested by the user. Does the user have to buy the entire work? There are no clear answers to these questions in the Bill.

- 9.6 This aspect of the Bill will require further consideration and discussion to determine the likely practical impact of the proposed amendments. It is also worth noting that there is no mention of the 'contracting out' issue as it applies to these provisions. In other words, it appears that any rights a library has to copy electronic source material under this provision could be overridden by contractual restrictions set out in a licence agreement with the publisher/supplier of that material. Licence agreements can, on the other hand, grant users broader rights than they have under Copyright Act, if the parties can reach agreement about the scope of those rights. Assuming that any such licence agreement is binding on a library (which some 'shrinkwrap' licences may not be), the terms of that agreement will need to be considered to determine what copies can be made and supplied.
- 9.7 Although the ALCC supports the extension of section 50 to cover digital copying and communication, there are several aspects of the proposed amendments which, in the ALCC's submission, require reconsideration.
- (a) First, for the reasons set out above, 'corporate' libraries should not be excluded from relying on this provision.
 - (b) Second, a library should only be required to check the commercial availability of a work in electronic form (ie whether a copy of the work is available within a reasonable time at an ordinary commercial price) when the amount requested is more than an article or more than a reasonable portion of another work. At the very least, subsection 50(7B) must be amended to confirm that the commercial availability test relates to the availability of the particular *part requested* within a reasonable time at an ordinary commercial price (so that libraries are not forced to buy an entire electronic work when all they want is a small part of that work).
 - (c) Third, a small change is required in subsection 50(1) (see Item 59 of the DA Bill) to ensure that interlibrary requests can be made via an intermediary library, rather than directly from one library to another (which is not always possible with some smaller libraries). To achieve this, the ALCC suggests replacing the words '*held in the collection of the other library*' with '*held in the collection of another library*'.
- 9.8 The ALCC also draws to the Committee's attention a general concern about the increasing use of contractual restrictions in licence agreements, which often override the rights of libraries and users under the Copyright Act.

10. REASONABLE PORTION

- 10.1 The DA Bill seeks to clarify (to some extent) the meaning of a 'reasonable portion' when copying from certain works in electronic form. This is relevant to users making copies of works in electronic form under the fair dealing provision (s 40).
- 10.2 A new subsection 10(2A) provides that no more than 10% of the number of words in or no more than a single chapter of certain electronic works (whichever is greater) will be considered a reasonable portion. This provision only applies, however, to published dramatic works and published literary works (other than computer programs or an electronic compilation, such as a database). It does not apply to musical or artistic works.

10.3 To make it clear that a person cannot rely on fair dealing to copy one 'reasonable portion' now, then another 'reasonable portion' of the same work at a later date, a new subsection (2C) has been added.

10.4 The ALCC does not oppose this aspect of the DA Bill.

11. SECTION 51

11.1 Subsection 51(1) currently allows unpublished works (eg manuscripts) held by libraries or archives to be copied for research or study or with a view to publication provided that 50 years have passed since the author's death and 75 years have passed since the work was made. The provision covers copying by users and copying by libraries and archives on behalf of users. The DA Bill amends this provision by:

- (a) removing the requirement that 75 years has passed since the work was made;
- (b) confirming that digital copies can be made;
- (c) confirming that copies can be supplied by way of online communication; and
- (d) introducing a broader definition of 'manuscript' which includes material in electronic form 'as initially prepared by the author'.

11.2 These changes are partly based on Part 1 of the CLRC Report on Simplification, and update the current provision to the benefit of libraries, archives and users.

11.3 Subsection 51(2) is also updated to cover digital copying and supply by way of online communication. This provision deals specifically with copying and supply (for research or study purposes) of unpublished theses held by archives or university libraries.

11.4 The ALCC supports these changes.

12. SECTION 51AA

12.1 Subsection 51AA deals specifically with copying of works kept in the collection of the Australian Archives for preservation purposes and for supply to its regional offices.

12.2 The DA Bill updates this provision to cover digital copying and online communication.

12.3 The ALCC supports these changes.

13. SECTION 51A

13.1 Section 51A currently sets out exceptions that cover copying by libraries and archives for preservation, replacement and 'medium shifting' purposes. The DA Bill includes a number of amendments to this section which, according to the Explanatory Memorandum, are intended to expand its scope, particularly in relation to digital copying and communication.

