

in some quarters as to whether this was the case. It was believed that Aboriginal artists drawing upon a pre-existing tradition could not prove the required element of originality to establish copyright ownership.¹⁴ That position has now been dispelled and Aboriginal artists receive the full protection of copyright law. Further, Aboriginal artists have available to them mechanisms by which Australian law will recognise and provide remedies relevant to the wider social, political and religious concepts underpinning the production of artistic works in Aboriginal communities. The courts are willing to take into account these matters in, for example, the assessment and determination of damages as was done in the *Carpets* case.¹⁵ The *Bulun Bulun* case indicates that the courts are able to provide remedies to persons other than the artist concerned in appropriate circumstances. It appears to the writer that, at least in the case of unauthorised reproduction of Aboriginal artistic works, the law provides adequate protection for both the rights of the artist

and the Aboriginal community concerned. Nevertheless, there still remains a call from some quarters for law reform to fulfil some undetermined lacuna in the law. Following the *Bulun Bulun* case the question has to be asked, what more is needed other than possibly legislation declaring the law as pronounced by the Federal Court?

1 *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* (1998) 157 ALR 193, Federal Court of Australia, Von Doussa J, 3 September 1998 ('*Bulun Bulun* case').

2 Staniforth Ricketson, *The Law of Intellectual Property*, Law Book Company, 1984, p.58.

3 Wandjuk Marika, 'Copyright on Aboriginal Art', *Aboriginal News*, Vol. 3 No 1, Feb. 1975, pp. 7-8.

4 *Bulun Bulun* case at 195.

5 *Bulun Bulun v Nejiam Investments*, Unreported proceedings 1988, before Olney J, which were settled after interlocutory injunctions were granted. See Colin Golvan, 'Aboriginal Art and Copyright: The case of Johnny Bulun Bulun' [1989] 10 *European Intellectual Property Review* 346.

6 *M v Indofum* [1994] 54 FCR 240. The name of the Applicant in this case commenced with the letter M. He was also the Second Applicant in

Bulun Bulun v R&T Textiles. M died in late 1998 and therefore consistent with Aboriginal tradition I have refrained from using his name.

7 *Bulun Bulun* case at 198-199.

8 Affidavit of Professor Howard Morphy.

9 *Bulun Bulun* case at 210-211.

10 *ibid* at 209.

11 *Mabo v Qld* [No 2] (1992) 175 CLR 1

12 *Bulun Bulun* case at 210-211.

13 *ibid* at 211-212.

14 See Report of the Working Party on the Protection of Aboriginal Folklore, Department of Home Affairs and the Environment, 1981.

15 *M v Indofum* [1994] 54 FCR 240. The name of the Applicant in this case commenced with the letter M. He was also the Second Applicant in *Bulun Bulun v R&T Textiles*. M died in late 1998 and therefore consistent with Aboriginal tradition I have refrained from using his name.

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"If You Think Digital Watches Are a Pretty Neat Idea"¹

Therese Catanzariti analyses the *Copyright (Digital Agenda) Bill*.

On 26 February 1999 the Attorney General and the Minister for Communications, Information Technology & the Arts released for public comment an exposure draft of the *Copyright Digital Agenda Bill* ("Bill")² and accompanying explanatory commentary ("Commentary").

The Bill is designed to amend the *Copyright Act 1968* (Cth) ("Act") to ensure Australian law is consistent with international standards in international treaties.³ It follows the *Copyright Convergence Report*,⁴ a *Discussion Paper*⁵ and consultation with copyright owners, users and other stakeholders.

The closing date for submissions on the Bill was 19 March 1999. The Attorney General has said he intends to introduce the Bill before the end of the current sittings, which at the time of publication was expected to run until 31 March.⁶

EXCLUSIVE RIGHT TO COMMUNICATE TO THE PUBLIC

The Bill provides that the exclusive rights of copyright in a literary, dramatic, artistic and musical work, a sound recording, a cinematograph film, a television broadcast and a sound broadcast will include the exclusive right to communicate the work or other subject matter to the public.⁷ This replaces the current right to broadcast and the right to transmit by cable to subscribers to a diffusion service.⁸ Published editions are not proposed to be accorded the right.

