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# Fair dealing and exceptions for libraries and archives

## Introduction

2.1 Under the Copyright Amendment (Digital Agenda) Bill 1999, the right to control whether or not copyright material is communicated to the public is an exclusive right of the copyright owner. Work and other subject matter can only be communicated to the public with the permission of the copyright owner, subject to the exceptions contained in the Bill.

2.2 This chapter examines the items of the Bill that relate to exceptions to this right, described as fair dealing and exceptions for libraries and archives.

## Fair dealing

2.3 The *Copyright Act 1968* currently sets out a fair dealing exception to the exclusive rights of the copyright owner. In determining whether or not a dealing is fair, a number of factors outlined in s. 40(2) are to be taken into account. These factors include: the purpose and character of the dealing; the nature of the work or adaptation; and the effect of the dealing upon the potential market for, or value of, the work or adaptation.[1] Notwithstanding these factors, a copy is deemed to be fair if it constitutes not more than a 'reasonable portion' of a work.[2] A 'reasonable portion' is

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1 Section 103C(2) of the *Copyright Act 1968* sets out similar factors in relation to dealings with audio-visual items.

2 See s. 40(3)(b) of the Copyright Act.

defined under s. 10(2) as 10% of the number of pages in a published edition of a work, or the whole or part of a single chapter of the work.

## What is a 'fair dealing' in the digital environment?

2.4 The Bill extends the existing fair dealing and reasonable portion test to the digital environment. Under proposed s. 21(1), the Bill also expands the definition of 'reproduction' to include conversions from print to digital form and vice versa. Therefore if a reproduction of a work, including a digitisation of a work, complies with the fair dealing exception, it will not be in breach of copyright.

2.5 Under proposed ss 10(2A), (2B) and (2C), users would be able to 'reproduce' a reasonable portion of a work and not be in breach of copyright. The process of reproducing reasonable portions of works in electronic form would often necessitate libraries digitising literary works that form part of their collection. In this way, users, rather than copyright owners, could control the 'first digitisation' of reasonable portions of works.

2.6 The joint submission from the Attorney-General's Department and the Department of Communications, Information Technology and the Arts (AGD and DCITA) stated that the extension of these exceptions 'is designed to enable cultural institutions to use modern technology to its full potential in providing reasonable access to copyright material in electronic form'. It is intended that libraries would be able to scan reasonable portions of works and email them to users in remote areas for research or study.[3]

2.7 Copyright owners objected to the exceptions for fair dealing being extended to the digital environment. In particular, they argued that they should have the right to control the digitisation of their works. The Australian Copyright Council (ACC) argued that the digitisation process should not occur without the equitable remuneration of copyright owners under a statutory licence regime.[4] The ACC stated that, when the current provisions of the Copyright Act were introduced, it was reasonable to assume that fair dealing as quantified did not interfere with the activities of copyright owners. However, such an assumption was now not reasonable for two main reasons. Firstly, 'digitisation allows the easy

3 Attorney-General's Department and the Department of Communications, Information Technology and the Arts (AGD & DCITA), *Submissions,* p. S737. See items 48-53 of the Bill.

4 Australian Copyright Council (ACC), *Submissions,* p. S356. See also the Australian Publishers Association (APA), *Submissions,* p. S406.

exploitation of single articles and portions of works' and secondly, there has been an 'increase in collective licensing'.[5]

2.8 The ACC further argued that the Bill's proposal to extend the existing limitations into the digital environment does not comply with the three-step test for valid restrictions on the exclusive rights of copyright owners. The three-step test is outlined in several international treaties, to which Australia is a party, dealing with copyright protection. The test involves limitations being able to satisfy the following criteria:

- only to apply in certain special cases;
- must not conflict with a normal exploitation of a work; and
- must not unreasonably prejudice the legitimate interests of the rights owner.[6]

2.9 The ACC stated that 'normal' uses of copyright material have changed and unlicensed uses in the digital environment have wide implications for copyright owners including:

- the capacity to prejudice opportunities to protect work by technological measures as there is no requirement for educational institutions and libraries to use technological protection measures to prevent infringing uses of digitised material;
- the possibility that the work may be made available outside the jurisdiction, creating the opportunity for infringement by millions of people;
- the capacity for easier duplication and distribution than a photocopy; and
- the greater potential for collection into new products, such as electronic databases.[7]

2.10 For these reasons, the ACC argued that the Government's intention to extend the existing exceptions into the digital age is contrary to Australia's international obligations. The Copyright Agency Limited (CAL) also stated its belief that the exceptions as proposed do not meet Australia's TRIPS / GATT agreement obligations.[8] CAL argued that this was mainly

5 Elizabeth Baulch, ACC, *Transcript*, p. 106.

6 Article 13, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and Article 9(2) Berne Convention quoted in ACC, *Submissions*, p. S356.

7 ACC, *Submissions*, p. S356.

8 ACC, *Submissions*, p. S356. See also the Australian Society of Authors (ASA), *Submissions*, p. S256; Michael Fraser, Copyright Agency Limited (CAL), *Transcript*, p. 71; VISCOPY,

due to the fact that the Bill equates digital technology with photocopying, without taking into account the different ramifications for copyright owners:

> To allow what was copyright free in the photocopying environment to become copyright free in the digital environment would be to destroy the market because the market is now for articles, for chapters provided online. So it is a mistake to apply exactly the same exception for the photocopying environment into the digital environment and think that you are maintaining a balance.[9]

2.11 The AGD and DCITA maintained that the extension of the exceptions was valid. They contended that any provision to compensate copyright owners for the 'first digitisation' of works by libraries or archives would be 'difficult to administer and would add a significant cost to local, State and Federally funded libraries'. Such a provision would be a 'significant departure from Government policy which is that existing print exceptions should be carried over to the digital environment'.[10]

2.12 The Arts Law Centre of Australia supported the Government's intention to extend the existing fair dealing exceptions to the digital environment.[11] Other groups also argued that the Bill continues to maintain an appropriate balance between the interests of copyright owners and copyright users. In particular, the Australian Libraries Copyright Committee (ALCC) argued that copyright owners were critical of the Bill, not because it fails to maintain the current balance, but because it 'fails to narrow the scope of user rights in the digital (and non-digital) environment'.[12] The ALCC further argued that the Bill will simply allow libraries to use new technologies to provide the same limited services for those engaged in research or study.

2.13 The Australian Vice-Chancellors' Committee (AVCC) stated that the current balance of the Bill allows '**limited** rights to members of the public to access and copy works, for very specific purposes, **free**'. This balance acknowledges the public interest in allowing equal opportunity for access

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*Submissions,* pp. S530-31; and International Federation of Reproduction Rights Organisations (iffro), *Submissions,* p. S708.

9 Michael Fraser, CAL, *Transcript,* p. 72.

10 AGD & DCITA, *Submissions,* p. 737.

11 Arts Law Centre of Australia, *Submissions,* p. S505.

12 Australian Libraries Copyright Committee (ALCC), *Submissions,* p. S213.

and use, 'irrespective of where people live or work or their ability to pay'.[13]

2.14 Similarly, the University of Canberra Intellectual Property Committee submitted that students and researchers would need to rely on exemptions to the right of communication to the public to enable fair dealing. Therefore, any proposed 'regulation of copyright in relation to digital materials must continue to give universities and libraries a right of fair dealing for legitimate research, study or preservation purposes'.[14] Furthermore, the AVCC argued that the mere fact that the digital environment allows the commodification of single chapters and parts of works, does not negate the public interest in allowing free copying in limited circumstances.[15]

## The Committee's conclusion – 'first digitisation'

2.15 As stated in Chapter 1, the Committee accepts in general terms the broad parameters of the Bill for the purposes of its inquiry. The Committee is aware of the policy intention that the existing exceptions for the copying of material in print form be extended to the digital domain. The Committee also understands the arguments of copyright users who support the application of the exceptions to the digital environment.

