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

Introduction

As foreshadowed in our original submission provided on 22 October 1999, the Attorney-General's Department (AGD) and the Department of Communications, Information Technology and the Arts (DoCITA) would like to provide the Committee with a supplementary submission on the *Copyright Amendment (Digital Agenda) Bill 1999* (the Bill) as set out below.

2. The aim of this submission is to clarify the Government's policy with respect to the proposed legislation, in response to a number of issues raised by copyright interests during the Committee's public hearings on the Bill. The submission is intended to be read in conjunction with the original submission.

3. The submission addresses the following areas of the Bill:

- the application of the exceptions to the "first digitisation" of copyright material (see Items 23 and 25, 48-53, 55-66, 71-78);
- the extension of the library and archives exceptions to the reproduction and communication of copyright material in electronic form (Items 44-61);
  - will the Digital Agenda Bill put libraries in a position to compete with online publishers?
  - can libraries acquire a copyright work and then supply it to all other libraries?
  - can library users browse and copy 'free' material on the Internet from a terminal in a library?
- the extension of the reasonable portion test to literary and dramatic works in electronic form (Item 20);
- the operation of the educational statutory licence for the "electronic use" of copyright works (Items 124-151, 178-199, 204-210);
  - flexibility of "electronic use" system
  - insubstantial portions
  - educational institutions' concerns about liability for browsing
- the temporary copies exception (Items 45 and 94);
- the making of (and liability for) a communication (Item 26);
- the interaction of copyright law and contract law; and
- the transitional provisions (Schedule 2).

First digitisation

Issue: **Copyright owners' right to control the first digitisation of their material (see Items 23 and 25, 48-53, 55-66, 71-78, ss.21(1A), 21(6), 49, 50, 51AA, 51A)**

Interests' response

4. Copyright owners are concerned that they should be able to control the "first digitisation" of their material (ie, when their material is first converted from print to electronic form). In particular, they are concerned that libraries will be able to convert printed works into digital format without their consent. Some owners argue that such digitisation should only be able to occur under a statutory licence.

Government policy

5. The Digital Agenda Bill clarifies that the exclusive right of reproduction in relation to works includes conversions from print to digital form and vice versa. Similarly, the Bill provides that the exclusive copying right in film and sound recordings includes conversions from analog to digital form and vice versa (see Items 23 and 25).

6. The application of the exceptions to the clarified meaning of "reproduction" and "copy" reflects the Government's policy of extending the exceptions to ensure reasonable access to copyright material in electronic form. This principle was specifically recognised in the WIPO treaties upon which the Bill is based. Such an extension is designed to enable cultural institutions to use modern technology to its full potential in providing reasonable access to copyright material in electronic form (for example, the scanning by a library of a "reasonable portion" of a work for email to a user in a remote area for their research or study).

7. Whilst extending the exceptions the Government has been fully aware of the need to protect copyright owners exclusive rights and emerging online markets. In response to concerns from copyright owners, new conditions / restrictions have been placed upon the reproduction and communication of copyright material under the exceptions in the Bill.

8. It should also be noted that any provision to compensate copyright owners for the 'first digitisation' made by libraries or archives, or to introduce a statutory licence scheme for s. 49 generally, would be difficult to administer and would add a significant cost to local, State and Federally funded libraries. It would also be a significant departure from Government policy which is that existing print exceptions should be carried over to the digital environment.

Extension of libraries and archives exceptions

Issue: **Will the Digital Agenda Bill put libraries in a position to compete with online publishers?**

9. Under the Copyright Act libraries can currently photocopy material and supply it to a user in response to a specific request for research and study purposes, provided certain conditions are met. The Digital Agenda Bill extends those provisions to allow electronic reproduction and communication of material in similar circumstances. Where only an article from a periodical publication, or a reasonable portion (being up to 10% or a chapter) of a published work, is requested for research and study, the library may copy and supply the material electronically (eg by email) without making any further inquires as to the commercial availability of the material. If more than that amount is requested, the librarian must have regard to whether the material can be obtained within a reasonable time at an ordinary commercial price before it can be supplied (Items 48–57).

