

Remaining issues

Introduction

- 6.1 The Bill includes a number of provisions dealing with aspects of the proposed new right of communication and its replacement of the existing technology-specific broadcast and cable diffusion rights. This chapter examines four remaining issues that arose as part of the Committee's inquiry, namely:
- the liability of Internet Service Providers (ISPs);
 - the exception for temporary reproductions;
 - the transitional provisions; and
 - minor drafting errors

Liability of Internet Service Providers

- 6.2 Telecommunications carriers and carriage service providers, including Internet Service Providers (ISPs), are central to the online delivery of electronic material and to the operation of the information economy. The Bill outlines the extent to which carriers and carriage service providers will be liable, both directly and through authorisation, for activities undertaken by customers using their facilities.¹

¹ Attorney-General's Department & the Department of Communications, Information Technology and the Arts (AGD & DCITA), *Submissions*, p. S595.

Definition of 'communicate'

- 6.3 Item 6 amends s. 10(1) to introduce the definition of 'communicate' into the Copyright Act. This definition is central to the proposed new right of communication to the public introduced by the Bill.²
- 6.4 The definition provides that 'communicate' means make available online or electronically transmit a work or other subject-matter.³ Electronic transmission can occur via a path, or a combination of paths, provided by a material substance or otherwise.⁴ The submission of Norman Waterhouse Solicitors expressed concern regarding the adequacy of the definition to cover some current and future communication technologies. It was suggested that the words 'electronically' and 'on-line' are themselves too technologically specific.⁵
- 6.5 Few submissions received by the Committee touched upon the definition of communicate, although the creation of the new right of communication was widely supported. One organisation to comment on the definition was Telstra, who broadly supported it.⁶
- 6.6 The Committee considers that the definition of communicate appears to adequately encompass emerging communication technologies.

Direct liability

- 6.7 Item 26 repeals the current ss 22(5) and (6) and substitutes a new formulation that identifies who would be liable for an infringing broadcast and communication.⁷

Liability for a broadcast

- 6.8 Proposed new s. 22(5) provides that a broadcast is taken to have been made by the person who provided the broadcasting service by which the broadcast was delivered.⁸ This provision aims to avoid the potential for conferring copyright on channel providers and production companies who may determine the content of the broadcast.⁹

2 Explanatory Memorandum, para. 13.

3 Proposed s. 10(1) of the Bill.

4 Proposed s. 10(1) of the Bill.

5 Norman Waterhouse Solicitors, *Submissions*, p. S162

6 Telstra Corporation Limited, *Submissions*, p. S463.

7 Explanatory Memorandum, para. 39.

8 Proposed s. 22(5) of the Bill.

9 Explanatory Memorandum, para. 39.

- 6.9 Telstra expressed serious concern regarding the proposed section, based on the 1997 High Court decision in *Telstra v APRA* (the 'music on hold' case).¹⁰ In that case, Telstra was held liable as a carrier for the music on hold played by its subscribers, even although Telstra had no control over the music.¹¹ The Australasian Performing Right Association (APRA), the Federation of Australian Radio Broadcasters (FARB) and the Federation of Australian Commercial Television Stations (FACTS) agreed that the new section would be successful in achieving its object of excusing carriers and carriage service providers from liability for providing the facilities used in an infringing broadcast.¹² However, Telstra stated that ambiguity in proposed s. 22(5) could lead to liability being imposed on carriers and carriage service providers (including ISPs), in circumstances where they have no control over what is transmitted, as occurred in the 'music on hold' case.¹³
- 6.10 Telstra also submitted that proposed s. 22(5) is inconsistent with proposed new s. 22(6), which refers to the person who determines the content of a communication. Telstra argued that proposed s. 22(6) correctly implements the principle necessary to avoid liability such as that imposed by the music on hold case.¹⁴ The Law Council of Australia made a submission to like effect.¹⁵
- 6.11 In the opinion of the Committee, proposed s. 22(5) implements the principle intended, when the definition of 'broadcasting service' in the *Broadcasting Services Act 1992* is borne in mind. Nevertheless, the Committee considers that amendment of the provision is desirable in order to avoid ambiguity and to ensure consistency with the proposed new s. 22(6).

10 (1997) 191 CLR 140.

