

Australian Copyright Council

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Follow up submission on Copyright Amendment (Digital Agenda) Bill 1999

1. Introduction

1. The Copyright Council supports a fair balance between the rights of copyright owners and the rights of users.
2. We recognise the important role of public libraries in our community in facilitating access to information and encouraging respect for, and interest in, the products of creative effort.
3. As we outlined in our submission dated 19 March 1999, we have real concerns about certain aspects of the Digital Agenda Bill, particularly in relation to the library copying provisions, and their adverse impact upon creators and owners of copyright.
4. It is the library provisions that are the focus of this supplementary submission. We have had the benefit of reading the Australian Libraries Copyright Committee's supplementary submission dated 5 May 1999 and we address some of the issues raised in that submission.

2. Balancing of interests

1. The ALCC submits that the Digital Agenda Bill does no more than "maintain a balance which has always been reflected in Australian copyright legislation" (paragraph 6(a)).
2. We submit that the Act does not merely retain the existing balance between owners and users, for the reasons we outlined in our submission of 19 March 1999 and which we elaborate on here.
3. We note that, in its discussion paper *Copying by libraries and archives under the Copyright Act 1968* (April 1997), the Copyright Law Review Committee stated that the amendments being proposed by libraries regarding digitisation of material "contemplate significant extensions to permissible copying".¹
4. In important respects, due to changing economics and technology, the balance under the current Act has shifted in favour of users of copyright material and away from owners.
5. One example of this shift is the situation with regard to articles in periodical publications. Advances in technology and the resulting changed economics of

¹ At paragraph 51, page 8

publishing have led to a situation where a person can purchase an article in a periodical publication without subscribing to the publication or buying an entire issue.² However, the current library provisions are predicated on the assumption that articles are not sold separately.

6. Separate sale was not contemplated in 1969 when the provisions were introduced, nor in the early 1980s when library copying was reviewed. Consequently, these provisions assume that copying one article from an issue of a periodical will not harm any copyright owner's market (as there is no market for articles) and the provisions allow this regardless of whether the article can be purchased separately. This means that articles in periodical publications are treated differently to books and other copyright material, which can only be copied in their entirety if they are not available for purchase.
7. The ALCC argues³ that the only market that should be protected is the market for periodical publications. We disagree. As there is now a market for the sale of single articles from periodicals, that is now that sale of single articles has become a "normal exploitation", that market should be protected in the same way as markets for other copyright material and the normal exploitation should not be interfered with.
8. Another area in which the balance has shifted in favour of users of copyright material as a result of changed economic conditions and advances in technology is the area of copying by private libraries. Private libraries are those within corporations, firms and non-profit organisations that exist primarily for the benefit of the organisation in which they are located and their staff.
9. When the library provisions were introduced in the 1960s, it was argued by the library association of the day that private libraries, such as those in industrial concerns, would often receive requests from students and researchers wanting copies of material from technical journals they held in their collections and that they ought to be afforded the same protection as other libraries. This argument was accepted by the Spicer Committee but it is clear that the Committee did not contemplate that this would open the way for private organisations to build up extensive collections of copyright material essentially for their own commercial gain, as is currently the case.
10. The fact that this was not contemplated is not really surprising considering that, in the 1960s the Australian economy was, to a large extent, a resources based one where companies did not trade in information or use it to competitive advantage to the same extent as they do today. These days, on the other hand, companies are employing people known as "knowledge managers" and creating databases of material for access by staff and customers. They are relying on the library provisions to obtain articles and other copyright material from other libraries to go into their collection without permission from, or payment to, copyright owners⁴. We do not see the

² See for example <http://www.smh.com.au/news/static/html/search/index.html> for articles from the *Sydney Morning Herald* and <http://www.hbsp.harvard.edu/home.html> for articles from the *Harvard Business Review*.

³ paragraph 41

⁴ which is allowed by section 50

justification for this and submit that it was not a situation intended by the legislators who first introduced the library provisions.

11. In our view, the extension of the library provisions to allow digital copying will tip the balance even further in favour of users of copyright material to the detriment of copyright owners and creators and at the expense of developing viable on-line content industries.

3. Access to digital material

1. The ALCC claims that the Digital Agenda Bill restricts a library to providing access to digital material on its premises.
2. We do not agree with this view.
3. The proposed amendments will allow libraries to “supply” copyright material (an article in a periodical, a chapter of a book, a photograph, cartoon or other artistic work that has not been separately published, or a whole book that is unavailable for purchase, for example) to anyone who requests that material for the purposes of their research or study and supplies the requisite written request and signed declaration.
4. The term “supply” has been defined in the Bill to include “supply by way of a communication”.
5. The act of communicating is defined to include making available online.
6. The act of “making available” would include transmitting material from point A (the library’s computer) to point B (the client’s computer) and putting material on a computer and allowing someone to log into that computer to access that material.
7. Therefore, a library could receive a request for material, digitise that material (in accordance with the limits – a book that is out of print, for example) and make it available on its server to that person or to anyone else who makes the prescribed request.
8. If a library has material in its collection already in digital form, (on CD ROM, for example) it could do the same thing, subject to the relevant licence agreement.
9. The fact that library can supply digital material in the ways described above, renders the limitations imposed by the proposed section 49(5) very slight indeed.

