

Digital Agenda) Bill 1999

Submission to House of Representatives

Standing Committee on Legal and Constitutional Affairs by

Australian Publishers Association

The Australian Publishers Association

The Australian Publishers Association (APA) is the trade association representing book publishers in Australia. According to the Australian Bureau of Statistics, the Australian Publishers Association represents 88% of the book publishing industry. The Association is concerned with the interests and problems of all Australian publishers, large or small; commercial or non-profit; educational, academic, specialists or popular, locally or overseas-owned.

Introduction

The Australian Publishers Association appreciates the opportunity to make this submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs.

The Association acknowledges the significant improvements proposed in the Copyright Amendment (Digital Agenda) Bill 1999 ("the Bill") compared with the Exposure Draft circulated in March ("the Exposure Draft"). We congratulate the Government on these changes and express our appreciation of the work of the Attorney-General's Department during the consultation process. Nonetheless we believe that the fundamental premise of the legislative approach is flawed, resulting in proposals that will undermine the ability of publishers and other copyright owners in Australia to develop the competitive and vibrant information economy that is the stated goal of the Government.

The premise of the Bill is that the balance of user and owner interests (access versus protection) struck in the print environment decades ago is an appropriate model in the digital world and that the extensive free copying provisions currently in the Copyright Act can be transplanted seamlessly into the information economy.

In our view, such an approach:

- does not appreciate the dramatic differences digital products make to copyright commerce;
- ignores the wider access to copyright content made possible by the new distribution mechanisms such as the Internet and developments in collective licensing that obviate the need for unauthorised and unpaid use of copyright property;
- is premature, as the industry licensing models are not fully developed and the impact of the changes is not fully predictable; and
- will, in our submission, have the opposite effect to that which is intended because the incentive to make copyright works available in Australia will be diminished.

Key Points

We welcome the Government's intention to review the operation of the Bill within three years. We agree that this is an important step where legislation affects an emerging market. We urge, however, that in two key areas the implementation of the new regimes be delayed until that review takes place.

Those two areas are:

1. the amendments to sections 49 and 50 which would permit libraries to set up document delivery services to compete, without licences and without royalty obligations, in a primary electronic publishing market (articles and portions of works); and
2. the proposal that libraries (and many others) may freely use the tools of piracy to acquire copyright product by hacking and decryption.

We are concerned that the potential impact of these changes is such that the development of market models may be prejudiced. In traditional print markets, the copying of articles and portions of works was a subsidiary market compared with sales of books and subscription journals. The electronic publishing market is developing differently. In the digital arena the primary market is for articles and small portions of works. The economics of licensing online (high volume, low cost transactions) differs from the sale of physical products and substantial investment must be made in digitisation and e- associated technologies. The environment for the user has also changed in that collective licensing has also had the effect of making these works more available. We urge that time be given to allow the market models (and market failures) to emerge.

In further support of our argument for delay in these two key areas, we note that there is an emerging dialogue between certain library and copyright interests. The Australian Publishers Association intends to contribute positively to these discussions. We are hopeful that the discussions will yield consensus and an industry code of practice on library use of copyright works in digital formats. We urge that the opportunity be given to the parties to reach non-legislative solutions or areas of common ground for presentation to the Government.

These two issues are addressed first in our detailed response to the proposed amendments which follows.

Submissions in Detail

Library Copying – sections 49 and 50

Section 49 currently permits a library to respond to a user request to supply photocopies of copyright works for the user's research and study. No permission need be sought. The library typically makes a charge for the service to recover costs and a proportion of overhead but no payment is made to the copyright owner.. Section 49 applies automatically for an article or reasonable portion of a work (10% or one chapter) and applies to whole works subject to a commercial availability test. Section 50 permits a library to acquire the work from another library, again without payment, to add to its collection or to supply a library user.

The Bill will "extend" these provisions to the digitisation of print material and the supply and communication of works in digital form. It will permit libraries to act as document delivery services on a commercial scale. Both the reproduction (eg scanning) and the supply (eg by email or online) will be permitted where the user requests the work for research or study.

The proposals are described as a key component of the Government's overall commitment to encouraging the growth of the information economy. We are concerned that the Bill will have the opposite effect as it will limit the ability of copyright owners to license the use of their property in this primary market and so the incentive for electronic publishing is diminished.

