

Announcement of the Government's decision on the Digital Agenda reforms to the *Copyright Act*

As indicated by Virginia Walsh in the last issue of *inCite*, the Commonwealth government has recently announced its intention to introduce significant reforms into the area of digital copyright. In two separate press releases issued by Senator Alston, minister for communications, the information economy and the arts and the Honourable Daryl Williams, attorney-general, reforms have been announced which may substantially benefit libraries and cultural institutions. Concerns have been expressed for some time by both libraries and cultural institutions at the lack of clarity of the current Act surrounding digital copying. Add to this the aggressive lobbying campaign by copyright owners, who have been arguing for more stringent legislation that could seriously restrict digital copying and we could well have resulted in a situation where access to information would have been seriously hampered. The following article prepared by Annabelle Herd, copyright research officer for ACLIS presents an excellent summary of the background, current situation and likely future action in this area. I would strongly recommend that you take time to read this article.

Craig Grimison, chair, ALIA Copyright Committee

On 30 April the attorney-general, Daryl Williams, made a speech at the Asia Pacific Intellectual Property Institute in Perth in which he announced that Cabinet had made a decision on what he called the 'Digital agenda' reforms to the *Copyright Act*. In that speech he broadly outlined the proposed reforms. On the same date, a release was put out jointly by the attorney-general and the minister for communications, the information economy, and the arts, Senator Richard Alston. The release announced that Cabinet had made a decision, and contained a very broad statement of the reforms that Cabinet had agreed to implement. On 5 April, Senator Alston released a further press statement detailing the benefit to Australia's cultural institutions, including libraries, of the proposed reforms. As yet, no draft legislation containing these reforms has been released or even written, and thus, detail on what the proposed reforms actually are has to be garnered from the attorney's speech and the two press releases.

Background

The government's decision on the 'Digital agenda' reforms is a continuation of the process of implementing changes to copyright law around the world in response to developments in digital technology. In late 1996, delegates at a World Intellectual Property Organisation (WIPO) Diplomatic Conference adopted two new copyright-related treaties. These treaties outlined certain measures that would bring copyright into the digital age. In proceeding to implement those treaties, in July 1997 the Departments of the Attorney-General and Communications and the Arts

released a joint discussion paper titled 'Copyright reform and the digital agenda'. The community was then invited to submit comment on the proposals contained in the discussion paper. Shortly after the closing date for response to the paper, the two departments held face-to-face consultation sessions with affected interests. Those interests that attended included collecting societies, publishers, writers, telecommunications companies, television broadcasters, internet service providers, computer software companies, and of course educational institutions and libraries.

The proposed reforms

A right of communication to the public

The introduction of a new right of communication to the public will mean that copyright owners will have the ability to control all communications to the public of their copyright material. The new right will cover both transmissions to the public and interactive on-demand 'communication' where a work is made available to be accessed by the public at a place and time chosen by them. This would occur, for example, where a work is placed on a webpage.

In introducing this new right, the government has chosen to adopt the language utilised in the new WIPO Copyright Treaty, despite the fact that in the 'Digital agenda' discussion paper it was proposed to introduce two new rights rather than one. In deciding to roll two separate rights into one broadly-based right, it has been recognised that whilst transmission and making available are two conceptually distinct acts at the moment, there may be

a day when the distinction is not so clear cut. The communication right will replace the existing wireless broadcast right, and cable diffusion right.

Exceptions

Despite strong submissions from copyright owners, the Government has decided to extend existing exceptions for fair dealing and library copying to apply to the new right of communication to the public. There will be an exception to the new right for libraries, to ensure that they will be able to continue to make digital works available to the public, within limits. The current library copying provisions, ss. 49 and 50, will be extended to apply to digital works. In applying current exceptions to the digital environment, the government is trying to replicate, as far as possible, the balance that exists between the rights of owners and users in the hardcopy environment. Similar limitations to the exceptions as currently apply will therefore continue to apply in the on-line environment. Specifically, the 'reasonable portion' test will be extended to apply to material in digital form, where possible.

Cabinet has also agreed to introduce a new exception for certain temporary copies made in the course of the technical processes of transmission and browsing.

Existing exceptions and statutory licences for educational institutions will also continue to apply to ensure the reasonable access that they have provided in the print paradigm extends to digital material.

ISP liability

Liability of Internet Service Providers (ISP) and carriers for copyright infringe-

- ment that is carried out using their facilities will be limited under the new proposals. ISPs will not be liable for infringement simply because they have provided the facilities on which the infringement has occurred. An exception for ISP liability will probably be framed in similar terms to that relied on by libraries in providing photocopying facilities (s. 39A). Beyond that, it is anticipated that general 'authorisation' law will apply to determine whether an ISP is liable or not. In this, factors such as how much control the ISP exercised over the content of transmissions over their service; and whether the ISP was aware, or had notice, that infringements were occurring, will be relevant.

Enforcement measures

In response to the ease with which material in digital form can be copied and re-transmitted over networks, copyright

owners have turned to technological anti-circumvention measures to protect their works in the on-line environment. Despite strong opposition from copyright users, the Government is proposing to introduce a ban on commercial dealings in devices that defeat these technological protections. ACLIS and other copyright user interests had argued that this goes beyond what is required in order to comply with the new WIPO treaties, and that the outlawing of the act of unlawful circumvention would have been sufficient. The fact that the manufacture, distribution, or importation for distribution of circumvention devices will be illegal means that copyright owners can potentially 'lock up' copyright information, and fair dealing rights may therefore be rendered ineffective.

The second of the enforcement

measures proposed by the government is a ban on the removal or alteration of rights management information electronically attached to copyright material.

What happens next?

It is expected that an 'exposure draft' implementing the government's 'Digital agenda' reforms will be released in late July at the earliest, it is, however, more likely to be August before such a draft becomes available. Once the draft is released, it is likely that there will be an opportunity for comment before the draft becomes a Bill and is introduced into Parliament. It is impossible to predict how long the process will take, and when the changes are likely to be enacted.

Annabelle Herd,
copyright research officer, ACLIS

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