

Developments in Australian Copyright Law: Implications for the Internet

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Abstract

This paper examines the implications of Australian copyright law for the exchange of information under copyright over the Internet. Expansion of the Internet poses problems for copyright law, originally developed for print media. It is more difficult to protect copyright when the Internet offers new ways of accessing and transmitting information. We outline here (a) copyright issues which affect the Internet (b) existing Australian copyright law (c) projected changes copyright Australian law to incorporate Internet and digital communication and (d) the implications of these changes for information systems professionals and Internet practitioners. Recommended practical safeguards will help avoid copyright infringements.

Keywords

BB01 LEGAL ISSUES, copyright, Internet, Australian law

INTRODUCTION

Digital technologies and, in particular, the Internet pose a serious threat to traditional copyright doctrines, which have operated in a variety of forms since the invention of the printing press. In part, the reason for this new threat is that the Internet facilitates virtually instantaneous and exact reproduction of another's work, in most cases without their knowledge or, more importantly, without their permission (Akindemowo, 1999). This reproduction can be executed without compromising quality and at little or no marginal cost (Schlachter, 1997; Scott, 1999).

The unprecedented threat to copyright inherent in Internet use is not merely due to the innate ease of replication. The potential for instantaneous and global dissemination makes this ease of replication more significant because the illicit replication can occur rapidly, in great quantity and across many different jurisdictions (as experience with the global transmission of computer viruses dramatically demonstrates). Infringement of copyright via the Internet can occur in a number of ways which are, to a great extent, unprecedented. It is possible for a work to be almost instantaneously replicated and published by an unauthorised user, who may in many cases be untraceable (Salango, 1997, Australian Copyright Council, 1997).

Dissemination via the Internet presents problems for creators of works and users alike given that as more people use the Internet, the rights of copyright owners who choose the Internet as a medium of expression are increasingly unclear (Salango, 1997). The phenomenon is in its infancy, and little is known about the technicalities of applying copyright law to the Internet (Christie, 1998). Those who publish, broadcast, perform or generally disseminate material on

the Internet need to be aware of how they are able to protect their interests in works created, and take action to deal with known infringements which occur via the Internet. Users also are, in general, unaware of their on-line rights and responsibilities (Perritt, 1996).

The importance of copyright issues as they relate to the Internet increases as the popularity of the Internet itself increases (Jordan, 1996). Copyright law has long operated as a formal means by which the rights of creators of works are balanced with those of the public to share in the knowledge of creators. This delicate balance has been, to a certain extent thrown into disarray by the advent of digital technology and its potential for copyright infringement (Akindemowo, 1999; Fitzgerald, 1998; Pool, 1983). Currently in Australia, there is no clear authoritative position on the operation of the law of copyright in the Internet context.

The fact that Internet-based infringement presents a challenge to traditional copyright doctrines is clearly important to the Australian Government, which has been grappling with the issue for several years now. This concern was evident in the following statement contained in the 1997 Commonwealth Discussion Paper entitled *Copyright Reform and the Digital Agenda*. The Paper stated that ‘... digital technology and the growth of computer networks, particularly the Internet, have posed many challenges to the protection and enforcement of copyright. These issues are of critical concern to creators and owners of copyright’ (Commonwealth of Australia, 1997:1).

This paper addresses these issues as they affect information systems practitioners, particularly people who are developing websites, maintaining Internet based communication and diffusion services, or either uploading or downloading files from publicly accessible servers. We discuss the current applications of and proposed changes to Australian law and the likely impact of the proposed changes to Internet-based activities.

AUSTRALIAN COPYRIGHT LAW APPLIED TO THE INTERNET

Australia adopted British copyright law early in the 20th century with the *Copyright Act 1912* (Commonwealth). This remained operative until 1968 when it was repealed and a new *Copyright Act 1968* came into force on the 1st of May, 1969). This act has been amended several times since (Rose, 1993).

The principle underpinning copyright protection in Australia (and elsewhere) is that ‘...an author should have the right to exploit their work without others being allowed to copy that creative output ... In Australian law, copyright is very much an economic right, focusing on the protection of commercial activities designed to exploit works for profit’ (McKeough & Stewart, 1991:95). Copyright protects the expression of an idea, not the idea itself (Samuelson, 1994). It does not prevent others from copying but the owner of the copyright in a work has an exclusive right to carry out a range of activities such as reproductions, adaptation or publication of the work and to licence others to do this (Jordan, 1996).

