TO:	House of Representatives Committee: Legal and Constitutional Affairs
FROM:	Ms Anna Ward (VISCOPY), Dr Mark Williams
DATE:	22 October, 1999
SUBJECT:	**Copyright Amendment (Digital Agenda) Bill 1999 - Round Table Forum**
	House of Representatives Standing Committee Hearing - Sydney

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Our preliminary general points, some of which were made at the last forum, are followed by specific references to part of the Bill ordered in the same order that they are listed for discussion:

1. VISCOPY has a specific focus on the provisions regarding the protection of artistic works and works of artistic craftsmanship. Nevertheless, VISCOPY members wish to ensure that works which might be categorised as compilations, tables or diagrams (which otherwise fall within the definition of literary work) are properly considered from a visual arts point of view as part of the forum process.

2. VISCOPY submits that the imposition of the Bill should be directed towards "Technology Neutrality" and that care must be taken to avoid piecemeal attempts at "technological parity". That is, proposed copyright solutions should ideally work for all media rather than perpetuating ad hoc or peace meal solutions specific to each medium which inevitably give rise to anomalies and complications. In particular:

   (a) The effect of digital fixation and transmission on artistic works is unparalleled compared even to the effect of photography or photocopying. A digital version is effectively the same however many times it s replicated and no matter how often it is transmitted from one means of digital storage to another. There can be no such thing as a "reasonable portion" of a copyright work in digital form.

   (b) Even though methods of digital fixation, such as digital cameras, have not unserved the unique qualities of the artistic work in physical materials:

      (i) The quality of digital capture will continue to improve;

      (ii) Artistic works are being created in digital form;

   In those circumstances, we must expect that some works in digital form will not even be replicas; they will, to all intents be the work.

   (c) No matter what storage or recording/reproduction mechanism, it is the content fixed as an artistic work which gives rise to the demand to record, store and use the

products of those digital signals. Protection of content must be foremost, regardless of carrying medium or means of transmission.

(d) As a matter of juris prudence, it has been long established that the creators of that content should;

(i) be able to control the circumstances in which others may reap without first having sewn, ie copy without having themselves credited the content;

(ii) receive fair remuneration in those circumstances where there is a demonstrable public enrichment in enjoying the content in another medium. Nevertheless, that fair remuneration must truly be fair having regard to all others who might benefit from such a licence, the effect upon the subsequent market for that work but remembering always that any such licence must not result in other monopolies being created which are inimical to either to the interests of the artist or the public.

(iii) In particular, reproduction in digital from for general public consumption which then allows another interest to appropriate images for commercial gain (such as application of the images industrially) without having any obligation to share this gain with the creator must be avoided. To use a European concept, Parliament must be wary not to allow a premature exhaustion of rights in the name of "fair use".

3. To restate the previous points, fixation for the preservation and efficient administration of libraries and museums which fulfil a public need or which generate truly social capital is to be commended; but subsequent use which amounts to an exploitation of the economic returns of the work must be subject to fair remuneration to the artist for the duration of copyright protection afforded to the work. Australia is, of course, constrained by its treaty obligations in this regard.

4. With regard to the reproduction of artistic works in public libraries and museums, a distinction must be drawn between the exhibiting of the actual artistic work in public and the exploitation of its image or simulacrum: that distinction applies equally whether or not the image is displayed inside a museum on a computer screen or kiosk, or reproduced outside the museum on its website or CD-ROM. The artist creates a work to be enjoyed in the form in which it was created: Parliament historically has never allowed the artist a right to restrain the owner of the work from enjoying it and inviting the public to view it. it is entirely another matter for the owner of a work to make a copy of it and invite people to view the copy. Section 29 of the Act clearly states that its is not a "publication" of an artistic work to exhibit the artistic work in public but, in Viscopy's view, it would clearly be a "publication" if a reproduction of the work was made available for viewing by the public in a public museum or library.

5. Since the 1968 Copyright Act at least, the Australian Parliament has recognised that the right to broadcast or transmit images to the public is an economic right which the artist retains and controls. Translation into digital form and transmission to the public is not public exhibition of the original. It is publication and transmission to the public.

With these principles in mind, VISCOPY submits:

Session 1

Topic (b) Exception for temporary reproductions

Item 45 Proposed sections 43A and 111 - Temporary reproduction

VISCOPY supports the argument in the discussion paper that the provisions of ss.43A(1) and 111(1) as presently drafted are too wide. The favoured position is that only **transient reproductions** which are **technologically indispensible** (or alternative agreed wording as proposed by ARIA) for the internal workings of equipment should gain the protection of these provisions.

The provisions of sub-sections 43A(2) and 111(2) which provide that protection under the respective sub-sections (1) is not extended to infringing copies are appropriate.

Topic (e)

Item 151 Section 135ZM - VISCOPY makes no submission in relation to s 135ZM.

