

29 October 1999

The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600
email: laca.reps@aph.gov.au

Copyright Amendment (Digital Agenda) Bill 1999
Follow up to Round Table Forum

Thank you for the opportunity to make oral submissions at the Round Table Forum on the current draft of the *Copyright Amendment (Digital Agenda) Bill 1999* (the "Bill") introduced into the House of Representatives on 2 September 1999. The Arts Law Centre of Australia would like to clarify some of the issues that arose out of this discussion.

Arts Law advocates a balance between the rights of creators, copyright owners and copyright users. We have noted the rise of adhesion contracts and technological devices leading to "private copyright legislation" by which copyright owners can restrict access and demand payment for any copying or downloading. We are concerned about adhesion contracts ultimately replacing the copyright regime. Our concerns appear to have been shared by various participants in the Round Table.¹

Against this background, we draw attention to the following points arising from the Round Table discussion.

1. Users' rights

We support the view of Mr Britton of the Australian Consumers Association in the Round Table that the Bill currently tends to favour a "pay per view" model favouring private over public interests. We also refer to Mr McLean of the Australian Vice-Chancellors Committee commenting on some of the submissions in favour of user pay options for copying:

... "you would go from a balance where there are some small things which are not paid for in a public interest or educational context to a situation where everything was paid for." [draft transcript page 272].

In our view these comments do identify an imbalance between the public interest and private rights. Getting this balance wrong could have severe consequences for the innovation and learning potential of Australians seeking to join the digital age. If existing copyright industries obtain greater control over access to copyright material, the public interest will suffer. In our view the digital age should provide benefits for all Australians and the Digital Agenda Bill should help to achieve this.

These comments are relevant generally to our earlier submission, and to the following point discussed in the Round Table discussion.

1.1 Artistic works, fair use and the s 51A(3) exception

We refer to the discussion of section 51A(3) of the proposed bill at the Round Table in which various competing views were expressed on the fairness of allowing intranet access to digitised preservation copies of works held by museums and other institutions. We note concerns about the effect of this amendment on the income of artists. In particular, we would have concerns if commercialisation could occur (for example by publication of a CD-Rom of the collection) or the collection was available online. In our view, the section should simply operate to allow public users to view the artwork more conveniently than they would at present - say by requesting a trip to the archives.

Our underlying thrust is that public collections should be on display as much as possible to the public. Intranet access (appropriately protected from abuse) is a way in which the public can have some form of access to the collection beyond the physical display limitations and preservation concerns applicable to the artworks. In our view, the appropriate analogy was made by Mr Britton, speaking on behalf of the Australian Consumer Association at the Round Table [draft transcript page 287] - namely it is like looking at the image on the wall.

To address the concerns raised at the Round Table regarding the potential effect of this provision on the income of creators, we strongly urge the Committee to examine a further extension of the Educational Lending Right and Public Lending Right to include digital reproduction in this context.

2. Creators' rights

In our view users' rights should not compromise the rights of creators to fair and equitable compensation for their efforts. We refer to pages 7-8 of our earlier submission where we recommended that the extension of the statutory licensing scheme proposed under Part VB of the Bill "*should be amended to guarantee a right of fair and equitable remuneration to creators*"; and in relation to proposed Part VC, that:

...“creator’s secondary rights should not be able to be assigned, and collecting societies such as ASDACS should have authority to collect payments for secondary retransmissions of free to air broadcasts of underlying works.”

In light of these recommendations we emphasize the following two points relevant to the Round Table discussion.

2.1 Directors copyright

We reiterate our earlier written submission supporting the inclusion of “directors” of film under the retransmission distribution scheme proposed by the Digital Agenda Bill. This was suggested by ASDACS. We strongly support the recommendations made by ASDACS in their written submission dated 1 October 1999 which would harmonise Australia’s laws with those of the European Union including the United Kingdom.

2.2 Artist’s rights to compensation for artworks featured in film

Arts Law reiterates in the strongest terms possible the repeal of section 69 “*Artistic works transmitted to subscribers to a diffusion service*”. Without the benefit of the transcript, a representative from FARB or FACTS proposed the

possible reintroduction of this section. Arts Law refers to its previous submission that this section must be repealed. It is unfair on artists to have their work included in television and film broadcasts which are for commercial purposes without compensation for the exercise of this copyright. The fair dealing exceptions adequately cover the incidental use of artistic works for non-commercial or public interest purposes. The analogy is music which is paid for when used by television and film production companies whether incidentally or not. Artworks require just as much skill and intellect in their creation as music and it is fundamental that the contribution of creators be recognised and compensated in this regard.

If you have any queries please contact Arts Law.

Yours faithfully

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¹As Mr Wodetski of the Supporters of Interoperable Systems remarked at the Round Table, we should *"bear in mind that the real interests at stake here are often those of publishers, not authors"*...[draft transcript p 284]. Mr Alexander of the commented that *"...we have to be very careful that it did not start moving towards a protection of ideas rather than the way they are expressed because very often things are just taken out, not because of the way they are expressed, but because of the concept they are putting forward..."* [draft transcript p 272].