2.16 However, the Committee concludes that the aim of extending the current free exceptions to the digital domain, thereby also allowing the digitisation of works, is not valid in all cases. The Committee is persuaded by the evidence that the differences in accessing and marketing material in the digital environment warrant differing approaches in different situations.

2.17 In particular, the Committee agrees with the ACC and CAL that 'normal' uses of copyright material in the digital domain have changed. The Committee also shares the concerns of copyright owners regarding the greater potential for infringement to occur when material is in digital form. In keeping with the broad parameters of the Bill, the Committee believes that the exceptions for fair dealing (including for research and study) should apply for copyright material that is reproduced from digital to digital form. The Committee is of this view because the copyright owner has had the opportunity to agree to the digitisation process.

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13 Australian Vice-Chancellors' Committee (AVCC), *Submissions*, p. S730.

14 University of Canberra Intellectual Property Committee, *Submissions*, pp. *S*698-99.

15 AVCC, *Submissions*, p. S732.

2.18 However, the Committee concludes that the exceptions should not apply to allow the conversion of material in print form to digital form without the agreement of the copyright owner, except in very limited circumstances. In this way, the Committee is recommending the creation of a 'firewall' against the conversion of a work from print to digital form without the consent of the copyright owner. This would ensure that the right of the copyright owner in relation to the 'first digitisation' of his or her work is protected in all but very limited circumstances. The Committee would expect that in most cases the conversion of copyright material from hardcopy to digital form would be the subject of commercial negotiations between copyright owners and libraries and archives, and between copyright owners and users.

2.19 Limited circumstances do exist, however, where the Committee accepts that there should be exceptions to the copyright owner's right to control the first digitisation of their work. The Committee concludes that the copyright owner should retain the exclusive right to reproduce his or her work when it involves digitising the work for the first time, except in the following limited circumstances:

- fair dealing for the purpose of criticism and review;
- fair dealing for the purpose of reporting news;
- fair dealing for judicial proceedings and providing professional advice;
- reproducing and communicating copyright material for preservation and other purposes[16]; and
- reproducing and communicating works by libraries and archives at the request of users who, by reason of their location, cannot obtain a hardcopy of the work within four days through the ordinary course of the post.

2.20 The Committee notes that, as the digital market is only emerging, some users may be disadvantaged by a lack of ready access to hardcopy materials in local libraries. Rather than allowing this disadvantage to continue while the digital market emerges, the Committee is of the view that a narrow exception to the copyright owner's right to control the first digitisation of his or her work should apply.

2.21 This narrow exception would allow libraries to convert a part of a work or the whole work into digital form and communicate it electronically to users, who would otherwise be disadvantaged by their location. Such a

16 The other purposes contemplated are those provided for in proposed ss 51A and 110B of the Bill.

restricted exception adequately protects copyright owners, but also meets the public interest concern of ensuring that new technology is used as a method of allowing equal access to all Australians, not just those in metropolitan areas.

2.22 In particular, the Committee recognises that allowing the digitisation of works by libraries and archives at the request of certain users would ensure that the benefits of new technologies flow beyond metropolitan centres. The Committee believes that if the hardcopy of a requested work cannot be delivered to a user within four days in the ordinary course of the post, then the library or archive should be able to satisfy the request with a digitised copy of the work. Applying this four day qualification on postal delivery should not impose an undue burden on libraries or archives, because of the ready availability of postal schedules and related information. The Committee believes that the limited nature of this exception will not unreasonably prejudice the interests of the copyright owner to control the first digitisation of his or her work.

2.23 The Committee concludes that applying these exceptions in relation to the first digitisation of a work will preserve the balance between access for certain legitimate purposes and the adequate protection of the copyright owner.

### Recommendation 1

2.24 **The Committee recommends that the *Copyright Act 1968* and the Copyright Amendment (Digital Agenda) Bill 1999 be amended to provide copyright owners with the exclusive right of copyright in relation to the conversion of copyright material from hardcopy to digital or other electronic machine readable form. That exclusive right should be subject to the following exceptions only:**

- **fair dealing for the purpose of criticism and review;**
- **fair dealing for the purpose of reporting news;**
- **fair dealing for the purpose of judicial proceedings and providing professional advice;**
- **reproducing and communicating copyright material for preservation and other purposes (the other purposes contemplated are those in sections 51A and 110B including proposed amendments contained in the Bill); and**
- **reproducing and communicating copyright material by**

**libraries and archives at the request of users who, by reason of their location, cannot obtain a hardcopy of the work within four days through the ordinary course of the post.**

## Reasonable portion test

2.25 The fair dealing exception covers the copying of a 'reasonable portion' of a work for the purposes of research or study.[17] The reasonable portion test aids users in determining what is a fair dealing and therefore what may be copied without payment to the copyright owner. A 'reasonable portion' is defined under s. 10(2) of the Copyright Act as up to 10% of the number of pages in a published edition of a work or the whole or part of a single chapter of a work. The reasonable portion test also plays an important role in the library and archives exceptions and the educational statutory licence regime.

2.26 The Bill seeks to extend the reasonable portion test to the online environment to ensure that it continues to have practical application.[18] The joint submission from the AGD and DCITA identified the purpose of the reasonable portion test as being certainty for users. If a quantitative test was not applied in the digital environment, educational institutions would, in its view, face uncertainty in determining what constitutes a fair dealing with works.[19] The submission further argued that the interests of copyright owners continue to be safeguarded because the Bill does not seek to extend the reasonable portion test to computer programs or databases, or musical works in electronic form.[20]

2.27 Item 20 of the Bill therefore extends the quantitative test to reproductions made from only certain types of copyright material in electronic form. As the concept of a number of pages is less relevant in the electronic environment, the test for a reasonable portion is based on the total number of words in the work.[21] The reproduction of part of a literary or dramatic work will only be taken to be a reasonable portion, if the number of words copied does not exceed 10%. If a work is divided into chapters and the reproduction exceeds 10% of the number of words, it will only be classified as a reasonable portion if it is made up of the whole or part of a single chapter of the work.

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17 Section 40, Copyright Act.

18 AGD & DCITA, *Submissions*, pp. S603-04.

19 AGD & DCITA, *Submissions*, p. S604.

20 AGD & DCITA, *Submissions*, p. S604. Proposed section 10(2A) of the Bill refers to 'a published literary work' or 'a published dramatic work'.

21 Explanatory Memorandum, para. 28.

2.28 The proposed new s. 10(2C) limits a person's ability to make serial reproductions under the reasonable portion test.

## Qualitative or quantitative test?

2.29 The question of whether a quantitative test for a reasonable portion should be used in the digital environment was strongly debated during the inquiry. As discussed, the ACC and CAL argued that the concept of fair dealing should not be applied to works in electronic form without equitable remuneration.

