

**Submission from the Copyright Sub-committee of the Intellectual Property committee
of the Business Law section of the Law Council (“Sub-committee”)**

Copyright Amendment (Digital Agenda) Bill (“Bill”)

The New Rights

Communication Right

The Sub-committee welcomes the introduction of the communication right for all proposed subject matter, but queries why it does not apply to published editions of works. Publishers already make materials available on-line and this method of distribution will increasingly supplement and replace distribution of “hard copies”. Therefore, we submit the communication right should apply to published editions. For these purposes, published editions should be re-defined so that it extends to format etc. made available on-line.

New Enforcement Measures

Onus of proof

Section 116A(5) creates a civil cause of action for the owner or licensee of the copyright. An action under section 116A has three elements:

- the work or other subject-matter must be protected by an effective technological protection measure;
- a person must do one of a list of acts including making or selling a circumvention device; and
- the person must know, or ought reasonably have known, that the device or service would be used to circumvent the effective technological protection measure.

In most actions the onus is on the plaintiff to establish all elements of the cause of action, the onus only shifts to the defendant to establish whether he or she fits within any exceptions or can establish any relevant defences.

Section 116A(6), however, changes this. It operates to shift the onus of proof to the defendant to prove that he or she did not know, or ought not to have reasonably known, that the circumvention device would be used for a purpose of circumvention once the plaintiff has proven the second element (that the defendant sold or made the device etc.).

This “onus shifting” also occurs in sections 116B and 116C which provide for actions in relation to electronic rights management information. These sections have four elements, two of which go to the state of mind. Both of the two mental elements are presumed unless the defendant proves otherwise once the first two elements are proven (that the electronic rights management information has been removed etc.).

A number of members of the Sub-committee are concerned by this reversal of the onus of proof as being inconsistent with common law principle. Other members of the Sub-committee, however, believe it is more appropriate to focus on whether defendants are unduly prejudiced in the circumstances. They consider that is not the case here and support the provisions.

Technological copyright protection measures

Definitions of “circumvention device” and “circumvention service”

The definitions of “circumvention device” and “circumvention service” embrace a device or service having “only a limited commercially significant purpose other than” circumvention. The Sub-committee understands that this approach excludes from the definitions devices and services which have a more than “limited” commercial significance beyond circumvention, whilst leaving within the definitions devices and services with some commercial significance beyond circumvention, where that significance is “limited”.

The word “limited” has no clear meaning. However, the Sub-committee recognises that this uncertainty is largely unavoidable when, as is the case here, flexibility is required in relation to quantum. However, the word “limited” has no precedent in copyright law. In light of this, the Sub-committee suggests that consideration be given to using a word with an understood (albeit unspecifiable) meaning in copyright law – such as “insubstantial”. Under this approach, the definitions would include devices and services having “only an insubstantial commercially significant purpose” other than circumvention.

Definition of “effective technological protection measure”

First, the definition continues to speak in terms of “access” to the work or other subject-matter. In the ED submission on the Exposure Draft (“ED submission”), the Sub-committee acknowledged that this word is without precedent in copyright law and that its meaning will remain uncertain until determination by a court. The Sub-committee, however, continues to support its use, believing it to be the widest, and hence most technologically neutral, concept.

Secondly, the definition speaks of the measure being effective “if, in the ordinary course of its operation” access is available by use of a code or process. There is a logical flaw in this definition. A technological protection measure will not be “effective” in the “ordinary course” if access can be obtained without use of the code or process, such as when a “circumvention device” or “circumvention service” is used. A device or service may be able to be obtained easily and routinely as the Bill does not prohibit use of circumvention devices (see items 98 and 100). In these circumstances, the odd result is obtained whereby the device cannot be said to ordinarily limit access since the technological measures will not be operative in potentially widespread cases. Likewise a technological protection measure is not an effective measure, and thus not a measure to which the anti-circumvention provisions apply, when there exists a device or service which can circumvent the measure. Yet it is precisely this device or service to which the provisions are directed.

The Sub-committee suggests that this would be remedied by deleting the words “in the ordinary course of its operation” and by deleting from the definition the word “is” on line 23 of page 4, and inserting in its place the words “would, but for any circumvention device or circumvention service, be”.