The Bill allows libraries to become publishers, without any of the responsibilities that accrue to that position. Libraries can compete with APA members in electronic publishing of articles, portions of works and in some cases complete books but they need not enter into contractual relationships with authors, they need not remunerate the authors, they need not consider the author's wishes in their use of the work. No publisher could behave in such a fashion.

We submit that these and other provisions of the Bill are contrary to article 10 of the WIPO Copyright Treaty which prohibits a Contracting State from providing limitations or exceptions to copyright that would conflict with a normal exploitation of the work or where the exception would prejudice the legitimate interests of the copyright owner. The supply of articles and other works is, or is becoming, a "normal exploitation" of works. As the supply by libraries potentially competes with licensed copies made available with the authority of the copyright owner, in our view the prejudice to the legitimate interests of the author would be "unreasonable".

In addition to these changes in the publishing market, the proposed extension of the library provisions to digitisation of works and supply in digital formats threatens electronic publishers more than the print copying provisions for other reasons.

Reproduction and distribution in this environment is easy, perfect and instantaneous which facilitates the more widespread and systematic reproduction of these products by libraries. The photocopying and interlibrary loan provisions may have been thought to facilitate ad hoc access in a fair manner but changes in library practices combined with ease of reproduction and communication permits of systematic supply that undermines publishers' returns.

Contracting Out

During the public debate on the Bill it has sometimes been suggested that publishers could overcome the library copying provisions by refusing to supply their publications to libraries unless libraries paid a premium for the purchase and/or agreed to terms limiting subsequent dealings with the work. This suggestion is not a practical one for a number of reasons. Provisions in the Copyright Act apply universally in the jurisdiction whereas a contract binds only the parties. There is rarely any contractual relationship between a library and a publisher for the sale or digitisation of printed books. Library acquisitions are typically made through retailers, distributors or specialist library supply firms.

There are many other difficulties with this approach including that libraries are unlikely to agree to terms limiting their rights under the Copyright Act and publishers do not want to limit the range of potential purchasers. Even if workable, determining an equitable price would be very difficult.

Available Works

Publishers submit that sections 49 and 50 be limited to circumstances where access to the work, article or portion is not available, whether in electronic form or otherwise, within a reasonable time at an ordinary commercial price.

We draw the Committee's attention to the original intent of these provisions, which was to permit libraries to assist users to copy a reasonable portion (an article or 10% of a book) because – on the students' part – it was not thought reasonable to have to buy the whole book or journal and distance or other handicap prevented them from attending at the library to copy for themselves. It was also to assist where greater portions or whole works were not available for purchase. The "balance" was to allow some uses while preserving the copyright owners' primary market which was at that time book and journal print sales.

In the modern context, sections 49 and 50 as amended will seriously shift that balance because it permits libraries to digitize and supply, free of copyright payment, in the

electronic publishers' primary market, where these reasonable portions of works can be readily available on licence terms.

We submit that a work should be considered to be available if it is available in any form, including paper, electronic and pay-per-view. As tabled, section 50 contains a limitation where the original work is in electronic form but not where the work is held in hard copy form. Accordingly, a library could digitise articles and out-of print works in its collection for the purpose of supplying digital versions to other libraries without licence or payment even where a digital version was available from the publisher.

Where the works are not available, we submit that copying should be subject to a statutory licence rather than a free exception.

Section 50(1)

We note that the Bill differs from the Exposure Draft in section 49(1)(a) which would now require that a library can only supply a work that is in its collection. This provision is undermined by section 50(1)(a) which permits the library to add to its collection in the royalty free and economical manner of acquiring the reproduction from another library.

Where the provisions apply, if any one library has a work in its collection other libraries may access it to add to theirs. Libraries can more easily cancel their journal subscriptions and rely on sections 49 and 50 in substitution. We understand that the concept of a distributed national collection presupposes co-ordination between libraries to ensure that Australian libraries- between them - have access to a wide range of materials. Systematic exploitation of the library provisions can significantly prejudice the commercial interests of the publisher. Further, it may not be economical for publishers to continue where subscriber numbers become so small. This might especially place at risk Australian originated material.

Interaction with Statutory Licences

In our view there is clear danger that the library provisions can undermine remunerated statutory licences, particularly Part VB (educational institutions) and section 183 (government departments and statutory authorities). Where the Parliament has legislated for a scheme of compulsory access based on the payment of fair remuneration, we think it inequitable for the schemes to be eaten away by free copying exceptions.

We submit that the provisions should be deemed not to apply where Part VB or section 183 apply.

