

**Australian Digital Alliance
And
Australian Libraries Copyright Committee**

**Final Response to the Legal and Constitutional Affairs
Committee Advisory Report on the Copyright Amendment
(Digital Agenda) Bill 1999**

January 2000

Recommendation 1

1. The Committee's provision for a right of first digitisation of a work for copyright owners is highly problematic.

The Digital Agenda Bill had already made provision for the digitisation of print works in its definition of 'reproduction'. Recommendation 1 distorts the balance between copyright owners and users to the detriment of users and cultural institutions and accordingly, we strongly suggest that this Recommendation not be included in the amended legislation.

2. Whilst the reasoning for the provision is understood and well meant, determining that 'digital is different' for one particular method of dealing with a copyrighted work, subverts the approach of the entire Bill: 'that the current balance that exists in the print world between owner and user will be transferred to the digital environment'.
3. In effect, the provision provides a mechanism to expand the revenue streams of copyright owners, as is anticipated by the Committee: "The Committee would expect that in most cases the conversion of copyright material from hardcopy to digital form would be the subject of commercial negotiations between copyright owners and libraries and archives, and between copyright owners and users". The right to first digitisation gives copyright owners something new to licence which in turn conflicts with the government's stated policy of not legislating to the cost detriment of libraries and user groups.
4. The rationale for this right is to protect the integrity of a print works' transition into digital format. The right to integrity is a moral right and personal to the creator of the work. Such a person will, in the vast majority of cases, not be the one negotiating the license to digitise their work with a copyright user - it will be the copyright collecting agency doing so on their behalf.

5. The mandate this provides to copyright collecting agencies is very powerful – control over the transition of works from print form to digital – ie. how it is done, by whom and for what charge. In a world of rapid technological change, where the demand for digitisation will increase exponentially, particularly in our libraries and educational institutions, and collecting agencies are already under scrutiny through such mechanisms as the Intellectual Property and Competition Review, such a mandate is inappropriate.
6. The point has also been made that, whilst the technology has been available for some time to digitise a print work in the case of a university proposal for the development of an electronic reserve, the collecting society [CAL] has been intransigent in its negotiations with the universities. As a consequence, through CAL's lack of willingness to negotiate a sustainable resolution which is affordable for universities, copyright owners have been disadvantaged in their potential receipt of income. It is unclear how a right to first digitisation will improve this situation.
7. Further confusion arises when considering the recommendation in light of already available technology, such as digital photocopiers. The boundaries that encompass a first digitisation are unclear - the definition needs to clarification.
8. In respect of the exceptions provided to the right of first digitisation, the lack of an exception for fair dealing for research and study purposes will result in educational institutions being greatly hindered in their development of technology to provide services to the nation's students. Whilst able to photocopy a book, students will not be allowed to scan the same fair dealing amount onto a disk – the use made of the work is the same in both cases, an educational purpose.

This recommendation will cause major difficulties for educational institutions and their libraries where perhaps it would be most common for users to want to digitise a print work - particularly specific or older out of print academic works infrequently available. This difficulty will also extend to scientific and medical libraries [unless the exclusion for professional advice was interpreted broadly and not seen as limited to the legal profession as could be implied by 'judicial proceedings'].

If Recommendation 1 is to be retained in the amended legislation, an exception for reproduction for educational purposes must be added to the list of exceptions.

9. The exception to the right of first digitisation for remote users of libraries is fraught with complications. As it stands, whilst a library can photocopy and fax a print work, they cannot scan and email the same request to a user unless that user is four days away via Australia Post delivery schedules. Again, it is a case of making it harder for cultural

institutions to utilise the benefits of new technology in their provision of services to users. Further complications arise when the question of 'when the four day rule applies from' is raised. From the day the request was received or from the day the work leaves the library?

