



AUSTRALIAN DIGITAL ALLIANCE

Mr Chris Creswell
Copyright Law Consultant
Intellectual Property Branch
Attorney-General's Department
Robert Garran Offices

8 April 1999

Dear Mr Creswell

**Copyright: Reverse Engineering of Computer Programs: Draft Copyright
Amendment (Computer Programs) Bill 1999**

The following response to the draft Copyright Amendment (Computer Programs) Bill 1999 is made on behalf of the Australian Digital Alliance (ADA).

The Australian Digital Alliance is a unique new coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include schools, universities, Internet industry groups, consumer groups, major cultural institutions, computer software producers, scientific and other research organisations, libraries and individuals.

ADA members are united by the common theme that copyright legislation must provide a balance between strong protection of copyright, and reasonable and equitable access to information in the public interest. It is the ADA's view that achieving the right copyright balance in the digital environment is essential to research, learning, innovation, and Australia's future prosperity as an information economy.

If you have any questions or require any further information on any aspect of this response, please do not hesitate to contact me on 02 6262 1273 or email aherd@nla.gov.au.

Yours Sincerely,

Annabelle Herd
Executive Officer



Copyright Amendment (Computer Programs) Bill 1999 Response from the Australian Digital Alliance (ADA)

1. Introduction

- 1.1. The Australian Digital Alliance thanks the Government for providing the opportunity to comment on the draft Copyright Amendment (Computer Programs) Bill 1999.
- 1.2. The ADA notes the Government's request for comment on the technical efficacy of the legislative proposals. Comments provided will therefore focus on aspects of the proposed wording which do not appear to meet the Government's stated policy objectives.

2. S. 47B - Reproduction for normal use or study of computer programs

- 2.1. The ADA notes that the proposed s. 47B is the only exception covered in the draft Bill that will not be subject to the 'contracting out' provision (s. 47 H) also contained in the bill.
- 2.2. The ADA further notes that s. 47B(3) specifies that any contrary 'express direction' (as defined in proposed s. 47B(4)) will override the exception set out in s. 47B(1) allowing the making of reproductions for normal use.
- 2.3. The ADA submits that the combined effect of these features of the proposed s. 47B severely limit the practical effect of the exceptions for normal use and for study. Further, there seems to be no stated policy reason for differentiating s. 47B in this manner and limiting its operation where other proposed exceptions in the draft bill are not so limited.
- 2.4. In this regard, the ADA notes comment made by the CLRC at paragraph 10.106 in its report, *Computer Software Protection*, and particularly notes that the Committee specifically recommended that a contracting out provision apply to any exception allowing the study of the operation of a computer program (Recommendation 2.31).

2.5. In relation to s. 47B the ADA further submits that for purposes of clarity, the two elements of draft s. 47B (the exception for normal use (s. 47B(1)), and the exception for studying the ideas behind a computer program and the way it functions (s. 47B(2)) would be more appropriately set out as two separate exceptions.

3. S. 47C – Back-up copy of computer programs

3.1. The Government has recognised the importance of a flexible approach in allowing the making and use of back-up copies. The ADA broadly supports the reviewed provision outlined in the draft Bill.

3.2. The ADA notes, however, that the practical effect of this provision may be severely limited by the application of proposed s. 47C(4) which would prevent legitimate consumers from relying on the back up copying exception where the program has been locked up or ‘designed so that copies of it cannot be made’.

3.3. The ADA submits that s. 47C(4) appears to directly contradict the policy implemented through the application of the contracting out provision (s. 47H) to s. 47C. Whilst the power to prohibit the making of back-up copies by contractual means has been removed, the power to prohibit back-up copies by technological means has been expressly permitted. As stated above, this is difficult to reconcile on the basis of stated policy objectives.

3.4. It is also submitted that the effect of s. 47C(4) would directly contradict the Government’s stated policy intention expressed in the Commentary accompanying the Digital Agenda Exposure Draft Bill in relation to technological protection systems, new enforcement measures, and their potential to limit the scope of the exceptions set out in the Copyright Act. Why is s. 47C singled out as not being an exception worthy of preservation in light of the fact that new technological protection measures have the potential to severely limit the operation of all of the exceptions set out in the Copyright Act?

3.5. The ADA does not see any stated policy on why this should be the case and thus submits that proposed s. 47C(4) should be deleted.

3.6. The ADA also queries whether the definition of a ‘locked up’ program in the context of proposed s. 47C(4) is intended to be linked in any way to the proposed definition of a ‘technological protection measure’ in s. 10(1) of the exposure draft Copyright Amendment (Digital Agenda) Bill.

4. S. 47D – Reproducing computer programs to make interoperable products

- 4.1. The ADA strongly supports the introduction of an exception allowing the making of reproductions in the course of obtaining information necessary to make another program to connect to, and be used together with, other programs.
- 4.2. The ADA supports the comments made on the proposed s. 47D in the response to this draft Bill from the Supporters of Interoperable Systems in Australia (SISA).
- 4.3. In particular, however, the ADA notes the concerns raised by SISA with respect to proposed s. 47D(d) and the problematic situation where a software developer has reason to believe that interface and other relevant information made available by owners of copyright in computer software may not be reliable or complete.
- 4.4. In the interests of effectively implementing this exception, the ADA strongly urges the Government to consider amending S. 47D in the manner suggested in the SISA submission on this draft Bill.

5. S. 47E - Reproducing Computer Programs to Correct Errors

- 5.1. The ADA supports the introduction of this provision.
- 5.2. The ADA does query, however, whether it is the Government's intention that a legitimate consumer of a computer software product, upon discovering errors in that program, would not be able to engage in error correction where another copy of that program was available to be purchased within a reasonable time at an ordinary commercial price. This does not seem to be a reasonable outcome for the consumer forced to purchase another copy of a software program in order to replace a copy that contains errors.

6. S. 47F - Reproducing computer programs for security testing

- 6.1. The ADA supports the introduction of this exception but notes that the comment outlined above in paragraph 4.3 of this response applies equally to proposed s. 47F(d).

7. S. 47H - Agreements excluding the operation of certain provisions

- 7.1. The ADA strongly supports the introduction of a provision excluding the operation of contractual terms which seek to override the exceptions set out in this draft Bill.

7.2. The Government has recognised that without the proposed 'contracting out' provision, new exceptions outlined in this draft bill would be rendered practically ineffective. This is due to the widespread use of licence agreements (including 'shrinkwrap' licences) to control and limit uses of computer software which would otherwise be permitted under the Copyright Act.

7.3. In light of the Government's recognition of this fact, and for reasons outlined above, the ADA strongly urges the Government to extend the application of s. 47H to include s. 47B.