COPYRIGHT AMENDMENT BILL 2006

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Attorney-General, the Honourable Philip Ruddock MP)
AMENDMENTS TO THE COPYRIGHT AMENDMENT BILL 2006

(Government)

OUTLINE

The purpose of these amendments to the Copyright Amendment Bill 2006 (‘the Bill’) is to ensure that the Bill properly reflects intended Government policy, to rectify or clarify the drafting of certain provisions and to respond to the report of the Senate Standing Committee on Legal and Constitutional Affairs (‘Senate Committee’).

In its report tabled on 13 November 2006, the Senate Standing Committee on Legal and Constitutional Affairs made a number of recommendations in respect of the Bill. These amendments seek to address many of the Committee’s recommendations. The amendments also address the outcome of submissions by, and consultations with, key stakeholders.

In summary, the amendments to the Bill will:

- repeal five strict liability offences in Schedule 1 which would have had the unintended effect of extending criminal liability to particular activities of individuals and legitimate businesses
- insert a definition of private and domestic use to clarify that the new exceptions are not restricted to domestic use only inside a person’s home
- amend new s 109A to ensure that the format-shifting exception will apply to reasonable consumer uses of digital music players
- amend new ss 109A and 111 to also include as prohibited dealings public performance and broadcasting of copies and recordings covered by those sections
- clarify the amendments to s 40 to make clear what constitutes a reasonable portion of the works specified, a reproduction of which made for the purposes of research or study is taken to be a fair dealing for those purposes
- amend new ss 51B, 110BA and 112AA to allow the making of up to three copies of relevant material but only for preservation purposes and to provide flexibility through a regulation making power to prescribe that particular libraries and archives can be determined to be key cultural institutions
- amend new s 28A to narrow the exception to communications made merely to facilitate a performance of the work (in a classroom) under s 28 and to clarify that the same range of copyright material covered by s 28 is included
- amend new s 200AAA to ensure that caching by educational institutions for efficiency purposes (proxy caching) does not infringe copyright; and
• substitute a new Part IV to leave intact the record keeping requirements now in Parts VA and VB but confer on the Copyright Tribunal additional jurisdiction to determine additional matters in relation to record keeping.

In addition, the amendments will:

• ensure that the existing definition of ‘record’ in the Act is retained for Part III, Division 6

• make clear that new s 200AB does not apply where a use is made for the purpose of obtaining a commercial advantage or profit

• provide new fair dealings provisions for parody and satire

• amend the definition of ‘broadcaster’ in Schedule 9 to ensure that relevant licence holders under the Broadcasting Services Act 1992 can authorise relevant acts under the encoded broadcast scheme

• ensure any decisions by the Copyright Tribunal to vary or substitute distribution arrangements apply only to future distributions

• clarify use of relevant Australian Competition and Consumer Commission guidelines by the Copyright Tribunal

• insert explanatory notes to assist with the reading of provisions generally; and

• make minor technical amendments.

FINANCIAL IMPACT STATEMENT

The proposed amendments will not have a financial impact.
AMENDMENTS TO COPYRIGHT AMENDMENT BILL 2006

NOTES ON AMENDMENTS

Amendment (1) Strict liability offences

1. This amendment replaces the word ‘offences’ with ‘offence’ in the heading before sub-s 132AL(8) of the Copyright Act 1968 to reflect the omission of the strict liability offence in sub-s 132AL(9).

Amendment (2) Strict liability offences

2. This amendment removes the strict liability offence in sub-s 132AL(9) inserted by Schedule 1 item 6 of the Bill. That offence relates to possessing a device to be used for copying a work or other subject-matter where the copy will be an infringing copy. The removal of this strict liability offence addresses a recommendation of the Senate Standing Committee on Legal and Constitutional Affairs (Senate Committee) that strict liability offences in the Bill should be re-examined for amendment because they may have the unintended consequence of extending criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. Removal of this strict liability offence does not affect the fault-based indictable or summary offences in new s 132AL which will apply to the same activity committed by people who have acted with criminal intent.

Amendment (3) Strict liability offences

3. This amendment amends new sub-s 132AL(10) inserted by Schedule 1 item 6 of the Bill to remove reference to the strict liability offence in sub-s 132AL(9). This is necessary because sub-s 132AL(9) is being omitted. The effect of the amendment is that the offence in sub-s 132AL(8) relating to making a device etc will be the only strict liability offence contained in s 132AL.

Amendment (4) Strict liability offences
4. This amendment removes the strict liability offence in new sub-s 132AN(5) inserted by Schedule 1 item 6 of the Bill. That offence relates to causing a literary, dramatic or musical work to be performed in public at a place of public entertainment where the performance infringes copyright in the work. The removal of this strict liability offence addresses a recommendation of the Senate Committee that strict liability offences in the Bill should be re-examined for amendment because they may have the unintended consequence of extending criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. Removal of this strict liability offence does not affect the fault-based indictable or summary offences in new s 132AN which will apply to the same activity committed by people who have acted with criminal intent.

5. This amendment also removes new sub-s 132AN(6) which currently provides that the offence in new sub-s 132AN(5) is an offence of strict liability. Sub-section 132AN(6) will no longer be necessary because of the omission of sub-s 132AN(5).

**Amendment (5) Strict liability offences**

6. This amendment removes the strict liability offence in new sub-s 248PA(5) inserted by Schedule 1 item 33 of the Bill. That offence relates to making a direct recording of a performance during the protection period of the performance and without the authority of the performer. The removal of this strict liability offence addresses a recommendation of the Senate Committee that strict liability offences in the Bill should be re-examined for amendment because they may have the unintended consequence of extending criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. Removal of this strict liability offence does not affect the fault-based indictable or summary offences in new s 248PA which will apply to the same activity committed by people who have acted with criminal intent.

7. This amendment also removes new sub-s 248PA(6) which currently provides that the offence in sub-s 248PA(5) is an offence of strict liability. Sub-section 248PA(6) will no longer be necessary because of the omission of sub-s 248PA(5).

**Amendment (6) Strict liability offences**
8. This amendment removes the strict liability offence in new sub-s 248PE(6) inserted by Schedule 1 item 33 of the Bill. That offence relates to possessing a plate or recording equipment to be used for making an unauthorised recording of a performance, or a copy of an unauthorised recording, where the possession occurs during the protection period of the performance. The removal of this strict liability offence addresses a recommendation of the Senate Committee that strict liability offences in the Bill should be re-examined for amendment because they may have the unintended consequence of extending criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. Removal of this strict liability offence does not affect the fault-based indictable or summary offences in new s 248PE which will apply to the same activity committed by people who have acted with criminal intent.

9. This amendment also removes new sub-s 248PE(7) which currently provides that the offence in sub-s 248PE(6) is an offence of strict liability. Sub-section 248PE(7) will no longer be necessary because of the omission of sub-s 248PE(6).

