Storm clouds ahead

Problems with digital copyright — Nick Smith

Libraries did fairly well out of the *Copyright Amendment (Digital Agenda) Act 2000*. That is to say, we could have done a whole lot worse. But it is far from ideal. Below are several problems that flow from the *Digital Agenda Act* or are otherwise on the horizon.

Definition of 'library'

An earlier version of the *Digital Agenda Act* contained a provision that would have excluded corporate libraries from the definition of 'library' in the *Copyright Act*, effectively taking them out of the ILL system and rendering them unable to function like other Australian libraries.

This was defeated but the idea has not gone away and may be revisited by the Government.

Contracts vs Copyright Law

As mentioned above in the Digital Agenda library compliance guide, the Act tends to imply that it is perfectly legal for contracts to override what the copyright law provides. This is not what the government intended but is a consequence of how the Act has been drafted.

The issue of copyright versus contracts is only going to get bigger and bigger. Some have said that contract will eventually largely or even totally replace copyright. This is disturbing when you consider where intellectual property contract bargaining power lies, especially with respect to consumers.

The real shark lurking in the contract pool however is an American law called the *Uniform Computer Information Transactions Act* (UCITA). UCITA is a contract law statute that would apply to computer software, multimedia products, computer data and databases, online information, and other such products. It was designed to create a uniform commercial contract law for these products and calls itself 'a cyberspace commercial statute'. It covers contracts that are generally known as 'shrink-wrap' or 'click-wrap' licenses. It is not here yet but it probably will not be long before copyright owners in Australia, particularly software publishers, are clamouring for it, insisting that it is vital that Australia has its own UCITA so that we can 'keep up' with the United States.

Some things that UCITA would permit include:

- Validating post-payment disclosure of terms. That is, it allows a contract to be valid even though you only discovered some or all of the terms after you have pressed the 'I agree' button.
- Creating doubt about whether online transactions of this kind are covered by consumer law. Traditionally mass-market software transactions have been treated as sales of goods and subject to consumer protection law. This may not be the case any longer.
- Validating the use of transfer restrictions in the mass market that conflict with normal customer expectations. This means that you may be restricted in lending a lawfully acquired product to another person even though you yourself do not keep a copy.
- Allowing the sellers of any goods to take advantage of UCITA if software is also provided and is a 'material' part of the transaction. 'Material' is described in a comment as meaning anything more than a trivial element of the deal. Because many goods are sold with software inside them, from cars to cameras, UCITA may wind up governing all kinds of distinctly non-online transactions.
- Allowing vendors to prevent users and reviewers from publicly discussing a product. This has already happened. The website slashdot.org contained postings about a Microsoft product security flaw. Microsoft demanded that slashdot.org remove the postings, contending that when the users downloaded the product from the Microsoft site, they clicked on a confidentiality agreement. Therefore, users are unable to publicly comment on the software.

This is not just a computer software problem. The American Association of Research Libraries said that: 'the broad definition of computer information would cover everything from copyrighted expressions such as stories, computer programs, images, music and web pages to other intellectual property such as patents, trade secrets, and trademarks as well as online databases and interactive games.'

So far, apparently, only the state legislatures of Virginia and Maryland have passed this law, though others are considering it. Virginia Governor Jim Gilmore said. 'This increase in electronic transactions [brought about by UCITA] will perpetuate the internet revolution, promote e-commerce and foster the growth of Virginia's technology and manufacturing economies.'

This kind of assumption that the information economy can be helped along by giving copyright owners greater rights at the expense of the public is not uncommon. Look for a UCITA clone at a legislature near you in the not too distant future.

Your (non-existent) right to read

And finally, there is an issue that the Act partially addressed, that of temporary reproductions. The Act makes it clear that temporary reproductions, such as copies automatically made on your screen, in your hard drive or in your Random Access Memory (RAM), which are made as part of a communication are excepted from the copyright owners' right. An example of this might be viewing material on the web. The copyright owner can control the communication from the website but not all the automatic reproductions that come with it.

However, in the case of an e-book, for example, the temporary reproductions made while reading such a publication are not part of a communication and are therefore not covered by the exception. The result of this is that you could need a licence to read an e-book, a very disturbing precedent in terms of our society's level of access to knowledge.

This problem will be exacerbated as electronic material is increasingly released in proprietary formats. One of the great advantages of a book is that it is an open technology that no one controls. Copyright laws allows some control over the words you could put in a book but not who could or could not make a book or what could be done with a book once it had been purchased.

In your digital copyright future, not only will electronic book technology be licensed, so too will the contents of such books. It is already the case that we typically license software rather than own it (though we may own the piece of plastic it comes on). In the future, a consumer might purchase a license to have access to copyright material for two years or for as long as she keeps paying licence fees. Once the licence period is over, the consumer is left with nothing, the copyright material having disappeared from her hard drive.

So while the *Copyright Amendment (Digital Agenda) Act 2000* was generally a good outcome for libraries, there are still a number of issues which require the close attention of librarians and other supporters of the public domain.

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