Copyright in the New Communications Environment:

Balancing Protection and Access

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Centre for Copyright Studies Ltd

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In its early years of operation, the Centre's main focus was a programme of visiting and research fellows. During this time the Centre was located at the Australian National University and operated under the direction of Professor Dennis Pearce. In 1999 the Centre moved to premises in Sydney. This publication represents part of the Centre's new programme of commissioned research.

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Australian Copyright Council

The Australian Copyright Council is a non-profit organisation established in 1968. The Council's objectives are to assist creators and other copyright owners to exercise their rights effectively, raise awareness in the community about the importance of copyright, identify and research areas of copyright law which are inadequate or unfair, seek changes to law and practice to enhance the effectiveness and fairness of copyright, and to foster co-operation amongst bodies representing creators and owners of copyright.

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Preface

This is a discussion paper about the new communications environment and the future role within it of the main exceptions to copyright infringement. It looks at the present balance struck in Australian copyright law between the protection afforded copyright creators and owners and the exceptions to infringement which provide access to copyright materials for certain uses. The paper explains how this balance is being radically altered by developing digital communications technologies. It questions whether the balance can be maintained in the digital environment merely through an extension of existing provisions with some relatively minor adjustments. The paper then explores some of the issues that will need to be considered in adjusting this balance for the future.

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Introduction

Digital dissemination is on the way to becoming a primary means by which individuals are given access to material such as films and newspapers, recordings of their favourite music and books. Digital dissemination is also likely to become a primary means by which businesses and other organisations, such as libraries and educational institutions, gain access to copyright material.

In April 1998 the Australian Commonwealth Government announced that it would amend the Copyright Act in a number of ways relevant to the new communications environment. Among other things, the Government announced that it would 'extend the existing exceptions' to the rights of copyright owners for libraries, archives and educational institutions so that they will apply in the new on-line environment. A draft exposure bill which purported to embody these aims was released by the Government for public discussion on 26 February 1999. A revised version of that draft was introduced into the House of Representatives on 2 September 1999, under the title Copyright Amendment (Digital Agenda) Bill 1999.

What has been consistently overlooked by those advocating the extension of the current exceptions to the digital environment, however, has been any real analysis of whether the assumption that the current exceptions to infringement can be simply 'extended' to the new communications network is well founded.

This paper therefore focuses on the extent to which our traditional thinking about copyright fits into the new communications environment. In particular, we look at the limits, or exceptions, to the rights of copyright owners, and whether these exceptions need to be reformulated in light of developing technologies. We especially reflect on the nature and scope of fair dealing for 'research or study' and on the library copying provisions.

The international context

Australian copyright law can only properly be understood in its international context. This is because Australia is a signatory to a number of international treaties dealing with copyright. The most important of these are the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS, which forms part of the General Agreement on Tariffs and Trade, the GATT). Most countries in the world are party to one or both of these treaties. The treaties set out minimum levels of copyright protection. Generally, permission from the copyright owner is needed to deal with copyright material in the ways dealt with under the treaties.

Under the treaties, exceptions to copyright owners' exclusive rights are permitted. However, under TRIPS, it is a requirement that any exceptions must be subject to what is known as the 'three-step test'.[1] Under this test, exceptions must:

- be confined to certain special cases;
- not conflict with a normal exploitation of the work; and
- not unreasonably prejudice the legitimate interests of the rights owner.

A leading commentator on these international treaties has pointed out that the word 'special' in relation to the 'certain special cases' in the first of these steps means that 'the use is justified by some clear reason of public policy or exceptional circumstance'.[2] The second step requires a clear understanding of what constitutes a 'normal' exploitation of the copyright material. The same commentator also notes that the third step becomes relevant only if the normal exploitation of the work is *not* threatened by the proposed exception.[3]

The 'three-step test' is also a key provision in the two World Intellectual Property Organization Treaties of 1996, to which Australia is considering becoming a signatory; and in the European Union's Draft Directive on Copyright and Related Rights in the Information Society.[4]

Exceptions to exclusive rights

Copyright in most countries, including Australia, has come to form the legal infrastructure for a great number of industries, such as the publishing, recording, music, film and computer software industries. These industries form a significant and, to date, growing part of the Australian economy – in 1992-93, the net contribution of copyright-based industries to the total economy was an estimated $11 billion in constant prices, or 2.9% of the total GDP.[5] Copyright is the glue in the various transactions between creators and investors – the legal mechanism which ensures that the value of creative effort or investment is not undermined and devalued by others taking a free ride on that effort or investment. It is vital to understand this in order to understand the proper role of exceptions.