Thirdly, in the ED submission, the Sub-committee noted that the ED definition spoke of the access being available by use of an access code or process “with the authority of the owner of the copyright”. The Sub-committee understands the words “with authority” to relate to the words “by the use of”. Accordingly, the Sub-committee understands this limitation to exclude from the definition of an effective technological protection measure any measure the use of which requires the authority of any other person. Under this approach, it would follow that the anti-circumvention provisions do not apply to measures provided by third parties, unless the third party provides the measure with the authority of the copyright owner. In the ED submission, the Sub-committee supported this approach.

The Bill has modified this definition so that the use of an access code or process may be authorised by the owner or licensee. The Sub-committee also supports this amendment.

Proscribed activities

Prohibition of use

Since the Exposure Draft of the Bill, the Sub-committee understands that the European Union has changed its approach and extended the prohibition to use of circumvention devices. As the Commentary on the Exposure Draft made it clear that the European Union's now superseded policy was the basis of the approach taken in the Exposure Draft, the Sub-committee has reconsidered its position.

In our view, a prohibition on use will be necessary if effective protection is to be provided. If use of circumvention devices is not prohibited, individuals will be able to undermine the prohibitions by the simple expedient of importing the devices for themselves or ordering them over the internet.

The Sub-committee considers, therefore, that it would be preferable to target exceptions to the prohibition on use to those specific situations where use can be justified.

Permitted purpose

In its response to the DP, the Sub-committee expressed its concern that the anti-circumvention provisions might prevent users from making use of copyright material in a manner permitted under the legislation. In the ED submission, the Sub-committee supported the drafting of the provisions with the intention of avoiding such a possibility.

The Sub-committee, therefore, supports proposed sections 116A(3) and (4) of the Bill which provide that the section does not apply if the device is made, supplied or imported for a permitted purpose.

Recklessness

In the ED submission, the Sub-committee supported the approach of the ED, where the mental element of both the civil and criminal law provisions require knowledge or recklessness of the fact that the device be used to infringe copyright in the material subject to the technological protection measure.

While the criminal law provisions of the Bill continue to require knowledge or recklessness, the civil provisions have to be amended. "Recklessness" has been replaced with "or ought reasonably to have known".

Subject to its comments on reversing the onus of proof, the Sub-committee supports this approach.

Rights Management Information

Creating civil remedies

The Sub-committee supports proposed sections 116B and 116C which provide remedies for the removal or alteration of electronic rights management information, and commercial dealings with works whose electronic rights management information is removed or altered. The drafting of the Bill, however, exposes some inconsistencies.

First, to Item 100 introduces into section 132 a liability provision on the basis that a defendant “knows or is reckless as to whether...” while the other prohibitions in section 132 impose liability on the basis that the defendant “knows or ought reasonably to have known ...”. It is not clear to us why any different approach should be taken here.

Secondly, although the criminal provisions in Item 100 use the phrase “knows or is reckless as to whether...”, section 132(5E)(d) only requires that the defendant “knows”. This appears to be a mistake as the EM states that the requisite mental element in section 132(5E)(d) is that the defendant “knows or is reckless as to whether...”.

Broadcasts

Use of a decoding device

Sections 135AN and 135AS provide stringent provisions for the manufacture, importation, sale and offering for sale of a Broadcast Decoding Device, but they do not prohibit the use of that decoding device. It is assumed that for some policy reason the Government has omitted use as a breach, but the Sub-committee fails to see that such omission has any justification. Accordingly, the Sub-committee submits that the use of a decoding device should be included in the list of proscribed actions in section 135AN and offences in section 135AS.

Exceptions and Limitations

Library and Archive Exceptions

The Digital Agenda Bill contains two new provisions not hitherto foreshadowed or the subject of current discussion limiting the scope of the library copying provisions of the Act, particularly those contained in sections 49 and 50. These changes have potentially far reaching consequences. The Sub-committee strongly opposes them as it is not aware of any studies undertaken that justify these significant changes and ensure the public interest in the proper balance between the rights of copyright owners and users will be maintained.

In broad terms section 49 permits a library to copy published material for a person for use by that person for the purpose of research or study, and section 50 permits a library to copy published material for another library for use in the other library’s collection or for supply by the other library to a person pursuant to section 49. Also of particular relevance is section 51A which permits copying by a library for preservation and storage purposes. Generally speaking the amendments in the Bill are intended to extend the library provisions into the digital environment. However, this is not the case with the two proposed changes referred to above.

