24 November 1999

Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Inquiry into the Copyright Amendment (Digital Agenda) Bill 1999

Copyright Agency Limited (CAL) was pleased to have had the opportunity to appear before the Committee at its final public hearing on the Copyright Amendment Digital Agenda Bill 1999 (the Bill) on Friday, 22 October 1999 to present its views on those matters the Committee was considering that day and thanks the Committee once again for its time.
CAL also appreciates the considerable time the Committee has made available on other occasions to hear CAL's perspective on this important draft legislation.
In this final submission, CAL simply wishes to provide additional material to the Committee and reiterate its position on certain matters, as set out under headings below.

Joint submission regarding the Round Table Forum on 14 October 1999
As the Committee is aware, CAL made a joint written submission with other organisations including the Australian Copyright Council (ACC) and the Australian Publisher's Association (APA) on Friday, 22 October 1999.
With respect to the library copying provisions, CAL supports the detailed drafting proposed by the ACC in their most recent submission to the Committee.
CAL respectfully submits that this drafting be referred by the Committee to the Attorney-General's Department for fulsome consideration.

Fair dealing
As undertaken by CAL, attached are 2 annexures (annexures A and B) giving details of guidelines regarding fair dealing copying practices adopted in the United Kingdom between copyright owners and users. We also enclose some information about the origin of these initiatives.
These guidelines were provided to the legal advisers to MCEETYA, the AVCC and the Australian Digital Alliance (ADA) during last week.

With respect to annexure A (the fair dealing guidelines for the electronic environment), these have been developed through discussions of a Working Party comprising representatives of the Publishers Association and senior higher education academics and librarians representing the UK higher education sector. CAL has been informed in the last week by the Publishers Association that the guidelines on fair dealing have been accepted by the universities and are being circulated to them with the consent of their central representative body, the Standing Conference of National and University Libraries (SCONUL).

With respect to annexure B (a guide for users for the print environment), this is a guide for users published by the British Copyright Council and last revised in 1990.

CAL has been informed by the Publishers Association that the print model is used in virtually every major library in the UK as the basic statement on fair dealing.

In addition, CAL encloses the Australasian Mechanical Copyright Owners Society Limited's (AMCOS) September *1999 Practical Copyright Guide to the Use of Print Music In Australia.* AMCOS represents the interests of publishers of print (sheet) music in relation to reproduction of that music. Importantly the guide sets out free licences from AMCOS publisher members to print music users allowing them to copy print music in limited circumstances. These licences are set out in section C of the guide.

It is CAL's view that these kind of licences provide a good indication of the kind of guidelines that could be developed in relation to the use of other kinds of published materials. CAL recommends that the Committee consider the AMCOS guide as well as the UK guidelines in its deliberations regarding the fair dealing exception in the Bill.

Finally, at annexure C, is the most recent version of a legal research and briefing paper for publishers (Net Law) on copyright and other legal issues prepared by Charles Clark. Mr Clark also prepared the UK guide for users for the print environment. The Committee will be interested to note the discussion at pages 4-7 which refers to the development of the UK electronic fair dealing guidelines (described above) .

Educational statutory licence and insubstantial copying provisions

Summary of position

Before proceeding to outline in more detail CAL's position with respect to the proposed Division 2A of Part VB of the Bill, we have summarised our preferred position with respect to the Government's proposal as contained in the Bill and MCEETYA's proposal.

CAL prefers the Government's proposal to that of MCEETYA's proposal, except in relation to s.135ZMB (multiple reproduction and communication of insubstantial parts of works). In relation to insubstantial copying, CAL opposes the inclusion of this provision in both the Government's and MCEETYA's drafts.

In relation to the Government's proposal, CAL notes that the major deficiency of the approach is that two systems for issuing of remuneration or electronic use notices will operate, laying additional burdens on both educational administering bodies and CAL. For this reason, if the Committee is so minded, CAL recommends that a complete review of the equity and operation of Part VB be undertaken by the Government, with a view to streamlining the operation of Part VB further, including the proposed new Division 2A.

CAL understands that in relation to this aspect of its proposal, that is, the principle of simplified operation of Part VB by enabling administering bodies to issue only one notice in relation to both hard and digital copies and communications there is greater agreement between copyright owners and users. Given this, CAL urges the Committee to recommend that Part VB be restructured in this manner.

If the Committee prefers MCEETYA's proposal to that of the Government's, CAL urges the Committee to:

preserve the Bill in s.135ZMB(1) and not adopt MCEETYA's drafting;

redraft section 135ZU by incorporating parts of s.135ZWA of the Bill; and

preserve s.135ZXA(b) of the Bill.

If the Committee wishes to recommend that the Government undertake a review of Part VB in further consultation with owners and users, CAL would urge the Committee to recommend that the following aspects of the Government's approach be retained:

the principles of flexibility in s.135ZWA and that this extend to both hard and digital copying and communication; and

the limitation in s.135ZXA(b) concerning access to licensed communications.

CAL would also recommend on a review of Part VB the following:

that the provisions allowing for records notices and sampling notices be repealed; and

that the right of revocation with 3 months notice (s.135ZZ) be amended.

