

1986

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COPYRIGHT AMENDMENT BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Attorney-General,
the Honourable Lionel Bowen, M.P.)

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OUTLINE

These amendments to the Copyright Act 1968 ("the Act") mainly arise from a review by the Attorney-General's Department of the provisions of the Act dealing with "audio-visual" materials (ie records, films and broadcasts). This review involved extensive consultations with interest groups, through written submissions, publication of issues papers and meetings.

The Copyright Amendment Bill 1986 ("the Bill") will amend the Act:

- A. With regard to "piracy" of both works and audio-visual materials, to -
- . make specific provision, in prosecutions and in civil proceedings, for proof by affidavit of subsistence and ownership of copyright;
 - . introduce, in prosecutions, a more objective test of the defendant's knowledge that the copies dealt with were infringing copies;
 - . create new offences; and
 - . increase and provide additional penalties.
- B. In other areas, to -
- . extend the Act expressly to satellite broadcasts;
 - . permit "fair dealing" in audio-visual materials for purposes of criticism or review, and reporting news;
 - . extend to audio-visual materials certain of the existing free compulsory licences to copy works, for library and archival purposes;

- . create two new statutory licences, subject to equitable remuneration, for the benefit of the handicapped;
- . enable Federal Court costs rules to be applied to proceedings before the Copyright Tribunal; and
- . effect other miscellaneous formal and drafting amendments.

FINANCIAL IMPACT STATEMENT

The Copyright Amendment Bill will have no direct impact on Commonwealth revenue or expenditure. Any indirect impact on expenditure which may occur will be minimal, and will depend on applications being made to the Attorney-General or to the Copyright Tribunal to exercise powers under sections 10A and 149A respectively, which this Bill will slightly extend.

A favourable indirect impact on Commonwealth tax revenue may be expected, as the strengthened anti-piracy provisions reduce untaxed illegal dealings in copyright materials, and encourage sales in legitimate product.

The position of the copyright industry can, therefore, be expected to improve as a result of the anti-piracy provisions, though the extent of this is difficult to quantify.

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NOTES ON CLAUSES

Clauses 1 and 2 - Short Title and Commencements

1. The first two clauses of the Bill identify the Principal Act, the Copyright Act 1968 ("the Act"), and provide for a short title for and commencement of the amending legislation (the Copyright Amendment Act 1986). The legislation will come into effect on a day to be fixed by Proclamation, except that amendments relating to evidence, offences and penalties (clauses 14-19 of the Bill), will come into operation 28 days after Royal Assent.

Clause 3 - Interpretation

This clause is to amend section 10 of the Act.

(a) "broadcast"

2. Amendments to broadcasting legislation, and the introduction of broadcasting via "AUSSAT", have highlighted possible uncertainty as to the meaning of the current definition, which provides that "broadcast" means "broadcast by wireless telegraphy". It is proposed to make clear that only transmissions intended to be received by the public (whether the "general" public, within the meaning of the Broadcasting Act 1942, or part of the public) are covered, and not those intended for a particular recipient ("point-to-point" transmissions) such as, typically, microwave communications.

3. Accordingly, "broadcast" will be redefined as "broadcast, other than from point to point, by wireless telegraphy", with the term "point to point" defined in a new sub-section 10(1A) (see sub-clause 3(d)).

(b) "holder of a radio licence"/"holder of a television licence"

4. These new terms will replace the terms previously defined, "holder of a licence for a broadcasting station" and "holder of a licence for a television station", which reflected terms in the Broadcasting and Television Act 1942. The terms bring the definitions into line with recent amendments to the Broadcasting Act 1942 (formerly the Broadcasting and Television Act 1942).

5. Consequential amendments will be effected in several places in the Act, as follows -

clause 8	section 91
9	99
21	152
23	184
25	199

(c) "institution assisting intellectually handicapped persons"

6. This term defines the class of institutions which will benefit from the statutory licence established by clause 26. Institutions assisting intellectually handicapped persons ("IIHs") will include both educational institutions, as already defined in the Act, and non-profit institutions which have a principal function to assist intellectually handicapped persons and which are declared to be IIHs following application to the Attorney-General (see clause 4).

(d) "point to point"

7. Sub-clause 3(d) inserts a new sub-section 10(1A) defining this term in relation to a broadcast. It is intended by this definition to exclude from the definition of "broadcast" (and "broadcasting") broadcasts intended by the broadcaster to be received only by particular equipment at a particular location.