11 AGD & DCITA, *Submissions*, p. S620.

12 Explanatory Memorandum, para. 59; Brett Cottle, Australasian Performing Right Association (APRA), Tracey Meredith, Federation of Australian Commercial Television Stations (FACTS) and Federation of Australian Radio Broadcasters (FARB), *Transcript*, pp. 246 and 248.

13 Telstra Corporation Limited, *Submissions*, pp. S461 and S463.

14 Telstra Corporation Limited, *Submissions*, p. S464.

15 Law Council of Australia, *Submissions*, p. S478.

Recommendation 32

- 6.12 **The Committee recommends that proposed section 22(5) of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to provide that the broadcast is taken to have been made by the person responsible for determining the content of the broadcast.**

Liability for a communication

- 6.13 Proposed new s. 22(6) addresses the issue arising from the music on hold case. It provides that carriers and carriage service providers, including ISPs, will not be directly liable for a communication where they are not responsible for determining the actual content of a communication.¹⁶ Telstra supported the wording of proposed new s. 22(6) and emphasised the provision's importance in light of the 'music on hold' case.
- 6.14 The International Intellectual Property Alliance (IIPA) submitted that proposed new s. 22(6) was ambiguous, as the person responsible for determining the content of a communication could be interpreted as meaning the original creator or author of the copyright material.¹⁷ IIPA therefore argued that it would be difficult for a person other than the creator to make an infringing communication under the Bill.
- 6.15 The Committee understands the IIPA's concern, however it believes that the definition of communicate provides adequate clarification of who would be 'the person responsible for determining the content of the communication'. That definition refers to works and other subject matter already in existence. It follows that the person who decides on the works and other subject matter that are communicated is responsible for the communication. Under proposed new s. 22(6), the creator of a work is not held responsible for its subsequent communication unless he or she communicates it.

¹⁶ AGD & DCITA, *Submissions*, p. S616.

¹⁷ Steven Metalitz, International Intellectual Property Alliance (IIPA), *Transcript*, p. 240.

Authorisation liability

- 6.16 The Bill clarifies the position of carriers and carriage service providers in relation to authorisation liability.¹⁸ Authorisation liability arises when a person authorises an act comprised in the copyright without the licence of the copyright owner,¹⁹ and it applies to both works and other subject matter. Items 39 and 87 insert into ss 36 and 101 respectively a list of factors that must be taken into account when determining whether an infringement has been authorised.²⁰
- 6.17 The factors which must be taken into account include: the extent, if any, of the person's power to prevent the doing of the act; the relationship between the person and the infringer; and whether the person took any reasonable steps to prevent the infringement.²¹ These factors codify the common law doctrine of authorisation liability as expounded in *University of New South Wales v Moorehouse*.²²

Knowledge of infringement

- 6.18 The IIPA submitted that an additional factor should be included in the list for determining whether or not a person has authorised an infringement. That factor is whether or not the person knew, or ought to have known, the infringing character of the act, or facts or circumstances from which the infringing activity is apparent.²³ They argued that ISPs and others service providers should be given an incentive to familiarise themselves with occurrences of copyright infringement that take place on their systems.²⁴
- 6.19 Telstra objected that the factor 'knowledge of facts and circumstances from which infringing activity is apparent' would require clarification.²⁵ Otherwise, Telstra generally supported proposed ss 36(1A) and 101(1A), although they voiced the belief that the provisions could go further to protect carriers and carriage service providers.²⁶ The Australian Digital

18 AGD & DCITA, *Submissions*, p. S617.

19 Explanatory Memorandum, para. 54.

20 Proposed s. 36(1A), 101(1A) of the Bill.

21 Proposed s. 36(1A), 101(1A) of the Bill.

22 (1975) 133 CLR 133; see Explanatory Memorandum, para. 56.

23 Steven Metalitz, IIPA, *Transcript*, p. 240.

24 Steven Metalitz, IIPA, *Transcript*, p. 241.

25 Telstra Corporation Limited, *Submissions*, p. S468.

26 Warwick Rothnie, Telstra Corporation Limited, *Transcript*, p. 245 and Telstra Corporation Limited, *Submissions*, p. S468

Alliance (ADA) does not accept the inclusion of the additional factor proposed by the IIPA.²⁷

- 6.20 The Committee acknowledges that the additional factor proposed by the IIPA — actual or constructive knowledge of the infringing character of an act, or of facts and circumstances from which infringement is apparent — is relevant to determining whether or not a person has authorised infringement. The Committee concludes that this fact should be included in the list in proposed ss 36(1A) and 101(1A), even though the list is expressed to be non-exhaustive.

