

*Submission to*

HOUSE OF REPRESENTATIVES STANDING  
COMMITTEE  
ON LEGAL AND CONSTITUTIONAL AFFAIRS –  
LEGISLATION COMMITTEE

Digital Agenda Reference

5 October 1999

**STATEMENT OF POSITION BY COPYRIGHT AGENCY  
TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS**

**DIGITAL AGENDA REFERENCE**

**The new Bill**

Copyright Agency Limited (CAL) commends to the Committee the diligent and competent work undertaken by the Attorney-General's Department and the Department of Communications, Information Technology and the Arts (DCITA) to prepare and table the Copyright Amendment (Digital Agenda) Bill 1999.

CAL is generally pleased with the changes the Government has made in one of the most complex policy and legislative areas, particularly in narrowing the Bill's definition of "library" and the further qualifications to interlibrary transactions and the use of circumvention devices.

We urge the Committee to support the retention of these important changes.

**The rest of the world**

Comparison with legislation in the US and Europe indicates that, despite the arguments mounted by libraries in Australia, the changes in the Bill move Australia into greater alignment with these important trading partners and with our obligations under the Berne and TRIPS treaties. A comparison of the Bill with legislation in other jurisdictions can be found in our detailed submission.

**Quantitative Tests**

Despite our submissions to the Government and those of our local and overseas members, one critical area of the Bill remains unchanged: the use of a test of *quantity* to determine what is fair copying in a digital environment without payment to the creator or owner of the rights. These tests occur in the fair dealing, library exception sections of the Bill, and the insubstantial portion exception which allows educational institutions to copy 1% of any work, without payment.

It is the firm view of our members that using a quantitative measure (eg. one chapter, an article, 10% of a work or an insubstantial portion equivalent to 1% of the words in a work) to decide what is fair, or can be copied without payment, in a digital environment is the wrong test.

### **CAL has a solution**

The correct approach is to look at the purpose of the copying and assess its effect on the commercial market for the work, the test used elsewhere in the developed world. Applying this solution would provide protection for traditional library users, keep Australia in step with the rest of the world, and protect the rights of creators to exploit their work if they wish.

### **What is the argument?**

Libraries and other users say the quantitative fair dealing and library exceptions of the Bill protect the traditional role of libraries as providers of information to the community, and maintain this role in the digital environment. CAL agrees that libraries' traditional services should be protected, but argue that the old, print-based rules which allow copying of a chapter, an article or 10% of a work for "fair dealing" purposes cannot be applied fairly to digital works.

The true measure of fair copying in the digital environment is a *qualitative* issue, not a quantitative issue, because the publication format of digital works, their market and the way they are used, is radically different to that of printed works. Determining whether an individual, or group of individuals, should have access to copyright works for free should depend on the proposed use of the work and whether that use affects the market for the work. This is the international Berne Convention test.

### **What about access to information?**

CAL agrees with libraries on the issue of access, in that we support the rights of students and others to benefit from fair dealing provisions which allow for free copying for legitimate, defined reasons. We also support the right of those with low incomes or those who live in remote regions to have reasonable access to the public library system. Thus, CAL too wants the "balance" to which all parties in this debate refer. In our view, however, all parties' needs can be satisfied by applying the market-based test to questions of fair dealing.

## **The problem with quantitative tests**

Photocopying a chapter of a book is one thing, but allowing the copying of a chapter of a digital document is altogether different. Portions of digital works (such as chapters and articles) are becoming a significant e-commerce product in the education market. Authors and publishers want to trade in these copyright works, but won't be able to if libraries provide copies to readers at a cheaper rate (and without a copyright fee).

This would be the outcome if fair dealing, library exceptions and deemed insubstantial portion is determined by the quantity of copying involved. A better way to judge this is to look at the purpose of the copying and its effect on the market for the work, rather than how much of a document can be fairly copied in *any* circumstances.

## **What *is* fair?**

For example, it would be fair for a student to copy an article without paying a copyright fee when preparing for an assignment, since it can be reasonably argued that the student would not buy the book or subscribe to the journal from which the article came. In other words, the student's copying would not affect the market.

But how can it be fair if a profit-making company doing research to improve its retail product can copy a chapter from a digital or printed work and not pay the rights owner? This is the type of inequity the Bill creates by not recognising that digital copying requires a different test of fairness. Copyright is a business cost like any other.

## **How can this be fixed?**

Very simply.

The Bill already contains a very good test of fairness in section 40(2). It uses the criteria noted above, and is in line with the “three-step test” provided in the Berne Convention.

The problem arises in the next section, 40(3), which *deems* the copying of 10%, a chapter or an article of a work to be fair in any circumstances. Every category of creator or rightsholder has decried the introduction of this “deeming” provision into the digital environment. It is no longer a test of fairness. If it were removed, fairness would be determined by the type of use and the effect on the market, thereby protecting traditional uses and ensuring that commercial copying includes the payment of a fee to the creator or rights owner.

The section 40(2) test could also be easily applied to the library copying provisions and the insubstantial portion exception that allows educational institutions to copy 1% of any work in any circumstance. Our detailed submission outlines for the Committee how this outcome might be achieved, and explains alternatives such as the provision of a statutory licence for copying by, and between, libraries.

## **Any other matters?**

Yes. There are a number of matters regarding the drafting of the changes to the Bill which need revision. These matters refer not to the substance of changes, but to clarification of drafting and correcting unintended consequences.

CAL does not believe the Committee will have time to deal with these issues, and suggests that the Committee recommend in its report that these matters be referred to the Attorney-General’s Department and DCITA for review, correction and inclusion as amendments to the Bill. CAL will address these matters in our formal submission.



---

## Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

---

### A. ABOUT CAL

1. CAL is a copyright management company, also known as a copyright collecting society, whose role is to administer licences to copy published works. CAL represents authors and publishers as their non-exclusive agent to licence the copying of their works to the general community.
2. CAL administers an important part of copyright for authors and publishers: the right to reproduce their works. CAL was established in 1974 and in 1999 is celebrating 25 years since its establishment as a member-based, not-for-profit company limited by guarantee. In that 25 years CAL has distributed over \$100 million dollars as payment to copyright owners for the copying of their works.
3. CAL represents the reproduction rights of approximately 4,000 Australian authors and publishers who, in turn, represent many thousands of authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.
4. CAL is the declared copyright collecting society under Section 135ZZB, Division 6, Part VB of the Copyright Act 1968 (the Act) for copying of works by educational and other institutions and under Section 153F, Division 3, Part VI for copying by government under Division 2, Part VII. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.

5. In addition, CAL offers voluntary licences to the public and corporations for the right to copy published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and essays through its licences to copy.