(e) new words in paragraph 10(3)(d)

8. This amendment is consequential upon the amendment in sub-clause 3(c).

(f),(g) "copying records" of an institution

9. These amendments are consequential upon the amendment in clause 26 of the Bill which establishes a statutory licence for IIHs, and are intended to extend the existing definition in paragraph 10(3)(d) to cover the records of an institution assisting intellectually handicapped persons.

10. The phrase "copying records..." is used in a number of the provisions of the Act (sections 203A-203H) relating to statutory or compulsory licences for institutions, libraries and archives. These provisions are amended by clauses 27-34.

(h) "custodian in charge of the copying records" of an institution

11. This sub-clause, which also follows on from clause 26, is to extend paragraph 10(3)(f) to cover a custodian in charge of the copying records of an institution assisting intellectually handicapped persons.

12. The phrase "custodian in charge..." is used in a number of the provisions of the Act (especially sections 203A-203H) relating to statutory and compulsory licences.

(j) "intellectually handicapped person's copy" in relation to the whole or a part of an eligible item

13. This new phrase is also consequential upon the IIH statutory licence. It is intended to apply to copies made in reliance upon that licence by IIHs.

(k),(m),(n) amendments to paragraph 10(3)(m) of the Act

14. These amendments also follow on from the amendments in clause 26 of the Bill, and are intended to bring records of making of intellectually handicapped persons copies within the term "relevant record".

Clause 4 - Declarations and notices relating to certain bodies and institutions

15. This clause is to extend the Attorney-General's power, to declare certain institutions for purposes of the operation of various statutory licences, to IIHs for the purpose of the new licence established by clause 26. This provision is intended to have effect with the definition of IIH inserted in sub-section 10(1) by sub-clause 3(c).

Clause 5 - Provisions relating to the making of a work or other subject-matter

16. Presently, under section 91, copyright subsists only in a broadcast "made from a place in Australia". Neither "point to point" transmission originating from a terrestrial transmitter and received by a satellite (an "uplink") nor a satellite-to-satellite link, is a "broadcast", (particularly given the clarifying definition in sub-clauses 3(a) and (d)). Whilst the "downlink" from a "direct broadcasting satellite" is a broadcast, it is almost certainly not "from a place in Australia". The result is that a broadcast via satellite apparently does not enjoy copyright protection.

17. In addition, owners of copyright in a work or audio-visual material may not be able to enforce their exclusive right to broadcast (see sections 31, 85, 86 and 87 of the Act) against a person who makes an unauthorised broadcast via satellite because infringements are constituted by acts done or authorised to be done "in Australia".

18. Sub-section 22(6) inserted by clause 5 follows the structure of existing sub-section 22(5), and deems a direct broadcast made from a satellite to have been made at the time and from the place of the transmission from the earth. By analogy with sub-section 22(5) in relation to terrestrial broadcasts which may be made from equipment which has received the broadcast on relay, "the person" making the broadcast is intended to be the person from whom, or organisation from which, the broadcast transmission originates, not the owner or operator of the satellite. New sub-section 22(6) is intended to ensure that -

- (i) a broadcast, made by the persons listed in section 91, via AUSSAT or another satellite, but originating from Australia, will have copyright protection;
- (ii) copyright owners will enjoy the usual rights to authorise the inclusion of their material in broadcasts via satellite.

Clause 6 - Insertion of new section (Sound broadcasts by holders of print-handicapped radio licences)

19. This clause inserts section 47A which establishes a new statutory licence enabling radio stations for print-handicapped persons (RPH) to broadcast literary and dramatic works, subject to copyright owners' right to claim equitable remuneration.

20. This statutory licence is a simplified form of those licences already provided under sections 53B and 53D of the Act, allowing copying of works. The major elements are -

- . subject matter: the licence affects published literary and dramatic works, and adaptations of such works: sub-section 47A(i).

- . beneficiary: this is the holder of a print-handicapped radio licence, to the extent that broadcasting occurs under this licence. The definition of a "print-handicapped radio licence" in sub-section 47A(11) follows the terms of the RPH broadcasting licences granted under any one of the broadcasting Acts referred to in that sub-section.

- . record keeping: the RPH licence holder must make a record setting out certain particulars of the material broadcast. The particulars required may be prescribed by regulation (sub-sections 47A(1),(2)). A penalty of \$500 is provided for failure to retain the record for the "prescribed period" (sub-sections 47A(3),(11)), but this does not apply where the failure occurs without the licence holder's fault (sub-section 47A(4)). Provision is made to ensure that the RPH licence holder is not liable to be convicted twice of an offence in relation to the retention of the same record (sub-section 47A(5)).

