Ms Claressa Surtees
Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Surtees

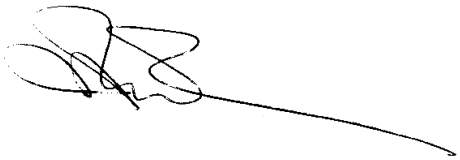
Copyright Amendment (Digital Agenda) Bill

At the Round Table discussion before the Committee in Sydney on 22 October 1999, the request was made that any final submissions or written material should be put before the Committee on or before 29 October 1999.

Having reviewed the discussions before the Committee at its various hearings, the AVCC has refined and summarised its positions in respect of the areas of critical concern to the university sector. Those positions are set out in the attached document.

The AVCC, along with representatives of the schools and library sectors, was also asked by the Committee to consider and comment on UK Guidelines for fair dealing in an electronic environment that were mentioned at the 22 October Round Table by Marie-Louise Symons of CAL. Those Guidelines have only just been received and a response is being co-ordinated by the various user groups. I expect it will be with you next week.

Yours sincerely



T J Mullarvey
Deputy Executive Director

Copyright Amendment (Digital Agenda) Bill 1999

- Summary of AVCC Position

The key concerns of the university sector relate to the possible erosion of the longstanding exceptions in favour of the public interest in higher education, research and study and access to information through libraries. The importance of these exceptions has been rightly recognised by the Government:

"The Bill includes an important package of exceptions to the new right of communication to the public, and the creation of new exceptions in relation to existing rights. As far as possible, the exceptions replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment."
(Explanatory Memorandum, p3)

Despite this recognition, the key exceptions are at risk of being undermined by the drafting of aspects of the Bill and by the concerted efforts of copyright owners to use the Bill as an opportunity to change the balance. It is the position of AVCC that:

Fair dealing is fair and must remain free

- It is critical to realise that the current balance allows **limited** rights to members of the public to access and copy works, for very specific purposes, **free**. This has always been seen as in the public interest and part of the bargain under which the state creates and protects copyright. It allows equal opportunity for access and use, irrespective of where people live or work or their ability to pay.

- AVCC and other user groups support the government decision to attempt to replicate this balance in the digital world. The way this has been done is supported by the only independent, objective expert Australian review on the question of exceptions in that digital world: that of the CLRC.

- In one critical respect, the Bill inadvertently makes browsing and fair dealing copying by students potentially remunerable in the digital environment, rather than free (as it is and will remain in the print environment). How? Simply because in order to browse or copy material in digital form, that material first has to be made available online or electronically to the student. This will involve an exercise of the new right to communicate by universities and schools, and copyright owners will claim that it must be paid for. Universities will be asked to pay in order that students can access, browse and do limited amounts of fair dealing copying. This was not intended, and the Bill should be amended to make this clear.

- Copyright owners have used discussion of the Bill as an opportunity to try to remove all "free" exceptions. Their position is that public interest access and use is acceptable as long as it is paid for. Reassurances that they may concede a zero rate in some situations are not an adequate protection of the public interest. If limited public interest access and use is to remain free, the only guarantee is for the Bill to say so.

Statutory licences must be simple and give a 'records' option

Most copying done by universities for staff and student use is paid for under statutory licenses. AVCC readily recognises the value of these licenses and the need for appropriate rewards to copyright creators and owners. As an important means of ensuring student access to works, and the remuneration of creators, it is critical that these licences are workable and efficient.

In an effort to create flexibility, the Bill introduces separate, different licences for electronic copying and for making works available electronically. They are very different to the licence that will continue for print copying. AVCC supports flexibility and a less prescriptive approach but says that the Bill needlessly sacrifices two critical aspects of the balance:

- ***Simplicity:*** It should be possible to have a single licence which covers all educational uses and to have a range of different rates for different value activities under that licence. The Bill allows for three separate licences with all the potential for multiple disputes that this involves.

- ***Choice:*** In removing the option for a school or university to record what they actually do and to pay on that basis, while leaving that choice in the print world, the Bill removes a basic safeguard. A university that wishes to manage copy levels and pay for what it does should not be locked in to some alternative system to be agreed – probably for the sector as a whole – with a monopoly collecting society. That society made it clear to the House of Representatives Committee that it wanted the record keeping option removed because it gave universities and schools some bargaining power; i.e. a choice. The record keeping option has been a basic check and balance and can and should be replicated in the digital world.

The exceptions are already narrow

Fair dealing rights and statutory licences cover very narrowly defined public interest purposes. The vast majority of use by most people of copyright works is and will remain outside these exceptions. These are the markets which define the normal exploitation of copyright works and they will not be affected by what happens in public libraries, schools and universities – they never have been. The copyright owners would have the Committee believe that if it allows these narrow exceptions to exist in the digital world, it will kill their markets. There is no evidence to support it. The dangers of limiting these exceptions are much more real, as Sir Anthony Mason rightly notes:

> *"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."*

The new digital markets fallacy

It has been argued by copyright owners that, in the digital world, they can now sell chapters, articles or pages separately and that therefore copyright law must change to protect their right

to do so. The Bill already does this – in most cases copying these smaller portions will now be the taking of a substantial part and therefore infringement. The Bill also allows narrow public interest exceptions at the same time. It is fallacious to suggest that because a single page can be sold, it cannot also be browsed or copied for free in some limited circumstances. This assumes that copyright law must help owners maximise their economic return, which has never been its rationale. If a student could browse or copy a page in print yesterday for free, the fact that today the same page could be separately sold in digital form does not alter the public interest in allowing that same limited copying for a very specific purpose to take place.

29 October 1999