CAL's response to the Government's proposal

CAL is generally pleased with the approach of the Government to the extension of the Part VB scheme to communication of copied works in electronic form, because of the flexible manner in which the administration of the scheme is designed by proposed s.135ZWA: that is, that the relevant terms such as the method of remuneration and the recording of copying is to be determined by the parties. CAL would support the Government's proposal in preference to MCEETYA's.

However, CAL notes that under the Government's proposal there will be the administration of 2 schemes depending on the original form of the material being copied. The Explanatory Memorandum says that "Two separate schemes will apply. The first will apply to copyright material in hardcopy or analog form, and the second (the new scheme) to copyright material in electronic form".

Although this approach recognises that the current Part VB scheme lacks the flexibility to adapt to digital copying, the concern with this approach is that administering bodies will need to issue multiple remuneration notices to collecting societies. This places additional burdens on users. It also requires consequent double administration by the relevant collecting society.

Further, under the Government's proposal users need to distinguish between the original form from which a work is copied and the method by which it is copied, leading to different quantities that may be copied and rates of remuneration (Explanatory Memorandum, p 84). Such a result would appear to defeat the Government's other professed policy aim of simplification of the *Copyright Act 1968* for owners and users, as evidenced by the Copyright Law Review Committee's simplification inquiry.

While CAL appreciates that it is the expressed policy of the Government that "the current provisions of Part VB should continue to apply to copyright material in hardcopy or analog form" (Explanatory Memorandum, paras 248, 249) CAL is of the view that Part VB operates unfairly with respect to the giving of remuneration notices.

CAL's experience with the existing scheme, which by s.135ZU(2) allows the educational administering body to determine whether to elect to make payment based on a records system or sampling system, is that permitting an educational body alone to choose whether they will participate in sampling or keep full records of their copying skews the balance between owners and users.

Given the importance of educational use of copyright material for both owners and users it is clearly unfair that one party (the educational sector) can decide, by their election of either record keeping or sampling, how the copyright owner can obtain information about the use of their work and consequently payment. The statutory licence involves a compulsory dealing with a copyright owner's work and accordingly any owner should be entitled to the best information available about the copying of their work.

When the choice over record keeping or sampling is coupled with the ability of an administering body to revoke notices with 3 months notice and to shift from sampling to record keeping, for instance, there is clear frustration of Parliament's intent. A move away from a sampling system has a number of consequences: notably, that a true picture of copying from a well designed sample cannot be maintained and that the expense of designing and conducting such a sample is potentially wasted.

The remarks of MCEETYA at the public hearing on Friday 22 October 1999 at LCA 296 that record keeping is a fundamental right of users misrepresents the purpose of these provisions. CAL does not agree with this statement in any respect. The inclusion of the statutory licence in the Act was simply for administrative convenience, as was the inclusion of the options of record keeping and sampling. It is a misnomer to describe record keeping as a right.

For these reasons, CAL submits that the Committee should recommend that the Government conduct a separate review of Part VB in consultation with owners and users to remedy some of the inequities that have arisen in the administration of the statutory licence. Alternatively, the Committee may feel able to recommend that sampling and record keeping as prescribed by the Act be abandoned (see paragraph 39 below).

CAL's response to MCEETYA's proposal (tabled before the Committee on Thursday 14 October 1999)

CAL welcomes the opportunity provided by the Committee to comment on the proposal put forward by MCEETYA for the schools sector and supported by universities, as represented by the AVCC.

We agree with MCEETYA that it would be preferable for only one written notice, a remuneration notice as it currently named, to be provided by the administering body of an educational institution to the relevant collecting society. For both copyright owners' representatives such as CAL and users such an approach has the attraction of simplicity and ease of administration. MCEETYA has achieved this approach by removing references to electronic use notices in the Bill and amending section 135ZU.

CAL also agrees with educational interests that less notices mean less potential for disputes. In addition, if users are only required to issue one notice then the Copyright Tribunal should have the ability to determine the matter once only in a comprehensive manner.

However, a number of changes would be sought to MCEETYA's proposal to make it acceptable to CAL.

In essence, CAL would propose that the flexibility of the Government's proposal (as contained in s.135ZWA) for reproduction and communication of electronic works apply to both Division 2 and Division 2A of Part VB. This would mean that administering bodies could issue one remuneration notice that could apply to:

either or both reproduction (licensed copies) and communication (licensed communication) of

copyright materials in either or both hard copy or and electronic form.

Such a remuneration notice could nominate which educational institutions covered by the notice were undertaking which activities in relation to which kind of materials. Therefore, remuneration could be calculated taking account of the different take up rates of technology by different institutions and not require that every institution be treated in a like manner.

CAL would prefer the application of the principle of s.135ZWA, namely that the matters and processes for assessment of copying and remuneration be determined by agreement between the parties or failing such agreement by the Copyright Tribunal. This concept should apply to all uses under Part VB.

This approach would remove any incentive for users to elect to shift between sampling and record keeping. The necessary amendments to Part VB would be

the deletion of s.135ZU(2), s.135ZU(3), s.135ZV (records notices) and references to sampling in s.135ZW (sampling notices) of the Act, and other consequential amendments.

