Australian Vice-Chancellors' Committee submission on the Copyright Amendment (Digital Agenda) Bill 1999

A. Introduction

The Australian Vice-Chancellors' Committee (AVCC), the peak body representing 37 Australian universities, welcomes this opportunity to comment on the Copyright Amendment (Digital Agenda) Bill 1999 which was introduced into the House of Representatives on 2 September 1999. The AVCC generally welcomes the proposed legislation which provides the opportunity to specifically address and clarify the basis upon which educational institutions can make use of copyright material in electronic form.

The capacity to leverage off existing investment in information technology in support of education and research in Australia is essential in maintaining the sector as a major export industry (currently Australia's 8th largest). Access to information and the exemptions of fair dealing underpin an information rich education and research environment without which Australia will limit its capacity to be innovative and a "clever country" in the digital age.

The AVCC and its member universities believe that the Exposure Draft which was released earlier this year outlined a copyright regime which would, if implemented in legislation, maintain the appropriate balance between the rights of copyright owners and users. The AVCC is pleased that a number of the changes that AVCC then put forward, to better protect the rights of access to and use of materials in both hard copy and digital form by staff and students, have been adopted.

However, the Bill needs to incorporate further provisions which the AVCC believes are critical to the ability of university, TAFE and school students and staff to continue to exercise rights of access, reading and fair dealing in the manner that the government intends. The failure to include such provisions will result in a significant and seemingly inadvertent change to the balance between the interests of copyright owners and users.

In particular, AVCC has identified these main areas of concern:

a) the extension of existing free-of-charge browsing and fair dealing rights into the digital environment is done in such a way that they will be subject to claims for payment;

b) the omission of a statutory licence for electronic communication of broadcasts;

c) the creation of a complex multiplicity of statutory licences to copy and make available works; and

d) the narrowing of the exemptions which allow libraries to make available copies of works to members of the public who require them for research or study, and to make available material for the purpose of inter-library loan systems.

Before addressing each of these areas, it is worth noting the context in which the AVCC raises these concerns.

B. Context of AVCC Concerns

In considering AVCC's concerns (as set out below) with respect to the Bill, the Committee needs to place them in the following context:

1. Universities recognise the importance of copyright and the appropriate economic incentives and rewards that it provides to creators. The health of academic publishing is obviously important to education, and universities are both creators and users of copyright material. Universities make statutory licence fee payments of more than $10 million each year, an amount which has more than doubled over the last five years. The AVCC has always acknowledged the need to pay equitable remuneration for the benefits obtained under these licences. Contrary to claims and predictions that have been made in the past, and which continue to be made, by collecting societies and publishers, the exercise by universities of public interest exceptions under the current Act has not seen a decline in academic publishing. To the contrary, it is and remains one of the most profitable sectors of that industry.

2. University revenue per student has been reducing over recent years and is projected to continue to reduce. Commonwealth funding (by means of base operating grants) has been progressively cut from $10,939 per EFTSU in 1994 to $10,060 per EFTSU in 1999, in constant prices. This represents a reduction of 8% from 1994. Even more importantly, the Government has announced that increases in university staff salaries and salary related costs will not be met by further Government funds being made available. As a consequence, the ability of universities to absorb additional expenses without compromising the services and resources that they offer simply does not exist. Cost savings are imperative and the almost uniform response has been an increase in the student to staff ratio. The student to staff ratio has increased from 13.2 students per staff member in 1990 to 17.9 students per staff member in 1998. Any significant increase in the cost of maintaining the existing access to, use of and benefits from copyright material will exacerbate these problems.

3. Australia has a substantial and consistent net deficit in royalty transactions related to copyright. The difference between inflows and outflows has been around $1.2 billion per year in recent years. Any new copyright regime of extended protection will have substantial costs to the Australian economy with few tangible benefits. Members of the Committee are exhorted to read Sir Anthony Mason's 1996 oration "Reading the Future" on this point

(http://www.nla.gov.au/nla/staffpaper/mason.html). As he says, in discussing proposed digital reforms to copyright legislation:

> "The two aspects of Australian public and national interest I have mentioned – access to knowledge, ideas and information and the financial cost to Australia – are critical considerations. Once this is recognised, we have much to lose from an expansion in copyright protection. It will suit copyright owners and large commercial interests in the United States and Europe, but disadvantage Australia."

