

Introduction

Background to the Copyright Amendment (Digital Agenda) Bill 1999

- 1.1 The Copyright Amendment (Digital Agenda) Bill 1999 is the product of a long process of policy formulation and public consultation on the issue of the extension of copyright law into the digital domain.
- 1.2 The process began in 1993 with the establishment of the Copyright Convergence Group (CCG). The CCG was tasked with considering the appropriateness of protection under the *Copyright Act 1968* for broadcasts and other electronic transmissions and the underlying copyright materials used in those transmissions.¹ The CCG reported in August 1994. Although it did not make any legislative response to the CCG's recommendations, in its 1996 election platform, *Australia Online*, the Government supported the key recommendation made by the CCG, to introduce a broadly-based technology-neutral transmission right into the Copyright Act.
- 1.3 In July 1997, the Government issued a discussion paper titled 'Copyright Reform and the Digital Agenda'. The purpose of the paper was to seek comments on the proposed scheme for the introduction of new enforcement measures and a new package of rights for copyright owners, including a proposed transmission right and the right of making available

¹ Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment*, Attorney-General's Legal Practice, August 1994, pp. 2-3.

to the public.² The Government received 70 submissions in response to the discussion paper, which on the whole supported the scheme.³

- 1.4 On 30 April 1998, the Attorney-General, the Hon Daryl Williams AM QC MP, and the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, announced their decision to implement the Digital Agenda copyright reforms.⁴ . Both of the Ministers' respective departments have been involved in the policy formulation and implementation throughout the drafting process, and the departments made joint submissions to this Committee during its inquiry.
- 1.5 On 26 February 1999 the Government released an Exposure Draft of the Copyright Amendment (Digital Agenda) Bill 1999. The Government received over 80 submissions and held numerous meetings with affected interests including three workshops on the key areas.⁵
- 1.6 On 2 September 1999, the Attorney-General introduced the Copyright Amendment (Digital Agenda) Bill 1999 (the Bill) into the House of Representatives. The Bill as introduced contains significant revisions on the Exposure Draft, largely in response to the submissions the Government received. The changes between the versions of the Bill are outlined later in this chapter. Some of those submissions were repeated in evidence to the Committee.

Relationship between the Bill and the Copyright Law Review Committee's Report

- 1.7 The first part of the Copyright Law Review Committee's (CLRC's) report on simplification of the Copyright Act was released in September 1998. In its simplification reference the CLRC was tasked with proposing measures to streamline the Copyright Act and make it more user-friendly. The Exposure Draft of the Bill was released soon after the second and final part of the CLRC's report on its simplification reference (released on 12 February 1999). .
- 1.8 Part 1 of the CLRC report, titled *Exceptions to the Exclusive Rights of Copyright Owners*, examines the appropriateness of the exceptions to the exclusive rights comprised in copyright. It discusses the balance struck in

2 Copyright Reform and the Digital Agenda, Discussion Paper, July 1997, Preface.

3 Attorney-General's Department (AGD) website:
<http://law.gov.au/publications/digitalsubs.htm>

4 The Hon Daryl Williams AM QC MP, Attorney-General and Senator the Hon Richard Alston, Minister for Communications and the Arts, Joint Press Release, 30 April 1998.

5 AGD e-news on Copyright, Issue 9, September 1999.

the Copyright Act between the interests of copyright owners and users. Part 2, titled *Categorisation of Subject Matter and Exclusive Rights, and Other Issues*, focuses on simplifying the rights and categories of material protected by copyright. It outlines the CLRC's preferred approach to simplification, and a number of alternative models for reform. The recommended approach is designed to both simplify the Copyright Act and to accommodate future technological change.⁶

- 1.9 There is, therefore, some overlap between the issues that arise in the Bill and the issues that have been considered by the CLRC. The Committee expects that the Government will respond to the CLRC's report in due course, and notes that it is likely that the implementation of the CLRC's recommendations will effect significant changes to the reforms introduced by the Bill. Consequently, the Committee did not deal with the matters raised by the CLRC.

Future review of the legislation

- 1.10 The departments acknowledge that in some areas the new legislation is entering into uncharted waters, particularly in relation to the provisions for the extended statutory licence scheme for educational institutions, and the new enforcement measures. New technologies and business models for the online trade of copyright material are still evolving. The responsible Ministers have therefore agreed that the Bill should be reviewed after three years.⁷ The review will focus on ensuring that an appropriate balance between copyright owners and users is maintained.
- 1.11 The Committee strongly supports the proposed review of the legislation. In the course of the inquiry the Committee became aware that it was indeed entering into uncharted waters, equipped with only a priori arguments from opposing interests. The Committee is of the opinion that in this area, experience is invaluable, and that a review after three years would be an extremely worthwhile contribution to Australian copyright law.