Interests' responses

10. Copyright owner interests such as Copyright Agency Limited (CAL) representing publishers and authors, objected to these exceptions saying that they allow libraries to compete with publishers who may wish to exploit new markets in supplying small portions and individual articles by online delivery. It was argued that libraries could build up an electronic database of requested articles in competition with commercial online publishers. It was proposed by CAL that the supply of all articles and reasonable portions by libraries be subject to voluntary arrangements / licences. Alternatively it was suggested that the supply of this material should be subject to a statutory licence whereby the library could supply the material (that is normally not subject to a copyright payment) subject to the payment of equitable remuneration by the library to a collecting society such as CAL for distribution to copyright owners.

11. Libraries maintain that they are not are not in a position to compete with publishers in this way, nor is it their intention to do so as their public role does not contemplate such competition.

12. This raises 3 questions, namely:

(a) Can libraries act unfairly as competitors to commercial publishers?

(b) What are the implications for publishers / users of emerging online markets for portions of works and articles?

(c) What are the implications for the enactment of a statutory licence for library copying and communication under the exceptions?

(a) Can libraries act as competitors to commercial publishers?

13. Libraries would find it very difficult if not impossible to act as commercial competitors to publishers by relying on the copyright exceptions for libraries and archives, for a number of reasons set out below.

14. The Bill provides that the exceptions for libraries do not apply to commercial libraries (see Item 11, 10(1)). Furthermore, the Copyright Act itself prohibits libraries from profiting from supply of copyright material. Under s.49(3), a library may not charge more than the cost of making and supplying a copy of copyright material requested by a user.

15. There are a number of further conditions under copyright legislation that libraries must observe if they are to take advantage of the exceptions:

- library users are required to make declarations that the material will only be used for research and study and no other purpose and that they have not previously been supplied with a copy of the article (s.49(1), s.49(2A) Copyright Act);
- penalties apply for failure to keep proper records, notations and for false declarations in relation to copying and supplying material (ss.203E–203H Copyright Act);
- the exception does not apply to a request for a copy of 2 or more articles from the same periodical publication unless they relate to the same subject matter (s.49(4) Copyright Act).

16. In response to copyright owner concerns, the library and archives exceptions in the exposure draft were narrowed still further so that:

- no electronic material (including articles) may be supplied between libraries unless the librarian is satisfied that a copy cannot be obtained within a reasonable time at an ordinary commercial price (each library will therefore have to acquire its own copy of electronic material if it is commercially available - Item 64 s.50(7B));
- libraries will be required to destroy the electronic copy of the material they have made as soon as practicable after it has been supplied (so that they will not be able to build up a database of articles and reasonable portions in competition with publishers) (Item 56);
- the exception now clearly applies only to publications held in the collection of the library (libraries will not be able to supply material without first acquiring it themselves – this preserves the primary market for journal sales to libraries);
- libraries will be required to provide a copyright notice to recipients of material in electronic form, advising that the reproduction was made under the exception and that the article or work is subject to copyright protection [and such other matters as are prescribed by the regulations] (Item56).

17. There are also a number of other restrictions on public libraries which would prevent them from acting in unfair competition with commercial publishers. Australia's public library system is established by Commonwealth and State enabling legislation that sets out the general purposes and powers of the various public libraries and provides for their

government by a council or board. The legislation establishing public libraries does not contemplate their competing with publishers in fulfilling their public functions. The legislation typically contemplates that the libraries are providers of public *as distinct from commercial* services. The NSW Library Act 1939, for example, provides that 'a local library is not to provide any service (whether or not it charges for the service) that under the guidelines issued by the Council is classified as a commercial service which is unfairly competitive with the private sector.'

18. Competitive neutrality principles agreed by the Federal and State governments in 1995 also militate against public bodies taking advantage of any potential benefits provided by their public status to compete unfairly with private entities.