10. It seems clear that the Committee's intention was not to restrict the library exceptions to the right to first digitisation by the other requirements attached to the general library exceptions in Section 49 of the Act [see paras 2.21 and 2.76]. Does this mean that whole works can be transmitted electronically as long as the recipient is a remote user in terms of Recommendation 1?
11. Technological neutrality is consciously discarded by the Committee through this Recommendation and whilst the three year review period is applauded, it could be anticipated that this Recommendation will meet its use-by date far before then. Print to print reproduction is not going to play a major role in the future of information whereas print to digital and digital to digital will. If we can only digitise our print works in limited circumstances for minority groups, then what of all the print works that publishers/copyright owners do not digitise for commercial reasons? The loss of access to past research and work and innovation because it is in the wrong format [ie. print] does not aid the copyright user, the copyright owner or society as a whole.
12. Further, when considering how this provision would operate in practice in a library/archive - the difficulties of ascertaining whether a work has already been digitised, assuming such information is actually accessible if it is not a work already in their collection, and whom the copyright owner is - would exacerbate the already expensive administration of these institutions. A further query would be to consider whether the right to first digitise a work extends only to the first ever digitisation, or whether it extends to the first ever digitisation in that particular library?
13. Critically, this recommendation immediately renders void such document supply mechanisms as ARIEL, a longstanding initiative of the library and university sectors where documents are scanned and emailed in response to specific library requests. For the National Library of Australia, ARIEL is currently used to supply approximately 40% of documents to other libraries, and represents a significant long term investment on the part of universities and libraries across Australia. This is a key issue for university libraries and libraries in general. If transmission by ARIEL is not permitted, Australian libraries and their users will be significantly disadvantaged as it is a technology used heavily around the world by libraries to supply material to each other and to their users. As overseas libraries could be considered remote and material would not be able to be received in four days, there will be an incentive for Australian libraries to source material from overseas libraries in preference to sourcing it from other Australian libraries. Remote users will also be disadvantaged as libraries will not invest in technologies for remote users only.

Recommendation 2

14. The ADA and ALCC would like to commend the Committee on its recommendation that Item 11 of the Bill be omitted. Further consideration of this issue is needed and deference to the CLRC report on the *Simplification of the Copyright Act 1968* warranted.
15. With reference to paragraph 2.38 of the Advisory Report, we support the retention of current arrangements concerning the ascertaining of a 'reasonable portion' in the digital environment. A deeming provision and quantitative test remain the most efficient mechanisms for calculating this.

Recommendation 3

16. The Committee's recommendation that s. 49(5A) be amended to make it clear that material to be supplied by a library to an end user under the s.49 exception must be 'held' in the collection of the library or archive, is intended to preserve the market for journal sales to libraries [2.78].
17. The extension of the s.49 exception to the electronic distribution of digitised legal deposit works, within the restrictions provided, is to be commended [2.79].
18. The limitation in Recommendation 3 regarding the digital supply of electronic material by a library or archive to an end user to works 'held' in the library/archives raises interesting questions regarding the definition of 'held'. Would works housed on a server off-site but maintained by the library in question fall within the definition? 'Held' would appear to limit the material able to be transmitted to that which is purchased by the library, acquired on legal deposit or which is donated to the library. This is in line with the Committee's reasoning but is unnecessarily restrictive to a physical location. Would this provision also restrict material available on the Internet from being out of the reach of libraries to supply to users?

The restrictions currently in place to protect the copyright owner's market are extensive [see para 2.67] – how can a digital library of works be built

up when it is a requirement [and indeed a default mechanism of some programs such as ARIEL] that the transmitted digital copy be destroyed following communication?

Further, the potential consequences for supply to an end user of electronic legal deposit items have not been considered. A digital legal deposit publication is preserved once by one library in Australia, with a view to it being made available with limitations to all libraries on a network, once it has past its commercial life with the permission of the copyright owner (strict guidelines apply). If the material must be 'held' in the supplying library per s.49 and 50, then this will not be possible. The result being duplication of resources and administration, increasing costs for legal deposit libraries and a potential loss of Australian heritage.

