

Australian libraries respond to the *Draft Digital Agenda Copyright Bill*

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On 26 February, the Government released for public comment the long awaited *Exposure Draft Copyright Amendment (Digital Agenda) Bill 1999*.

As well as updating the *Copyright Act* to suit new technological environments, the amendments would ensure that Australian law is in line with new international standards set by the World Intellectual Property Organisation (WIPO) Copyright Treaty and the Performances and Phonograms Treaty (both adopted in 1996).

As stated in the accompanying commentary, the central aim of the draft bill is to ensure that copyright law continues to promote creative endeavour, whilst allowing reasonable access to copyright material on the internet and through new communications technologies. The Bill achieves this aim by granting new stronger rights and enforcement measures to copyright owners, whilst at the same time carrying existing exceptions forward into the digital environment.

The Australian Libraries Copyright Committee (ALCC), of which ALIA is a member, has submitted a detailed response to the draft Bill expressing strong support for the Government's commitment to maintaining the appropriate copyright balance in the digital environment. The response does, however, detail certain areas where the proposed amendments may not achieve the Government's stated policy objectives.

Strong new protection for copyright owners

The introduction of a new right of communication to the public for copyright owners will fill certain gaps in protection brought about by advances in communications technologies. This new protection will give copyright owners the exclusive right to control communication to the public of their material. Copyright owners will thus be able to control the transmission and the online availability of their material, for example, on a Website. The ALCC supports the introduction of the new right, subject to the proposed introduction of an appropriate exception for libraries as discussed below.

The Bill also introduces strong new copyright enforcement measures. In the digital environment, copyright owners will increasingly turn to technological protection measures such as encryption to control uses of their material. Under the proposed Bill, manufacture and dealings in devices with a limited commercially significant purpose other than the circumvention of these technological protection measures will be prohibited. This will be so unless the maker or distributor of the device can show that he or she did not know or was not reckless to the fact that the device would be used for circumvention *and* copyright infringement. This mental element has been added to the prohibition to ensure that legitimate users of copyright material (such as libraries relying on an exception) will be able to access these devices where material has been 'locked up' by the copyright owner.

The ALCC fundamentally supports a ban on the *act* of unauthorised circumvention, rather than what is effectively a 'devices ban'. However, the Government has recognised the fact that legitimate users will need access to these devices in certain circumstances and this is reflected in the wording of the proposed provisions. Therefore, subject to the provision of some clarification, the ALCC has supported the provisions contained in the Draft Bill on this issue.

The Bill also introduces penalties for removing or tampering with electronic rights management information attached to digital copyright material.

New exceptions appropriate to the digital environment

The very nature of digital material means that the technical process of transmitting, accessing, and viewing material in digital form involves the making of certain temporary digital copies. Simply viewing something on a computer screen causes a copy of that material to be made in the computer's memory for example.

The *Digital Agenda Bill* clarifies that temporary reproductions made in the course of transmission or browsing, will not constitute 'reproductions' for the purposes of the copyright owner's

reproduction right. Of course, the ALCC has strongly supported this proposed provision.

The draft Bill also contains an important but limited exception for libraries, archives, museums and galleries, to the new communication to the public right. Where material has been acquired in digital form, a library will be able to communicate that material to the public but only on computer terminals which are 'on the premises' of the library and on which printing and downloading capabilities have been disabled. The ALCC has expressed strong reservations as to the operation of this provision, and the effect on the fair dealing rights of users. In effect, library users will not themselves be able to make fair dealing copies of any portion of material purchased by the library in digital form, and instead will have to make a request to the library (under library document supply provisions) in order to obtain a copy.

Carrying forward existing exceptions for fair dealing, libraries, and education

The Government has attempted throughout the draft *Digital Agenda Bill* to apply existing exceptions to the digital environment in such a way as to not disturb the current balance between protection and access in the *Copyright Act*.

Whilst stating that the fair dealing provisions will apply to the new communication to the public right, and continue to apply to existing rights in the digital environment, the draft Bill only carries forward the 'reasonable portion' test to the digital environment in a limited manner. The draft bill deems a 'reasonable portion' to be ten per cent of the 'words' of a literary, dramatic or musical work in electronic form, but only where the work has also been published in hardcopy form, *and* that hardcopy is not 'conveniently available' to the user. The ALCC has pointed out several difficulties with this approach including: the difficulty of defining ten per cent of the words of a musical work (where that work is set out in musical notes); the lack of guidance on the term 'conveniently available'; and the lack of guidance on what

a 'reasonable portion' of an electronic work is where there is no published hardcopy version of the work.

The draft Bill will allow libraries to utilise new communications technologies to provide copies of works to users and other libraries under the library copying provisions (sections 49 and 50). Under the proposed amendments, libraries will be able to digitally scan and transmit by e-mail material supplied under these provisions. Current requirements concerning requests, signed declarations, and retention of records will continue to apply. The ALCC has, of course, strongly supported these provisions in the draft bill.

Libraries, archives, museums and galleries, will also be able to make digital copies of material for preservation purposes. Access to these copies, however, would be restricted to officers of the library or archives, and could not be communicated to the public. The ALCC has submitted that whilst the ability to make digital copies for preservation is vital, allowing a library to communicate the material to the public, at least on terminals on the premises of the library, would not harm the interests of the copyright owner.

Over-riding the exceptions

The ALCC has also noted that the draft bill does not contain a 'contracting out' provision in relation to the exceptions and statutory licences set out in the Act. In light of the recent trend toward licence agreements as a means of setting the terms and conditions of access for electronic materials, it is essential that a provision be included in the Act specifying that contractual terms which seek to override exceptions are ineffective. Government is considering its position on this issue.

Other Digital Agenda reforms

The draft *Digital Agenda Bill* is long and complex. Other areas covered by the Bill include: the application of the educational copying statutory licence

to the digital environment; liability of telecommunications carriers and carriage service providers for copyright infringement; copyright in broadcasts; codification in the *Copyright Act* of factors determining whether a person has 'authorised' copyright infringement; and implementation of certain recommendations from the Copyright Law Review Committee's 1995 report, *Computer software protection*.

The revised Bill is expected to be introduced into parliament in May.

The Australian Libraries Copyright Committee's response to the Copyright Amendment (Digital Agenda) Bill 1999 is at: <http://www.alia.org.au/copyright/news/1999.03a.html> ■

Inquiry into copyright enforcement

The House of Representatives Standing Committee on Legal and Constitutional Affairs has been asked by the Attorney-General to inquire into, and report on, issues relevant to the effective enforcement of copyright in Australia. The inquiry was announced on 25 March 1999. A background paper and the Committee's terms of reference can be found at <http://www.aph.gov.au/house/committee/laca/inqinf.htm>.

Submissions to the inquiry will close on 21 May 1999.



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