Recommendation 33

- 6.21 **The Committee recommends that proposed sections 36(1A) and 101(1A) of the Copyright Amendment (Digital Agenda) Bill 1999 each be amended to include a new subparagraph:**

(d) whether the person knew the infringing character of the act or was aware of facts or circumstances from which the infringing character of the act was apparent.

Industry code of practice

- 6.22 One of the factors listed in ss 36(1A) and 101(1A), to which regard must be had in determining authorisation liability, is compliance with relevant industry codes of practice (paragraph (c)). The Business Software Association of Australia (BSAA) was concerned that copyright owners may not be consulted in the drafting of industry codes of practice.²⁸ ARIA and PPCA submitted that industry codes of practice should be treated as evidence, to which a court should be free to ascribe such weight as it thinks fit.²⁹

27 Australian Digital Alliance (ADA), *Submissions*, p. S713.

28 Maurice Gonsalves, Business Software Association of Australia (BSAA), *Transcript*, p.242.

29 Emmanuel Candi, Australian Record Industry Association (ARIA) and Phonographic Performance Company of Australia (PPCA), *Transcript*, p. 243.

- 6.23 Telstra drew the Committee's attention to the Internet Industry Code of Conduct developed by the European Union Internet Industry Association. Telstra submitted that the EU Code of Conduct would not require substantial amendment in order to apply in Australia, and that it should be adopted in the Bill.³⁰

The Committee's conclusions

- 6.24 The Committee concludes that proposed paragraphs 36(1A)(c) and 101(1A)(c) should remain in the Bill. In the view of the Committee, the concerns of the BSAA, Australian Record Industry Association (ARIA) and Phonographic Performance Company of Australia (PPCA) are addressed in part by the adjective 'relevant'. This allows a court some discretion in the view it takes of a particular industry code of practice. The Committee encourages all sections of the industry to contribute to the development of an accepted code of practice.

Communication using the facilities of a carrier or Internet Service Provider

Liability of carrier and carriage service providers

- 6.25 Items 42 and 95 insert proposed ss 39B and 112E respectively, which limit the liability for infringement of carrier and carriage service providers. Under the new provisions, an ISP is taken to have authorised an infringement of copyright merely because it provides the facilities which are used to do something that is not included in the copyright.

Liability too broad

- 6.26 The IIPA submitted that proposed ss 39B and 112E are too broad and should be restricted to conform with the Agreed Statements adopted by the diplomatic conference that approved the World Intellectual Property Organisation (WIPO) treaties.³¹ The Agreed Statements exempt carriers and carriage service providers only in respect of infringement of the right to communicate to the public.³² ARIA and PPCA supported the IIPA's submission. They added that injunctive relief should be available against a carrier or carriage service provider.³³

30 Telstra Corporation Limited, *Submissions*, p. S469.

31 Steven Metalitz, IIPA, *Transcript*, p. 241.

32 Agreed Statement concerning article 8 of World Intellectual Property Organisation (WIPO) Copyright Treaty 1996.

33 ARIA and PPCA, *Submissions*, p. S490.

6.27 The Committee does not consider it necessary to limit proposed ss 39B and 112E in the way advocated by the IIPA. The Committee is not aware of potentially infringing acts that can be perpetrated with the facilities of carriers or carriage service providers other than unauthorised communications. The Committee will address the question of injunctive relief later in this chapter.

Liability not broad enough

6.28 Telstra supported proposed ss 39B and 112E, but stated that they do not go far enough to protect carriers and carriage service providers.³⁴ Telstra also objected to the use of the word 'merely', which they maintained considerably limits the protection provided by these sections.³⁵ The Committee does not share Telstra's concern in this regard.

6.29 Storage Technology of Australia submitted that the class of people protected by proposed ss 39B and 112E is too narrow.³⁶ They argued that the new provisions should also protect people who provide similar services to carrier and carriage service providers, such as companies that provide digital storage services.³⁷

6.30 The Committee sympathises with Storage Technology of Australia's submission.

Recommendation 34

6.31 The Committee recommends that proposed ss 39B and 112E of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to limit the liability for infringement of providers of digital storage services as well as that of carriers and carriage service providers.

