

8 October 1999

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

Copyright Amendment (Digital Agenda) Bill 1999

Thank you for the opportunity to make a submission on the current draft of the *Copyright Amendment (Digital Agenda) Bill 1999* (the "Bill") introduced into the House of Representatives on 2 September 1999.

Arts Law made an earlier submission on the exposure draft of the Bill released for comments on 26 February 1999. This submission updates our earlier submission to the extent that the Bill has been subsequently changed.

We attach an executive summary for your convenience.

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between these interest groups achieved under the Bill. For this reason, we request the opportunity to make an oral presentation to the Committee so that our recommendations can be fully discussed.

Yours faithfully

Delia Browne
Executive Director

Kate Gilchrist and Sally McCausland
Legal Officers

EXECUTIVE SUMMARY

The Arts Law Centre of Australia

The Arts Law Centre of Australia is the national community legal centre for the arts, a source of legal and financial information and advice to creators in all arts sectors which gives ongoing assistance to its subscribers. In 1998 the Centre advised on over 2,500 arts law related queries.

General support for Bill and its objects

The Centre supports the Bill's introduction of a technology-neutral regime for the digital environment. The Centre welcomes the certainty and clarification this will bring to copyright issues in the digital environment.

The Centre supports the stated objects of the Bill. However, we submit that certain adjustments should be made if the Bill's objects are to be achieved in practice.

Suggested adjustments to achieve the Bill's objects

The Bill's main effect is to increase the exclusive rights of copyright owners in the digital environment. We submit that a balance must be struck between the rights of owners, creators and users of copyright. Should a proper balance not be achieved, Australia will be faced with lessened competitiveness in the digital age. This would be against the objects of the Bill.

The Centre submits that the rights of creators and users under the Bill should be strengthened in order to achieve the objects of the Bill. The Centre's recommendations are:

1. *A statutory licensing scheme be considered to collect licence fees in respect of secondary uses of works included in on-line content, whereby the remuneration is distributed to creators of copyright works and copyright owners in fair and equitable manner.*
2. *Section 135ZZI definition of "relevant collecting society" should be amended to add the words "and creators" after the words "owners of copyright".*
3. *Section 135ZZT be amended to include the words "and creators" after the words "copyright owners" wherever those words appear.*
4. *Part VC should be amended to allow the collection of licence fees in respect of secondary uses of works included in on-line content, whereby the*

5. *Section 49 (as amended under the Bill) be further amended to provide that libraries may systematically digitise their hard copy collections and make them available for digital browsing at on-site and remote locations provided that the library can guarantee (via technological protection devices) that down-loading will not occur except as prescribed for fair dealing purposes and that a copyright notice is displayed at the digital access point.*
6. *Proposed section 49(5A) be amended to remove the words “within the premises of the library or archives” so as to provide that digitised works may be digitally browsed at local and remote locations provided that the library can guarantee (via technological protection devices) that down-loading will not occur except as prescribed for fair dealing purposes and that a section 39A prescribed notice is displayed at the digital access point.*
7. *New provisions be inserted to award appropriate remuneration to creators and copyright owners as a result of the amendment suggested at 1. and 2. above, analogous to the proposal discussed at point 3. of this submission.*
8. *The Government should give further consideration to measures for protecting public access to information given the existence of technological protection devices and adhesion contracts restricting access to copyright material in the digital environment.*
9. *The Centre supports the Bill’s maintenance of existing fair dealing exceptions in the digital environment. However, the Government should give further consideration to how fair dealing can be implemented in practice given the existence of technological protection devices and adhesion contracts restricting use of copyright material in the digital environment.*
10. *Subject to our concerns at 6. and 7., in the case of material to which on-line access is initially restricted by an adhesion contract:*
 - (a) *ERMI must contain all terms and conditions of access and use imposed by the adhesion contract; and*
 - (b) *ERMI must be displayed before a user enters the adhesion contract.*
11. *ERMI must include identification of the creator (or creators) of the copyright material even if this person or persons is not the copyright owner.*

The Centre has noted various inconsistencies in terminology in the Bill in the final part of its submission. **The Centre stresses that given the short time frame**

1. LIMITATION ON SUBMISSION

1.1 Time frame

As with the previous exposure draft released in February, Arts Law notes the difficulty of making a detailed submission imposed by the short time frame for comment on this draft of the Bill.