It appears from CAL's reading of MCEETYA's proposal that although the proposal eliminates two notices, it has one notice that applies different rules for licensed copies (sampling or records) and licensed communications (as determined by the parties). CAL's proposal is for no distinction between copies and communications. This truly achieves MCEETYA's aim of simplicity and flexibility for the parties.

We note that under MCEETYA's proposal the existing s.135ZU(3) and the proposed s.135ZU(4), which confirms that a remuneration notice remains in force until revocation have been deleted. CAL would propose that this clarification remain.

Item 151 Section 135ZMB (multiple reproduction and communication of insubstantial parts of works that are in electronic form)

CAL has made its position with respect to this provision of the Bill known to the Committee in its oral and written submissions. The Committee may wish to refer particularly to pages 14-16 of CAL's written submission dated 5 October 1999 where CAL indicates the reasons for its opposition to this aspect of the Bill and the existing s.135ZG in the Act.

CAL wishes to reiterate its opposition to MCEETYA's insertion of the words "solely for the educational purposes" and "or of another educational institution" and the deletion of the existing words "on the premises" in s.135ZMB of the Bill. The concession for nonremuerated copying contained in s.135ZG (extended by the Bill) was quite explicitly limited to certain copying for an institution within the confines of that institution. The extension to communication both within and for another institution enables email, post, fax, internet copying and communication and insubstantial copying dramatically increases. Put bluntly, it is CAL's view that this kind of use should be caught by other provisions in Division 2A and remunerated.

Temporary reproductions

As CAL indicated to the Committee on Friday 22 October it has not made a written submission to the Committee with respect to items 45 and 94 of the Bill (temporary reproductions). However, CAL supports the position advanced by ARIA and others in their written drafting provided to the Committee that day. The drafting as suggested by ARIA encapsulates many of the views expressed by CAL to the Attorney-General's Department in its written submission dated 22 April 1999 (paragraphs 102–104). Particularly, that the wording of the *European Draft Directive on Certain Aspects of Copyright and Related Rights in the Information Society* be incorporated and that the word "temporary" be further clarified. For the Committee's benefit we have attached a copy of our submission provided to the Attorney-General's Department dated 22 April 1999.

CAL is pleased to note that the Bill has been amended since the Exposure Draft and the words "in the course of looking at material on a computer screen" have been omitted. With the APA CAL welcomes this change.

However, we reiterate our oral submission that the ambiguity in the Explanatory Memorandum at paragraph 63 must be rectified, to avoid any doubt in the application of the proposed section. The Explanatory Memorandum should make clear that neither browsing or caching are permitted in reliance on the exception. CAL submits that paragraph 63 could be rectified by amendments as follows:

63. New s.43A(1) excludes from the scope of the existing reproduction right temporary reproductions made in the course of the technical process of making or receiving electronic communications. ~~The exception for temporary reproductions is intended to include the browsing (or simply viewing) of copyright material, including copyright material that involves the production of sound.~~ This amendment reflects the Government's aim of ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised. ~~The exception would also mean that reproductions made in the course of certain caching would not be caught by the existing reproduction right. In general terms, "caching" is the process whereby digital works are copied as part of the process of electronically transmitting those works to an end user.~~

Finally, we support the comments of Mr Metallitz to the Committee concerning the agreed statement of the *WIPO Copyright Treaty* concerning the scope of the reproduction right. It is CAL's understanding that an agreed statement for such a treaty may be taken into account in the interpretation of the treaty, as a document which adduces the intention of the parties. Article 31 of the *Vienna Convention on the Law of Treaties* provides that other "instruments" made by the parties in the conclusion of a treaty can provide a context for interpretation of that treaty.

Accordingly, we oppose the drafting suggestions of the ADA and the interpretation given to the deliberations of WIPO by Mr Wodetzki on the ADA's behalf.

Circumvention devices and technological protection measures

CAL fully endorses the submissions of the APA (6 October 1999) and the ACC (6 October 1999) concerning use of circumvention devices and sanctions against circumvention of technological protection measures.

Specifically, we agree with the ACC that the Bill should not specify permitted purposes for use of circumvention devices other than for law enforcement or national security.

In addition, we note that the Bill still does not prohibit "use" of such devices and accordingly we agree with the submission of the ACC that there should be sanctions against use in addition to those available against a maker, seller or importer. On this point we refer to paragraph 159 of our submission dated 22 April 1999 where we stated:

CAL also notes that there is no liability for the use of a circumvention device. In CAL's view, a civil penalty should apply to the use of a circumvention device with commercial impact on the copyright owner. For example, a law firm or other person could buy such a device and use it to hack into a legal database, thereby avoiding any requirement to make licence payments. As there is no liability for the use of the device they would not be liable even if it is used to infringe copyright. Finally, CAL submits that in s.132(5C)(e) that the word "and" at the end of the clause be replaced with the word "or"].

CAL wishes the Committee well in the final weeks of its deliberations and looks forward to the presentation of the Committee's report later this year.

Yours sincerely

Michael Fraser
Chief Executive Officer