2.30 However, if the reasonable portion test is to apply to works in electronic form, the ACC submitted that 'it could be *presumed* that copying a reasonable portion is fair for the purposes of the fair dealing provision but not *deemed* to be fair for the purposes of the fair dealing provision [emphasis added]'.[22] This suggestion was supported by a joint submission from the ACC, CAL, the Australian Society of Authors (ASA), the Australian Publishers Association (APA) and Screenrights.[23] By removing the deeming provision, fairness would be determined by reference to the factors in s. 40(2) of the existing legislation. These factors include the type of use made of the copy and its effect on the market. In effect, this would create a qualitative test of fair dealing for the copying of a reasonable portion of a work in electronic form.

2.31 In this way, it was suggested, copyright owners would not be unreasonably prejudiced by a quantitative test which deems the copying of 10% to be fair under any circumstances.[24] A court would not be precluded from determining that, what was fair use with regard to a hardcopy, is not fair use with regard to an electronic copy.[25] CAL argued that the true measure of fair copying in the digital environment is a 'qualitative issue' because of the radically different nature of digital works and their market.[26]

2.32 It was further argued that the use of a qualitative test would be in line with international standards governing exceptions to the exclusive rights of copyright owners. CAL stated that the need for certainty by users was appreciated, but that this need not be achieved legislatively. Rather, joint

22 Elizabeth Baulch, ACC, *Transcript,* p. 106.

23 ACC, CAL, APA, ASA, Screenrights, *Submissions,* p. S662.

24 CAL, *Submissions,* p. S293.

25 APA, *Submissions,* p. S405.

26 CAL, *Submissions,* p. S292. See also International Intellectual Property Alliance (IIPA), *Submissions,* p. S452.

industry guidelines could be developed.[27] In support of this argument, it was stated that the Copyright Law Reform Committee (CLRC) has recently concluded that a quantitative test to determine a 'reasonable portion' of a work in electronic form would be unworkable.[28]

2.33 Educational institutions represented by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) and the AVCC opposed this approach. MCEETYA and the AVCC jointly argued that changing the definition of a reasonable portion to make it a presumptive test would:

> require unqualified users of copyright material to make qualitative judgments as to what may constitute a fair dealing. These are difficult issues and the average teacher, lecturer or student would not be in a position to make such a judgment.[29]

2.34 MCEETYA and the AVCC further argued that such a change would lead to uncertainty and threats of legal proceedings. The Australian Digital Alliance (ADA) agreed that a qualitative test would be administratively unworkable, and stated that:

> Even CAL admitted that adopting this qualitative test would result in litigation to assist in establishing some measure of a baseline – an unnecessary cost resulting in uncertainty for libraries / educational institutions.[30]

2.35 The ADA also affirmed its position that the combination of a quantitative test and deeming provision remains the 'best option for ensuring continued clarity and certainty in a digital environment'.[31] The joint submission from the AGD and DCITA similarly stated that the experience of attempting to develop consensus-based guidelines for fair use in the United States has led to large areas of uncertainty and litigation.[32]

## The Committee's conclusion

2.36 The Committee agrees that extending a qualitative or presumptive test to the definition of a 'reasonable portion' in the digital environment would

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27 Caroline Morgan, CAL, *Transcript*, p. 122.

28 ASA, *Submissions*, p. S256. Australian Record Industry Association (ARIA) / Phonographic Performance Company of Australia Ltd (PPCA), *Submissions*, p. S486.

29 Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) and AVCC, *Submissions*, p. S621.

30 Australian Digital Alliance (ADA), *Submissions*, pp. S711-12.

31 ADA, *Submissions*, p. S711.

32 AGD & DCITA, *Submissions*, p. S745.

create uncertainty for users. The Committee also recognises the concern raised by the AGD and DCITA, that many copyright users are not in a position to defend a legal challenge.[33] Deeming the reproduction of a percentage of some works in electronic form to be fair, at least allows a measure of certainty. The Committee agrees that it is impractical and administratively unworkable to expect the average user to assess the fairness of *any* copying under s. 40 factors, such as its impact on potential markets.

2.37 The Committee notes the arguments of some groups that the CLRC has recently found that a quantitative test would be unworkable in the digital environment. The CLRC argued that it was difficult in some cases to determine the number of words in an electronic work, particularly in the case of the Internet. An additional concern was that such a measure could not apply to a musical work and could amount to a substantial part of an electronic database.[34]

2.38 The Committee understands these concerns, however it accepts that there are plausible arguments that can be advanced for the application of the Bill. The experience of the practical application of these provisions may prove that this balance is not correct. The Committee believes, therefore, that the issue of a quantitative test in the digital environment may require further examination as part of the Government's proposed three year review of the legislation. The Committee considers that, for the time being, excluding musical works and computer databases from the application of the reasonable portion test, as provided by the Bill, adequately covers the concerns of copyright interests.

## Exceptions for archives and libraries

2.39 The Copyright Act contains a number of exceptions to the exclusive rights of copyright owners for libraries and archives for educational and preservation purposes. The Bill seeks to maintain the balance between such uses and the adequate protection of copyright owners in the digital environment.[35]

33 AGD & DCITA, *Submissions*, p. S744.

34 Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, Canberra, September 1998, paras 6.53–6.66.

35 Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999, p. 7428.

2.40 This section discusses the following issues related to the exceptions for libraries and archives:

- the change in the definition of 'library';
- the extension of s. 49 to electronic reproduction and communication;
- the inter-library supply of copyright material;
- the reproduction and communication of works for preservation and other purposes; and
- the 'preservation reproduction' of artistic works.

## Definition of 'library'

2.41 The Bill contains a new definition of 'library' that was not included in the Exposure Draft released by the Government for comment early in 1999. The Government's policy position, as stated in the joint submission from the AGD and DCITA, is that allowing for-profit institutions to rely on the exceptions for libraries and archives 'deprives copyright owners of a potential source of revenue'.[36] Therefore, the definition of library was amended before the introduction of the Bill in order to narrow the scope of the exceptions by excluding libraries operating solely or mainly for the purposes of a business.

2.42 Item 11 states that the definition of 'library' excludes libraries owned by any person or body carrying on business for profit, if the person maintains the library mainly or solely for the purposes of that business. Libraries owned by educational institutions that are conducted for profit are included. Effectively, this means that for-profit libraries such as those owned by corporations will not be able to rely on the exceptions for libraries and archives.[37]

### Support for narrower definition of 'library'

2.43 The ACC, CAL, ASA, APA and VISCOPY all supported the narrower definition of 'library' contained in the Bill.[38] ASA argued that not all libraries should be treated equally as providers of information to the public. In particular, ASA stated that the mission of a 'profit-driven corporation with its own libraries differs dramatically from that of a non-

36 AGD & DCITA, *Submissions*, p. S604.

37 Explanatory Memorandum, para. 18.

38 VISCOPY, *Submissions*, pp. S525 and S657; ASA, *Submissions*, p. S256; Elizabeth Baulch, ACC, *Transcript*, p. 129; Caroline Morgan, CAL, *Transcript*, p. 132; and APA, *Submissions*, p. S402.

profit library serving its local (non-commercial) community'.[39] APA submitted that it is not fair to allow corporations to copy without payment to copyright owners simply because they maintain a library for their business purposes.[40]