## **B. DIGITAL AGENDA BILL – OBJECTIVES**

6. CAL welcomes the expressed intention of government in introducing the Copyright Amendment (Digital Agenda) Bill 1999 (the Bill) namely, *to ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment* (Copyright (Digital Agenda) Amendment Bill 1999, Second Reading Speech, the Hon Daryl Williams AM QC MP, Attorney-General).
7. However, in CAL's view, and in the view of its 4,000 Australian author and publisher members, the proposed Bill fails to achieve its objectives. Because of that failure, the Bill, if enacted in its present form, severely threatens the growth of a market for Australian originated material on the Internet. It also will inhibit the opportunity for the next generation of Australian's to participate as full partners in the global information economy.
8. In CAL's view, the proposed Bill fails to achieve its objectives primarily because of the flawed assumptions it makes about the existing balance of rights and access between users and copyright owners and also because of a fundamental misunderstanding of the power of new digital technology to significantly alter that balance.

## **C. THREE YEAR REVIEW**

9. CAL is pleased that the government intends to review the operation of the legislation in particular the extended statutory licence scheme for educational institutions and the new enforcement provisions within three years. CAL submits that the Committee should include in its report a recommendation that the review be carried out.
10. In CAL's submission, the prospect of a review of the legislation means that the government should acknowledge the concerns of copyright owners by implementing legislation that provides a minimum number of

exceptions to copyright owner's rights. This will permit the market for works in a digital environment to develop without distortion.

11. If after three years, the fears of the library community and other users that copyright owners will use contract and technological measures to deny access to their work are proved to be well founded, then the exceptions can be reviewed and widened if necessary.
12. If the proposed Bill were enacted in its present form and the concerns expressed by the copyright owners that the scope of copying and communication permitted by the exceptions would destroy their markets were held to be well founded then the review might prove to be too late.
13. The net result would be to stifle Australian creativity in the online environment and the loss of the early mover advantage Australia now enjoys by being among the first countries to enact legislation for copyright on the Internet.
14. CAL endorses the approach of the US government in the Digital Copyright Millennium Act. This law encourages copyright owners by protecting their rights in the digital environment. However, in relation to a prohibition on the circumvention of technological protection measures, the Register of Copyright is required to undertake an examination of the position of copyright users who may be impeded in their access to works by such a prohibition. If the result is that copyright users are adversely affected the Librarian of Congress can declare that the prohibition not apply to that class of users for an ensuing three year period (section 1201(a)(C)).



## D. CAL's CONCERNS – GENERALLY

15. CAL's main concerns with the proposed Bill are with the scope of exceptions to both the reproduction and communication rights.

### International Basis for Exceptions

16. CAL notes that the international standard for exceptions to a copyright owner's right is prescribed by the so called "three step test". It is set out in the Berne Convention for the Protection of the Literary and Artistic Works at Article 9(2); in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS agreement) in Article 13; and in the WIPO Copyright Treaty in Article 10.

17. The three-step test permits exceptions to the copyright owner's rights to be made in national legislation if the uses permitted are:

- Certain special cases;
- Do not conflict with a normal exploitation of the work; and
- Do not unnecessarily prejudice the legitimate interests of the copyright owner.

18. It is for this reason that certain exceptions in the Act provide for payments to copyright owners. For example, the educational statutory licence in Part VB of the Act has been justified on the grounds that it is a special case and that photocopying does not conflict with a normal exploitation of the work.

19. However, the licence requires payment for the copying because the volume of copying which takes place was considered to be such as to unreasonably prejudice the legitimate interests of the copyright owner. Those exceptions for which payment to the copyright owner is not required must therefore be much narrower in scope (eg library exceptions or fair dealing exceptions).

20. Compliance with the three-step test is part of Australia's international treaty obligations. The elements comprising the test are incorporated

into Australian law by section 40(2) of the Act. Section 40(2) lists the factors to be taken into account when determining if a dealing (such as copying or communicating of a work) is fair.

21. It is important to note that CAL and its members do not oppose exceptions being made to copyright owner's rights in their works. What CAL and its members do oppose is exceptions being made which do not meet the three step test and which thereby undermine the contributions being made by authors and publishers. I said in my appearance before the Committee on 7 September 1999, (transcript LCA 274): *"The returns will be manifold,..... , if we turn ourselves into a knowledge based economy. That means educating ourselves into respecting works of the mind as intellectual property, paying for their use and attracting talent that does not have to rely on generous government grants and subsidies, but professionalises it so that our best minds are drawn into creating and producing new innovative, imaginative, intellectual property copyright works for the benefit of our community and for our cultural and economic development, and for our exchange and trade with the region and the world."*

### Specific Concerns

22. CAL submits that the government intention to carry across to the digital environment the existing exceptions in the Act means that Australia's legislation may breach the three-step international standard and act as a disincentive to the promotion of a knowledge based economy.

In particular, CAL is concerned about:

- (a) The provisions authorising libraries to copy and communicate to users without payment to the copyright owner;
- (b) The assumption that in all the circumstances the copying of a certain quantitative proportion of a work is fair. This assumption is made at a number of places in the Act. In CAL's submission it is unlikely that the quantitative exceptions did meet the three-step test even when the only copies permitted were photocopies. It is CAL's submission that they do not comply with the test when the copies are perfect digital reproductions of the original;

- (c) The application of the “reasonable portion” test to the research and study exceptions;
  - (d) The “insubstantial” copying exception in the educational statutory licences; and
  - (e) The copying of “illustrative” artistic works in the educational and library statutory licences.
23. In CAL’s view, if the operation of each of these copying exceptions was subject to the fairness test set out in the existing section 40(2) then Australia’s copyright legislation would comply with all international obligations. Government would therefore achieve its stated objective of ensuring that Australia’s copyright legislation encourages Australian content production and ensures access to works by the general community and academic research bodies.

## **E. SPECIFIC PROPOSALS – LIBRARY COPYING AND COMMUNICATION OF WORKS**

### **The current situation**

24. Sections 49 and 50 of the Act (the library exceptions) permit libraries to make and supply copies (usually photocopies) of works to users and to other libraries. The libraries may charge for the supply on a “cost recovery” basis, including in this charge a sum to offset their general overheads. CAL understands that the currently recommended charge made for the supply of an item by library organisations is \$12 per article. A copyright fee to be paid to the copyright owner of the works being supplied is not included in the fee.
25. At the time when these provisions were introduced, the original justification for the library exceptions was that they permitted copying only in certain special cases and the copying did not conflict with normal exploitation of the work and did not unreasonably prejudice the interests of the copyright owner.
26. However, since their introduction, a sophisticated and extensive system of inter-library and user document supply has been developed by Australian libraries utilising these provisions. In CAL’s submissions, the

extensive use made of these provisions does prejudice the legitimate interests of the author. The author and publisher of the work should not be required to subsidise the operations of libraries.