19. The Government is satisfied that there are sufficient restrictions on libraries to prevent them from competing unfairly with commercial publishers in supplying material under the terms of the exception. The exception is considered essential for libraries to maintain their public role of providing reasonable access to research material in the digital environment, particularly for regional and remote users.

(b) What are the implications for publishers/users of emerging online markets for portions of works/articles?

Market forces, access and price

20. The demand for academic articles is high but few people can afford to acquire their own journals. At present the journal market is underpinned by sales of subscriptions to libraries, whether they are in educational institutions, corporations or government agencies. Other purchasers of journals include academics (who can claim the cost as a tax deduction). This distribution model allows remuneration to flow to the publishers (with payment also coming from other sources such as the reprinting of articles in course packs) while also allowing a high level of access by students and the research community.

21. Copyright owners have argued that, in the future, there will be a new market for portions of works and individual articles. Adopting a strictly market approach to the dissemination of articles for research and study purposes could lead to reduced access if commercial publishers adopt a strategy of maximising returns from the sale of individual articles. Removing the exceptions which allow libraries to supply articles could therefore reduce access to this important material for ordinary students and researchers.

22. On the issue of whether the distribution of research articles should be left entirely to the market, the Australian Publishers Association (APA) gave evidence on 14 October 1999 to the Committee that:

> '… there is no need in this environment to have access that is determined by the Copyright Act; the access will be determined by the market'.

23. The Deputy Chair of the Committee Ms Nicola Roxon MP and the Hon Duncan Kerr MP expressed some concern that this market model did not contemplate libraries fulfilling their long-standing function of providing access to people who would otherwise not be able to afford it.

24. The Government regards libraries as playing a crucial public role in providing access to research materials. It has decided not to leave this important role entirely to market forces as this could restrict access to research articles for those students and researchers who are unable to afford the market price.

25. Libraries provide the key market for scientific, technical, medical (STM) journals. The changes to s. 50 are designed to not undermine emerging markets for articles from such journals and portions of works in electronic form. Current provisions allowing copying for free have not undermined the markets for these materials. Commercial hard copy document suppliers have built successful markets in parallel to these exceptions.

26. Opposition to the extension of the library exceptions into the digital environment has been expressed as concern over the likelihood of market competition. Removal of the library exceptions would maximise the price publishers could negotiate in contracts for supply of copyright material to libraries. The effect of this may be to make digital material more expensive. The Government would be concerned if this were to be the case and the cost to libraries for the acquisition of digital material became prohibitive. This impact would obviously be in addition to a dramatic decrease in access to information for research and study purposes if the library exceptions were removed or unduly restricted.

27. Given that online markets for the supply of copyright material are still evolving, it is also proposed to conduct a review of the operation of the legislation. The review may include consideration of how efficiently copyright owners are remunerated in the online environment and the costs of providing material for research and educational purposes.

(c) What are the implications for the enactment of a statutory licence for library copying and communication?

28. CAL has suggested that a statutory licence should apply to the supply of material, which currently incurs no copyright fee under the library exceptions. It is not entirely clear what such a licence would involve. Would it for example only cover the supply of digital material under the extended exceptions provided by the Bill, or would it also involve payments for supplying photocopies of material? Would it also involve pay-per-view of digital material accessed in the library? It is also not entirely clear who would bear the burden of payment. Would it be libraries, governments or individual users?

29. In this context it is relevant to note that payments are not only made by libraries when material is initially acquired but ongoing payments are already made to authors and publishers for the public lending of their material.

30. In this regard libraries currently make payments to publishers and creators under the Australian Public Lending Right scheme (PLR). PLR is one of 18 such schemes in the world and is based on the concept that creators and publishers may incur a loss of income when copies of their books are freely available in public libraries for loan, and are borrowed by the general public who might otherwise purchase the books if they were unavailable in public libraries.

31. PLR in Australia does not operate under copyright legislation. It operates under a separate Act (The *Public Lending Right Act 1985 (Cth)*) and involves a Government grant but only to Australian authors and publishers. In 1998-9, PLR payments totalled $5.22 million, benefiting 8,127 creators and publishers. Eligible authors are entitled to $1.23 per copy held in an Australian public library and publishers are entitled to $.3075 per copy. It is important to note that copying under the free exceptions is not covered by this scheme.