1.2 Fair dealing reforms

Arts Law also notes the exclusion of direct consideration of fair dealing reforms. We understand that the Government is inviting comments, so far as they apply to the Bill, on the relevant recommendations of fair dealing reforms proposed in Part 1 of the report on the *Simplification of the Copyright Act 1968 - Exceptions to the Exclusive Rights of Copyright Owners* (the Part 1 recommendations). However, Arts Law understands that the Part 1 recommendations are intended to be considered separately after the passage of the Bill.

Time has not permitted us to consider how the Part 1 recommendations might apply to the Bill. However, we submit that it is essential to consider the Part 1 recommendations, as well as moral rights and other proposed reforms, in a “big picture” view of how copyright law will work in the digital age. Arts Law would welcome the opportunity to make submissions on the Part 1 recommendations at the appropriate time.

1.3 Discussion paper

We note that we made an earlier submission (the “1997 submission”) on the discussion paper for the digital agenda. This submission draws on and develops some of the proposals made in that submission. Please let us know if you would like a copy of that submission.

2. INTRODUCTORY COMMENTS: ACHIEVING A BALANCE

2.1 The main interest groups: creators, copyright owners and users

Arts Law identifies three general interest groups among its subscribers for the purposes of the Bill. They are:

creators;
copyright owners (such as publishers and software houses), and
users, who may access the digital environment individually or through public institutions such as libraries.

These interest groups may of course overlap, as where for example a creator is also a copyright owner, or a user accesses copyright material in order to create new copyright material. However, Arts Law submits that these groups form distinct interest groups. In particular, the economic interests of creators and copyright owners are often separated: *“Now, creative and artistic skills underpin a network of rich industries.”*¹

2.2 Practical effect of the Bill

Arts Law submits that the Bill, and in particular its introduction of a technology-neutral right of communication to the public, predominantly bolsters the rights of copyright owners. This is primarily because the new general right of communication closes existing “gaps” in the existing technology-specific regime.

In addition, the digital environment allows copyright owners to restrict access to copyright material by using “click licences” or “adhesion contracts” imposing contractual conditions of use. These adhesion contracts can prevent public access through browsing and override existing fair dealing exceptions. Examples include, in the television context, the shift towards pay television, including pay-per-view and video-on-demand services. More importantly, in the on-line context we note the increase of user-pay restricted access services for news and other information.

2.3 Achieving a balance in practice

The digital environment is increasing in importance relative to “hard copy” use of copyright material:... *“digital delivery of copyright material is developing into a main use.”* (Part 1 recommendations, paragraph 7.182).

Arts Law submits that a central consideration if the Bill's objects are to be achieved is the balancing of rights between creators, copyright owners, and users. There is a public interest in achieving such a balance. This must be achieved in practice through the particular measures provided by the Bill.

3. CREATORS' ECONOMIC RIGHTS UNDER THE BILL

When creators' rights are separated from copyright ownership, for example when they assign their copyright, their interests centre around equitable remuneration for further uses of their work, and moral rights.

The substance and practical application of the Bill suggests an expansion of copyright owners' rights at the expense of creators. The effect is inequitable remuneration for creators.

3.1 Moral rights

As submitted elsewhere, Arts Law supports the introduction of a moral rights regime for creators without waiver.

3.2 Economic rights

It has been our experience that creators are in a disadvantageous bargaining position when dealing with their copyright; leading to inequitable remuneration for the creator's intellectual skill and effort. This inequity is likely to be greater with the introduction of a broad right of communication to the public. This is because creators are often required to assign all their rights, without the opportunity to consider the value of new digital rights at the time of assignment. For example, screenwriters must generally assign their rights in an option and purchase agreement. Similarly, musicians have no choice but to assign their rights to record companies under recording agreements.

