

The Digital Agenda: a Progress Report for Libraries

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The Copyright Amendment (Digital Agenda) Act 2000 introduced provisions aimed at updating copyright legislation to accord with the digital environment. For libraries, the Act extended the existing library and archives exceptions to enable libraries to utilize digital technology in providing access to information. A review of the Digital Agenda Act is currently underway to assess how the Act has performed against its original objectives. This paper explores the most controversial and important issues for libraries in the review.

The Digital Agenda

When the Attorney-General introduced the *Copyright Amendment (Digital Agenda) Act 2000* (“the DA Act”), he made an undertaking to review the Act after three years in operation. The promise was made with the understanding that the new legislation was to some extent a venture into uncharted waters and although the passage of the Bill had taken some 2 years to transform into an Act, its successful operation and effect on the information industries could not be assured.

The *Copyright Amendment (Digital Agenda) Act 2000*

The *Copyright Amendment (Digital Agenda) Act 2000* came into force in March 2001 and contains the most comprehensive changes to the Act since the introduction of the underlying principal *Copyright Act 1968* (“the Act”).

Central to the DA Act is the new right of communication to the public. The right of communication recognizes the current reliance on electronic communication and gave copyright owners the right to control how their work is electronically transmitted. The right is designed to be “technology neutral” and covers a broad range of uses and platforms from broadcasting and cable-diffusion to email, intranets and web publishing.

In order to maintain the balance that had been struck by the *Copyright Act*, the DA Act also extended the exceptions to the rights of copyright owners accordingly. The “fair dealing” provisions (ss40-43 of the *Copyright Act*) which have long provided users with equitable access to works in relation to analogue materials were extended to allow for limited copying of material by electronic means for certain purposes (ie. research and study, criticism and review, reporting the news and judicial proceedings) without the copyright owner’s permission.

The DA Act also extended the existing exceptions for libraries and archives to enable copying and electronic communication of works in certain circumstances to complement the extended fair dealing provision. Under the new legislation, libraries are able to provide electronic copies of works to users (provided the request satisfies certain conditions), make material acquired in electronic form available to the public within the premises of the library, copy and transmit electronic copies of material to officers of other libraries, and make a digital preservation copy of an artwork that has deteriorated or has been lost.

In relation to exceptions for educational users of copyrighted material, the DA Act extended the existing educational statutory licenses to enable educational institutions to copy and communicate electronic material so long as the material is used for educational purposes and equitable remuneration is paid to the relevant collecting society.

Other provisions introduced by the DA Act clarify the scope of liability of Internet Service Providers (ISPs) and carriers, in respect of copyright infringement that occur on their networks. These provisions provide that an ISP is not liable for acts of infringement unless the ISP has control over the content of the material or otherwise authorise the infringement.

Finally, the DA Act also introduced provisions prohibiting the manufacture and trade of devices and services which circumvent technological copyright protection measures. There are, however, exceptions created for certain types of organisations to use circumvention devices, on making a written declaration that the device will only be used for a “permitted

purpose”. A “permitted purpose” includes certain activities of libraries, educational institution, governments and decompilers of software.

The Digital Agenda Review Process

The review of the DA Act began in November 2002 with a controversial decision by the Government to open the task of undertaking the review for tender. The announcement caused some consternation for copyright stakeholders who queried the appropriateness of engaging an external consultant, particularly as the subject was and continues to be highly sensitive.

Commercial law firm, Phillips Fox was appointed in March 2003 by the Government as the external consultant with the requisite legal, technological and economic expertise to undertake the review. Phillips Fox was to assess how the Act had performed against its stated objectives; the report by Phillips Fox was to form part of a broader review by the Government. The terms of reference for the review included a specific reference to library provisions and directed the consultant to provide research and give an analysis of:

- a) *the operation of the libraries and archives exceptions on copyright owners’ markets and the ability of libraries to discharge their community function as disseminators of information in digital form; and*
- b) *whether the definition of “library” in section 18 of the Act should exclude “corporate libraries” having regard to factors including the extent of the provision of copyright material from corporate libraries to public libraries”ⁱ*

Phillips Fox then began the process of consultation with copyright stakeholders in a series of roundtable discussions and on August 1 unveiled four *Digital Review Issues Papers*ⁱⁱ (“Issues Papers”) comprising:

- *Libraries, Archives and Educational Copying Issues Paper;*
- *Circumvention Devices and Services, Technological Protection Measures and Rights; Management Information Issues Paper;*
- *Technology and Rights Issues Paper; and*
- *Carriers and Carriage Service Providers Issues Paper*

The Issues Papers identified thirty separate issues covering major aspects of the DA Act. Six issues in the *Libraries, Archives and Educational Copying Issues Paper* related directly to the libraries and archives exceptions. These are:

- The definition of “library” in the Act and whether it should exclude “corporate libraries” from being able to benefit from the library and archives exceptions;
- Differential treatment in the library and archives exceptions particularly in respect of artistic works;
- Effect of the library and archives exceptions on copyright owners’ markets;
- Effect of the library and archives exceptions on the ability of libraries to serve their function as disseminators of information;
- The effect of provisions enabling digitization of material by libraries and archives
- Whether the provisions of the DA Act have been effectively technologically neutral

Main Issues for Libraries

A reading of the Issues Papers underscores leads to one central observation; the controversial issues that were relevant to copyright debate at the time of the DA Bill continue to be hotly debated, the pressures and stakeholders in the review, likewise, remain unchanged.