The first change is the repeal of the current definitions of library and the introduction by clause 11 of the Bill of a new definition of library. This definition excludes "a library owned by any ... person or body carrying on business for profit [other than an educational institution] if the person maintains the library mainly or solely for the purpose of that business". Unlike the current position, this excludes from reliance on the library copying provisions in the Act all libraries operated by for-profit organisations other than educational institutions even if the libraries themselves are not conducted for profit. While many libraries will clearly qualify as a library excluded by the new definition, in some cases it may be difficult to determine whether a particular body is carrying on a business for profit or whether a library is maintained mainly for the purpose of a business, eg. certain hospital libraries.

The bases of the Sub-committee's objections are as follows.

First, as noted above, this change has not been the subject of public consultations.

Secondly, the change will potentially impose substantial costs on the Australian economy.

If the proposed definition becomes law libraries operated by for-profit organisations will not be able to copy for persons pursuant to section 49. Nor will such libraries be able to participate in the inter-library copying provisions of section 50 either as a requesting or a copying library, and this is so even if the requesting or copying library is a public library or a library owned by an educational institution. This will mean that libraries will need to pay a licence fee to make the copies. Alternatively, it will mean that researchers and other legitimate users will simply be denied access to the material as we discuss below.

Thirdly, these costs will be imposed without any justification in principle. It is not clear what capacity a library has under the general law to copy material on behalf of another. Sections 49 and 50 were introduced specifically to remove this uncertainty to promote legitimate access to knowledge and information. The effect of the new definition of library may be to largely limit the availability of material held in libraries operated by for-profit organisations to the borrowing of the actual material (if permitted) except in relation to those persons able to physically visit the library and themselves copy the material pursuant to the fair dealing provisions of the Copyright Act. Of course many of the libraries concerned may not be conveniently open to non-employees. The Sub-committee is not aware of the volume of material held by libraries conducted by for-profit organisations which is not available or generally available in public libraries or libraries owned by educational institutions. Access problems for all libraries are likely to be exacerbated by the fact that it may not always be possible to purchase copies of the required material or obtain copying permission in an acceptable time frame or at all. This is particularly so in relation to out-of-print material, foreign material and material for which a licensor cannot be readily located.

Fourthly, there is no reason for discrimination between libraries run by educational institutions conducted for profit and libraries run by other for-profit enterprises.

For the above reasons the Sub-committee does not support the proposed changes to the definition of library contained in the Digital Agenda Bill, or at least until an investigation into the effects the changes will have, particularly on students and researchers.

The second change to the library provisions of particular concern to the Sub-committee is that effected by the proposed subsection 50(7B) introduced by clause 64 of the Bill. This severely limits inter-library copying from material held in the copying library in electronic form. Under the current law if a library requests another library for a copy of material pursuant to section 50 of the Act, copying is not permitted of the whole of the work (other than an article contained in a periodical publication) or more than a reasonable portion of the work unless in effect a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price. This continues to be the case under the Digital Agenda Bill where the work from which the reproduction is made is in hardcopy form. However, if the work from which the reproduction is made is in electronic form, no part of the work including an article contained in a periodical publication can be reproduced unless in effect the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price. There does not appear to be any justification for such a disparate treatment of material based on the technology in which the work is housed in the library. Furthermore, the proposed change has the potential to cause undue delay in accessing information and in some circumstances to effectively deny access to material available only in electronic form. For these reasons the Sub-Committee does not support the new subsection 50(7B).

Temporary Reproduction

As a preliminary comment, a general provision that exempts temporary copies or reproductions made as a part of the technical process of making or receiving a communication may give rise to an implication that all other types of temporary reproduction are, or are no longer intended to be, outside the scope of the reproduction right. This would be contrary to the conclusions reacted by the CLRC in its *Final Report on Computer Programs* (see paras 14.42). Exactly which types of temporary reproductions are and are not covered by sections 43A and 111A should be made clear.

The Sub-committee again recommends in the strongest terms possible that if these sections are enacted in their current form, it should be made clear that their enactment is not intended to change the existing treatment under copyright law of other types of temporary reproductions.

See also below (Third Party Liability).

Educational Copying Provision

Electronic Use Notices

The Bill introduces a new concept of “electronic use notice” which is intended to supplement the present “records notice” and “sampling notice”. An electronic use notice is required to be given if an institution wishes to make electronic reproductions.