Equitable remuneration to creators should be assured under the Act. This is in line with the objects of the Bill, specifically 3(a)(i) "*...by allowing financial rewards for creators...*", and 3(d) "*...the provision of adequate remuneration to creators...*". The Centre submits these objects are not met by the Bill as currently drafted and tend to favour copyright owners' rights over creators' rights in the digital environment. Special consideration needs to be given to the effect of the exploitation of "secondary rights" in the digital environment.

(a) *Secondary rights*

We define "secondary rights" as those rights which are subsidiary to the primary rights acquired by a copyright owner from a creator. The primary purpose tends to be one which commits the work to a particular tangible form, for example, a book or sound recording. A secondary exploitation of a copyright work is an exploitation or use of the work which differs

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from the primary or originally intended use. Arts Law submits that secondary uses of works in the digital environment are and will become more prevalent.

It is the practice of investors or purchasers of copyright to acquire all rights or as wide a collection of rights as possible to maximise the return on their investment. For example, a purchase agreement to make a film of a novel will include the primary rights to make the film, but will also deal with the “secondary rights” such as the right to exploit the film on-line. Creators will have difficulty judging the value of these secondary rights when negotiating upfront.

Arts Law submits that the Government should consider a statutory licence scheme (like that existing in France, eg., Copie France, and in Germany, eg., Bild-Kunst¹) *which provides equitable remuneration to creators, (as distinct from copyright owners), where works are exploited in the digital environment. The administration of such a scheme could be modelled on systems developed by the International Confederation of Societies of Authors and Composers (CISAC)² and IMPRIMATUR, a European Union-funded program standing for “Intellectual Multimedia Property Rights Model and Terminology for Universal Reference”.*³

(i) Current position under the Copyright Act

Currently the Copyright Act recognises secondary rights to a limited extent. The relevant statutory licence schemes under the Act are found under Part VA and Part VB of the Act.

These two statutory schemes acknowledge to some extent the secondary rights of copyright owners. However, the legislation does not designate “creators” as those entitled to collect remuneration. Arts Law submits that such statutory schemes should expressly require a fair split of secondary licence income between copyright owners and creators.

Arts Law endorses the view of Vi\$copy that “a statutory provision for the individual artist’s (sic. creator’s) share would mean writers, artists, composers would always benefit from so-called ‘secondary rights’ irrespective of their contractual arrangements for primary rights.”¹

(b) **The Bill**

The Bill proposes no special remuneration for creators as distinct from copyright owners. We submit this is inequitable and contrary to the objectives of the Bill. Arts Law also notes Article 8 of the Berne Convention in respect of the right of communication to the public refers specifically to “authors”, that is, “creators”; and Article 10 of the 1996 WIPO Copyright Treaty refers to the “author”.

(i) **Proposed extension of Part VB**

Arts Law notes the proposed amendments to Part VB of the Act which will extend the statutory licensing scheme to encompass copying under the new right of “communication to the public” with regard to educational and other institutions. This statutory scheme should be amended to guarantee a right of fair and equitable remuneration to creators.

(i) **Introduction of Part VC**

We note the introduction of Part VC which seeks to provide compensation to copyright owners for the retransmission of free to air broadcasts via collecting societies. We note that the definition of “relevant collecting society” in sections 135ZZI and 135ZZT which refer to collecting societies being for “owners of copyright” and “copyright owners”.

We note that in various overseas jurisdictions, creators of our submission) are compensated when secondary uses (as discussed above at 3.2(a) are made of their works. As you may be aware, the Australian Screen Directors Authorship Collecting Society (ASDACs) is currently agitating for the introduction of “directors’ copyright” to bring Australia into line with other jurisdictions. A copy of our letter of support to the Attorney-General is attached to this submission as Annexure A.