Proposed section 135ZMB - insubstantial portions

This section is not expressed to extend to artistic works but in so far as works of VISCOPY members may be characterised as tables or compilations, VISCOPY comments that the quantitative test is entirely inappropriate in relation to the reproduction of tables or compilations in digital format. Electronic rights management schemes are likely to be technologically capable of capturing information regarding usage. In the mean time, the matter should be a matter for negotiation. The statutory licence scheme may be extended once technological measures are commercially available.

Topic (f) Educational Statutory Licences and Illustrative Artistic Works

Section 135ZME

The position has been stated that the value of an illustration in digital form is much greater in that it can readily be divorced from the text and is in a far more accurate form than previous technologies would allow.

VISCOPY favours repeal of this section in its entirety. If s135ZME is omitted from the bill, then an educational institution can copy and communicate artistic works under s135ZMD.

If this section remains, it must remain with the provision that the Copyright Tribunal has jurisdiction over any issues which arise between collecting societies. The jurisdiction of the Copyright Tribunal in this regard should also be introduced into Parts VA and VC of the Act.

Session 2

Fair Dealing - Museums & Libraries

In relation to fair dealing issues with regard to museums and libraries

Topic (a) Reasonable portion test

Item 54 - Proposed Section 49(5A):

- this provision will have the unintended consequence of allowing any artistic work reproduced in a periodical article to be transmitted to the public within a gallery, museum or library and for a hard copy to be made under the fair dealing provisions. In effect, the whole of the artistic work might be reproduced;

- as a minimum position, this defacto site licence must entitle the artist to remuneration under a statutory scheme;

Alternatively, this subsection should exclude artistic works.

Item 56 - Setion 49 (7A)

VISCOPY submits that this provision will rise to a disproportionate loss of control of the right of copyright owner with regard to reproduction of artistic works once they have been released in electronic form - in effect, the economic right would be damaged irreparably;

Section 49 is deficient in that it does not specify that rights management and anti-circumvention methods must be preserved on copies provided by museums, libraries or archives in electronic form.

Topic (b) Definition of Library

Item 11 - “Library”

VISCOPY supports the narrower definition of "library" in the Bill;

- is concerned about the blanket inclusion of "educational institutions" in subsection 10(1);

- supports the position of the Australian Copyright Council in regard to its proposed definition of "library" and

Item 14 - “Archive”

VISCOPY does not agree upon the indiscriminate extension of a definition of "archive" to museums or galleries;

- submits that "archival use" must be distinguished from the other activities which an institution having archival responsibilities might engage in, especially as economic pressures force institutions to cast about for assets which they might exploit but which might not necessarily be solely theirs or the nation's to use;

- submits that as a minimum position, the privileges attached to an archive must be restricted to publicly constituted museums and galleries which may not distribute their profits or surpluses to their members or owners.

Topic (c) Extension of section 49 to electronic reproduction and communication
Topic (d) Inter library supply of copyright material

Item 64 - Subsection 50 (7A)

The proposed amendments, particularly Section 50 (7A)(e)(ii) and (7B) (e) (ii) are inappropriate and destructive of the rights of creators of artistic works. The present wording fails to cease the opportunity provided by the electronic medium. VISCOPY submits that the test of commercial availability should no longer be the availability of commercial copy given that a digital reproduction is effectively identical with the one available for sale. The availability a commercial licence to reproduce (from VISCOPY or any other authorised collecting society) should constitute commercial availability. These subsections should be amended accordingly.

Items 73 and 75 - Proposed Section 51A.

The intended amendment to Section51A(2) and (3) does not sufficiently define the myriad of purposes which might or might not be "administrative". VISCOPY submits that any electronic copies made under the proposed clause 51A should be under a statutory licence and the library or archive must continue to restrict its use to the purposes set out in Section 51A.

The proposed Section51A (3A) is an unwarranted use of the reproduction and transmission right where a preservation copy of a work is displayed on-line. Whilst the conservation reasons for the creation of a "preservation copy" are understood, the artist is still entitled to remuneration and it is submitted (as previously discussed in relation to Items 14 and 54) that the artist is still entitled to remuneration where an image is transmitted on-line to the public.

Item 79 - Section 53

VISCOPY has noted the provision by CAL in paragraph 31 of that organisation's submission regarding Section 53. It supports the deletion of Section 53 for the reasons set out by CAL.

Educational Statutory Licences:

See our previous submissions.

Other Exceptions

Given the redefinition of ‘broadcast’ in subsection 10(1), and the associated repeal of s69 which VISCOPY supports, VISCOPY requests that the Government uses this Bill to adopt the recommendations (8.43) of the Copyright Law Review Committee Report on Simplification of the Copyright Act 1967 to also repeal sections 65, 66 and 67.