- . inspection: any copyright owner may give notice of his intention to inspect the copying records (sub-section 47A (6)). A penalty of \$500 is provided for failure without reasonable excuse to allow such inspection (sub-section 47A(7)).

- . payment: payment may be requested in writing by the copyright owner. Where this is done the amount to be paid may either be agreed between the parties, or in default of agreement determined by the Copyright Tribunal (sub-sections 47A(8),(9)). Provision will be made in section 149A for the exercise by the Tribunal of this jurisdiction (see clause 20).

- . voluntary arrangements: RPH stations and copyright owners may agree on terms for broadcasting works independently of the statutory licence (sub-section 47A(10)).

Clause 7 - Copying of Works for preservation and other purposes

21. The purpose of this amendment is to remedy a possible defect in existing sub-section 51A(5) of the Act. Section 51A allows copying of works, by a library or archives, for preservation and other purposes, and in certain circumstances, the supply to a third party of copies made under the provision. Sub-section 51A(5) currently provides that copying done under the section does not amount to publication. Section 29 of the Act would seem to make clear that the mere making of copies does not constitute publication. Accordingly, sub-section 51A(5) is to be amended to provide that the supply of copies made under sub-section 51A(1) does not constitute publication. This technical change will bring section 51A(5) into line with wording to be used in the equivalent part of the new audio-visual preservation copying exemption (refer clause 12).

Clauses 8 and 9 - Television broadcasts and sound broadcasts in which copyright subsists; Ownership of copyright in television broadcasts and sound broadcasts

22. These amendments to sections 91 and 99 follow on the new terms provided for by sub-clause 3(b).

Clause 10 - Insertion of new section (Interpretation)

23. For the purpose of the new audio-visual "fair dealing" provisions inserted by clause 11, clause 10 inserts a new section 100A in Part IV, Division 6 ("Infringement of Copyright in Subject-matter other than Works"), providing a

new term "audio-visual item" defined to mean a sound recording, a cinematograph film, or a sound or television broadcast. Thus "audiovisual item" is intended to include all the categories in the Act of "subject-matter other than works", except published editions.

Clause 11 - Insertion of new sections (Fair dealing)

24. The clause inserts two new sections as follows -

- . Section 103A: Fair dealing for purpose of criticism or review
- . Section 103B: Fair dealing for purpose of reporting news.

At present the only fair dealing exemptions provided in the Act are those relating to works (sections 40-42). The new provisions are intended to extend fair dealing into the audio-visual area, (but not for the purpose of research or study) and will apply to any "audio-visual item", a new defined term inserted by clause 10.

25. As is the case in sections 41 and 42 of the Act, upon which the two new sections are modelled, what amounts to a fair dealing is a matter to be determined on the facts of each case. The dealing must, however, be genuinely for the purpose permitted in the sections, and not for some other "hidden" purpose. Sections 103A and 103B are intended to operate (as do sections 41 and 42 of the Act) as complete defences to actions for infringement. A number of factors may be considered in determining whether the defence is made out, such as the nature of the material, the amount and substantiality of the part of the material used, and the effect of the dealing on the commercial value to the copyright owner of the material.

26. Section 103A will permit fair dealing with an audio-visual item for the purpose of genuine criticism or review, whether of that or another audio-visual item or of a work. A "sufficient acknowledgement" of the item must be made. Existing section 41, and the proposed section 103A, have their basis in common law, which provided that a dealing would not be defensible as criticism or review if one person's material were used by another only to his or her own benefit. The purpose of this fair dealing defence is to allow use of parts of materials to carry out the criticism or review which is ordinarily expected or sought by the copyright owner, and which provides information and comment for possible consumers and audiences.

27. Section 103B will permit fair dealing with an audio-visual item for the purpose of, or associated with, the reporting of news. If the dealing occurs in a newspaper or the like a "sufficient acknowledgement" must be made.

28. Section 103B follows the existing pattern in section 42 of making no direct provision for fair dealing for the purpose of reporting news by means of a sound recording. However a fair dealing with an audiovisual item which resulted in the making of a sound recording for the purposes of, or associated with, the reporting of news by means of broadcasting, is intended to be within the provision.

29. Where the audio-visual item is a film, the exemption applies to a fair dealing by way of a "diffusion" (ie, broadly, a cable television transmission) as it does to a broadcast, by virtue of new sub-section 103B(2). (For other audio-visual items, ie records and broadcasts, no such extension of the provision is required because the copyright in those subject matters does not include an exclusive right to diffuse).