27. In addition, secondary markets for exploitation of works by copyright owners have also developed, especially with the enhanced ability for copyright administration and management by collecting societies, such as CAL. However, the continued evolution of this market is also inhibited by the library exceptions (that is, they conflict with a normal exploitation of the work).
28. Because of the relationship between the library exceptions and the fair dealing provisions for research or study very few commercial organisations have taken a licence with CAL. Most advise that all copying they do is covered by the free exceptions, such as for libraries and fair dealing for research and study.

### **The proposed legislation**

29. CAL welcomes the changes that have been made to the library exceptions since the release of the Exposure Draft in February this year.
30. In particular, CAL welcomes the new definition of library. CAL notes that the new definition means that the library exceptions are similar in their application to non-profit libraries to those which apply in other countries, such as the UK and the USA. A summary of the situation in these countries is provided at Annexure A.
31. CAL supports the new requirements that items may only be supplied if they are not commercially available and the requirement that libraries may only supply material held in the library collection (if the original is in electronic form). These restrictions are attempting to ensure that the use of copyright material permitted under the provisions complies with the three-step test.
32. The result of these changes is that some copying by libraries which was previously undertaken under the library provisions, without payment to the copyright owner, will now be licenced by CAL. CAL is looking forward to developing licence schemes for this copying in consultation with library groups. However, in CAL's respectful opinion, the scope of

the provisions has not been narrowed sufficiently to ensure compliance with the three-step test.

33. In addition, CAL is disappointed with the number of additional exceptions made for the copying and communication of artistic works. For example, section 53 permits the reproduction and communication of artistic works which explain or illustrate the work being copied under section 49 or section 50 (for supply to users and other libraries). In CAL's view, the extension of this provision to the electronic environment, in which users can cut and paste and revise the artistic works unfairly prejudices the interests of copyright owners in artistic works. In CAL's submission, section 53 should be deleted, or if this is not acceptable to the Committee, its operation confined to the print environment.
34. CAL also objects to the insertion of a new section 51A(3A), permitting the making available online within a library of a preservation reproduction of an artistic work held in the collection of the library, gallery or archives. In CAL's submission, the operation of this provision also unfairly prejudices the interest of copyright owners in artistic works. In addition, the establishment of VI\$COPY means that this type of use is one which could be licensed by a collecting society representing the copyright owners concerned.

### **Libraries Concerns with the Amendments**

35. CAL submits to the Committee that two further amendments to the Act, would go some way to addressing concerns expressed by libraries about voluntary licensing. Firstly, voluntary licences offered by CAL should be subject to the jurisdiction of the Copyright Tribunal.
36. CAL understands that the CLRC, as part of its reference in respect of the powers of the Copyright Tribunal is proposing to recommend such an extension of the Copyright Tribunal's power.
37. A further provision which the Committee might consider recommending is an amendment to the Act which would expressly permit CAL to licence on an "exclusions" basis.

38. At present CAL licences are “inclusive”. CAL provides users with a list of the copyright owners whose works they may copy under the licence. This approach is unnecessarily cumbersome for copyright users.
39. An alternative is for CAL to licence on an “exclusions” basis. CAL could then advise users of the names of those copyright owners whose works may not be copied under the licence, because they had notified CAL as such. CAL submits that this approach is much more workable for the user.
40. As the Committee may be aware, CAL has recommended to the government previously (most recently in its submission concerning the Digital Agenda Bill, 22 April 1999) that a provision similar to s.136 of *the Copyright, Designs and Patents Act 1988* (UK) be introduced into the Act. Under this provision an indemnity is implied in certain schemes and licences for reprographic copying. If a licensee is unable to determine whether a work falls within certain licences or schemes, there is an implied undertaking by the collecting society to indemnify the licensee against any liability incurred by reason of the user having infringed copyright by copying within the apparent scope of the licence.
41. Under the Canadian model, section 38.2 of the *Canadian Copyright Act* limits the liability of a collecting society authorising reprographic reproduction to the licence fee that would have been paid to the copyright owner for the use of the copyright.
42. CAL submits that a provision in Australia that limits the liability of a collecting society, in relation to all voluntary licences, based on the Canadian model is the preferred approach. CAL invites the Committee to give consideration to this proposal as part of its deliberations.

## Overseas Situation

43. In addition to the information provided in Annexure A, it is CAL's understanding, as a consequence of assurances from both American and European lawyers, that the scope of copying permitted by the library exceptions in those countries is much more limited than in Australia.

## CAL's Proposals

44. CAL believes that there are four alternatives to the proposed library exceptions. Of the alternatives, CAL's preference would be for all library copying and communication to be subject to the fair dealing tests as set out in section 40(2) of the Act (alternative (ii)). However, CAL acknowledges that libraries are concerned about certainty, and for this reason, CAL has suggested three (3) other alternatives for the Committee's consideration.

45. If the Committee is interested to explore any of these alternatives, CAL would be pleased to assist further, including providing suggested amendments to the Act.

### **(i) Limit the library exceptions to non-systematic use**

46. CAL is not concerned with the supply of copyright material to "occasional" users; such as someone in a remote area, or a post graduate student. CAL's concerns are with systematic supply by libraries – that is, for libraries and users to view the library exceptions as an alternative to purchase of an original work or obtaining a licence from a collecting society.

47. CAL submits that reliance on the provisions should only be permitted in circumstances which do not constitute a "systematic" use. For example, in the US Copyright Act, section 108(9) restricts library copying to "isolated and unrelated" reproduction. It does not extend to cases where the library is aware that it is engaging in the related reproduction or distribution of multiple copies or the library engages in the systematic reproduction or distribution of single or multiple copies.

48. CAL submits that a similar restriction in library exceptions could be introduced in the Act adopting the wording set out in Annexure A.

**(ii) Subject reliance on Library Exceptions to fair dealing only**

49. As stated above, it is CAL's preferred alternative that all copying by libraries be subject to a fairness test. Under such a model, each copying instance is considered separately and each circumstance which may make a particular dealing fair is taken into account.

50. The Copyright Law Review Committee (CLRC) in part 1 of its report on *Simplification of the Copyright Act 1968*, recommended the repeal of sections 49 and 50 of the Act, arguing that these provisions could be embraced by its proposed model of fair dealing (recommendation 7.59). The CLRC also recommended that libraries and archives be permitted to perform copying for users in all instances where those users would be permitted to make a copy themselves under fair dealing (recommendation 7.60).

