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Fair use in the digital age

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The jurisdiction question is unlikely to be resolved any time soon, and will ultimately require the development of a credible, independent, international dispute resolution body. However, it is hard to see how small value disputes are likely to ever be economically resolved, unless co-operative, mutually-supporting self regulatory systems become the norm.

In the meantime, the IIA has addressed the issue by requiring pre-contractual disclosure by traders to customers of relevant jurisdiction. This will permit consumers, many of whom are confining their online transactions to low-value purchases, to at least do so in the knowledge that, should a dispute arise, resolution is likely to be less accessible. It then becomes a factor of an informed buying decision. Both CI and TACD concede that disclosure is a minimum condition for acceptable conduct.

Conclusion

While the revolutionary changes of the new economy are well under way, we believe that for the foreseeable future consumer welfare will be best preserved by a combination of an informed market interacting with businesses who understand the marketing advantages of responsible behaviour and whose efforts are backed by supportive governments. While the rise of global brands may inspire confidence in those who deal with them because of the sheer size, that is no guarantee of safety. And small online traders can only really compete by operating within jurisdictions which place a premium on honesty. Either way, trust must be earned before the e-dollars can fall from the sky.

1 Internet Industry Association [www.iiia.net.au]
2 October 1999, Department of the Treasury, Canberra.
3 Australian Bureau of Statistics ‘Use of Internet by Householders, Australia’ report 8147.0, released December 1999 (for 12 months ending August 1999).
6 See for example, the Internet Industry Association Code of Practice draft version 3.0 [http://www.iiia.net.au/Codec5.html].
8 In Australia credit card transactions which are not accompanied by the signature of the card holder are subject to dispute in the event that a card holder alleges fraud.

Fair use in the digital age

by William Van Caenegem, Associate Professor of Law, Bond University

The House of Representatives Standing Committee on Legal and Constitutional Affairs tabled its ‘Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999’ in the House of Representatives on 6 December 1999. The Bill aims to extend copyright into the digital domain. It resulted from a long process of policy formation and public consultation. The Bill’s progress through parliament is occurring against the background of other law reform and legislative initiatives in copyright law. This generates some confusion and difficulties in coordinating developments on various fronts.

The Bill will introduce a technology neutral right of ‘communication to the public’. This will replace the broadcast and cable diffusion rights with a right adapted to cyberspace, and purports to implement the provisions of the WIPO Copyright Treaty 1996. It also introduces new enforcement measures supporting self-help in cyberspace, introducing criminal penalties and civil remedies for the circumvention of encryption. The Bill faces a number of practical difficulties. It needs to be synchronized with other relevant reviews of copyright law.

Should cyberspace be treated like analog space?

The Bill’s approach is to apply existing copyright principles to the digital environment by simple analogy. However, during the course of its inquiry, the Committee came to realise that ‘the digital environment could not be likened to the print environment in all respects’ (at 1.23). The Committee also agreed with the Attorney-General’s Department and the Department of Communications, Information Technology and the Arts, that ‘in some areas the new legislation is entering into uncharted waters’ (at 1.10). The Committee became aware that it was indeed entering into uncharted waters, equipped with only a priori arguments from opposing interests. The Committee therefore supported a proposed review of the legislation in three years time, as agreed to by the responsible ministers. The Bill certainly attempts a difficult task: to adapt copyright legislation to an as yet unknown, and largely unpredictable future Cyberspace.

Control vs access: the fair dealing exception in the digital environment

Those ‘a priori arguments from opposing interests’ came to be focussed on the Bill’s adaptation of the fair dealing exceptions in the digital environment. In his Second Reading Speech the Attorney-General stated that ‘[A]s far as possible, the proposed exceptions replicate the balance struck in the print environment between the rights of owners of copyright and the rights of users’ (Hansard, 2 September 1999, 2228).

However, copyright producers and users opposed the simple parallel between analog and cyberspace. They fear a total loss of control over copyright materials in the digital world, and a consequent loss of revenue (see eg the Australian Copyright Council (ACC) paper ‘Copyright in the New Communications Environment’ 1999). On the other hand, copyright users – as represented by public libraries (in particular, the Australian Libraries Copyright Committee (ALCC) – fear a loss of access through the deployment of electronic self-help measures (mainly encryption) backed-up by punitive legislation.