13.2 First, the preservation/replacement exception is amended to:

- (a) confirm that digital copies can be made;
 - (b) remove unnecessary technology-specific language (ie 'microform copy'); and
 - (c) allow the online communication of preservation/replacement copies.
- 13.3 Second, the 'medium shifting' provision is replaced with a new 'administrative purposes' provision which:
- (a) extends the provision from 'microform only' to all forms of copying and reproduction, including digital;
 - (b) permits libraries/archives to copy for 'administrative purposes' (which is probably intended to cover 'medium shifting' copying such as conversion of bulky material like newspapers to a more convenient and less bulky format); and
 - (c) permits these copies to be made available through computer terminals on library/archives premises, but only to *officers* of the library/archives (ie material copied under this 'administrative purposes' exception can *not* be made available to other library users, even within the library premises).
- 13.4 Third, a special new exception is created to allow preservation copies of 'original artistic works' to be made available online through computer terminals on library/archives premises (nb this should also cover many not-for-profit galleries and museums), provided that those terminals are 'view only' (ie they can not be used to print, transmit or save to disk).
- 13.5 A number of issues arise under these provisions, including as follows:
- (a) Although the administrative purposes exception will now allow 'medium shifting' to digital formats (not simply microform), the benefits of doing so are frustrated by the fact that the provision does not permit digital copies to be made available to users other than library officers.
 - (b) There may be a technical problem with the new provision for making digital preservation copies of original artistic works available through computer terminals (subsection 51A(3A)). It is a condition of this provision that the terminal can not be used to make an electronic copy. However, most if not all online viewing will involve an electronic copy being made in the terminal (ie a temporary electronic copy).
- 13.6 Sections 110A and 110B are also updated by the DA Bill. Section 110A deals with copying of unpublished sound recordings and films held by libraries or archives, and is equivalent to section 51. Section 110B deals with copying of sound records and films held by libraries and archives for preservation or replacement purposes, and is equivalent to section 51A.
- 13.7 Generally, the ALCC supports the changes to section 51A directed at updating the provision to cover digital copying and communication technologies. However, in the ALCC's submission, the following changes are necessary:

- (a) Sections 51A(1) and (3) should permit digital preservation/replacement copies and digital administrative purposes copies to be made available to all users within the premises of a library or archives, not simply library officers. The reason for making these copies is to ensure that library users will still be able to access the information. If only library officers can access the information, there is not much point making the digital copy in the first place. This problem can be addressed (at least in part) by replacing 'officers' with 'officers or users' in subsection 51A(3).
- (b) To address the technical problem in relation to subsection 51A(3A), paragraph (b) should be amended to refer to 'a permanent electronic copy'.

14. CIRCUMVENTION DEVICES

- 14.1 The DA Bill inserts a new s116A which provides for a civil right of action against persons who make or deal in certain circumvention devices or provide certain circumvention services. The scope of the prohibition is set out in subsection (1) as a three part test:
- (a) a work (etc) is protected by an 'effective technological protection measure' ('ETPM'); and
 - (b) a person makes or deals in a circumvention device or provides a circumvention service (nb the device or service must be capable of circumventing or facilitating the circumvention of the ETPM) without the permission of the owner or licensee of the copyright in the work (etc); and
 - (c) the person knew, or ought reasonably to have known, that the device or service would be used to circumvent or facilitate the circumvention of the ETPM.
- 14.2 In the exposure draft, the third part of the test required knowledge that the device would be used to circumvent *and infringe*. The DA Bill now simply requires knowledge that the device would be used to circumvent, and substitutes a narrower set of exceptions by introducing the concept of 'permitted purposes'.
- 14.3 Subsection (3) exempts a supplier from liability under section 116A for supplying a device/service where the customer gives the supplier (on or prior to supply) a signed declaration that the device will only be used for a permitted purpose (and identifies that purpose in the declaration). Subsection (4) exempts a manufacturer/importer from liability under section 116A for making/importing a device for use only for a permitted purpose or for the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose.
- 14.4 The 'permitted purposes' are defined exhaustively in subsection (7). That subsection states that a device/service is taken to be used for a permitted purpose *only* if:
- (a) the device/service is used for the purpose of doing an act comprised in the copyright in a work (etc); and
 - (b) the doing of the act is not an infringement of the copyright in the work (etc) under section 47D, 47E, 47F, 49, 50, 183 or Part VB.

