

**JOINT SUBMISSION FROM THE ATTORNEY-GENERAL'S DEPARTMENT
AND THE DEPARTMENT OF COMMUNICATIONS, INFORMATION TECHNOLOGY AND
THE ARTS TO THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
INQUIRY INTO THE *COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999***

INTRODUCTION

Officers of the Attorney-General's Department and the Department of Communications, Information Technology and the Arts appeared before the Committee on 23 September 1999 to provide oral evidence on the *Copyright Amendment (Digital Agenda) Bill 1999* (the Bill). Officers of the Departments have also provided extensive briefing materials and assistance to the Committee's Secretariat. Further to the information already provided, the following submission is put forward to assist the Committee in its consideration of the Bill.

2. The submission addresses the following issues:
 1. Background to the development of the Bill;
 2. Issues raised in relation to the Exposure Draft Bill and the Government's response;
and
 3. Issues raised after the Bill's introduction and the Government's policy position.
3. The Departments also look forward to providing a further supplementary submission in response to the issues raised during the public hearings on the Bill conducted by the Committee, as discussed with the Committee's Secretariat.

1. BACKGROUND TO THE DEVELOPMENT OF THE BILL

1.1 The *Copyright Amendment (Digital Agenda) Bill 1999* was introduced into the House of Representatives on 2 September 1999. The Bill implements the most comprehensive package of reforms to Australian copyright law since the enactment of the *Copyright Act 1968* (the Act). It is the Government's major copyright priority, and will update Australia's copyright law to meet the challenges posed by new communications technologies, particularly the Internet.

1.2 The Bill is part of the Government's strategic framework for the development of the information economy in Australia. It forms the Government's main initiative to address the challenges for copyright posed by rapid developments in communications technologies. The reforms implemented in the Bill are an important part of establishing a legal framework to encourage online activity.

1.3 The Bill implements the Government's decision on the Digital Agenda copyright reforms announced on 30 April 1998. The central aim of the Bill is to ensure that copyright law continues to promote creative endeavour, and at the same time, allow reasonable access to copyright material through new technologies.

1.4 The reforms are based largely on the proposals in the Discussion Paper, *Copyright Reform and the Digital Agenda*, which was released in July 1997. The proposals in the Discussion Paper built upon the recommendations made in the 1994 report of the Copyright Convergence Group, which, amongst other things, recommended the introduction of a broadly-based right of transmission to the public.

1.5 The reforms are also consistent with new international standards to improve copyright protection in the online environment adopted in the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty. The enactment of this Bill will be a major step towards aligning Australia's copyright laws with these standards. Many countries have signed these new treaties including European Union countries, Canada and Indonesia. The United States has recently ratified both these treaties. Neither treaty, however, is yet in force since in each case 30 countries must have deposited instruments of ratification or accession for this to occur.

1.6 The centrepiece of the Bill is a new technology-neutral right of communication to the public. The new right will replace and extend the existing technology-specific broadcasting right which currently only applies to "wireless" broadcasts. Further, the new right will replace the limited right to transmit to subscribers to a diffusion service. The new right of communication to the public also encompasses the making available of copyright material online. The exercise of the "making available" right would include the uploading of copyright material onto a server which is connected to the Internet.

1.7 The Bill includes an important package of exceptions to the new right of communication to the public, and the creation of new exceptions in relation to existing rights. As far as possible, the exceptions replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment. The existing fair

dealing exceptions are applied to the new right of communication to the public and also apply to electronic reproductions. The 'reasonable portion' test is extended to apply to the reproduction for the purposes of research or study of literary and dramatic works in electronic form. The Bill also extends the existing exceptions for libraries and archives to the reproduction and communication of copyright material in electronic form. A new exception is introduced for temporary copies made in the course of the technical process of making or receiving a communication which includes the browsing of copyright material online.

1.8 The Bill extends the existing statutory licence scheme for educational institutions to permit these institutions to make electronic copies of works and to communicate them to students for educational purposes, subject to the payment of remuneration to the copyright owners. The Bill also implements a new statutory licence scheme to allow the retransmission of free-to-air broadcasts subject to the payment of equitable remuneration by the retransmitter to the underlying rights holders.

1.9 Enforcing copyright in the digital environment is a major concern for copyright owners as digital technology facilitates the transmission of multiple infringing copies of copyright material. In response to these problems, the Bill introduces new enforcement measures. It provides civil remedies and criminal sanctions against the manufacture and dealing in devices for the circumvention of technological protection measures (eg software to break password protected copyright material). The Bill also provides civil remedies and criminal sanctions against the intentional removal or alteration of electronic rights management information (or RMI), such as digital watermarks. The Bill further proscribes certain activities in relation to copyright material from which the attached RMI has been removed or altered.

1.10 The Bill also introduces enforcement measures to deal with the unauthorised reception of subscription broadcasts. It provides civil remedies and criminal sanctions against the manufacture and dealing in decoding devices for the unauthorised reception of encoded subscription broadcasts (eg decoders to allow the unauthorised reception of pay TV signals).

1.11 Telecommunications carriers and carriage service providers (including Internet Service Providers - ISPs) play a key role in the online delivery of content and the operation of the information economy. To encourage continued investment in these crucial new online businesses, the Bill clarifies and limits the liability of carriers and ISPs in relation to activities undertaken by customers using their facilities.

1.12 The Bill also includes amendments to adopt some outstanding recommendations contained in the Copyright Law Review Committee's 1995 report, *Computer Software Protection* to fine-tune the existing protection of computer software.

2. ISSUES RAISED IN RELATION TO THE EXPOSURE DRAFT BILL AND THE GOVERNMENT'S RESPONSE

2.1 The Attorney-General and the Minister for Communications, Information Technology and the Arts released an exposure draft of the Bill for public comment on 26 February 1999. The Government received over 80 submissions and held numerous meetings with affected interests including three workshops on the key areas relating to exceptions, enforcement measures and carrier and ISP liability. We have outlined below key issues raised by copyright interests in relation to the exposure draft and the main amendments made to the Bill in response to these issues.

Fair dealing and exceptions for libraries/archives

Reasonable portion test

2.2 The fair dealing exception for research and study is normally subject to a number of factors (see s.40(2) of the Act). These include users having to make an assessment in relation to the potential market for the work and the effect of their use on that market. Such consideration can require some technical expertise which the ordinary user may not have.

2.3 Under the Act as it currently stands, copying of a reasonable portion of a literary, dramatic or musical work for the purposes of research or study is deemed to be a fair dealing under s.40(3) to provide a simpler means for users to access the fair dealing provisions. A "reasonable portion" is defined under s.10(2) to be up to 10% of the number of pages in a published edition of a literary, dramatic or musical work. Alternatively, if the work is divided into chapters, a reproduction will be taken to contain a reasonable portion of the work if the number of pages copied does exceed 10% of the work but only contains the whole or part of a single chapter of the work.

