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Recent proposals for reform to the Australian *Copyright Act* are putting us on a fast-track course to an information world based on a pay-per-use system. The federal government's proposed 'Digital Agenda' reforms to the *Copyright Act*, if passed unaltered, will grant copyright owners the ability to control every access to, and every use of, material in digital form, irrespective of whether that material is actually protected by copyright or not.

It is in response to these concerns that the Australian Digital Alliance (ADA) has been formed. Whilst the ADA does support strong copyright law, the ADA primarily supports balanced copyright law, and there are a number of reasons to be concerned that the balance is under threat in the digital environment.

Threatening the balance

Arguably the most significant of the exclusive rights that copyright owners have is the right to control reproduction of their works. One of the most hotly-contested topics raging in the copyright world today is the status of the temporary and incidental digital 'copies' that occur as a by-product of transmission, storage and use of digital material. Reading, lending, viewing and/or transporting print and other 'off-line' materials does not involve any act of 'reproduction' however with digital materials every use — including simply reading on screen — involves the making of multiple digital copies.

If these incidental copies are not excluded from the scope of the reproduction right, then every use of copyright material in the online environment will potentially be an infringing use.

Whilst current copyright law protects databases that display the requisite level of skill, labour and creativity as 'compilations', use of the contents of those databases is not restricted unless the contents qualify as copyright works in themselves. However, if current international discussions result in the

adoption of a new international database protection treaty, the situation may drastically change. The type of protection being proposed would prevent the unauthorised 'use' of any substantial portion, (which could be an accumulation of small portions), of the contents of a protected database (a database would qualify for protection simply on the basis that a substantial investment had been made in its production).

So, where a database consisted of public domain material such as facts or raw data, the database owner would be able to control future use of those facts or data to a large extent. These proposals clearly have serious implications for science, research, education, and the scope of the public domain generally, and it is highly questionable that there is any global need for such comprehensive new rights in data.

If implemented, the federal government's proposal to ban devices that can be used to circumvent technological protection measures employed by content owners to protect on-line material, would take us directly to a pay-per-use system. Even in circumstances where material is not protected by copyright, or where the use either falls within an exception, or does not fall within the scope of copyright protection at all, technological protection systems could prevent access.

Because there will be no means of getting around any technological copy protection mechanism such as a software lock in order to rely on fair dealing rights, any limitations on the scope of copyright protection, and any exceptions to copyright owners' rights, will be rendered entirely ineffective and redundant as permission would always be required.

The use of licence agreements to govern the use and distribution of electronic information products is already widespread. Most of these online licences outline non-negotiable terms and conditions and require the user to click on the 'I agree' button before be-

ing granted access (hence the term 'clickwrap licence'). It is also common that these agreements set down terms and conditions of use which are far more restrictive than copyright law. Due to the fact that these licences can be used in conjunction with copy protection systems, users may have no choice but to agree to whatever terms are set down in order to gain access at all. Furthermore, because 'clickwrap' licences are in all likelihood enforceable contracts, action could be taken by the rights-holder if the terms of the agreement are breached in any way, irrespective of whether or not the use is allowed under copyright law.

In order to ensure that copyright law does not become obsolete in the face of widespread use of licence agreements, it is essential that the *Copyright Act* be amended to ensure that certain provisions such as exceptions for fair dealing, cannot be avoided or overridden by contractual means.

Maintaining the balance

Just as we must ensure that under-protection does not result in a lack of incentives for investment in the creation of digital copyright material, so too must we ensure that over-protection does not unreasonably restrict access to that material.

Achieving the right balance is not going to be easy. It does seem quite clear, however, that a pay-per-use system, where reading, viewing, browsing, listening, quoting small portions, lending and transportation of all on-line copyright and potentially non-copyright material, can only be done with permission from the rights-holder, is not a balanced outcome.

The Australian Digital Alliance (ADA) is a new coalition of public- and private-sector organisations and individuals formed to promote balanced copyright law. ADA members include schools, universities, internet industry groups, consumer representatives, major cultural institutions, computer software producers, scientific and research organisations, libraries and individuals. ■