It does not make social or economic sense for Australia to tilt the existing copyright balance in favour of copyright owners.

4. The complexity and cost of the existing system of statutory licences under the Copyright Act already makes it almost unworkable. It is a sad irony that while commercial radio stations, ABC and others have the benefit of statutory licences under which fees are calculated as a simple percentage of advertising revenues, gross outgoings or the like, universities have a licence which does not allow any such simple calculation. The result has been a multiplicity of disputes with collecting societies, lengthy proceedings before the Copyright Tribunal, uncertainty as to whether Universities can afford to access and use material, a plethora of issues which preclude ready negotiation and agreement, and huge legal costs. For example, in each of 1998 and 1999 the AVCC will spend close to $1.5 million in legal fees in disputes with collecting societies before the Copyright Tribunal and the Federal Court. In 1998 these disputes took up almost two months of hearing time before the Tribunal. Rather than resolve all the issues in dispute between the parties, there are now more issues on appeal, the subject of separate Federal Court proceedings, and otherwise in dispute, than there were at the outset. Any increase in the complexity of the statutory licence regime will exacerbate these problems. The uncertainty that it will create will act as a barrier to universities taking advantage of digital technologies and giving students and staff access to learning in the most efficient way. The simpler the statutory licence regime the greater the likelihood that matters can be agreed, or quickly and finally resolved.

5. It has never been the case under Australian copyright law that the monopoly granted by copyright is intended to ensure to the owner a maximum economic return. Copyright law balances competing interests – assuring the author a fair return, thus creating the necessary incentive to authors, while permitting certain levels of access and use in the public interest. The fact that copyright law could be restructured to deliver a greater economic return to copyright owners is irrelevant. The monopoly copyright collecting societies, quite rightly from the viewpoint of their principals, have this as their charter and have pressed the Government and this Committee to amend the Bill to meet their aims. This Committee should resist this pressure.

In this context, any strengthening of the position of copyright owners by altering the balance between them and the public interest will disadvantage Australia, Australian consumers and university, TAFE and school students and staff in particular. For this reason, the Government is absolutely right in its stated desire to maintain that balance. However, for the reasons set out below, the Bill does not achieve this in some very fundamental respects. It is very important that it is amended and simplified in order to do so.

AVCC agrees that the operation of the statutory licences in the digital environment should be reviewed after the new provisions have been operative for three years. In the meantime, a very conservative approach should be taken to translating the statutory licence into the digital environment. To make some of the radical changes that the copyright owners and their collecting societies have suggested will create fresh property rights and expectations which will prove very difficult to remove in three years time and cause considerable damage in the meantime.

C. The Fair dealing Exceptions

The effect of the Bill as presently drafted will be to make educational institutions open to claims for payment every time a student reads (or browses), or exercises his or her fair dealing rights under sections 40 and 41 of the Act, by accessing works electronically. This is because in making material available electronically to students, an educational institution will be exercising one of the exclusive rights of copyright (the new exclusive right of communication), for which it is open to claims for payment under the proposed new Part VB statutory licensing scheme.

The following examples serve to illustrate the failure of the Bill to translate the existing balance between owners and users of copyright to the digital world:

1. Student browsing the library

Currently

A student attends the library and is able to browse the library shelves (no act of copyright involved) and may either read the material on the premises (no act of copyright involved), borrow material to read at a later time (no act of copyright involved) or copy the relevant portion (under the fair dealing exceptions to copyright contained in either section 40 or section 41 of the Act). The university, which has outlaid the cost of one or more copies of the book or journal, incurs no further cost in relation to any of the above activities. The rights of the copyright owner are protected by the display of a notice in the prescribed form warning students of the limits to the fair dealing exceptions.

