The digital copyright deadlock

Fiona Macmillan, Associate Professor of Law, Murdoch University, Western Australia

This is part one of a two-part article — part two, to be featured in the June issue, will cover the library and archive exceptions which relate to royalty-free copying of digital material...

Australia is currently attempting to revise its copyright law in order to respond to challenges for copyright law in the digital environment. The first step in this revision was the publication in 1997 of the government's discussion paper, *Copyright reform and the digital agenda*. The consultative process initiated by this discussion paper has now spawned two drafts of the *Copyright Amendment (Digital Agenda) Bill*.

This paper considers the approaches taken by the *Digital Agenda Bill* to the issue of royalty-free copying of digital material, focussing upon the related areas of copying by individuals under the fair dealing regime, and copying by libraries and archives.

Striking the copyright balance

Copyright law works by granting a range of exclusive rights in relation to the copyright work to the copyright owner, and then qualifying those rights by granting certain exceptions to them. In doing this, copyright law purports to be striking some sort of balance between the owners of copyright material and those who wish to use that material. In recognising the interests of those who wish to use copyright material, copyright law is arguably also recognising a public interest in free access to and circulation of information. The *Exposure Draft and Commentary* which accompanied the first draft of the *Digital Agenda Bill* had little to say on these matters. It, however, identifies the 'central aim' of the reforms in the Bill as 'to ensure that copyright law continues to promote creative endeavour whilst allowing reasonable access to copyright material on the internet and through new communications technology'. Its only comment on the overall approach to the matter of copyright exceptions is that '[a]s far as possible, the proposed exceptions will replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment'.

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Right of communication to the public

The centrepiece of the reforms proposed by the *Digital Agenda Bill* is the copyright owner's new exclusive right of communication to the public. The right is not intended to be technology specific, but by virtue of the new definition of 'communicate' [cl 6 amending s 10(1)] it applies only to electronic transmission or making available on-line. The content of the exceptions to this new right is obviously crucial to balancing access to, and use of, information which is stored digitally. An issue which is particularly important to libraries and to their users is how this affects libraries making available to those users works in digital format.

Fair dealing exceptions

The *Digital Agenda Bill* makes no changes to the general structure of the fair dealing defences. With one exception, its only amendments to these sections are minor consequential amendments designed to effect the Government's decision to make the new right of communication to the public subject to the fair dealing exceptions. Accordingly, a fair dealing with a copyright work for the purposes of research or study [s40 & s103C], criticism or review [s41 & s103A], reporting the news [s42 as amended by cll 43 & 44, and s103B as amended by cll 88 & 89], or giving professional legal advice [s43(2) & s 104(c) in relation to works regulated by Part IV. Note that any dealing for this purpose with a Part IV work is excepted under s 104 (c)] will amount to an exception to the right of communication to the public.

The one area of fair dealing law in which an important change has been made by the Bill is in relation to the quantitative test [s40(3)], which forms part of the exception for fair dealing with literary, dramatic or musical works for the purpose of research or study. At present this test deems a dealing which involves the copying of a periodical article or, in cases not involving periodical articles, a reasonable portion of the work in question (not exceeding ten per cent), to be a fair dealing. An issue raised in the digital environment is what is meant by a 'reasonable portion' of a work in electronic form. In the *Digital Agenda Bill*, an attempt is made to address this issue, although the approach taken may raise more problems than it solves.

The second draft of the Bill provides that, without limiting the meaning of 'reasonable portion', if a literary or dramatic work has been published in electronic form then a reasonable portion will be up to ten per cent in aggregate of the number of words in the work or, if the work is divided into chapters, up to one chapter [cl 20 amending s 10(2) by the insertion of s 10(2A)-(2C)]. Where a published literary or dramatic work is contained separately in both hard-copy form and electronic form then a reproduction of the work

will only amount to a reasonable portion if it falls within the definition of this term for either hard-copy or electronic works. Overall the provision is a considerable improvement on the earlier draft provision on the meaning of 'reasonable portion' in relation to electronic works.

The earlier draft provided, in essence, that there could not be royalty-free copying of a reasonable portion of electronic works which have not been published in hard-copy. Further, if the hard-copy was 'reasonably available', whatever that means, then copies of a reasonable portion of a work could not be made from the digital copy. In proposing limitations of this type on the application of the reasonable portion test in the digital environment, an attempt was being made to deal with the sort of situation where copyright works are only published electronically as part of a large database (of, for example, 100 hard-copy books) with the result that if the existing ten per cent rule was applied to the database as a whole, the amount copied royalty-free would account for far more than what would be thought of as a reasonable portion of a work under the present hard-copy rules. Under the proposed provision in the most recent draft of the *Digital Agenda Bill*, this problem is dealt with by limiting the application of the reasonable portion works to literary works published electronically other than 'a computer program or an electronic compilation, such as a database'. As neither 'database' or 'compilation', let alone 'electronic compilation' are defined in the existing *Copyright Act* or the *Digital Agenda Bill*, the results of this may be a little uncertain. Not only is this of concern in relation to the quantitative test as it applies in the context of the fair dealing exceptions, it is also of concern in the context of the exceptions for copying by libraries.

Next month: library and archive exceptions...

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