**Amendment (7)  Strict liability offences**

10. This amendment removes the strict liability offence in new sub-s 248QB(6) inserted by Schedule 1 item 33 of the Bill. That offence relates to possessing a plate or recording equipment to be used for making an unauthorised recording of a performance. The removal of this strict liability offence addresses a recommendation of the Senate Committee that strict liability offences in the Bill should be re-examined for amendment because they may have the unintended consequence of extending criminal liability more widely than intended, eg to activities of ordinary Australians and legitimate businesses. Removal of this strict liability offence does not affect the fault-based indictable or summary offences in new s 248QB which will apply to the same activity committed by people who have acted with criminal intent.

11. This amendment also removes new sub-s 248QB(7) which currently provides that the offence in sub-s 248QB(6) is an offence of strict liability. Sub-section 248QB(7) will no longer be necessary because of the omission of sub-s 248QB(6).
Amendment (8)  

Definition of record

12. This amendment amends Schedule 3 of the Bill to insert, after item 8, new item 8A. New item 8A inserts new sub-s 54(1A), to provide a localised definition of ‘record’ for the purposes of Division 6 of Part III.

13. The effect of the amendment is to retain the existing definition of ‘record’ in the Act for Part III, Division 6. This amendment is necessary because the new definition in s 10(1) inserted by Schedule 3 Item 2 of the Bill (to include ‘electronic file’) would have had an unintended effect of extending the operation of the statutory licence for recording or musical works under Part III, Division 6 of the Act, for example, to digital downloads and ring-tone sales. Retention of the existing definition ensures that the Bill makes no change to Part III, Division 6.

Amendment (9)  

Private and Domestic Use

14. This amendment amends Schedule 6 by adding new item 1A to insert a definition of ‘private and domestic use’ in sub-s 10(1). This definition clarifies that ‘private and domestic use’ means such use on or off domestic premises.

15. A number of items in the Bill will add copyright exceptions that permit the recording or copying of copyright material for private and domestic use. This amendment makes clear that a private and domestic use can occur outside a person’s home, as well as inside. For example, a person who makes a recording of a broadcast for private and domestic use under new sub-s 111(1) is not restricted to watching or listening to that recording in domestic premises. Similarly, the requirement in new sub-s 109A(1) that a later copy of a sound recording must be made for private and domestic use does not prevent a person listening to that later copy with a digital music playing device in a public place or on public transport.

16. This definition will also apply to existing uses of the term ‘private and domestic use’, for example in Part XIA.

Amendment (10)  

Time-Shifting
17. This amendment amends item 1 of Schedule 6 of the Bill by inserting a Note at the end of new sub-s 111(1). This Note indicates that the term ‘broadcast’ is defined in sub-s 10(1).

18. New s 111 provides an exception to permit the recording of a broadcast for private and domestic use to watch or listen to at a more convenient time. This exception does not permit a person to make a ‘library’ by recording a broadcast and keeping it indefinitely in a collection of films or sound recordings for repeated use.

19. This exception applies to a communication to the public delivered by a ‘broadcasting service’ within the meaning of the Broadcasting Services Act 1992. This does not include television and radio program material that may be made available to the public in ways that are not broadcasting services, for example over the Internet as a digital download.

Amendment (11)  Time-Shifting

20. This amendment amends item 1 of Schedule 6 of the Bill by inserting paragraphs (e) and (f) in new sub-s 111(3).

21. Sub-section 111(3) contains a number of restrictions preventing sales and other dealings with an article or thing embodying a film or recording of a broadcast. If an article or thing is dealt with, sub-s 111(2) is taken never to have applied. In that case, the making of a film or sound recording may infringe the copyright in the broadcast as well as included material.

22. New paragraph (e) adds to the prohibited dealings listed in sub-s 111(3) a use for causing the film or sound recording to be seen or heard in public. The intention is to prevent possible misuses of s 111.

23. Section 111 permits the making of a film or sound recording of a broadcast for private and domestic use to watch or listen to at a more convenient time. Causing the film or recording to be seen or heard in public is not a private and domestic use. Thus s 111 does not permit a recording to be made of a broadcast for presentation to a public audience. Performances within a family or home setting would not be regarded as having a public
character. In addition, causing a 'public performance' would normally infringe other rights in copyright material included in television and radio broadcasts. However, s 108 of the Act provides a statutory licence that permits the public performance of published sound recordings, if equitable remuneration has been paid or an undertaking is given to pay equitable remuneration as determined by the Copyright Tribunal.

24. New paragraph (e) addresses a concern that a person found using an unlicensed copy of a published sound recording for a public performance may raise as a defence to a claim of infringing copyright in the sound recording that the making of the copy does not infringe copyright if, at the time the copy of the sound recording was made, it was made under s 111 from a broadcast for the purpose of private and domestic use and that a later decision to use the copy for a public performance is permitted under s 108 on an undertaking to pay equitable remuneration. New paragraph (e) ensures that such a defence will not operate in the case of a sound recording made of a broadcast.

25. New paragraph (f) adds to the prohibited dealings listed in sub-s 111(3) a use for broadcasting a film or sound recording. This is also intended to prevent a possible misuse of s 111, in conjunction with the statutory licence at s 109 for broadcasting a published sound recording.

26. In this instance, new paragraph (f) addresses the possibility that a person who uses a sound recording made under s 111 for the making of another broadcast might raise a similar defence as outlined above, but this time also relying on the statutory licence at s 109. New paragraph (f) ensures that such a defence will not operate in the case of a sound recording made of a broadcast.

Amendment (12) Format-Shifting

27. This amendment amends item 8 of Schedule 6 of the Bill by omitting the proposed s109A and substituting a new s 109A.

28. The amendments will better recognise and render legitimate the ordinary use by consumers of digital music players such as iPods and MP3 players. In particular, new s 109A responds to concerns that, as originally introduced, this provision was too restrictive
in several ways, including in not recognising that a person using a digital music player to listen to his or her music collection may need to make and keep more than one copy of a sound recording.

29. New s 109A permits the owner of a copy of a sound recording to make another copy for private and domestic use. The new exception will allow the owner of a sound recording to make copies for the purpose of using a playing device that he or she owns.

30. New sub-s 109A lists the conditions necessary for the new provision to operate. First, sub-s 109A(1) requires that a later copy must be made by the owner of a copy of a sound recording (the earlier copy) using the earlier copy.

31. Next, paragraph 109A(1)(b) requires that the sole purpose of making the second copy must be the owner’s private and domestic use of the later copy with a device that can cause sound recordings to be heard and is owned by the owner of the earlier copy. The definition of ‘private and domestic use’ inserted in s 10(1) by amendment (9) indicates that the private and domestic use can occur on or off domestic premises.