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1 By way of contrast, the Berne Convention applies the test only to 'reproductions'. See generally, Sam Ricketson, 'International Conventions and Treaties', paper delivered to ALAI Study Days, Cambridge, September 1998.

2 loc. cit.

3 Sam Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1996* (Centre for Commercial Law Studies, Queen Mary College, London, 1987), at 482-483.

4 *Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society* (COM (97) 0628 final 97/0359 (COD); approved by the European Parliament with amendments (A4-0026/99)).

5 Hans Hoegh Guldberg, *Copyright: an Economic Perspective* 2nd ed, (Australian Copyright Council, Sydney, 1994), 'Summary' and at 32.

The Copyright Act in Australia sets out a number of situations in which dealing with copyright material does not require permission. In a number of these situations, payment to the copyright owner is also not required. Under the current Copyright Act, for example, a person may freely make a 'fair dealing' with copyright material for the purposes of: research or study; criticism or review; reporting the news; or professional advice from a legal practitioner, patent attorney or trade marks attorney.[6]

Similarly, there are a number of exceptions which libraries may rely upon. These exceptions fall into two broad categories: those which allow a library to copy for their own clients and for clients of other libraries who require material for research or study; and those which allow a library to preserve, replace, or augment material in its collection. In order to protect the copyright owner's interests, there are limits to the amount that can be copied. Copies made under these provisions must be marked and, in some cases, records must be kept.[7]

History of 'fair dealing' and library copying

English courts started developing notions of 'fair use' as early as 1740.[8] Since then, exceptions have come to be embodied in legislation. Importantly, these exceptions have been developed in the contexts of industries, such as book publishing, which were already up and running. The 'traditional' Anglo-Australian exceptions therefore bear a reasonably close relationship with the 'three-step test' set out in the international treaties: they are purpose-specific; and the concept of 'fairness' carries with it the notion that the dealing does not conflict either with a normal exploitation of the work or with the legitimate interests of the rights owner, determined by reference to the established industries.

Each exception or defence has a particular history within Anglo-Australian copyright jurisprudence. Each embodies certain values, and reflects certain priorities about the scope of the copyright owner's rights in relation to the general public interest. It is our view that the exceptions for research and study, reporting news and for library copying, in particular, have served the community well in the past, but that their application in the digital environment has to be carefully assessed.

There are two underlying questions which must be dealt with in order to understand our contention. First, how and why have the various types of dealings come to constitute exceptions to the general need for permission from the copyright owner; and second,

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6 The exceptions are subject to various limitations and provisos, which we will not explore in this paper.

7 Detailed information about the library copying provisions is contained in the Copyright Council's practical guide *Non-Profit Libraries & Copyright* (7th revised version, Australian Copyright Council, Sydney, July 1997), which has now been superseded by *Non-Profit Libraries: Print Resources* (Australian Copyright Council, Sydney, 1999) and a forthcoming publication, *Non-Profit Libraries: Digital & Audiovisual Resources*.

8 Australian Copyright Council, *Fair Dealing in the Digital Age: a Discussion Paper*, revised ed. (Australian Copyright Council, Sydney, 1998), at 5.

under Anglo-Australian law, what concepts or values are wrapped up in the adjective 'fair'?

Reasons for the 'fair dealing' exceptions

The criticism or review exception is derived from the view that once a copyright owner has released his or her work to the world, he or she impliedly licenses reviewers and critics to quote excerpts of the work. In one case, it was noted that books are 'published with an expectation, if not a desire, that they will be criticised in reviews, and ... that parts of them will be used as affording illustrations by way of quotation, or the like'.[9]

On the other hand, the fair dealing exceptions relating to professional legal advice exist on the separate ground that people are entitled to know their legal rights and obligations.[10] It is not the purpose of this paper to discuss the continued availability of these exceptions.

In the Anglo-Australian context, the research or study exceptions were first introduced into legislation in the Copyright Act 1911 (UK).[11] Commentators have noted that the exceptions ensure research and education are not unduly hampered.[12] Also, these provisions are particularly important where there may otherwise be a market failure (for example, where it would be unduly difficult to obtain permission for a particular, often one-off, use in circumstances where there is no market for the particular material which is required).[13]

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9 *Chatterton v Cave* (1978) 3 App Cas 483 at 492, per Lord Hatherley LC.

10 See *Copyright Law Committee Report on Reprographic Reproduction* (the Franki Report) (AGPS, Canberra, 1976), at para 7.16.