"Communicate" means "electronically transmit or make available on-line sounds and/or visual images⁹ that are not capable of being heard or seen except by the use of reception equipment".¹⁰ The definition is deliberately not technology specific.¹¹

The right to communicate to the public is distinct from the public performance right by the use of the words "reception equipment"¹² in the definition of

"communicate" and a new section¹³ which expressly states that communication to the public is not a performance.

The phrase "to the public" has been defined as "to the public within or outside Australia".¹⁴ The *Discussion Paper*¹⁵ stated that the phrase "to the public" has been accepted to mean "the copyright owner's public", that is, the nature of the audience is such that the copyright owner would be entitled to expect payment for the use of the copyright material by the particular audience.^{16 17}

WHO IS "COMMUNICATING TO THE PUBLIC"

The Bill provides that a communication is taken to be made by the person responsible for determining the content of the communication.¹⁸

This means that if a person is merely relaying a communication whose content is determined by someone else and does not take responsibility for the content of

that communication, then the relaying person has not exercised copyright.

The question arises, therefore, whether a regional television station which merely relays a Sydney broadcast would be responsible for determining the content and may not be exercising the right to communicate the broadcast to the public. A similar question arises if an ISP sets up a mirror site on its server of a popular external site in order to reduce traffic flow to external sites. The ISP may not be "communicating" the material on the site "to the public" because it is merely mirroring the external site.^{19 20}

However, the regional television station and the ISP may be exercising the right to communicate to the public because even though they have not *in fact* determined the content of the communication, they are *responsible* for determining the content - they have made the decision to relay the transmission or mirror the site unaltered, regardless of its content.²¹

WHO IS NOT COMMUNICATING TO THE PUBLIC

The Bill expressly provides who is *not* liable for exercising the rights to communicate to the public. The express provisions address the controversies arising from the broad definition of "communication" and the implications of the *Telstra v APRA* case.²²

The Commentary²³ states that an ISP would not be *directly* liable for a communication on their networks because the ISP would not be determining the content but rather the web-site proprietor would be determining the content.

The Bill provides that a "carrier" or "carriage service provider"²⁴ is not taken to have *authorised* an infringement of copyright merely because they provide the physical facilities used by a person to infringe copyright.²⁵ The Attorney General has said that this is intended to translate the print exception for photocopying machines in universities to the on-line environment.²⁶

However, the Bill does not immunise carriers and ISPs completely. In particular, ISPs may be liable for authorising copyright infringements in web-sites which are on their own servers. The Bill introduces a list of factors which essentially codify case law principles²⁷ to determine whether a person has

authorised the exercise of copyright. The list of inclusive factors are:²⁸

- (a) the extent (if any) of the person's power to prevent the doing of the act;
- (b) the nature of any relationship existing between the person and the person who did the act concerned; and
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act.²⁹

TEMPORARY REPRODUCTIONS

The Bill introduces provisions that copyright is not infringed by making temporary reproductions of works³⁰ or audio visual works or published editions³¹ as "part of the technical process of making a communication in the course of looking at material on a computer screen".

One of the objects of the Bill³² is to ensure that the "relevant global technical standards which form the basis of new communications and information technology such as the Internet are not jeopardised". The Commentary³³ refers to "caching" and "browsing" as part of the process.

The Commentary generally explains caching as copying as part of the process of electronically transmitting works to an end-user.³⁴

This is true in some cases, but in other cases, caching involves copies being stored on a server and accessed as and when required in place of the external site. In these circumstances, caching cannot properly be characterised as *part* of the dynamic technical process of electronically transmitting material. Such caching may not be covered by the exception.

It is also interesting to note that the Attorney General,³⁵ the Discussion Paper³⁶ and the Commentary³⁷ refer to "made in the course of", but the Bill uses the phrase "part of the process". These are two different concepts.

The Discussion Paper³⁸ and Commentary³⁹ note that "browsing" or viewing material on a screen is not a "communication to the public" because there is no act of transmission and the material has already been made available. The Discussion Paper and Commentary suggest that temporary copies used to enable browsing should not infringe the

reproduction right because they are incidental to the communication to the public.

The Bill provides⁴⁰ that copyright is not infringed if a temporary reproduction is made "in the course of looking at material on a computer screen". One of the interesting issues will be to what extent a stored temporary copy is considered to be "temporary" and "in the course of" browsing.