2.4 The definition of "reasonable portion" also plays a crucial role in defining a specific quantum upon which the library and archives provisions and educational statutory licence scheme are based.

2.5 The exposure draft Bill extended the reasonable portion test to the digital environment (see Item 16 of the exposure draft Bill). It deemed that copying of up to 10% of the number of words in a published literary, dramatic or musical work in electronic form would constitute a reasonable portion. Copyright interests identified practical problems with the application of the reasonable portion test (as extended in the exposure draft) to musical works in electronic form. Copyright owners also raised concerns about the level of copying which could be undertaken if the test applied to electronic databases and computer programs.

2.6 In response to these concerns, the reasonable portion test has been more narrowly defined so that it does not apply to musical works in electronic form or computer programs and databases (see Items 19 and 20). Further, the Bill now provides that if the work is divided into chapters, the reproduction will be taken to contain a reasonable portion of the

work if the number of words copied does exceed 10% of the work but only contains the whole or part of a single chapter of the work. This has been implemented to provide greater consistency with the current definition of reasonable portion which applies to copyright material in hardcopy form. The Bill also limits the ability to make serial reproductions so that a person may not reproduce more than one reasonable portion from the same work under the reasonable portion test.

Exceptions for libraries and archives

2.7 Under exceptions in the existing Act, libraries and archives can make copies of copyright material for library users and other libraries without infringing copyright. The exposure draft extended these exceptions to the electronic reproduction and communication of copyright material (see Items 44 - 61 of the exposure draft Bill).

2.8 Copyright owners objected strongly to these exceptions. They argued that the exceptions would allow libraries to compete with publishers in the emerging markets for online delivery of small portions of works and articles. They also stated that libraries would be able to build up electronic databases of works requested by users in competition with commercial publishers. Further, it was argued that if libraries could electronically supply material to other requesting libraries, this would also seriously affect publishers' sales to libraries. As the exceptions in the exposure draft were not limited to material held in the libraries' collections, libraries could potentially circumvent technological protection mechanisms then supply these works without having to acquire them as part of their collections. Further, copyright owners argued these problems could be exacerbated if corporate libraries could rely on the library and archives exceptions.

2.9 Libraries and archives objected to the exposure draft proposal that fair dealing reproductions could not be made by library users of electronic material made available onsite. Museums and galleries also argued that the provisions should allow a greater use of technology in preserving and allowing access to original artistic works held in their collections.

2.10 The Government implemented a number of changes to the exposure draft to take into account the concerns of both copyright owners and users. Generally, these included narrowing the libraries and archives provisions to better protect emerging online markets. They also included amendments to ensure that reasonable access was maintained and that libraries and archives could rely upon the exceptions to take full advantage of new technologies. For example, the amendments include allowing fair dealing reproductions in hard copy form to be made from electronic material made available within the premises of a library or archive (see Item 54). They also include the extension of the exceptions for libraries and archives (including museums and galleries) to enable such institutions to digitally reproduce artistic works for preservation purposes and make those reproductions available to the public.

Definition of "library"

2.11 A new definition of "library" has been inserted since the exposure draft (see Item 11). The definition of "library" now excludes libraries owned by persons conducting business for profit if such persons maintain the library mainly or solely for the purposes of their business. Effectively, the definition now excludes for-profit libraries, for example, those operated by corporations and law firms, so that such libraries will not be able to rely on the libraries and archives exceptions. Importantly, the new definition specifically includes libraries operated for the purposes of for-profit educational institutions.

Supply of material in electronic form by libraries and archives to users

2.12 Currently, s.49 of the Act provides an exception that permits libraries and archives to make a copy of a work for a user for the purposes of research or study. The exposure draft extended this provision to the reproduction and supply (including by electronic communication) of electronic copies of articles or reasonable portions of works in response to user requests for research and study purposes. This exception has now been clarified so that it only applies to reproductions of published works that are held in the collection of the library or archives (see Items 49 and 51). This means that in most cases payments will have been made to the publisher for the acquisition of the material.

2.13 The exception which allows libraries and archives to make and communicate electronic reproductions to users has been further amended. When a library or archives makes a communication to a person in response to a user request, the response must now include a notice with words to the effect that the reproduction has been made under the exception in s.49 of the Act and the article or work is subject to copyright protection. The purpose of the notice is to warn users that the material is subject to copyright protection. Further, any reproduction made by the library for the purpose of the communication must be destroyed as soon as practicable after it is communicated to the requesting user (see Item 56). This provision is intended to prevent libraries and archives from building up electronic collections of articles or reasonable portions of works as a result of communicating them to users under s.49.

Making available of copyright material in electronic form within libraries

2.14 The exception that allows libraries and archives to make material acquired in digital format available online on the institution's premises has been broadened. Copyright users raised concerns that under the exposure draft Bill, they could not make fair dealing hard copies of electronic material. This was inconsistent with users' ability to make fair dealing photocopies of hard copy material in a library's collection. In response to these concerns, s.49(5A) has been amended so that users will be able to make a fair dealing hard copy of such a work made available online on the premises of a library or archives (see Item 54). The provision has been clarified so that material made available online within institutions'

premises should not be able to be reproduced electronically or communicated by users using libraries' or archives' facilities.

Supply of copyright material in electronic form by libraries or archives for other libraries or archives

2.15 Under s.50, libraries and archives may make a copy of a work for other libraries and archives for certain purposes. The exposure draft extended this exception to the electronic reproduction and communication of copyright material (see Items 48-49 of the exposure draft Bill). This exception has since been narrowed so that the supply of articles and reasonable portions of works in electronic form is subject to the commercial availability test (see Item 64).

2.16 The commercial availability test is intended to apply so that an article or reasonable portion of a work in electronic form cannot be supplied to another library or archives where *that article or reasonable portion* is available within a reasonable time at an ordinary commercial price. This differs from the supply of copyright material to other libraries and archives in hardcopy form. Currently, under the Act the supply of such material is only subject to the commercial availability test where more than an article or reasonable portion is supplied. The Bill preserves this situation in relation to copyright material in hardcopy form. The effect of the provision is to require libraries to acquire their own copies of articles and reasonable portions of works in electronic form if they are commercially available.

Exceptions for works copied for preservation purposes

2.17 The exposure draft provided amendments that extended the exceptions for libraries and archives (including museums and galleries) to enable such institutions to digitally copy and communicate works in their collections for preservation purposes (see Items 56 - 61 of the exposure draft Bill). Part of this exception was limited to works communicated to officers of the library or archives to be accessed at computers within the institution's premises. Museums and galleries submitted that the exception should be expanded to allow the copying of artistic works and communication of these works to the public within the institution's premises on computers that allow viewing only.