11 The Copyright Act 1911 (UK) was adopted as Australian law in 1912, and continued in effect in Australia until the current Copyright Act came into operation on 1 May 1969. Sections 40 and 103C in the current Australian Copyright Act deal with fair dealing with copyright material for the purposes of research or study.

12 *Report of the Copyright Law Review Committee* (the Spicer Report) (AGPS, Canberra, 1959), at para 13.

13 See generally, Wendy Gordon, 'On the Economics of Copyright, Restitution, and 'Fair Use': Systemic Versus Case-by-Case Responses to Market Failure', (1997) 8 (1) *Journal of Law & Information Science 7.*

The meaning of 'research' and 'study'

In a case dealing with a commercial press clipping service,[14] the Court adopted the *Macquarie* dictionary meaning of the words 'research' and 'study'. In that dictionary, 'research' is defined as being:

> diligent and systematic enquiry or investigation into a subject in order to discover facts or principles ...

'Study' is defined in the *Macquarie* as being:

> 1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. the cultivation of a particular branch of learning, science, or art: *The study of law*. 3. a particular course of effort to acquire knowledge: *to pursue special medical studies* ... 5. a thorough examination and analysis of a particular subject ...

Until the legislation was amended by the Copyright Amendment Act 1980, the adjective 'private' qualified the concept of 'study'. There has, however, been no decision in the Australian context as to the effect of this removal. Denis Rose QC, at the time Chief General Counsel of the Attorney-General's Department, considered the question of how to define 'research' and 'study', and what might be included within its scope. In his opinion, written after the word 'private' was removed from the section:[15]

> [It is] likely that the courts would hold that 'study' is confined to study by individuals for their own purposes, whether in private or in some institutional course or otherwise. Moreover, the courts could well confine 'research' to research activities such as those in universities and the CSIRO, for the purpose of increasing knowledge in the community as a whole – by contrast, for instance, with research in a Government Department for the purpose of advising Ministers on proposed legislation, or research by a manufacturing company for the purpose of improving its products.

In our view, a good way of approaching the issue of whether the types of research discussed by Rose are within the control of copyright owners is by reference to whether the dealing is 'fair'.

Determining 'fairness'

The fair dealing provisions may only be relied upon if, in all the circumstances, the dealing is 'fair'. In Anglo-Australian copyright law, the concepts or values by which a dealing is judged to be 'fair' are principally concerned with whether the dealing adversely affects the copyright owner's legitimate market.

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[14] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292; the Court found the clipping service had infringed copyright because its dealings with the newspaper articles were for the purpose of neither research nor study; rather, its purpose was commercial – gathering information for others.

[15] Copyright Law Review Committee, *Computer Software Protection* (Office of Legal Information and Publishing, Attorney-General's Department, Canberra, 1995), at 149.

In relation to dealings by way of copying for research or study, the current Act reflects this principle by providing a list of the matters to be taken into account in determining whether the dealing is 'fair'. These include whether it is possible to obtain the material 'within a reasonable time at an ordinary commercial price', and the 'effect of the dealing upon the potential market for, or value' of the material.

Reasons for the library copying provisions

In 1956, the United Kingdom Parliament passed an extensively revised Copyright Act, which included completely new provisions that allowed libraries in certain circumstances to copy copyright print material for clients. The revision of the United Kingdom Act followed many of the recommendations in the *Report of the Copyright Committee* (known as the *Gregory Report*).[16] When the 1911 Australian Copyright Act was substantially rewritten (resulting in the Copyright Act 1968), similar library copying provisions were created under Australian copyright law. The redrafting of the Australian Act followed the Report of a Committee appointed to examine whether the Australian Copyright Act should also be amended.[17] (This report is generally referred to as the *Spicer Report*.)

It is not our intention to give a full analysis of those two reports. However, a number of features of each report are worth commenting upon.

The *Gregory Report* noted that librarians were concerned about their liability for infringement of copyright if they were assisting students wanting copies of copyright material for research or study. It recommended that, subject to a number of limits and procedural steps, librarians in certain types of libraries be able to make a copy of copyright material if the client might themselves be able to make the copy.

The United Kingdom's library copying provisions originated, however, as much from a concern to protect the market for copyright works, as to safeguard librarians. The shape of the *Gregory Report's* recommendations for the library copying provisions for articles from journals and other periodicals was based on:

> the arrangements which have been concluded between the Royal Society, individual Scientific Societies, and many of the publishers of scientific periodicals.[18]

These 'arrangements' included provisos to the effect that only one article from a periodical might be copied; that only a single copy be supplied; that the client's request be in writing; and that the client require the work solely for his or her private study, research or review. For works other than periodicals (such as books), the *Gregory*

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[16] *Report of the Copyright Committee* (London, Her Majesty's Stationery Office, 1952).