2.44 VISCOPY, ACC, APA, ASA, CAL and Screenrights further argued that the definition of library should not include libraries in educational institutions that are conducted for profit.[41] The concern of copyright owners was the extent to which these libraries would rely on exceptions to their exclusive rights, as provided by the Bill. ASA suggested that provision should be made in those cases for the remuneration of the copyright owners with differing rates of payments to reflect the differing categories of libraries. This would enable:

> a zero-rating or shifting scale of remuneration for those transactions deemed to be for the social good, or fundamental to core principles of access and equity.[42]

## Arguments against excluding corporate libraries

2.45 A number of submissions opposed the Bill's proposed new definition of 'library'. It was argued that the new definition would fundamentally alter the nature of research and the current exchange of information within the library sector. The ADA argued that the impact of excluding libraries that operate in a corporate environment would result in a loss of access to often valuable and specialised resources.[43] The Australian Library and Information Association (ALIA) listed some of the resource-sharing that currently occurs:

- library resource-sharing between public and private hospitals and the health sector;
- pharmaceutical industry library services to hospital staff and medical practitioners in regional areas;
- university library services accessed by industries and corporations;

39 ASA, *Submissions,* p. S256.

40 APA, *Submissions,* p. S402.

41 VISCOPY, *Submissions,* p. S525. ACC, APA, ASA, CAL and Screenrights, *Submissions* , p. S715. See also Combined Newspapers and Magazines Copyright Committee of Australia, *Submissions,* p. S426.

42 ASA, *Submissions,* p. S257.

43 ADA, *Submissions,* pp. S278 and S712. See also the Council of Australian State Libraries (CASL), *Submissions,* p. S36; Australian Law Librarians' Group (ALLG), *Submissions,* p. S113; AVCC, *Submissions,* p. S554; ALCC, *Submissions,* pp. S215-17; and Australian Library and Information Association (ALIA), *Submissions,* pp. S348-51.

- specialist services to the public such as the Australian Stock Exchange library; and
- access to corporate library resources by parliamentary and government libraries.[44]

2.46 ALIA pointed out that if the new definition were to come into effect, these 'for profit' libraries would not be permitted to copy even small portions of works for research or study purposes without the permission of the copyright owner.[45] The ALCC agreed, adding that the long-term integrity of valuable specialist libraries within corporate sectors could be jeopardised because of their inability to rely on the provisions allowing copying for preservation purposes.[46]

2.47 The Committee also received many submissions from corporate libraries strongly urging that the proposed new definition of library be omitted from the Bill.[47] Apart from the effect on resource-sharing, these libraries indicated that it would be unworkable to have to gain the permission of copyright owners for every use of a work. Phillips Fox Lawyers submitted that only being able to copy for research, study or preservation purposes to the extent of licensing arrangements with CAL, or individual copyright owners not members of that body, was 'a particularly daunting prospect'.[48]

2.48 Architects, Construction & Consulting Engineers Specialist Services (ACCESS) agreed, stating that where material is not explicitly covered under a CAL voluntary licence, 'it would be impossible to provide material to clients to meet their research needs'.[49]

2.49 Similarly, Arthur Robinson and Hedderwicks Solicitors argued that the exclusion of corporate libraries from the library copying exemptions would have the following implications:

- the reduction in value of the inter-library system, and the creation of inefficiencies;

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44 ALIA, *Submissions,* pp. S350-51.

45 ALIA, *Submissions,* p. S350.

46 ALCC, *Submissions,* p. S216.

47 See for example: ALLG, *Submissions,* pp. S113-15; Norman Waterhouse Solicitors, *Submissions,* p. S162; Halpern Glick Maunsell Pty Ltd, *Submissions,* pp. S572-74 and Holding Redlich Lawyers and Consultants, *Submissions,* p. S539.

48 Phillips Fox Lawyers, *Submissions,* p. S38. See also Queensland Law Society Inc, *Submissions,* p. S387.

49 Architects, Construction & Consulting Engineers Specialist Services (ACCESS), *Submissions,* p. S197.

- the division of the library system between public libraries, and individual corporate libraries, as well as the replication of existing resources;
- a lack of satisfactory alternative methods to enable corporate libraries to comply with the proposed changes;
- an increase in costs for corporate libraries in obtaining permission and a licence for the use of copyright material; and
- the potential for discrimination against library users unable to visit corporate libraries.[50]

2.50 Many groups urged a deferral of this issue until further consultation with interested parties and pending consideration of the CLRC's recommendations.[51] The CLRC has specifically recommended that all libraries, whether or not they are conducted for profit, should be able to rely on the library exceptions.[52] In particular, the CLRC concluded that royalty-free copying in limited circumstances by libraries conducted for profit would not unreasonably prejudice the legitimate interests of copyright owners.[53]

## The Committee's conclusion

2.51 The Committee agrees that the full ramifications of the Government's proposed change to the definition of library have not been adequately considered. The Committee believes, particularly given the fact that the proposal was not included in the Exposure Draft of the Bill, that more consultation is needed with affected parties.

2.52 Furthermore, the Committee agrees with the ADA and ALCC that the issue of the access of corporate libraries to the exceptions provided by the Copyright Act is very broad. The Committee believes that consideration of this broad issue may benefit from a wider policy debate than has been possible since the introduction of the Bill into Parliament.

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50 Arthur Robinson and Hedderwicks Solicitors, *Submissions,* pp. S433-36.

51 See for example, the National Library of Australia (NLA), *Submissions,* p. S567.

52 ALCC, *Submissions,* p. S215. See CLRC, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners,* para. 7.28.

53 CLRC, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners,* para. 7.25.

**Recommendation 2**

2.53 **The Committee recommends that item 11 of the Copyright Amendment (Digital Agenda) Bill 1999 be omitted, pending further consultation with affected parties and consideration of the Copyright Law Review Committee's report on the *Simplification of the Copyright Act 1968*.**

## Extension of section 49 to electronic reproduction and communication

2.54 Section 49 of the Copyright Act allows libraries and archives to copy material in hardcopy form for users if it is for the purpose of research or study. The Bill seeks to extend this exception to the electronic environment, by allowing libraries to reproduce and supply electronic reproductions of works or parts of works in response to user requests.[54] The circumstances in which libraries may supply such copies are limited in a similar way to that which applies to copies supplied in print form.

2.55 The Government's policy, as stated in the joint submission from the AGD and DCITA, is that libraries and archives should not be burdened with additional costs because of new technologies, which allow them to provide access to copyright material in electronic form for research and study purposes.[55] Items 49 and 51 provide that the exception will only apply to those published works that are already held in the collection of the library or archives. Item 56 states that it is not an infringement of copyright for the library or archive to communicate a work in accordance with the other proposed amendments to s. 49. Item 56 also provides that the exception will not apply unless the reproduction is destroyed 'as soon as practicable after it is communicated to the requesting user'.[56]

2.56 Item 54 of the Bill states that an article contained in a periodical publication or published work, acquired in digital form by a library or archive, may be made available online within the premises by an officer in charge. Certain conditions would apply, including that a user could not use any equipment supplied by the library or archive to make an electronic copy of the work, nor could they communicate it. A hardcopy of a work available online may be made on the premises as long as it complies with fair dealing principles.