Proposed

The same student attends the same library, and finding that the material required is not available in hard copy, accesses the material electronically. The mere act of making the material available electronically – the equivalent in the hard copy world of placing it on the shelf to be browsed by students – is an act of copyright which will become (under the proposed Division 2A, see items 151 and following of the Bill) remunerable by the university under the Part VB licence. While the student is still able to make a reproduction in reliance on the fair dealing exceptions, the university will be paying, under the Part VB statutory licence, to have "books on shelves", and will *prima facie* be liable to pay again each time a student engages in the digital equivalent of picking a book off the shelf and browsing it. The student's fair dealing rights have been rendered practically meaningless. Every fair dealing by a student for the purpose of research or study, where the work is accessed electronically, will also involve an act of copyright for which the university is *prima facie* liable to pay under the statutory licence of the communication right. This will place an uncertain and possibly intolerable financial burden on universities with the likely result that they will be forced to limit student access to material. Every page that a student copies from an electronic format - which will increasingly be the only format - will have to be paid for.

2. **Closed reserve**

Currently

A university makes four copies of an in-demand chapter or article to place in a library on closed reserve for borrowing on short-term loan. The university pays for these four copies under the Part VB statutory licence. Students can borrow as many times as they wish and either read the work on the premises (no act of copyright involved) or copy in order to read at a later date (in reliance on the s.40 fair dealing exception).

Proposed

The same university makes an in-demand chapter or article available electronically. If the material is copied digitally in order to make it available electronically, the university will pay for this exercise of the reproduction right under the Part VB statutory licence. The university will also be liable to a claim for more money under the new Division 2A, Part VB statutory licence for the exercise of the communication right involved in making the material available electronically. Every time a student accesses this material in order to read it on-line (or to copy it to read later under the s.40 exception) there will be a further exercise of the communication right for which the university will be liable to a claim for payment under the Part VB statutory licence. In an attempt to quantify the likely cost of this pay-per-view approach to electronic closed resource, Queensland University of Technology undertook a calculation based on the $5 per access rate which CAL at one stage proposed to universities. The result was that QUT would be faced with an annual statutory licence fee of $30 million. This compares with its annual expenditure on all new

books, journals, tapes and other library acquisitions of approximately $5.5 million in 1999.

3. Internet

Currently

A student attends the library and accesses material on the Internet (usually no act of copyright involved). An article of interest might be printed or downloaded to disk either in reliance on s.40 of the Act or in reliance on an implied licence to copy for the purpose of research or study.

Proposed

The same student attends the library and accesses the same material on the Internet, involving an exercise by the library of the right of communication to the public (the uploading of copyright material on to a server and making it available to students electronically). The student is still able to print or download to disk in reliance on his or her rights under s.40 of the Act, but the university will also be liable to a claim for payment for the exercise of the new Division 2A statutory licence of the communication right.

Conclusion

The existence of the fair dealing exceptions to copyright are a recognition that in striking a balance between the rights of users and owners of copyright, the legislature did not intend that every exercise of copyright be remunerable. If the Bill is passed in its current form, all electronic access will become remunerable. All educational institutions will be required to pay for students to exercise their browsing and fair dealing rights electronically. There will not be technology neutrality, as payment will not be required if these rights are exercised with respect to works in hard copy form.

Recommendation

Universities are not seeking to avoid liability for payment of equitable remuneration under the Part VB statutory licensing scheme. Universities recognise that digital technology allows for the electronic delivery of course materials to students, and accept that it is appropriate for copyright owners to be remunerated for this use under the Part VB licence.

However, the Bill should be amended to include a saving provision to the effect that universities will not be liable to pay for the exercise of the right of communication where this right is being exercised merely to allow students to exercise their browsing or fair dealing rights. This situation can be distinguished from that where the right of communication is being exercised as a substitute for making multiple copies of works available to students. In this respect it is important to note that in recommending a

statutory licensing scheme for educational institutions, the Copyright Law Committee on Reprographic Reproduction (Franki Committee) stressed that the right of educational institutions to make multiple copies of works under the scheme should be in addition to whatever might be done under the fair dealing provisions.