51. The new model of fair dealing recommended by the CLRC was based on the proposition that the section 40(2) factors currently in the Act should be applied to all dealings to determine fairness or otherwise (recommendation 6.44).

52. CAL supports the CLRC's proposal to extend the section 40(2) factors to all dealings and submits that the Committee adopt the CLRC's view.

53. To alleviate the concerns of libraries that such an approach would not provide the certainty they require as to the instances of reproduction and communication permitted, CAL suggests that guidelines could set out the extent of the uses of works that copyright owners would consider fair under these provisions.

54. CAL has already begun to discuss such guidelines with the Australian Publisher's Association, the Australian Society of Authors and with representatives of the library community.

55. CAL suggests that the Committee consider whether government should sponsor the continuation of these discussions. Such an approach could be similar to the Committee's Recommendation 6 in its report, "Don't



Stop the Music!” that a voluntary code of conduct be established in relation to acceptable licensing practices and activities.

**(iii) Not Commercially Available**

56. Alternatively, the commercial availability test which has already been introduced into section 50 of the Act by the Bill could apply to all supplies to users by libraries.
57. Libraries have expressed their concern that this approach would enable price discrimination by publishers, that is, for publishers to make their works commercially available but so expensive that no one can afford them.
58. In CAL’s view, the test that copies of the works must be available within a reasonable time at an ordinary commercial price, would mean that if the price were “uncommercial” then the work could not be considered to be “available” and the test would not be satisfied. However, CAL recognises that price determination in the digital environment is a complex matter, which may require adjustments and fine tunings, especially by commercial publishers, to both establish and satisfy the market. This can only be achieved over time.

**(iv) Statutory Licence**

59. A statutory licence with the facility to ensure payment to copyright owners, in circumstances where there is a public interest in libraries being able to supply copyright material to users or to other libraries but where the use would otherwise prejudice the copyright owners interests, may be an alternative. Such a licence can be justified in the same way as the educational statutory licence.
60. It is CAL’s belief that the statutory licence should apply where the library makes a charge or obtains some commercial advantage from the supply, but some copying by libraries, (perhaps that meeting the fair dealing test) could be permitted under the free exceptions. The terms of the licence, including the records to be kept and payments to copyright owners would be subject to the jurisdiction of the Copyright Tribunal.

## F. SPECIFIC PROVISIONS – FAIR DEALING

### CAL's concerns

61. CAL's concerns regarding the practical effect of the fair dealing provisions in the Act are twofold:

- The definition of “reasonable portion”; and
- The assumption that the copying of a reasonable portion is fair in all circumstances if the copying is for research or study. The effect of this “deeming provision” is to place a researcher in a for-profit company in the same position with respect to the copyright owner as a post graduate student. In effect, the provision requires the author or publisher to subsidise one of the inputs into a commercial activity.

### Definition of Reasonable Portion

62. CAL notes that the formulation of the reasonable portion test in the Bill has developed from an attempt to apply or extend the current reasonable portion test to works which are not in the form of “articles” or “chapters”. What is absent from this approach is any consideration of how works may change or develop or may be bought and sold in electronic form. In CAL's view, more detailed analysis over a period of time is essential before any quantitative test can be developed which applies to material in electronic form.

63. If a quantitative provision is to apply to electronic publications (or the digitisation of printed originals) CAL suggests to the Committee that the definition must be developed in consultation with various copyright owner and user representatives.

64. CAL notes that the Bill modifies the scope of the definition of reasonable portion by requiring that a person cannot copy more than one “reasonable portion” from a particular work.

65. In CAL's view, this restriction will only have the effect of restricting students from copying more than 10% of a text. A major concern with the fair dealing provisions is the copying of journal articles or the

reliance on the provisions by commercial companies rather than students. CAL submits that for the restriction to be effective the definition must:

- Only permit the copying of one article from a journal; and
- Apply to institutions ( and companies) as well as to individuals.

### **Application of Reasonable Portion to Fair Dealing**

66. In CAL's view, section 40(3) which deems all copying for research and study to be fair, must be repealed. Again, the development of guidelines as to the particular uses to be considered to be fair could be developed through consultation between copyright owners, user groups and perhaps sponsored by government.

67. Alternatively, the operation of the provision should be confined to "copying" in print form and modified to ensure that it only applies to copying which is private, individual and non-commercial.

68. In addition, the Committee should review whether the existence of section 40(3) means that the objectives sought to be achieved by the government in its amendments to the library copying provisions (in particular the definition of library) can be subverted by commercial and other libraries being appointed to act as "agent" of the end user for fair dealing purposes.

### **G. SPECIFIC PROVISIONS – EDUCATIONAL LICENCES**

69. In respect of the statutory licence for education and its extension, CAL has major concerns and notes that these provisions did not form part of the Exposure Draft. Consequently, CAL did not have the opportunity to comment on the provisions in detail previously. CAL would appreciate the opportunity to further consult with educational interests and government regarding the terms of the proposed statutory licence.

### **"Insubstantial Copying" – Item 51 (section 135ZMB)**

70. CAL submits that any quantified "free" copying by educational institutions is a breach of the three-step test.

71. CAL has always opposed the quantification of “insubstantial copying” by education. In CAL’s view, the issue is difficult to manage in practice and is more properly a matter for consideration by the Copyright Tribunal in its determination of the equitable remuneration payable under the licence generally.
72. CAL’s views are based on actual research that has recently been conducted to determine the nature of copying undertaken in educational institutions. CAL has clear statistical evidence that a significant proportion of the copying by a teacher for the purpose of classroom instruction is of only one to two pages of a work. This means that this type of copying falls within the ambit of insubstantial copying under section 135ZG of the Act.
73. Currently, there are no restrictions on copying one to two pages from a number of sources so as to accumulate the most desirable parts of a series of works or to space the copying apart over a period of time.
74. CAL’s own statistical analysis is supported by that undertaken by the Teaching Resources and Textbook Research Unit, The University of Sydney: Faculty of Education in 1991. In his report, “An Expert Teacher’s Use of Textbooks in the Classroom”, Mike Horsely reports that with respect to photocopying that teachers distributed photocopied handouts (“collected photocopy parts of a range of textbooks”) of one and a half pages per child per lesson (<http://atex.edfac.usyd.edu.au/Year1/cases>). This kind of copying is in CAL’s view akin to coursepack copying undertaken by universities, to which the Chairman of the Committee alluded in his remarks on 7 September 1999 (transcript LCA 275).
75. Coursepack copying was recently considered by the Copyright Tribunal (CAL v University of Adelaide and others (1999) 42 IPR 529) and in his decision Justice Burchett remarked as follows: *.....some copying may have a special value because the sections of works selected for copying may well be the key sections of those works, so that the complication of a coursepack may, as Counsel for the applicant rather picturesquely put it involve “picking the eyes out of a number of different works.* CAL believes that Justice Burchett’s remarks are entirely consistent with the practice which CAL has observed in educational institutions.