2.18 In response to these concerns, a provision has been inserted to allow libraries and archives to make available to the public online reproductions of original artistic works, subject to certain conditions (see Items 75). This exception is limited to "preservation reproductions", which are defined to be reproductions made for the purpose of preserving the original version of the work against loss or deterioration (see Item 78). In order to rely on this exception, the library or archives would need to ensure that the material is only made available within its premises on a computer terminal that cannot be used to make an electronic or hard copy reproduction, or to communicate the reproduction.

Exception for temporary copies

2.19 The exposure draft Bill provided a new exception from copyright infringement for temporary copies made in the course of the technical process of making a communication, or in the course of looking at material on a computer screen (see Items 43 and 81 of the exposure draft Bill). This provision was generally supported by both copyright users and carriers and ISPs. Copyright users, however, requested clarification that the exception also applied to copies made as a result of the reception of a communication. Further, users submitted that the provisions should be drafted using more technology-neutral language. Copyright owners made a number of suggestions for the narrowing of the proposed exception. These included qualifying the exception so that it only applied to temporary copies which have no independent economic value. Copyright owners also argued that the exception should not apply where the communication was not authorised by the copyright owner.

2.20 In response to these concerns, the exception has been clarified so as to apply to temporary copies made as part of the technical process of making or receiving a communication. As stated in the Explanatory Memorandum, the reception of a communication includes the browsing of copyright material online. The exception was also amended so that it does not apply to temporary copies made in the course of an unauthorised communication (see Items 45 and 94). The provision has also been expressed in more technology-neutral language (ie removing reference to material on computer screens). The exception includes temporary copies made in the course of receiving an infringing communication. For example, a person will not be liable for temporary copies made as a result of viewing a particular website (ie receiving a communication) where copyright material has been made available without the licence of the copyright owner.

Statutory licence for educational institutions

2.21 The exposure draft Bill extended the existing statutory licence scheme for the reproduction of copyright material in hardcopy form by educational institutions to the reproduction and communication of copyright material in electronic form (see Items 91-95 of the exposure draft Bill). Copyright owners and users raised concerns that the proposed extended statutory licence scheme would be difficult to implement in practice.

2.22 In response to these concerns, a new scheme for the electronic use of copyright material by educational institutions has been proposed (Items 124-151, 178-199, 204-210). The new scheme is drafted broadly to enable it to encompass future technological developments. The basic limits under the current statutory licence as to what amount of copyright material can be copied will apply to the new scheme (see Item 151). The key to the new scheme is flexibility based upon agreement between the relevant administering body and the collecting society. The Bill provides a set of minimum requirements to protect copyright material reproduced and communicated in electronic form (see Item 189).

2.23 The new system aims to avoid the technology-specific requirements of the current record and sampling systems. The new electronic use system is broad enough to encompass

electronic copyright management systems or what ever system the relevant parties agree to use. If the parties fail to agree on the amount of equitable remuneration payable or the appropriate system to determine this, the parties have recourse to the Copyright Tribunal.

2.24 Educational institutions assisting persons with a print or intellectual disability raised concerns that the exposure draft Bill did not extend their statutory licences to material in electronic form. The Bill has been amended to extend these statutory licences to the electronic environment.

Enforcement measures

Circumvention devices

2.25. The exposure draft provided civil remedies and criminal sanctions against the manufacture and dealing in devices for the circumvention of technological copyright protection measures (such as computer locks and password protection) (see Items 84-90 of the exposure draft Bill). Copyright owners expressed concerns that the provisions were not practically enforceable. Specifically, they stated that the proposed exception to the provisions was too broad as a result of the mental requirement that the manufacturer knew, or was reckless as to whether, the device would be used for the purposes of infringing copyright. Copyright owners also argued that a wider range of activities should be proscribed, including the distribution and use of circumvention devices and the making available of such devices online. Copyright users were generally supportive of the provisions.

2.26 In response to the concerns raised, the enforcement measures relating to circumvention devices have been amended to make them more practically enforceable. The mental requirement which was criticised in the exposure draft (as described above) has been removed. In substitution, specific exemptions (“permitted purposes”) have been inserted to allow for the practical operation of educational, government, library and certain other exceptions (see Items 98 and 100, ss.116A(7) and 132(5J)). In addition, further activities have been proscribed, including the distribution and making available of circumvention devices online (Items 98 and 100, ss.116A(1)(b) and 132(5C)). Other less significant amendments have also been made to the provisions.

Electronic rights management information

2.27 The exposure draft contained criminal sanctions against the intentional removal or alteration of electronic rights management information (RMI) and commercial dealings with copyright material whose electronic rights management information has been removed or altered (see Item 87 of the exposure draft Bill). RMI includes “digital watermarks” which provide information about the copyright owner and the terms and conditions of the use of the material. Copyright owners argued that equivalent civil remedies should be included in the Bill to allow copyright owners to take action against persons who remove or alter RMI. In response to this concern, the Bill has been amended to introduce civil remedies against the removal or alteration of electronic rights management information and commercial

dealings with works whose electronic rights management information has been removed or altered (see Item 98, ss.116B and 116C).

Encoded subscription broadcast signals

2.28 New enforcement provisions have been included to introduce civil remedies and criminal sanctions against the manufacture and dealing in devices for the unauthorised reception of encoded subscription broadcast signals (see Item 104). Such devices include broadcast decoders which enable the unauthorised reception of cable pay TV signals. There were no provisions in the exposure draft dealing with this issue. These provisions have been inserted in response to concerns raised by subscription broadcasters.

Statutory licence for retransmission of free-to-air broadcasts

2.29 Currently, retransmitters, such as cable pay TV operators, are able to retransmit free-to-air broadcasts without the permission or remuneration of either the owner of copyright in the broadcast or the owner(s) of copyright in the underlying works, such as any music or written material.

2.30. The exposure draft Bill attempted to address this in relation to the underlying works included in the broadcast through implementing a statutory licence for the retransmission of broadcasts based on the s.109 statutory licence (which deals with the broadcast of sound recordings) (see Items 97, 98 and 101 of the exposure draft Bill). Both copyright owners and users submitted that the proposed scheme would be difficult to administer. In response to these concerns, the Bill implements a new scheme based on Part VA of the Act (which provides a statutory licence for the copying of broadcasts by educational institutions). The new scheme will be more effective in its practical operation (see Item 200).