In our view, creators’ secondary rights should not be able to be assigned, and collecting societies such as ASDACs should have authority to collect payments for secondary uses such as retransmission of free to air broadcasts of underlying works.

3.3 Recommendations

Arts Law recommends that:

1. *A statutory licensing scheme be introduced to collect licence fees in respect of secondary uses of works included in on-line content, whereby the remuneration is distributed to creators of copyright works and copyright owners in fair and equitable manner.*
2. *Section 135ZZI definition of “relevant collecting society” should be amended to add the words “and creators” after the words “owners of copyright”.*

3. *Section 135ZZT be amended to include the words “and creators” after the words “copyright owners” wherever those words appear.*
4. *Part VC should be amended to allow the collection of licence fees in respect of secondary uses of works included in on-line content, whereby the remuneration is distributed to creators of copyright works and copyright owners in a fair and equitable manner.*

There are a number of practical issues relating to Arts Law’s submission which time does not permit Arts Law to adequately address. These are:

- I. An appropriate definition of a “creator”.
- II. The economic implications of a statutory licensing scheme for secondary rights in the digital environment and the potential overlap with existing licences under Part VA and VB.
- III. The above submission is intended to deal only with works as opposed to other subject matter. This should be considered further.
- IV. The proposal outlined above would need to be examined in light of the international nature of the digital environment. Arts Law notes that collecting societies such as Vi\$copy, APRA, AMCOS, and CAL have reciprocal arrangements with other international collecting societies, and therefore appropriate arrangements can be made to collect and distribute licence fees to creators within and beyond Australia.

3.4 Performers’ rights

Arts Law notes the Bill proposes no amendments to provide protection or rights to performers in respect of recorded performances in audio or audio-visual formats which will now be more widely “communicated to the public”, particularly on-line.

4. USERS’ RIGHTS UNDER THE BILL

Arts Law submits that the digital environment has the following potential effects on *access* and *use* of copyright material:

- (1) The traditional “right to browse” of the hard copy environment is being eroded because of copyright owners’ ability to restrict *access* to material through the use of technology
- (2) The contractual basis of adhesion contracts threatens to undermine existing fair dealing exceptions for *use* of copyright material.

These issues have attracted international concern.¹

4.1 Access to copyright material in the digital environment

We note the Bill's object of providing "reasonable access" to end users.

The subscription access model is increasingly prevalent in the digital environment and is creating two tiers of digital users in Australia: those who can pay for access to quality copyright material, and those who cannot.

As stated in our 1997 submission, copyright law is not intended to prevent people from reading, viewing or hearing copyright material. We submit that digital browsing is an analogous activity and should not be unduly restricted.

(a) In-principle position on digital browsing

In principle, Arts Law supports free digital browsing rights for the public, and opposes the use of adhesion contracts and technological protection devices which restrict digital browsing of on-line sites. Arts Law's reasons for this position are as follows.

(i) Fair trading ramifications

First, Arts Law has concerns about fair trading ramifications of adhesion contracts which restrict digital browsing of on-line commercial sites. If it is not possible to browse digitised copyright material, it will be difficult for users to determine whether they wish to buy from the "virtual bookstore". We note the commercial practice of some subscription sites where users are permitted to browse for a certain amount of time to determine the content and suitability of the site. This type of provision may be sufficient to address this concern.

(ii) The public interest in access to information

Second, Arts Law has concerns about the public interest in "reasonable access" for users if digital browsing is in practice restricted from most on-line sites. However, Arts Law envisages circumstances in which copyright owners should be able to restrict digital browsing rights. These circumstances include where the restricted information is of a confidential nature, where there are privacy concerns, or where the value of the information will be lost immediately if browsing is permitted.

These issues raise difficult balancing considerations. We note that digital browsing rights were the subject of a proposed article of the WIPO treaty, but was deleted through lack of consensus on wording.² *In the time available we too have been unable to determine an appropriate balance of interests in relation to digital browsing.*

Accordingly, we restrict our recommendation in this submission to digital browsing of library collections, but urge further consideration be given to our general concerns.