The statement that the review was *not* to be a re-evaluation of the policy decisions made in formulating the DA Act was also oft repeated; “the review is not an opportunity to reconsider issues that were argued and decided in the context of the deliberations and public consultation that took place prior to the passage of that legislation”ⁱⁱⁱ. While it is understandable that the Government may not want to revisit the drawn out debates during the passage of the DA Act, the same policy discussions necessarily underlie review of the legislation. The insistence that somehow the review could be undertaken without engaging in policy discussion was difficult to observe if not naïve when you consider the inconclusive nature of the debates leading up to the passing of the DA Act. While the Government formulated broad policy goals in introducing the DA act, many practical issues remained in a legal grey area.

The Issues Papers also made repeated requests for provision of statistics or “economic data” to substantiate statements made in submissions to the review. Despite the emphasis on supporting data, little meaningful data was presented and made available to the consultants in the 72 public submissions made in response to the Issues Papers. While some interest groups like the Australian Libraries Copyright Committee were able to present some data in relation to the effect of the Digital Agenda Act on some library activities^{iv}, statistics in relation to broader market gains or losses were not gathered nor presented in the submissions to the review. The obstacles to gathering this sort of information, such as the difficulty and inaccessibility of information, cost and time involved prevented many groups from undertaking this type of research. Some groups have expressed surprise that neither the government nor consultant appointed to undertake the review have assumed responsibility for gathering this information.

The *Libraries, Archives and Educational Copying Issues Paper* drew most comment in the submissions made in the review. The most important issues for libraries as discussed by the submissions include the issue of “corporate libraries”, the provisions for interlending and document supply, and the right of first digitisation.

Corporate Libraries

The issue of “corporate libraries”, and whether or not these libraries should be permitted to rely on the various library and archives exceptions, has been raised many times over the past decade.

The original Explanatory Memorandum (EM) to the DA Act included provisions to repeal section 18 of the *Copyright Act* which reads “for the purposes of this Act, a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit” and the insertion of a new definition which would exclude libraries operated by “for-profit” organizations from relying on the exceptions. However the ferocity of the response at the time saw that the provision repealing s18 was removed before the Bill was passed. Instead, the final DA Act inserted a new s49(9) in the *Copyright Act* which stated that “in this section, Library does not include a library that is conducted for the profit, direct or indirect, of an individual or individuals”. The meaning and operation of this new s49(9) has baffled many libraries because of the difficulty of knowing with any level of certainty the meaning of “indirect”. For example does “indirect” encompass

supply to a researcher undertaking study that is funded partly by a commercial enterprise? The lack of guidance in the Act in relation to this provision has resulted in the section being largely ignored; libraries instead chose to rely on the clearer s18.

Copyright owners have long objected to the provisions that allow libraries owned by business organisations to share their information with libraries in the public system. Many of the submissions from copyright owners and publishers claimed that this traffic is an unjustified drainage of a legitimate revenue stream that rightly lay within the exclusive rights of copyright holders^v. This view however is balanced by submissions from libraries and universities who argued that the claim is outweighed by the negative consequences of such a fundamental change to the resource network. Submissions from the libraries sector argued that although corporate libraries make up a relatively small percentage of the library network, they serve the crucial functions of maintaining specialist collections and providing public access to those materials through their contribution to the national resource sharing system^{vi}.

In the debate surrounding the issue during the time of the DA Bill, the ease with which digital information could be copied and disseminated lent fuel to the argument for excluding “corporate” libraries from the benefit of the library and archives exceptions. Legislators to date have been sensible enough to give prevalence to the importance of maintaining public access to specialist collections but it remains to be seen whether this will stand in the face of increased pressure from publishers and copyright owners in this Review.

Sections 49 & 50: Library and Archives Exceptions

Much of the debate on the library exceptions (ss49&50 *Copyright Act*) surrounds the provisions relating to document supply. The Digital Agenda Act extended the usefulness of library-to-library provisions to enable digital document supply. The DA Act also introduced new provisions that were aimed at curbing any negative effects of the extension of library document supply exceptions on copyright owners’ markets. Checks to the extended library exceptions included the application of the “commercial availability test”^{vii} to *any* supply of digital material, the requirement to destroy copies of material created to facilitate a request and limitations in the way that the work is communicated the user, ie material can be communicated to the user only via “dumb terminals” (a “dumb terminal” is one from which no electronic copy can be made and which does not allow the work to be further communicated).