32. The term ‘with a device’ in paragraph 109A(1)(b) envisages that a later copy might be stored in the memory of a personal computer or portable digital device that is a device that can cause sound recordings to be heard or the later copy might be embodied in a physical article such as a compact disc or storage medium for use with a device for playing sound recordings. Copying may also occur sequentially. A person who owns a copy of a sound recording as a compact disc and who owns several playing devices in the form of a personal computer, a digital portable player and a MP3 car sound system could make a copy for all three playing devices. The compact disc (earlier copy) could be copied to the memory of a personal computer (later copy). The copy stored in the personal computer would be an ‘earlier copy’ in relation to making a later copy in the portable player or another later copy as a compact disc for use with his or her car’s MP3 audio system. This will allow for digital playing devices, such as the Apple iPod, to function where more than one copy of a sound recording is maintained in the device and a personal computer.
33. In addition, there are existing exceptions in the Act dealing with temporary reproductions as part of a technical process of using a work or a subject-matter which may also apply if a reproduction is incidentally made in relevant circumstances.

34. Paragraph 109A(1)(c) requires that the earlier copy of a sound recording must not have been made by downloading over the Internet a digital recording of a radio broadcast or similar program. The purpose of this exclusion is to avoid including within the scope of s 109A emerging markets for digital recordings of radio programs provided as ‘podcasts’, unless authorised by the copyright owner.

35. Paragraph 109A(1)(d) requires that the earlier copy must not be an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording. This condition prevents a copy of a sound recording which infringes copyright being used to make a later copy which does not infringe copyright because of the operation of this provision.

36. New sub-s 109A(2) provides that the making of the later copy is not an infringement of copyright in the sound recording, or in a literary, dramatic or musical work or other subject-matter included in the sound recording. This exception to copyright is central to the operation of s 109A.

37. New sub-s 109A(3) provides for dealings which may make a later copy an infringing copy. The purpose is to prevent sale, hire, trading in, distribution of, public performance or broadcasting of a copy of a sound recording that is made under this provision. A later copy must be made for private and domestic use of the owner of the earlier copy. If a specified dealing with a later copy occurs, sub-s 109A(2) is taken never to have applied to its making. The consequence is that the making of the later copy may become an infringement of copyright in the sound recording or in a work or other subject-matter included in the sound recording. In addition, the sale or other dealing with an infringing copy may also be an infringement of copyright.

38. New sub-s 109A(3) also applies to dealings with an earlier copy. The effect of this is that a later copy may become an infringing copy if the owner disposes of the earlier copy.
from which it is made. The intention is to prevent a person acquiring a copy of a sound recording, using it as an earlier copy to make a later copy to keep for his or her future use and then passing ownership of the first earlier copy to another person who might repeat the process. Such behaviour could harm copyright owners by affecting the sales of sound recordings to different individuals. An owner who chooses to dispose of a copy of a sound recording used as an earlier copy to make a later copy would be expected to delete or destroy any later copy prior to disposing of the earlier copy.

39. New sub-s 109A(4) provides, for the avoidance of doubt, that paragraph 109A(3)(d) does not apply to a loan of the main copy by the lender to a member of the lender’s family or household for the member’s private use.

40. While s 109A allows the owner of a copy of a sound recording to copy it in certain circumstances, it does not provide permission for the owner to circumvent an access control technological protection measure applied to the sound recording. The new provisions inserted by Schedule 12 of the Bill relating to technological protection measures do not allow an exception to allow for this form of copying.

**Amendment (13) Parody and Satire**

41. This amendment amends Schedule 6 of the Bill by inserting items 9A and 9B to insert new exceptions for fair dealings with works (new s 41A) and fair dealings with audio-visual items (new s 103AA) for the purpose of parody or satire. Previously the proposed exceptions for parody and satire were part of new s 200AB. That section will enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties.

42. The amended parody and satire exceptions will apply where a person or organisation can demonstrate that the use for the purpose of parody or satire is a fair dealing.

43. These exceptions are consistent with the present structure of the Act which already contains fair dealing exceptions for criticism and review and reporting the news. Case law suggests that the use of copyright material for parody and satire is likely to overlap or be closely connected to uses for these other fair dealing purposes.
44. It is appropriate to require that a use for the purpose of parody and satire should be
‘fair’. Parody, by its nature, is likely to involve holding up a creator or performer to scorn
or ridicule. Satire does not involve such direct comment on the original material but, in using
material for a general point, should also not be unfair in its effects for the copyright owner.

Amendment (14) Parody and Satire

45. This amendment amends item 10 of Schedule 6 of the Bill by substituting ‘or (4)’ for
‘(4) or (5)’ in paragraph 200AB(1)(b). This change is a consequence of the omission of
sub-s 200AB(5).

Amendment (15) Fair Use

46. This amendment amends item 10 of Schedule 6 by omitting the words ‘or a person
licensed by the owner of the copyright’ from paragraph 200AB(1)(d).

47. Paragraph 200AB(1)(d) incorporates part of the obligation set out in article 13 of the
World Trade Organisation (WTO) TRIPS Agreement, being that exceptions or limitations
to exclusive rights shall not unreasonably prejudice the legitimate interests of the rights
holder.

48. The amended paragraph 200AB(1)(d) more closely follows the wording of that part of
article 13 of the TRIPS Agreement.

Amendment (16) Fair Use

49. This amendment amends item 10 of Schedule 6 of the Bill by adding ‘or profit’ at the
end of paragraph 200AB(2)(c).

50. New s 200AB allows a court to decide if a particular use should be permissible without
a copyright owner’s consent, that is, whether the copyright owner is able to control that use.

51. Before deciding the use is outside the copyright owner’s control, a court would need to
be satisfied that the particular use complies with the conditions set out in sub-s 200AB(1).
52. The intention is that s 200AB provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties. This provision might be determined by a court, for example, to allow a library or archive to make a use of a work where a copyright owner’s permission cannot be obtained because he or she cannot be identified or contacted, or an educational institution that wishes to continue using a teaching resource held in a form which has become obsolete and is not commercially available in a form appropriate for contemporary teaching technology.

53. This amendment requires that a use by a body administering a library or archives must not be made partly for the purpose of obtaining a commercial advantage or profit. Present paragraph 200AB(2)(c) in the Bill imposes a condition that it not be for the purpose of obtaining ‘a commercial advantage’. The intention was that an eligible body should not obtain an exception to copyright under sub-s 200AB(1) if the body administering a library or archives was making use of copyright material partly for the purpose of gaining an advantage, benefit or gain from being engaged in commerce. The addition of the words ‘or profit’ is to make clear that this condition includes that the use by a body administering a library or archives is not to be partly for the purpose of making a profit.