Infringement of copyright occurs where an unauthorised person ‘exercises the exclusive rights of’ (i.e., infringes the copyright of) a copyright owner, even if that person is unaware that they are replicating an owner’s work. Australian copyright provisions (*Copyright Act 1968*, Section 29) apply to text, drama, music and performance where the whole or a substantial part is made available to the public. It does not matter whether an unauthorised supplier receives payment for distributing the work or not; such distribution still infringes copyright.

A moderating factor in copyright doctrine is the acceptance of the principle of ‘fair dealing’

which allow the use of copyright material in limited circumstances without the permission of the copyright holder. The fair dealing provision of the Act aims to ensure that there is an appropriate balance between the interests of the copyright holders and the public good that would result from sharing that information. The fair-dealing provision has been applied in a number of contexts (e.g., education, legal advice, reporting news and current affairs) but the application of the fair use principles in the Internet context is unclear.

CASE LAW RELATED TO COPYRIGHT IN THE INTERNET CONTEXT

To date, the Australian courts have had little opportunity to deal with Internet copyright infringement. In the absence of local cases, international decisions are instructive and a few significant cases are cited below.

- In one of the first cases to apply copyright law to the Internet context, *ProCD, Inc. v. Zeidenberg* [86 F. 3d 1447, 1449 (7th Cir. 1996)] the plaintiff argued that the defendant infringed the plaintiff's copyright by downloading residential data from a purchased CD-ROM and then allowing Internet users to access the listings from the computer onto which the data had been downloaded. The information had been compiled from publicly-available telephone books. The United States Court of Appeal for the Seventh Circuit found for the plaintiff in 1996, but the Federal Court had earlier ruled that such material was not able to be copyrighted.
- When Playboy Enterprises took action against George Frena [*Playboy v. Frena* – 839 F. Supp. 1552 (M.D. Fla. 1993)] in 1993 for displaying pictures owned by Playboy on his Internet bulletin board service without authorisation, the U.S. District Court held that the defendant had infringed Playboy's exclusive right to display the pictures. The photographs could be downloaded to subscribers' home computers. Frena was unaware that his activity infringed Playboy's copyright and removed the pictures as soon as he became aware of their presence. This, however, was not accepted as a defence.
- In *Sega Enterprises v. MAPHIA* [857 F. Supp 679 (N.D. Cal. 1994)], a bulletin board service had been allowing subscribers to download copies of Sega games. The court granted Sega an injunction barring the defendants from copying or making available copies of Sega games thus ensuring that infringement of copyright was discontinued.
- In *Religious Technology Centre v. Netcom On-Line Communications Services* [907 F. Supp. 1361 (N.D. Cal. 1995)] portions of a protected but unpublished work were posted to a bulletin board service. The defendant, Erlich, accessed the bulleting board via a service owned by another defendant, Klemesrud, who in turn accessed the Internet via another defendant, Netcom On-Line Communications. The court decided that Netcom had not directly contributed to the infringement, yet vicarious liability was still applicable as it does not require specific knowledge of the infringing activity. Netcom had the ability to control subscribers from posting infringing works. However, because Netcom did not receive any direct benefit from the subscriber's infringement, the court ruled against vicarious liability.
- In Australia the most widely recognised decision with implications for copyright in the Internet context is the 1997 High Court decision of *Telstra Corporation Limited v. Australasian Performing Rights Association Limited* [1997] 38 IPR 294]. The case focused on the playing of taped, CD or radio-received music to telephone callers put on hold in three

forms: organisations playing music to their callers, Telstra playing music to callers to its service centres and Telstra playing music to certain customers of its call-managing service. APRA argued that its copyright in the musical performances was infringed in each case but the High Court decided that, depending on whether the caller used a conventional or a mobile phone, the infringement shifted from the rights to cause a work to be diffused to the right to broadcast it. The key element here is the court's interpretation of the diffusion right (S.26). The High Court, on appeal, accepted APRA's arguments, reasoning that Telstra had agreements with each of its subscribers to provide a service of distribution of broadcast or other matter to the premises of the customers (Gilchrist, 1997). This clearly has direct implications in the Internet context, particularly in relation to ISPs.

The most controversial issue related to infringement of copyright via the Internet relates to the matter of liability for infringement (Knopf, 1995). Several authors (Gilchrist, 1997; Andrews, 1997; Paynter and Foreman, 1997) have suggested that in Australia, based on *Telstra Corporation v. Australasian Performing Rights Association*, liability should lie with ISPs. However, the Australian Government is not proposing a system which imposes such liability for infringement on ISPs, unless they have authorised the act of infringement (Peach and Garlic, 1998; Australian Copyright Council 1997). The Australian position on liability of ISPs thus remains to an extent unclear.

