

# Copyright in 2000

## How is the digital future shaping up?

Jamie Wodetzki

Information access is up for grabs in the year 2000. After several years of (sometimes fierce) lobbying from copyright owners and users, a final draft of the *Copyright Amendment (Digital Agenda) Bill* is about to be released. Everyone has now had their say before a House of Representatives Committee, and the committee has published its report. It sets out an interesting collection of recommendations for change, and a government response is expected shortly.

The approach taken by the government and opposition parties to this Bill will have a profound effect on Australia's libraries and the notion of fair access to information in the digital age. What follows is an explanation of some of the key issues in the Bill, and some comments on the likely impact on libraries.

### 'Digital firewall' is not the solution

A key feature of the committee report was the recommendation that a 'digital firewall' be created between print and digital formats. In other words, the committee said that copyright owners must have the right to control the transformation of print material into digital form. Under this approach, the library provisions would only permit print-to-print or digital-to-digital copying. A library could not, however, scan a print item and e-mail it to a student or researcher. There would also be serious doubts hanging over the use of faxes for document delivery.

This recommendation is clearly a major problem for libraries for various reasons. If implemented, it would:

- destroy the goal of carrying forward the existing balance between protection and access;
- place responsible users (like libraries) in a technological backwater;
- prevent libraries and students from using new technology to access information for research or study purposes; and
- not stop irresponsible users (that is, true 'pirates') from making illegal digital copies.

In other words, the so-called 'digital firewall' will harm education and research, but will not save copyright owners from the unlawful digital copying they fear.

### Some good news

On a more positive note, the committee accepted arguments from the library community and has recommended that private sector libraries not be excluded from the library provisions of the *Copyright Act*. If this recommendation is accepted, the risk of a split in the interlibrary document supply system has at least been deferred. It is clear, however, that CAL and other copyright owners are unlikely to let this issue rest.

The committee also accepted arguments from the Australian Digital Alliance and others that a blanket ban on circumvention devices would create a real risk of highly restricted access to information in years to come. Although there is likely to be a general ban on these devices, it will still be possible for libraries, universities and software developers to get hold of a device as a last resort if technological locks are used to override their rights under copyright law.

### The temporary copy debate

Every time you send an e-mail, view a web page or turn on some other electronic device, temporary electronic 'copies' are usually made. These copies may last a split second or a few minutes, but they are not the kind of 'copies' that you keep. Recognising this, the *Digital Agenda Bill* confirmed that temporary copies made as part of the technical process of (lawfully) transmitting a work should not infringe copyright. The proposed exception would remove the risk of copyright owners stopping or charging extra licence fees for every little electronic copy that appears as information is relayed across a digital network. Internet service providers, libraries and other users welcomed this exception, subject to a bit of fine-tuning.

Surprisingly, the committee took the view that temporary copies exceptions are not necessary at all. In-

stead, it recommended that the right to claim monetary damages for these copies be removed. Unfortunately, this would not prevent copyright owners from taking out an injunction to stop any temporary copying activity that they had not specifically authorised. And based on past performance, many copyright owners would do this without hesitation.

If the committee's recommendations on temporary copies are accepted, many internet 'caching' practices and digital copying technologies would fall under a cloud of uncertainty.

### The contract threat

One issue that is not addressed by the *Digital Agenda Bill* is the risk that licence agreements will slowly but surely be used to rewrite the rules of information access. Digital information products are usually licensed, which means there is a set of contractual terms saying how the product can and cannot be used. These agreements are often more restrictive than the *Copyright Act* (although they can also be more generous).

The only way for libraries and other users to resist this contractual erosion of rights is through negotiation. As the law stands, if there is a clash between the *Copyright Act* and the terms of a licence agreement, the latter will win (assuming that its terms were known and accepted up front). However, it will always be easier to negotiate a fair licence agreement if there is a fair balance under copyright law that can be used as a benchmark. This is one reason why it is important to fight for library rights under the *Digital Agenda Bill*.

At the time of writing this article, various issues are still up in the air. Not until these amendments finally become law will we be able to assess fully the practical consequences for Australia's libraries. Time will tell.

*Jamie Wodetzki is an intellectual property consultant and joint managing director of SpeedLegal.com, a startup company developing a web-based legal document assembly system.*