54. This amendment clarifies that an activity for the purpose of making a profit would comply with the condition at paragraph 200AB(2)(c) even though an activity for the lesser purpose of obtaining some commercial advantage would not comply.

Amendment (17)  Fair Use

55. This amendment amends item 10 of Schedule 6 of the Bill by adding ‘or profit’ at the end of paragraph 200AB(3)(c).

56. This amendment clarifies that a use by a body administering an educational institution is not to be partly for the purpose of making a profit.
Amendment (18)  Fair Use

57. This amendment amends item 10 of Schedule 6 of the Bill by adding ‘or profit’ at the end of paragraph 200AB(4)(c).

58. This amendment clarifies that a use by or for a person with a disability is not to be partly for the purpose of making a profit.

Amendment (19)  Parody and Satire

59. This amendment amends item 10 of Schedule 6 of the Bill by omitting sub-s 200AB(5).

60. Existing sub-s 200AB(5) in the Bill provides for uses of copyright material for the purposes of parody or satire. New exceptions for parody and satire are now being inserted by these amendments (see amendment 13).

Amendment (20)  Fair Use

61. This amendment amends item 10 of Schedule 6 of the Bill by inserting new sub-s 200AB(6A) which provides that a use does not fail to meet the condition in paragraphs 200AB(2)(c), (3)(c) or (4)(c) merely because of the charging of a fee that is connected with the use and that fee does not exceed the costs of the use to the charger of the fee.

62. This amendment is intended to clarify that the adoption of a ‘user pays’ system is not sufficient to indicate that the purpose of the relevant body or individual is partly to obtain a commercial advantage or profit. It is common for bodies such as libraries and archives or educational institutions to impose a fee to recover costs associated with uses of a kind covered by sub-ss 200AB(2), (3) and (4). The mere fact of adopting a ‘user pays’ system of recovering costs connected with a use should not constitute a purpose partly for obtaining a ‘commercial advantage or profit’.

Amendment (21)  Fair dealing for research or study

63. This amendment replaces proposed sub-s 40(5) in the Bill with a new sub-s 40(5) and inserts new sub-ss 40(6), (7) and (8).
64. New sub-s 40(5) makes the same change to existing sub-s 40(3) as was intended by proposed sub-s 40(5) in the Bill. That intention was to state exhaustively what constitutes a ‘reasonable portion’ of the works specified, a reproduction of which made for the purposes of research or study is taken to be a fair dealing for those purposes. Many submissions that commented on proposed sub-s 40(5) in the Bill expressed the understanding that it had a different effect to what was intended. Sub-section 40(5) has been drafted to express the original intention in a different way.

65. Sub-s 40(5) now in the Bill refers to elements of the definition of ‘reasonable portion’ in sub-s 10(2) and (2A) in the Act. Instead, new sub-s 40(5) in the amendment incorporates a definition of ‘reasonable portion’ comprising those elements and also indicates the works of which such amount may be reproduced. The types of works and the amounts that may be copied are clearly set out in the table in new sub-s 40(5). Consequently, to determine under the new sub-s 49(5) what is a reasonable portion of what works, for the purposes of making a reproduction of a work that will qualify as a fair dealing under the provision, it will not be necessary to refer to sub-s 10(2) or (2A) in the Act. Indeed, new sub-s 40(8) inserted by the amendment excludes the application of sub-s 10(2) and (2A) to new sub-s 40(5), (6) or (7).

66. The drafting of new sub-s 40(5) is also intended to make it clear that, as is the case under s 40 of the Act now, reproduction of more than a reasonable portion of the works referred to in sub-s 40(5), or of other works, may still be considered a fair dealing for research or study under sub-s 40(1) and (2).

67. New sub-s 40(6) provides that if a work exists in both hardcopy and electronic form and in both forms may be reproduced under new sub-s 40(5), reproduction of no more than a reasonable portion of it in either form will be a fair dealing under sub-s 40(5) even though the amount reproduced would not be a reasonable portion in the other form. This provision incorporates the effect of sub-s 10(2B) in the Act, which by virtue of new sub-s 40(8) will no longer apply to new sub-s 40(5), (6) or (7).

68. New sub-s 40(7) provides that if a person makes a reproduction of no more than a reasonable portion of a published literary or dramatic work, and then makes a reproduction
of another part of the work, the later reproduction will not qualify as a fair dealing under new sub-s 40(5). This provision incorporates the effect of sub-s 10(2C) in the Act, which by virtue of new sub-s 40(8) will no longer apply to new sub-s 40(5), (6) or (7).

69. New sub-s 40(8) provides that sub-ss 10(2), (2A), (2B) and (2C) in the Act do not affect new sub-s 40(5), (6) or (7), as already mentioned above.

Amendment (22) Preservation copying

70. This amendment amends item 26 of Schedule 6 of the Bill to omit the heading for new s 51B and substitutes a new heading. The new heading more appropriately reflects the scope of revised s 51B as amended by amendments (23), (24), (25), (26) and (27) below, permitting key cultural institutions to make copies of significant works for the purposes of preservation.

Amendment (23) Preservation copying

71. This amendment amends item 26 of Schedule 6 of the Bill to omit paragraph 51B(1)(a) and substitute new paragraph 51B(1)(a).

72. New sub-s 51B(1)(a) retains the original requirements that in order to rely on s 51B, a body administering the library or archives must have, under the law of the Commonwealth, State or Territory, the function of developing and maintaining its collection, but now also confers on the Minister a power to prescribe by regulation particular institutions for the purposes of the provision.

73. This amendment will provide scope to consider the merits of claims of institutions other than those who have a statutory function of preserving a collection, but who nonetheless develop and maintain collections that are of historical and cultural significance to Australia.

Amendment (24) Preservation copying

74. This amendment amends sub-s 51B(2) inserted by item 26 of Schedule 6 of the Bill which deals with copying of manuscripts by key cultural institutions. It omits reference to ‘a single reproduction of the work from the manuscript’ and increases the number of such
reproductions that may be made to 3, but restricts the purpose for which they may be made to preservation only.

75. The effect of this amendment is that new sub-s 51B(2) will allow an authorised officer of a key cultural institution to make up to 3 copies of a work from a manuscript without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia. However, the copies must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used for any other purpose. For example, they must not be made available to patrons, nor may they be used for copying to fulfil requests from other libraries or archives.

76. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.

77. An officer of a key cultural institution is not required under this section to wait for a manuscript to deteriorate, or to have been lost or stolen before making a preservation copy or copies. An authorised officer of the institution may make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on this section is three.

**Amendment (25) Preservation copying**

78. This amendment amends sub-s 51B(3), inserted by item 26 of Schedule 6 of the Bill, to omit reference to ‘a [single] comprehensive photographic reproduction of the work from the original artistic work’ and increase the number of copies that may be made to 3, but restricts the purpose for which those copies may be made to preservation only.