The decisions briefly outlined above demonstrate the application of conventional copyright law to infringements occurring via the Internet and in the digital context. This clearly indicates that the Internet is not exempt from the law (Greenleaf, 1998; Kirby, 1998), but it also highlights the need for copyright reform. Other international cases have raised new issues about copyright which apply only to digital and Internet material, including hyperlinking (Lambrick, 1999: ¶35-43).

LIKELY CHANGES TO AUSTRALIAN COPYRIGHT LAW

The goals of copyright laws have remained basically the same since the passing of the *Act of Anne* in 1709. They include the protection of the copyright material as well as the recognition of the social utility of shared information (Samuelson (1995). However, copyright law as it currently operates is limited in the extent to which it can deal with copyright infringement via the Internet (Litman, 1996; Noel, 1995; Akindenowo, 1999). This limitation is widely recognised and it is generally agreed that there is a need to develop and adapt copyright law to take the new technologies into account. There is little agreement, however, about the solution to this legal problem. It remains a matter of contention what the revisions to copyright law should be (see Fujita, 1996; Eikin-Koren, 1996).

Moves to amend Australian copyright law

In Australia, the need to change copyright law and the mechanisms for protecting interests have been under consideration since the early 1990s. The Copyright Convergence Group (CCG), in its 1994 report to the Attorney General, *Highways to Change*, made a number of recommendations for appropriate changes to copyright law in order to meet the challenges posed by the Internet. The recommendations included a new 'right of transmission' to the public which was intended to:

- Cover the transmission of copyright material in intangible form to the public by any means or

combination of means which is capable of being made perceivable or used by a receiving device;

- Encompass the existing right to broadcast and replace and extend the right to transmit to subscribers of a diffusion service;
- Remain separate from the existing public performance right;
- Be given to all owners of copyright in sound recordings and broadcasts.

The changes recommended by the CCG, in addition to the World Intellectual Property Organisation (WIPO) treaties were the motivation for the proposed changes to copyright law incorporated in the *Copyright Amendment (Digital Agenda) Bill 1999*. These treaties include WIPO Copyright Treaty (WCT) 1996 and the WIPO Performances and Phonograms Treaty (WPPT), 1996.

The complexity of the proposed changes presents the legislature with something of a challenge. It is necessary for an understanding of the Internet and the intricacies of its operation to be developed by the legislature, so that a grounding for the need for change can be established (Okerson, 1996). Equipped with relevant background knowledge, it has then been necessary for the legislature to determine which (if any) changes to the copyright regime are necessary, and ultimately for the courts to interpret those changes or lack thereof appropriately.

Introduction of new rights

In 1997 the Commonwealth Attorney-General's Department and the Department of Communications and the Arts presented a discussion paper seeking comment on whether Australia should sign the new WIPO treaties and a response to proposals to reform copyright law to respond to the challenges posed by new technologies and the on-line environment. The *Discussion Paper* built on the CCG Report and proposed two new rights (Section 4) consistent with WIPO treaties. These new rights distinguish new interactive media such as the Internet from traditional forms of media which broadcast material to the public.

The new **transmission right** would be broadly-based and technology-neutral.

The proposed transmission right would apply to transmissions to the public in the traditional non-interactive sense of "broadcasting", that is, the emitting of signals from a transmitter to a receiving device at a time chosen by the person making the transmission. The person receiving a broadcast can only receive it at the time when the person making the broadcast chooses to make the transmission. (Section 4.11)

The Discussion Paper concluded that the proposed new transmission right would not apply to, and would be distinguishable from, the distribution of physical copies of copyright material, such as books and sound recordings. It would also be separate from the public performance rights which operate currently under the Act. This would result from the proposed definition of *transmission* as requiring the use of reception equipment to perceive the material transmitted.

The second right is the **right of making publicly available**. This right relates specifically to interactive, on-demand services and thus covers Internet communications via websites.

In contrast to the proposed transmission right, the right of making available to the public would be exercised when copyright material was made available to the public in such a way that it could be accessed at a time and a place chosen by members of the public. (Section 4.14)

The *Discussion Paper* makes it clear that the right of making publicly available could also involve an exercise of the reproduction right. The example provided was that of a person

uploading a copy of an article onto a publicly accessible Internet site. Under the proposed scheme, that person will have exercised the right of making publicly available, as well as the reproduction right. The fact that one action may involve the exercise of several rights is not new but it could be exercised without exercising the right of reproduction. The example provided was a person connecting a file server with a copyright article already on it to a publicly accessible computer network, such as the Internet.