19. Per para 2.75, it is disappointing to note that the Committee found favour with the Bill's proposed limitation on dealing with an online work transmitted to a user per s.49. To be able to make a fair dealing print copy only of a work transmitted in this fashion does not reflect technological neutrality.
20. Paragraph 2.84 fell subject to heavy criticism from librarians regarding the idea that any user could approach any library who possessed/held the work desired. Most libraries have very specific user groups for security and verification procedures, and it is expected that a user would currently first approach their home library in order to request material from another library, rather than email the holding library directly.

Kaye Lee, Senior Librarian at the Concord Repatriation General Hospital, would draw the government's attention to this: "A user of the Concord Hospital Medical Library, is not an eligible user of for example, the University of Sydney or another hospital library outside our particular Area Health Service. Therefore, if one of Concord's users sends a 'direct request to an original library' or found the time to go to another library, she/he would not be permitted to obtain, or to copy for example an electronic full text article from a medical journal licensed to that library. The only way she/he could access that work is to get a print copy via our interlibrary loan system, provided she/he met the fair dealing provisions or those of the existing CAL license".

Recommendation 4

21. Requiring that a library to library supply of a reproduction be destroyed as soon as is practicable following communication to the requesting library is acceptable to the ADA and ALCC, being mindful of copyright owner concerns.

Recommendation 5

22. It is disappointing that the Committee did not find favour with the ADA/ALCC suggestion that a library/archive should be permitted to reproduce a reasonable portion of a digital work or an article in a digital publication without checking the portion's commercial availability. Fair dealing should be protected and valued in the digital environment, as a basic exception and an unchanging social principle.
23. The commercial availability test will prove an administrative burden to implement for libraries. As more and more works are converted into digital format, it becomes difficult to find out what is commercially available and from where. The concept of 'out of print' does not apply to digital works.
24. It is conceded however that the Committee has achieved a workable solution in requiring that the commercial availability test in s.50 only applies to the particular part of the work requested, within a reasonable time and at the ordinary commercial price.

Recommendation 6

25. We are pleased with the Committee's recommendation - for recognising the need for certain supply services that access overseas collections for supply to smaller libraries to be exempt from the 'held in the collection of the library' requirement of s.50. The number and nature of such services will need to be ascertained.

Recommendation 7

26. The confusion surrounding the wording in the Bill regarding preservation copies of artistic works or manuscripts per s.51A made for administrative purposes - that is, that they could only be viewed by officers of the library - seems to have been clarified by the Committee. Whilst it was read as stating that preservation copies could only be viewed by officers of the institution, the Committee suggests that this is restricted only to preservation copies made for administrative purposes - not all preservation copies, as was interpreted by the ADA/ALCC/CASL and

other organisations. The Committee states in para 2.111 that Item 73 of the Bill would in fact give institutions a broad mandate to reproduce and communicate certain artistic works or manuscripts for preservation purposes. The ADA/ALCC welcome this interpretation and suggest such clarification be applied to the wording of the section in the Bill.

27. The concerns raised by artistic and cultural institutions regarding Recommendation 7 revolve around the restriction that a preservation reproduction of an artistic work cannot be made available online within the premises of the institution unless the 'work has been lost, deteriorated or has become so unstable that it cannot be displayed'. Common sense would suggest that a preservation copy of a work should be made before a work has deteriorated, become lost or unstable. Presumably then the end result of the Committee's recommendation is that a preservation copy of an artistic work could be made for administrative purposes by an officer of the institution before the original work becomes lost, unstable or deteriorates – but the work could only be posted following the occurrence of such.
28. A further observation: did the Committee consider the benefits to cultural institutions and to the general public of being able to make a preservation copy of an artistic work that is not currently on display (perhaps in storage as much of the artwork currently held in our institutions is), and making it available online to view within the institution in digital format? One obvious use of virtual technology is to facilitate access to our cultural heritage which in the past has been inconceivable due to the limitations of a physical environment.