79. The effect of this amendment is that new sub-s 51B(3) will permit an authorised officer of a key cultural institution to make up to 3 comprehensive photographic reproductions from an original artistic work held by the institution without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia and if it is not commercially available. Copies made under sub-s 51B(3) must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used
for any other purpose. For example, they must not be made available to patrons, nor can they be used to fulfil other library or archive requests.

80. An officer of a key cultural institution is not required under sub-s 51B(3) to wait for the artistic work to deteriorate, or to have been lost or stolen before making a preservation copy or copies, but copying is subject to the commercial availability test. An authorised officer of the institution may make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that may be made in reliance on sub-s 51B(3) is three.

81. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation. However, if a photographic reproduction of the artistic work is still commercially available within a reasonable time and for an ordinary commercial price, it is appropriate that the authorised officer obtain a commercially available copy.

**Amendment (26) Preservation copying**

82. This provision amends sub-s 51B(4), inserted by item 26 of Schedule 6 of the Bill, to omit reference to ‘a single reproduction of the work from the copy held in the collection’ and increase the number of reproductions that may be made to 3, but restrict the purpose for which those reproductions may be made to preservation only.

83. The effect of this amendment is that sub-s 51B(4) will permit an authorised officer of a key cultural institution to make 3 reproductions of the published work from the copy held in its collection without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia and if a copy of the work, or of the edition in which it is held in the collection, cannot be obtained within a reasonable time at an ordinary commercial price.

84. Subsection 51B(4)(b) makes clear that even if another edition of the work (a different edition to that held in the collection, but not necessarily a later edition) is commercially available, the authorised officer may nonetheless make up to 3 copies of the copy of the
work held by the institution for preservation purposes if it is appropriate to do so eg. curatorial reasons.

85. Reproductions made under 51B(4) must be made solely for the purpose of preserving the work against loss or deterioration. The reproductions must not be used for any other purpose.

86. An officer of a key cultural institution is not required under this section to wait for a published work in its collection that needs to be preserved to deteriorate, or to have been lost or stolen. An authorised officer of the institution can make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on sub-s 51B(4) is three.

87. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation. However, if a published edition is still available within a reasonable time and for an ordinary commercial price, and there is no special reason to copy the particular edition held in the collection, then it is appropriate that the authorised officer obtain a commercially available copy.

**Amendment (27)  Preservation copying**

88. This amendment amends item 27 of Schedule 6 of the Bill to substitute a new heading for new s 110BA. The new heading more appropriately reflects the scope of s 110BA as amended by amendments (28), (29), (30), (31) and (32) below, permitting key cultural institutions to make copies of significant recordings and films in their collections for the purposes of preservation.

**Amendment (28)  Preservation copying**

89. This amendment omits existing paragraph 110BA(1)(a), inserted by item 27 Schedule 6 of the Bill, and substitutes new paragraph 110BA(1)(a).

90. This amendment retains the original requirements that in order to rely on s 110BA, a body administering the library or archives must have, under the law of the Commonwealth,
State or Territory, the function of developing and maintaining its collection. Alternatively, new sub-paragraph 110BA(1)(a)(ii) now also confers on the Minister a power to prescribe by regulation particular institutions for the purposes of s 110BA.

91. This amendment will provide scope to consider the merits of claims of institutions other than those who have a statutory function of preserving a collection, but who nonetheless develop and maintain collections that are of historical and cultural significance to Australia.

**Amendment (29) Preservation copying**

92. This amendment amends sub-s 110BA(2), inserted by item 27 of Schedule 6 of the Bill, to increase the number of copies of a recording from a first record or unpublished record embodying a sound recording that an authorised officer may make, but to restrict the purpose for which those copies may be made to preservation only.

93. The effect of this amendment is that new sub-s 110BA(2) will allow an authorised officer of a key cultural institution to make up to 3 copies of a recording from a record without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia. However, the copies must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used for any other purpose.

94. Institutions are not required under this section to wait for a record that needs to be preserved to deteriorate, or to have been lost or stolen. An authorised officer of the institution can make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on sub-s 110BA(2) is three.

95. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.

**Amendment (30) Preservation copying**
96. This amendment to sub-s 110BA(3), inserted by item 27 of Schedule 6 of the Bill, increases the number of copies of a recording from a published record an authorised officer may make, but restricts the purpose for which those copies may be made to preservation only.

97. The effect of this amendment is that new sub-s 110BA(3) will allow an authorised officer of a key cultural institution to make up to 3 copies of a published sound recording without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia, and subject to a commercial availability test. The copies must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used for any other purpose.

98. Institutions are not required under this section to wait for a record that needs to be preserved to deteriorate, or to have been lost or stolen. An authorised officer of the institution can make an assessment of the need for a preservation copy at any time.

99. However the cumulative total of preservation copies that can be made in reliance on sub-s 110BA(3) is three.

100. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation. However, if a copy of the recording is still commercially available, it is appropriate that the authorised officer obtain a commercially available copy.

**Amendment (31) Preservation copying**

101. This amendment to sub-s 110BA(4), inserted by item 27 of Schedule 6 of the Bill, increases the number of copies of a film from the first copy or unpublished copy an authorised officer may make, but restricts the purpose for which those copies may be made to preservation only.

102. The effect of this amendment is that new sub-s 110BA(4) will allow an authorised officer of a key cultural institution to make up to 3 copies of a film from the first copy or
unpublished copy held in the collection without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia. The copies must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used for any other purpose.

103. Institutions are not required under this section to wait for a film that needs to be preserved to deteriorate, or to have been lost or stolen. An authorised officer of the institution can make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on sub-s 110BA(4) is three.

104. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.

**Amendment (32)  Preservation copying**

105. This amendment to sub-s 110BA(5), inserted by item 27 of Schedule 6 of the Bill, increases the number of copies of a film from a published copy of a film held in the collection an authorised officer may make, but restricts the purpose for which those copies may be made to preservation only.

106. The effect of this amendment is that new sub-s 110BA(5) will allow an authorised officer of a key cultural institution to make up to 3 copies of a film from a published copy of the film held in the collection without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia, and subject to a commercial availability test. The copies must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used for any other purpose.

107. Institutions are not required under this section to wait for a film that needs to be preserved to deteriorate, or to have been lost or stolen. An authorised officer of the institution can make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on sub-s 110BA(5) is three.
108. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation. However, if a copy of the film is still commercially available, it is appropriate that the authorised officer obtain a commercially available copy.

**Amendment (33)  Preservation copying**

109. This item amends item 29 of Schedule 6 of the Bill to substitute a new heading for new s 112AA. The new heading more appropriately reflects the scope of s 112AA as amended by amendments (34) and (35) below, permitting key cultural institutions to make copies of significant published editions in their collections for the purposes of preservation.