32. The Educational Lending Right (ELR) program will begin in 2000-1 with initial total payments of $8 million, increasing to $11 in 2003-4. This means that the Federal Government will be spending close to $20 million in 2003-4 to compensate authors and publishers for the borrowing of books in public and educational libraries.

33. While it is not possible to predict how much a statutory licence scheme for library copying and communication under ss.49 and 50 would cost, it could be expected to amount to a significant impost on libraries in addition to the payments that are already being made under PLR and that will be made under ELR.

34. Given that a statutory licence scheme is usually envisaged as being levied on a *per use* basis (ie, each time a user-request is fulfilled) it has the potential to be costly in terms of payments to copyright owners and in terms of administrative costs to libraries. Even if payments under a statutory licence were restricted to payments for the first digitisation of a print work, this would amount to a significant cost and administrative burden for libraries.

35. Under PLR, payments to publishers will not be made until a claim has been received from a relevant author. The distribution of the payment between the author and publisher is fixed (eg. current rates for 1998-99 are: authors $1.23 a copy and publishers $0.3075 a copy). This is unlikely to be acceptable to publishers under a statutory licence scheme for copying and communication under s.49. The long term effects of such a scheme (including the remuneration of primary creators) are uncertain.

36. Evidence of the possible difficulty of ensuring returns to creators from such a scheme can be seen from a recent survey conducted by CAL. The survey *Use of Artistic Works in Australian Publishing* demonstrates that there is disparity between publishers as to their requirements for assignment/licence of rights from primary creators. These are the rights that would enable creators to qualify for secondary income streams (such as remuneration paid under a statutory licence). The survey also showed that 'the artists' opinion of how often they give all rights in a written or verbal agreement differs … dramatically to the publishers'.

37. The Government's view is that the introduction of a statutory licence would involve significant cost burdens to the library sector without providing appreciable or certain gains for creators. Federal and most tertiary institution libraries are funded by the Federal Government; State, some tertiary institution and school libraries are funded by State Governments; and municipal libraries are funded by local Governments. Any statutory licence scheme in this area could lead to significant budgetary demands for all three levels of Government, assuming that the costs are borne by the libraries themselves. In budgeting for such a scheme it would not be unreasonable for Governments to expect that payments under the licence would at least equal those under ELR and PLR (ie close to $20 million in 2003-4). Such costs may become a significant barrier to reasonable access to information, particularly if such cost were to be met in part or whole by users.

38. A statutory licence scheme for s. 49 would run counter to the Government's stated policy that existing copyright exceptions should be carried over to the digital environment.

Issue: **Can libraries acquire a copyright work and then supply it to all other libraries? (see Items 58-66, s.50).**

Interests' responses

39. Several copyright owner interests have advanced the view to the Committee that s. 50 as amended by the Bill (Items 58-66) would allow just one Australian library to purchase a copyright work and then copy and supply this work to all other Australian libraries for free.

Government policy

40. Under the proposal contained in the Bill, s. 50 is more limited with respect to works in digital format. The commercial availability test applies to all requests, even if they are for a reasonable portion or an article. Articles and portions of copyright works in electronic form can only be supplied to another library where the article or portion of the work is not commercially available in electronic form.

41. At present, under s. 50 of the Copyright Act, a library may supply a reasonable portion of a work in hardcopy form to another library upon request. If the library wishes to supply more than a reasonable portion, then it must satisfy the commercial availability test. That is, it can only supply more than a reasonable portion if a copy of the work is not available within a reasonable time at an ordinary commercial price.

42. In the current environment, libraries use s. 50 almost exclusively to help satisfy user requests, not to build up their own collections.

***Issue*:** **Can library users browse and copy 'free' material on the Internet from a terminal in a library?**

Interest's response

43. The National Library: 'it is important to note that the vast majority of current Australian electronic publications are produced not for sale but distributed gratis and we believe this situation will continue in the foreseeable future. Given this situation some aspects of the Digital Agenda amendments may be seen as unnecessarily restrictive for freely accessible publications.'

