- The terms and conditions of any shrinkwrap licence should be conspicuously displayed on the outside of the packaging. The statement on the outside of the packaging must make it clear that acceptance of the terms and conditions of the shrinkwrap licence is a condition to the transaction proceeding. If this is not practical, a statement on the outside of the packaging should refer to the fact that the terms and conditions of the shrinkwrap licence are enclosed with the software and that certain steps will be taken to constitute acceptance of those terms and conditions. In addition, the initial screens displayed when the software is loaded should set out the terms and conditions of licence and require the user to indicate acceptance by hitting, for example, an "accept" button.
- The language of any shrinkwrap licence should be simple and the terms should be fair and reasonable.
- Where possible, the acceptance of a shrinkwrap licence should be directed to a person with authority.
- Where one user is likely to purchase a number of copies of software, it would be desirable to use a master licence setting out the terms of the shrinkwrap licence.
- Shrinkwrap licences should be used for lower priced software which is used for non-critical applications. High priced software which is likely to be the subject of a separate negotiated agreement should have all of the terms and conditions set out in the relevant agreement.

In conclusion, there are no easy answers where there is an interposed third party. Time will tell whether the law can adapt to meet the needs of copyright owners or whether the legislature will be prepared to step in to fill any void which might open up. In the meantime lawyers can only advise their clients to take as many precautions as possible to maximise the possibility of legal protection.

New Plan for Copyright On-line

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In a recent press release the Attorney-General, Daryl Williams, has announced the Government's plan to amend the *Copyright Act 1968* to address some of the problems with protecting material that is published on-line. The Government proposes to present an amendment bill in early 1999. The Attorney-General has outlined four key elements that will be addressed in the bill.

The first element is a new right of communication to the public. This dispenses with the Government's earlier proposal of having two separate rights, a right of transmission and a right of making available to the public on-line. The proposed new right of communication will be technology neutral, and thereby get around the limited diffusion right. This springs from various concerns expressed by members of the legal community, most notably Kirby J in *APRA v Telstra.*[1] His Honour in that case noted that Internet service providers may be classed as a diffusion service saying that *'Parliament may need to consider these questions'*. The proposed amendments to the *Copyright Act* would remove this confusion and confirm that ISPs were not a diffusion service.

The second key element of the proposal is a change to the regime of exceptions. Under the current *Copyright Act*, it is legal to copy a reasonable portion of a work for research or study (known as fair dealing). The example of a fair dealing provided in the Act is a person copying not more than 10% of the number of pages, or any one chapter for research or study. However, the Act does not set out an example for material that is not divided into pages, such as electronic material. The Attorney-General proposes that this exception be extended to electronic material that is also published in hard copy, presumably by classing a reasonable portion as including an amount of the electronic version that is equivalent to 10% of the hard copy. The Attorney-General stresses in the press release that *'the 10% test will only apply where there is a hard copy published edition of the electronic material'*.

It is difficult to see the rationale behind retaining the reference to printed pages when simply providing for 10% of the material (be it electronic or printed) would clearly be appropriate. The proposed change has the potential to leave users without any fair dealing defence for the use of a small amount of material that is not otherwise available in hard copy. This would be an absurd result given that the Act, in setting up the rule about 10% of the pages, does so *'without limiting the meaning of the expression "reasonable portion"'*.[2]

There is no doubt that we will see an increasing number of publications that are only available on-line, and the Government should provide for a fair dealing defence for copyright material that is only available in electronic format. The Government does propose to provide that educational institutions that provide access to copyright material on-line

for educational purposes will not be infringing copyright, but it is unclear how this will work in the context of material that is only available in electronic format.

The proposed exemptions will also cover the controversial area of temporary copying. As part of the ordinary process of accessing material through a web browser, that material is copied into the cache of the user's computer. Technically, this constitutes a breach of copyright, although it would be strongly arguable that there is an implied licence to view material that was made available on the Internet. The proposed changes will create an exemption for certain temporary copies that are made in the course of the technical process of transmission and browsing on the Internet.

While it is obvious that uploading a whole web page onto another server is clearly infringing copyright and viewing a web page on the screen is not intended to be an infringement, there is a significant grey area. Much will hinge on the final definition of temporary, especially since it is possible to set most browsers so that they don't delete the cache at all. There may be confusion where an 'exempt' cache copy of material on the internet is copied, either deliberately through accessing the cache directory or accidentally by backing up a hard drive. On large networks such as Universities, several cache copies will be made of any material browsed and it will be a difficult legislative exercise to ensure that all legitimate caching is included in the exemption without permitting some forms of deliberate copying.

The third element of the proposed changes are the new enforcement measures. The Government proposes to ban decoders and password cracking software, as well as banning the removal of electronic information attached to copyright material. The latter provision presumably relates to electronic signatures and watermarks, which at this stage, are not common on Internet material. While the Attorney General says that *'these two new enforcement measures are vital'* they will not assist in the enforcement of the rights of copyright owners. They merely make copying tools illegal and these new provisions themselves will be very difficult to police. As such, the new scheme fails to deal with the fundamental difficulty of protecting copyright in material that is freely and globally available and is cheap and easy to duplicate. To deal with the issue of enforcement, the Government would have to a have a commitment to policing Internet copyright infringement rather than leaving it to copyright owners to protect their own rights. However, the Government does not seem prepared to make this commitment.

The fourth, and possibly most important, element of the proposed amendments is the limits on the liability of ISPs for the use of their services to breach copyright. There is currently wide spread concern amongst ISPs that they will be held liable for unknowingly facilitating the infringement of copyright by their customers. This is a common allegation by software vendors in circumstances where a customer of an ISP makes their products available through *'wares'* sites and the customer cannot be found or does not have deep enough pockets to warrant legal action against them. Under the proposed changes, the ISPs will not be taken to have authorised the copyright infringements by its customers where they only provide the physical facilities. The Attorney-General has pointed out that ISPs will be held liable where they turn a blind eye to the publication, or do more than simply provide the physical facilities that are used for the infringement. Presumably, this would cover circumstances where the ISP assists in providing content for a web page or manages an email distribution list. It can only be hoped that providing software and services such as administration and technical assistance is not doing more than providing the 'physical facilities' for the purposes of this exception.

The new proposal is an interesting and necessary bandaid for problems caused by applying a 30 year old legislative scheme to a new technology. Provided the sticking points of fair dealing and enforcement can be addressed and the provisions relating to temporary copying and ISP liability are drafted with care, it will add much needed certainty to copyright on the World Wide Web.

[1] High Court of Australia, 14 August 1997
[2] *Copyright Act 1968*, s.10(2)