[17] op. cit.

[18] *Gregory Repor*t, at 18.

Report recommended that, among other restrictions, copying by a library on behalf of a client only be allowed if the copyright owner could not be traced to obtain permission.[19]

Thus the library copying recommendations made by the Gregory Committee reflect market practice (in adopting the 'arrangements' between organisations such as the Royal Society and many of the publishers). Further, the recommendation that libraries be entitled to copy only from books in situations where copyright owners or publishers could not be traced clearly evidences the Committee's interest in protecting copyright owners and publishers. In addition, the Committee stated:

> we do not believe that an exemption of this kind [allowing libraries to copy journal articles for clients] is likely to be abused or that the sale of the works in question is likely to be reduced.[20]

Indeed, the Gregory Committee's concern to protect the market interests of the copyright owner is further evidenced by the fact that the *Gregory Report* recommended that copies only be supplied to clients if the client paid the library for the copy (the amount to be not less than cost price, and to include an allowance for the library's overhead expenses).[21] All of these recommendations were embodied in section 7 of the UK Copyright Act 1956.

In Australia, the Spicer Committee accepted that any revised Australian Copyright Act should safeguard librarians making copies for the research or study of clients. The Committee also expressed great concern that copyright owners not be prejudiced by any exceptions. In particular, the Committee stated that it did not think it 'desirable or fair to copyright owners that their works or parts of those works should be copied by mechanical means without the knowledge of the copyright owners'.[22]

The current library copying provisions in the Copyright Act only took their shape after a number of amendments in 1980 and 1984. Again, this is not the place to go into the details of either set of amendments. We note, however, the following matters. Firstly, the 1980 amendments followed the recommendations of the Franki Committee.[23] The Franki Committee noted that:

> even in cases where copying is carried out in the pursuit of a socially desirable objective, it by no means follows that it should take place to the unreasonable prejudice of the economic or other legitimate interests of the author.[24]

Secondly, while the Committee reported that it was not unanimous in its outlook,[25] it did note that 'solutions can be formulated only after a thorough consideration of the

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[19] ibid., at 21.

[20] ibid., at 19.

[21] ibid., at 19. This initial situation should be contrasted with the current situation, whereby copies obtained from a library may be free.

[22] *Spicer Report*, para 140.

[23] *Report of the Copyright Law Committee on Reprographic Reproduction* (AGPS, Canberra, 1976).

[24] ibid., at para 1.10.

[25] ibid., at para 1.12.

practical circumstances in which reprographic reproduction is taking place in the community'.[26]

It is important, therefore, to note that not only do the current library copying provisions have a reasonably short history in copyright law, but they were generally introduced after careful consideration of the particular circumstances applying to a particular technology at a particular time, and with a careful eye on what effects the provisions might have on copyright owners.

Rethinking fair dealing and library copying

The Australian Government's statements about its 'Digital Agenda' amendments to the Copyright Act refer to 'extending' the special exceptions which apply to printed material so that they also apply to digitised material.[27]

However, before any exception can be introduced or 'extended', consideration must be given to whether the exception will conflict with the evolving forms of normal exploitation of copyright material, or whether the exception would unreasonably or unjustifiably prejudice the legitimate interests of copyright owners. In other words, can one assume that the current fair dealing exceptions and the library copying provisions can be merely transplanted into the digital communications environment? If the exceptions are 'extended', would the current balance between the competing public interests of rights owners and access for socially worthwhile purposes be maintained, or would it be changed? Would the extended exceptions still comply with the three-step test?

In this section we explore the 'newness' of the new communications environment: for example, what is new about it, what will be a 'normal' exploitation of copyright material in that environment, and whether the players – the individual, the library and the copyright owners such as authors, composers and publishers – still have the same roles as in the analogue environment?

What is 'new' about the new communications environment?

There are a number of features of the new communications environment which, by reference to existing practice, are new developments entirely, or which represent developments which are justifiably labelled as 'new' because the scale of the development represents a new general model.

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[26] ibid., at para 1.19.

[27] See, for example, the Government 'Digital Agenda' media release of 30 April 1998, and the speech of the Attorney-General, the Hon Daryl Williams, to the Copyright Society of Australia – 'The Government's Digital Agenda for Copyright', 11 June 1998, published in (1998) 16 *Copy Reptr* 93. See also the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 at 3.