(b) *Digital browsing rights under the Bill*

In the context of libraries, the Bill largely replicates existing exceptions for copying of library material into the digital environment. However, there are restrictions. Under proposed section 49 of the Bill, libraries will not be able to systematically digitise their collections to create a “virtual browsing library”. In addition, under proposed section 49(5A), if the library purchases works in digital format, the library may make the work available for browsing on-line without the copyright owner’s permission, but only **on-site**.

The Bill retains the idea of a physical library space. The Bill therefore fails to recognise that the digital environment is non-geographically specific and therefore well suited to Australia’s vast population spread. We submit that the Government should encourage Australians to access the internet and other digital platforms from remote locations, thereby encouraging the creation of “virtual libraries” accessible in all areas of Australia. This would harmonise with the Government’s existing initiatives such as the Outback Digital Network which has received substantial funding to assist remote Australians to participate in the digital age.

We submit that creators and copyright owners could be compensated through a statutory licence scheme such as that recommended at **3.3** above.

We have not had an opportunity to consider provisions relating to the digital environment and educational institutions in any detail. However, we would have concerns should copyright owners be able to undermine these provisions with adhesion contracts. We also note that our comments regarding the inappropriateness of restricting digital browsing to onsite locations in libraries appear to apply equally to the proposed provisions under Part VB regarding education institutions.

(c) *Recommendations on digital browsing of library collections*

Arts Law recommends that:

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1. *Section 49 (as amended under the Bill) be further amended to provide that libraries may systematically digitise their hard copy collections and make them available for digital browsing at on-site and remote locations provided that the library can guarantee (via technological protection devices) that down-loading will not occur except as prescribed for fair dealing purposes and that a copyright notice is displayed at the digital access point.*
 2. *Proposed section 49(5A) be amended to remove the words “within the premises of the library or archives” so as to provide that digitised works may be digitally browsed at local and remote locations provided that the library can guarantee (via technological protection devices) that down-loading will not occur except as prescribed for fair dealing purposes and that a section 39A prescribed notice is displayed at the digital access point.*
 3. *New provisions be inserted to award appropriate remuneration to creators and copyright owners as a result of the amendment suggested at 1. and 2. above, analogous to the proposal discussed at point 3. of this submission.*

4.2 Use of copyright material in the digital environment

(a) Existing fair dealing exceptions under the Bill

It appears that, with some exceptions, the Bill has transposed the existing fair dealing regime under the Copyright Act into the digital environment. However, as noted above, the use of adhesion contracts and technological protection devices in the digital environment have the tendency to override existing fair dealing exceptions to the exclusive rights of copyright owners.

(b) In-principle position on fair dealing in the digital environment

Arts Law submits that adhesion contracts should not be able to restrict fair dealing with copyright material.

In Arts Law’s view, it would be appropriate to override the contractual rights of copyright owners in the digital environment where those contractual rights have the effect of restricting the fair dealing rights of end users. However, Arts Law acknowledges the practical difficulties of policing fair dealings of digitally available material in these circumstances. We note examples of other possible solutions to this problem in the international arena.¹ *In particular, we note that certain EC Directives already set out specific user rights which cannot be waived under contract.*²

In the absence of further time and resources, Arts Law refrains from making specific recommendations on this issue. However, Arts Law submits that as other fora are debating

Arts Law Centre of Australia Submission on *Copyright Amendment (Digital Agenda) Bill 1999* measures to address these issues,³ the Government should take further time to consider how a harmonised international approach could be achieved.

(c) ***Recommendation regarding definition of “electronic rights management information” (“ERMI”)***

The proposed definition of ERMI in section 10(1) of the Bill states that ERMI means information that (among other things) “*identifies or indicates some or all of the terms and conditions on which the work or subject-matter may be used, or indicates that the work or subject matter is subject to terms or conditions*”.

