

Supporters Of Interoperable Systems In Australia

First Submission

To The House Of Representatives Legal And Constitutional Affairs Committee (‘Committee’)

Copyright Amendment (Digital Agenda) Bill 1999

Dated 1/10/1999

Executive Summary

In SISA's submission, the DA Bill is a reasonable attempt at ensuring that a proper balance is maintained under Australian copyright law, particularly as this law applies to the fast growing information economy. Accordingly, SISA supports the DA Bill, subject to the following minor changes:

- The 'permitted purposes' for which devices are available should ideally be broader. In particular, SISA supports the addition of subsection 47B(3) as a permitted purpose. SISA also supports the extension of permitted purposes to include the fair dealing provisions.
- To remove the implication that all temporary copies are reproductions in material form, sections 43A and 111A should be redrafted as an exclusion from the scope of the reproduction right. If this change is not made, a number of additional exceptions must be added to the DA Bill to ensure that various other temporary 'copies' are not regarded as copyright infringements (eg those made in stand alone equipment such as computers and CD players).
- Subsection 43A(2) should be deleted, or amended to exclude only the temporary copies made by the person who *initiates* an unauthorised communication.

1. INTRODUCTION

- 1.1 Supporters of Interoperable Systems in Australia (SISA) is pleased to make the following submission on the *Copyright Amendment (Digital Agenda) Bill 1999* ('**DA Bill**'), which was introduced to Parliament on 2 September 1999.
- 1.2 This submission sets out SISA's initial comments on the DA Bill from the perspective of developers of open systems and interoperable software and hardware products. SISA will welcome the opportunity to provide supplementary written comments and to participate in any hearings or discussions that may be organised by the Committee.
- 1.3 Generally, SISA supports the policy goals underlying the DA Bill, particularly the goal of maintaining balanced copyright laws. SISA believes that copyright laws must provide effective protection for copyright owners without unreasonably restricting access to information or creating harmful barriers to competition. A proper balance of protection and access is essential to the creation of an environment in which Australian IT developers can compete and succeed.
- 1.4 In SISA's submission, the DA Bill is a reasonable attempt at ensuring that a proper balance is maintained under Australian copyright law, particularly as this law applies to the fast growing information economy. The DA Bill is not a radical proposal. It is the end result of consultation and debate over a number of years, and is consistent with the balanced international approach established under the WIPO Copyright Treaty (which was concluded in 1996).
- 1.5 Subject to some suggested improvements set out in the submission, SISA urges the Committee to support the DA Bill.

2. SUMMARY OF SISA ISSUES

- 2.1 The issues of most relevance to SISA are:

- (a) circumvention devices;
- (b) temporary copies;
- (c) ISP liability; and
- (d) other software changes.

- 2.2 Comments on these aspects of the DA Bill are set out below.

3. CIRCUMVENTION DEVICES

- 3.1 The DA Bill inserts a new s116A which provides for a civil right of action against persons who make or deal in certain circumvention devices or provide certain circumvention services. The scope of the prohibition is set out in subsection (1) as a three part test:
- (a) a work (etc) is protected by an 'effective technological protection measure' ('ETPM'); and

- (b) a person makes or deals in a circumvention device or provides a circumvention service (nb the device or service must be capable of circumventing or facilitating the circumvention of the ETPM) without the permission of the owner or licensee of the copyright in the work (etc); and
 - (c) the person knew, or ought reasonably to have known, that the device or service would be used to circumvent or facilitate the circumvention of the ETPM.
- 3.2 In the exposure draft, the third part of the test required knowledge that the device would be used to circumvent *and infringe*. The DA Bill now simply requires knowledge that the device would be used to circumvent, and substitutes a narrower set of exceptions by introducing the concept of 'permitted purposes'. No reason has been given for the change to a narrow set of permitted purposes (which, significantly, does not include a number of lawful purposes).
- 3.3 Subsection (3) exempts a supplier from liability under section 116A for supplying a device/service where the customer gives the supplier (on or prior to supply) a signed declaration that the device will only be used for a permitted purpose (and identifies that purpose in the declaration). Subsection (4) exempts a manufacturer/importer from liability under section 116A for making/importing a device for use only for a permitted purpose or for the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose.
- 3.4 The 'permitted purposes' are defined exhaustively in subsection (7). That subsection states that a device/service is taken to be used for a permitted purpose *only* if:
- (a) the device/service is used for the purpose of doing an act comprised in the copyright in a work (etc); and
 - (b) the doing of the act is not an infringement of the copyright in the work (etc) under section 47D, 47E, 47F, 49, 50, 183 or Part VB.
- 3.5 From SISA's perspective, this covers the interoperability (s 47D), error correction (s 47E) and security testing (s 47F) exceptions in the Act. SISA strongly supports the inclusion of these provisions as part of the 'permitted purposes' definition. It also covers library (ss 49, 50), government (s 183) and some educational (Part VB) exceptions and statutory licences. It does not, however, cover all exceptions in the Act. For example, making a copy under the 'normal use' (including studying functionality and ideas) exception (s 47B) or the back-up exception (s 47C) will not be a permitted purpose. Similarly, making a copy under the fair dealing exceptions (ss 40, 41, 42, 43, 103A, 103B, 103C, 104) or under the preservation/replacement/etc exceptions (ss 51, 51AA, 51A) will not be a permitted purpose. It also appears not to cover dealings in public domain material.
- 3.6 There is a specific exception to section 116A to cover law enforcement and national security activities (subsection (2)).
- 3.7 The first part of the three part test in subsection 116A(1) requires that a work is protected by an ETPM. This is defined to mean a device or product, or a component incorporated into a process, that is designed to prevent or inhibit the infringement of copyright subsisting in a work (etc) if, in the ordinary course of its operation, access to the work (etc) protected by the measure is available solely by use of an access code or