First, end users will primarily access copyright material from the privacy of a computer terminal in their home or office, rather than in public spaces such as shops and libraries. While catalogue shopping from home is not new, the digital equivalent is likely to become the norm, giving users almost instantaneous ability to locate and access that material from any site in the world, and have it delivered into the home or office. The way we currently think of 'public' and 'private' as two different spheres will be considerably eroded.

Second, end users will acquire the item or material they require in digital form, rather than in hard copy. The digital supply of the requested material might take the form of a digital file or a 'stream' rather than, for example, a book, a video cassette or a newspaper.

Third, the end user will primarily access that material via the one intermediary channel, such as the Internet, rather than via discrete chains of suppliers such as television or radio broadcasters; or from a publisher, record company, or computer software developer via a shop.

Fourth, if material is primarily accessed digitally, then the appliances by which the material is accessed will be variations of the one type of appliance, rather than the different appliances and modes we currently use. In other words, computers or a network of computers will largely replace our need to have a television for television broadcasts, a radio for radio broadcasts, a newspaper for news, a telephone for telephone calls and a fax machine for faxes.

Resulting changes to industry practices

The factors outlined above have significant implications for the way industries based on copyright rights will operate. In particular, there has been a considerable shift in what constitutes a 'normal exploitation' of copyright material.

In the past, the main forms of 'normal exploitation' of text works have been publication in periodicals (newspapers, magazines and journals) and in books. Sale of these publications has been the main source of income for the relevant copyright owners. The exceptions which allow fair dealing for research or study, and the library exceptions, sanction copying which was presumed not to undermine these 'normal uses'. However, two developments in particular have resulted in new forms of 'normal use'. The first is digitisation, which allows sale of entire works, or parts of works, previously only available as part of a printed volume. The second is licensing by copyright collecting societies such as Copyright Agency Limited (CAL), the Australasian Performing Right Association (APRA), Screenrights, VISCOPY and the Australasian Mechanical Copyright Owners Society (AMCOS).

Just as importantly, there has been a major shift in the role and nature of major user organisations such as libraries and educational institutions.[28]

[28] For example, both libraries and educational institutions are increasingly 'entrepreneurial'.

New ways of publishing and distributing digitised material

Digitised material can be published on a physical carrier, such as a CD-ROM, or on-line.

If the material is published on a physical carrier, the copyright owner can receive payment for the copyright material from the proceeds of the sale of the physical carrier, for example as a royalty. This form of publishing is similar to that for material contained in other physical carriers, such as audio CDs, videocassettes and books.

If the material is published on-line, the copyright owner generally has to look to other ways of being paid for the material, for example, by allowing a prospective purchaser to view all or part of the material, but requiring payment to print or otherwise save the material. Alternatively, as with on-line subscription services, payment might be made before the material can be viewed. Other ways of creating revenue from on-line publishing might include providing free on-line access to materials, provided the customer has purchased either that material or ancillary material in printed form (for example, a journal subscription), or by 'bundling' a hard-copy with a digital subscription.

In addition, copyright owners will probably need to provide 'value-added services' with their material, for which users will be willing to pay. These services could be, for example, guarantees of authenticity or integrity, filtering services and recommendations about what material in particular subject areas is likely to be most useful to the person requiring the material.

These are evolving forms of use which, if not already 'normal exploitations', will become so in the very near future. Only time will tell which models eventually prove the most effective and efficient.

Users of copyright material have argued that copyright owners should not be able to control browsing of material which is in digital form or, alternatively, that there should be a special exception which allows browsing without permission from the copyright owner.[29] The argument is that it is wrong in policy to allow copyright owners to charge a fee to view material on a screen, when viewing copyright material in non-digital form – such as in a book – is not controlled under copyright law.

However, the book analogy and the resulting argument are misleading in a number of ways. For example, only one person can read a book at any one time, whereas, potentially, any number of people can simultaneously view a digital version of a work. Further, if one is browsing in a book store, one then has to make the decision whether to purchase so as to be able to read at leisure, whereas browsing on-line can be done from home or the office at any time of the day or night, and a printer is usually handy if a copy is required.

Also, the copyright owner's main source of income from a book is from the sale of the book, and perhaps from the Public Lending Right payment if the book is held in a

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[29] Under the current law, viewing digitised material usually results from the material being reproduced in the temporary memory of the computer, and may thus be controllable by the copyright owner.

library.[30] There are no equivalent payments for a work published on-line, and charging to view may be the only way the creator and copyright owner can get paid for their time, talent and investment in creating and publishing the work.[31]

In other words, the copyright owner's response to the argument that 'browsing should be free' is that if on-line viewing becomes a primary use of copyright material, then it should be remunerable.