54 Explanatory Memorandum, para. 69.

55 AGD & DCITA, *Submissions*, p. S605.

56 Explanatory Memorandum, para. 81.

2.57 Before the Committee details its conclusions below at paragraphs 2.73 to 2.80, the following issues are considered:

- arguments in support of an extension of s. 49;
- arguments against an extension of s. 49, including the view that it will allow libraries to become 'commercial publishers'; and
- issues relating to the introduction of a statutory licence regime for s. 49.

## Support for the extension of s. 49

2.58 The ALCC and ADA both supported the general policy behind the Government's proposed amendments to s. 49.[57] The ADA submitted that the provision allowing a library to produce an electronic copy of a print work and supply it in response to a request from a user is a balanced approach, because it is limited in the following ways:

- a declaration must be signed by the user indicating that the reproduction is for the purposes of research or study;
- there are criminal penalties for a false declaration; and
- a library can only charge cost recovery.[58]

2.59 The ADA also pointed out that, under proposed s. 49(7A), a library must destroy a reproduction 'as soon as practicable' after it is communicated to a user. This provision prevents a library from building up an electronic database of digitised works.[59]

2.60 While supportive of the proposed amendments to s. 49, groups representing users and libraries argued that the Bill is still unnecessarily restrictive. In particular, they rejected the proposed provisions allowing libraries to make electronic material available on machines which cannot be used to make electronic reproductions, or to communicate works. The Council of Australian University Librarians (CAUL) indicated that this restriction would be problematic because libraries would have to provide specific machines to comply with this section. CAUL pointed out that for other material purchased under licence, broader use might be authorised requiring different machine capabilities.[60]

2.61 Therefore, both the ADA and the ALCC argued that where electronic material is made available on library premises for users to browse, those

57 Tom Cochrane, ALCC, *Transcript*, p. 141 and Jamie Wodetzki, ADA, *Transcript*, p. 133.

58 ADA, *Submissions*, p. S712.

59 Jamie Wodetzki, ADA, *Transcript*, pp. 144-45.

60 Council of Australian University Librarians (CAUL), *Submissions*, p. S51.

users should be able to make copies permitted under fair dealing using both digital and hardcopy technologies.[61]

2.62 Other groups also argued that the Bill was unnecessarily restrictive, but indicated that a statutory licence regime should apply to the use of electronic material under s. 49. The Arts Law Centre of Australia submitted that the Bill should remove the requirement that online access be limited to the physical space of the library and allow systematic digitisation of collections creating 'virtual' libraries. Such an amendment should be subject to a statutory licence regime and a guarantee from libraries that downloading would not occur except as prescribed for fair dealing purposes.[62]

## Opposition to the extension of s. 49

2.63 The ACC argued that the s. 49 exception should not be extended to the digital environment, and that the making available of material online should require the licence of the copyright owner because:

- it is a 'normal' use of the work;
- it unreasonably prejudices the legitimate interests of the rights owner (for example, their plans for licensing the making available of the work online in the future); and
- the proposed provisions are not limited to material purchased by the library.[63]

2.64 Both the ACC and the ASA argued that it would be possible for the provisions to operate so that material supplied by a library to another library for inclusion in its collection would be 'acquired' by the requesting library. Similarly, a library may make available online a digital reproduction of a non-digital work made for preservation or replacement purposes.[64] A joint submission from the ACC, APA, ASA, CAL and Screenrights suggested that the exception should only apply to works purchased or donated to the library or archives in electronic form.[65]

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61 ALCC, *Submissions,* p. S220. See also CASL, *Submissions,* p. S36; National Museum of Australia, *Submissions,* p. S323; and ALIA, *Submissions,* p. S349.

62 Arts Law Centre of Australia, *Submissions,* p. S514. The issue of a statutory licence regime for s. 49 is discussed later in this chapter.

63 ACC, *Submissions,* p. S362.

64 ACC, *Submissions,* p. S362; and ASA, *Submissions,* pp. S257-58.

65 ACA, APA, ASA, CAL, Screenrights, *Submissions,* pp. S717-18.

## Libraries as 'commercial publishers'?

2.65 APA also rejected the extension of s. 49, arguing that the Bill would permit libraries to become document delivery services on a commercial scale. Libraries would be able to compete with APA members in electronic publishing of articles, portions of works and, in some cases, complete books without remuneration or contractual relationships with authors. APA suggested that the Bill would, in this way, diminish the incentive for electronic publishing.[66]

2.66 Publishers therefore recommended that s. 49 (and s. 50) be limited to circumstances where access is not available, whether in electronic form or otherwise, within a reasonable time at an ordinary commercial price. Further, a work should be considered available if it is available in any form including paper, electronic and pay-per-view. Where works are not available, APA argued that copying should be subject to a statutory licence.[67] Similarly, VISCOPY stated that a statutory licence should apply to artistic works reproduced in a periodical article and transmitted to the public within a gallery, museum or library.[68]

2.67 Claims that the exception provided under s. 49 would mean that libraries would be able to compete with commercial publishers were strongly contested. The joint submission from the AGD and DCITA noted that libraries would find it very difficult if not impossible to act as commercial competitors to publishers by relying on the copyright exceptions for the following reasons:

- a library may not charge more than the cost of making and supplying copyright material to the user;
- library users must make declarations that material will only be used for research and study and that they have not previously been supplied with a copy of the article;
- there are penalties for failing to keep records and for false declarations;
- the exception does not apply to a request for a copy of two or more articles from the same periodical publication unless they relate to the same subject matter;
- libraries will be required to destroy the electronic copy 'as soon as practicable' after communicating it; and

66 APA, *Submissions,* p. S399.

67 APA, *Submissions,* pp. S400-01. See also VISCOPY, *Submissions,* pp. S528-29.

68 VISCOPY, *Submissions,* p. S657.

- the exception now clearly applies only to publications held in the collection of the library (preserving the primary market for journal sales to libraries).[69]

2.68 The joint submission from the AGD and DCITA argued that a strictly market approach to the dissemination of articles for research and study purposes could lead to reduced access, if commercial publishers adopt a strategy of maximising returns from the sale of individual articles.[70] It was acknowledged however that online markets for the supply of copyright material are still evolving and that it is 'proposed to conduct a review of the operation of the legislation'. Such a review, the submission suggested, may include consideration of the adequacy of remuneration of copyright owners and the costs of providing material for research and educational purposes.[71]

## Introduction of a statutory licence regime for s. 49?

2.69 As stated, copyright owners argued that there should be a statutory licence regime governing the first digitisation of works in order to provide some compensation for use of this copyright material.[72] ASA opposed the proposed new s. 49(5A) and s. 110B(2A) (a similar provision relating to sound recordings and films), on the basis that making material available online is a 'normal' use of the work and should not be an unremunerated exception.[73] At the least, ASA argued, the provisions should be limited to material purchased by the library and should not include works deposited in the National Library or in certain State libraries to comply with legislation.[74]

2.70 Screenrights objected to proposed s. 110B(2B) because, in their view, it would allow libraries and archives to copy each other's collections into a digital format and make them available online to each other without remuneration.[75] Under s. 110B of the Copyright Act, libraries and archives may make copies of original sound recordings and films for purposes including preservation, replacing deteriorated, lost or stolen copies and for the purpose of research at the library or at another library. The Bill extends the operation of s. 110B to cover communication of copies to be

69 AGD & DCITA, *Submissions,* p. S739.

70 AGD & DCITA, *Submissions,* p. S740.

71 AGD & DCITA, *Submissions,* p. S741.

72 Jose Borghino, ASA, *Transcript,* p. 146. See also Motion Picture Association (MPA), *Submissions,* p. S190.

73 ASA, *Submissions,* pp. S257-58. See also Screenrights, *Submissions,* pp. S157-58.

74 ASA, *Submissions,* pp. S257-58.

75 Screenrights, *Submissions,* p. S158. See also comments by the MPA, *Submissions,* p. S190.

accessed online, through computer terminals installed within the premises of the other library or archive, for the same purposes.