process (including decryption, unscrambling or other transformation of the work etc) with the authority of the owner or licensee of the copyright in a work (etc).

- 3.8 There was previously a potential problem with the ETPM definition that has now been addressed. Under the exposure draft definition, it was possible to argue that a technological protection measure that could be circumvented (ie through use of a device) was not an 'effective' technological protection measure because access was not available 'solely' by use of an access code with the authority of the copyright owner. This problem has been addressed by adding the words 'in the ordinary course of its operation'. In other words, the fact that a technological protection measure can be circumvented can no longer be used to suggest that the measure is not an 'effective' measure.
- 3.9 The definition of 'circumvention device' is much the same as it was in the exposure draft. It means a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure. Any suggestion that computer programs may not have been covered is now addressed by specific mention of such programs. Words have also been added to make clear that devices with no commercially significant purpose or use other than circumvention are caught. Put simply, to fall outside the definition, a device must have more than a limited commercially significant purpose other than circumvention.
- 3.10 The definition of 'circumvention service' is very similar in scope to the definition of circumvention device.
- 3.11 In relation to the third part of the three part test (ie knowledge that a device would be used to circumvent), subsection (5) reverses the onus of proof by establishing a presumption that the defendant (in an action under section 116A) knew, or ought reasonably to have known that the device or service would be used to circumvent an ETPM. To escape liability under this part of the test, defendants must prove that they did not know and that they ought not reasonably have known that a device or service would be used to circumvent. This weakens a defendant's position when compared to the exposure draft, in which a defendant was only required to prove that it was not reckless as to whether a device would be used to circumvent.
- 3.12 Nonetheless, it is now clear that a person can make or import a circumvention device for a permitted purpose. It is also clear that a circumvention device/service can be supplied to a person who provides a signed declaration that it is to be used for a permitted purpose.
- 3.13 It is not yet known whether a digital signature will be recognised by the Australian courts. However, it is possible that digital signatures created and verified using a secure public key infrastructure will be sufficient to meet the common law requirements for a signature. Digital signatures are also likely to be given specific legislative recognition when (and if) the *Electronic Transactions Bill 1999* is passed and comes into force.
- 3.14 Criminal sanctions against making or dealing in circumvention devices and providing circumvention services are also included in the DA Bill. To achieve this, several new subsections are added to section 132 in substantially the same terms as section 116A. The main difference with the criminal sanctions is that the knowledge test is based on recklessness (as it was in the exposure draft) and the defendant bears a lesser burden of proof.

3.15 SISA has a number of concerns in relation to circumvention devices:

- (a) First, although SISA supports anti-circumvention laws as a means of improving copyright enforcement, it is important that copyright owners are not given such strong new rights that they are able to extend the scope of their copyright protection. In SISA's submission, it is critical that any new laws dealing with anti-circumvention measures must be drafted in a way that permits circumvention for lawful, non-infringing purposes. Anyone with a need to circumvent to exercise rights lawfully available to them (eg under an exception) must be able to gain access to the devices that will enable them to do this. Otherwise, copyright owners will be able to use technological measures to re-write the careful balance of rights set out in the Act, at great cost to the wider public interest.
- (b) Second, Although SISA does not support a ban on circumvention devices, it recognises the fact that the Government has made a policy decision to take such an approach. Given the decision to ban the manufacture of and commercial dealings in circumvention devices, the inclusion of a permitted purposes exception in the proposed new criminal and civil provisions is critical to ensuring that relevant devices will be available to those needing to use them for certain lawful purposes. The possibility that circumvention devices will be available where ETPM are used to extend copyright protection (eg by overriding exceptions) should act as a strong disincentive to the use of ETPM in this way.
- (c) SISA is aware that some copyright owners are now calling for a ban on the use of circumvention devices in addition to the ban on dealings in those devices. In SISA's view this additional ban is unnecessary. Even if a person is able to obtain a device and use it without breaching the ban on dealing in devices, a copyright owner will still be able to bring an action against any person who then goes on to infringe copyright. If a device is used to circumvent but no copyright infringement occurs, it is difficult to understand why there is a problem.