3. ISSUES RAISED AFTER THE BILL'S INTRODUCTION AND THE GOVERNMENT'S POLICY POSITION

3.1 This section of the submission identifies preliminary issues raised by interests in response to the introduction of the Digital Agenda Bill. The Departments would appreciate the opportunity to provide a further submission addressing the concerns raised by copyright interests during the Committee's public hearings.

Fair dealing and exceptions for libraries/archives

Reasonable portion test

Issue: The extension of the "reasonable portion" test to published literary and dramatic works in electronic form (see Items 19-20, s.10(2)).

3.2 The reasonable portion test assists users in determining what is a fair dealing and consequently what copyright material can be copied without remuneration to the copyright owner. It also plays a vital role in the library and archives exceptions and the educational statutory licence scheme .

Interests' responses

3.3 Copyright owners argue that it is inappropriate to use a quantitative test to measure what is a reasonable portion and hence a fair dealing in the digital environment. Portions of digital works are the commodity that will be traded in online markets. Allowing these portions to be freely copied will destroy this market for authors and copyright owners. A better approach would be to adopt a qualitative test to determine a reasonable portion. The Bill should have regard to a similar set of factors as currently set out in s.40(2) in relation to fair dealing for the purposes of research or study. Such factors include the purpose of the copying and its effect on the potential market for the work.

3.4 Copyright users on the other hand argue that a reasonable portion test is practicable and easily determined. Extending the quantitative test to the digital environment protects the role of libraries to provide access to information. A qualitative test (requiring the user to have regard to technical matters such as the effect of their activity on the market for the material) is difficult to determine and administratively unworkable. Libraries and individual users are not in a position to easily assess such factors.

Government policy

3.5 The purpose of the reasonable portion test is to provide certainty for users. It provides a specific quantity which is deemed to be a fair dealing when copied for the purposes of research or study. It also provides a quantum which is essential to the operation of the library and archives provisions and the statutory licence for the reproduction of copyright material by educational institutions. It has been extended into the online environment to ensure the continued practical application of these exceptions. The test continues to safeguard the interests of copyright owners, for example, it does not apply to computer

programs or databases as copying 10% of these works could consist of a substantial amount of material. Further, the test does not extend to musical works in electronic form.

3.6 Failing to extend the reasonable portion test to the online environment would provide less certainty for copyright users in the digital environment. For example, libraries and educational institutions would not be in a position to readily assess the effect of the copying on the potential market for the work.

Definition of "library"

Issue: Change in definition of library to exclude for-profit libraries. Consequently, for-profit libraries will no longer be able to rely on the libraries exceptions (Item 11, s.10(1)).

Interests' responses

3.7 Copyright users argue that the exclusion of private-sector libraries from the library and archives exceptions prevent these libraries from being a ready and widely accessible part of Australia's information resources. The changes will mean that public sector libraries can no longer request inter-library loans from specialised private library collections, and vice versa. The resulting split between private and public sector libraries will be administratively unworkable and the cost of research will rise. Collective licensing arrangements between CAL and private sector libraries will not guarantee blanket coverage of all copyright owners. The issue should be deferred for consideration as part of the Government's response to the Copyright Law Review Committee's Simplification Report.

3.8 Copyright owners argue that the broad definition of library as it currently stands means that for-profit institutions can rely on the library exceptions for the free use of copyright material for the purposes of conducting their business. These institutions normally pay for the use of valuable resources but they can freely use copyright material under the library and archives provisions. Such a broad definition poses a threat to new online markets for copyright material.

Government policy

3.9 Allowing for-profit institutions to take advantage of the library and archives exceptions deprives copyright owners of a potential source of revenue. The definition of "library" has been amended so as to narrow the scope of the exceptions in a way which preserves the role of libraries and archives in providing access to information to the general public and non-profit researchers, whilst at the same time excluding libraries operated solely or mainly for the purposes of a business. Libraries owned by for-profit educational institutions will still be able to rely on the libraries exceptions, recognising the important role libraries play in facilitating access to copyright material for students.

Extension of s.49 to electronic reproduction and communication

Issue: Extension of the s.49 exception (which currently allows for the copying by libraries and archives of copyright material in hardcopy form for users) to the reproduction and communication of material in electronic form (Items 48-57, s.49).

Interests' responses

3.10 Copyright owners argue that the exception for libraries and archives should not be extended to the digital environment. Small portions or articles will be the tradeable commodities in new online markets. Allowing libraries to freely copy small portions or articles will directly interfere with the rights of copyright owners to commercially exploit their works online. Libraries should be required to negotiate licences with publishers for the online communication to researchers of articles and reasonable portions. Alternatively electronic reproduction and communication of material by libraries and archives to users should be done under a statutory licence in return for the payment of 'equitable remuneration' to a collecting society.

3.11 Copyright users argue that the exception should be extended so that libraries and archives can continue to provide access to information for users, regardless of the information's form. The conditions imposed by the Bill are more than sufficient to protect copyright owners' interests. Councils argue that their local libraries could not afford to make additional payments for the electronic supply of the same portions of material that may currently be supplied for free to researchers in hard copy form.

Government policy

3.12 It is the Government's policy that libraries and archives should be able to use new technologies to provide access to copyright material for research and study purposes to the general community without imposing additional cost burdens on the library sector.

3.13 The extension of the exception in s.49 merely enables libraries to supply material electronically in similar limited circumstances to those in which they supply hard copies. The exception was originally enacted to enable the libraries to make and send 'fair dealing copies' on behalf of users (ie, copies which users would be entitled to make for themselves under fair dealing provisions, if they had access to the material). The exception was therefore designed to facilitate legitimate access for research and study purposes, particularly for remote and regional users.

3.14 To ensure the economic rights of owners of copyright material are not unreasonably prejudiced in the digital environment, the extension of the exception in s.49 imposes new conditions on the reproduction and communication of material in electronic form by libraries and archives. For example, the exception applies only to those published works already in the collection of the library or archives. Libraries and archives are also required to provide copyright notices to users before supplying them with electronic reproductions. The institution must destroy any reproductions made in the course of supplying the material

to the user as soon as practicable after the communication is made so as to prevent libraries and archives building up electronic collections of articles or reasonable portions of works. Further, libraries and archives which generally make works in digital format available online can only do so within the premises on terminals that cannot be used to communicate or electronically copy the material. Users, however, will be able to make fair dealing hard copies of this material.

3.15 The Government views the extension of the exceptions as necessary if libraries are to maintain their public role of providing reasonable access to research information in the digital environment, particularly in relation to regional and remote users.

Inter-library supply of copyright material

Issue: Different application of commercial availability test for electronic and hardcopy material in inter-library supply provisions (Item 64, s.50(7A) and (7B)).