34 Telstra Corporation Limited, *Submissions*, p. S465.

35 Warwick Rothnie, Telstra Corporation Limited, *Transcript*, p. 465.

36 Storage Technology of Australia provides products and services to store and secure digital information, such as mainframe data and video images.

37 Storage Technology of Australia, *Submissions*, p. S235.

Exception for temporary reproductions

- 6.32 Temporary or incidental reproductions of copyright material are an essential part of technical processes that enable others to use copyright material. Such reproductions routinely occur when a work or other subject matter is electronically transmitted. However, they also occur during uses other than communication of the work or other subject matter, especially in integrated systems.³⁸
- 6.33 Evidence to the Committee approached this issue from two diametrically opposed standpoints, although an agreed position was eventually reached. On the one hand, copyright owners argued that there should be no exception for temporary reproductions, although remedies for infringing temporary reproductions should be nominal. On the other hand, the copyright users argued that temporary reproductions should not be classified as reproductions at all, so that making them would not amount to infringement. Before considering each of these arguments in more detail, it is useful first to deal with the international treaty aspect of the issue.
- 6.34 There was some argument before the Committee as to the requirements of the WIPO treaties in relation to temporary reproductions.³⁹ The IIPA and the Copyright Agency Limited (CAL) maintained that there is nothing in the treaties that requires Australia to create a temporary reproduction exception.⁴⁰ By contrast, the Supporters of Interoperable Systems in Australia (SISA) and Telstra submitted that there is no international consensus as to whether or not temporary reproductions constitute reproductions.⁴¹ The Committee considers that it does not need to reach a view on the international debate in relation to this issue.

No exception

- 6.35 The copyright owners, including ARIA, PPCA and IIPA, urged the Committee to endorse the US approach in relation to temporary copies. That approach does not derogate from the copyright owner's exclusive right to make reproductions, but instead limits the type of relief that is available against carriers in respect of infringements through temporary

38 Tracey Meredith, FACTS and FARB, *Transcript*, p. 251.

39 Art 10 of the WIPO Copyright Treaty 1996.

40 Steven Metalitz, IIPA, *Transcript*, p. 249; Copyright Agency Limited (CAL), *Submissions*, p. S696.

41 Jamie Wodetzki, Supporters of Interoperable Systems in Australia (SISA), *Transcript*, pp. 253-254 ; Warwick Rothnie, Telstra Corporation Limited, *Transcript*, p. 255.

reproductions made on their facilities.⁴² The US approach was rejected by SISA and Telstra. Telstra argued that the approach is not feasible in Australia as a result of the decision in *Telstra v APRA*.⁴³

Not a reproduction

- 6.36 SISA argued that temporary reproductions should not be regarded as reproductions properly so called. This is because the Copyright Act refers to a 'reproduction in a material form'. The sorts of incidental, ephemeral copies that are contemplated in the proposed section are not in material form. The Committee considers it unnecessary to explore this argument in any length, except to note that the question of materiality is a real one in this context.

Provisions of the Bill

- 6.37 Against this background the Committee considered the provisions of the Bill. Proposed ss 43A and 111A, inserted by items 45 and 94 of the Bill into Parts III and IV of the Copyright Act respectively, provide an exception to infringement for temporary reproductions of a work that occur 'as part of the technical process of making or receiving a communication'. The Explanatory Memorandum states that the exception is intended to ensure that technical processes that form the basis of new technologies such as the Internet are not jeopardised.⁴⁴
- 6.38 The policy basis for the exception was further explained in the submission from AGD and DCITA:⁴⁵

There is strong public interest in providing an exception for temporary copies ... for the effective, efficient and timely operation of communication networks. Furthermore, such temporary copies are regarded as having no economic significance or material impact on the potential market for the relevant copyright material.