**Amendment (34)  Preservation copying**

110. This amendment retains the original requirements that in order to rely on s 112AA, a body administering the library or archives must have, under the law of the Commonwealth, State or Territory, the function of developing and maintaining its collection. Alternatively, new sub-paragraph 112AA(1)(a)(ii) now also confers on the Minister a power to prescribe by regulation particular institutions for the purposes of s 112AA.

111. This amendment will provide scope to consider the merits of claims of institutions other than those who have a statutory function of preserving a collection, but who nonetheless develop and maintain collections that are of historical and cultural significance to Australia.

**Amendment (35)  Preservation copying**

112. This amendment to sub-s 112AA(2), inserted by item 29 of Schedule 6, allows an authorised officer to make up to 3 facsimile copies of the edition from the copy held in the collection, if the officer is of the view that the work is of historical or cultural significance to Australia, and subject to a commercial availability test.
113. The effect of this amendment is that new sub-s 112AA(2) will allow an authorised officer of a key cultural institution to make up to 3 copies of the edition from the copy held in the collection without infringing copyright, if the officer is of the view that the work is of historical or cultural significance to Australia, and subject to a commercial availability test. The copies must be made solely for the purpose of preserving the work against loss or deterioration. The copies must not be used for any other purpose.

114. Institutions are not required under this section to wait for a published edition that needs to be preserved to deteriorate, or to have been lost or stolen. An authorised officer of the institution can make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on sub-s 112AA(2) is three.

115. The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation. However, if a facsimile copy of the edition is still commercially available, it is appropriate that the authorised officer obtain a commercially available copy.

**Amendment (36) Communication for educational instruction**

116. This amendment omits from the Bill proposed s 28A inserted by item 1 of Schedule 8 of the Bill, and substitutes, at the end of existing s 28, new sub-s 28(5).

117. New sub-s 28(5) provides that a communication of a literary, dramatic or musical work, a sound recording or a film is taken not to be a communication to the public where the communication is made merely to facilitate a performance that is not an infringement of copyright under s 28 of the Act.

118. Existing s 28 provides an exception whereby literary, dramatic and musical works, films and sound recordings may be performed in the classroom without infringing copyright and with no remuneration payable. The policy underpinning s 28 is that performances of copyright materials in the classroom to students in the course of instruction should not give rise to a right of remuneration for the copyright owner.
119. New sub-s 28(5) has been drafted to better reflect the Government’s original policy intention that communications made merely to facilitate performances in classrooms, where those performances are exempt from any remuneration or the need for a licence, are also not an infringement of copyright. New sub-s28(5) is narrower in drafting than proposed new s 28A in the Bill. This is to avoid the unintended consequences of s 28A in permitting acts beyond the scope of the rights granted by s 28 and which would otherwise be subject to remuneration under statutory licences.

120. It is intended that new sub-s 28(5) will allow, for example, copyright materials to be communicated from a centrally located source ‘player’ to remote classrooms without being subject to a requirement to pay remuneration to the copyright owner.

Amendment (37)  Caching by educational institutions

121. This amendment replaces proposed new s 200AAA, inserted by item 10 of Schedule 8 of the Bill, with new s 200AAA.

122. New sub-s 200AAA(1) provides that four conditions must be satisfied for s 200AAA to apply. First, the computer system must be operated by or on behalf of a body administering an educational institution. Secondly, the system must be operated primarily to enable staff and students of the institution to use the system in order to gain online access to material for educational purposes. (It is not intended that incidental use of the computer system for other than educational purposes would prevent reliance on this section. Section 200AAA would apply notwithstanding the system is used to access online material unrelated to educational purposes, so long as the primary reason for the operation of the system is to facilitate access for educational purposes.) Thirdly, the system automatically makes temporary electronic reproductions of works and temporary electronic copies of subject-matter other than works which are made available online and are accessed by users through the system. Fourthly, the temporary copies made automatically by the system are made merely to facilitate efficient access to the online material by users of the system.

123. New sub-s 200AAA(1)(b) allows for caching of material that is available from the Internet or from other online sources, including e-mail.
124. New sub-s 200AAA(2) provides that where the conditions in sub-s 200AAA(1) are met, copyright in the work or other subject-matter is not infringed by reproducing the work or communicating the work to a user of the system.

125. New sub-s 200AAA(3) makes clear that ss 28, 43A, 43B, 111A or 111B are not limited by the new provision. For example, if a student accesses a webpage from the institution’s proxy server (under s 200AAA), and the student’s individual computer, as part of the technical process of making that page available to the student, makes a subsequent temporary copy of the webpage on the student’s individual computer, the provisions in ss 43A and 43B will apply to that subsequent temporary copy.

126. New sub-s 200AAA(4) requires s 200AAA to be disregarded in circumstances of caching by persons other than educational institutions.

127. New sub-s 200AAA(5) inserts a definition of ‘system’ to make clear that it includes a network.

128. New s 200AAA is intended to better capture the Government’s policy intention to allow educational institutions to proxy cache material. Passive caching is already allowed under s 43A. New s 200AAA makes clear that proxy caching, i.e., where a temporary reproduction of the material is automatically made in response to an action by a user in order to facilitate efficient access to that material by that user or other users, is not an infringement of copyright.

129. New s 200AAA is not intended to allow an educational institution to retain permanent copies of online material, nor to deliberately create an archive of online material under the guise of caching. This is made clear by new paragraphs 200AAA(1)(c) and (d) which require copies to be ‘temporary’ and made only for efficiency purposes (e.g., to reduce bandwidth congestion). It is not intended, for example, that the provision would allow the downloading of a computer program onto a server for purposes other than the efficiency of the educational institution’s Internet access. The policy intention of the provision is to allow educational institutions to provide efficient Internet access. The nature of proxy caching is that cached material is eventually ‘overwritten’ by the system as the available memory of the
system becomes full. Accordingly, new s 200AAA does not require that material be ‘deleted’ or ‘removed’.

Amendment (38) Encoded broadcasts

130. This amendment amends item 1 of Schedule 9 of the Bill by replacing the definition of ‘broadcaster’ with a new definition. The amendment corrects an unintended consequence of the original definition which may, in effect, have excluded parties who were intended to fall within its scope.

131. The definition of ‘broadcaster’ is central to Part VAA because it is the broadcaster who can authorise or refuse to authorise acts under the provisions. In practice, the person who holds a broadcasting licence under the Broadcasting Services Act 1992 and, in the case of subscription services, who contracts with subscribers to provide a broadcasting service, is the appropriate person to provide that authorisation. In practice, such persons would include, within the meaning of the Broadcasting Services Act 1992, licensees of subscription broadcasting and subscription narrowcasting services and, to the extent that their broadcasting services delivers encoded broadcasts, commercial or national broadcasting service licensees.