30. Under these new provisions it is intended that a fair dealing with an audio-visual item itself does not infringe copyright in any work or other copyright subject-matter which may be included in the audio-visual item.

Clause 12 - Insertion of new sections (Copying of unpublished items and Preservation copying)

31. The clause inserts two new sections as follows -

Section 110A: Copying of unpublished sound recordings and cinematograph films; and

Section 110B: Copying of sound recordings and cinematograph films for preservation and other purposes.

32. Section 110A applies to records or films over 50 years old, which have not been published. The copyright in unpublished records or films is of potentially unlimited duration as the 50 year term of copyright runs from first publication (see sections 93, 94(1) of the Act). The new section is, therefore, intended to qualify the operation of such "extended term" or "perpetual" copyrights.

33. The section only applies to a record or film which is held in the collection of a library or archives where it is accessible to the public. Accordingly, copyright owners may, by virtue of the qualification, allow deposit of their materials and, at the same time, preserve their rights by imposing conditions on public access to the material.

34. In circumstances to which the section applies, it is intended to be permissible to make a copy for the purposes of research or study, or with a view to publication. (In the last case, however, it is intended that the user must nevertheless obtain permission from the copyright owner before actually effecting publication). The copy may be made by the person desiring it for the purposes mentioned above, or by the library or archives on that person's behalf.

35. As is the case with copying of works under existing section 51, upon which section 110A is based, copying under the section is permissible without the requirement to make declarations or copying records or to pay remuneration. It is also provided that such copying infringes neither the copyright in the record or film, nor that in any copyright work or subject matter included in it.

36. Section 110B is based on existing section 51A, and is intended to allow a library or an archive to make whole copies of records or films in its collection -

- . where the record or film is a first record or first copy, for the purpose of preservation against loss or deterioration, or for the purpose of research in that or another library or archives;
- . where the record or film is held in a published form, for the purpose of replacing a damaged or deteriorated copy, or a copy that has been lost or stolen.

In the latter case, however, the exemption only applies where an authorised officer of the library or archives has, after reasonable investigation, made a declaration that he is satisfied that a new copy of the item cannot be obtained within a reasonable time at an ordinary commercial price. Administrative provisions in sections 203A-H will be amended to provide for retention, inspection and so on of such declarations (clauses 27-34).

37. Copying done under section 110B infringes neither the copyright in the record or film concerned, nor the copyright in any work or other subject matter included in it.

38. Sub-section (4) makes special provision to ensure that the supply of a copy of an unpublished item under the section does not amount to publication. This is intended to ensure that such supply does not infringe (in circumstances where such supply could amount to publication) the copyright in the record or film. It is also intended to preserve the copyright owner's exclusive right to publish.

39. Under section 110B copying is free.

Clause 13 - Reproductions of editions of works

40. Under the Act copyright subsists in a published edition of a work, and gives the owner the exclusive right to make a photographic copy of the edition. Section 112 presently overcomes the possible inhibiting effect of published edition copyright by providing that copying of a work already permitted elsewhere in the Act is permitted also in relation to the published edition of that work.

41. This clause is to amend section 112 to take account of the new statutory licence for intellectually handicapped persons (see clause 26).

Clause 14 - Repeal of heading and substitution of new heading

42. The new heading "Proof of facts in civil actions" more accurately reflects the existing provisions of Division 4 of Part V all of which only cover civil actions. A new evidence provision relating to both civil and criminal proceedings is inserted elsewhere, in Division 5 (see clause 18).

Clause 15 - Offences

43. Sub-clauses 15(a) and (c) are intended to introduce an objective test of the mental element necessary to establish that an offence has been committed under sub-sections 132(1), (2) and (3). It is currently required that the offender

"knows" that the copies in which he is dealing are infringing copies. This knowledge test is to be amended to: "knows or ought reasonably to know.....". Thus it is intended that a court may have regard to the circumstances of the alleged criminal act to determine whether the accused "ought reasonably" to have known that the copies dealt with were infringing copies.

44. Sub-clause 15(b) inserts sub-section (2A) which creates a new offence of possession of an article for certain commercial purposes, where one knows or ought reasonably to know that the article is an infringing copy. Currently possession is only an offence in relation to a "plate" (see sub-section 132(3)).