42 Steven Metalitz, IIPA, *Transcript*, p. 258.

43 Warwick Rothnie, Telstra Corporation Limited, *Transcript*, p. 260.

44 Explanatory Memorandum, para. 63.

45 AGD & DCITA, *Submissions*, p. S748.

- 6.39 FACTS and FARB submitted that the proposed provisions are fairly balanced.⁴⁶ Telstra expressed concern that the proposed ss 43A and 111A do not go far enough to protect carriers and carriage service providers from liability. This is particularly because ss 43A(2) and 111A(2) provide that the temporary reproduction exception does not apply in the case of an infringing communication. Telstra argued that the vast majority of cases in which an attempt is made to impose liability on the carrier or carriage service provider are cases involving infringing communications.⁴⁷ The Committee understands Telstra's concern, but considers that an adequate solution to such a case is provided for in proposed ss 39B and 112E.
- 6.40 The copyright owners argued that the proposed exception is too broad, and that it conflicts with the normal exploitation of copyright works.⁴⁸ This is primarily because the Bill contains no definition of the term 'temporary copy'.
- 6.41 In order to give the proposed section a more acceptable scope, various formulations were suggested, including 'a transient copy made as an indispensable step in the technical process in making or receiving a communication', or 'unavoidable step' or 'essential step'. The copyright users replied that the use of such phrases would invite the argument that many temporary reproductions are made in order to increase network efficiency; they are not strictly unavoidable and therefore do not fall within the exemption. For reasons set out below, the Committee does not consider it necessary to express a preference as to the choice of words in proposed ss 43A and 111A.

Browsing and using computer programs

- 6.42 The copyright owners also argued that the temporary reproduction exception should not apply to reproductions made in the course of using or running a computer program. This is because the marketing and licensing of mass produced software depends upon the ability to make temporary reproductions.⁴⁹ The Committee recognises this as a potential problem presented by the current drafting of ss 43A and 111A.

46 Tracey Meredith, FACTS and FARB, *Transcript*, p. 251.

47 Warwick Rothnie, Telstra Corporation Limited, *Transcript*, p. 256.

48 BSAA, *Submissions*, p. S61.

49 Maurice Gonsalves, BSAA, *Transcript*, p. 261.

- 6.43 CAL submitted that proposed ss 43A and 111A do not cover the activity of browsing. CAL based their submission on the change in wording between the Exposure Draft and the Bill as introduced.⁵⁰ However, AGD and DCITA explained that in relation to proposed ss 43A and 111A:

It is intended that the reference to temporary copies made in the course of receiving electronic communication would include temporary copies made in the course of browsing (which would include for example simply viewing copyright material on a computer screen).⁵¹

- 6.44 The Committee concludes that browsing will fall within the temporary reproduction exemption, as noted in the Explanatory Memorandum.⁵² The Committee notes the comment made by the Australian Publishers Association, that browsing and caching have a significant impact on electronic commerce.⁵³ However, the Committee does not think that temporary reproductions will impact unreasonably or adversely on that market.

Temporary reproductions in other contexts

- 6.45 SISA pointed out that the issue of infringement through temporary reproductions is not confined to the context of making or receiving a communication. Temporary reproductions are routinely made in other contexts, for example, the operation of a portable CD player or a PC. The Australian Consumers' Association agreed, noting that as consumer equipment becomes increasingly digital, temporary copies will abound.⁵⁴
- 6.46 SISA therefore argued that by creating a specific exception to infringement for temporary copies made in the course of communication, the Bill implicitly provides that temporary copies made in other contexts constitute infringements of copyright. The Committee notes that this is what the Copyright Act currently provides, since it does not contain an exception to infringement for temporary copies made for any purposes.
- 6.47 The Committee is not aware of any decision in which a person has been held liable for infringing copyright in underlying works by, for instance, operating a portable CD player or using a PC. As a practical matter, the Committee notes that the enforcement in this context would be almost

50 CAL, *Submissions*, p. S696.

51 AGD & DCITA, *Submissions*, p. S611.

52 Explanatory Memorandum, para. 63.

53 Australian Publishers Association, *Submissions*, p. S407.

54 Australian Consumers' Association, *Submissions*, p. S393.

impossible. For example, how would the damage suffered by copyright owners through the making of temporary reproductions be quantified?

Committee's conclusion

- 6.48 In its consideration of this issue, the Committee has been mindful that, temporary reproductions are currently being made as a routine part of the operation of everyday technology. While the Committee agrees that temporary reproduction in technical processes is likely to increase, it does not consider temporary copies should be excluded from the definition of reproduction.
- 6.49 As in the context of the manufacture of circumvention devices by system administrators, there are strong principles of public policy that militate against the imposition of any penalty for infringement through the making of temporary reproductions. The Committee is confident that the courts would act on those principles. For this reason the Committee concludes that an exception to infringement for temporary reproduction is not necessary.