Government policy

44. The library exceptions to copyright need only be relied upon by libraries in cases where they would otherwise be infringing copyright. Where copyright material is made available on the Internet, libraries do not exercise any of the exclusive rights simply by providing a terminal which has Internet access. In such a situation only the reception of a communication (not the making of a communication which is the new exclusive right of the copyright owner) can result from the browsing of copyright material on the Internet. Further, any temporary copies created as a result of receiving the communication would fall within the temporary copies exception.

45. Libraries may therefore provide terminals which allow their users access to the Internet. These terminals need not be restricted to allow only hard copies to be made. This restriction only applies to non-Internet material acquired in digital form and made available within the library. Users may make any fair dealing copies of material they access on the Internet via terminals provided by the library. In addition, libraries will not be liable for any infringing copies made by users by reason only that the copy was made at the terminal, provided a notice about copyright infringement is displayed at the terminal.

Reasonable portion test

Issue: **Should the reasonable portion test be a presumption or contained in industry guidelines rather than a deeming provision? (Item 20).**

Interests' responses

46. Some copyright owners have claimed that fair dealing certainty is better provided by a 'presumption' or industry consensus guidelines rather than the reasonable portion test (see Item 20). Copyright owners have claimed that such guidelines have been successfully employed overseas.

Government policy

47. The reasonable portion test is an integral part of the fair dealing provisions, the library and archives exceptions and the educational statutory licence. In relation to fair dealing, it provides users with certainty that their copying of copyright material for the purposes of research and study is within the law. If the test did not exist users would be required to assess if their proposed copying is fair according to the five principles under s. 40(2) of the

Act. These principles include the impact of the proposed copying on the copyright owners' market, something which most users would not have expertise to do.

48. Copyright owners have suggested two alternatives to the test: (1) a presumption rather than a deeming provision and (2) that the test be dropped altogether in the hope that industry consensus guidelines can be agreed upon by owners and users.

A fair dealing presumption

49. In relation to fair dealing, the purpose of a reasonable portion test is that it offers users certainty. It means that the reproduction of a specific quantity of copyright material for research and study is deemed to be a fair dealing.

50. A presumption would operate to provide that certain reproductions are prima facie fair dealings but may be subject to legal challenge if it is thought that one or more of the fair dealing principles are not satisfied. As a result, users would be left with little or no certainty. Many copyright users are not in a position to defend a legal challenge. If the certainty of the current test was replaced with the uncertainty of a presumption then users would have less confidence in relying upon the fair dealing provisions. This may result in restricted access to information for the purposes of research and study. A fair dealing presumption would therefore be self-defeating.

51. The reasonable portion test also plays a vital role in the mechanics of the library and archives exceptions and the statutory licence for educational institutions. Without such a test these exceptions could not operate effectively.

Industry consensus guidelines

52. Consensus-based guidelines have been attempted in the United States. The experience in such countries re-enforces the need for a legislated reasonable portion test in this country.

53. In the United States, free copying is permitted by the Fair Use provision. This permits copying if the use is fair according to four principles (including the effect of the use on the potential value of the material). The meaning of these principles has been elucidated through litigation since the introduction of the provision in 1976. However, after significant negotiations there are still large areas of uncertainty.

54. The US attempted to address free use through the Conference on Fair Use (CONFU). After protracted negotiations no consensus has been achieved on guidelines for what is regarded as a fair use.

Educational statutory licence for electronic use

Issue: **Flexibility of "electronic use" system for the reproduction and communication of material in electronic form by educational institutions (see Items 124-151, 178-199, 204-210, Part VB).**

Interests' responses

55. Educational institutions have argued that the "electronic use" system proposed for Part VB is unnecessarily restrictive. They suggest that the proposed system provides fewer options than are currently available under the sampling and record keeping based schemes which currently apply under Part VB for the reproduction of works in hardcopy form.