This seems to suggest that licensors may, in theory, continue to impose further conditions of use of copyright material after the user has clicked on the licence to access the material. Arts Law has noted its difficulties with adhesion contracts, and particularly those which restrict digital browsing. Should adhesion contracts restricting digital browsing be tolerated in the digital environment, Arts Law submits that, at the very least, the licensor should be required to display *all* terms and conditions of access and use *before* the user enters into the contract. To do otherwise would be to seriously undermine users’ freedom of contract⁴ *and therefore the Bill’s object of “reasonable access”*.

We submit that if the Government is going to grant copyright owners new protections for their adhesion contracts, they must also recognise the rights of users to informed consent to the terms and conditions of such contracts. We also submit that, in accordance with our comments at 3. regarding the rights of creators to statutory remuneration, (and, incidentally, in accordance with the proposed moral right of attribution), creators should be required to be identified in ERMI.

Accordingly, we submit that the proposed provisions of ERMI be amended to provide that:

I. In the case of material to which access is restricted by an adhesion contract:

- (a) ERMI must contain all terms and conditions of access and use imposed*
- (b) ERMI must be displayed before a user enters the adhesion contract.*

by the adhesion contract.

- Arts Law Centre of Australia Submission on Copyright Amendment (Digital Agenda) Bill 1999
- II. *ERMI must include identification of the creator (or creators) of the copyright material even if this person or persons is not the copyright owner.*

5. OTHER COMMENTS ON THE BILL

This section sets out comments on provisions which appeared unclear or in need of clarification. We again note that in the time available we have not had an opportunity to examine all provisions on the Bill in detail. The following comments should not be regarded as comprehensive, and are designed to raise queries regarding issues of terminology rather than form conclusions about how the sections should be drafted.

We would welcome the opportunity provide properly considered comments on these and other sections of the Bill.

5.1 Right to communicate to the public

The proposed definition of **Subsection 10(1) - Definition of *communicate*** refers to “electronic transmission” and “online”. We are concerned that these references are in fact technology specific. We note other instances of such usages in the Bill, such as in the proposed definition of “reception equipment”.

We note that there is no definition of “communication”, yet it is used repeatedly in the Bill. We assume the definition of “communication” is to be taken from the definition of “communicate”.

5.2 Reproductions

When there is an infringement under proposed **Subsection 21(1A) - Reproduction of Works** and **Subsections 21(6) - Reproduction of Works** considerations of fair dealing are relevant. As noted at **1.2**, time does not permit review of the Part 1 recommendations in relation to the Bill.

We note that the proposed **Section 111A Temporary copy made in the course of communication** applies only to an audio-visual item. Arts Law reiterates its concerns that this terminology will be inconsistent with other terms used in the Act, that is, “sound recordings” and “cinematograph film”.

5.3 Libraries and archives

We refer to our comments at **4.1(b)(ii)**.

Are examples under proposed **Subsection 10(4) - Examples** necessary? We assume that an example is not part of the legislation, but to what extent will judges take notice of these?

Does the example refer to profit making museums and galleries as well as or only publically funded ones?

Section 104B - Infringing copies made on machines installed in libraries and archives: we believe uncertainty is created by the introduction of terms such as “audio-visual” into the Act, given its inconsistency with currently described “works” and “other subject matter”.

5.4 Broadcasts

We note that the proposed **Subsection 10(1) - Definition of *broadcast*** brings the Act into line with the *Broadcasting Services Act 1992*. Does this make “broadcasting” a sub-set of “communication to the public”?

(a) *Acts not constituting infringements of copyright in artistic works*

Arts Law does not support the current sections 65, 67 and 68 in their current form as they deny recognition of the intellectual skills and efforts of artists when other creators, for example, musicians are adequately compensated for the reproduction of their music in film, albeit incidental use. From this perspective we support the proposed repeal of section 69, however, we note that as the definition of “broadcast” has been expanded and the copyright in cinematograph films extended to include “communication to the public”, the application of section 65 and 67 is extended in a way which is unfair to creators. We do not support this.