9 See www.treasury.gov.au
10 Op.cit.; see especially clause 10.1
11 Forrester Technograpics [www.forrester.com]
12 Forrester Technograpics [www.forrester.com]
14 Article 25 binds member States in respect of dealings with third countries.
16 As co-developer of the TCP/IP protocol, Cerf is widely regarded as an internet pioneer.
17 For an explanation of the balancing act in achieving a workable policy on spam, see http://www.iiia.net.au/news/2002/11.html.
18 This differs from the opt-out position taken by the Australian Direct Marketing Association [www.adma.com.au].
19 See www.consumerinternational.org.
Fair dealing provisions old and new

In the narrow context of education and public interest reporting, the socially beneficial goal of free public access to, and use of, information, presently outweighs the copyright owner’s normal statutory rights to control the exploitation of their works. Thus dealing with copyright works (eg making copies of it, performing it in public, or broadcasting it) for the purpose of study or research, criticism or review, or reporting the news, will not infringe copyright if the dealing is fair. The Copyright Act provides that copying within certain quantitative limits is taken to be fair. In other cases a number of substantive factors are to be taken into account, inter alia the possibility of obtaining the work within a reasonable time at a reasonable price, and the effect of the dealing on the potential market for or value of the work.

Extending existing fair dealing exceptions to the digital environment, as the Bill proposes, would entitle individual copyright users, or public libraries on their behalf, to perform the ‘first digitisation’ of a printed work (digitisation = reproduction). Copyright owners objected, arguing ‘that they should have the right to control the digitisation of their works’ (2.7). The ACC submitted that a loss of control over first digitisation would prejudice the opportunity to protect the work by technological measures; allow the work to be made available abroad with a total loss of control over further uses; and allow easy exploitation of single articles and portions of works, for instance by inclusion in databases (see 2.7 – 2.9). The ability to exploit copyright material in cyberspace, critically dependent on control and self-help, would be undermined by allowing others to freely enter the digital domain through first digitisation. Copyright owners tend to stress the ‘other-ness’ of cyberspace, copyright users its similarities. The ALCC argued that ‘the Bill will simply allow libraries to use new technologies to provide the same limited services for those engaged in research or study’ (at 2.12).

Copyright owners are seen as overstating the dangers of loss of control in cyberspace in the context of allowing ‘limited’ rights to members of the public to access and copy works, for very specific purposes, ‘free’ (as stated by the Australian Vice-Chancellors Committee (AVCC): at 2.12). The public interest in free access in very limited circumstances is not negated by the risks to copyright owners inherent in digitisation and cyberspace.

The Committee’s conclusions

The Committee was persuaded ‘by the evidence that the differences in accessing and marketing material in the digital environment warrant differing approaches in different situations’ (at 2.16). Hence, although the fair dealing exceptions should apply fully once the copyright owner has digitised the work, they should not allow the conversion into digital form of analog works for the purposes of research or study. The only free digitisation should be: for the purpose of criticism and review, reporting the news and by libraries reproducing and communicating works at the request of users who, by reason of their location, cannot obtain a hard copy of the work within four days through the ordinary course of post (at 2.19). The Committee thus recommended the creation of ‘a firewall against the conversion of a work from print to digital form without the consent of the copyright owner’ (at 2.18).

The amendments to the Bill mooted for the Autumn sittings of parliament will reveal the Government’s position. The Committee has made other recommendations that it will have to consider (eg relating to enforcement measures), but it is in the context of the fair dealing exception that contrasting views of the purpose of copyright, the future of cyberspace and the public interest collide most acutely.

A careful balance must be struck, so that the promise of the Internet – cheaper, easier, faster and more accurate access to information and entertainment – is realised while (and by) maintaining fair returns for copyright owners. There are limits to the extent to which analog copyright principles can simply be extended to the totally new digital environment, but whether ‘firewalling’ the digital and analog environments of the future is ever the answer is open to doubt. The difficulty is, while cyberspace is still a largely unknown and distant galaxy, legislation is required in the concrete ‘here and now’.

1 For example, the Copyright Convergence Group Report ‘Highways to change’ (1993); the Government Discussion Paper ‘Copyright and the Digital Agenda’ (1997); and the Exposure Draft Bill released on 26 February 1999.

2 The House of Representatives Standing Committee on Legal and Constitutional Affairs’ inquiry into the enforcement of copyright in Australia, which was suspended to enable work on the Digital Agenda Bill; and the ACC’s Report on Simplification of the Copyright Act, Part 1 ‘Exceptions to the Exclusive Rights of Copyright Owners’ (released September 1998); and Part 2 ‘Categorisation of Subject Matter and Exclusive Rights, and Other issues’ (released 22 February 1999).

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