Definition of Library

The Australian Publishers Association welcomes the repeal of section 18 and the introduction of a definition of “library” that excludes a library owned by a person or body carrying on business for a profit and maintained for business purposes.

While we would prefer to see all systematic copying by libraries and other institutions as subject to fair remuneration, to the extent that free copying provisions exist we agree that they should be limited to cultural institutions and not extend to copying and communication of works for business purposes. Accordingly the change in the definition of library is a very significant amendment and we congratulate the Government on this important step. It is not fair to permit the continuation of a regime in which corporations can copy without royalty payments to copyright owners simply because they maintain a library for their business purposes.

Publishers do not take the view, however, that limiting the library provisions to educational and non-profit libraries overcomes our legitimate objections to the proposed sections 49 and 50. The publisher who loses market share and the author who receives no royalty will not be consoled by the library’s non-profit status. This simply makes the library an unfairly advantaged competitor.

As to the specifics of the drafting of this definition, we have read a preliminary draft of the submission to be made to the Committee by the Australian Copyright Council and agree with its comments on this new definition. We submit that the definition be amended in the manner proposed by the Council.

Circumvention Devices

The Australian Publishers Association welcomes the introduction of civil and criminal sanctions relating to circumvention devices and tampering with rights management information. We are pleased with the changes to the Exposure Draft made in the Bill.

Contrary to our earlier submissions, however, the Bill permits circumvention devices to be supplied to a person who declares that the device is to be used for a “permitted purpose”. Permitted purposes include the library provisions (sections 49 and 50), the educational statutory licence (Part VB) and Government use (section 183). Other permitted purposes are section 47D, 47E and 47F which relate to computer programs.

Publishers contend that making, dealing in or using circumvention devices should be prohibited. Circumvention devices are the tools of commercial copyright piracy. Their use is not legitimate, even in the hands of schools or librarians. Works in electronic format are very vulnerable to unauthorised copying and copyright owners should be permitted to market in this format with suitable technical protection. In our view the use of such devices or services is not fair in circumstances where the copyright owner has taken

positive technological steps to provide remunerated access and prevent unauthorised free use.

There has never been a positive right in the Copyright Act to have access to works (for example, to steal a manuscript or to break into a publisher's warehouse) merely in the circumstance that there would be a defence to infringement to subsequently copy the work. As a matter of fundamental philosophy, we oppose the elevation of defences to infringement, such as the government, educational and library provisions, into a de facto right to require access to material that is otherwise not accessible or is available only on licence terms.

Aside from the principle, we also note that this proposal in practice is likely to make it impossible to control the distribution of circumvention devices and works where copy protection has been removed (legally or illegally). It is also likely that such a system will encourage a cycle of ever stronger encryption and stronger piracy/circumvention tools.

We note that criminal and civil sanctions would be introduced for the making of circumvention devices, commercial dealings in circumvention devices and providing circumvention services. The use of such devices and services is not covered. Publishers submit that civil remedies should apply to the use of circumvention devices and services. Detection of the use of such devices is likely to be easier than detection of individual acts of infringement using these devices. Further, the penalties are likely to be more appropriate because damages for small numbers of detected infringements are likely to be small. There may also be many cases where the defendant is outside the jurisdiction, for example sales of decryption software delivered over the Internet.

Right of Communication to the Public

The Australian Publishers Association welcomes the introduction of the right of communication to the public and the amendment to the definition as it had appeared in the Exposure Draft.

We oppose the introduction of the proposed subsection 22(6) (Item 26), in deeming a communication other than a broadcast to have been made by the person responsible for determining its content. Section 22 is concerned with protection and not infringement. These are technical subsections determining the time in which the copyright comes into existence and identifying the "maker" or first owner of copyright. Different considerations apply to liability for infringement than to the determination of ownership. Where the intention is to remove liability for infringement for certain acts the legislation should simply say so.

Aside from this, as a matter of drafting the subsection is ambiguous. A work might be made available on a web site by an infringer who does not "determine" the content or even take the trouble of informing themselves of the content.

Our comments on the liability of carriers and internet service providers are provided below.

Authorisation - Items 39 and 87

The Australian Publishers Association does not support the inclusion of factors that must be considered in determining authorisation of infringement, but more particularly objects to the form of the proposed provision. Contrary to the assertion in the Explanatory Memorandum, it is not the case that the new provision “essentially codifies” the principles in *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

In *Moorhouse* it was held that:

a person who has under his control the means by which an infringement of copyright may be committed – such as a photocopying machine - and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use. (at page 13).