Recommendation 8

29. We welcome the decision by the Committee to amend the Bill and extend the statutory licence scheme under Part VA, to enable educational and other institutions to communicate broadcasts copied under Part VA, as part of the equitable remuneration scheme.
30. Concern is raised however that such a licence will be remunerable in addition to the fee already paid for reproducing the work in order to communicate it. A logical progression would indicate that where an educational institution reproduces a work within the bounds of the statutory licence scheme, the reproduction is undertaken with a view to communicate it to students. The Committee have stated that they 'support the need for equitable remuneration to be a feature of the new licence' [3.18]. We would submit that this should be reconsidered on the grounds that to require educational institutions to pay a separate fee to communicate a work, where they have already paid a fee to reproduce it

for the sole reason of communicating it for an educational purpose, is inequitable.

31. If not possible to remove the implication that an additional licensing scheme will be imposed, our submission would be that any additional fee structure should be incorporated into the already existing reproduction license. There should not be a separate licensing scheme for communicating this material.
32. One suggested method of overcoming this issue would be to license according to an 'educational purpose' communication - where the 'reproduction and making available of the information for an educational purpose' was licensed. Thus, controversy regarding the different methods of transmitting information does not need to be addressed, the inequity of collecting agencies charging per student access to material is avoided and legislative concerns raised over taking a 'snapshot' of current technology are averted.

Recommendation 9

33. Before discussing Recommendation 9, a comment needs to be made regarding the Committee's findings in paragraphs 3.21 - 3.30, with reference to remuneration notices. Whilst the Committee's intention is understood, the need for two payments and two notices is undesirable, for simple reasons of efficiency. Educational institutions have however declared their preparation to accept this provision, whilst voicing the concern that electronic use notices be extended within the provisions for a duration of more than twelve months, in order to reduce the administration burden to schools and universities. The ADA/ALCC support this suggestion.
34. Recommendation 9 is that the Bill be amended to omit the proposed extension to the digital environment of 'an exception to infringement of copyright for material in electronic form where an insubstantial part of the work is reproduced or communicated by an educational institution for the purposes of a course of study provided by it'. The ADA/ALCC regrets the Committee's decision not to extend to the digital environment, provisions that currently serve the best interests of Australian educational institutions in the print world. This Recommendation obviously conflicts with the stated purpose of the Digital Agenda Bill by altering the balance between copyright owners and users.
35. The origins of this provision should be considered by the legislature. Insubstantial portion reproduction and communication for educational purposes is a narrow use of copyright work, essentially providing a mechanism whereby tracts of texts do not have to be memorised by teachers in order to educate their students and introduce them to a

diversity of ideas. CAL's argument that the provision should no longer exist in either the print or digital environment – because CAL now exists to collect payments on behalf of the copyright owners who were not in a position to do so earlier – is beside the point. The question is ultimately one of the value placed on education in our country. Very small and limited reproductions from works for narrow educational purposes does not detract from the copyright owner's market share. It is very unlikely that students would purchase whole works in order to access one paragraph of it, and this applies to the digital environment as much as it does to the print world. The end result is the potential for greater innovation in the generation to come.

36. A quantitative insubstantial portion exception for educational purposes should be extended to the digital environment. It is inconceivable that 1% or less of a work – a phrase, a couple of words, one word, two sentences – could be considered as encroaching upon the copyright owner's market share for their work. In effect, through the removal of this provision, such use will need to be remunerated by universities and schools, the result of which is the flow of further funds to copyright collecting agencies and more expense for educational institutions.
37. The ADA/ALCC also regret the Committee's suggestion that the same provision in the print environment be repealed and would urge that no further action be taken in this regard.
38. In consideration of the scope of the exception to infringement for the reproduction and communication of insubstantial works [3.43 – 3.47], the Committee suggests that the wording of the provision not be altered, if indeed the provision is retained. Concerns raised regarded whether 'on the premises of' would prevent an educational institution from communicating the work in a way that would enable students in remote areas access. The Committee consider this action would be within the boundaries of this provision and did not recommend the wording of the provision be altered.
39. Where there is confusion regarding the effect of the terms used, we would submit that the terms should be clarified in order to give greater effect to the Committee's intention, and remove all doubt regarding the scope of the provision.