RETRANSMISSION

The Bill also amends the provisions of the Act relating to the transmission by pay TV operators of free-to-air television broadcasts.

The Commentary⁴¹ refers to the current provisions which allow pay TV operators to retransmit free to air broadcast without the permission of the owner of the rights in the broadcast, or the owners of the literary, dramatic, musical or artistic works incorporated in the broadcast.

The Commentary⁴² states that the Act will be amended to require pay TV operators to compensate owners of underlying copyright material incorporated in the broadcast for the retransmission of the broadcast. It suggests an approved collecting society will collect and distribute payments and in case of dispute, the Copyright Tribunal will arbitrate using principles similar to those used to determine the equitable remuneration for the broadcast of sound recordings.⁴³

One of the catalysts for these provisions is that foreign collecting societies, such as Bild Kunst in Germany, have refused to distribute German statutory pay television retransmission royalties to Australian copyright owners in part because German copyright owners are not entitled to retransmission royalties in Australia.

In fact, in anticipation of the change, some Australian industry based guilds⁴⁴ have asked their members to assign to industry based collecting societies the right to receive foreign statutory royalties. In addition they are recommending to their members not to assign the right to receive Australian pay television retransmission royalties and to reserve these rights in contracts, even before the rights have been introduced. It is intended that the Australian rights will then be assigned to an industry based collecting society⁴⁵ or other collecting society. This would effectively introduce a residuals

system, in place of the current "buy-out" system.

However, the Bill⁴⁶ is not limited in its terms to pay television operators even though the Commentary⁴⁷ and a representative from the Attorney-General's Department⁴⁸ has said that it only applies to pay television.

TRANSITIONAL PROVISIONS

One of the weaknesses of the Bill is the lack of transitional provisions. A representative of the Attorney General⁴⁹ said that the transitional provisions will not be drafted until the Bill is introduced into Parliament

The issues are:

- whether the rights will apply to work and other subject matter which already exist;
- if it does apply to work and other subject matter which already exist, who will be the owner of the rights.

This is particularly important in the case of cinematograph films or multi-media works, which may incorporate a number of literary, dramatic, artistic or musical works, sound recording and other cinematograph films (such as film clips).

EXISTING WORKS

If the new rights apply to existing works, the user of copyright will need to determine:

- all of the relevant works and other subject matter within the film/multi-media work;
- who are the owners of all of the relevant works and other subject matter;
- find the owners of all of the relevant works and other subject matter;
- renegotiate with the owners of the relevant works and other subject matter.

This could be administratively complex and costly, particularly in the case of older works or foreign works where the documentation may not exist or be easily accessible.

WHO OWNS THE NEW RIGHTS IN EXISTING WORKS

If the rights apply to existing works, one of the critical issues is determining who will be the owner of the right.

If the new rights vest in the person who has a binding contract with the author for an assignment of all rights, then the later user of copyright may only need to locate the person who owns rights in the multi-media product, on the basis that this person may have secured all rights in the works or other subject matter incorporated in the multi-media product. For example, it is standard practice that a film producer obtains an assignment of all rights from all contributors to the film, such as the script writer, actors, director, costume designers, the set designers, cinematographer etc.

For example, if the new rights vest in the person who has entered into binding contracts with the author, a webcaster who wants to use a cinematograph film may only need to locate the producer of the film, and secure a licence from the producer.

However, if the new rights vest in the individual authors, the webcaster will need to renegotiate with the individual contributors to the film, such as costume designers, the set designers, the writers, the script editors, the director (for example, to the extent that they changed the script during shooting) etc. This may well be impossible.

There is also an issue in that the producer may have granted the right to broadcast by wireless telegraphy to a free-to-air television broadcaster, and the right to transmit by cable to a pay-TV operator. If the new "communication to the public" right applies to existing works, it is not clear who controls the right to communicate. A webcaster may need to secure a quitclaim from each of the broadcaster and pay television operator acknowledging that the webcaster is entitled to webcast the film, as well as a licence from the owner of the rights in order to satisfy itself that it has the necessary rights to webcast material through the Internet.