76. The position at the time when s135ZG (then s53B) was first inserted in the Act was quite different from that found by Justice Burchett recently.
77. The provision was recommended by the Copyright Law Committee on Reprographic Reproduction (Franki Committee) in its 1976 report. At the time they said (paragraph 6.67):

*Three of us consider that in non-profit educational establishments provision should be made permitting multiple copying of very limited amounts of works without remuneration ... These members recommend this provision which they consider to be desirable for the benefit of education and in general it would permit only an amount of copying in respect of which any royalty would be very small and probably uneconomic to collect. The other member does not support this proposal.*

78. Their recommendation was enacted is section 53B of the Act, later becoming s135ZG.
79. The important points about the Franki Committee's comments are that the amount of copying was expected to "very limited" and of a kind that remuneration would be difficult to collect. The situation today is altogether different. CAL is now an established copyright collecting society, as it was not in 1976, and well able to administer the collection of remuneration for copying on behalf of authors and publishers, even if the Committee accepted that this was still "very limited".
80. When the Franki Committee's recommendation was implemented by the government, musical works were excluded from the provision because the government recognised that *such works are often no more than two pages in length and almost invariably copying in reliance on this provision would have amounted to copying a substantial portion of such works.* (p 11, paragraph 33, Explanatory Memorandum, Copyright Amendment Bill (No 2) 1979)). CAL submits that published materials, including literary works and artistic works, should be excluded on the same basis today and the provision repealed.
81. In respect of the formulation of insubstantial copying set out in the Draft Bill CAL makes the following observations:

- The amount has been determined without any consideration of how works will be used by educational institutions in the digital environment.
- For many digital works, 1% of the “words“ is a significant proportion of the work. The provision will permit the copying of discrete “units” of a major work – for example, in a work on the capital cities of the world, free copying of 1% of the words may be sufficient to allow the educational institution to copy the whole of the text on a particular city which is sufficient for teaching needs. Such copying is more properly the subject of a statutory licence.
- The section pays no regard to contemporary publishing practice. Issues based learning means that publishers design their works with “parallel narratives”, where the central message is expressed in both words and pictures to encourage visual literacy and to facilitate the learning process of investigation, communication and participation. CAL proposed to show the Committee some Australian educational titles which are designed in this way. Such an approach to publishing is particularly appropriate for electronic publications. The insubstantial portion copying provision would permit the systematic copying of such “parallel narratives” undermining the operation of the Part VB statutory licence.
- The 1% rule does not require the words to be “continuous”. The provision will permit the “eyes” to be picked out of a publication. For example, a school could copy all the review questions at the end of each chapter in a book, if they were under 1% of the words in the total work.
- Because of the structure of the Division, artistic works which explain or illustrate the 1% of the words being copied may also be copied. In the example mentioned previously, this means that not only the literary description of the particular capital city could be copied but all photographs, maps and reproductions of other artistic works (such as fine art paintings of the city) could also be copied.
- It is not certain what the reference to a person means. Does it apply to the institution or the individual teacher or even the student? If it

applies to the individual teacher does this mean many teachers in an institution could see the work and accumulate the portions for “fair dealing” access of students?

82. In CAL’s view, the only solution is to repeal the existing section 135ZG and the proposed section 135ZMB and ask the Tribunal to have regard to the possible insubstantial nature of some copying and communications by educational institutions in its determination of the equitable remuneration to apply .

**Artistic Works which Explain or Illustrate the Literary Work being Copied – Item 51 (section 135ZME)**

83. The proposed section 135ZME extends the existing section 135ZM of the Act. Again, CAL’s concern with this provision is with the quantitative nature of the copying – that is, regardless of the intention of the copier and the subsequent use made of the copy – the whole of an artistic work may be copied without additional payment by educational institutions.

84. CAL has already made numerous submissions to government requesting the repeal of the current section 135ZM.

85. The extension of this provision into the digital environment is unwarranted for the following reasons:

- Once copied under the provision, the artistic work can be “cut” and “pasted” in different ways so that its downstream use is not confined to explaining or illustrating a literary work.
- It is inequitable that the value of separate literary and artistic works being copied is not assessed and the equitable remuneration payable adjusted accordingly.

86. CAL suggests that section 135ZM and Section 135ZME be repealed. If this is not acceptable to the Committee, CAL suggests that the provisions be amended to allow the Copyright Tribunal to assess whether a separate amount should be paid for the copying. CAL suggests that this objective could be achieved by including the words *the Tribunal fixes for the copying of the works under this section* in

section 135ZM and into section 135ZME(2) after the words *the amount of the remuneration* and before the words *must be divided*. CAL respectfully suggests that this suggestion be referred back to the Attorney Generals Department and DCITA for inclusion as amendments to the Bill in the House of Representatives or the Senate.

#### **Part VB Division 2A – Generally – Item 51**

87. CAL notes that this Division was not set out in the Exposure Draft of the Bill released in February. Consequently, CAL has not had the opportunity to provide comments on the practical applications or any drafting inconsistencies in the provision. CAL would be happy to provide its comments to the Committee shortly.

#### **H. Other issues**

88. CAL is still considering and reviewing other aspects of the Bill and will endeavour to provide a further submission to the Committee as soon as possible setting out our other areas of concern with the Draft Bill.

#### **CONCLUSION**

89. The Copyright Agency would like to thank Committee members and staff for the opportunity to appear before the Committee on 5 October 1999. We fully understand the difficulty faced by the Committee in dealing with such a complex Bill in a limited time.

90. In any event, CAL offers its expertise and resources to the Committee during its deliberations, and is very willing to assist the Committee in any way the Committee chooses.