The AVCC proposes that the following section be inserted in the Copyright Act:

Section [?]

(1) Subject to this section, the copyright in a literary, dramatic or musical work is not infringed by the communication of the work by the administering body of an educational institution if:

(a) the work is only made available for access by staff or enrolled students of the educational institution at the premises of the educational institution with the intention of allowing the staff member or student to read or browse the work or exercise his or her fair dealing rights; or

(b) the work is made available to an enrolled external student of the educational institution with the intention of allowing the student to read or browse the work or exercise his or her fair dealing rights; and

(c) a notice in the prescribed form is given to the person to whom the communication is made containing:

(i) a statement to the effect that the communication has been made under this section and that any work contained in the communication is subject to copyright protection under this Act; and

(ii) such other information or particulars (if any) as are prescribed.

(2) This section does not apply to any exercise of the right of communication which is intended by the administering body as a substitute for making available multiple copies of works to students. In determining whether this subsection (2) applies, it shall be relevant whether or not the administering body has set as a prescribed reading for a particular course of study the work which is made available.

(3) Any provision of a contract, (including a provision that is not set out in the contract but is incorporated in the contract by another term) that purports to exclude or restrict or has the effect of excluding or restricting

(a) the application of subsection (1), or

(b) the exercise of any right conferred by subsection (1);

is void.

Lest there be any doubt that users are permitted to use a circumvention device in order to exercise their fair dealing rights, s 116A(7) should be amended to include ss 40, 41, 42, 43, 103A, 103B, 103C and 104. In this respect we refer the Committee to the oral submission of Simon Cordina, Principal Legal Officer, Attorney General's Department, on 23 September 1999 and in particular his statement that the American Digital Millennium Copyright Act provides for circumvention devices to be used in the exercise of fair use rights.

D. The Statutory Licence for Broadcasts

The Bill does not extend the current statutory licence with respect to broadcasts to enable universities to make copies of broadcasts available electronically. This will have the unintended effect of limiting and perhaps removing the ability of universities to access and use broadcasts for teaching and other educational purposes.

Two examples will make this point:

1. A university will not be able to record broadcasts digitally, store them digitally and make them available for either performance in the classroom or viewing by students in a library at a later date without obtaining a voluntary licence from the copyright owners. There are many owners involved with respect to any particular broadcast (the owners of the copyright in the script, in any dramatic work, in musical works and comprised in the soundtrack, in the recording of the soundtrack itself, in the cinematographic film, and in the broadcast itself) and any one of them could refuse a licence or require an unreasonable payment so as to prevent use.

   While the Bill would allow the university to copy the broadcast digitally, there is no point in making and paying for a digital copy if it cannot be communicated. The definition of "communicate" in the proposed sub-section 10(1) is in terms of "make available online or electronically transmit .... a work or other subject-matter". This would clearly include the digital transmission or delivery online of a broadcast which had been recorded digitally.

   As current technologies become obsolete by virtue of the digital revolution, universities will be denied the benefits of the statutory licence because they cannot use digital technology to make the broadcasts available to students in the most convenient or efficient way. At best the Bill allows broadcasts to be recorded on current analog VHS video tapes and viewed or heard over a television or sound system. Even if this is the case, and the next example suggests otherwise, the Bill has the result that a university has the benefit of a statutory licence if it uses yesterday's technology to enable students to view or hear broadcast material, but not if it uses digital technology. This seems unintended and is contrary to the stated aim of the Bill to create a technology neutral copyright regime.