132. In relation to subscription broadcasts, the amended definition reflects industry arrangements, where the technical role of ‘making an encoded broadcast’ is not necessarily undertaken by the license holders. For example, a person may be the subscription television broadcast or narrowcast licensee for a certain area or group but due to commercial arrangements which provide for the sharing of technical broadcast infrastructure with other broadcasters, may not necessarily be the person that makes the encoded broadcast.

133. In line with the policy intent of the encoded broadcast scheme to provide adequate remedies for piracy of encoded broadcasts, the amended definition focuses on the license holder rather than the technical maker of the broadcast. The phrase ‘by which an encoded broadcast is delivered’ is intended to cover those licence holders who have the direct commercial relationship with the subscriber and who provided the equipment necessary to receive the broadcast. These parties are most likely to suffer loss if their subscription television services are accessed without authorisation.
Amendment (39)  Voluntary licences

134. This amendment substitutes a new definition of ‘licensor’ in sub-s 136(1) of the Act in place of the proposed definition inserted by item 2 of Schedule 11 of the Bill. The definition has been revised to restrict it more clearly to collecting societies because it became apparent that the definition in the Bill could unintentionally include persons or bodies who hold a substantial number of copyrights but do not administer them collectively.

135. The new definition confines its coverage to corporations whose constitutions include a number of specified requirements that are to be found in the constitutions of the existing recognised copyright collecting societies. For a corporation to come within the definition, its constitution will have to allow all owners of copyright or all owners of a particular kind of copyright to be members and to require it protect its members’ interests relating to copyright. The main business of the corporation must be copyright licensing and it must have to distribute licence revenue to members after deducting administrative expenses. Finally the corporation’s constitution must prevent it from paying dividends.

Amendment (40)  ACCC Guidelines

136. This amendment substitutes a new s 157A for the proposed s 157A inserted by item 27 of Schedule 11 of the Bill.

137. The first change made by the amendment is to limit the circumstances in which the Tribunal, in proceedings concerning voluntary licences and licence schemes, has regard to any relevant guidelines made by the Australian Competition and Consumer Commission (ACCC). Under new sub-s 157A(1) this will arise only when the Tribunal is asked to do so by a party to the proceedings. The second change is that when such a request is made by a party, new sub-s 157A(1) requires the Tribunal to have regard to such ACCC guidelines. Finally, when the Tribunal is so required under sub-s 157A(1) to have regard to those ACCC guidelines, new sub-s 157A(2) confirms that it is able to have regard to other relevant matters in deciding the application or reference before it.

Amendment (41)  Review of collecting society’s distribution arrangement
138. This amendment adds to the end of new sub-s 135SA(2), inserted by item 28 of Schedule 11 of the Bill, the proviso that an order made by the Copyright Tribunal varying or replacing the distribution arrangement of the declared collecting society does not affect a distribution begun before the Tribunal’s order is made. The amendment is intended to ensure that, where the society’s distribution arrangement applies to successive annual distributions, any variation or replacement ordered by the Tribunal cannot oblige the society to redistribute moneys already paid or committed under an annual distribution that has been completed or begun when the order was made.

Amendment (42) Review of collecting society’s distribution arrangement

139. This amendment adds to the end of new sub-s 135ZZEA(2) inserted by item 29 of Schedule 11 of the Bill the proviso that an order made by the Copyright Tribunal varying or replacing the distribution arrangement of a declared collecting society does not affect a distribution begun before the Tribunal’s order is made. The amendment is intended to ensure that, where the society’s distribution arrangement applies to successive annual distributions, any variation or replacement ordered by the Tribunal cannot oblige the society to redistribute moneys already paid or committed under an annual distribution that has been completed or begun when the order was made.

Amendment (43) Review of collecting society’s distribution arrangement

140. This amendment adds to the end of new sub-s 135ZZWA(2) inserted by item 30 of Schedule 11 of the Bill the proviso that an order made by the Copyright Tribunal varying or replacing the distribution arrangement of a declared collecting society does not affect a distribution begun before the Tribunal’s order is made. The amendment is intended to ensure that, where the society’s distribution arrangement applies to successive annual distributions, any variation or replacement ordered by the Tribunal cannot oblige the society to redistribute moneys already paid or committed under an annual distribution that has been completed or begun when the order was made.

Amendment (44) Review of collecting society’s distribution arrangement
141. This amendment adds to the end of new sub-s 183F(2) inserted by item 35 of Schedule 11 of the Bill the proviso that an order made by the Copyright Tribunal varying or replacing the distribution arrangement of a declared collecting society does not affect a distribution begun before the Tribunal’s order is made. The amendment is intended to ensure that, where the society’s distribution arrangement applies to successive annual distributions, any variation or replacement ordered by the Tribunal cannot oblige the society to redistribute moneys already paid or committed under an annual distribution that has been completed or begun when the order was made.

Amendment (45) Records notices

142. This amendment omits Part 4 (ie items 39 to 54) of Schedule 11 in the Bill and replaces it with a new Part 4 (new items 39-44) as indicated below. The new Part 4 includes some changes but also retains some provisions of existing Part 4 in the Bill. In general, new Part 4 does not repeal any existing provisions of sub-s 135K(2) or sub-s 135ZX(2) of the Act, as existing Part 4 in the Bill does. Consequently the record-keeping requirements of those provisions of the Act, and regulations made under them, will continue.

New Schedule 11, Item 39

143. This new item 39 inserts new sub-s 135K(2A) which provides that any matter that relates to record-keeping as prescribed in sub-s 135K(2) or by regulations under that provision and which needs to be determined is to be agreed on between the administering body and the relevant collecting society or, failing such agreement, determined by the Copyright Tribunal on application by either of them. An example of such a matter could be the procedure to be adopted by the administering body for accurately making the prescribed records.

144. New sub-s 135K(2B) inserted by the item provides that s 135E and s 135F do not apply to copies or communication of broadcasts made by or on behalf of an administering body during a period in which it does not comply with an agreement or order of the Tribunal that is in force under new sub-s 135K(2A). Section 135E allows copying and communication of broadcasts by or for the administering bodies of educational and certain
other institutions, and s 135F allows the making and communication by them of preview copies. In encouraging compliance with agreements and Tribunal orders under new sub-s 135K(2A), new sub-s 135K(2B) corresponds to existing item 41 in the Bill.

145. This item also inserts the same headings in s 135K as do existing items 39 and 41 in the Bill.

*New Schedule 11, Item 40*

146. This item is a transitional provision for the amendments made by this new Part to s 135K. The amendments will apply in relation to records notices given after the commencement of the amendments. Where a body that has given a notice before the commencement of the amendments enters into an agreement with the collecting society on a matter relating to the record-keeping requirements of s 135K, the amendments apply also in relation to that notice from the date of that agreement. This item corresponds to existing item 42 in the Bill.

