

**Submission by
Australian Consumers' Association**

**to
House of Representatives Standing Committee on Legal and Constitutional
Affairs**

Inquiry into Copyright Amendment (Digital Agenda) Bill 1999

Introduction

The Australian Consumers' Association (ACA) is concerned about the impact of certain aspects of this Bill on consumer access to information. While the Bill has a laudable and reasonable objective to move the copyright regime into the digital era in a balanced and technologically neutral way, some details of the Bill do not seem to advance this objective. Portions become quite technologically specific, fair dealing rights of consumers are eroded in places with consequential potential for denial of access. The Bill risks reinforcing the growth of the digital divide between information rich and information poor by way of increasing expense and barriers which limit the ability of libraries to service consumers with limited means and by defining a pay per view future for reading.

Our specific concerns relate to consumer access to circumvention devices, the redefinition of libraries to exclude vital portions of the library network, an implication that certain temporary copies are infringing copies, denial of consumer access to digital copies made for 'administrative purposes', and the potential for electronic use provisions to pave the way for a "pay per view" future. These are detailed below.

Consumer Access to Circumvention Devices

The ACA is concerned that things that might be construed or characterised as circumvention devices could become unavailable to consumers, since there is a limited list of exceptions which support the use of such devices, and those such as the fair dealing exception, backup access or access to public domain material are not included.

We will present two examples where a consumer could be disadvantaged by this restriction:

1) DVD disks and players are currently zoned by manufacturers into geographic areas. These must match for the disk to play. There is a thriving industry to turn single zone DVD players into 'multi-zone' players, which can play disks irrespective of their geographic zoning. This is proving essential to the take up of this technology. Industry sources estimate that "... as many as 50 percent of all DVD units sold in Australia have been modified"¹, and that a "hard clampdown on modification might just 'halve hardware sales'". It is plausible that equipment used to multi-zone DVD players could fall foul of the circumvention device restrictions, or be deemed an interference with rights management information. In either case, the consumer with disks legitimately obtained (by import, because of immigration or relocation, by Internet purchase) could have access to material they possess denied to them.

¹ Sue Lowe "The backstreet market in DVDs grows", The Sydney Morning Herald, 30-Aug-99, P39

2) Consumers have an exception to make backup copies of software which is otherwise copyright. However, if this software is locked up in such a way as to deny backup, the consumer is denied access to a device to unlock it for the reasonable and legitimate reason of backing up to preserve the value of their investment.

Listing the permitted exceptions means that as technology changes, the Act may need to be revisited, or innovation may be stifled. Here the Bill is potentially failing the test of technological neutrality. Intrusive schemes of locking and monitoring are usually unpopular with consumers, and create barriers to technological innovation. They do not need to be given additional protection at law

The process of signed application and authorisation of each acquisition of a circumvention device is cumbersome and will create administrative cost for little utility.

Recommendation: That the provisions for circumvention devices in Section 116A be recast to allow access to such devices for any non-infringing purpose, relying on any exception granted.

Recommendation: Remove the authorisation procedure contemplated in relation to the purchase of circumvention devices.

This restriction on access to circumvention devices leads to an erosion of the consumers capacity to exercise their right of access independent of copyright holder control, particularly in the absence of any provision to protect the permitted uses under the exceptions in the Copyright Act from being overridden by contract.

Recommendation: There should be general provision in the Act to ensure that uses permitted under the exceptions in the Copyright Act cannot be avoided by contractual means.

Redefinition of Libraries to exclude vital portions of the Library Network

We are concerned by the definitional change to lock 'corporate libraries' out of the library exceptions of the Act. Libraries function as a network, adding value to the information of their collections as a total interconnected resource. Such a change is likely to have significant systemic consequences, the consequences of which may be far reaching and not immediately apparent.

An immediate impact will be to lock specialised collections of material in such 'corporate libraries' away from the reach of ordinary users. There will be significant uncertainties for such libraries when they share their material with other libraries, voluntary licenses being only a partial and incomplete solution. There may be research, industry development and educational impacts.

The scope of the change is not confined to digital copies, but all copying, thus going further than the ostensible objective of the Bill to bring the Copyright Act up to date with digital reality. This change was not foreshadowed in the exposure draft or consultations which surrounded it. The implications of such a change have not been thoroughly explored.

Recommendation: That the definitional change in subsection 10(1), barring 'corporate libraries' from reliance on the library exceptions of the Copyright Act, be removed from the Bill.