Recommendation 12

40. The Committee recommends herein that the definition of 'circumvention device' be amended in Item 4 of the Bill to broaden the scope of the provision. The Committee's intention is to catch devices whose primary purpose is, or devices which are marketed as, circumvention devices.
41. The ADA/ALCC strongly oppose this recommendation.

42. The Explanatory Memorandum to the Bill states that the original definition is designed to “ensure that all general purpose electrical equipment, such as computers and video recorders, does not fall within the definition simply because it could be used to circumvent technological measure” [p22]. Expanding the definition in the manner recommended by the Committee would undermine this important safeguard.

General and dual purpose technologies are often critical to industry and consumers alike. Many of the technologies and devices that could, potentially, be used as part of broader circumvention activity, will often serve a wide range of lawful and important purposes. Most cryptographic software tools are used to build and maintain security systems that are vital to the information economy. This will be the primary and indeed only purpose of hundreds of IT professionals when they acquire and use these tools. However, there is always a chance that someone will market a general purpose cryptographic device with circumvention (and piracy) in mind.

Under the Committee’s recommendations, as soon as one person mentions the potential for hacking and infringement in their marketing material, the device becomes classified as a circumvention device and must then be subject to the restrictive marketing provisions of the Bill. This could even apply to most personal computers. It would be a serious mistake to bring PCs and other such devices within this definition simply because someone chooses to market a device as having the potential for circumvention,.

The restrictions that attach to circumvention devices, such as requiring a signed declaration against use for copyright infringement at purchase, weigh also against expansion of the definition as suggested.

The ADA/ALCC support the original definition in the Bill.

Recommendation 13

43. The Committee has recommended that s.116(1)(c) be amended to encompass the situation where ‘a person knew or ought reasonably to have known that the ERMI had been so removed or altered without the permission of the owner or licensee of the copyright’ in order to create civil liability.
44. The broadening of this provision is unnecessary in light of the breadth of the original proposed section. Whereas the person engaged in removing the ERMI is caught within the original section, the amendment seeks to also attend liability on anyone who ought to have known that tampering

had occurred. It would seem that attribution of constructive knowledge could logically only be mainly evidenced on grounds of employment, leaving open the question of attaching civil liability to many within the computer and information industries, for something they well may have no knowledge of. Given the global nature of the internet and the speed at which information is transferred, the extension of this provision appears unduly severe.

Recommendation 14

45. Here the Committee recommends that item 98 of the Bill be amended to ban the intentional use of a circumvention device for the purpose of infringing copyright, regardless of whether copyright is actually infringed or not. It would appear unlikely that an infringing 'purpose' could be evidenced on the balance of probabilities without evidence of actual infringement of copyright also existing. Banning an intentional use to infringe copyright whether or not infringement occurs is an unnecessary broadening of the provision.

The ADA/ALCC oppose this recommendation.

46. The Committee discuss in paragraph 4.44 their support for a civil remedy where a person uses a circumvention device for the purpose of infringing copyright even where no infringement has occurred per Recommendation 14. It is noted that a civil remedy already exists for copyright infringement no matter how it occurs, including through the use of a circumvention device. It is difficult to see how a provision for a civil remedy for 'use of a circumvention device for the purpose of infringement where no infringement has occurred' (with a penalty to the Commonwealth as a remedy?) where there is no copyright owner whose copyright has been infringed, could operate in practice.

Recommendation 15

47. We welcome the Committee's acknowledgment in para 4.55 that 'users should not be deprived of innovative Australian circumvention devices for uses other than the infringement of copyright'. We regret the argument for expanding all permitted purposes to include 'all non-infringing purposes' did not find favour with the Committee. The difficulty of ascertaining and identifying permitted purposes within the legislative

regime, and the risk of taking a 'snapshot' of technology at the same time, could have been averted had the argument to include all non-infringing purposes been accepted by the Committee.