2.71 The AGD and DCITA argued that introducing a statutory licence regime for s. 49 would amount to a significant cost and administrative burden for libraries.[76] The ALCC also argued that the costs of a licensing arrangement would ultimately be borne by libraries or users:

> If users bear the costs, the long and valued tradition of libraries as providers of information to all breaks down and increases the already major risk of worsening the information divide.[77]

2.72 Given the proposed s. 49(7A), the ADA pointed out that any statutory licensing regime would mean that a fee would have to be paid each time a library digitised a work under the proposed provisions.[78] The Australian Consumers' Association (ACA) argued that such a system could lead to a 'pay per view' future where the mere act of viewing would incur a charge.[79]

## The Committee's conclusion

### Extension of section 49

2.73 The Committee accepts the arguments that libraries using current technologies are unlikely to be able to compete with commercial publishers, by virtue of the limited exceptions provided under the proposed amendments to s. 49. Similarly, in terms of the communication of films and sound recordings between libraries and archives under proposed ss 110B(2A) and (2B), the Committee considers that the limitations of the proposed provisions mean that the commercial markets of copyright owners are not adversely or unreasonably affected.

2.74 The Committee notes the support of the ACC for the amendment limiting the application of s. 49 to material held in the collection of the library or archive.[80] The Committee also notes VISCOPY's support for the provision that a reproduction must be destroyed after it has been communicated.

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76 Libraries already make payments under the Australian Public Lending Right Scheme. The Government also pointed out that a new scheme called the Educational Lending Right (ELR) program will be introduced in 2000-01 to compensate authors and publishers for the borrowing of books in public and educational libraries. AGD & DCITA, *Submissions,* pp. S741-42.

77 ALCC, *Submissions,* p. S686.

78 Jamie Wodetzki, ADA, *Transcript*, pp. 144-45.

79 Australian Consumers' Association (ACA), *Submissions,* pp. S393-94.

80 ACC, *Submissions,* p. S361.

VISCOPY indicated that 'these changes go some way to addressing concerns that libraries and archives could become publishers of copyright material'.[81] Thus, the Committee concludes that the s. 49 exception should apply to the supply of works that are already in digital form at the request of users.

2.75 Furthermore, the Committee agrees with the Bill's proposed limitation on users only being able to make a fair dealing hardcopy of material in electronic form, which is available online within the premises of libraries or archives. The Committee believes that any electronic to electronic copying of material made available online within the premises of libraries or archives should be a matter of commercial negotiation between the libraries or archives and copyright owners.

## First digitisation

2.76 The Committee believes however that, given the pace of technological change, there is every reason to expect that within a short time the particular arguments regarding the capacity of libraries to act as commercial publishers may no longer be sound. The Committee therefore concludes, subject to the provisos above in Recommendation 1, that the s. 49 exception should not apply to the first digitisation of works by libraries and archives for supply to users for research and study.[82] This conclusion was reached in full recognition of the need to balance two competing public interests. One interest is the need to preserve an environment in which the creators of work can flourish. The other interest is the need to ensure that access to information using new technology is not unnecessarily hindered.

2.77 Nevertheless, the Committee recognises that the digitisation and supply of copyright material by libraries and archives within the limits of the proposed amendments to s. 49 will be an important means of accessing collections. This is particularly true for users who are disadvantaged by reason of their location and who cannot therefore receive a hardcopy of material within four days through the ordinary course of the post. The Committee considers, therefore, that the exception provided in Recommendation 1 for libraries to digitise material for those users will maintain an appropriate balance between public access and copyright interests.

81 VISCOPY, *Submissions*, p. S528.

82 See Recommendation 1 above.

### Publications 'held in the collection' of a library or archive

2.78 The Committee agrees with the Government's policy intention to limit the supply of material under the s. 49 exception to works held in the collection of the library or archive. The Committee notes that the proposed amendments are intended to preserve 'the primary market for journal sales to libraries'.[83]

2.79 The Committee also agrees with the ACC and ASA that the word 'acquired' in proposed s. 49(5A) could be interpreted in a broad sense to allow the reproduction of work which had not been purchased by the library or archive in the first instance. Any confusion in this matter should be rectified through an amendment to proposed s. 49 of the Bill. The Committee does not accept, however, the suggestion that the s. 49 exception should not apply to works required to be deposited under statutory schemes. This would unreasonably restrict access to a vast number of resources for little tangible benefit to copyright owners.

**Recommendation 3**

2.80 **The Committee recommends that proposed section 49(5A) of the Copyright Amendment (Digital Agenda) Bill 1999 be redrafted to make it clear that an article contained in a periodical publication or a published work (other than an article contained in a periodical publication) must be held in the collection of the library or archive.**

## Inter-library supply of copyright material

2.81 Under s. 50 of the Copyright Act, the inter-library supply of copyright material does not constitute an infringement where the making or supplying of a copy containing more than a reasonable portion of the work is done by an authorised officer of the library. The authorised officer must be 'satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price'.[84]

2.82 The Bill creates a different test of commercial availability for electronic material under the inter-library supply provisions. In recognition of the difference between electronic and print mediums, the Government has proposed an amendment to the current s. 50 of the Copyright Act.

83 AGD & DCITA, *Submissions*, p. S739.

84 Section 50(7A), Copyright Act.

Justification for the amendment is primarily based on the fact that, compared with the print medium, 'copyright material in electronic form can be much more easily, cheaply and conveniently disseminated'.[85]

2.83 The proposed new s. 50(7B) provides that if a reproduction is made in electronic form, then it will be subject to the commercial availability test, regardless of whether or not it constitutes more than an article contained in a periodical publication or reasonable portion of the work. Thus, any supply of works by libraries in electronic form under s. 50 is intended to be subject to the commercial availability test.[86]

2.84 The AGD and DCITA argued that the inter-library loan exception would not play as great a role in the electronic environment.[87] Users are likely to send a request directly to the library with the original holding, as a result of the extension of s. 49 to the supply of reasonable portions of works to users through electronic communication.