2. Even more disturbing, the Bill seems to deny a university the benefit of a statutory licence in situations where there is no use of digital technologies and where a university has always had a statutory licence to date. For example, universities will typically record all or part of a broadcast on analog VHS tapes to be made available later in classrooms or for students to watch in a library. To enable the tapes to be seen and heard, they must be shown either on a television screen (which receives electronic signals from the video recorder), or on a network of televisions linked to a central video facility which allows the recorded broadcast to be shown in more than one classroom or location. In each case, the university will have made the recorded broadcast available electronically, even though no digital technology is necessarily involved. This "making available electronically" will involve an exercise of the new exclusive right of communication (as defined in subsection 10(1) of the Bill) for which there is no statutory licence. Clearly this is an unintended result. It is pointless for the Bill to enable a university to record a broadcast under a statutory licence, and to pay equitable remuneration for that recording, if it cannot make the recording available for students and staff to view.

The decision not to extend the Part VA statutory licence to embrace the new right of communication, assuming it was not an oversight, has the unintended consequence of drastically altering – if not removing – the ability of universities to access, record and use broadcasts under a statutory licence. If the intention was to prevent the re-transmission of broadcasts then this can be achieved by only allowing the communication of copies of broadcasts which have been made and paid for under the Part VA statutory licence.

AVCC notes that the relevant collecting society, Screenrights, supports the extension of the statutory licence to the new right of communication and it is discussing with Screenrights alternative suggestions as to how this might best be done. AVCC believes that Screenrights' proposal (which requires the addition of a new Division 2A in Part VA) is much more complex than necessary:

- it fails to take account of the need to preserve the preview provisions;
- it fails to take account of the ability to agree or fix different rates of equitable remuneration for different types of copying, student or institution;
- it requires two remuneration notices and agreements as to equitable remuneration in every case when a single notice and payment for the copy and use of the broadcast should be possible (after all, nobody will wish to copy without some ability to communicate); and
- it fails to make it sufficiently clear when communication is to be treated as merely incidental to the copying of a broadcast and therefore free of charge.

In most situations a copy will only be made so that it can be made available to students in classrooms or libraries in the usual way and it is important that the Bill makes it clear that, while technically there will have been an exercise of the new right to communicate, it will have conferred no additional benefit on the university or burden on the copyright owner and so should attract no extra fee over and above that which will already have been paid for the making of the copy. In other words, where a university is doing digitally no more than it currently does in an analog world then equitable remuneration should remain the same.

Recommendation

The AVCC respectfully submits that the Bill should be altered to provide for a statutory licence of the right to communicate licensed copies of broadcasts and recommends that Part VA of the Act be changed in the manner set out in Annexure "A". All recommended changes to the Act have been highlighted in that attachment.

E. Complexity of the Statutory Licence for Works (artistic, literary, dramatic, musical)

The existing Part VB statutory licence is already the most complex and uncertain statutory licence under the *Copyright Act*. It has given rise to multiple disputes which neither the parties nor the Copyright Tribunal have been able to resolve quickly or finally. The Bill creates a regime which is significantly more complex, even more uncertain and arguably doomed to fail given that it is based on the assumption that agreements can be readily reached between the parties and that, absent agreement, the Copyright Tribunal can resolve disputes quickly and finally. The Copyright Tribunal does not have jurisdiction to resolve many of the critical issues. The likelihood of agreement between the parties can be maximised only by reducing the complexity of the legislation, and the disputes to which it gives rise.

The AVCC makes the following more specific comments and suggestions in this regard:

1. Multiplicity of Statutory Licences

The Bill focuses on each of the exclusive rights of the copyright owner and creates a series of separate statutory licences with the resulting need for a multiplicity of remuneration notices and remuneration agreements. The more notices, and therefore agreements as to equitable rates of remuneration that need to be reached, the greater the likely level of dispute, uncertainty and legal expense in administering these new licences. The AVCC submits that a preferable approach would be to focus on the educational uses that require the benefit of a statutory licence and to have a single licence which covers any copying or communication of copyright material for the purpose of those uses. The following example will highlight the complexity of the proposed Part VB licences.

Example

Assume that a university holds a journal article in both printed and electronic form. It wishes to make it available to students who would benefit from reading the article if they choose to write a particular essay or to lead a particular tutorial discussion. It wishes to make the article available to those students in both printed and electronic form. To cater for the likely demand over the week before the essay is due, it wishes to make four copies and place them on closed reserve in the library. Students with

access to a terminal within the relevant faculty can also access the article in electronic form.