## US AND EUROPEAN APPROACH TO EXCEPTIONS TO COPYRIGHT OWNERS RIGHTS

### 1. LIBRARY COPYING

The following models provide guidance as to how legitimate library copying and communication can be facilitated:

#### United Kingdom

- The provisions of the UK *Copyright, Designs and Patents Act 1988* which govern copying by libraries are sections 37–44. (Section 38 and 39 reflect section 49 of Australia’s law and section 41 reflects section 50 of Australia’s law).
- Sections 38 and 39 which concern copying of works by libraries for research and study purposes of users only apply to certain prescribed libraries, as set out by regulations made by the Secretary of State (s37(1)(a)).
- The regulations that currently prescribe those libraries that may rely on sections 38 and 39 are the *Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989, Part A, Schedule 1* (the Regulations).
- Prescribed libraries are:
  - libraries within government;
  - public libraries;
  - libraries in educational institutions; and
  - libraries conducted for the purpose of facilitating or encouraging study in a specified range of subject areas (such as bibliography, education, fine arts, history, law etc) or libraries administered by an organisation which is conducted for these purposes.
- Any library conducted for profit is not a prescribed library. Conducted for profit is defined in the Regulations (reg 3(5)) as *a library or archive which*

*is established or conducted for profit or which forms part of, or is administered by, a body established or conducted for profit.*

- All libraries, not just prescribed libraries, may make and supply to a *prescribed library* or a library outside the UK that is not conducted for profit a copy of an article in a periodical or the whole or part of a published work.

## **Comment**

*CAL endorses the UK approach to exclude for profit libraries from the scope of prescribed libraries and, subject to some reservations, the concept of defining prescribed libraries.*

## European Union

- A number of recitals of *the European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society* (COM(1999) 250 final) (Directive) anticipate European Union Member States making exceptions to the rights of copyright owners. Recitals merely set out the background to the text of the Articles of the Directive but in so doing they assist in understanding the policy behind the Articles.

- With respect to copying by libraries, Recital 24 recognises explicitly that:

*Member States should be given the option of providing for certain exceptions for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.*

- In addition, Recital 28 provides guidance on the scope of any exception for establishments accessible to the public, giving the example of non-profit-making libraries and equivalent institutions. Recital 28 says that exceptions, that would relate to non-profit-libraries, must be limited to certain special cases (drawing on existing treaty language) and should not *cover uses made in the context of on-line delivery of protected works or other subject matter.*
- Article 5 of the Directive concerns exceptions. However, although the recitals anticipate exceptions for copying by libraries, there is no specific exception carved out for libraries to rely on except in relation to reproduction for archiving or conservation purposes (Article 5(2)(c)).
- Nonetheless, the breadth of other paragraphs of Article 5 may allow exceptions to be framed by Member States to enable copying by libraries on behalf of other libraries or users, so long as fair compensation to copyright owners is ensured. All exceptions have to be framed with reference to the three step test (Article 5(4)).

## Comment

*CAL endorses an approach to exceptions for copying by libraries where fair compensation to copyright owners is obligatory and the three-step test must be satisfied.*

*CAL notes that Recitals 21 and 29 emphasise that the existing exceptions to rights given by Member States have to be reassessed in the light of the new electronic environment*

## **United States**

- The US Copyright Law<sup>1</sup> provides that nothing in section 108, permitting copying by libraries and archives, affects the fair use exception available to users (section 108(e)(4)). However, the Law does provide that library reproduction and distribution is limited to the isolated and unrelated reproduction by non-profit libraries (section 108(g)). No multiple copies may be made and no systematic reproduction is possible (section 108(g)(1) and (2)).

## **Comment**

*CAL submits that the US approach, which meets the concerns of copyright owners by taking into account the requirements of the three-step test, is an appropriate model for adoption in Australia.*

## **2. FAIR DEALING**

Certain elements of the following models provide guidance on how fair dealing exceptions can be framed:

### **United States**

- The US Copyright Law does not deem certain acts in relation to a work to be fair use. Instead, there are statutory criteria to determine whether the use made of a work is a fair use as well as non-exhaustive list of

---

<sup>1</sup> The US law is found in: *The Digital Millennium Copyright Act of 1998* (Millennium Act);

*Copyright Law of the United States of America 1999* (Copyright Law); and *Sonny Bono Copyright Term Extension Act 1998* (Sonny Bono Act). This Annexure attaches relevant parts of the Copyright Law and the Millennium Act.

purposes that might be fair dealing (criticism, comment, news reporting, teaching, scholarship or research) (section 107). The factors for consideration are similar to the test in section 40(2), however the application of the test is not limited to dealings for research and study only, as in Australia, but to any dealing with a work.

## Comment

*CAL submits that the US approach that applies the fair dealing criteria to all uses of a work is the appropriate approach for Australia.*

- **Europe (including UK)<sup>2</sup>**
- Article 5(3) of the Directive does contain fair dealing provisions that apply to the right of reproduction and the right of communication only.
- The fair dealing exceptions are similar to those in Australia (eg news reporting, criticism and review, copying for parliament and judicial proceedings etc). No remuneration to copyright owners is required for copying in reliance on these provisions.
- However, where the use is “for the sole purpose of illustration for teaching or scientific research” the rightsholder is entitled to receive fair compensation (Article 3(a)).
- Article 2(b) and 2bis of the *EC Directive* also allow exceptions for reproductions “made by a natural person for private and strictly personal use and for non-commercial ends”. Where a Member State creates such an exception, fair compensation to the rightsholder is required.
- All exceptions have to be framed with reference to the three step test (Article 5(4)).

## Comment

---

<sup>2</sup> The EC Directive applies to the UK, in addition to the Copyright, Designs and Patents Act 1988 (UK).

*CAL endorses an approach to exceptions for fair dealing where fair compensation to copyright owners is obligatory and the three-step test must be satisfied.*

*CAL notes that Recitals 21 and 29 emphasise that the existing exceptions to rights given by the Member States have to be reassessed in the light of the new electronic environment.*

## **United Kingdom**

- In the UK representatives of user and owner groups have jointly developed guidelines as to what would amount to fair dealing in the digital environment.

## COPYRIGHT LAW

### § 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include ----

(1) the purpose and character of the use, including whether such use is of a

commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the

copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a

finding of fair use if such finding is made upon consideration of all the above

factors.

### § 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if --

(1) the reproduction or distribution is made without any purpose of direct or

indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii)

available not only to researches affiliated with the library or archives or with

the institution of which it is a part, but also to other persons doing research in

a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if

(1) the copy or phonorecord becomes the property of the user, and the

library or archives has had no notice that the copy or phonorecord would be

used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are

accepted, and includes on its order form, a warning of copyright in accordance

with requirements that the Register of Copyrights shall prescribe by regulation.

(e) the rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on



the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if

(1) the copy or phonorecord becomes the property of the user, and the

library or archives has had no notice that the copy of phonorecord would be

used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders

are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by

regulation.