The *Discussion Paper* concluded that the definition of the term ‘to the public’ is critical to the operation of the proposed new rights. The paper noted

The approach taken in copyright case law to the interpretation of the expression “to the public” is to examine the nature of the audience and consider whether the use of the copyright material is one which the copyright owner may reasonably regard as theirs to control. The interpretation of the expression “to the public” in case law has led to the acceptance that the term applies to the “copyright owner’s public”. (Section 4.37)

The *Copyright Amendment (Digital Agenda) Bill 1999* was tabled in February 1999 and is expected to be dealt with in the June 2000 sitting. Its objectives in amending the *Copyright Act 1968* include:

- ensuring the efficient operation of copyright industries in the online environment through promoting financial rewards for creators and investors and providing a practical enforcement regime;
- promoting certainty for communications and information technology industries;
- providing reasonable access and certainty for end users of copyright material online;
- ensuring cultural and educational institutions can access copyright material online on reasonable terms, including the provision of adequate remuneration to creators and investors; and
- ensuring that the technical processes which form the basis of the operation of the Internet, such as caching and hyperlinking, are not jeopardised.

The Bill acknowledges the importance of a legal framework to encourage online activity and the growth of the information economy.

The proposed amendments to the *Copyright Act 1968* incorporate the two new rights foreshadowed in the *Discussion Paper* that will assist in clarifying the position of those who use the Internet. The proposed *transmission right* and right of *making publicly available* will ensure that mere use of the Internet will not constitute copyright infringement, and incidental actions, such as caching for example, will not constitute infringement. These new rights are intended to provide a greater degree of certainty for those who use the Internet, whether they be owners or copyright material, or users of it. Further, the introduction of these proposed rights is intended to ensure fair and reasonable access to information on-line, in much the same way as traditional copyright law has been aimed at achieving a balance between the interests of authors and the social utility of shared information.

Table 1 (adapted from the *Discussion Paper*) provides a number of examples of situations in which the proposed new rights would be exercised. With the inclusion of the proposed new rights, use of the Internet for the purposes of browsing and transmission, or making temporary copies of a document in the course of browsing (e.g., in a cache), would not constitute an exercise of the rights of transmission or making publicly available. However, subscription

broadcasting and/or non-subscription broadcasting would constitute exercises of the proposed transmission right.

Use of Copyright Material	Exercise of proposed transmission right?	Exercise of proposed making available right?
Subscription broadcasting (wireless & wired)	Yes	No
Non-subscription broadcasting	Yes	No
Linking a server (with copyright material) to the WWW	No	Yes
Uploading a document to a WWW site	No	Yes
Downloading a document from the WWW	No	Yes
Emailing an article as part of a commercial service	Yes	No
Emailing an article to a mailing list	Depends on the list	No
Emailing an article to a friend (outside business/work)	No	No
Browsing the WWW	No	No
Making temporary copies in the course of browsing	No	No
Making temporary copies in the course of transmission	No	No
Posting an article to a newsgroup	Depends – the Discussion Paper invites comment on this issue	Yes

Source: Commonwealth of Australia Discussion Paper: *Copyright Reform and the Digital Agenda*.

Table 1: Examples of how the proposed new rights would be exercised in practice

Where a person other than the author (or a person authorised by the author) exercises the exclusive rights of a copyright owner, an infringement of copyright has occurred. Based on this premise, it can be concluded that an exercise of the rights referred to in Table 1 by any party other than the author or by a person authorised to do so would constitute an infringement of copyright under the proposed system.

Exercising the right of transmission applies to

- Broadcasting (TV, radio & cable TV)
- Global email and messaging systems
- Live streaming audio & video (real time).

Exercising the right of making publicly available applies to

- Uploading files to and downloading files from a website other than live-streaming audio and video or managing a web server.

Clearly, linking a server with copyright material to the WWW or uploading a document to a WWW site would both constitute an exercise of the proposed right of making publicly available as would posting copyright material to a newsgroup. Emailing to nominated people, casual browsing of the web and the creation of incidental copies in caches do not constitute an exercise of either of these two rights. But such activities would often result in copyright material being stored in the form of temporary files which gives the potential to infringe copyright. What practical steps can IS practitioners take to ensure that they do not infringe copyright, especially since much of the material they supply is subsequently out of their control?