45. Sub-clause 15(d) effects a consequential amendment to sub-section 132(4).

46. Sub-clause 15(e) amends existing sub-section 132(5) which provides an offence of allowing the performance of a work in public, knowing that the performance constitutes an infringement. Sub-clause 15(e) will -

- . introduce an objective test of the knowledge element, in line with amendments to sub-sections 132(1), (2) and (3) by sub-clauses 15(a) and (c) (see para. 45); and
- . ensure that the introduction of that test does not result in an inappropriate widening of the offence, add a new element in the offence, namely "at a place of public entertainment", which is defined in a new sub-section 132(9), inserted by sub-clause 15(g) of the Bill.

By the latter change sub-section 132(5) is made consistent with the new sub-section 132(5AA) inserted by sub-clause 15(f).

47. Sub-clause 15(f) inserts sub-section 132(5AA) which makes it an offence for a person to cause the performance of a sound recording or film at a place of public entertainment, where one knows, or ought reasonably to know, that the performance constitutes an infringement.

48. Sub-clause 15(g) provides a definition of "place of public entertainment".

Clause 16 - Penalties

49. Section 133 of the Act sets out the penalty levels in respect of offences under section 132. Sub-clause 16(a) is intended to increase and re-structure these penalties. A distinction will be drawn between a natural person and a body corporate. For the first time imprisonment is provided for a first offender, where the offence relates to a film. The changes are set out in the form of a table at Appendix A.

50. Sub-section 133(2) provides maximum penalties which may be imposed for an offence (see sub-sections 132(1), (2) and (2A)) which relates to a number of infringing copies, and so avoids the possibility of unlimited penalties per offence. The current maximum penalties are expressed to apply in respect of articles "comprised in the same operation or transaction". However, the scope of this phrase is uncertain. Accordingly, in addition to raising the level of maxima as noted in the table, the maxima will apply only in respect of articles "to which the offence relates". There is of course no limit in the Act to the number of offences for which a person may be convicted and punished.

51. Sub-clauses 16(b) and (c) remove sexist language from sub-section 133(4) of the Act.

Clause 17 - Advertisement for supply of infringing copies of computer programs

52. Section 133A of the Act provides an offence of advertising the supply of infringing copies of computer programs. Clause 17 amends this section in two respects. First, the current knowledge test ("believes, or has reasonable grounds for believing") is brought into line with that to be applied to section 132 ("knows, or ought reasonably to know"), which is intended to make the test more objective. Secondly, the level of penalties is raised and a distinction is drawn between natural persons and corporate offenders. Special provision is made in amended sub-section 133A(1)(c) to ensure that an offence under the existing sub-section 133A(1)(c) will be counted in determining whether a second offence has occurred.

53. The changes in penalty levels are shown in the table at Appendix B.

Clause 18 - Insertion of new section (Affidavit evidence of subsistence and ownership of copyright)

54. The new section 134A provides that, in civil or criminal proceedings under the Act, proof of subsistence or ownership of copyright may be given by affidavit. Where another party to the proceedings wishes, in good faith, to cross-examine the deponent the court may, in its discretion, decline to admit the affidavit unless the person appears as a witness. This proviso is intended to reduce hearing costs, where appropriate, by allowing affidavit evidence whilst preserving a defendant's right "in good faith" to test the evidence against him.

Clause 19 - Interpretation

55. Paragraph 136(2)(d) of the Act, read with other provisions (eg. sections 158, 159) in the same Part (Part VI - The Copyright Tribunal), has the effect that where a person, in causing a public performance, complies with the terms of a licence scheme formulated by a licensor of performing rights, the performance will not amount to an offence under sub-section 132(5) (as amended - see clause 15).

56. By clause 19, it will be provided that, in equivalent circumstances, "performances" of films and recordings will not amount to an offence under new sub-section 132(5AA) inserted by sub-clause 15(f) which deals with infringing performances of films and records in a place of public entertainment.

Clause 20 - Repeal of section 149A and substitution of new section (Applications to Tribunal under sections 47A, 53B, 53D and 200A)

57. Section 149A of the Act currently makes provision for the Copyright Tribunal to determine equitable remuneration to be paid to the copyright owner under compulsory licences provided by section 53B and section 53D. By clause 20, section 149A is amended -

- . to provide for the Copyright Tribunal to determine a level of equitable remuneration for the broadcasting of literary and dramatic works under the new compulsory licence in section 47A for radio for the print-handicapped inserted by clause 6;
- . to provide for the Copyright Tribunal to determine a level of equitable remuneration for the making of intellectually handicapped persons' copies under the

new compulsory licence in section 200A for institutions assisting the intellectually handicapped inserted by clause 26.

by omitting references in sub-sections (3) and (4) to the taxing of costs by the Tribunal. The taxing and settling of costs is dealt with by section 174 as proposed to be amended by clause 22.