Currently

There is only a need for one statutory licence. A single remuneration notice would be given under Part VB and remuneration would be assessed on either a records or a sampling basis. The copying could be done, from either the printed version of the article or its electronic form. The article could be copied into a printed or an electronic format. Making the relevant material or copies of that material available electronically would not involve the need for any separate licence. Unfortunately, rather than a single rate of equitable remuneration calculated on a per student basis or as a percentage of the actual or deemed student fee income of the university or some other such straightforward measure, the calculation of equitable remuneration (at least under sampling) is complicated by the Act (and recent Tribunal decisions). Remuneration will differ depending upon:

- the number of pages of different types of work copied (there is one rate for literary works, a different rate for art works and a different rate again for printed music);

- how the copies are provided to students (there will be one rate if the journal article is provided on a stand alone basis, a different rate if it is provided as part of a coursepack); and

- the format in which the copy is provided (there is a different rate where artworks are copied onto slides).

Proposed

Under the Bill, the university may need three separate statutory licences and for each there will need to be a remuneration notice and an agreement as to the rate of equitable remuneration. More specifically, the Bill will require the following:

a) A statutory licence to make the copies of the journal article that are to be placed on reserve. These are copies made in print form so that a remuneration notice will need to be given under the existing provisions of Part VB and the university will need to elect to pay on either a sampling or a record-keeping basis.

b) Where the University makes a copy in electronic form (such as by scanning a printed copy of an article into a database) then this copying cannot be done under the statutory licence and remuneration notice referred to in (a) above. Instead, there will need to be a separate remuneration notice (under Division 2A which the Bill introduces into Part VB) and a separate payment pursuant to that notice. That notice will not be a sample or record keeping notice but rather a new form of notice called an "electronic use notice". The basis upon which payment for

copying done under this notice is calculated is left flexible but, at least in the initial stages, uncertain. The possibility of different rates for different types of copying is clearly left open, as is the possibility that those rates, and the categories of copying to which they apply, could be different to those which apply under the remuneration notice that the same university has given to copy the same article into a print format. Those categories and rates will need to be agreed between the university and CAL and if there is disagreement as to whether or not a particular category should be remunerated differently from another, or as to the rate at which it should be remunerated then every one of those disagreements will need to be determined by the Tribunal.

c) If the University wishes to make available the copy that it has made of the article and to do so electronically, then there must be a third statutory licence with respect to the exclusive right to communicate and a fresh remuneration notice again given (under the new Division 2A). While the Bill allows for a single electronic use notice to cover both the copying and the communication of a work in electronic form, it would also allow for a separate remuneration notice to be given with respect to both (see the definition of "electronic use notice" to be inserted in section 135ZB and paragraph 236 of the Explanatory Memorandum). Whether or not the communication is covered by a separate remuneration notice, it is clearly done under a separate statutory licence for which a separate equitable remuneration may be requested, agreed or determined by the Copyright Tribunal. Again, it is possible if not likely that different rates of equitable remuneration will be payable for the communication electronically of different types of work, of works in different formats and of works which are to be used in different ways. Failure to agree the relevant categories by which communications should be differentiated, or the rate for any particular category, will lead to disputes which require resolution by the Copyright Tribunal.

The complexity of this matrix of notices and the issues on which they will require the parties to agree is mapped our in the chart attached as Annexure "B".

2. No record-keeping option for electronic use

The above example also raises one other very important problem with the multiple licence approach of the Bill:

In the case of copying into a print format, universities have a choice between paying equitable remuneration based on a sampling system (which will necessarily involve an element of error and, in the case of a sector wide sampling system such as has always existed, will also involve payment depending upon levels of copying within the sector rather than the specific university) or based upon actual copying recorded within that specific university. This choice is critical as it allows a university to turn its back on the administrative convenience and reduced record keeping burden of a sampling system if it wishes to more closely manage and monitor its copying levels and licence fees or to adopt copying practices which are quite different from those of

the sector as a whole. In late 1998 thirty-three universities gave record-keeping notices to Screenrights to cover licensed copying from 1 March 1999 and recently nine universities gave record-keeping notices to CAL to cover licensed copying from 1 January 2000.