Recommendation 16 & 17

48. Whilst the Committee determined that a specific exemption for system administrators 'was probably unnecessary', it suggests that the Explanatory Memorandum to the Bill be amended to make it clear that these people are not intended to be held liable for manufacturing circumvention devices or providing circumvention services in the proper pursuit of their work. Further, if an action was brought against a systems administrator, the Committee took the optimistic view that a court would dismiss the case with nominal damages [4.69].
49. The ADA does not share the Committee's optimistic view in this context. Some of the things that systems administrators do to expose and correct security flaws could fall squarely within the anti-circumvention provisions of the Bill. There is no guarantee that systems administrators would not be sued and equally no guarantee that some of those actions would succeed under the current provision of the Bill. If the Bill is clear on its face, any 'clarification' in the EM will provide little (if any) comfort to those systems administrators involved in the test case for infringement.
50. The ADA/ALCC strongly recommend that the Committee's intention be reflected in a specific amendment to the Bill, rather than amending the Memorandum (which would only work if the Bill was ambiguous on its face). A specific exemption for systems administrators (acting in proper pursuit of their functions of their usual functions - including and beyond security testing) should be inserted into the Bill.
51. Without such changes, Australia may find itself unable to access the tools, services and information that help to keep the internet working smoothly, efficiently and securely. This would be a backward step for the Australian information economy.

Recommendation 18

52. The ADA/ALCC again refer to the government's stated policy mandate in legislating for copyright in the digital world. It was a reasonable expectation that the balance struck between copyright owners and users that exists in the print world would be expanded to the digital environment. The base premise of the legislation is to protect copyright

whilst allowing access to ensure innovation. Our main concern with this recommendation is the absence of an exception for fair dealing.

53. Fair dealing is one of the most essential elements of the copyright balance and has proven critical to continued innovation in the print world. Not all engagement with copyright material should be remunerated and not all engagement should be an offence – there must be limits to the over-reaching ability of copyright owners and collecting agencies to effect such. Where legitimate reasons exist for accessing copyright material through technological measures that do not infringe the owner’s rights, such actions should be permissible within the scope of the legislation. We submit that a limited number of permitted purpose exceptions do not achieve the desired balance.
54. The ADA/ALCC welcome the extension of the exceptions to s. 47B(3) and s.51A.
55. The anomaly will exist however where works in the public domain available on the internet for instance, cannot be accessed by a user. According to the definition of in section 116A (7), unlocking a device on a public domain work will not be a permitted purpose per s 116A(7)(a) because the device will not ‘be used for the purpose of doing an act comprised in the copyright in a work or other subject-matter’.

The ADA/ALCC consider this an unwarranted paring back of the rights of copyright users in the digital environment.

Recommendation 19

56. The Committee recommends a penalty for making a false statement in a declaration when being supplied with a circumvention device for a permitted purpose. The maximum penalty recommended is the penalty specified under s 11 of the Statutory Declarations Act, ie 4 years imprisonment.
57. This penalty is draconian when applied in context of copyright laws and in particular to the provisions regarding use of circumvention devices. In the ADA/ALCC’s view, it is incorrect to elevate these declarations to the same status as declarations under the Statutory Declarations Act. Ideally, in our submission, no penalty would apply. However, if a penalty does apply, it should be consistent with the penalties applicable to making false library declarations (eg s203f).
58. Further, recommendation 14 already provides sufficient safeguards against the misuse of circumvention devices for copyright infringement purposes (particularly given the broadening of the recommendation to include intent to infringe regardless of result).