Clause 21 - Applications to Tribunal for determination of remuneration payable for broadcasting published sound recordings

58. These amendments to section 152 follow on the introduction of new terms in sub-clause 3(b) of the Bill.

Clause 22 - Costs of Proceedings

59. Section 174 of the Act empowers the Copyright Tribunal to order that the costs of any proceedings before it (other than inquiries into record royalty rates by the Tribunal under section 148) be paid by a party to the proceedings. The section also provides that the Tribunal may tax or settle the amount of those costs or specify the manner in which they are to be taxed.

60. Clause 22 of the Bill will amend section 174 by -

- (a) inserting a new sub-section which is intended to enable the Tribunal, or other person or persons (such as the Secretary to the Tribunal), to have regard to the provisions of the Federal Court Rules, including the scale of costs contained in the Second Schedule of those Rules, when taxing costs of proceedings; and
- (b) inserting a further sub-section which will provide that a certificate as to taxed costs signed by the Secretary is prima facie evidence of the matters stated in the certificate.

61. Certain of the amendments to section 149 of the Act are consequential upon the new provisions being inserted into section 174.

Clause 23 - Application of Act to countries other than Australia

62. These amendments to section 184 follow on the introduction of new terms in sub-clause 3(b).

Clause 24 - Interpretation

63. This clause amends section 195A of the Act containing definitions relevant to "Part X - Miscellaneous". The amendments provide new and amended definitions relating to the statutory licence for IIHs, inserted by clause 26. (Other interpretation provisions relevant to IIHs are made by clauses 3 and 4 to sections 10 and 10A. The amendment to the definition of "prescribed retention period" also relates to the new "preservation copying" provision inserted by clause 12.

(a) "prescribed retention period"

64. Sub-section 195A(2) currently defines "prescribed retention period" for which declarations, and records of copying, under existing free and remunerated statutory licences in the Act must be retained. The prescribed retention period presently is 4 years. The purpose of the amendment is to apply the period to declarations under the "preservation copying" provision inserted by clause 12 and copying records under the new statutory licence for IIHs.

(b) "institution"

65. Currently sub-section 195A(3) provides that an institution which was once an educational institution, or an institution assisting handicapped readers, will continue to be treated as such for purposes of its obligations to account for earlier copying done by it. The purpose of the amendment is to apply the same principle to IIHs.

(c) "eligible item"

66. This new term describes the works and other subject matter covered by the IIH statutory licence. However, the item must have been published - except where it was a broadcast. This stipulation preserves the copyright owners' right to determine when and how public dissemination of their material will first take place. The statutory licence is intended only to make available to the intellectually handicapped, in appropriate form, materials as are or have been available to other members of the public.

"copy of an eligible item"

67. The purpose of this new term is to describe the nature of the "copy", which can be made in reliance upon the new IIH statutory licence. Contrary to the ordinary meaning of "copy", in relation to literary, dramatic or musical works the right to make a copy is intended to include a right to make an adaptation.

Clause 25 - Reception of broadcasts

68. These amendments to section 199 follow on the introduction of new terms in sub-clause 3(b).

Clause 26 - Insertion of new section (Copying of eligible items by institutions assisting intellectually handicapped persons)

69. This clause will insert section 200A which establishes the proposed new statutory licence for institutions assisting intellectually handicapped persons (IIHs). The licence allows IIHs to reproduce and adapt specified published copyright material for the limited sole purpose of use in providing assistance to intellectually handicapped persons, where the

material is not commercially available in a form suitable for such use, subject to the keeping of records and the payment of equitable remuneration to copyright owners who take steps to claim it. The licence is intended to follow the terms of the 2 existing remunerated statutory licences: (i) multiple copying by educational institutions under section 53B; and (ii) multiple copying by institutions assisting handicapped readers (IHR) under section 53D.