Scope of remedy

- 6.50 In correspondence to the Committee, ARIA and PPCA submitted a proposal in relation to remedies for infringement which the Committee finds attractive.⁵⁵ The proposal relates to infringements by carriers and carriage service providers through the making of temporary reproductions as part of the technical process of making a communication, through the doing of acts necessary for transmission in a communication network, and through storing a reproduction at the request of a subscriber.
- 6.51 ARIA and PPCA proposed that, provided the carrier or carriage service provider satisfied certain conditions in relation to the communication, then in any action for an infringement of the type described in the preceding paragraph, the only available remedy should be an injunction. ARIA and PPCA implemented their proposal through a suggested amendment to s. 115, the section that specifies the relief that a court may grant in an infringement action. The proposed amendment is included as Appendix G to this report.

55 ARIA & PPCA, Correspondence to the Committee, 9 November 1999.

- 6.52 The Committee considers it desirable to limit the relief that is available against carriers and carriage service providers in certain infringement actions. In the Committee's view, the amendment proposed by ARIA and PPCA is an appropriate way to achieve this objective.

Recommendation 35

- 6.53 **The Committee recommends that items 45 and 94 be removed from the Copyright Amendment (Digital Agenda) Bill 1999.**

The Committee also recommends that the Government consider introducing an amendment to section 115 in accordance with the proposal contained in Appendix G.

Schedule 2 — Transitional Provisions

- 6.54 As discussed in Chapter 1, the Bill proposes a new right of communication to replace the existing rights of broadcast and transmission to subscribers of a diffusion service. The proposed new right is broader than the existing broadcast and diffusion rights, neither of which include the right of making material available online. As stated in the Explanatory Memorandum, the new right of communication has implications for existing licensing and assignment contracts which deal with the broadcasting and diffusion rights.⁵⁶

Item 3(1)

- 6.55 Schedule 2 of the Bill is intended to clarify how the Bill affects existing licensing and assignment contracts. Item 3(1) of Schedule 2 provides that, unless they provide otherwise, licences, contracts and arrangements will not be affected by the creation of the proposed right of communication to the public, nor by the amended definition of 'broadcast'.⁵⁷ The current provisions of the Copyright Act will continue to apply in respect of them.

⁵⁶ Explanatory Memorandum, para. 429.

⁵⁷ Explanatory Memorandum, para. 430.

- 6.56 The rationale behind the Bill's approach is apparent from the Attorney-General's Second Reading Speech.⁵⁸ The Attorney-General explained that the Bill is expressed to commence six months after it receives Royal Assent, unless it is proclaimed earlier. The period between enactment and commencement will enable affected copyright owners and users to renegotiate their current arrangements and licences, where appropriate, in light of the amendments effected by the Bill.

Application to licences

- 6.57 The approach of the Bill — to presume that existing licence contracts exclude that portion of the new right to communication not contained in the broadcast and diffusion rights — was the subject of criticism from APRA, ARIA, PPCA, FACTS, FARB, Australian Copyright Council (ACC), Australian Broadcasting Corporation (ABC) and J Albert and Son. All these organisations submitted that the Bill approaches the matter from the wrong direction, and that the reverse presumption should apply. Many reasons for this were offered. Firstly, if the presumption in the Bill applies, different regimes will apply to licences.⁵⁹ Secondly and as a result, practical difficulties and legal uncertainties will arise. Thirdly, the new portion of the right to communicate not encompassed in the existing broadcast and diffusion rights — the right to make material available online — is currently exercised in the copyright world through different means. Therefore presuming that existing licence contracts will apply to the right of communication does not effect a significant change to the positions of the contractual parties.⁶⁰

Application of to assignments

- 6.58 Another aspect of item 3(1) attracted comment before the Committee. This item draws a distinction between a licence, contract or arrangement on the one hand, and an assignment on the other. FACTS and FARB submitted that it is not clear why an assignment of the broadcast and diffusion rights should be treated differently to a licensing of those rights.⁶¹ They further submitted that an assignee of the whole of the copyright (including the

58 The Hon D. Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999 p. 7430.

59 Brett Cottle, APRA, Emmanuel Candi, ARIA and PPCA, Tracey Meredith, FACTS and FARB, and Libby Baulch, Australian Copyright Council (ACC), *Transcript*, p. S264-267; Australian Broadcasting Corporation, *Submissions*, p. S98, and J. Albert and Son Pty Limited, *Submissions*, p. S108.