4. Retention of digital copies

1. The ALCC argues that the provisions of the Bill mean that a library would have to destroy a digital version made for a client under section 49 and 50 and therefore could not build up a database of material.
2. As we have pointed out above, a library can make material available to a client without actually sending it to the client. The material can be digitised and does not have to leave the library premises.

5. Technological protection measures

1. The ALCC has asserted that copyright owners want to use technological protection measures to “override the operation of the exceptions”.
2. It is not the case that copyright owners want to stifle legitimate research or study.
3. We are concerned that the proposals in the Digital Agenda Bill will leave copyright owners unprotected in the on-line world and will encourage the creation of a market for devices which override technological protection measures.
4. It has been recognised internationally that the on-line trading of copyright material cannot take place without technological protection measures. Trying to sell copyright material on-line without these would be tantamount to leaving books, CDs and films in the street unattended hoping that people who wanted to own and use them would be honest enough to track down the owner and make appropriate payment.
5. It is simply unrealistic to expect an on-line economy to develop if vendors cannot obtain payment from users and protect their wares from theft.
6. The fair dealing and library copying provisions do not currently guarantee access to copyright material. A book must first be purchased by someone before the provisions can be relied upon. A person cannot simply go into a bookstore, take a book, photocopy a chapter and return it. They must go to a library which has purchased the book in order to avail themselves of the fair dealing or library copying provisions.
7. The Digital Agenda Bill, on the other hand, potentially allows the use of copyright material in reliance on exceptions even where material has not been purchased. There is no requirement under section 49 (in relation to articles) or under section 50 (in relation to any material) that the supplying library have the material in its collection before it can copy it. In the analogue world, such a requirement is generally unnecessary. In a digital world, it becomes vital. If use of a circumvention device to access material is not prohibited and the copying of the material is not prohibited then the copyright owner cannot prevent a library from accessing and copying material from anywhere in this way. We doubt that the Government intended this result and we are simply pointing out a potential loophole which should be closed.
8. However, even if material has been purchased by a library it is our position that the library should not be able to circumvent technological protection measures that the owner has put in place in order to make copies. The issue of access and copying of that material should be dealt with by contract between the library and the publisher, as is currently the case with products such as CD ROMs.
9. We reject the ALCC assertion that we portray libraries as unscrupulous “hackers”. We did not use the word “hack” in our first submission. Libraries would not be illegitimate hackers if they accessed material under the provisions of the Digital Agenda Bill. They would simply be doing what the law allowed them to. We are simply saying that they should be not allowed to circumvent protections that copyright owners have put in place in order to reproduce material under the library provisions.

6. Overseas approaches

1. We note that the library copying provisions in the Digital Agenda Bill are out of step with the approaches taken to library copying in Europe and the USA.
2. The United States Digital Millennium Copyright Act of 1998 allows only very limited digital reproduction by libraries. It contains no provisions equivalent to those in the Digital Agenda Bill allowing libraries to digitise material for clients' research or study and make that available on-line and no equivalent of the inter-library supply provisions. Also the US Act does not entitle libraries to override technological protection measures.
3. The proposed European Directive *Copyright and Related Rights in the Information Society* does not allow for digital copying by libraries. The following statement is contained in a document explaining the draft Directive:

...the making available of material on line by libraries (on-site or off-site)...differs significantly in economic terms from the traditional "lending of physical copies", which can only be seen by one at a time. In the on-line situation, perfect quality copies of any work can be made available on-demand to a large number of users be it on-site (with a multiplicity of screens in the library) or off-site (to other libraries or remote users). If there was an exception for making available works on-line, even when limited to the physical site of the establishment, there would be a risk of impeding the development of new ("normal") on-line exploitation of works. It would give libraries an undue privilege over other net content providers.⁵

4. We reiterate the view expressed in our earlier submission that the proposed library copying provisions do not comply with the three step test for exceptions in the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty which is that:
 - a. exceptions must be limited to certain special cases;
 - b. exceptions must not conflict with a normal exploitation of copyright material; and
 - c. exceptions must not unreasonably prejudice the interests of copyright owners.

Virginia Morrison
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27 May 1999

⁵ This document is from the European Commission's web site: <http://europa.eu.int>