In the case of copying into electronic formats and the making available of copyright material electronically, this option for a university to pay based upon what it actually does has not been preserved by the Bill. While the parties could agree to pay on the basis of a record keeping system, if CAL (the relevant collecting society) refused to agree such a system then a university would have to persuade the Copyright Tribunal to allow such a system. No rationale is given for preserving the record keeping option in the case of the much simpler print licence but rejecting it in the case of the more complex electronic licences.

The intention of the draughtsperson seems to have been to create a basis for assessing levels of copying and communication that should be paid for in a way which created maximum flexibility for the parties (or Tribunal) and avoided problems associated with the types of records and marking of copies (and communications) that record keeping and sampling systems raise when translated into a digital environment. However, this removes the existing right of a university to pay for what it actually does. This is not a sacrifice that needs to be made. If flexibility can allow an appropriate electronic use system to be agreed or determined by the Tribunal, it can also allow for an appropriate record keeping system to be agreed or determined.

3. No licence to communicate material in hard copy form

There is no statutory licence with respect to the right to communicate in relation to materials in hard copy form. The assumption seems to be that such material cannot be made available electronically or online. This is debatable. An artwork which is reproduced on a slide, or text reproduced onto a microfiche, could be electronically projected onto a screen, or made available by facsimile machine or video conferencing facilities to remote students. As currently drafted, there is no statutory licence which allows this to be done. This concern will be addressed if AVCC's suggestion of a single use based statutory licence is adopted.

4. Remuneration issues

The AVCC recommends that a provision be inserted in the Bill so that it is clear that the position is technology neutral - where a copy delivers the same benefit, whether in hard copy or digital form, then it should be remunerable at the same fee. This is the stated intent of the Government but is not achieved by the Bill.

5. Simplicity

AVCC submits that it ought to be possible to have a single remuneration notice undertaking to pay for any copying or communication works made for educational

purposes. Greater flexibility can be introduced into the types of sampling and record system which can be used to assess copying and communications and the types of records or marking that need to be kept or made. Specific provisions could and should be included to make it clear that equitable remuneration for copying and making available material for educational use can be agreed or determined as a single global figure by reference to the number of students or the actual or deemed revenue from students or some other easily calculated figure. This would allow the parties and the Tribunal to reduce the number of matters in dispute and would make it more likely that agreement could be reached or mediated more quickly and easily.

The AVCC submits that a simpler system such as that which it suggests, and which was suggested in the Exposure Draft of the Bill, more closely approximates the sort of licence that a university would get if it were negotiating direct with copyright owners. It is unrealistic to think that copyright owners would require three separate licences to cover educational use by a university. The licences which universities already have for electronic published journals involve a single grant of a licence, for a single payment, to cover a range of educational use. A statutory licence does not need to be, and should not be, any more complex. Every layer of complexity will create a corresponding layer of dispute, legal action, cost and delay. This creates a barrier to access to copyright material and to its efficient use within Australian universities which will put them and Australian students at a disadvantage when compared to their overseas counterparts.

Recommendation

AVCC recommends that the provisions of the Bill relating to Part VB be amended to take account of the concerns outlined above. AVCC is working with schools bodies to prepare suggested amendments and will shortly provide the Committee with a draft of those amendments.

F. Library Exceptions

The Australian Vice Chancellors Committee shares the concerns raised in the submissions of the Council of Australian University Librarians (CAUL) and the Australian Libraries Copyright Committee (ALCC) and makes the following additional comments on the library provisions.

Library Definition Section 10(1)

One unexpected change between the Exposure Draft and the Copyright Amendment (Digital Agenda) Bill has been the inclusion of the definition of a 'library', which means that libraries in 'for profit' businesses and organisations will be unable to rely on the library exceptions which are provided for in the Act.