60 Brett Cottle, APRA, *Transcript*, p. 265.

61 FARB, *Submissions*, p. S102; FACTS, *Submissions*, p. S120;

broadcast and diffusion rights) should have the same rights as the copyright owner, which is not the case under the proposed provisions.

Conclusion

- 6.59 There was a general consensus in the evidence that item 3(1) should be amended so that the presumption in the Bill is reversed, and the distinction between licences and assignments is removed. In other words, the new right to communicate should apply to assignments and licences entered into before, as well as after, the commencing day, unless the right is expressly excluded. The Australian Copyright Council submitted that where there is a clear arrangement between the parties that contemplated making the material available online, then the arrangement should continue after the commencing day.⁶²
- 6.60 The Committee agrees that item 3(1) should be so amended.

Recommendation 36

- 6.61 **The Committee recommends that Schedule 2 of the Copyright Amendment (Digital Agenda) Bill 1999 be amended as follows.**

Insert in item 1 the following definition:

'communication right means the exclusive right to communicate a work or other subject matter to the public under the Copyright Act as amended by this Act.'

Replace item 3(1) with the following:

'A licence, contract or arrangement (including an assignment of copyright) in relation to the broadcasting right or the cable transmission right in a work or other subject-matter that was in force immediately before the commencing day continues to have an effect on and after that day as if it was a licence, contract or arrangement in respect of the communication right in that work or other subject-matter, but subject to any contrary intention appearing in it and the Copyright Act as amended by this Act applies in relation to that licence, contract or arrangement accordingly.'

62 Libby Baulch, ACC, *Transcript*, p. 267.

Item 3(2)

6.62 Item 3(2) states that the new right to communicate will not apply in relation to a broadcasting or diffusion right that was assigned before the commencing day. The Explanatory Memorandum states that

The provision has the effect that where copyright has been assigned prior to the commencement of the proposed legislation, that assignment would not include the new rights conferred by the legislation.⁶³

6.63 The Committee's attention was drawn by a number of organisations to a perceived difficulty with the operation of item 3(2) of Schedule 2. Screenrights, FACTS, FARB, APRA submitted that the effect of item 3(2) is that an assignment of the broadcasting or diffusion right in a work or other subject matter made before the commencing day will cease to have effect after that date.⁶⁴ Telstra agreed with their conclusion, adding that at the least, assignments of the broadcast and diffusion rights should continue to take effect according to their terms.

6.64 The Committee notes that the legislative intention was to preserve the existing regime in respect of assignments of the broadcast and diffusion rights.⁶⁵ For the reasons given above, relating to the desire to treat licences and assignments identically, the Committee concludes that item 3(2) should be deleted.⁶⁶

Recommendation 37

6.65 **The Committee recommends that item 3(2) of the Copyright Amendment (Digital Agenda) 1999 be omitted.**

63 Explanatory Memorandum, para. 439.

64 FARB, *Submissions*, p. S101; APRA, *Submissions*, p. S93; FACTS, *Submissions*, p. S120; Screenrights, *Submissions*, p. S161.

65 AGD & DCITA, *Submissions*, S750a.

66 Telstra Corporation Limited, *Submissions*, p. S461.

Minor drafting errors

- 6.66 The Committee agrees with the suggestions made by the Australian Copyright Council (ACC) that there appear to be typographical errors in proposed s. 135ZN, regarding the copying of published editions by institutions assisting persons with a print disability.⁶⁷

Recommendation 38

- 6.67 **The Committee recommends that the Copyright Amendment (Digital Agenda) Bill 1999 be amended so that the last three lines of proposed section 135ZN read as follows:**

... a body administering an institution assisting persons with a print disability for use in the provision, whether by the institution or otherwise, of assistance to such persons.

Kevin Andrews MP
Chair
November 1999

⁶⁷ ACC, *Submissions*, p. S367.