56. Furthermore, they have argued against the operation of two separate schemes (ie, one applying to works in print form and the other to works in electronic form). The Government's policy behind this approach is described at paragraph 3.31 of the original submission).

Government policy

57. The electronic use scheme (for the reproduction and communication of copyright material in electronic form) proposed in the Bill has been specifically designed to provide a greater level of flexibility than is currently provided under the sampling and record-keeping systems. The new system also aims to avoid the technology-specific requirements of the current systems. The new electronic use system is broad enough to encompass electronic copyright management systems or any other relevant system that the parties agree to use. As with the current scheme, if the parties fail to agree on certain issues they will have recourse to the Copyright Tribunal.

58. It is important to note that the intention of the Bill is that the proposed scheme could include a system based on record keeping or sampling, or any other system the parties choose. It is also important to note that the intention is that *not every educational institution would have to adopt the same "electronic use" system*. Under the proposed scheme therefore, an educational institution could choose between a scheme based on the current sampling or record keeping systems, in addition to a range of other schemes which may be more suited to the digital environment. The Government therefore believes educational institutions will have more options under the proposed scheme than they currently have.

Insubstantial portions

Issue: **Exception for the reproduction and communication of insubstantial portions of works in electronic form by educational institutions (see Item 151, new s.135ZMB).**

Interests' responses

59. Copyright owners have argued that the existing statutory licence for educational institutions (which applies to the copying of works in print form) should not include an exception for insubstantial portions. Furthermore, the insubstantial portion test should not be extended to the electronic environment.

Government policy

60. The proposed insubstantial portion exception allows for the free reproduction and communication of no more than 1% of the total number of words in a work. In addition to this, further protection is provided to copyright owners: the reproduction of another insubstantial portion from the same work must be separated by 14 days, and such portions cannot be simultaneously made available on-line.

61. The proposed exception is an extension of the current print-based exception under the Act which provides for the copying of insubstantial portions by educational institutions (see s.135ZG).

62. It is a fundamental principle of Australian copyright law that an act in relation to copyright material is an infringement of copyright only where it is in relation to a substantial part (see s.14). The current 135ZG and the proposed exception both reflect this principle. The exceptions provide educational institutions with some guidance as to what should be regarded as an insubstantial part. They also reflect what is considered desirable for the benefit of education.

63. The Government therefore regards the inclusion of the proposed s.135ZMB in the educational statutory licence scheme as part of the balanced extension of the existing scheme into the digital environment.

Educational institutions' concerns about liability for browsing

Issue: **Will educational institutions be liable for a payment each time a student browses copyright material online?**

Interests' responses

64. AVCC 'the new law will undermine an area of Australian liberty which has hitherto been taken largely for granted – the right to browse information in libraries in digital form, whether this be via the Internet or simply via video (or audio) tape.'

Government policy

65. New subsection 49(5A) in the Bill (see Item 54) specifically allows libraries to make material acquired in digital format available online within the library. The material may not only be browsed, but users may print out material in accordance with fair dealing provisions. The new definition of library in the Bill (see Item 11) specifically contemplates that it would

apply to libraries in educational institutions.

66. Libraries may also have computers installed for general access to the Internet. Users will not be liable for copyright infringement or be required to make payment merely as a result of viewing material using library computers. The browsing of copyright material on the Internet is not an exercise of the new right of communication. Furthermore, the Bill contains specific exceptions so that temporary copies made during the technical process of receiving a communication (such as cache copies made whilst browsing) will not infringe copyright (see Items 43 and 81).

67. In addition, amendments to s.39A (see Item 42) operate so that if a copyright notice is placed near a computer in the library with Internet access (similar to the notices libraries currently place near photocopiers), the library will not be liable for any infringing copies made by the user merely because they have provided the terminal.

68. Under the educational statutory licence (see Items 124-151, 178-199, 204-210), educational institutions will be required to pay equitable remuneration for educational material (such as 'course packs') which is communicated online to their students. The number of students who have access to the material may be a relevant factor in determining the level of equitable remuneration payable for the communication but this will be a matter for agreement between the educational institution and the collecting society or failing agreement for determination by the Copyright Tribunal.