Committee's ongoing inquiry into enforcement of copyright

- 1.12 The Attorney-General signed the terms of reference for the inquiry into the Bill on 3 September 1999. At that time the Committee was in the process of conducting an inquiry into the enforcement of copyright in Australia, which it had commenced in March 1999. Upon receipt of the

6 AGD e-news on Copyright, Issue 7, April 1999

7 AGD e-news on Copyright, Issue 9, September 1999.

present reference, the Committee suspended further work on the enforcement inquiry and concentrated its efforts on the Bill.

- 1.13 The Committee recognises that a number of the issues dealt with in the present inquiry, especially in Chapters 4, 5 and 6 of this report, are enforcement issues. The Committee also recognises that the use of digital technology, with which the present inquiry is concerned, has its own set of enforcement issues that do not apply to the print domain. In the present inquiry, the Committee has limited itself to consideration of the enforcement issues that are introduced by the Bill. The Committee has not attempted to deal exhaustively with the enforcement of copyright in the digital domain. The Committee does not consider itself precluded from revisiting the issues in the present inquiry as part of the enforcement inquiry.
- 1.14 As a reference, the Committee considers it helpful to list here the focal points in the enforcement inquiry. That inquiry is concerned with:
- evidence of the types and scale of copyright infringement in Australia,
 - options for the owners to protect their copyright against infringement,
 - the adequacy of criminal sanctions against copyright infringement,
 - the adequacy of civil actions in protecting the competing interests of the parties to a copyright dispute,
 - the desirability of amending the law to provide further assistance to copyright owners,
 - the effectiveness of legal provisions for border seizures, and
 - the effectiveness of existing institutional measures for the enforcement of copyright.⁸

Differences between the Exposure Draft and the Bill as introduced

- 1.15 The Committee considers it also helpful to outline the main differences between the Exposure Draft of the Bill, released on 26 February 1999, and the Bill introduced to Parliament on 2 September 1999. Key amendments as described by the departments include:

⁸ The full terms of the Committee's reference for the inquiry into the enforcement of copyright in Australia can be found at:
<http://www.aph.gov.au/house/committee/laca/copyrightenforcement/Torreff.pdf>

- the libraries and archives exceptions allowing for the copying and communication of copyright material in electronic form have been narrowed (see items 48–78 and 91–92 of the Bill);
- the definition of ‘library’ now excludes libraries owned by persons conducting business for profit if such persons maintain the library for the purposes of their business (eg the definition now excludes for-profit libraries operated by corporations and law firms so that such libraries will not be able to rely on the libraries and archives exceptions) (item 11);
- exceptions for museums and galleries have been broadened to allow such institutions to digitally copy artistic works for preservation purposes and communicate these works to the public at terminals within the premises (subject to certain conditions) (items 75 and 78);
- the reasonable portion test for the copying of copyright material in electronic form for the purposes of research or study has been more narrowly defined (item 20);
- the enforcement provisions which introduce sanctions against the removal of ‘electronic rights management information’ have been extended to include civil remedies (item 98). Further, the provisions which introduce sanctions against the manufacture and dealing in circumvention devices have been made more practical (items 4, 8 and 96–103);
- new enforcement provisions have been included to introduce sanctions against the manufacture and dealing in devices for the unauthorised reception of encoded subscription broadcast signals (item 104);
- the exception for temporary copies made in the course of the technical process of making or receiving a communication has been narrowed so that it does not apply to copies made in the course of an unauthorised communication (items 45 and 94);
- the statutory licence scheme for the remuneration of underlying copyright owners for the retransmission of free-to-air broadcasts has been revised to ensure a more practical operation (items 15 and 200). Similarly, the statutory licence scheme for the electronic use of copyright material by educational institutions has also been revised (items 124–199); and
- the provisions limiting the liability of carriers and carriage service providers (including Internet Service Providers – ISPs) have been extended to cover all facilities provided by the carrier or ISP, not just physical facilities (items 42 and 95).