Recommendation 20

59. Concern is raised again in regard to the reversal of the onus of proof as discussed in paragraphs 4.84 - 4.87 regarding item 98 of the Bill.
60. Further, not only has the Committee has seen fit to retain this reversal, they have also broadened the standing requirement in order to bring actions under these sections. 'Any person authorised by the owner of the copyright may also bring an action under ss 116A(5), 116B(2) and 116C(2)' extends the enforcement provision to a licensee or any person off the street given such authority by the copyright owner.
61. In our submission, this breadth of standing is inappropriate and should be rejected by the government.

Recommendation 33

62. The ADA/ALCC opposes the inclusion of the IIPA proposed additional factor - 'actual or constructive knowledge of the infringing character of an act, or of facts and circumstances from which infringement is apparent'.
63. The rationale behind the amendment to the Bill originally was to codify the Australian case law on authorisation, not to add a new factor that expands the basis for attributing knowledge of infringement.
64. This recommendation would change years of case law developed by the Australian courts on the basis of a narrowly focussed recommendation of a foreign industry body. There is nothing to stop the Australian courts from considering the IIPA's factors if they consider them relevant and appropriate (ie. the factors are clearly stated as inclusive, not exhaustive.)

Recommendation 34

65. The ADA/ALCC strongly support and welcome the Committee's recommendation to limit liability for infringement of providers of digital storage services as well as that of carriers and carriage service providers.

Recommendation 35

66. The issue of whether temporary reproductions equate to copyright infringement is one of universal interest. Items 45 and 94 of the Bill propose that temporary reproductions of a work that occur 'as part of the technical process of making or receiving a communication' are an exception to infringement of copyright. The Committee has recommended that these items be removed from the Bill. This recommendation subverts the intention of the government to make this policy direction clear in the legislation. In the Attorney-General's own words:

"The Digital Agenda Bill therefore continues to allow for the free browsing of copyright material on the internet. It would be inconceivable to attempt to legislate to provide otherwise. Such a law would jeopardise the present form of the internet as we know it" [Opening Address, Daryl Williams AM QC MP, 9th Biennial Copyright Law and Practise Symposium, 11 November 1999, Taronga Centre, Sydney].

67. The Committee does not consider that 'temporary copies should be excluded from the definition of reproduction' [6.48] and notes that 'browsing will fall within the temporary reproduction exemption, as noted in the Explanatory Memorandum' [6.44].
68. The rationale for removing the temporary copy infringement from the Bill seems to rest on an observation that few people would be sued for infringement of copyright in this manner and that if they were, the penalties would not be onerous [6.49]. Hence the decision to follow the US approach - no derogation from the copyright owner's right to reproduction but limitations placed on the type of relief that is available [and the recommendation to the government to consider Appendix G].
69. The ADA/ALCC respectfully submit in the first instance that all temporary reproductions should be excluded from the scope of the reproduction right. This would ensure that temporary reproductions made in all contexts, whether in browsing, caching, using a PC or operating a portable CD player, are not infringements of copyright. Both public policy and industry awareness would be greatly assisted by such clarity.
70. Not only have the Committee rejected this approach, they have found that no temporary reproduction exemption - even for browsing and caching - is needed at all. Respectfully, we submit this is an erroneous decision. As the government has repeatedly acknowledged, there is a need to confirm that many temporary electronic copies are not the exclusive right of copyright owners to control. Copyright owners have and will bring or threaten legal action against those who make such temporary 'copies' either to prevent those copies being made or to demand additional licence fees. The US case of *MAI v Peak* is one example where the US courts

have been willing to find some digital copies to be reproductions for copyright purposes. Although the Australian courts may, as the committee suggests, choose not to award damages in such an action, there is no guarantee that 'strong principles of public policy' will always prevail to bring about this result. Without legislative clarity on this point, there will be wide scope for letters of demand, legal actions, damages awards, injunctions and court costs. It is for these reasons that recommendation 35 (including ARIA's narrow, ISP-focused proposal set out in Appendix G) should be rejected. We note that Appendix G, although modelled on the US DMCA, appears to be missing a number of the safeguards that also appear in that legislation.