Submissions from the library sector have indicated that the new provisions for providing access to digital material and digital document supply have been largely unproblematic. Submissions from copyright owners however, have claimed that the provisions introduced by the DA Act provides inadequate protection to copyright owners. The claims have been made on the basis that the electronic publishing environment is fundamentally different from the traditional publishing environment. Copyright owners have argued that this difference necessitates a reassessment of the appropriate copyright balance to be struck, in light of the fact that digital technology has enabled copies of works to be made with ease and on a scale not contemplated at the formulation of the principal Act. These submissions claim that the DA Act has resulted in various “unintended consequences” such as a reliance on resource sharing works which has displaced legitimate document supply markets^{viii} and access provisions that allow hard copies to be printed from dumb terminals.

(Right of First) Digitisation

When the Digital Agenda was initially raised (then the “Digital Agenda Reforms”), it contained a proposed “right of first digitisation”. The right was first discussed by the House of Representatives Legal and Constitutional Affairs Committee, as an extension of the bundle of exclusive rights reserved to copyright owners. As the Digital Agenda evolved, the “right of first digitization” was tempered and by the time the Bill was passed, the concept was imported into the Bill as part of the right of reproduction rather than a separate right as initially conceived.

The digitisation right was perhaps the most hard-fought of the issues within the Digital Agenda for libraries. And predictably so; the ability to exercise the right is fundamental to the ability of libraries to harness advances in technology to continue their role as repositories and disseminators of information in the digital age. For copyright owners the ability for (near) perfect digital copies of works to be made on large scale and the speed and ease of dissemination with new communication technology such as the internet caused some panic which manifested in zealous demands for restrictions on library practices. Copyright owner representatives argued that the nature of digital information, coupled with existing library provisions for interlibrary traffic created a situation whereby libraries were able to usurp publishers in the market.

The fact that libraries are not and do not aspire to be in competition with publishers did not seem to gain sufficient acknowledgement. The response on the part of libraries has been to point out that the responsibility of libraries to disseminate information and provide public access to material remains as important in the digital environment as in the print world. Libraries have queried the equation of digitization with publication as propounded by submissions from copyright owners and asserted the need for fair dealing exceptions to be extended accordingly, to balance the new rights conferred to copyright owners by other parts of the DA Act.

Public Debate

Phillips Fox hosted two public forums on August 12 and September 4, in Melbourne and Sydney respectively, as an opportunity to discuss and clarify matters relating to the review. In addition, an online forum was held on September 9 to enable those who could not attend in person to also participate in the process.

Some 60 stakeholders in copyright debate, including collecting societies, copyright owner groups, libraries, universities and commercial interests such as Internet Service Providers, attended the public forum in Sydney. However, whether for lack of interest, lack of knowledge, or lack of faith, discussion at the forum was for the most part uninspired and in sharp contrast to the passage of the Digital Agenda Act which elicited impassioned speeches from participants. Aside from a few broad position statements, the participants in the Digital Agenda Review were cautious and the discussion failed to address the real underlying issues in the debate.

Several factors may have contributed to disappointing quality of discussion. These include:

- the technical and legal complexity of the Issues Papers,
- the manner in which the forum was conducted (the questions in the Issues Papers were simply read aloud with a pause for comment) and
- the strong emphasis that the consultants were interested in supported statements only, and did not wish to facilitate policy debate (which was considered outside of their reference).

The Next Phase

Although the review carried out by Phillips Fox was declared to be only part of a broader review by the Government of the DA Act, so far there have not been other formal initiatives. The “broader review” currently seems to encompass not much more than an invitation to contact the Government department, should interested parties want to raise issues that fall outside those outlined by the Issues Papers.

Phillips Fox is expected to report to the Government by the end of 2003, though it is not known whether the report will be made publicly available.

Endnotes

- ⁱⁱ Media Release from Attorney General's Department "Review of Leading Edge Copyright Reforms" April 1, 2003
- ⁱⁱ Digital Agenda Review Issues Papers available from Phillips Fox website: www.phillipsfox.com
- ⁱⁱⁱ Digital Agenda Review Libraries, Archives and Educational Copying Issues Paper, point 2.6, p4
- ^{iv} Australian Libraries Copyright Committee *Library Survey: impact of the Copyright Amendment (Digital Agenda) Act* is available from the ALCC website www.digital.org.au/alcc
- ^v Australian Publishers' Association Submission to the Digital Agenda Review, p3
- ^{vi} National Library Australia Submission to the Digital Agenda Review, p7
- ^{vii} The test is taken to mean that 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
- ^{viii} Copyright Agency Limited Submission to the Digital Agenda Review, point 3.13