The approach of the Committee

Policy

- 1.16 In his second reading speech on the Bill, the Attorney-General stated that:
- The central aim of the bill ... is to ensure that copyright law continues to promote creative endeavour, and at the same time, allows reasonable access to copyright material in the digital environment.⁹
- 1.17 The Attorney-General identified the two competing public interests and the Committee has borne these in mind throughout the course of the inquiry. On the one hand, there is a public interest in providing incentives to creators through equitable remuneration, and on the other, there is a public interest in maintaining reasonable access to copyright material for users.
- 1.18 In describing the main reforms introduced by the Bill, the Attorney-General stated:
- ...the centrepiece is a new broadly based technology-neutral right of communication to the public. The new right will subsist as an exclusive right in literary, dramatic, musical and artistic works, and in sound recordings, films and broadcasts.¹⁰
- 1.19 In the Committee's view, it is potentially misleading to refer to the right of communication as a new right for two reasons. Firstly, as acknowledged in the Explanatory Memorandum, the right to communicate replaces and extends the existing technology-specific broadcasting right and cable diffusion right.¹¹ The Committee considers that the right to communicate also closely resembles the copyright owner's existing right to publish;¹² indeed making a work available on line is analogous to supplying it to the public in electronic form. Thus the right to communicate is not a distinctly novel right but rather an extension and restructuring of existing rights in a technologically neutral way.
- 1.20 Secondly, the description of the right may mislead through its reference to a new right to communicate. Some members of the public may interpret
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9 The Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999, p. 7428.

10 *ibid.*

11 Explanatory Memorandum, Outline.

12 See section 29 of the *Copyright Act 1968*.

this to mean the right of the general public to communicate copyright material. The Committee wishes to emphasise that the right of communication belongs exclusively to copyright owners.

- 1.21 The Bill proposes to establish the right to communicate as one of the exclusive rights of the copyright owner. This means that a person cannot communicate copyright material without the permission of the owner, or unless the person can establish that one of the proposed exceptions to the right of communication applies. In relation to the proposed exceptions in the Bill the Attorney-General stated:

As far as possible, the proposed exceptions replicate the balance struck in the print environment between the rights of owners of copyright and the rights of users.¹³

- 1.22 The Committee notes that the departments' policy intention is to maintain the same balance between the interests of copyright owners and users in all environments. The Committee understands this approach, given that the existing balance has been acceptable for over 30 years. However, a number of witnesses argued that the replication of the existing balance in the digital domain is inappropriate. In the words of one witness, spoken in the context of digital copying, but applicable to the digital domain in general:

The balance that was struck in an analog world may not be the right balance in a digital world.¹⁴

- 1.23 During the course of the inquiry the Committee became increasingly aware that the digital environment could not be likened to the print environment in all respects. This is so particularly because the volume and quality of reproductions that can be made in the digital domain potentially far exceed those in the print domain. This fact has consequences for the issues of control of, and access to, material in digital form. The Committee recognises that the greatest potential for copyright infringement lies in the digital domain, given the ease of digital to digital reproduction of material.
- 1.24 Some members of the Committee are inclined towards the view that, due to the difficulty in controlling the unauthorised use of copyright material in the digital domain, use of digital material should be exclusively controlled by copyright owners. However, the Committee resolved not to

13 The Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999, p. 7428.

14 Steven Metalitz, International Intellectual Property Alliance, *Transcript*, p. 225.

deal with this issue in this report, in part because the Committee has not reached a consensus on the issue, and in part because dealing with it may result in major structural amendments to the Bill. The Committee may explore the issue in more detail in its inquiry into enforcement of copyright in Australia.

- 1.25 The Committee determines that for present purposes the existing exceptions to copyright should apply within each of the print and digital environments. In other words, copyright would not be infringed by the making of a print to print reproduction, or a digital to digital reproduction, in largely the same circumstances described by the various exceptions in the Copyright Act. Nevertheless, in view of the differences between the print and digital environments, the Committee thinks it desirable to maintain some form of barrier or 'firewall' between them, when the copyright owner does not consent to reproduction of his or her material in the digital environment.

Separating the print and digital environments

- 1.26 The Committee proposes to isolate the digital from the print environment by preventing copyright users from making digital reproductions of print material except in very limited circumstances. Under the Bill, the right to digitise print material is included in the right of reproduction; 'reproduce' is defined as follows:

a work is taken to have been reproduced if it is converted into or from a digital or other electronic machine-readable form and any article embodying the work in such a form is taken to be a reproduction of the work.¹⁵

- 1.27 The right to reproduce a work is currently one of the exclusive rights of the copyright owner.¹⁶ The Committee proposed that in order to prevent users from digitising print material, only limited exceptions should apply to reproductions from hardcopy to digital form.

First Digitisation

- 1.28 The Committee's rationale for constructing a barrier to the first digitisation of print material is manifold. Firstly, as explained above, the Committee is aware of the enormous potential for unauthorised use of digital material. The risk of copyright infringement is increased because the exceptions will

15 See item 23 of the Bill.

16 See section 31 of the *Copyright Act 1968*.

apply within the digital domain. That being so, the Committee is concerned that the decision to expose material to such a risk should be a considered decision made by the copyright owner, rather than by the user. Therefore, the owner generally should control the first digitisation of the work.