Changes in the distribution chain

Leaving aside contractual considerations, and leaving aside technological protection devices,[32] the new communications technology allows anyone who holds or controls copyright material to supply material directly to anyone else, and to make an infinite number of perfect copies. In some cases, the supplier may be the copyright owner, or someone authorised to supply the material by the copyright owner; in other cases, the supplier may be acting without authority. Either is possible via what has been referred to as the 'celestial jukebox'.[33]

Such distribution (which might be termed 'super-distribution') is likely to be accompanied by a process of 'disintermediation'. It may well be that the middle 'links' in the distribution chain between the originator or publisher of the material and the end user (whether the material infringes copyright or not) will either disappear or be functionally absorbed by the originator or publisher. In other words, sales and distribution of material over the Internet may be to the loss of retailers and warehousers.

In some cases, however, organisations which hold copies of the material (such as libraries and educational institutions) may be in a position to provide digital access to that material.

The potential for copyright owners to create markets for digitised versions of their material is at serious risk if access to digitised material can be given by libraries and educational institutions in reliance upon special exceptions in the Copyright Act, particularly if those special exceptions are coupled with a right to over-ride technological

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[30] The Public Lending Right (PLR) Scheme pays compensation to authors and publishers for the loss of potential income represented by their books being borrowed, free of charge, from public libraries. Australian PLR is one of 15 such schemes in the world (for more information, see http://www.dca.gov.au/plr.html).

[31] Of course, as with the Internet at the moment, many copyright owners are likely to continue to be willing to provide a certain amount of material for free. Whether copyright owners provide material for free or not should, however, be their decision.

[32] We discuss both the growth of contract and the development of technological protection devices below.

[33] On-line information services; video on demand is an example of this, as are sites offering computer software updates or MP3 files (MP3 is a form of digital compression making it very easy to upload and download high-quality sound recordings). The sites offering such services may offer either authorised or unauthorised access to copyright material.

protection measures put in place by copyright owners, as proposed in the Copyright Amendment (Digital Agenda) Bill 1999.

Libraries are no longer merely holders of copies which they have bought. Increasingly, they are 'information centres', with fast and international interlibrary copying capabilities. This capability is increased enormously by digital technology. Public libraries are also increasingly used by people such as solicitors, accountants and other business people. Also, institutions such as libraries are increasingly entrepreneurial.[34] Together, these factors have increased the risk of serious loss to copyright owners as libraries essentially become rivals to publishers and distributors.

Collecting societies

Apart from libraries, the type of intermediary that is likely to grow in importance as digital distribution really takes off is the collecting society – generally, non-profit organisations acting directly on behalf of individuals to license different types of rights in different types of copyright material. With digitisation there is, in addition, increased scope for tailoring licences to suit both owners and users.

Collecting societies are also likely to have an important role in 'looking out' for individual owners' rights, representing the concerns of individual copyright owners to government and taking an enforcement role which would otherwise be beyond the capacity of an individual acting alone.

Collecting societies have already shown that they provide an efficient and cost-effective way of giving the community access to copyright material. Digitisation and on-line licensing by collecting societies is likely to enhance their cost effectiveness to users, and their ability to provide a global service.

The terms and conditions of licences offered by such societies may, as discussed below, have an effect on whether users can rely on statutorily defined exceptions to infringement. However, such concerns can be addressed – for example, by extending the Copyright Tribunal's supervision of the activities of such societies.[35] Alternatively, the existence and efficiency of collecting societies does make the possibility of statutory licences[36] a more attractive option to copyright owners than merely granting free access.

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[34] By way of example, a workshop sponsored by the Canadian Library Association on 15 September 1999 is looking at how various entities, including libraries and archives can sell content and services on the Net, assess and establish digital goals, and develop an e-commerce strategy in order to earn money and promote their services and products on-line.

[35] Shane Simpson, *Review of Australian Copyright Collecting Societies* (AGPS, Canberra, 1995), at para 32.1-32.5, proposed that the role of the Copyright Tribunal be expanded to cover all copyright licensing schemes, and an Ombudsman be established for collecting societies.

[36] That is, exceptions created through the Copyright Act in return for payment to rights holders.

How will copyright owners protect themselves?

The developing technology of protection

Physical property may be secured by physical means. If you own a car, you can keep it secure in a garage, or you can lock it. If you own a piece of land, you can build fences around it and keep guard dogs to keep people out.

To prevent other people walking off with intellectual property, however, law and the threat of legal action have traditionally been all the owner has relied upon to secure his or her property: copyright law – and specifically, the threat of legal action – has acted as garage, lock, fence and guard dog.