70. The major elements of the scheme are as follows -

- . subject-matter: The licence applies to "eligible items" (sub-section 200A(1)). A definition of this term is inserted in section 195A by clause 24. The licence extends not only to works but also to "audio-visual" copyright subject matter (films, records, broadcasts), provided it has been published (except for broadcasts).
- . beneficiary: The copying etc, permitted by the licence may be done by or on behalf of an "institution assisting intellectually handicapped persons". That phrase is defined in section 10 by a new definition inserted by clause 3(c).
- . pre-conditions: The licence operates only where the person making the copy is satisfied, after reasonable investigation, that a new copy of the item - in the case of a work, which has been separately published in a suitable form, and in any other case, a new copy - cannot be obtained within a reasonable time at an ordinary commercial price (sub-section 200A(2)).
- . purpose: The "copy" must be for use only in "the provision, whether by the institution or otherwise, of assistance to an intellectually handicapped person

or persons". (sub-section 200A(1)). There is no requirement that the assistance referred to is provided to a particular intellectually handicapped person or persons. (In this regard the licence differs from that applying to IHRs, which allows handicapped readers' copies only for use by a particular handicapped reader). Further, there is no requirement that such "use" be by the institution which made the copy. It will therefore be permissible provided all other conditions are met for the copy to be used by another institution or a third party in providing such assistance.

- . acts permitted: The making of a "copy" as defined in sub-section 195A(5).

- . record-keeping: The institution must make, as soon as practicable, a record of the making of the copy setting out such particulars as are prescribed by regulation (sub-section 200A(4)). The record may be kept in writing or in any other manner prescribed by the regulations. If the records are kept in writing they must be in accordance with the form prescribed by regulations (sub-section 200A(5)).

- . immunity: Compliance with the conditions described above provides immunity from infringement action in respect of the subject-matter directly copied (ie the eligible item) and any copyright material included in it. (sub-sections 200A(1),(2) and (4)). Fines and other sanctions, but not infringement liability, are involved in failure to comply with the remaining obligations set out below.

- . record retention and inspection: Further provision in relation to retention of records for the IIH compulsory licence will be made in amendments to section 203A-H. With regard to inspection of records, see amendments to section 203E effected by clause 31.

- . payment: Payment may be requested in writing by the owner of copyright in the subject-matter directly copied. The amount to be paid may then be agreed between the parties or, in default of agreement, determined by the Copyright Tribunal. (sub-sections 200A(6) and (7)). Regarding the Tribunal's jurisdiction in this matter, see also amendments to section 149A effected by clause 20.

- . other matters: Sub-sections 200A(8) and (9) make provision for the making of a temporary, or "ephemeral" copy of an eligible item to be used in the making of "an intellectually handicapped person's copy". (See definition inserted in sub-section 10(3) by clause 3(j)). Sub-section 200A(10) ensures that no copyright vests in the maker of an intellectually handicapped person's copy. Thus, even where an adaptation has been produced, the institution does not acquire a copyright separate from that in the original item. Sub-section 200A(11) preserves the option for copyright owners and institutions to agree on terms for copying independently of the compulsory licence.

Clause 27 - Retention of records and declarations in relation to copies made by libraries, archives or institutions

71. Section 203A of the Act is the first of several provisions dealing with "administrative" aspects of those statutory

licences provided under the Act which are subject to the making of records and/or declarations. Section 203A provides a number of offences for failure to retain properly those records or declarations. The section will be amended by clause 27 to extend to declarations made under the new preservation copying provision (clause 12) and records required under the new compulsory licence for IIHs provided by clause 26.

72. Declarations and records must be retained for the "prescribed retention period". That term is defined in section 195A as amended by clause 24. (The period is currently 4 years).

Clause 28 - Certain institutions may elect to deposit copying records with central records authorities

73. Section 203B of the Act permits copying records to be sent to and retained by a central records authority to relieve individual institutions of the physical problems and legal obligations associated with the arrangement and storage of those records. By clause 28, section 203B will be extended to cover copying records of an IIH. Note that "copying records of" an institution is defined in sub-section 10(3) as amended by clause 3(f)-(g).

74. The opportunity has been taken to simplify the structure of the provision so that an election under section 203B to deposit copying records with a central records authority must be made with respect to all of the categories of copying record made by that institution.

Clause 29 - Retention of copying records by central records authorities

75. Where an election has been made to deposit copying records with a central records authority, section 203C provides an offence of failing to retain properly those records. By clause 29, section 203C will be extended to cover the copying records of an IIH.

Clause 30 - Arrangement of declarations and records

76. Section 203D defines the manner in which declarations and copying records must be arranged so that libraries and educators are protected against allegations of infringement and so that copyright owners can make checks or claim remuneration, as appropriate. By clause 30, section 203D will be extended to cover declarations under the "preservation copying" provision inserted by clause 12 and the copying records of an IIH.

77. In relation to declarations under sections 49, 50, 51A and new section 110B, the only requirement is that they be arranged in chronological order according to the dates on which they were made. This is because copying under those provisions is free, and it is considered that copyright owners need only be in a position to check there is no systematic abuse of the provisions. There is no requirement to segregate declarations relating to copying under different sections of the Act.