The Sub-committee does not see the need for the introduction of the new notice. It believes that the right to copy electronically should be a right available upon the giving of a records notice or a sampling notice without the need to give a further notice. However, it does consider that an educational institution should have the right to give either a records notice or sampling notice for hard copy reproductions and for electronic reproductions. For example, an institution may wish to give a sampling notice for electronic reproductions and a records notice for hard copy reproductions.

The Sub-committee is also concerned that the records notice should only remain in force for 12 months. The Sub-committee appreciates that it may be considered appropriate that electronic copies only be retained for 12 months, but it does not consider it is appropriate to achieve this by having a notice expire. Such a system would create an unnecessary administrative burden on bodies which administer educational institutions. It also is likely to lead to unintentional infringement where a body has forgotten to provide the notice.

The Sub-committee also considers that an institution should be able to retain electronic copies for more than 12 months and the obligation to pay equitable remuneration should only be triggered when electronic copies are made available for communication.

Finally, the Sub-committee notes that the provisions of the Bill do not contemplate making electronic copies from hard copies. The Sub-committee considers that such reproductions should be permitted. The Sub-committee realises that restrictions on the retention of electronic copies may need to be imposed.

Right of Communication

This right is restricted to a communication “carried out on the premises of an educational institution”. It might be contended that a communication made to a student of that institution off-campus (for example, studying from home) would not be permitted.

The Sub-committee considers that such communication should be permitted and that the Act should make this clear. The only test should be that the communication is made solely for the educational purpose of the institution.

Copying of broadcasts

The Bill does not extend the right of communication to broadcasts which have been recorded by an institution. It is unclear why this should be the case.

By not extending the right, those institutions which have central facilities for recording and communicating broadcasts to classroom/lecture halls would not be able to use those systems without the approval of the copyright owners.

The Sub-committee considers that the right of communication should be extended to Part VA of the *Copyright Act*.

Third Party Liability

Direct liability

Who makes the broadcast

The Sub-committee notes that a broadcast is taken to have been made by the person who provided the broadcasting service by which the broadcast was delivered, rather than the person responsible for determining the content of the broadcast. The Sub-committee is concerned that this is inconsistent with section 22(6) and that this inconsistency will lead to anomalies. If section 22(5) is retained in its existing form, the Sub-committee questions whether it should be amended to make it clear that liability attaches to the person who provides the broadcasting service in Australia.

Browsing

The EM states that section 43A is intended to remove from the reproduction right temporary reproductions including the browsing (or simply viewing) of copyright material including sound. The Sub-committee has several comments regarding this.

First, sections 43A and 111A of the Bill no longer contain the words “or in the course of looking at material on a computer screen” which the Sub-committee presumed had been intended to implement the Government’s view that mere “browsing” should not infringe copyright. It may therefore not be clear whether the section still covers browsing as the EM states Parliament intends, even without these words. This gives rise to a suggestion that browsing is not permitted or, if it is, that it will be remunerable. The Sub-committee believes that it should be made clear that browsing is permitted and that no remuneration would be payable in respect of temporary reproductions made in the course of browsing.

Secondly, under section 43A(2) and 111A(2), the carve out for temporary copies and reproductions made in the course of making or receiving a communication does not apply if the making of the communication is an infringement of copyright. The Sub-committee considers this will substantially undermine the protection these provisions were originally intended to afford to carriers and carriage service providers such as ISPs. The Sub-committee submits, therefore, that the provisions should be deleted.

Caching

The EM refers to the effect of draft sections 43A and 111A as being to remove from the reproduction right copies “made in the course of certain caching”.

The term “caching” is used to describe a variety of occurrences, that range from the temporary reproduction that occurs when a site is accessed, to the situation where an ISP retains a copy for a few days, to the situation where an ISP sets up a mirror site. It is unclear which, if any, of these forms of “caching” are protected by sections 43A and 111A. It seems likely that the requirement for reproductions to be made in the course of transmission will not cover most types of caching and so Australian law will be narrower and out of step with the USA and the EU. Therefore, the Sub-committee submits that the exception should be extended.

