

# International Obligations and Copyright law: An Australian Libraries perspective

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International agreements on copyright issues have acted as a catalyst for many changes to Australian copyright law over the past 10 years. The rise of the internet and other digital technology continues to present challenges to legislators formulating copyright regimes that ensure that the rights of copyright owners, are balanced against the need for reasonable and equitable access to works in the digital world.

## International Agreements

Australia is signatory to a host of international agreements, among them, the Berne Convention, GATS (General Agreement on Trade in Services) and TRIPS (Trade Related Aspects of Intellectual Property).

The most recently concluded international copyright agreements are the World Intellectual Property Organisation (WIPO) "Internet" treaties (1996). The Internet treaties consist of the Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These treaties introduced new standards for the digital environment and also created new obligations to ensure the effective enforcement of rights.

The need to comply with our international obligations and particularly with the WIPO treaties was one of the primary driving forces behind the *Copyright Amendment (Digital Agenda) Act 2000* (DAA).

## Digital Agenda Amendments

The changes introduced by the DAA were the most comprehensive amendments to the Australian *Copyright Act 1968* since the principal Act has been in place. The primary objectives were to amend Australia's copyright regime to address the needs of the digital environment and to bring Australian copyright legislation in line with the provisions of the WIPO treaties to enable Australia to become a signatory in the future.

The Digital Agenda Amendments involved wide-ranging changes to the *Copyright Act*, to introduce new standards as established by the WIPO treaties. The amendments included:

- creating a right of communication to the public
- creating the right of making available to the public
- protecting against the abuse of technological protection measures;
- protecting against the removal of electronic rights management information; and
- new enforcement measures

The provisions of the DAA sought to extend the established balance in the Act with respect to analogue material; this complied with the principle contained in the WIPO treaties that "digital is not different". When the DAA was introduced, it was acknowledged that the legislation was "cutting edge" and that its real effects were not assured. To that end, the Government committed to undertaking a review of the DAA at three years after the introduction of the amendments.

### *The Digital Agenda and ILDS*

The Digital Agenda Amendments extended the library-to-library provisions in the Act to enable digital document supply. Taking into account the novel capabilities of digital technology, the Digital Agenda Amendments also introduced new provisions that were aimed at curbing any possible negative effects of the extension of library document supply exceptions on copyright owners' markets.

In order to allow digital document supply, amendment was made to the definition of "supply" to include supply by way of a communication (a "communication" is defined in the DAA as an electronic transmission or act of "making available online").

Several safeguards were implemented to ensure that copyright owners' rights were not damaged. One of these was the requirement to apply the "commercial availability test" to *any* supply of digital material. Whereas the commercial availability test applied only to requests for supply of more than a reasonable amount of print material, a request for supply of material from an *electronic* source would invoke the application of the test regardless of whether the request was for a reasonable amount or not. The "commercial availability test" applied to print material is taken to mean that a work is not "commercially available" if an appropriate reproduction cannot be obtained within a reasonable time, at an ordinary commercial price where an "appropriate reproduction", is one which is separately published, in the format desired, and not second hand. In applying the test to electronic document supply the amendments further clarified that in order for a work to be "commercially available", it must be available for separate sale.

Another safeguard included in the amendments was the requirement that "interim copies" ie digital copies made from print material, created for the purposes of document supply must be destroyed as soon as practicable. This presumably was to prevent libraries from building up huge super efficient databases of digitised material which would then undermine the publisher's market for electronic materials.

Together, these amendments legitimised what previously were grey areas of practice and libraries could now confidently undertake digital document supply under the Act. The real value of the digital document supply provisions (and for that matter, many of the other library provisions in the Act) must however, be considered in the context of the widespread and growing reliance on contracts and licences.

### *Other library provisions*

Further restrictions on the supply of the material to users were also introduced to curb any negative effects of providing access to electronic works.

The amendments include provisions which sets limitations on access to works from an electronic source. Where a library supplies electronic material to users (under s49), supply must be made only to a computer terminal within the premises of the library where the computer has been disabled to ensure that no electronic reproduction of the work can be made and where it is not possible to communicate the work further.

Also, where material is sent electronically to users (under s49), libraries must ensure that the work is accompanied by a warning notice (this notice is similar to warning notices placed on library machinery).

## **Current Developments in Australian Copyright Law**

### *Digital Agenda Review*

The 3 year mandated review of the Digital Agenda Amendments is currently underway with the window for making submissions to the review only recently closed. The review is intended to assess how the DAA is performing against its original objectives and purports to give a legal, technological and economic analysis of the effect of the amendments.

Among a number of issues that are currently under review is the issue of electronic document supply. Publishers have suggested that the ability of libraries to engage in digital document supply is hindering the growth of the Australian electronic publishing market. In response, libraries have argued that the limitations currently in place are in contrast, *more* restrictive than the document supply provisions for print material and that in fact, the growth of the electronic publishing market is steady.

The issue of document supply between libraries within for-profit organizations and “public” libraries is also being discussed in the review. This issue was raised by copyright owners concerned about the reliance by public libraries on document supply from libraries within for-profit organizations (or “corporate libraries”); the concern is based on the belief that the traffic between these libraries represents the scale of lost sales properly within the economic rights of copyright holders.

The discussions in the review so far have involved similar arguments to those raised by copyright owners groups during debate of the DAA in Bill form. These arguments are premised on the belief that the ease with which electronic information can be copied, warrants draconian provisions restricting access to digital material.

### *Australia- US Free Trade Agreement*

Negotiations with the United States over a proposed bilateral Australia- US Free Trade Agreement (AUSFTA) began in November 2002. Although AUSFTA covers a range of trade sectors, copyright has been receiving a lot of attention in the negotiations from the United States Trade Representative (USTR). Given that the American copyright industries have a surplus balance of trade in Australia (as well as with every single country in the world), this interest is perhaps not surprising. The issues that have been tagged as open for negotiation in AUSFTA within the intellectual property chapter of the agreement cover almost every aspect of use and access to copyright materials. The USTR approach in the negotiations so far, has been to place pressure on the Australian Government to “harmonise” Australian copyright law to American standards and more specifically, to standards as embodied in the DMCA.

It is anticipated that the final text of the agreement will crystallise by December 2003. To date there has been little detail about the substantive issues being negotiated. However, there are a number of broad issues that will affect the work of libraries, for example the issue over extension of the term of copyright to the author’s life plus 50yrs.

### **The future of access**

The simultaneous developments of the Digital Agenda Review and the AUSFTA negotiations has raised some uncertainty among copyright stakeholders regarding how and to what extent one will influence the other. However both developments demonstrate an apparent trend; trade and economics is of increasing importance to copyright legislators. While there is no doubt that trade has been an important ingredient in the formulation of copyright regime for centuries, over the last ten years,

trade considerations manifesting in international multilateral or bilateral agreements and treaties has proliferated, and trade has become a primary concern.

The thickening web of international treaties and bilateral agreements has a strong and growing influence on Australian copyright law. This development has been concurrent with the rise of digital technology that has essentially traversed traditional boundaries drawn by national copyright regimes. In order for Australian libraries to continue providing access to users in a digital world, libraries will have to broaden the scope of their strategies to include initiatives with an international focus.