IMPLICATIONS OF THE LAW FOR IS PRACTITIONERS

The most important message for those who use the Internet, is that the law of copyright applies to many of the actions engaged in online (Scott, 1999). It is clear that legal action can be taken if an author's copyright is infringed via the Internet. But this does not mean that all uses of another person's work will constitute an infringement of copyright via the Internet. The principles of fair use which have applied traditionally also apply in the Internet context. This means that if material found on the Internet is used and cited in the appropriate way, infringement of the rights of the author can be avoided. This principle applies even though there is, as yet, no clear statement of the extent to which the principles of fair use apply in the Internet context (Okerson, 1996).

The courts are willing to award traditional remedies such as injunctions and awards of damages in the instance of copyright infringement via the Internet. The effectiveness of these remedies can be questioned given the scope of prospective infringement, however, in some cases an injunction may be an effective means by which an Internet author is able to protect their interests.

Most importantly, IS practitioners should appreciate the fact that material found on the Internet cannot be used with disregard for the laws of copyright. From a practical point of view, in many instances the safest way to use information found in the Internet is by complying with any copyright statements found on a particular site (Scott, 1999; Australian Copyright Council, 1997; Christie, 1998). In essence, this will ensure that any further use of the information will not constitute an infringement of copyright.

Although the issue of copyright on-line is complex, IS practitioners can take a number of steps to protect themselves and others from copyright infringement. The same principles can be addressed from the point of view of either the supplier or provider of the information or the person who accesses the information. We have developed a provisional checklist which is shown in Table 2.

It is also advisable for those who provide websites to include material to educate their users about copyright issues, appropriate use of the material and other sites which contain more information about these issues.

Copyright Principle	Internet dissemination of copyright material (Internet Service Provider's view)	Internet access to copyright material (Internet User's view)
Right of transmission	For real-time streaming media or distributing material to a global list, check that the supplier of the material owns copyright and that permission is granted. Ensure that copyright claims are clearly attached to the transmitted material.	Right of transmission is not applicable. Should be aware that other copyright laws may apply if information is captured and stored.
Right to make publicly available	All information on a server which is subject to copyright should be scrutinised for permissions to ensure that making publicly available does not infringe copyright. Processes should be developed for vetting such material when uploading occurs.	When downloading material from the WWW, check the copyright status and what conditions apply to its use. Clarify that the intended use and method of storage do not infringe copyright. Fair dealing only applies to limited circumstances (see below).
Copyright ownership	Ensure that any copyright is clearly stated on all material uploaded or distributed. Other copyright laws may apply especially if the material is further disseminated or if downloaded material is then reproduced in another form such as print.	Copyright held by others must be identified and observed within the boundaries of fair dealing.
Fair Dealing	Best practice is to state how the material may be used under the principle of fair dealing (e.g., clearly indicate that use for educational purposes is permitted, but proscribe other uses.)	The application of the fair use principle in the Internet context is currently unresolved. Check with the Australian Copyright Council http://www.copyright.org.au for current status.

Table 2: Checklist for managing copyright for Internet Service Providers and Internet Users

CONCLUSION

Australia copyright law is due to be revised to accommodate the growth of digital technologies, in particular the Internet. The new transmission right extends the concept of broadcasting to include dissemination via technologies such as cable, networks and email. It is based on the fact that the act of dissemination is under the control of the supplier of the material. In contrast, the right of making publicly available pertains to situations where the flow of material is under the control of the client or recipient of that material. This is typified by the WWW model where users can elect to view parts of a website on demand. Copyright material is made available but is only accessed by choice.

The effect of the proposed changes will be to clarify the application of copyright law to Internet communication but it will not necessarily make copyright issues simple. IS practitioners, ISP providers and others working with material on the Internet will need to be vigilant to protect

copyright in original material as well as avoiding breaches of others' copyright. It is doubtful whether current law enforcement practices can deal effectively with these developments, but lack of uniformity will not afford protection for those who are charged with copyright infringement via the Internet as the cases cited here attest..

Even if the law is updated and clarified, further issues related to policing and redress in the instance of on-line infringement abound. These issues will need to be addressed in a coherent and integrated way across international jurisdictions. The borderless nature of the Internet and the transience of many postings means that copyright infringement in many cases is undetected. Further research will be required to determine the extent to which the legislative changes are successful in regulating copyright on the Internet.

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