Interests' responses

3.16 Copyright users argue that it is unfair to apply a stricter commercial availability test to material in electronic form as compared to material in hardcopy form. The Bill applies the commercial availability test to all electronic works, including articles from periodical publications, regardless of how much of the work or article is to be copied. This will require libraries to pay for material where the equivalent hardcopy form can be copied under the exception. This could involve enormous costs if electronic publishers will only sell whole works and not portions. Libraries are concerned that the availability test should only apply to the part requested. Otherwise they could be required to buy an entire electronic work when all the user needs is a small part of the work.

3.17 Copyright owners argue that portions of works and articles in electronic form will be the basis for online markets in these materials. It is fair to apply a stricter commercial availability test to material in electronic form in order to remunerate authors and publishers. If the test is not stricter, then one library could have access to electronic material and it could then disseminate the material very quickly and widely on the basis of the inter-library loan provisions.

Government policy:

3.18 The Bill draws a distinction between the inter-library supply of reasonable portions of works and articles in hardcopy and electronic form, in recognition of the differences which exist between these formats. Copyright material in electronic form can be much more easily, cheaply and conveniently disseminated, so it is not possible to apply the print-based rules without amendment.

3.19 The inter-library loan exception will not play as important a role in the electronic environment as it does in the print environment. As a result of the extension of s.49 to the supply of reasonable portions of works and articles to users by means of electronic communication, users will be able to send a direct request to the original library which has

acquired the copyright material. Users will therefore not have to rely as heavily upon inter-library supply as they have done in relation to copyright material in print form.

3.20 It is important to note that the intention of the Bill is to require libraries and archives to acquire their own copies of articles and reasonable portions of works where the article or reasonable portion is commercially available. It therefore does not apply to the commercial availability of the entire periodical publication or work of which the article or reasonable portion forms a part. The limitation is designed to protect new online markets for articles and portions of works.

Preservation copying of artistic works

Issue: Scope of the exception for communication and reproduction of artistic works for the purposes of preservation (Items 73-78, s.51A).

3.21 The exception permits archives (including museums and galleries) to copy and communicate artistic works in their collections subject to certain conditions (for example, an original artistic work may be copied to prevent deterioration or for the purposes of research being carried out on the premises).

Interests' responses

3.22 Copyright owners argue that it is unfair to extend the exception to communication to the public and they should be remunerated for this use of copyright material.

3.23 Copyright users argue that extending the exception will allow galleries and museums to provide greater access to their works for the general public. For example, the National Gallery of Australia has approximately 90 000 works in its collection, the majority of which are still in copyright. Yet it can only display 2 000 works in its exhibition spaces. There are many works in its collection which have never been made available to the public that can now be made available in digital form.

Government policy

3.24 Cultural institutions around the world, including in Australia, are taking advantage of new technologies to further their goals of preserving cultural heritage and making it available to the public. Digital technologies present an opportunity for cultural institutions to allow access to the works in their collections that are in storage due to limitations on physical exhibition space.

3.25 Subsection 51A(3A) permits cultural institutions to reproduce and communicate to the public onsite all original artistic works in their collections. In response to copyright owners' concerns that this will have a negative impact on their copyright markets, the exception is subject to the following conditions: that the copies made under the exception must be within the premises of the institutions; and that the copies can only be made available on terminals from which a copy cannot be made or communicated.

Statutory licences for educational institutions

Operation of electronic use system

Issue: System of electronic use notices for reproduction and communication of material in electronic form by educational institutions (Items 124-151, 178-199, 204-210, Part VB).

Interests' responses

3.26 Copyright users argue that the electronic use system does not give educational institutions the same options that they have in the print environment. Currently educational institutions can choose between record keeping and sampling systems for hardcopy reproductions. The new system does not provide the same scope.

3.27 Copyright owners argue that the electronic use system provides greater flexibility for both copyright owners and users and will allow the development of appropriate systems as the electronic environment develops.

Government policy

3.28 The electronic use system (under the amendments to Part VB) for the reproduction and communication of copyright material in electronic form aims to avoid the technology-specific requirements of the current record system and sampling system used to determine the amount of remuneration payable for reproductions of material in print form. The new electronic use system is broad enough to encompass electronic copyright management systems or any other relevant system that the parties agree to use. This would include a system based on record keeping or sampling of the parties were to so choose. The scheme offers greater flexibility and choice of copyright management systems than the current scheme for hardcopy reproductions. It is based upon agreement between the parties and provides recourse to the Copyright Tribunal in the event of disagreement.

Distinction between systems for electronic and hard copies

Issue: Two separate schemes apply for copying of works by educational and other institutions based on the form of the works being copied. Hardcopy/analog material is dealt with separately to electronic material (Items 124-151, 178-199, 204-210, Part VB).

Interests' responses

3.29 Copyright users argue that splitting the two systems between hardcopy and electronic material will create the potential for higher licence fees to apply to material in electronic form.

3.30 Copyright owners argue that it is appropriate to treat electronic and hardcopy material differently. As electronic markets will deal in small portions and articles, the value of electronic material will be higher and should be remunerated separately.

Government policy:

3.31 The Bill introduces a new scheme for material in electronic form in response to concerns raised by copyright owners and users that it is not appropriate to apply the current print based scheme to copyright material in electronic form. The new scheme will allow parties to agree on the value of the reproductions of material in electronic form. Potentially, copies of electronic works and articles may be more valuable, however, this is a matter for parties to agree upon. Parties have recourse to the Copyright Tribunal in the event of disagreement.

Insubstantial portions

***Issue:* Exception for the reproduction and communication of insubstantial portions of works in electronic form by educational institutions. Such copying is not remunerated under the educational statutory licence scheme (Item 151, s.135ZMB).**

Interests' responses

3.32 Copyright owners argue that educational institutions should not be able to freely copy insubstantial portions of works and communicate them in electronic form. Small portions or articles will be the tradeable commodities in new online markets. Allowing educational institutions to freely copy small portions or articles will directly interfere with the rights of copyright owners to commercially exploit their works online. Copying of insubstantial portions of electronic material by educational institutions should be remunerated under the statutory licence scheme. Copyright users argue that there is no need to separately remunerate this form of copying.

Government policy

3.33 The exception for insubstantial portions is intended to allow very small portions of literary and dramatic works, ie less than 1% of the total number of words in the work, to be freely copied by educational institutions. This amendment extends the insubstantial portion exception which currently applies to copyright material in hardcopy form (ie s.135ZG of the Act). The insubstantial portion test is subject to limitations in the electronic environment to prevent the test being used to circumvent the statutory licence scheme. Educational institutions benefiting from the exception cannot make a further reproduction or communication of an insubstantial portion of the same work until 14 days after the original reproduction or communication. Further, the exception prevents the simultaneous making available online of more than one insubstantial portion of the same work.