(f) Nothing in this section –

(1) shall be construed to impose liability for copyright infringement upon a

library or archives or its employees for the unsupervised use of reproducing

equipment located on its premises: *Provided*, That such equipment displays a

notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or requests a

copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use or such copy or phonorecord: if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending

of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a);

or

(4) in any way affects the right of fair use as provided by section 107, or any

contractual obligations assumed at any time by the library or archives when it

obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or

phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee --

(1) is aware or has substantial reason to believe that it is engaging in the

related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a

period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or

multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or

effect, that the library or archives receiving such copies or phonorecords for

distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

## DIGITAL MILLENIUM COPYRIGHT ACT

### SEC. 404 EXEMPTION FOR LIBRARIES AND ARCHIVES.

Section 108 of title 17, United States Code, is amended --

(1) in subsection (a) --

(A) by striking "Notwithstanding" and inserting "Except as otherwise provided in this title and notwithstanding";

(B) by inserting after "no more than one copy or phonorecord of a

work" the following: ", except as provided in subsections (b) and (c)";

and

(C) in paragraph (3) by inserting after “copyright” the following:

“that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section”;

(2) in subsection (b) –

(A) by striking “a copy or phonorecord” and inserting “three copies or phonorecords”;

(B) by striking “in facsimile form”; and

(C) by striking “if the copy or phonorecord reproduced is currently in the collections of the library or archives.” and inserting “ if -- “(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and “(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.”; and

“(3) in subsection (c) –

(A) by striking “a copy or phonorecord” and inserting “three copies or phonorecords”;

(B) by striking “in facsimile form”;

(C) by inserting “or if the existing format in which the work is stored has become obsolete,” after “stolen,”; and

(D) by striking “if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.” and inserting “if --

“(1) the library or archives has, after a reasonable effort, determined that

an unused replacement cannot be obtained at a fair price; and

“(2) any such copy or phonorecord that is reproduced in digital format is

not made available to the public in that format outside the premises of

the library or archives in lawful possession of such copy.”; and

(E) by adding at the end the following:

“For purposes of this subsection, a format shall be considered obsolete if

the machine or device necessary to render perceptible a work stored in

that format is no longer manufactured or is no longer reasonably available

in the commercial marketplace.”.

## HOW THE DIGITAL AGENDA BILL WILL AFFECT RIGHTS HOLDERS

The Library provisions of the Copyright Act allow a public Library to supply to anyone a digital version of 10% or a chapter of a book, or a journal article from a publication, provided the person requesting it signs a form to say they want the work for research and study.

“E-Biology” is a quarterly publication on the Internet edited by an Australian Biology Professor. It is a respected publication, each three-monthly installment typically containing five or six original articles on various research projects the Professor and his colleagues undertake. The journal can be downloaded from the net for a small fee using a credit card.

The State Library subscribes to E-Biology.

Two people are in the market for a 40-page article from the current journal. One is a university student preparing a paper as part of his post graduate studies. The other is research scientist in the employ of a large chemical company, developing a new medication for the market.

Each of these people is faced with a choice of how to obtain the article. One is to go to the E-Biology website and pay \$15.00 for the article. The second is to logon to the Sate Library and request the article under the Library copying provisions by filling out a form on the internet declaring that the article is needed for research and study, for a cost recovery fee of \$12.00. The article finally downloaded is identical using either service.

Both choose the service provided by the Library because is it cheaper. Neither realise that this is because the author of the article is missing out on his copyright fee when the Library supplies a copy of his article under the Library provisions of the Copyright Act which state that an article from a journal can be copied for the purpose of research and study without a payment to the copyright holder.

Our biology professor cannot understand why his work is so often quoted and so highly respected, but no one is purchasing his work from his website. After a year of supporting the cost of the website from other income

sources, the professor closes the site permanently. He now submits his research articles to a US owned science publication. This is also a public interest issue. The Australian research that our professor undertakes now has to compete for publication with the large volume of US research work which already vying for a place in the US magazine.

If the *quantitative* test were removed from the Copyright Act, the library would not have been able to provide the article to the chemical company research scientist. He would have purchased it from E-Biology, and the journal would still be operating on the Internet today.

## **Section 40(3) deems 10% or a chapter or an article from a journal can be copied without payment to the creator of the work.**

John is unemployed, living in a fringe suburb of a large city. He is interested in the GST. He rides his pushbike to the local library, sits in front of the computer terminal and searches the digitised newspaper collection of the library. He finds an excellent article on GST in the Financial Review, and downloads and prints it so he can read it later.

In the CBD, Allan sits at his desk in the offices of his accountancy firm. He is searching the Library database for an article on the GST he remembered reading some days before. He wants to use the article in some advice he is giving one of his corporate clients. He finds the article on and downloads it. He then distributes it to his eight colleagues in the accounting firm, so that they might also use the article.

The “deeming” provisions make no distinction between these users.

### **How s.135ZG (insubstantial copying) effects *Science Australia***

- This book is 210 pages. Therefore under s.135ZG of the Act 2 pages of the book may be copied (provided it is not excluded by the other requirements of the section) without remuneration going to the copyright owner every two weeks.
- There are 38 [government NSW] school weeks in a year, which would mean that technically a teacher could copy two pages from *Science Australia* for the one class every two weeks, that being 38 pages, free of remuneration. As a percentage of the book this is 18.9%, far greater than the 10% allowed under the educational statutory licence.
- CAL’s records show that this type of systematic copying of the one book is the norm, rather than the exception in schools.
- The most vulnerable pages in this book are its “inquiry” pages. Some examples can be found at pages 8, 11, 18, 21 etc.

- Possibly some of the inquiry pages may be considered whole works, as the page is a self-contained activity, and therefore outside the perimeters of s.135ZG. However this may not be the case.
- Curricula in all subjects now tend to focus on problem solving, information organising and analysis skills. Therefore to a teacher the activities pages, such as *Science Australia's* “inquiry” pages are intrinsically more vulnerable than other parts of the work. In other words, are the eyes of the work.
- The publisher, Curriculum Corporation, advised CAL that the book was specifically designed to have as many two pages spreads on topics as possible. This was done in response to market demand from teachers, as this size fitted the time for one class. See for example the two page spreads on: patterns in the sky at pages 110–111, The Moon at pages 120–121, What is an animal at pages 134–135 etc.
- A common practice of school teachers is what is known as “cutting and pasting”. That is choosing one section from one part of the text another section from another part of the text, photocopying it and making a master copy of it to be distributed to the class.
- In the process of cutting and pasting from a book, a teacher will often exceed the copying limits of s.135ZG, therefore the copying would come under the educational statutory licence and the copyright owner would be remunerated for this copying.
- The extension of the insubstantial copying provisions into the digital arena, allows that a user may copy 1% of **the words** of a book, rather than of pages. This will result in much of the “cut and paste” type copying falling outside of the statutory licence, and no payment going to the copyright owner.