- 14.5 This covers the interoperability (s 47D), error correction (s 47E) security testing (s 47F) library (ss 49, 50), government (s 183) and some educational (Part VB) exceptions and statutory licences. It does not, however, cover all exceptions in the Act. For example, making a copy under the fair dealing exceptions (ss 40, 41, 42, 43, 103A, 103B, 103C, 104) or under the preservation/replacement/etc exceptions (ss 51, 51AA, 51A) will not be a permitted purpose. Similarly, making a copy under the 'normal use' exception (s 47B) or the back-up exception (s 47C) will not be a permitted purpose. It also appears not to cover dealings in public domain material.
- 14.6 The first part of the three part test in subsection 116A(1) requires that a work is protected by an ETPM. This is defined to mean a device or product, or a component incorporated into a process, that is designed to prevent or inhibit the infringement of copyright subsisting in a work (etc) if, in the ordinary course of its operation, access to the work (etc) protected by the measure is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work etc) with the authority of the owner or licensee of the copyright in a work (etc).
- 14.7 The definition of 'circumvention device' is much the same as it was in the exposure draft. It means a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure.
- 14.8 The definition of 'circumvention service' is very similar in scope to the definition of circumvention device.
- 14.9 In relation to the third part of the three part test (ie knowledge that a device would be used to circumvent), subsection (5) reverses the onus of proof by establishing a presumption that the defendant (in an action under section 116A) knew, or ought reasonably to have known that the device or service would be used to circumvent an ETPM. To escape liability under this part of the test, defendants must prove that they did not know and that they ought not reasonably have known that a device or service would be used to circumvent. This weakens a defendant's position slightly when compared to the exposure draft, in which a defendant was only required to prove that it was not reckless as to whether a device would be used to circumvent.
- 14.10 Nonetheless, it is now clear that a person can make or import a circumvention device for a permitted purpose. It is also clear that a circumvention device/service can be supplied to a person who provides a signed declaration that it is to be used for a permitted purpose. Although the need for a signed declaration is not ideal, it does make the provision much more clear than in the exposure draft.
- 14.11 It is not yet known whether a digital signature will be recognised by the Australian courts. However, it is possible that digital signatures created and verified using a secure public key infrastructure will be sufficient to meet the common law requirements for a signature. Digital signatures are also likely to be given specific legislative recognition when (and if) the *Electronic Transactions Bill 1999* is passed and comes into force.
- 14.12 Criminal sanctions against making or dealing in circumvention devices and providing circumvention services are also included in the DA Bill. To achieve this, several new subsections are added to section 132 in substantially the same terms as section 116A. The main difference with the criminal sanctions is that the knowledge test is based on

recklessness (as it was in the exposure draft) and the defendant bears a lesser burden of proof.

- 14.13 These provisions should ensure that most libraries and archives have the right to acquire circumvention devices and services where technological measures are used to prevent them from making copies under sections 49 and 50. This may help to deter the use of unreasonably restrictive technological measures by electronic publishers.
- 14.14 However, in the ALCC's submission, the following changes are necessary to ensure an appropriate balance under the DA Bill:
- (a) Ideally, circumvention devices/services should be available to any person who requires the device/service for a non-infringing purpose. This was the approach taken under the exposure draft and is simpler and more balanced than the approach now set out in the DA Bill which discriminates between lawful uses which are 'permitted purposes' and lawful uses which, for some reason, are not 'permitted purposes'. No explanation has been given for the discriminatory 'permitted purposes' approach.
 - (b) As a minimum, the scope of permitted purposes should be expanded to cover fair dealing (ss 40, 41, 42, 43, 103A, 103B, 103C, 104) and the full range of library and archives provisions (ss 48A, 49, 50, 51, 51AA, 51A). Libraries and archives should, for example, have the right to acquire devices to circumvent ETPM where necessary to make preservation copies of electronic material in their collections.

15. SUMMARY OF ALCC POSITION

- 15.1 In summary, the ALCC supports the underlying policy and broad approach taken under the DA Bill, which seeks to carry forward into the digital environment the existing reasonable exceptions applicable to libraries and archives.
- 15.2 However, in the ALCC's submission, the following changes are necessary to improve the implementation of the underlying policy goals:
- (a) The DA Bill should not exclude libraries from the library provisions simply because they happen to be located within private sector businesses. The issue of 'corporate' or private sector libraries should be deferred for consideration as part of the Government's response to the CLRC's Simplification Report (which deals with this issue in more detail). Pending further consideration of the issue, the DA Bill could confirm that any library which itself is conducted for profit, or which provides document supply services for profit, cannot rely on the library exceptions.
 - (b) Most, if not all, temporary 'copies' should not be regarded as reproductions for copyright purposes. The DA Bill should be drafted in a way that does not create a presumption that temporary 'copies' are reproductions. Sections 43A and 111A should therefore be redrafted to state that temporary copies made as part of the technical process of making or receiving a communication *'are not reproductions in material form'* (rather than stating that such copies 'do not infringe' copyright).