- 1.29 Secondly, the Committee envisages that access to copyright material will not be hindered by requiring the consent of the copyright owner to first digitisation. The Committee expects that copyright owners would be willing to provide digital versions of their works, and that market forces would ensure they do so on reasonable terms. This restriction will not affect the access arrangements that exist in the print environment, as the exceptions will continue to apply to print to print reproductions and to digital to digital reproductions.
- 1.30 Thirdly, as explained above the Committee views digitisation of material as akin to a form of publication. Therefore, the right to digitise a work is akin to a moral right: the creator should be able to choose whether or not to make his or her work available in digital form. To the extent that the right of publication is a moral right protected under Australian copyright law, it is consistent to provide protection to the right to first digitisation.
- 1.31 The Committee is mindful that its proposal to prevent most of the exceptions from applying to the first digitisation of print material is a significant departure from the Bill, and that it alters to some extent the balance struck between the competing public interests in copyright law. However, the Committee thinks that this different treatment is warranted and that it would not significantly undermine the public interest in providing reasonable access to copyright material.
- 1.32 As part of ensuring that reasonable access to copyright material continues, the Committee proposes to allow the first digitisation of print material in a limited set of circumstances. These circumstances, which are discussed in more detail in Chapter 2, relate to fair dealing for the purposes of criticism, review and reporting the news, to reproductions made for the purposes of judicial proceedings and professional advice, to reproductions made for preservation and administrative purposes, and to reproductions made by libraries in order to supply users in remote locations.
- 1.33 The Committee cannot, of course, be certain that its proposal will have the effect it foresees. Indeed, whether the proposal produces an acceptable balance is likely to be discovered only through experience. For this reason the Committee considers it vital that the safeguard on first digitisation, and the balance between the interests of copyright owners and users, be reviewed in three years' time, as the Government proposes.

Evidence

- 1.34 The preceding paragraphs explain the Committee's philosophical or policy approach to the main issues which have arisen in the inquiry. It is desirable to also comment on aspects of the approach the Committee took to the evidence itself. The departments claimed that the reforms in the Bill are consistent with the standards adopted in the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, made in Geneva. Reference was made to the WIPO treaties in a number of arguments before the Committee, in order to support viewpoints from both sides.
- 1.35 The Committee has considered the provisions of the treaties where relevant. While the Committee has gained some guidance from the treaties, it has refrained from reaching a conclusion as to the correct interpretation of particular sections. The Committee has taken the same approach in relation to examples of corresponding legislation from other jurisdictions to which it has been referred.
- 1.36 Finally, the Committee observes that many groups used the inquiry as an opportunity to revisit aspects of copyright law that are not specific to the digital agenda. For example, the Committee received submissions concerning the duration of copyright protection, the appropriateness of the 10% rule in defining a reasonable portion and the ownership of copyright in films.
- 1.37 The Committee has confined itself to consideration of issues that directly relate to the extension of copyright into the digital domain. Thus, unless they had a particular impact in the digital environment, the Committee did not consider such wider issues. The Committee does not consider itself to be presently in a position to give adequate consideration to such issues. However, the Committee may revisit some of these issues in the course of its enforcement inquiry.

The inquiry process

- 1.38 The terms of reference for the inquiry were posted on the Committee's website, and advertised in newspapers on 11 September 1999. The Committee invited all interested persons and organisations to make written submissions.
- 1.39 The Committee received some 100 original written submissions on the Bill, as well as exhibits and other correspondence.¹⁷

¹⁷ Appendix A contains a list of submissions, and Appendix B contains a list of exhibits.

- 1.40 Public hearings were held in Brisbane, Canberra and Sydney.¹⁸ Three of these hearings took the form of round table discussions with representatives from many of the key interest groups present.

Scope and structure of the report

- 1.41 In the report, the Committee focuses on the key issues identified in the evidence and the structure of the report reflects the major groups of issues.
- 1.42 In Chapter 2 the Committee examines the arguments in relation to fair dealing and exceptions for libraries and archives in the digital environment. The right of first digitisation is also discussed and limited exceptions to the right are proposed.
- 1.43 Chapter 3 of the report deals with the issues raised in evidence in relation to the extension of the statutory licence schemes in Parts VA and VB of the Copyright Act to allow institutions to reproduce and communicate copyright material in electronic form.
- 1.44 Chapter 4 of the report examines the issues raised in relation to the enforcement measures introduced in the Bill to prevent the infringement of copyright in the digital domain.
- 1.45 Chapter 5 of the report addresses the issues in relation to retransmission and broadcast raised by the evidence.
- 1.46 The final chapter deals with the remaining issues raised during the inquiry, namely: the liability of ISPs; the exception for temporary reproductions; the transitional provisions; and some minor drafting errors.

18 Appendix C contains a list of witnesses.