## Opposition to the extension of s. 50

2.85 Representatives of copyright owners opposed the extension of s. 50 to the digital environment without equitable remuneration. CAL argued that the extensive use of the exceptions for libraries under both s. 49 and s. 50 prejudices the legitimate interests of the author: 'a sophisticated and extensive system of inter-library and user document supply has been developed by Australian libraries utilising these provisions'.[88] Failing any alteration of the proposed provision, CAL supported the different application of the commercial availability test for material in electronic form. VISCOPY suggested that the availability of a 'commercial licence to reproduce' from a collecting society should constitute commercial availability.[89]

2.86 The ACC also registered their opposition to the policy that libraries may supply a copy of a work to another library without equitable remuneration to copyright owners. The ACC submitted that s. 50 should at least require a library to include certain information with a communication and to destroy an electronic reproduction after a work had been communicated to the user (a similar measure to the proposed amendments to s. 49).[90]

85 AGD & DCITA, *Submissions,* p. S606.

86 Explanatory Memorandum, para. 93.

87 AGD & DCITA, *Submissions,* pp. S606–07.

88 CAL, *Submissions,* p. S298.

89 VISCOPY, *Submissions,* p. S658.

90 ACC, *Submissions,* pp. S362-63.

## Application of the 'commercial availability' test

2.87 The ADA supported the extension of s. 50 to the digital environment, however submitted their objection in principle to the different commercial availability test for works in electronic form. The ADA argued that the commercial availability test should not apply to the reproduction of reasonable portions of the works under the inter-library supply provisions.[91]

> A library should only be required to check whether a copy of the work is available within a reasonable time at an ordinary commercial price when the amount requested is more than an article from a periodical or more than a 'reasonable' portion of another work.[92]

2.88 The National Library indicated that applying the commercial availability test to the supply of less than a reasonable portion of a work would present a considerable obstacle to efficient document supply. The National Library argued that the amendment would be 'particularly burdensome for small and medium libraries which lack the expertise in the increasingly complex environment of commercial document supply and electronic publishing'.[93]

2.89 Some evidence indicated concerns about the practicality of having to apply different commercial availability tests. In particular, CASL argued that electronic information products vary widely and are frequently updated. In this context, it would be very difficult for a library officer to determine the commercial availability of requested material.[94] The University of Queensland stated that the marketplace for electronic works is much more complicated than for print works and the net result of the amendments would be that the requesting library 'wastes time and money and the researcher has to submit to delays and uncertainty'.[95]

2.90 CAUL also indicated that the proposed amendments were problematic. In particular, CAUL stated that the item required may be available commercially but only within a database or suite of databases, not as an individual portion. In such a case, the proposed section does not make it clear whether or not the requesting library would be able to obtain that portion.

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91 Jamie Wodetzki, ADA, *Transcript*, p. 288. See also Law Council of Australia, *Submissions*, p. S477.

92 ADA, *Submissions*, p. S279.

93 NLA, *Submissions*, pp. S568-69.

94 CASL, *Submissions*, p. S36.

95 University of Queensland, *Submissions*, p. S200.

> Does this mean that the requesting library cannot then obtain the portion they are seeking unless they purchase access to the entire database or suite of databases?[96]

2.91 Confirming this potential confusion, John Wiley and Sons Australia Ltd ('John Wiley') stated its belief that inter-library loans of individual articles would be allowed under the Bill, because the library officer would conclude that they are not commercially available separately. John Wiley urged that the proposed amendments to s. 50 be changed to make it clear that if an individual article is available as part of a subscription to the periodical in which it appears, then it is commercially available and thus not a candidate for an interlibrary loan.[97]

2.92 The ADA argued the contrary case, stating that at the very least the Bill should make it clear that proposed s. 50(7B) only requires the commercial availability test to apply to the availability of the *particular part* of a work or periodical publication requested within a reasonable time at an ordinary commercial price.

> This would mean that libraries would not be forced to buy an entire electronic work when all they want is a small part of that work.[98]

2.93 The AGD and DCITA indicated that the provision is intended to require libraries and archives to acquire their own copies of articles and reasonable portions of works where they are commercially available separately.

> 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.[99]

## On-requesting of material by libraries

2.94 Some requests were also made for amendments to proposed s. 50(1). The ADA requested that references to 'the other library' be amended to 'another library' to accommodate the on-requesting of material by very small libraries that fall outside the inter-library loan system.[100]

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96 CAUL, *Submissions,* p. S51.

97 John Wiley and Sons Australia Ltd, *Submissions,* p. S203.

98 ADA, *Submissions,* p. S221.

99 AGD & DCITA, *Submissions,* p. S607.

100 Jamie Wodetzki, ADA, *Transcript*, p. 288. See also ALIA, *Submissions,* p. S349.

2.95 The National Library voiced its concern that the proposed section would prevent smaller libraries from being able to access overseas collection materials.[101] This is due to the requirement in the proposed amendments to s. 50(1) that a library supplying reproductions of a periodical publication or published work must hold the requested item in its collection. The National Library indicated that it did not believe that a document supply service such as SUPPLY 1 would fall within this category. CAL on the other hand supported the requirement that libraries could only supply material held in their own collections.[102]

## The Committee's conclusion

### First digitisation

2.96 Consistent with Recommendation 1 above, the Committee does not agree that the exception under the proposed amendments to s. 50 should apply to the first digitisation of a work. Therefore, the exception would only apply in the digital environment where a work was already in electronic form and held in the collection of the supplying library or archive.

2.97 For material already in electronic form, the Committee believes that, given the proposed different application of the commercial availability test, the interests of copyright owners would not be unreasonably prejudiced by the operation of the inter-library supply provisions in the digital environment. Indeed, the Committee agrees with the AGD and DCITA that the inter-library supply provisions are likely to become less important in the future with users being able to email requests directly to the library holding the material.

2.98 To further safeguard the interests of copyright owners, the Committee agrees with the ACC and concludes that item 64 of the Bill should be amended to require the supplying library to destroy the reproduction 'as soon as practicable' after the reproduction is communicated to the requesting library. This amendment should be along the lines of the wording provided by proposed s. 49(7B). It should be noted that the following recommendation will not be necessary unless the Committee's first recommendation is not adopted.

101 NLA, *Submissions*, pp. S567-68.

102 CAL, *Submissions*, p. S298.

**Recommendation 4**

2.99 **The Committee recommends that item 64 of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to require a library supplying another library with a reproduction under section 50 to destroy the reproduction, as soon as practicable, after the reproduction is communicated to the requesting library.**

**This recommendation will not be necessary if Recommendation 1 is adopted.**

## Application of the 'commercial availability' test

2.100 The Committee supports the policy behind the intended operation of the commercial availability test under proposed ss 50(7A) and (7B). The Committee is not convinced that the purported administrative difficulties of checking the commercial availability of electronic material outweigh the benefits of protecting the new online markets for articles and portions of works. While no unanimously concluded view was reached, the Committee envisages that reference to a part of work means the particular article in the periodical publication or chapter of the work.

2.101 The Committee agrees with submissions that the wording of the proposed provisions makes it unclear what 'commercial availability' means. This confusion should be rectified by appropriate amendment of proposed ss 50(7A) and (7B).

**Recommendation 5**

2.102 **The Committee recommends that item 64 of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to clarify that the commercial availability test applies to the availability of the particular part of a work or periodical publication requested, within a reasonable time at an ordinary commercial price.**

## Accessing overseas collections

2.103 The Committee recognises the concerns of the National Library in regard to the importance of its SUPPLY 1 service for small and medium sized libraries, and the impracticalities for these libraries in accessing holdings of overseas publications. Rather than drafting a broad exception to allow the on-requesting of material generally, the Committee believes that the

National Library's concern is better addressed by describing the type of service that should be exempted from the proposed new s. 50(1) definition of 'publication'. This would allow smaller libraries to access holdings of overseas publications, through the supplying library, for the purposes of research or study. It would also guard, to some extent, against the concerns of copyright owners.