1 Douglas Adams, "The Hitchhikers Guide to the Galaxy" (<http://www.math.ntnu.no/~tgt/docs/HGTTG.html>)

2 Copyright Amendment (Digital Agenda) Bill 1999
3 WIPO Copyright Treaty 1996; WIPO Performances and Phonograms Treaty 1996

4 Copyright Convergence Group report dated August 1994 "Highways to Change - Copyright in the New Communications Environment"

5 "Copyright Reform and the Digital Agenda" Discussion Paper issued July 1997 by the Attorney General and the Department of Communications, Information Technology and the Arts

6 Attorney General in a speech given at the Gilbert & Tobin Industry Leader Breakfast on the Digital Agenda Copyright Bill and the Electronic Transactions Bill on 12 March 1999 ("GT

Speech")

7 Items 27, 28, 29, 64, 65, 66 of the Bill, amending sections 31, 85, 86, 87 of the Act.

8 Ibid.

9 One of the speakers at the Copyright Society Seminar on the Bill on 14 March 1999 highlighted that the right only covers "sounds and/or visual images" and not "works or other subject matter" which is the phrase used in the WIPO treaties. This means that the right is not *exactly* synchronised with the exclusive right in literary works to communicate the literary work to the public to the extent that the literary work is not transmitted by sound or visual images. For example, it would not cover a communication of a computer program

We note that the Attorney General said in the GT Speech that the right will encompass the making available of *copyright material on-line*. This is broader than sounds and/or visual images.

10 Item 6 of the Bill amending section 10(1) of the Act.

11 Commentary at paragraph 24.

12 Reception equipment is defined in section 12 of the Bill amending section 10(1) of the Act as equipment which enables people to see images or hear sounds that are electronically transmitted or made available on line.

13 Item 24 of the Bill amending section 27(2) of the Act.

14 Item 15 of the Bill amending section 10(1) of the Act.

15 Discussion Paper at paragraph 4.37.

16 *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 71 ALJR 1312.

17 This definition has caused some concern in that it could conceivably cover an essentially *private* communication, for example, from a producer to a television broadcaster. In contrast, the EU Background Paper to the proposed EU Directive on Copyright and Related Rights in the Information Economy issued on 10 December 1997 makes clear that private communications are not covered, even though the same "to the public" language is used in the proposed Directive as is used in the Bill. In addition, there is concern that the addition of the words "outside Australia" may vary the accepted meaning of the phrase "to the public" as "the copyright owner's public" because the copyright owner may only be entitled to expect payment for the exercise of rights in Australia, because the copyright owner only owns the rights in Australia, and the rights outside Australia are owned by someone else.

18 Item 22 of the Bill inserting new section 22(6) of the Act.

19 This approach may lead to an international copyright loophole if the laws of a country provide that it is only an exercise of copyright to *transmit* a communication from that country and it is not an exercise of copyright to *determine content* of the communication. The content of a communication could be determined in that country without exercising the right to communicate to the public in that country, and then transmitted in Australia without exercising the right to communicate to the public in Australia. The Bill is inconsistent with international broadcasting practice such as the European Union Directive 93/83 which implement the "emission theory" that a broadcaster is exercising copyright only in the country from where the signal is introduced and not in the footprint countries, so that the broadcaster only needs to seek authorisation from the owners of copyright in the

country from where the broadcast is transmitted.

20 Even if the ISP is not "communicating", it is still exercising copyright because it is reproducing the external site. However, if the new provisions relating to temporary reproduction are introduced, the ISP may not be liable for infringing copyright for reproducing the external site if the reproduction is temporary and is "part of the technical process of making a communication". See discussion in section 6 of this article.

21 This is consistent with the decision in the defamation case *Thompson v Australian Capital Television Pty Limited* (1996) 186 CLR 574 where the Canberra television station was liable for publishing a defamation in a program produced in Sydney, relayed from Sydney to Canberra, and then broadcast in Canberra by the Canberra station. The Canberra station was not entitled to rely on the defence of "innocent dissemination" because even though it "did not participate in the production of the original material... [the Canberra station] had the ability to control and supervise the material it televised." The fact that the near-instantaneous relay did not permit the Canberra station to monitor the content before it was broadcast was not an acceptable excuse because it was the Canberra station's decision that the telecast should be near instantaneous "... it adopted the immediacy of the program. It did that for its own purposes."