69. It is important to note that educational institutions will *not* have to pay for the browsing by their students of copyright material generally made available on the Internet where the students use facilities provided by the institution.

Operation of temporary copies exception

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

Interests' responses

70. Some copyright owners have argued that the temporary copies exception is too broad and should only apply to temporary copies that are essential to the technical process of making or receiving a communication (see paragraphs 3.36-3.42 of the Departments' first submission).

71. Furthermore, copyright owners contend that the temporary copies exception will allow users of computer programs to avoid some licensing arrangements for software. They argue that owners of copyright in computer software will not be able to control the use of their software in a networked environment. When a computer program is uploaded to a server and communicated across a network, temporary reproductions of the program are made as

various users on the network access the software. Copyright owners are concerned that the temporary copies exception would potentially allow the free use of software on such networks.

Government policy

72. The exception for temporary copies is intended to apply to temporary copies including those that are not necessarily essential to the technical process. The purpose of this exception is to ensure that the technical processes which form the basis of new technologies such as the Internet are not jeopardised. There is a strong public interest in providing an exception for temporary copies (such as those created in the process of certain types of caching) for the effective, efficient and timely operation of communication networks. Furthermore, such temporary copies are regarded as having no economic significance or material impact on the potential market for the relevant copyright material.

73. The temporary copies exception will not enable software users to circumvent licensing arrangements for software over networks. The use of software in a networked environment will involve the exercise of the new right of communication to the public which is specifically designed to allow copyright owners to control and gain remuneration from the use of their material on communication networks. The exclusive right of communication to the public will enable copyright owners to control the making available online and electronic transmission of their copyright material (see definition of "communicate" in Item 6, new s.10(1)). They will also be able to control the original uploading of the copyright material onto the server as this would be an exercise of the owner's exclusive right of reproduction. These rights would need to be dealt with in any licensing arrangement with the user.

74. Using the example provided by copyright owners above, any temporary copies made in the course of the transmission of the software from the server to the network user will be caught by the temporary copies exception. Importantly however, the copyright owners' rights of communication and reproduction (reproduction of the program which is uploaded to the server) will *still* need to be the subject of a licence. Furthermore, any temporary copies made as a result of an unauthorised communication *would not* be included within the temporary copies exception (see Item 45, s.43A(2)).

The making of (and liability for) a communication

Issue: **Some copyright interests have asserted that subsection 22(6) is ambiguous and has unintended effects that undermine the Bill (see Item 26).**

75. Subsection 22(6) addresses the 1997 High Court decision of *APRA v Telstra* where Telstra was found liable for the music on hold played by its subscribers even though Telstra had no control over that music. Section 22(6) addresses this decision and provides that a communication is taken to have been made by the person who is responsible for determining the content of the communication.

Interests' responses

76. This provision was criticised in the Committee hearings because of a perceived ambiguity. It was argued by the IIPA that the person who is 'responsible for determining the content of a communication' may be the person who creates the content in the first place (eg the author of a novel).

Government Policy

77. The above interpretation is not correct. The person who is responsible for determining the content of a communication is the person responsible for deciding what material is actually communicated. This does not necessarily have to be the original creator of the copyright material communicated. For example, if a person was to communicate an artistic work in electronic form by making the work available on a website, that person would be regarded as responsible for determining the content of the communication. The original creation of the artistic work by the artistic is a completely separate activity. Although the artist would be responsible for determining the form of the original artistic work, they would not be regarded as responsible for determining the content of the subsequent communication of their work.

78. Subsection 22(6) therefore provides that the person who is responsible for determining the *content* of a communication is responsible (and therefore liable) for making that communication even if they did not actually author that content themselves. This is a common occurrence; there are many communications made where the person who creates the copyright material is not the person who actually communicates it.