147. A note in this item indicates that existing s 135K applies wherever the amendments do not apply.

*New Schedule 11, Item 41*

148. This item inserts new sub-s 135ZX(2A) which provides that any matter that relates to record-keeping as prescribed in sub-s 135ZX(2) or by regulations under that provision and which needs to be determined is to be agreed on between the administering body and the relevant collecting society or, failing such agreement, determined by the Copyright Tribunal on application by either of them. An example of such a matter could be the procedure to be adopted by the administering body for accurately making the prescribed records.

149. New sub-s 135ZX(2B) inserted by the item provides that a list of sections in Part VB do not apply to hardcopy or analogue reproductions or copies of works or other subject-matter made by or on behalf of an administering body during a period in which it does not comply with an agreement or order of the Tribunal that is in force under new sub-s 135ZX(2A). Those listed sections of Part VB allow reproduction and copying of works
and other subject-matter by or for the administering bodies of educational and certain other institutions. In encouraging compliance with agreements and Tribunal orders under new sub-s 135ZX(2A), new sub-s 135ZX(2B) corresponds to existing item 49 in the Bill.

150. The new item also inserts the same headings in s 135ZX as existing items 47, 49 and 50 do in the Bill.

New Schedule 11, Item 42

151. This item is a transitional provision for the amendments made by this new Part to s 135ZX. The amendments will apply in relation to records notices given after the commencement of the amendments. Where a body that has given a notice before the commencement of the amendments enters into an agreement with the collecting society on a matter relating to the record-keeping requirements of s 135ZX, they apply also in relation to that notice from the date of that agreement. This item corresponds to existing item 52 in the Bill.

152. A note in this item indicates that existing s 135ZX applies wherever the amendments do not apply.

New Schedule 11, Item 43

153. This item inserts new s 153BAA to provide for the procedure for an application to the Copyright Tribunal under new sub-s 135K(2A) inserted by this new Part. The application is for the Tribunal to determine a matter relating to record-keeping prescribed by s 135K for the copying of broadcasts under Part VA, and the parties are the collecting society and the body administering an educational or other institution under Part VA. New s 153BAA provides that the Tribunal must consider the application, must give those parties an opportunity to present their cases and must make an order determining the matter, having regard to any matters prescribed in the regulations. This item corresponds to existing item 53 in the Bill.

New Schedule 11, Item 44
154. This item inserts new s 153DB to provide for the procedure for an application to the Copyright Tribunal under new sub-s 135ZX(2A) inserted by this new Part. The application is for the Tribunal to determine a matter relating to record-keeping prescribed by s 135ZX for the reproduction and copying of works and other subject-matter under Part VB, and the parties are the relevant collecting society and the body administering an educational or other institution under Part VB. New s 153DB provides that the Tribunal must consider the application, must give those parties an opportunity to present their cases and must make an order determining the matter, having regard to any matters prescribed in the regulations. This item corresponds to existing item 54 in the Bill.

**Amendments (46), (47) and (48)  Technical correction—interoperability**

155. These amendments amend the exception for interoperability in sub-s 116AN(3), inserted by item 9 of Schedule 12 of the Bill, to make a technical correction. The amendments delete paragraph 116AN(3)(c) and insert a new subparagraph 116AN(3)(b)(iia).

156. The effect of these amendments is to clarify that the exception for interoperability applies only where the elements of the computer program that is the subject of circumvention are not readily available to the person exercising the exception at the time of circumvention. For example, if the owner of copyright in the computer program has elements of that computer program that are necessary to create an interoperable program readily available in an unprotected format, then the exception will not apply.

**Amendments (49), (50) and (51)  Technical correction—interoperability**

157. These amendments amend the exception for interoperability in sub-s 116AO(3) inserted by item 9 of Schedule 12, to make a technical correction. The amendments delete paragraph 116AO(3)(c) and insert a new subparagraph 116AO(3)(b)(iia).

158. The effect of these amendments is to clarify that the exception for interoperability applies only where the elements of the computer program that is the subject of circumvention will not be readily available to the person exercising the exception at the time of circumvention. For example, if the owner of copyright in the computer program will make
elements of that computer program that are necessary to create an interoperable program readily available in an unprotected format, then the exception will not apply.

Amendments (52), (53) and (54)    Technical correction—interoperability

159. These amendments amend the exception for interoperability in sub-s 116AP(3), inserted by item 9 of Schedule 12, to make a technical correction. The amendments delete paragraph 116AP(3)(c) and insert a new subparagraph 116AP(3)(b)(iia).

160. The effect of these amendments is to clarify that the exception for interoperability applies only where the elements of the computer program that is the subject of circumvention will not be readily available to the person exercising the exception at the time of circumvention. For example, if the owner of copyright in the computer program will make elements of that computer program that are necessary to create an interoperable program readily available in an unprotected format, then the exception will not apply.

Amendments (55), (56) and (57)    Technical correction—interoperability

161. These amendments amend the exception for interoperability in sub-s 132APC(3) inserted by item 11 of Schedule 12 to make a technical correction. The amendments delete paragraph 132APC(3)(c) and insert a new subparagraph 132APC(3)(b)(iia).

162. The effect of these amendments is to clarify that the exception for interoperability applies only where the elements of the computer program that is the subject of circumvention are not readily available to the person exercising the exception at the time of circumvention. For example, if the owner of copyright in the computer program has elements of that computer program that are necessary to create an interoperable program readily available in an unprotected format, then the exception will not apply.

Amendments (58), (59) and (60)    Technical correction—interoperability
163. These amendments amend the exception for interoperability in sub-s 132APD(3), inserted by item 11 of Schedule 12, to make a technical correction. The amendments delete paragraph 132APD(3)(c) and insert a new subparagraph 132APD(3)(b)(iia).

164. The effect of these amendments is to clarify that the exception for interoperability applies only where the elements of the computer program that is the subject of circumvention will not be readily available to the person exercising the exception at the time of circumvention. For example, if the owner of copyright in the computer program will make elements of that computer program that are necessary to create an interoperable program readily available in an unprotected format, then the exception will not apply.

**Amendments (61), (62) and (63) Technical correction—interoperability**

165. These amendments amend the exception for interoperability in sub-s 132APE(3), inserted by item 11 of Schedule 12, to make a technical correction. The amendments delete paragraph 132APE(3)(c) and insert a new subparagraph 132APE(3)(b)(iia).

166. The effect of these amendments is to clarify that the exception for interoperability applies only where the elements of the computer program that is the subject of circumvention will not be readily available to the person exercising the exception at the time of circumvention. For example, if the owner of copyright in the computer program will make elements of that computer program that are necessary to create an interoperable program readily available in an unprotected format, then the exception will not apply.