Implication that certain temporary copies are infringing copies

Section 43A allows that temporary copies made in the course of a non-infringing communication are themselves non-infringing. However, by inference, this makes other temporary copies, not made in the course of communication, infringing. The current status of temporary copies is indeterminate and this treatment of temporary copies may unfortunately crystallise the status of non-communication temporary copies with unintended consequences.

Such temporary or ephemeral copies may be found in the anti-jog buffers of portable music equipment, in caching arrangements for CD playing on PCs, inside digital photocopiers, all of which are copies made in the course of the legitimate enjoyment of a work and are not made with any intent to infringe. As consumer equipment becomes increasingly digital, such temporary copies abound. Legal uncertainty in this area is not helpful in developing consumer confidence in new technology.

Recommendation: That the Bill state that temporary copies necessarily made in the process of using a digital work and which do not persist in a useable form after the use of the work are not reproductions in material form.

Denial of consumer access to digital copies made for 'administrative purposes'

Libraries will have access to an exception to make digital reproductions for 'administrative purposes', which replaces 'medium shifting' activity. However, the advantages of doing so will be circumscribed by the fact that the provision does not allow these copies to be made available to any user other than an officer of the Library.

Recommendation: That digital reproductions for 'administrative purposes' be available to all users of a library on the same terms as those made for preservation or replacement.

Electronic use provisions pave the way for a "pay per view" future

The new electronic use system seeks to avoid technological specificity with regard to record keeping, but is actually technologically specific in its operation, distinguishing as it does between electronic and 'hard copy' versions of works.

The electronic use system seeks to apply a broadcast style model to material which is traditionally paper based. The material is being transferred to digital media for reasons of convenience and access, while the model of consumption and usage will not change appreciably. Consumers will use the material in the way they always have, for reference and information.

The idea of paying per use, rather than per copy, moves the 'goal posts' of intellectual property management significantly. Material which has hitherto been managed as text and images on paper, where a price per copy regime applies, will be priced per view. A user who consults an electronic document more than once will incur multiple charges, whereas a user who copies the paper equivalent and pays the relevant fee can consult the document as many times as they wish without further charge. The act and purpose of copying, not the act of viewing should be the point of accounting and control.

Electronic use should adhere to the same model as hard-copy copying and refer to a substantive first copy, and allow subsequent access free for fair dealing and non-infringing purposes such as study or research.

The electronic use should not bestow additional rights on the copyright holder. In this context, the imposition of a 12 month expiry period on the possession of an electronic copy is also troubling and technologically discriminatory. It should be removed.

This usage related change is a critical shift to a pay to read future, where the copyright holder, using rights management technology, can turn the consumers access to material on and off at will. It is a fundamental shift of paradigm which tilts the balance of rights between copyright holders and consumers of information. Electronic copying provisions should allow for the capture of information for use and reuse (for non-infringing purposes) by the consumer without the imposition of repeated charges for viewing.

The bill potentially alters the cost structure of libraries with possible ripple effects of degraded service and impaired collections for all consumers of library services, particularly students and consumers on the information poor side of the 'digital divide'.

Recommendation: That provisions for electronic copying align with print methods so that a substantive first copy is remunerable and subsequent access for fair dealing and non-infringing purposes such as study or research is free - thus technological specificity is removed.

Recommendation: Remove the 12 month expiry period on the possession of an electronic copy.

Summary

In summary therefore, the ACA considers that the following actions be made in relation to the Copyright Amendment (Digital Agenda) Bill:

1. That the provisions for circumvention devices in Section 116A be recast to allow access to such devices for any non-infringing purpose, relying on any exception granted
2. Remove the authorisation procedure contemplated in relation to the purchase of circumvention devices.
3. There should be general provision inserted in the Act to ensure that uses permitted under the exceptions in the Copyright Act cannot be avoided by contractual means.
4. That the definitional change in subsection 10(1), barring 'corporate libraries' from reliance on the library exceptions of the Copyright Act, be removed from the Bill.
5. That the Bill state that temporary copies necessarily made in the process of using a digital work and which do not persist in a useable form after the use of the work are not reproductions in material form.
6. That digital reproductions for 'administrative purposes' be available to all users of a library on the same terms as those made for preservation or replacement.
7. That provisions for electronic copying align with print methods so that a substantive first copy is remunerable and subsequent access for fair dealing and non-infringing purposes is free - thus technological specificity is removed.

8. Remove the 12 month expiry period on the possession of an electronic copy.