Illustrative artistic works

***Issue:* Application of statutory licence scheme to reproduction and communication of illustrative artistic works that accompany articles or works in electronic form (Item 151, s.135ZME).**

Interests' responses

3.34 Copyright owners argue that, in an online environment, users read information differently and their perceptions of the work are altered. Accompanying illustrations are no longer a minor accompaniment to the text but rather an integral element in the online context. In the digital environment, accompanying illustrations should be treated differently and remunerated separately under the statutory licence.

Government policy

3.35 The existing provision which provides for the remuneration of owners of copyright in illustrative artistic works by educational institutions has been extended to the online environment. Under the statutory licence scheme, educational institutions must pay remuneration in respect of the reproduction and communication of illustrative artistic works that accompany electronic works or articles. The provision makes it clear such remuneration must be divided between the owner/s of the copyright in the illustrative artistic work and the owner/s of the copyright in the artistic work. It is a matter for the copyright owners to determine and agree as to how the amount of remuneration is to be divided. The parties may take into account the nature of the digital environment in their negotiations. Failing agreement, the copyright owners have recourse to the Copyright Tribunal.

Exception for temporary copies

Issue: Breadth of the exception for temporary copies made as part of the technical process of making or receiving a communication (Items 45 and 94, ss.43A and 111A).

Interests' response

3.36 Copyright owners argue that the exception for temporary copying is too wide as it applies to all forms of temporary reproductions and caching. The exception should not extend to reproductions generated as a result of a caching process as caching is not technically necessary or indispensable to the process of accessing material online. Copyright owners should be able to decide what browsing can be freely undertaken. The exception should be limited to temporary reproductions that are transient, internal to the equipment used for the communication and technologically indispensable. The exception should also be limited to the reproduction right. Copyright users argue that the exception may not be broad enough as it may not extend to all forms of caching. Users have also argued that temporary copies should also be excluded from the scope of the reproduction right.

Government policy

3.37 Many temporary or incidental copies of copyright material are made in the course of the technical process of electronic uses of material on communication networks, including the Internet. The Digital Agenda Bill provides an exemption from the scope of the reproduction right (which is one of the exclusive rights comprising copyright) for temporary copies made in the course of the technical process of making and receiving an electronic communication. It is intended that the reference to temporary copies made in the course of receiving an 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). This exception will include copies made in the random access memory (RAM) of a computer or on screen.

3.38 Copyright owners' economic rights remain fully protected as they retain control over the communication which delivers the material to the computer terminal for browsing by the user. Viewing the result of the communication is analogous to reading a book. While copyright owners have been able to control the distribution of books through the reproduction right, they have never been able to control the reading of books. Similarly, copyright owners will be able to control the electronic distribution of their material through the exercise of the right of communication to the public, but not the viewing of that material on screen by the end user.

3.39 The exception also has the effect of excluding from the reproduction right copies made by certain types of caching (ie, the process whereby digital works are copied as part of the process of transmitting that work to an end user).

3.40 It is not appropriate for the Bill to provide technical detail in relation to exactly what forms of caching will fall within the scope of the new exception. Such an approach would create technology-specific legislation which would quickly become outdated as technology continues to rapidly evolve.

3.41 The temporary copies exception was also amended since the exposure draft to make it clear that it does not apply to any temporary copies made during the course of an unauthorised communication.

3.42 The new exception is an important part of the balance between the rights of owners and users of copyright. The purpose of the exception is to ensure that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised. Although most forms of caching are not technically essential to the process of communication, there is a strong public interest in providing an exception for such temporary copying for the effective, efficient and timely operation of communication networks.

Enforcement measures

Scope of prohibitions for circumvention devices

Issue: The Bill provides civil remedies and criminal sanctions against the manufacture and commercial dealing in circumvention devices but not against the activity of circumvention itself (see Items 98 and 100, ss.116A and 132(5B)-(5L)).

Interests' response

3.43 Copyright owners argue that circumvention devices are the tools for copyright piracy and their use is not legitimate. The absence of a prohibition on the use of circumvention devices undermines that ability of copyright owners to protect their work using technological measures. The provisions do not provide adequate legal protection against the circumvention of technological protection measures, contrary to what is required by the WIPO treaties. A thriving market for circumvention devices could develop if there is no prohibition on the use of such devices.

3.44 Copyright users argue that it is not necessary to prohibit the use of circumvention devices. The current provisions are consistent with the WIPO treaties and in fact go beyond what is required. It is inappropriate at this stage to ban the use of devices as there is little evidence of their widespread use and consequent harm to copyright owners' rights. There is a need to allow use of circumvention devices in some situations to enable education and research, for example, in relation to computer security.

Government policy

3.45 This is a new area of law to regulate an aspect of rapidly developing technology. The Government has provided strong remedies against the manufacture and commercial dealing in circumvention devices which will provide copyright owners with a powerful tool to combat online piracy.

3.46 A ban on circumvention devices is more effective and practical to enforce than a ban on the activity of circumvention, and is more focused on protecting the commercial interests of copyright owners. The Government believes that the most significant threat to copyright owners' rights lies in preparatory acts for circumvention, such as manufacture, importation, making available online and sale of devices, rather than individual acts of circumvention.

3.47 The enforcement of sanctions against the manufacture and dealing in circumvention devices will mainly occur in relation to public and commercial activities. This is to be contrasted with sanctions against the use of such devices which would necessitate intervention in the private sphere.

3.48 Further, a ban on the *activity* of circumvention of 'technological protection measures' could prevent users carrying out otherwise lawful activities, particularly with respect to IT security testing or fair dealing, in addition to activities carried out under other exceptions to the exclusive rights of copyright owners.

Scope of exemptions to circumvention device provisions

Issue: Breadth of the “permitted purposes” which provide exemptions to the sanctions against the commercial dealing and manufacture of circumvention devices (Items 98 and 100, ss.116A and 132(5A), (5B) and (5J)).

Interests’ response

3.49 Copyright users argue that the exemptions are not broad enough to properly facilitate the exceptions to copyright owners’ exclusive rights. The “permitted purposes” are too technology-specific and should instead provide for any non-infringing purpose. The requirement for a signed declaration in relation to supply of a circumvention device for a permitted purpose will inhibit the practical operation of the scheme. It is overly reactive and will stifle the development and use of software tools used for security purposes.

3.50 Copyright owners argue that the exemptions are too broad and should be removed. The exemptions significantly undermine the operation of the enforcement prohibitions because they contain such a wide range of permitted purposes. They argue that the breadth of the exceptions (for example, the library and archives exceptions) in conjunction with the problematic scheme for signed declarations, will facilitate the evasion of liability.