The outcome of this more limited definition of a 'library' for the purposes of the Bill would seem to run counter to expressed Government policy, which seeks more collaboration between the public and private sectors. On the encouragement of

Government, research in Australia depends on collaborative activities between public institutions (CSIRO, Universities, Hospitals) and industry (eg mining or pharmaceutical companies). If the 500 libraries (or 10%) that fall in the new definition are excluded from public access, significant specialist information held in those collections will be effectively "locked away" from public use and from use by Collaborative Research Centres. Corporate libraries will no longer be able to request documents, on behalf of their research scientists, from not-for-profit libraries, and will have little incentive to contribute holdings data to the National Bibliographic Database, which up until now has permitted libraries from every sector to participate in a national resource sharing scheme.

Library to User Copying (Section 49) and Library to Library Copying (Section 50).

It is vital for the Australian information economy that the Bill preserves and maintains the strong tradition of resource sharing that exists between Australian university libraries.

The mechanisms that have sustained the Australian scholarly community for several decades were developed in a print environment, and it is imperative that new mechanisms be developed to ensure that opportunities offered by the new technologies are utilized to full effect.

Through its support of JEDDS (Joint Electronic Document Delivery Software) and LIDDAS (Local Interlending and Document Delivery Administration Systems), the AVCC has contributed to the development of an electronic document delivery software package and an integrated interlibrary loan management system which can deliver documents to library or client workstations where they are received and read, printed or downloaded.

The sender machine holds the document in electronic form until a message is received reporting the success of the transmission, the receipt of the document by the requesting library or end user, and automatically deletes the document once it has been read or downloaded. At the receiving library, library staff can either print out the document and send it to the requester, or hold the document in a central store and alert the requester via email that the document has been received. The requester can then view, print or download the document to the extent that the section 49 and 50 exceptions allow. A delete command is automatically triggered the first time the document is opened.

Under the proposed Section 49(5A), users accessing a document in a library, that has been received electronically for the purpose of research or study, would be restricted to viewing and printing out the document. A significant aspect of the functionality which these systems were designed and funded to deliver will be lost. No persuasive rationale is given for this change in the balance which will reduce current levels of access and convenient use for users. To deliver the same level of access and

convenience (as they enjoy in hard copy), universities will have to obtain broader (voluntary) licenses from copyright owners at a cost.

The provision also will require libraries to ensure that technological measures exist to prevent a user from making or communicating an electronic copy of the work that was accessed. This will require universities to invest in or maintain equipment that they would not otherwise need or which lacks functionality which may be important for other purposes.

Under the proposed Section 50(7B) the Bill applies a new and stricter commercial availability test if the material copied is held by the library in electronic form. The test applies to all works (including journal articles), and applies no matter how much of the work or article is to be copied. The supplying library cannot reproduce and supply from the electronic source material unless the requesting library officer makes a declaration that, after reasonable investigation, he/she is satisfied that 'the work' cannot be obtained within a reasonable time at an ordinary commercial price. This new test raises a number of questions, including the significant difficulty of defining 'the work' to which the commercial availability test applies and whether there was an ordinary commercial price for that work in electronic form. This test will create an enormous administrative burden on librarians and create delay and uncertainty for library users. How does a library make these enquiries when there is a student at the desk requesting access to a work which it does not have but which is available from another library in electronic form? There is no good reason to distinguish between access to hard copy and electronic forms of a work in this way which is clearly not technology neutral. It will disadvantage smaller libraries, which will not be able to obtain from larger libraries material which is only available in electronic form (which will increasingly be the case) in order to meet the requests of users who want access for research or study and request it under section 49. In other words, rights of access are being constrained.

G. Concluding Remarks

In short, while the Government has not intended to alter the balance of power between copyright owners and the university sector as a user, this will be the effect of the Bill unless changes along the lines of those suggested by the AVCC, and supported by other user and consumer groups, are made.

11 October 1999

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