78. However because sections 53B, 53D and new section 200A enable copyright owners to claim equitable remuneration, it may be necessary that they be able to identify copying of their own works in order to claim remuneration. Accordingly proposed new sub-sections 203D(2) and (4) require records to be arranged so that it is possible to inspect those relating to works or eligible items by the same author or maker, without having to inspect those relating to other authors or makers.

79. If an institution falls into more than one category (eg, is an IHR which is also an IIH), and can thus copy under more than one statutory licence, it may at its option keep the different types of copying records separately, or merged in a single sequence. Similarly, copying records of an IIH may, at the option of the institution, be segregated into records relating to works and those relating to other eligible items, or maintained in 2 groups.

Clause 31 - Inspection of records and declarations retained by libraries, archives or institutions

80. Section 203E provides that a copyright owner or his agent may inspect the collections and declarations of a library or archives, or the copying records of an institution, upon giving 7 days notice in writing. By clause 31 this provision will be extended to apply to collections and declarations made under the new preservation copying provision (clause 12) and to the copying records of an IIH.

Clause 32 - Additional offences in relation to the making and retention of records and declarations

81. Section 203F provides penalties for false declarations and records, or wilful, premature destruction of declarations and records made under compulsory licences provided in the Act. By clause 32 this provision will be extended to apply to declarations made under the new "preservation copying" provision (clause 12) and to the copying records of an IIH.

Clause 33 - Return of copying records deposited with a central records authority

82. Section 203G allows an institution to revoke an election under section 203B to deposit its copying records with a central records authority, and to resume direct responsibility for the arrangement and storage of its records. By clause 33, section 203G will be amended to cover the copying records of an IIH.

Clause 34 - Notation of certain copies & c

83. Section 203H provides that copies made under compulsory and statutory licences provided by the Act are to be identified as such by a specific notation or recorded messages as appropriate, setting out the date on which the copy was made and the institution on whose behalf it was made. The notation provides prima facie evidence of the matters stated in it. It enables a given copy to be related to relevant copying records which may be needed in defence to an infringement action. It also allows copyright owners to check that relevant provisions of the Act have been complied with.

84. By clause 34 the section will be amended so that analogous provision is also made for preservation copies of records and films and intellectually handicapped persons' copies.

APPENDIX A

CURRENT AND PROPOSED NEW
PENALTIES FOR MAJOR COPYRIGHT OFFENCES

Offence	Current (1981) Penalty	Proposed (1986) Penalty
<u>A. Unauthorised commercial dealings in, or possession of, infringing copies: s. 132(1),(2) and (2A)</u>		
First conviction re work or subject matter other than a film.	\$150/article	NP - \$ 500/article BC - \$2,500/article
First conviction re a film.	\$1,500/article	NP - \$1,500/article and/or 2 years' imprisonment BC - \$7,500/article
Subsequent conviction re work or subject matter other than a film.	\$150/article or 6 months	NP - \$ 500/article and/or 6 months BC - \$5,000/article
Subsequent conviction re a film.	\$1,500/article or 6 months	NP - \$ 1,500/article and/or 5 years BC - \$15,000/article

B. Overall limit on fine imposed under s. 132(1),(2) or (2A).

	(Applied to articles comprised in the same operation)	(Applied where there is more than one article to which the offence relates)
Fine limit in Federal Court	\$10,000	NP - \$ 50,000 BC - \$250,000
Fine limit in other Court	\$1,500	NP - \$ 10,000 BC - \$ 50,000

C. Possession of plate; unauthorised performance s. 132(3), (5) & (5AA)

First conviction	\$1,500	NP - \$ 1,500 BC - \$ 7,500
Subsequent conviction and/or	\$1,500 or 6 months	NP - \$ 1,500 and/or 6 months BC - \$15,000.

Notes:(1)'NP' means natural person
'BC' means body corporate
(2)'article' means infringing copy, not
title copied.

APPENDIX B

CURRENT AND PROPOSED NEW PENALTIES
FOR ADVERTISING SUPPLY OF INFRINGING COPIES OF COMPUTER PROGRAMS

	<u>Current (1984) Penalty</u>	<u>Proposed (1986) Penalty</u>
First conviction	\$1,500	NP - \$1,500 BC - \$7,500
Subsequent conviction	\$1,500 and/or 6 months imprisonment	NP - \$1,500 and/or 6 months BC - \$15,000