Interaction of copyright law and contract law

Issue: **Contracts between copyright owners and users increasingly require that users waive their rights as granted by copyright exceptions. Should the Digital Agenda Bill address this in some way?**

Government policy

79. The Government is aware that there are difficulties that arise from the interaction of copyright law and contract. The Government acknowledges that it has not included a provision in the Bill that expressly prohibits parties from contracting out of the exceptions. The interaction of copyright law and contract law is a broad issue which goes beyond the scope of the Digital Agenda reforms. However the Government expects that libraries and publishers would have regard to the exceptions when negotiating licences for the use of material by libraries.

80. The Government understands that exceptions are currently being used by libraries as a negotiating tool with publishers, either in determining what uses are permitted by the contract or in setting the final price. The Government will monitor the use of licences and the

interaction of contract and copyright law and may consider this as part of its review of the practical operation of the legislation.

Transitional provisions

Issue: **Application of the transitional provisions to the proposed definition of "broadcast" (Schedule 1, Item 1) and new right of communication to the public (see Schedule 2, Items 1-3).**

Interests' responses

81. Some collecting societies and broadcasters have argued that existing licences or assignments should, on the commencement of the Bill, automatically apply to the broader meaning of "broadcast" as defined in the Bill, and / or the broader communication right. It is suggested that this default position should be subject to any contrary intention appearing in the licence or assignment.

Government policy

82. The new right of communication to the public is made up of two elements: "electronically transmit" and "make available online". The new right will replace the existing exclusive rights of broadcasting and transmission to subscribers of a diffusion service. These rights will be included in the concept of "electronically transmit", in the new definition of communicate, to allow for new delivery mechanisms of copyright material. Furthermore, an amendment to the definition of "broadcast" will mean that both cable and wireless broadcasts will be included in the definition of "broadcast".

83. However, the new right of communication is broader than both the present broadcast and diffusion rights, as it introduces the right of making available online. This element of the right of communication is substantially different to the existing broadcast and cable transmission rights, and includes activities such as the uploading of material onto the Internet. The introduction of a new right of communication to the public therefore creates implications for existing licenses or assignments governing the broadcasting and cable diffusion right.

84. The intention of the transitional provisions is to provide two outcomes. Firstly, that the exclusive right of communication subsists in all copyright material (excluding published editions) in which copyright subsisted immediately before the commencement of the Bill (Item 2(a)), and that the new right subsists in all such copyright material created on or after the commencement of the Bill (Item 2(b)).

85. Secondly, to clarify that existing arrangements dealing with the assignment or licensing of rights are not affected by the creation of the proposed right of communication to the public, nor the amended definition of "broadcast" (Item 3). References to the "broadcast

right" will therefore only continue to apply to "transmissions by wireless telegraphy" as currently provided under s.10(1) of the Act and not to the broader definition of "broadcast" as proposed under the Bill. Furthermore, references to the cable diffusion right ("to cause a work to be transmitted to subscribers of a diffusion service" - see for example s.31(1)(v) of the Act) will continue to apply as if this right had not been subsumed by the broader right of communication.

86. The intention of Item 3 is to prevent a licence or assignment which only applied to the current broadcasting and / or cable diffusion right from automatically applying to the new definition of "broadcast" or the full scope of the communication right.

87. This is consistent with the Government's broader policy to provide copyright owners with greater protection and control of their copyright material in the digital environment.

88. The Government recognises that an essential part of this policy is to allow, subject to certain conditions, copyright owners to determine when components of the communication right are licensed or assigned, and to be able to negotiate appropriate remuneration for licence or assignment.

89. The proposal made by some collecting societies and broadcasters as described above, would provide an unfair result for original creators and owners of copyright material. Such an approach would provide licensees and assignees with the ability to undertake activities under licences and assignments which did not contemplate the broader definition of "broadcast" or the new communication right. It would therefore enable them to undertake activities which were not specifically licensed or assigned.

90. It should be noted that the operation of Item 3 is intended to be subject to any contrary intention appearing in the licence or assignment (eg, where the copyright owner has specifically licensed an activity, such as the uploading of a work onto the Internet, which involves the exercise of a new element of the communication right).