Increasingly, technology will supplement (if not supplant) the role of law, and it may be that there will be less infringement and a greater chance of detecting infringement with digital material and on-line access than with infringements via physical means such as making photocopies or 'burning' CDs without permission. Certainly, technological measures have the potential to lessen the 'low-end' infringements which occur – the leakage of value through unauthorised 'private' copying.

For example, technology can be used both to inhibit the use of unauthorised reproductions and to encode digitised material with information about the source of the work and the copyright owner, so that origins and authenticity can be checked. These types of strategy involve what are variously referred to as 'technological protection measures', 'Electronic Copyright Management Systems' (ECMSs) or 'Rights Management Information' (RMI) systems. These strategies may be allied with electronic blocking of access, or with monitoring of access so that when material is accessed, an audit trail sends information back about what is 'happening' to the material. In addition, various 'bots' have been developed, to help track music on the web, to ascertain whether that music has been licensed or not.[37]

Also, different types of encryption (symmetric and asymmetric) can not only be used to protect privacy of communications, but also to ensure that only authorised subscribers access the material.[38]

Contract, not statute, as the mediator of use

Digital technology is changing not only the normal forms of exploitation of works, but also the contractual substructure of copyright industries.

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[37] In particular, BMI (a United States collecting society which licenses the public performance and broadcasting of music) has created MusicBot — a patent-pending web robot and databasing solution.

[38] The two most common types of asymmetric encryption, based on complex algorithms with 'keys' of up to 512 bits, are the Diffie-Helman and RSA. Another reasonably popular encryption system is Pretty Good Privacy (PGP), which is freely available on the Net.

While it is unlikely that copyright owners will ever seek to rely on contract alone, rather than copyright law,[39] the recognition that contract will be of increasing importance in mediating access to copyright material has led to some alarmist requests for legislative intervention, on the basis that copyright owners may 'lock up' their material and only give access on terms and conditions which are onerous and exorbitant.[40] However, the models for 'normal exploitations' are still being developed, and it is not at all clear that these fears are justified.

Those who hold such fears, and who therefore demand that the current raft of exceptions be extended into the digital environment, ignore the two most likely consequences of a copyright owner making contractual access to a particular product too onerous. First, opportunities for competing products would thereby be opened up; second, the copyright owner's return from licensing access to the product is likely to be diminished, as fewer individuals or institutions avail themselves of the licence offered.

In any case, if copyright owners are imposing onerous conditions on consumers and institutions, the proper areas of law in which to address these concerns are trade practices law and other consumer protection laws such as legislation dealing with unfair contracts, and in equitable concepts such as unconscionability.[41] In addition, the current mechanism of referring the terms and conditions of certain licences to the Copyright Tribunal could be developed.

Fair exceptions for the digital environment

The argument that exceptions to infringement act as a safety valve in the event of market failure fall apart if all works are always available on-line, from anywhere in the globe at any time of the day or night. From a different angle, it is difficult to know how legislation

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[39] Contract will doubtless be of increasing importance as a legal tool to empower content providers in relation to people and institutions wanting access to the material they are offering. However, contract is no substitute for copyright: copyright is good against third parties, while contract is generally only enforceable between the parties to the contract; also, a copyright owner can get remedies from a court such as injunctions and other forms of equitable relief in the event of an infringement, remedies which are generally not available if someone breaches a contract.

[40] Gail Evans, 'Opportunity Costs of Globalizing Information Licences: Embedding Consumer Rights within the Legislative Framework for Information Contracts', paper presented at *The Protection of Intellectual Property in the Digital Age* conference at the Calypso Plaza Resort, Coolangatta, by the Southern Cross University Law School on 5-6 March 1999. See also JH Reichman and Jonathan A Franklin, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information', paper presented at the same conference, to be published in a forthcoming edition of the *University of Pennsylvania Law Review*; and Trotter Hardy, 'Contract, Copyright and Preemption in a Digital World', (1995) 1 Rich J of LT (available at http://www.urich.edu/~jolt/v1i1/hardy.html).

[41] In the Conference which led to the Stockholm revision of the Berne Convention, India, among other nations, proposed the addition of a fourth paragraph to the three-step test 'permitting, in effect, a general compulsory licence, arguing that such a provision was necessary to ensure that monopolistic interests did not hamper the dissemination of works which had been lawfully made available to the public'; Ricketson, *Berne Convention*, op. cit., at 481. Ricketson notes, loc. cit., that the proposal 'was rejected decisively by the Conference'.

to allow people to over-ride protection can be crafted without consideration being given to the developing 'market' in digital works.