### ***How s.135ZG (insubstantial copying) does and will effect Homework Contracts by Harry O'Brien and Greg Purcell***

- *Homework Contracts* is a book of 34 homework sheets for year 4 primary (NSW) students.



- *Homework Contracts* is what is known in the publishing industry as a workbook. Primary workbooks are designed for students to write in. They are designed to provide students with the opportunity to practice their skills or record results. Primary workbooks predominantly develop a child's skills in handwriting, grammar, and maths.
- Each homework contract is two pages long. The first page of the two page homework sheets has activities on English and/or social studies and the second page has activities on maths and/or science.
- CAL's would say that each two page homework contract is an individual whole work, in the same way that a test or questionnaire is. However, this may not be the case.
- If a teacher copied this book in reliance on s.135ZG, that teacher would be able to copy one page of the book per fortnight (as the book is only 72 pages).
- As the two pages of the homework sheets are divided between maths/science and English/social studies the s.135ZG restriction of only 1 page probably would not concern a teacher.
- There are 38 [government NSW] school weeks in a year. One page per fortnight of *Homework Contracts* for the one class would give that class 26.38% of the book for free.
- CAL's records show that this systematic copying of the one book is the norm, rather than the exception in schools.
- A common practice of school teachers is what is known as "cutting and pasting". That is choosing one section from one part of the text another section from another part of the text, photocopying it and making a master copy of it to be distributed to the class. In other words the teacher is "picking the eyes" out of the book.
- In the process of cutting and pasting from a book, a teacher will often use more than 1 or 2 pages, and therefore exceed the copying limits of s.135ZG, consequently the copying would come under the educational statutory licence and the copyright owner would be remunerated for this copying.

- The extension of the insubstantial copying provisions into the digital arena, allows that a user may copy 1% of **the words** of a book, rather than of pages. This will result in much more of the “cut and paste” type copying falling outside of the statutory licence, with no payment going to the copyright owner.
- As a result of the new digital provisions, if a teacher wanted to give say both maths and english homework to their class, rather than photocopying the two pages of *Homework Contracts* and thus falling within the statutory licence and payment going to the copyright owner, the teacher would simply digitally cut and paste the two sections (being only part of one page and therefore together making up one page or 1%), so that the copying would be within s.135ZG.

### **How s.135ZG (insubstantial copying) does effect *Science Australia***

- This book is 210 pages. Therefore under s.135ZG of the Act 2 pages of the book may be copied (provided it is not excluded by the other requirements of the section) without remuneration going to the copyright owner every two weeks.
- There are 38 [government NSW] school weeks in a year, which would mean that technically a teacher could copy two pages from *Science Australia* for the one class every two weeks, that being 38 pages, free of remuneration. As a percentage of the book this is 18.9%, far greater than the 10% allowed under the educational statutory licence.
- CAL’s records show that this type of systematic copying of the one book is the norm, rather than the exception in schools.
- The most vulnerable pages in this book are its “inquiry” pages. Some examples can be found at pages 8, 11, 18, 21 etc.
- Possibly some of the inquiry pages may be considered whole works, as the page is a self-contained activity, and therefore outside the perimeters of s.135ZG. However this may not be the case.
- Curricula in all subjects now tend to focus on problem solving, information organising and analysis skills. Therefore to a teacher the

activities pages, such as *Science Australia's* “inquiry” pages are intrinsically more vulnerable than other parts of the work. In other words, are the eyes of the work.

- The publisher, Curriculum Corporation, advised CAL that the book was specifically designed to have as many two pages spreads on topics as possible. This was done in response to market demand from teachers, as this size fitted the time for one class. See for example the two page spreads on: patterns in the sky at pages 110–111, The Moon at pages 120–121, What is an animal at pages 134–135 etc.
- A common practice of school teachers is what is known as “cutting and pasting”. That is choosing one section from one part of the text another section from another part of the text, photocopying it and making a master copy of it to be distributed to the class.
- In the process of cutting and pasting from a book, a teacher will often exceed the copying limits of s.135ZG, therefore the copying would come under the educational statutory licence and the copyright owner would be remunerated for this copying.
- The extension of the insubstantial copying provisions into the digital arena, allows that a user may copy 1% of **the words** of a book, rather than of pages. This will result in much of the “cut and paste” type copying falling outside of the statutory licence, and no payment going to the copyright owner.

## **How s.135ZG (insubstantial copying) does and will effect *Homework Contracts* by Harry O'Brien and Greg Purcell**

- *Homework Contracts* is a book of 34 homework sheets for year 4 primary (NSW) students.
- *Homework Contracts* is what is known in the publishing industry as a workbook. Primary workbooks are designed for students to write in. They are designed to provide students with the opportunity to practice their skills or record results. Primary workbooks predominantly develop a child's skills in handwriting, grammar, and maths.

- Each homework contract is two pages long. The first page of the two page homework sheets has activities on english and/or social studies and the second page has activities on maths and/or science.
- CAL's would say that each two page homework contract is an individual whole work, in the same way that a test or questionnaire is. However, this may not be the case.
- If a teacher copied this book in reliance on s.135ZG, that teacher would be able to copy one page of the book per fortnight (as the book is only 72 pages).
- As the two pages of the homework sheets are divided between maths/science and english/social studies the s.135ZG restriction of only 1 page probably would not concern a teacher.
- There are 38 [government NSW] school weeks in a year. One page per fortnight of *Homework Contracts* for the one class would give that class 26.38% of the book for free.
- CAL's records show that this systematic copying of the one book is the norm, rather than the exception in schools.
- A common practice of school teachers is what is known as "cutting and pasting". That is choosing one section from one part of the text another section from another part of the text, photocopying it and making a master copy of it to be distributed to the class. In other words the teacher is "picking the eyes" out of the book.
- In the process of cutting and pasting from a book, a teacher will often use more than 1 or 2 pages, and therefore exceed the copying limits of s.135ZG, consequently the copying would come under the educational statutory licence and the copyright owner would be remunerated for this copying.
- The extension of the insubstantial copying provisions into the digital arena, allows that a user may copy 1% of **the words** of a book, rather than of pages. This will result in much more of the "cut and paste" type copying falling outside of the statutory licence, with no payment going to the copyright owner.

- As a result of the new digital provisions, if a teacher wanted to give say both maths and english homework to their class, rather than photocopying the two pages of *Homework Contracts* and thus falling within the statutory licence and payment going to the copyright owner, the teacher would simply digitally cut and paste the two sections (being only part of one page and therefore together making up one page or 1%), so that the copying would be within s.135ZG.