5.5 Circumvention devices

Under proposed **Subsection 10(1) - Definitions of *circumvention device* and *circumvention service*** what does “a limited commercially significant purpose” mean? Will this be a quantitative or qualitative test for purpose? There may be uncertainty relating to this definition.

Annexure A

The Hon Daryl Williams AM QC MP
Attorney-General
Suite MF 19
Parliament House
Canberra ACT 2600

Dear Attorney-General

Re: Copyright Amendment (Digital Agenda) Bill 1999 (the "Bill")

We are writing in relation to the cable retransmission scheme proposed to compensate copyright owners for retransmission of their films on pay television under proposed sections 152AA and 199A of the Bill (the "retransmission scheme").

As you are aware, the Australian Screen Directors Authorship Collecting Society (ASDACS) has submitted that the retransmission scheme be amended to include remuneration for film and television directors. This proposal is supported by prominent Australian and overseas directors.

We also support this proposed expansion of the retransmission scheme under the Bill. In our submission on the exposure draft of the Bill (sent to the Attorney-General's Department on 19 March 1999) we suggested that proposed section 152AA be amended to provide for standing for "creators" to be beneficiaries of payments determined under the scheme. We believe it would be appropriate and just to include directors as "creators" for these purposes.

Similar schemes exist overseas and are already a source of revenue and recognition for Australian directors. Australia's status as a leader in the international film arena would be further enhanced if such schemes are reciprocated domestically. We believe it would be easy and just to amend the Bill to achieve this.

Yours sincerely

Delia Browne
Executive Director

CC: Simon Cordina, Intellectual Property Branch, Attorney-General's Department

¹ Mr Justice Laddie, *Copyright: Over-strengthened, Over-regulated, Over-rated?* [1996] E.I.P.R. 253 at 254.

¹ Information on these societies supplied courtesy of Vi\$copy.

² See *Worksnets, CIS Brief No.1: Welcome to the future*, at <http://www.issn.org/brochure/issnbroc.htm>.

³ See <http://www.imprimatur.alcs.co.uk>.

¹ Quoted from Vi\$copy's preliminary notes for response on the Bill.

¹ In particular, we refer to papers delivered at the recent Australasian Intellectual Property Conference, "The Protection of Intellectual Property in the Digital Age", Australasian Intellectual Property Conference presented by Southern Cross University Law School, 5-6 March 1999, Coolangatta ("AIPC") by United States commentators J.H. Reichman and Johnathan A. Franklin (*Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Goods Uses of Information*) and by New Zealand commentator Susan F. French (*Digital Technologies and Distance Education: A New Zealand Perspective*.) As a further example we refer to the findings of IMPRIMATUR's international forum, *Contracts and Copyright: The Legal Framework for Future Electronic Copyright Management* held in London, England in July 1998 (European Commission DGIII Esprit Project Consensus Forum 1998, an international forum on contracts, copyright and the internet, in association with the Institute for Information Law, University of Amsterdam, London, Lond, 2-3 July 1998). There are many others.

² *Basic proposal for the substantive provisions of the treaty on certain questions concerning the protection on literary and artistic works*, Geneva, WIPO CRNR/DC/4, August 30, 1996, proposed art. 7(2).

¹ Id note 6. Reichman and Franklin conclude with a proposal for a "public interest unconscionability test" which would presume the validity of terms overriding "fair use" exceptions but would subject mass-marketing adherence contracts to a general test of fairness and reasonableness having regard to the public interest. The authors argue that this would encourage licensors to negotiate with different forms of price differentiation, collective bargaining and product differentiation to achieve a balance promoting competition in the digital environment. See also the discussion by the working groups of IMPRIMATUR.

² *Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC)*, O.J.E.C. no. L 122, 17/05/91, art.5(2); *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, O.J.E.C. No L 77, 27/3/96, arts. 6 & 8.

³ Id note 6.

⁴ See for example the discussion of this issue in Reichman and Franklin, id.