3.16 In SISA's submission, a number of minor changes are needed to improve the detail of the proposed anti-circumvention laws:

- (a) The 'permitted purposes' for which devices are available should ideally be broader. SISA strongly supported the exposure draft approach of treating all *non-infringing purposes* and permitted purposes. The DA Bill has narrowed the range of permitted purposes to a selected list of exceptions, which has the effect of excluding a number of lawful purposes.
- (b) In particular, SISA supports the inclusion of subsection 47B(3) as a permitted purpose. This subsection creates an exception for copies made when studying the ideas and functions behind a computer program, and was introduced as part of the recent *Copyright Amendment (Computer Program) Bill 1999* (due for proclamation shortly). Given that this exception cannot be 'contracted away' (see s 47H) it seems logical that it should also be included as a permitted purpose.

- (c) SISA also supports the extension of permitted purposes to include the fair dealing provisions. Although most of SISA's main concerns are addressed by the inclusion of sections 47B(3), 47D, 47E and 47F, there are other areas of activity (eg encryption research) which may only be covered by the fair dealing, or (if adopted) a broader fair use defence. SISA is not aware of any policy reason for excluding fair dealing from the list of permitted purposes.

4. TEMPORARY COPIES

- 4.1 The DA Bill proposes to insert a new section 43A into the Act which creates an exception to infringement for temporary reproductions made in the course of communication. The new provision provides that copyright in a work (or adaptation) is not infringed by making a temporary reproduction of the work (or adaptation) 'as part of the technical process of making or receiving a communication'. This is qualified by a new subsection stating that the exception does not apply where the making of the communication is itself an infringement.
- 4.2 Unlike the exposure draft, this provision makes no reference to 'looking at material on a computer screen'. The Explanatory Memorandum does, however, state that the exception is intended to cover 'browsing' copyright material, 'including copyright material that involves the production of sound'.
- 4.3 The Explanatory Memorandum also states that, under the exception, 'reproductions made in the course of certain caching would not be caught by the existing reproduction right'. It does, however, define 'caching' simply as 'the process whereby digital works are copied as part of the process of electronically transmitting those works to an end user'.
- 4.4 The Explanatory Memorandum appears to reflect a confusion about the difference between excluding temporary copies from the scope of the reproduction right and creating an exception to infringement for temporary copies. In different places, the Explanatory Memorandum claims that section 43A does both of these things (which is not possible). In fact, the new section is still drafted as an exception, which gives rise to an implication that temporary copies do fall within the scope of the reproduction right and would (but for this new exception) expose the maker of any such copies to the risk of liability for infringement.
- 4.5 The consequence of drafting section 43A as an exception is that all other temporary copies not addressed by a specific exception will now be much more likely to infringe the reproduction right (unless licensed). For example, temporary copies of works stored in computers and other electronic devices during normal use or playback (some CD and MiniDisc players have an anti-skip electronic memory buffer of up to 40 seconds) may now infringe copyright. This could mean that placing a multimedia CD ROM into the CD ROM drive of a computer and 'browsing' it will give rise to a copyright infringement because a temporary electronic 'copy' of the material is made during browsing. As these temporary 'copies' are not made in the course of a communication, they will not be covered by the section 43A exception.
- 4.6 SISA is also concerned that certain forms of 'caching' are not adequately addressed by section 43A. Many stand-alone computers will create temporary 'cache' files of documents, images, multimedia content and software during normal use. These files are often necessary to ensure the efficient operation of the computer. However, as they are not always made in the course of a communication, section 43A will not apply.