Government policy

3.51 The current enforcement measure provisions represent a balance between strong sanctions against the manufacture and dealing in circumvention devices and the continued operation of the exceptions to copyright owners’ exclusive rights in the digital environment. In order to ensure that the exceptions to copyright owners’ rights can continue, specific exemptions to the sanctions against circumvention devices have been identified.

3.52 These exemptions, described in the Bill as “permitted purposes”, relate to specific exceptions defined in the Copyright Act. The permitted purpose exemptions are designed to prevent the use of technological protection measures to restrict the scope of the recognised exceptions, and to ensure reasonable access to copyright material in electronic form.

3.53 At the same time, however, the interests of copyright owners are protected. A signed declaration must be provided to a person supplying a circumvention device or service, stating that the device or service is to be used only for an identified permitted purpose. The system of requiring declarations is not overly onerous and is necessary to ensure as far as possible that dealings in circumvention devices are only made for permitted purposes. The Government believes that the enforcement measure provisions have been drafted in a way which both protects copyright owners but also allows for legitimate activities under the exceptions.

Scope of prohibitions for decoding devices

Issue: The Bill provides civil remedies and criminal sanctions against the manufacture and commercial dealing in devices for the unauthorised reception of encoded subscription broadcasts. The provisions do not prohibit the use of such devices nor do they deal with devices for the reception of encrypted free-to-air broadcasts (see Item 104, new Part VAA).

Interests' response

3.54 Broadcasters argue for a ban on the use of broadcast decoding devices. Free-to-air broadcasters contend that the ban should not only apply to devices for the unauthorised reception of encoded subscription signals, but also extend to devices used to decode free-to-air signals (where they have been encrypted to ensure licence area integrity). In particular, they are concerned that decoders obtained and suitable for use within regional areas are being imported into metropolitan areas. These decoders are used in commercial premises (largely hotels and clubs) in order to avoid metropolitan blackouts on live television broadcasts. Therefore free-to-air broadcasters would like to see the Bill extended to include a prohibition on the use or possession of a decoding device to receive a free-to-air signal outside its intended licence area.

Government policy

3.55 New enforcement provisions have been included to introduce civil remedies and criminal sanctions against the manufacture and dealing in devices for the unauthorised reception of encoded subscription broadcast signals (see Item 104, new Part VAA). The unauthorised reception of an encoded broadcast is not itself an infringement of the copyright in the broadcast, or in any of the underlying material in the broadcast. Rather, the activity is best categorised as an avoidance of contractual obligations (including payment) which would ordinarily be imposed by the subscription broadcaster. The enforcement measure provisions, therefore, are designed to protect such contractual obligations.

3.56 In the area of enforcement, the Government's policy is to ban the manufacture and commercial dealing in devices rather than the use or the possession of such devices. It is more practical and effective to enforce a ban against the manufacture and dealing in devices rather than individual use or possession. The Government believes that the main threat to copyright owners' rights lies in the preparatory acts for unauthorised reception (such as manufacture and commercial dealing in decoding devices) rather than individual acts of unauthorised reception. Enforcement actions against individuals for the use and possession of broadcast decoding devices could involve heavy handed intrusion into the private sphere.

3.57 One way in which the specific concerns of free-to-air broadcasters in relation to receipt of free-to-air signals outside a licence area may be dealt with is by provisions in broadcasting legislation.

Broadcasting and retransmission issues

Subsistence of copyright in non-broadcast communications

Issue: Subsistence of copyright in non-broadcast communications such as program carrying signals (see Items 1, 83, 85 and 86, ss.10(1), 87, 91, 99).

Interests' response

3.58 Free-to-air broadcasters contend that copyright protection should be extended to “non-broadcast” program carrying signals. This relates to the transmission of a ‘broadcast’ between affiliated TV stations (ie network feeds). Free-to-air broadcasters are concerned that where live broadcasts are relayed from one station to another for a delayed broadcast, that live signal may be intercepted and rebroadcast without infringing copyright (as there may be no underlying copyright material included broadcast eg a live broadcast of a football match).

Government policy

3.59 Under the Digital Agenda Bill a “broadcast” is a specific type of communication to the public. “Broadcast” is defined to mean a communication to the public delivered by a broadcasting service within the *Broadcasting Services Act 1992* (BSA) (see Item 1, s.10(1)).

3.60 A “broadcast” is also recognised as a specific category of copyright subject-matter. Item 85 amends s.91 to provide that copyright subsists in a television or sound broadcast made from a place in Australia under the authority of a licence or a class licence under the BSA or by the ABC or SBS. This simplifies the current s.91 which has a similar effect. Copyright does not extend to other forms of communications that do not fall within the category of broadcasts. As a broadcast is a specific category of subject-matter, the owner of copyright in a broadcast (see Item 86, s.99) is able to control the copying of the broadcast, the rebroadcasting of the broadcast and any further communication of the broadcast (see Item 83, s.87).

3.61 To extend copyright protection to general communications such as non-broadcast program carrying signals would go well beyond our international obligations specified under the provisions of the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (the Rome Convention 1961). However, as part of the consideration currently being given to a new treaty to update protection of broadcasting under the Rome Convention, protection of pre-broadcast signals is being proposed. It is important to note, however, that the underlying copyright material included in such communications would of course be protected under the proposed amendments. One way in which the particular concerns of free-to-air broadcasters could be dealt with is in specific broadcasting legislation relating to unauthorised reception of program carrying signals.

Conversion of broadcasts from analogue to digital format

Issue: The Bill provides in effect that a sound recording or film is taken to be copied if it is converted into or from a digital or other electronic format. Should there be an exception for broadcasters in relation to the conversion of analogue material into digital format (see Item 25, new s.21(6))?

Interests' response

3.62 Free-to-air broadcasters argue that the extension of the terms 'copy' and 'reproduction' to include digital conversions will impose onerous obligations on broadcasters who are required to simultaneously transmit both analogue and digital programs, under the *Broadcasting Services Act 1992*. Copyright material is routinely converted from analogue to digital and vice versa as part of the process of preparing and making a broadcast. Free-to-air broadcasters strongly oppose such an extension without adequate exceptions.

Government policy

3.63 The provisions relating to the terms "copy" and "reproduction" (see Items 23 and 25, ss.21(1A) and 21(6)), clarify that a reproduction of a work or the copying of a sound recording or film includes electronic or digital conversions. In the new digital environment it is increasingly important for copyright owners to control these types of activities if they are to effectively exploit their copyright material. The particular concerns of free-to-air broadcasters are of a technical broadcasting nature. One way in which these concerns could be addressed is in specific broadcasting legislation.