### Recommendation 6

2.104 **The Committee recommends that the amendments to section 50(1) in the Copyright Amendment (Digital Agenda) Bill 1999 provide an exemption for certain supply services, such as SUPPLY 1, which access overseas collections, from the requirement of requested material having to be 'held in the collection of the other library'.**

## Reproducing and communicating works for preservation and other purposes

2.105 Currently, s. 51A of the Copyright Act allows the copying of an original artistic work or manuscript by libraries or archives for the purposes of preservation, research on the premises, or replacing a work that has been damaged, lost or stolen. The joint submission from the AGD and DCITA supported the view that cultural institutions should be able to further their goals of preservation and allowing access to their collections through the use of digital technologies.[103]

2.106 Therefore, the purpose of the proposed amendments to s. 51A is to allow libraries and archives to digitise the copyright material in their collections and to exercise the communication right for preservation and other purposes, including 'administrative purposes'.[104] Under item 73, reproductions made for preservation / replacement purposes would be able to be made and communicated to the public. Reproductions made for administrative purposes would only be allowed to be communicated to officers of the library within its premises.[105]

103 AGD & DCITA, *Submissions*, p. S607.

104 Explanatory Memorandum, para. 103.

105 See proposed s. 51A(3) of the Bill.

## Availability of reproductions to the public

2.107 Some submissions argued that works reproduced for administrative purposes should be able to be communicated to the public and not just to library officers. CASL, for example, submitted their concern about proposed s. 51A(3) in relation to original materials that have been preserved in digital formats:

> Restricting access to this preserved material to 'library officers' only would be against the spirit of free and equitable access to Australia's cultural heritage.[106]

2.108 Some submissions interpreted the provisions to mean that preservation / replacement reproductions made under s. 51A(1) would only be available to library officers. For example, the ADA argued that s. 51A(1) and (3) should be amended to permit digital preservation and administrative purposes copies to be made available to all users within the premises of a library or archive, not simply library officers. Limiting access to officers of the library or archive, in its opinion, 'completely frustrates the purpose of the provision'.[107]

2.109 The ALCC, Central Queensland University, and the Australian Consumers' Association agreed with this view in their submissions.[108] Similarly, Screensound Australia outlined its view of the combined effects of proposed amendments to ss 49 and 50 and new ss 51AA, 51A, 110A and 110B. They interpreted these sections to mean that officers of the archive would be able to look at digitised images, but members of the public would only be able to access these images online with the permission of the copyright owner.[109]

2.110 Apart from any issues of availability of reproductions made under s. 51A, some submissions indicated their concern at the lack of a definition for 'administrative purposes'. In particular, the ACC pointed out that the Explanatory Memorandum contains no justification for the provisions and no explanation or examples of what the Government considers to be 'administrative purposes'.[110] ASA argued that 'such open-endedness

106 CASL, *Submissions,* p. S37. See also comments by ALCC, *Submissions,* p. S223.

107 ADA, *Submissions,* p. S279. See also NLA, *Submissions,* p. S570.

108 ALCC, *Submissions,* pp. S223-24. See also Central Queensland University, *Submissions,* p. S242; ACA, *Submissions,* p. S393.

109 Screensound Australia, *Submissions,* pp. S53-54. See also National Museum of Australia, *Submissions,* p. S323.

110 ACC, *Submissions,* p. S364. See also VISCOPY, *Submissions,* p. S658.

could lead to this provision being exploited against the intent of the new amendment'.[111]

## The Committee's conclusion

2.111 The Committee considers that the proposed provisions do not limit preservation / replacement copies to access by library officers only. On the contrary, the Committee understands that under item 73, reproductions made by a library or archive for preservation / replacement purposes would be able to be made and communicated to the public. Under the Bill, new s. 51A(3) would only limit access to reproductions made for 'administrative purposes' to library officers.

2.112 Given the proposed amendments to s. 51A(1) under item 73, the Committee does not agree that the Government's policy or the purposes of the provisions are frustrated by limiting reproductions made for 'administrative purposes' to library officers. Indeed, the making of administrative copies infers their use by officers of the library. The Committee does not believe that such copies need to be made available to the public.

2.113 The Committee recognises that the scope of 'administrative purposes' is not defined. However, the Committee does not agree that a specific definition of 'administrative purposes' is necessary. The Committee considers that any use of the works under the proposed provision would be limited, particularly as such reproductions would only be made available to officers of the library or archive.

## Preservation reproduction of artistic works

2.114 The Bill extends the scope of the exception under s. 51A to permit archives (including museums and galleries[112]) to copy artistic works in their collections subject to certain conditions. Under proposed s. 51A(3A), libraries and archives may make a 'preservation reproduction' of original artistic works available to the public online. A 'preservation reproduction' is defined by item 78 as a reproduction made only for the purpose of preserving the original version of the work against loss or deterioration. The library or archive would have to ensure that there were no means for the public to make an electronic or hardcopy or to communicate the

111 ASA, *Submissions*, p. S259.

112 See item 21 of the Bill.

reproduction. The reproduction would only be available within the premises.[113]

### Opposition to the proposed s. 51A(3A)

2.115 CAL argued that such a new use of the work unfairly prejudices the interests of copyright owners in artistic works. Further, CAL argued that VISCOPY should provide the licence for such a use.[114] VISCOPY agreed with CAL, submitting that the proposed s. 51A(3A) is unwarranted and that the artist is entitled to remuneration for communication to the public online within the premises of an archive, museum or gallery.[115]

2.116 The Arts Law Centre of Australia however took a different view, arguing that public collections should be on display as much as possible to the public. The Arts Law Centre stated that the analogy made by ACA, that is, looking at an image on a wall, was correct. The Arts Law Centre did suggest though that the Committee recommend the extension of the Educational Lending Right and the Public Lending Right to include this type of digital reproduction. [116]

## The Committee's conclusion

2.117 The Committee agrees with ACA and the Arts Law Centre that the mere act of making digital reproductions of artistic works (for preservation purposes) should not be the subject of a statutory licence. The Committee considers that the restrictions on any communication outlined in proposed s. 51A(3A) are sufficient to protect the interests of copyright owners of artistic works. In particular, the Committee supports the limitation that a person accessing the work would not be able to make an electronic or hardcopy of the reproduction or communicate it.[117]

2.118 The Committee further considers that, as a reproduction of an artistic work can only be made for legitimate preservation purposes, the rights of the copyright owner will not be unreasonably prejudiced. If, however, any new and additional use were to be made of the digitised image, the Committee agrees that this would need to be the subject of negotiation between libraries and archives and the copyright owners.

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113 Explanatory Memorandum, para. 108.

114 CAL, *Submissions,* p. S299. See also IIPA, *Submissions,* p. S453.

115 VISCOPY, *Submissions,* p. S658.

116 Arts Law Centre of Australia, *Submissions,* p. S688.

117 See proposed s. 51A(3A)(b) of the Bill.

2.119 However, consistent with Recommendation 1 above, the Committee does not believe a library or archive should be able to digitise a work and make it available online within the premises, unless the work has been lost or has deteriorated to such an extent that it cannot be displayed. The Committee also believes that the relevant creator of the work should be accorded a right of integrity in dealings with that work. Therefore, the Committee considers that the creator should be able to object to the reproduction of the work under these circumstances.

### Recommendation 7

2.120 **The Committee recommends that proposed section 51A(3A) of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to provide that a preservation reproduction may not be made available online within the premises of the library or archive unless the work has been lost, has deteriorated or has become so unstable that it cannot be displayed.**

**The owner of the copyright in the work may object to the reproduction based on factors of material alteration, distortion, or other derogatory treatment of the work.**