The USA (through the Digital Millennium Copyright Act of 1998) and the European Commission (Through the Proposal for European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market COM (1998) 586 Final, 1999 OJ C30/4, 5 February 1999) have granted, or are in the process of permitting, more extensive “caching”. In particular, the deliberate retention of a copy to satisfy subsequent requests of the same material so that it is unnecessary for it to be retrieved from the original source every time. This extension is desirable as it provides far more efficient use of network resources (band width) and reduces waiting time for recipients. In each case, important limitations are imposed to preserve the copyright owner’s interests, and similar limitations should be enacted in the Australian Copyright Act. These include:

- non-modification of the material;
- compliance with rules about access;
- compliance with rules about refreshing material;
- non-interference with usage or “hit” reporting; and

- expeditious removal of material where it has been removed or changed on, or access barred at, the initial source.

As the USA and the European Union were the strongest proponents of the view that the WIPO Treaties should expressly permit control over “temporary” copies, the Sub-committee submits that an exception for caching along the above lines (and with appropriate safeguards) should certainly be adopted in Australia to promote further and better the certainty and efficiencies identified by the Government in the ED Commentary.

Liability for authorisation

The Sub-committee notes that the intention behind the Exposure Draft is to protect a carrier or carriage service provider (“CSP”) from liability for copyright infringement where the CSP does not play any meaningful role in initiating or controlling the infringing activity.

Sections 39B and 112E provide that a CSP is not taken to have authorised an infringement of copyright merely because the CSP provides the facilities used in that infringement. The Sub-committee agrees with the enactment of the sections but submit that they do not go far enough.

The Sub-committee notes that there are at least two separate issues involved:

- the extent to which a CSP should be liable for authorisation where he, she or it did not have knowledge; and
- what should happen once the CSP is notified of the alleged infringement.

Only the first issue has been addressed in the Bill and that in a very inconclusive manner.

However, the Sub-committee notes that the Bill is not as extensive as either the US legislation or the European Commission’s proposals. Both expressly state that a CSP is not liable (except to an injunction) where he, she or it:

- does not have actual knowledge of the infringement or of facts and circumstances from which infringing activity is apparent; and
- acts expeditiously to remove or block access to the material on receiving notice.

As this exception to liability is acceptable to the major copyright “exporting” interests, the Sub-committee submits that it is both appropriate and desirable for Australia to expressly exempt CSPs in *at least* the same circumstances.

The Sub-committee also supports the European proposal which makes it clear that CSPs have no express obligation to monitor the information which they transmit or store nor to actively seek facts or circumstances indicating illegal activity. To impose obligations of this sort would be to impose too onerous an obligation to no useful purpose.

As to the second issue, the Sub-committee notes that the USA has adopted a notice and take down procedure in determining whether or not a CSP has acted expeditiously. The Sub-committee has some concerns about the complexity of the system. We note, however, that it is designed to avoid frivolous claims and counter-claims. Moreover, it is similar in essential outline to procedures under the Act applicable to customs seizure.

The European Commission on the other hand proposes to adopt a different approach, leaving these matters to be addressed by industry codes of conduct. If an appropriate code can be developed, this may be preferable.

The Sub-committee considers that the legislation should address these issues also.

Computer Programs and Digital Reproduction

Definition of computer program

On the definition of “computer program”, the Bill is following the CLRC recommendation of 1995 and this will be an improvement on the existing definition. One interesting feature is that it will exclude data being included within the definition of program and it might be that this would lead to a different result in cases such as *Coogee*. Although the Government appears to have rejected this view, the Sub-committee is of the opinion that no specific definition is required, ie it would be better simply to leave the question for courts to determine on a case by case basis, and that this would be a more technology-neutral approach.

Digital reproduction

Section 21(1A) seems to be a sensible and necessary provision that will clear up some present uncertainties.

Proposed sections 21(5) and (6) are in accordance with the CLRC's recommendations and are supported by the Sub-committee.

Definition of material form

The Sub-committee questions whether a revised definition of “material form” in s 10(1) was required, but in light of the proposed s 21(1A), the use of the word “reproduce” in the definition should no longer pose any problems.

New Issue

The Sub-committee notes that the High Court, in *Data Access v Powerflex*, has called for legislative consideration of the issues raised by its finding that the inclusion of a Huffmann compression table in an otherwise non-infringing computer program infringed copyright.

Transitional

Item 3: This provision relating to assignments and licences gives rise to concerns. As item 3(2) is currently worded, the communication right will not apply to “pre-existing” material in any situation where the broadcasting right or the cable transmission right has been assigned. This does not appear to have been intended and there does not appear to be any reason in principle why this should be so. There does not seem to be any reason why item 3(1) should not apply to assignments also.