The proposed section 36(1A) would add limitations to this principle by:

- the addition of the word “any” before “reasonable steps” in paragraph (c); and
- the reference to compliance with industry codes of practice.

The inclusion of the word “any” is unjustified. Further, the reference to industry codes of practice is ill-conceived. In our view it is not appropriate for user groups to set their own standards for the determination of infringement of another’s property right.

We submit that if this provision stands, paragraph (b) and the final phrase of paragraph (c) be omitted. The word “any” in paragraph (c) should be deleted or replaced with the word “all”.

Fair Dealing

The Australian Publishers Association is concerned about the application of the fair dealing provisions to works in digital form. There is a widespread misconception that fair dealing applies to all copying for personal use. If fair dealing provisions extend to digital copying and supply, the commercial significance of this misconception for copyright

owners and content providers will be greatly increased because of the ease with which copies can be made.

We have the following specific comments:

Reasonable Portion Quantitative Test

If our submission that the fair dealing provisions should not apply to digital works is not accepted, we seek at least that the proposed quantitative test (proposed subsection 10(2A)) be deleted from the Bill and that the definition of “reasonable portion” in subsection 10(2) be amended to insert the word “printed” before the terms “periodical publication” and “published edition”. We note that this was a recommendation of the Copyright Law Review Committee (CLRC).¹

Aside from the difficulties in applying this test identified by the CLRC,² such a deeming provision denies a court from concluding (in our submission correctly) that what is fair with a hard copy may not be fair in electronic format.

We agree with the CLRC when it says:

*The Committee notes that the fact that a dealing results in the use of a work in a digital form could be raised as a consideration weighing against regarding the dealing as fair. It recognises the greater potential access to, and therefore greater value of, copyright material in digital form, especially if such material is accessible via an electronic network.*³

Where it applies, a deeming provision of the kind proposed in subsection 10(2A) denies the opportunity to weigh that consideration. To the Committee’s identified reason for an electronic copy being more valuable than a print copy we would add:

- the ability to manipulate works in electronic format (compared with a photocopy);
- the ability to search the document electronically;
- the ability to access the work from any location;
- the ability to forward the document instantly to users anywhere in the world; and
- the ability to create new works in a digital environment by customising content from a wide range of sources.

¹ Simplification of the Copyright Act 1968 Part 1 _6.72

² Part 1 _ 6.45ff

³ Part 1 _6.93

Available Works

We submit that the Copyright Act should contain a presumption that a dealing is not fair where that work or part of the work is available (electronically or otherwise) within a reasonable time at an ordinary commercial price. Such a provision would encourage publishers to adopt business practices that made articles and other works widely available, while permitting dealings where the publisher does not choose to exploit that part of the market.

Fair Dealing and the Communication Right

Our principle concern is with the fair dealing provision for research and study. We do not believe that this exception should apply to the communication right. We do not agree that it would ever be necessary for a person's own research or study to post a work on the worldwide web or otherwise communicate it to the public.

As Professor Ricketson has commented:

This [Article 10(1)] clearly indicates that Contracting State cannot adapt existing exceptions and limitations that apply in relation [to] rights accorded by the Treaty in an automatic and unthinking fashion. Each such adaptation needs to be considered afresh, by reference to the criteria specified in art 10(1). For example, while a defence in relation to educational use or news reporting may be "appropriate" in the context of the right of communication to the public (as it is in the case of reproduction), an exception in favour of private use for the purpose of research or study may not be.⁴

Temporary Reproductions (section 43A)

The proposed section permits the temporary reproduction of a work as part of the technical process of making or receiving a communication.

While we have no objection to the policy behind this provision if it extends only to a reproduction which is **merely** a "technical process" which is necessary to the delivery of the work, we are concerned at the possible implications of this provision.

We note that the provision has been amended from the Exposure Draft by the removal of the reference to viewing on screen. We welcome this change and the policy decision that

⁴ Ricketson, S. "The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties" Paper delivered at ALAI Study Days, Cambridge, September 1998.

underpins it. We agree that there is a difference between a reproduction that is incidental (as part of a technical process) and a reproduction that is part of the intentional delivery and consumption of copyright works.