22 Supra n 16. In the case, the High Court held that Telstra was liable to APRA for exercising copyright in music controlled by APRA because music was played while a person was on hold during a telephone call on the Telstra telephone network, even though Telstra had no control in determining the music played.

23 Commentary at paras 115 and 116.

24 The terms "carrier" or "carriage service provider" are defined as defined in the Telecommunications Act 1997 (section 2 and 3 of the Bill amending section 10(1) of the Act).

25 Item 33 of the Bill inserting new section 39B of the Act, and item 83 of the Bill inserting new

section 112C of the Act.

26 Copyright Society Seminar on the Discussion Paper 1998.

27 In particular, the Bill codifies the principles in *University of New South Wales v Moorhouse and Angus & Robertson Publishers Pty Limited* (1975) 133 CLR 1.

28 Item 31 of the Bill inserting new section 36(1)(a) of the Act, and item 70 of the Bill inserting new section 101(1A) of the Act.

29 In para 131 of the Commentary, the Government invites submissions on the approach in the Bill and in particular whether the "reasonable steps" should be clarified. We note that the approach is in contrast to the United States Digital Millennium Copyright Act 1998, the United States Act implementing the WIPO Copyright Treaty, which includes detailed notice and take down provisions.

30 Item 43 of the Bill inserting new section 43C of the Act.

31 Item 81 of the Bill introducing new section 11A of the Act. It is a curious anomaly that there is an exception for temporary copies of an audio-visual item or published edition but not of temporary copies of sound recordings and/or broadcast, particularly since the Bill does not introduce a right to communicate a published edition to the public.

32 Section 3(e) of the Bill.

33 Commentary at paras 10 and 73.

34 Commentary at para 73

35 GT Speech at para 26

36 Discussion Paper at paras 4.54 - 4.61

37 Commentary at paras 71, 72, 73

38 Discussion Paper para 4.59 - 4.61.

39 Commentary at para 72.

40 Item 43 of the Bill inserting sections 43C of the Act

41 Commentary at para 166. See also *Amalgamated Television Services Pty Limited v Foxtel Digital Cable Television Pty Limited* (1996)

66 FCR 75.

42 Commentary at para 167.

43 One of the speakers at the Copyright Society Seminar on 14 March 1999 asked why the Government had decided to use the mechanism used for the compulsory licence for the broadcast of sound recordings. The Attorney General's representative acknowledged that the mechanism may not be appropriate as sound recordings only involve one copyright owner, the owner of the sound recording, rather than a number of different copyright owners. The representative said that the Government would be interested in receiving submissions on this issue.

44 Australian Writers Guild; Australian Screen Directors Association

45 for example, Screenrights, Australian Screen Directors Authorship Collecting Society, Australian Writers Guild Authorship Collecting Society.

46 Item 101 of the Bill inserting section 199A of the Act.

47 Commentary at para 166.

48 Simon Cordina, Principal Legal Officer, Intellectual Property Branch, Attorney-General's Department speaking at the Copyright Society Seminar on the Bill held on 14 March 1999.

49 *ibid*

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Is The "User Pays" Principle at Risk in Australia's Copyright Act?

Simon Lake of Screenrights spoke at the 'Copyright Futures Seminar' about the organisation's concerns regarding the CLRC recommendations to expand the 'fair dealing' rules.

Screenrights is the copyright collecting society whose membership consists of underlying rights holders in Australian broadcast programs including producers, distributors, scriptwriters, owners of music and other rights holders in film and television programs.

Formerly known as the Audio-Visual Copyright Society, we are the non-profit collecting society established for the purposes of administering a scheme under the *Copyright Act 1968* (Cth) ("*Copyright Act*") which allows

programs to be copied from television and radio by Educational Institutions for educational purposes. This includes schools, universities, TAFES and for-profit colleges and institutions.

Since we have been set up to administer this scheme, we have developed a number of other schemes for members including a similar voluntary scheme in New Zealand. In addition, Screenrights collects cable retransmission royalties for members in Europe, the USA and Canada. We have over 1,000 members in 40 countries.

For Screenrights copyright is obviously our business.

In the recently reported words of Lesley Ellen Harris, the author of "Digital Property": "intellectual property is hot property".

In Harris' words:

"we are surrounded by digital assets - data bases, images, sound and video files - some already in digital form; others waiting to be converted. These are destined to become more and more valuable."