- (c) Subsection 49(5A) should be amended to ensure that, where electronic material is made available on library premises for users to browse, users are able to make reasonable copies lawfully permitted under fair dealing using both digital and hardcopy technologies (ie to cover printing and saving to floppy disk). This change will improve the technological neutrality of the Act.
- (d) There is a technical problem with subsection 49(5A) which arises from the exclusion of equipment which can be used to make 'an electronic reproduction'. If temporary electronic 'copies' are reproductions, then all computers (which make temporary electronic copies during use) will be caught by the exclusion in paragraph (a). This problem must be addressed.
- (e) A small change is required in subsection 50(1) (see Item 59 of the DA Bill) to ensure that interlibrary requests can be made via an intermediary library, rather than directly from one library to another. This can be achieved by replacing '*the other library*' with '*another library*'.
- (f) A library should only be required to check the commercial availability of a work in electronic form (ie whether a copy of the work is available within a reasonable time at an ordinary commercial price) when the amount requested is more than an article or more than a reasonable portion of another work. At the very least, subsection 50(7B) should confirm that the commercial availability test relates to the availability of the particular *part requested* (so that libraries are not forced to buy an entire electronic work when all they need is a small part of that work).
- (g) Sections 51A(1) and (3) should permit digital preservation/replacement copies and digital administrative purposes copies to be made available to all users within the premises of a library or archives, not simply library officers. The reason for making these copies is to ensure that library users will still be able to access the information.
- (h) To address a technical problem in relation to subsection 51A(3A), paragraph (b) should be amended to refer to 'a permanent electronic copy'. Otherwise, the 'temporary copy' problem will make it unlawful to use a computer to make works available for browsing within library premises.
- (i) Circumvention devices/services should be available to any person who requires the device/service for a non-infringing purpose. This approach is simpler, more balanced and removes the random discrimination between 'permitted purposes' and non-permitted (but lawful) purposes. As a minimum, the scope of permitted purposes should be expanded to cover fair dealing (ss 40, 41, 42, 43, 103A, 103B, 103C, 104) and the full range of library and archives provisions (ss 48A, 49, 50, 51, 51AA, 51A).

ATTACHMENTS

[Attachment A - ALCC Membership]

[Attachment B - Original ACLIS submission on Simplification] – to follow by post

AUSTRALIAN LIBRARIES COPYRIGHT COMMITTEE

TERMS OF REFERENCE (FROM FEBRUARY, 1999)

1. The Australian Libraries Copyright Committee (ALCC) is the cross-sectoral body acting on behalf of Australian libraries on copyright and related matters. It seeks to have the interests of users of libraries recognised and reflected in copyright legislation, and in so doing, help build and sustain a copyright regime which promotes learning, culture and the free flow of information and ideas in the interests of all Australians.
2. The role of the ALCC is to provide an ongoing mechanism to:
 - a) monitor proposed changes to Australian copyright legislation;
 - b) make submissions to government and relevant agencies on copyright and related issues;
 - c) provide regular information to the Australian library and information services community with regards to copyright issues and responsibilities (note: a query based advisory service is provided by the Australian Library and Information Association);
 - d) act as a steering committee for the Copyright Advisor;
 - e) interact with international organisations on copyright issues as appropriate.
3. The ALCC will comprise members from the following organisations:
 - Australian Council of Archives
 - Australian Library and Information Association
 - Australian School Library Association
 - Council of Australian State Libraries
 - Council of Australian University Librarians
 - Federal Libraries Information Network
 - National Library of Australia.
4. The ALCC may co-opt members representing specific interests or sectors at its discretion for a term to be determined at the time of co-option.
5. The ALCC shall normally meet once a year, more often as issues require.
6. Each organisation will meet its own costs in respect of participation at ALCC meetings and in other activities on the Committee.
7. The ALCC may vary its membership from time to time as it sees fit.
8. The costs of operational activities of the ALCC will be met from the copyright support function budget maintained on behalf of the ALCC through the National Library of Australia.
9. The ALCC may invite an appropriate person to chair the Committee who is not him or herself a sectoral representative, but rather takes an overview of copyright policy and the matters before the Committee. The Committee will normally appoint a Chair for a two year period. The Committee may also determine to what extent it will recommend funding support for the attendance of the Chairperson.
10. The Committee is supported by, and gives direction to the Copyright (Law and Policy) Advisor, who develops policy proposals, advocacy documents and information in consultation with the Committee.
11. The ALCC may vary these Terms of Reference at any time by a majority decision of the Committee.