Our concern here is not with the Bill itself but the comments in the Explanatory Memorandum and we note that the provision might be interpreted by reference to those comments. The Memorandum states that the intention of the provision is to permit browsing or viewing, including the production of sound, and caching. We believe that browsing and caching have a significant impact on electronic commerce. Publishing on-line, for example webcasting and Internet libraries, can be significant uses of copyright material and care should be taken with exceptions to infringement in this area.

Netlibrary Inc, whose Internet site is located at www.netlibrary.com, is an example of a commercial service for the delivery of electronic books for viewing on screen (rather than downloading or printing). This type of on screen delivery, as opposed to mere browsing, is likely to become more common with improvements in screen resolution and portability.

As to caching, this can have a significant impact on advertising revenue and we submit that these matters might be best left to contracts in these early stages of the development of Internet commerce.

We submit that this provision be omitted from the Bill. If that submission is not accepted, we urge that these uses should be expressly limited to the circumstances required under Article 10 of the WIPO Copyright Treaty - that is, where the temporary copy does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the copyright owner.

Educational Statutory Licence

Publishers do not think it appropriate to simply extend the statutory licence in Part VB to digitisation and communication of works digitally. We believe that this proposal will compete with the "normal exploitation" of articles and portions of works by electronic publishers in the educational field.

We believe that the two acts involved – copying into the database and communicating out of it (which we refer to as 'scanning' and 'accessing') – should be within the copyright owner's control. A statutory licence is acceptable only where the work, article or portion is not available (whether electronically or otherwise) within a reasonable time at an ordinary commercial price.

Under a statutory licence (whether limited by an availability test as we propose or not), we submit that educational institutions should be required to maintain comprehensive records of digital copying and that the parties be given an opportunity to negotiate fees that differentiate between different types of works and different uses of works on an individual transaction basis. We expect that developments in information technology will permit

publishers this form of individual transactional licensing rather than the blanket approach taken by the existing statutory licence scheme.

We agree with the Australian Copyright Council and Copyright Agency Limited in their submissions in relation to free copying of so-called “insubstantial parts” of works and in relation to section 135ZM concerning artistic works.

We may have further comments on the educational copying provisions after consultation with Copyright Agency Limited and educational representatives.

ISP and Telco Liability

It is proposed that a carrier or carriage service provider is not taken to have authorised an infringement “merely because the it provides facilities” used to perform a copyright activity.

Please note our comments above in relation to proposed subsection 22(6).

The detection and removal of infringing copies on the Internet will depend in very large part on the co-operation of internet service providers in using monitoring devices and having appropriate contractual relationships with content providers. It is important that carriers and internet service providers retain responsibility for the services they offer at a price. They are best placed to control content and if their immunity extends too far the incentive for them to use means at their disposal (and only at their disposal) to prevent infringements will be greatly lessened.

We also note that section 115(3) of the Copyright Act assists innocent carriers and internet service providers.

In our submission, the direct infringement and authorisation liability of carriers and internet service providers can be adequately dealt with in the manner provided in the Agreed Statements to the WIPO Copyright Treaty.

Transitional Provisions

We are concerned at the operation of the transitional provisions, particularly Item 3(2). If our interpretation is correct, the right of communication to the public will not subsist in works that have been the subject of an assignment of copyright before the commencement of the new provisions. That is, Item 2 will not apply to them. We assume this is the case whether there has been a full assignment or an assignment of the broadcasting and/or cable right separately.

Further, the broadcasting and cable rights will no longer subsist in these works because Item 3(1) will not apply either. As this outcome cannot have been intended we assume our

interpretation is incorrect and would value the Committee's assistance in helping to understand the operation of these provisions.

In any event, we urge that the better policy is to apply the new communication right to all works, whether or not there may have been a change of ownership in the past. It would seem to us administratively difficult for a different regime to apply to a set of pre-existing works merely because there had been a change of ownership. For publishers who manage numerous copyrights, such a distinction creates a significant burden.

Conclusion

The Internet and related online services should be seen as a low-cost and not a no-cost delivery medium. Publishers welcome the new economy. Because of the power of e-commerce, the new economy promotes the opportunity to deliver works widely and efficiently with a proper return of equitable remuneration to publishers and their authors. Legislation which denies the power of e-commerce in the manner described in this submission is regressive and puts Australia at a disadvantage.

We have seen preliminary drafts of the submissions to be made by the Australian Copyright Council and Copyright Agency Limited and note our general agreement with those submissions.

Thank you for the opportunity to provide these comments. We are available to answer questions or consult with the Committee further on the issues raised by the Bill.

Australian Publishers Association
1 October 1999