- 4.7 The provisions of section 43A are repeated in section 111A for audio-visual items (eg films and sound recordings).
- 4.8 The status of temporary electronic 'copies' under copyright law remains unresolved. An attempt to 'confirm' that temporary 'copies' do fall within the scope of the reproduction right was rejected in 1996 by the international community at the WIPO Copyright Treaty negotiations in Geneva. In SISA's submission, most, if not all, temporary 'copies' do not satisfy the 'material form' requirement and should not be regarded as reproductions for copyright purposes.
- 4.9 To avoid the problems referred to above, SISA submits that sections 43A and 111A should be redrafted as exclusions from the scope of the reproduction right. This will remove the implication that all temporary copies are reproductions in material form. For example, section 43C could be redrafted as follows:
- A temporary reproduction of a work, or an adaptation of a work, made as part of the technical process of making or receiving a communication is not a reproduction in material form of that work or adaptation.*
- 4.10 If this change is not made, SISA strongly submits that a number of additional exceptions must be added to the DA Bill to address various other temporary 'copies' that might otherwise become copyright infringements (including those identified above).
- 4.11 SISA also submits that subsection 43A(2) should be deleted. That subsection could expose an Internet or communications company (or even an innocent end user browsing a website) to liability for 'copies' that merely pass through its servers and routers where the company has no way of knowing which of those 'copies' relate to authorised communications and which relate to unauthorised communications. Section 43A should simply make it clear that temporary 'copies' made as part of a communication are not really 'reproductions' for copyright purposes. Liability for unauthorised communications will, in any event, rest with the person making the communication. An alternative solution would be to amend subsection 43A(2) so that it excludes only the temporary copies made by the person who *initiates* the unauthorised communication.

5. ISP LIABILITY

- 5.1 A number of provisions in the DA Bill relate to the issue of ISP and communications carrier (ie phone company) liability. In general terms, the DA Bill provides that:
- (a) Direct liability for making a communication will rest with the 'person responsible for determining the content of the communication'. This is intended to exclude ISPs and carriers from direct liability when material is communicated to the public using their networks, but they do not determine the content of those communications (subsection 22(6)).
- (b) Indirect liability for 'authorising' infringements of copyright will be determined according to a codified authorisation test (based on existing case law), now set out in new subsection 36(1A). Under that subsection, authorisation liability will depend on, amongst other things, the extent of a person's power to prevent an infringement, the nature of the relationship with the direct infringer, and whether any reasonable steps were taken to prevent or avoid the act of direct

infringement (including compliance with any relevant industry codes of practice).

- (c) Indirect or 'authorisation' liability is further clarified for carriers and carriage service providers (which, broadly, should cover many phone companies and ISPs) through new sections 39B (works) and 112E (audiovisual items). These sections state that authorisation liability will not arise 'merely because the carrier or carriage service provider provides facilities' used by a person to infringe. The reference to 'facilities' gives this clause broader application than the exposure draft, which referred to 'physical facilities'. The Explanatory Memorandum explains that 'facilities' is intended to cover both physical facilities (and gives the example of a server) and 'the use of cellular, satellite and other technologies'.
- (d) Liability for making temporary copies is also addressed through the temporary reproduction exception set out in sections 43A and 111A (which, as explained above, should cover 'browsing' and some 'caching').

5.2 The net effect of these provisions is that phone companies and ISPs are less likely to be liable for direct infringements, but will need to take appropriate steps to ensure that they are not liable for indirect infringement.

5.3 Subject to the changes suggested above in relation to section 43A, SISA supports these new provisions.

6. OTHER SOFTWARE CHANGES

6.1 The DA Bill implements a number of outstanding recommendations from the CLRC's *Computer Software Protection* report. These include:

- (a) a new, simpler definition of computer program;
- (b) clarification that a source code version of a computer program is a reproduction of an object code version of that program, and vice versa;
- (c) confirmation that, unlike other unpublished works, unpublished computer programs will not enjoy indefinite copyright protection.

6.2 SISA supports these provisions.

7. SUMMARY

Subject to any contrary comments set out in this submission, SISA supports the DA Bill. However, in SISA's submission, the following minor changes should be made:

- (a) The 'permitted purposes' for which devices are available should ideally be broader. In particular, SISA supports the addition of subsection 47B(3) as a permitted purpose. SISA also supports the extension of permitted purposes to include the fair dealing provisions.
- (b) To remove the implication that all temporary copies are reproductions in material form, sections 43A and 111A should be redrafted as an exclusion from the scope of the reproduction right. If this change is not made, a number of

additional exceptions must be added to the DA Bill to ensure that various other temporary 'copies' are not regarded as copyright infringements (eg those made in stand alone equipment such as computers and CD players).

- (c) Subsection 43A(2) should be deleted, or amended to exclude only the temporary copies made by the person who *initiates* an unauthorised communication.

8. CONTACT

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