So how should exceptions to the general protection of copyright be framed in the context of the new communications technology?

First, Australia is obliged to ensure that any exceptions to copyright owners' rights are consistent with the 'three-step test'. Therefore, demands for legislation to extend the current fair dealing and library access provisions to digital material need to be assessed by closely considering the *effect* of doing this in relation to the developing industry models, and by staying close to the 'three-step test' which is in the treaties to which Australia is already a party (namely, the Berne Convention and TRIPS) and in the treaties to which Australia is considering becoming a signatory (namely, the two 1996 WIPO treaties).

Second, how the notion of 'fairness', as embodied in the current print provisions, will apply in the new communications environment must be considered. The blind assumption that if it is fair in print, it must be fair in the digital environment cannot be relied upon to produce an outcome that is still 'fair' in the way that concept has come to be understood. In this context, the current provisions that deem the use of certain amounts of material (an article in a journal or periodical; 10% or one chapter of certain other works) must also be re-thought insofar as digital material is concerned.

Clearly, legislative intervention to create (free) access should only proceed slowly and cautiously, and with clear policy in mind. However, it is not clear that the thinking which led to the Copyright Amendment (Digital Agenda) Bill 1999 adopts this approach in a consistent fashion.

Certainly, there are some important differences between the draft exposure bill and the Bill as tabled in the House on 2 September 1999. Firstly, under the Bill as introduced into Parliament, a library will only generally be able to rely upon the library copying provisions to deal with electronic material if that material is held in its own collection. (This proviso would mean that, generally, a library could not rely upon the library copying provisions to copy from the Internet or from a subscription site if the library is not allowed, under the terms of their subscription, to retain a copy of the material from the site.) Secondly, a library will only be able to rely upon the library copying provisions to reproduce or electronically deliver digital material to another library if that material is not otherwise available electronically to that other library in a reasonable time at an ordinary commercial price. Thirdly, libraries will not be entitled to keep digital copies of material they make in reliance upon the provisions which will allow making and delivering electronic copies to clients for research or study. Fourthly, an attempt has been made to limit access to devices to circumvent technological protection measures to government, libraries and educational institutions, rather than to anyone in the community.

Fundamentally, however, it is important that the overall extension of the current analogue exceptions into the new communications environment not risk substantially *altering* the current balance between the respective rights of copyright owners and users. Effectively, copyright owners will otherwise be expected to subsidise the operations of

libraries and the general development of knowledge within the community. As Reichman has recently pointed out:[42]

> Those who would defend existing privileged users must find new justifications for measures that seem to make authors and artists, rather than taxpayers, a primary source of funding for activities that generally promote education, science, research, and the public welfare.

There should be some concern that the provisions in the Bill may act as a disincentive for people in Australia to invest in the on-line provision of copyright material. If that occurs, we will see little Australian content on-line; the content which Australians will be able to access will be produced overseas. Further, with on-line distribution becoming a primary means of distribution, adverse flow-on effects to the analogue industries in Australia may occur – to the publishing, film production and recording industries. These industries are not only (currently) a healthy and growing part of the Australian economy, but they secure Australian cultural identity, both here and abroad.

Digital material is being published, marketed and distributed in ways which are different from those applying to print material. These differences must be taken into account *before* exceptions originally introduced to apply to print materials are merely 'extended' into the new communications environment. Further, developing digital industries in Australia must be allowed to establish themselves before extending exceptions which may be quite inappropriate and broad. As Marybeth Peters, the United States Register of Copyrights, stated in testimony before the Committee on the Judiciary, United States Congress, on 25 May 1999:[43]

> As a fundamental premise, the Copyright Office believes that emerging markets should be permitted to develop with minimal government regulation. When changes in technology lead to the development of new markets for copyrighted works, copyright owners and users should have the opportunity to establish mutually satisfactory relationships. A certain degree of growing pains may have to be tolerated in order to give market mechanisms the chance to evolve in an acceptable direction.

If Australia fails to allow the digital market place to evolve before legislating for exceptions, then it fails its international obligations, and, more importantly, fails Australian creators and industries.

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[42] Reichman and Franklin, op.cit., at 46. See also Robert P Merges, 'The End of Friction? Property Rights and Contract in the 'Newtonian' World of On-line Commerce' (1997) 12 *Berkeley Tech LJ* 115, at 134.

[43] The paragraph also appears in the Office of Copyrights *Report on Copyright and Digital Distance Education* (May 1999), which is a available from the Office of Copyrights website: http://www.loc.gov/copyright/reports/.

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