Number of collecting societies under the retransmission scheme

Issue: Under the Bill the Attorney-General may declare one or more collecting societies for the collection and distribution of equitable remuneration to owners of copyright in broadcasts for the retransmission of that material (see Item 200, new s.135ZZT). Should this be restricted to one society declared in relation to a particular class of copyright owners (eg owners of copyright in sound recordings)?

Interests' response

3.64 Some collecting societies argue that it is more administratively convenient and cost efficient to have a single society to deal with all rights holders. Multiple collecting societies would require copyright owners to negotiate with each society about the payment of equitable remuneration. Other collecting societies argue that the interests of the owners of different classes of copyright can differ. Further, a new licence for retransmission could be added into existing licence arrangements.

Government policy

3.65 The proposed approach leaves it open to the Attorney-General to declare different collecting societies to represent different groups of rights owners if he considers it appropriate to do so. However, it is also open to the Attorney-General to declare only one collecting society in relation to the retransmission scheme. This merely provides the scheme some flexibility in determining the appropriate collecting society or societies.

Payments to film directors under the retransmission scheme

Issue: Should film directors be paid royalties under the scheme to provide equitable remuneration to underlying copyright owners for the retransmission of broadcasts? Relevant copyright owners for the purposes of the scheme are owners of copyright in works, sound recordings and films (see Item 200, new Part VC particularly s.135ZZI and s.98 of the Copyright Act).

Interests' response

3.66 Television and film directors argue that they should be remunerated under the statutory licence scheme for the retransmission of broadcasts as copyright owners in underlying material contained in the broadcast. Further, directors contend that they should be recognised as copyright owners in films.

3.67 Producers argue that the statutory licence for the retransmission of broadcasts should not be extended to persons who are not recognised as copyright owners under the Copyright Act and the Bill. Further, producers argue that remuneration of directors is sufficiently dealt with by contractual and industrial arrangements.

Government policy

3.68 The retransmission scheme will provide for the payment of equitable remuneration to all recognised copyright owners including owners of copyright in film. In common law jurisdictions, film directors are not specifically recognised as the owners of copyright in film. This is reflected in s.98 of the Copyright Act where the maker of a film is deemed to be the copyright owner. It is therefore usually the case that the producer of the film is the owner of the copyright in the film (although directors will be owners of films where they are also makers of films). Given that directors are not recognised as copyright owners under the Copyright Act, the retransmission scheme proposed in the Bill does not provide for their remuneration.

3.69 These arrangements are long standing and well recognised in the film industry. The Government has never proposed to change these arrangements in the context of the Digital Agenda reforms to the Copyright Act.

3.70 The Copyright Law Review Committee in Part 2 of its report on the *Simplification of the Copyright Act* has addressed the issue of ownership of copyright in different forms of copyright material, including films. The Government will have regard to the concerns of directors and other interests in the film industry when considering its response to this report.

Statutory licence for broadcasts of sound recordings

Issue: Licence for the subscription broadcasting of sound recordings (Item 201, s.136).

Interests' response

3.71 Copyright owners argue that it is inappropriate to extend the statutory licensing scheme for sound recordings to subscription broadcasts of sound recordings. They argue that such a licence will allow subscription broadcasters to directly compete with and possibly displace direct sales of sound recordings by the copyright owner. The extension of the licence scheme should be removed from the Bill so that subscription broadcasters must obtain a voluntary licence from the copyright owner before they can broadcast sound recordings. Alternatively, if the licence is not removed, it should be qualified so that it only applies to sound recordings which are collectively licensed by a collecting society.

Government policy

3.72 The Digital Agenda Bill expands the definition of 'broadcast (see Item 1) to include cable transmissions in line with the definition of 'broadcasting service' in the *Broadcasting Services Act 1992*. The Bill retains and extends the existing statutory licences under the Copyright Act to 'broadcasts' in the expanded sense. Consequently, s.109 of the Act, which provides a statutory licence to broadcast sound recordings, will apply to both over-the-air and cable transmissions. However, s.109(1) of the Act specifically excludes subscription broadcasts.

3.73 Subscription broadcasters will therefore have to obtain a licence to broadcast sound recordings as they currently must do from the owners of copyright in the musical works used in the recordings. However, item 201 of the Bill amends s.136 so that the Copyright Tribunal has jurisdiction to review the reasonableness of the licences offered by record producers, as it now does to review licences offered by music copyright owners. The amendment therefore provides a means of ensuring that subscription broadcasters have access to musical content on reasonable terms.

ISP liability

Issue: Liability of carriers and carriage service providers (such as Internet Service Providers (ISPs)) for communications made using their facilities (Item 26 - ss.22(6), Items 39 and 87 - ss.36(1A) and 101(1)), Items 42 and 95 - s.39B and 112E).

Interests' response

3.74 Copyright owners argue that the direct liability provision is drafted too broadly as it absolves ISPs from all direct liability. ISPs should be liable where the ISP knows, or ought reasonably to have known, that its facilities are being used to transmit communications that infringe copyright owners' rights. The provision as drafted provides no incentives for ISPs to encourage their customers to respect copyright.

3.75 Carriers and ISPs argue that the provisions as drafted are not broad enough to capture all the possible activities of carriers and ISPs in relation to transmissions via the Internet.

Government policy

3.76 The Government recognises that carriers and ISPs play a key role in the online delivery of content and the operation of the information economy. The provisions of the Digital Agenda Bill are designed to both limit and clarify the liability of carriers and ISPs in relation to direct and authorisation liability.

3.77 Item 26 (ss.22(6)) of the Bill in effect provides that carriers and ISPs will not be directly liable for a communication where they are not responsible for determining the content of the communication. This is designed to overcome the 1997 High Court decision of *APRA v Telstra* where Telstra (as a carrier) was held liable for the playing of music-on-hold by its subscribers to their clients, even though Telstra exercised no control in determining the content of the music played.

3.78 The Bill also clarifies the position of carriers and ISPs in relation to authorisation liability. Items 39 and 87 (ss.36(1A) and 101(1)) codify an inclusive list of factors to assist in determining when an infringement has been authorised. The exposure draft was amended to add compliance with relevant industry codes of practice as an additional factor to be considered in determining whether all reasonable steps have been taken to avoid infringement.

3.79 Items 42 and 95 (s.39B and 112E) provide that a carrier or ISP is not taken to have authorised an infringement of copyright merely because they provided the facilities used by a person to undertake the infringement.

3.80 The effect of these provisions is to limit the liability of carriers and ISPs where they have little or no control over the content of the material communicated on their facilities, have no relationship to the infringer, and have taken reasonable steps to avoid infringement.